

State of Minnesota
Minnesota Pollution Control Agency
Attachment 2 to MPCA Post-Hearing Response to Public Comments
MPCA Detailed Responses to Public Comments
March 8, 2023

This document supplements information in the Statement of Need and Reasonableness (SONAR; Hearing Exhibit D) in the matter of proposed revisions of Minnesota Rules, chapter 7050, relating to Class 2 beneficial use designations.

This document contains the Minnesota Pollution Control Agency’s (MPCA or Agency) detailed responses to public comments on the proposed amendments submitted during the pre-hearing comment period, December 12, 2022 – February 3, 2023. The Agency thoroughly reviewed public comments and this review resulted in the compilation of comments on several topics, which are addressed in detail in this document. All comments received during the pre-hearing comment period are posted in their entirety on the MPCA webpage for this rulemaking at: <https://www.pca.state.mn.us/get-engaged/use-designations-for-some-stream-reaches>.

The comment topics specifically addressed are:

A. Comments in support of the proposed rule amendments 2

B. Request for clarification on the use designation review timeline 2

C. Request for clarification or additional information to support the proposed use designation 4

 C.1. Reaches lacking biological data..... 4

 C.2. Coldwater use changes segments where more information may be useful 10

 C.3. Clarification for some Lake Superior – South Watershed segments 14

D. Comments related to the use review process and requirements for evidence supporting use designations 14

E. Comments related to coordination with other agencies..... 17

F. Comments regarding coordination with Tribal nations 18

Summary of comments received in the matter of proposed revisions of Minnesota Rules, chapter 7050, relating to Class 2 beneficial use designations.

The MPCA received two comment letters on the proposed amendments to Minn. R. ch. 7050 during the pre-hearing comment period (December 12, 2022 - February 3, 2023). A summary of these comments is in Attachment 1 (“Spreadsheet of Comments”). In cases where the MPCA’s response is brief, the Agency’s response is contained within Attachment 1. However, in most cases the Agency is providing more detailed responses to the comments received. These responses are found in this document. To avoid repetition, similar and duplicative comments are aggregated under headings A through F. The comments listed in Attachment 1 can be referenced to the responses in this document using the indexed headings in column D of Attachment 1.

A. Comments in support of the proposed rule amendments

Relates to:

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Hearing Exhibit D (SONAR) discussion at:

Section 1.B, Introduction and statement of general need [pp. 2-3];

Section 5, Reasonableness of the amendments [pp. 18-20].

Summary of comments:

One commenter expressed general support for the need to review and revise beneficial uses in a timely manner [Minnesota Center for Environmental Advocacy (MCEA) (Hearing Exhibit I)].

MPCA response:

The MPCA appreciates the statements of support for the primary goal of this rulemaking which is to assign appropriate use designations in a timely manner. The ability of the MPCA to implement use designations improves protections for water quality and aquatic life (e.g., fish, insects, mussels, plants) that depend on healthy aquatic habitats (Hearing Exhibit D, SONAR [pp. 2-3]). This goal is consistent with the Clean Water Act's (CWA) objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" ([33 U.S.C. § 1251 \(a\)](#)). Amending use designations as needed to assign the correct goals for streams will lead to better outcomes by ensuring that appropriate actions are taken to protect or restore water quality. The proposed amendments reasonably designate beneficial uses for protecting and restoring aquatic life based on attainable biology (Hearing Exhibit D, SONAR [pp. 1-3, 18-20]).

B. Request for clarification on the use designation review timeline

Relates to:

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Hearing Exhibit D (SONAR) discussion at:

Section 2, Review and designation of aquatic life uses: Overview [p. 8]

Section 2, Minnesota's watershed approach [pp. 9-10]

Other relevant documents:

Hearing Exhibit D, SONAR Exhibit S-18: Amendments to aquatic life (Class 2) use designations for streams (+appendices)

Summary of comments:

One commenter requested clarification on the use designation review timeline and the use of data that is outside the 10-year assessment window [MCEA (Hearing Exhibit I)].

MPCA response:

The MPCA performs use designation reviews in a timely manner when new data are available and as needed. Many of the use designation reviews are triggered by the MPCA's Intensive Watershed Monitoring framework. In this framework, the MPCA and its partners intensively monitor eight major

Attachment 2 MPCA Detailed Responses to Comments 3/8/2023

OAH Docket No. 23-9003-37415

Revisor ID No. R-4692

watersheds on average each year for water chemistry, habitat, and biology. This monitoring design provides an extensive dataset which supports use designation reviews, assessments, and other water quality management activities. The typical timeline requires on average 4-5 years from the collection of data to the publication of Watershed Restoration and Protection Strategies (WRAPS). The process includes the following steps in this order: 1) monitoring, 2) use designation review, 3) assessment, 4) stressor identification, 5) development of WRAPS and Total Maximum Daily loads (TMDLs), and 6) implementation of water quality management activities (Hearing Exhibit D, SONAR [pp. 9-10]). For example, the Upper St. Croix watershed was monitored in 2016, use designation reviews were performed in 2017, assessments occurred in 2018, and the WRAPS report was published in 2021. The work that the MPCA and its partners perform to develop water quality management strategies is complicated and there are often multiple concurrent activities. This is important to produce reasonable timelines so that monitoring data can be translated to on-the-ground activities that produce water quality benefits. As a result, work to develop protection strategies for the Exceptional Use streams proposed in these amendments has already begun and the adoption of these amendments will allow implementation of these strategies. To make additional data available to stakeholders and to inform them on the progress in watersheds, the MPCA included web links to relevant documentation (e.g., assessment, stressor identification, and WRAPS reports) in the Technical Support Document for this rule (Hearing Exhibit D, SONAR Exhibit S-18).

Although most use designation reviews are triggered by MPCA monitoring, use reviews may also be initiated due to activities of other Agencies or they may be requested by any person (see [Minn. R. 7050.0405](#)). In the current rule, some use designations were initiated due to changes to the Minnesota Department of Natural Resources' (DNR) trout waters list (Hearing Exhibit D, SONAR [p.8]). Such use designations are included in MPCA use designation rule amendments in a timely manner as the MPCA seeks to amend use designations as needed and as quickly as possible. However, there are limitations imposed by staff time and the effort required to develop and propose a rule that meets the requirements of Minnesota's Administrative Procedures Act.

Regarding the use of data that are outside the 10-year assessment window, any available data are considered as part of use designation reviews. This is important because these reviews need to reasonably determine the existing use¹ based on available data. This requires review of any historical data to determine the highest attainable use. It is only for assessment purposes that only data from within the most recent 10 years is considered valid for determining attainment of water quality standards.

¹ "Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." [40 CFR § 131.3\(e\)](#)

C. Request for clarification or additional information to support the proposed use designation

Relates to:

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins)

Relevant documents:

Hearing Exhibit D, SONAR Exhibit S-18: Amendments to aquatic life (Class 2) use designations for streams (+appendices);

Hearing Exhibit D, SONAR Exhibit S-23: MPCA (2015) Technical guidance for designating aquatic life uses in Minnesota streams and rivers. Minnesota Pollution Control Agency, St. Paul, MN;

Hearing Exhibit D, SONAR Exhibit S-25: MPCA (2015) State Register, 30 April 2018. Volume 42, Number 44. [pp. 1298-1341];

Hearing Exhibit D, SONAR Exhibit S-26: State Register, 13 April 2020. Volume 44, Number 42. [p. 1153];

Hearing Exhibit D, SONAR Exhibit S-24: State Register, 20 October 2008. Volume 33, Number 16. [pp. 708-712];

Attachment 3: Summary Table Class 2 Proposed Use Designations (wq-rulecl2-2122f).

C.1. Reaches lacking biological data

Summary of comments:

The MPCA received a comment requesting additional information or clarification of the evidence supporting specific proposed use designations [United States Environmental Protection Agency (USEPA) (Hearing Exhibit I)].

MPCA response:

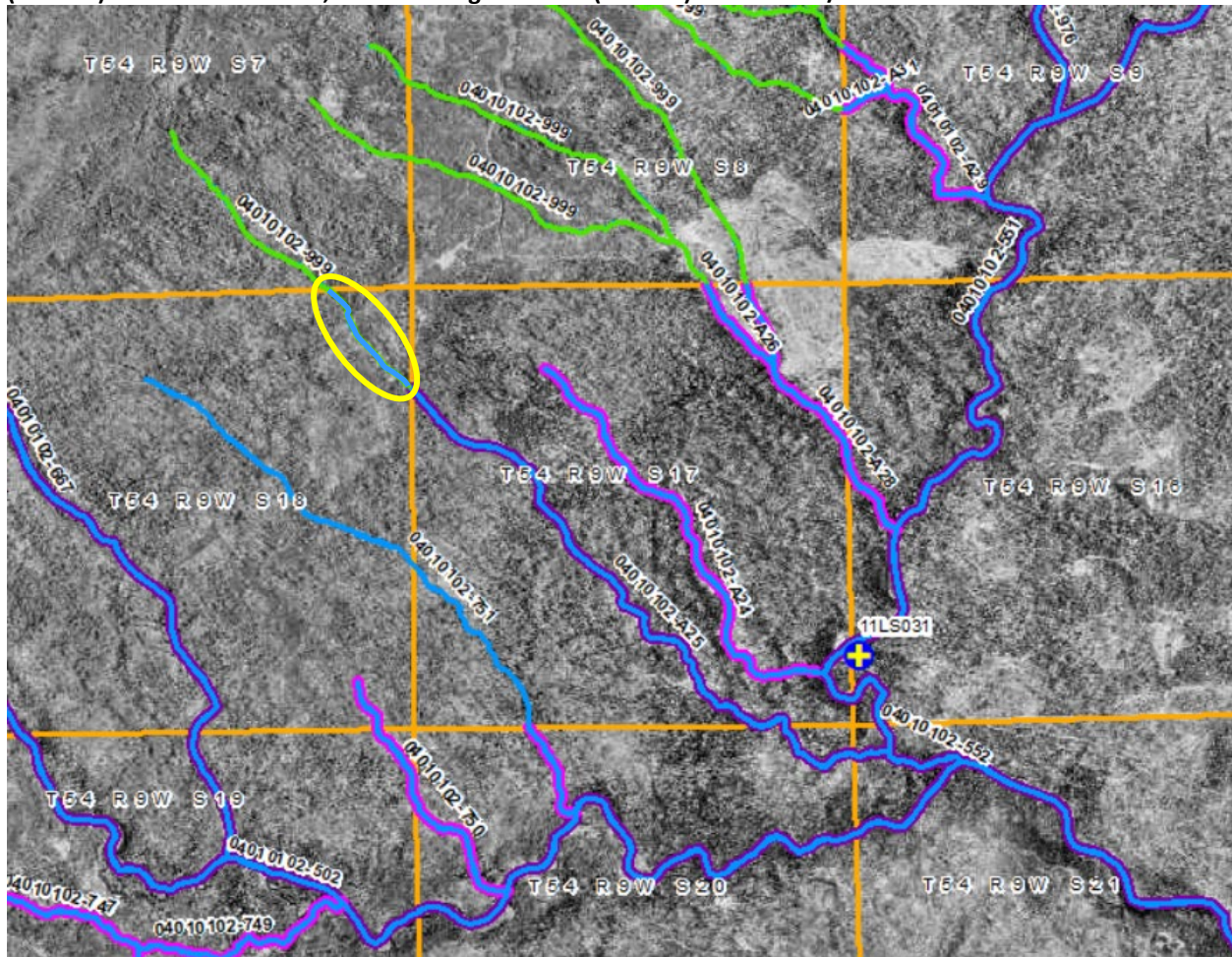
The reaches for which the USEPA is seeking clarification include reaches that were erroneously designated because the incorrect Public Land Survey (PLS) system sections were included in the trout waters list ([Minn. R. 6264.0050](#)) maintained by the DNR. The MPCA originally designated these waters Class 2A because historically the MPCA included all DNR designated trout streams and tributaries² within PLS sections containing trout waters as Class 2A waters. The DNR removed these sections from the trout waters list (Hearing Exhibit D, SONAR Exhibit S-26) and the MPCA is seeking to align its designations with complementary DNR designations. Although these streams lack monitoring data, there is no evidence indicating that these stream reaches support or supported cold water habitats and the size of these streams and landscape characteristics indicate they are unlikely to support cold water habitats. Below the Agency is providing additional clarifying information for specific reaches to address the request submitted by the USEPA.

Unnamed creek (Skunk Creek Tributary) (04010102-A25): The reach of this unnamed creek was erroneously included as part of the 04010102-A25 Class 2A designation (Hearing Exhibit D, SONAR S-18 [p. 23]). This unnamed creek was originally designated Class 2A because this reach was within PLS sections T54 R9W S17, S18, S20, and S21. These sections included parts of two cold water streams: Skunk Creek and the Gooseberry River. As a result, all streams within these PLS sections were designated Class 2A because they were considered trout water tributaries. In 2020, the DNR amended

² Waters designated as “trout waters” under [Minn. R. 6264.0050](#) consist of two types: 1) waters managed for trout and 2) tributaries to waters managed for trout which are within the PLS section which contains waters managed for trout. Most of the waters in this second category are not cold water habitats, but are an administrative designation used by the DNR to protect downstream trout waters.

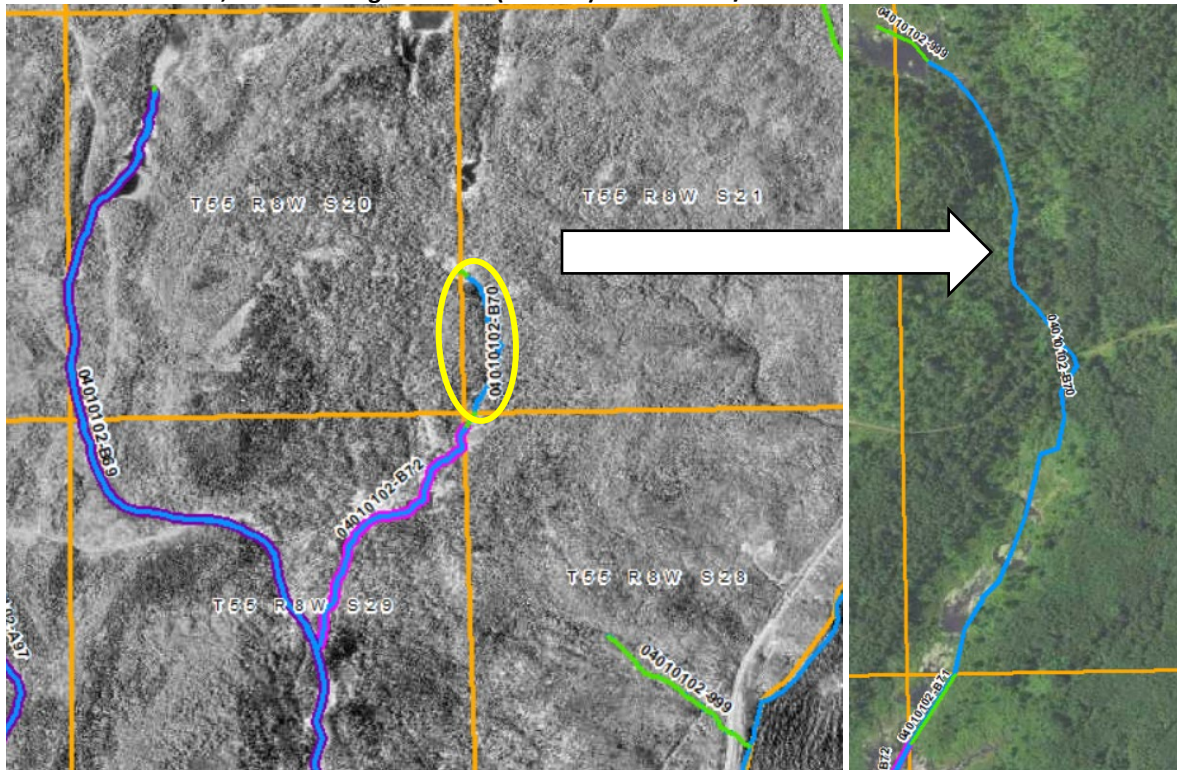
the trout waters list ([Minn. R. 6264.0050](#)) and designated the portion of this unnamed creek (04010102-A25) in PLS sections T54 R9W S17, S20, and S21 a trout water (Hearing Exhibit D, SONAR Exhibit S-26). As a result, it is reasonable for the MPCA to retain the Class 2A designation for this portion of the reach. In the DNR's designation, it did not extend the trout water designation for this stream into PLS System section T54 R9W S18. The portion of this creek within T54 R9W S18 should be designated Class 2Bdg because the original Class 2A designation was based on the Skunk Creek trout water designation. This reach is jurisdictionally disconnected from the trout water which established the original Class 2A designation (i.e., Skunk Creek). The watershed within and above PLS section T54 R9W S18 is very small and the stream channel is less well defined than in the lower reaches where the trout water designation applies. The MPCA has proposed to designate this stream reach Class 2Bdg due to the erroneous designation and evidence indicating that this stream reach is unlikely to support a cold water habitat. Based on this evidence, [40 CFR § 131.10\(g\)\(1\)](#) applies to this reach and it is reasonable to designate this stream reach Class 2Bdg.

Map indicating the location of the proposed use designation (yellow highlighted area) for 04010102-A25. Figure key: thick purple lines () are waters managed for trout; thick pink lines () are tributaries to waters managed for trout which are within a PLS section which contains waters managed for trout; narrow, blue lines () are Class 2A waters; and narrow green lines () are Class 2B/2Bd waters.



Unnamed creek (04010102-B70): The reach of this unnamed creek, which is contained within PLS section T55 R8W S21, was erroneously included as part of the Class 2A designations for 04010102-537 and 04010102-B69 (Hearing Exhibit D, SONAR S-18 [p. 24]). The reason for the inclusion of this section was due to a transcription error because the trout water reaches (04010102-537 and 04010102-B69) do not flow through this PLS section. The DNR corrected this error in 2020 (Hearing Exhibit D, SONAR Exhibit S-26). The reach itself has a very small watershed and partially consists of wetlands or beaver ponds. Furthermore, this reach is disconnected from the downstream trout water by wetlands and a Class 2B stream section. The MPCA has proposed to designate this stream reach Class 2Bdg due to the erroneous designation and evidence indicating that this stream reach is unlikely to support a cold water habitat. Based on this evidence, [40 CFR § 131.10\(g\)\(1\)](#) applies to this reach and it is reasonable to designate this stream reach Class 2Bdg.

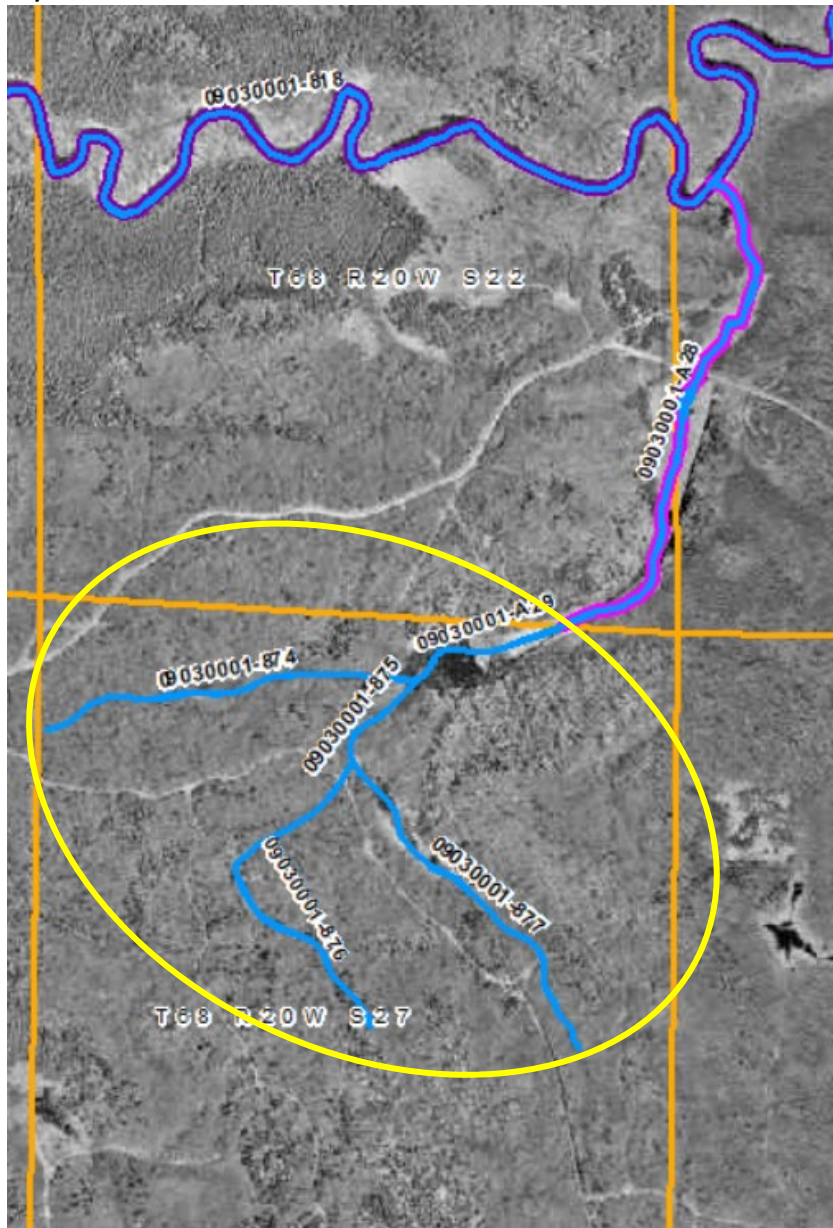
Map indicating the location of the proposed use designation (yellow highlighted area) for 04010102-B70 (left) and close-up view showing impoundments and the disconnected nature of the reach (right). Figure key: thick purple lines () are waters managed for trout; thick pink lines () are tributaries to waters managed for trout which are within a PLS section which contains waters managed for trout; narrow, blue lines () are Class 2A waters; and narrow green lines () are Class 2B/2Bd waters.



Unnamed creeks (Ash River Tributaries) (09030001-874, -875, -876, -877, -A29): The reaches of this unnamed creek, which are contained within PLS section T68 R20W S27, were erroneously included as part of the Class 2A designation for 09030001-818 (Hearing Exhibit D, SONAR S-18 [pp. 31-32, 35]). The reason for the inclusion of this section was due to a transcription error because the trout water reach (09030001-818) does not flow through this PLS section. The DNR corrected this error in 2020 (Hearing Exhibit D, SONAR Exhibit S-26). The reaches themselves are part of a very small watershed and the stream channels are poorly defined. The MPCA has proposed to designate this stream reach Class 2Bdg

due to the erroneous designation and evidence indicating that this stream reach is unlikely to support a cold water habitat. Based on this evidence, [40 CFR § 131.10\(g\)\(1\)](#) applies to this reach and it is reasonable to designate this stream reach Class 2Bdg.

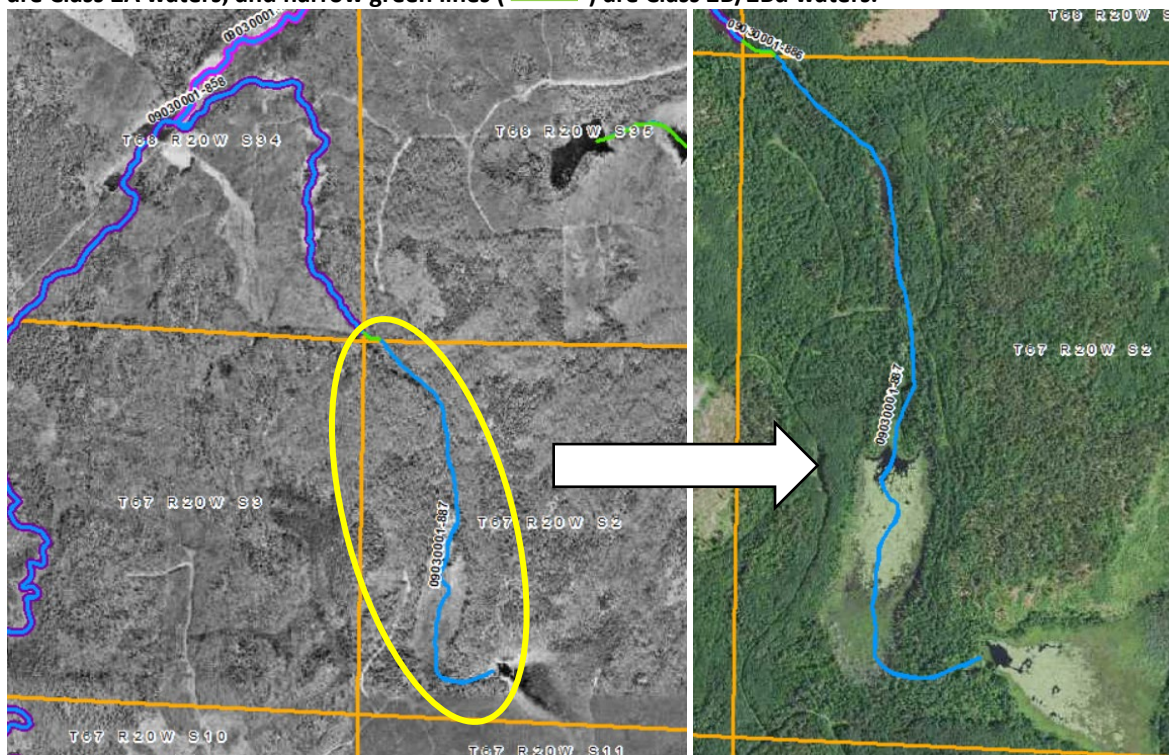
Map indicating the location of the proposed use designations (yellow highlighted area) for 09030001-874, -875, -876, -877, and -A29. Figure key: thick purple lines (█) are waters managed for trout; thick pink lines (█) are tributaries to waters managed for trout which are within a PLS section which contains waters managed for trout; narrow, blue lines (█) are Class 2A waters; and narrow green lines (█) are Class 2B/2Bd waters.



Unnamed creek (Blackduck River Tributary) (09030001-887): The reach of this unnamed creek, which is contained within PLS System section T67 R20W S2, was erroneously included as part of the Class 2A designation for 09030001-820 (Hearing Exhibit D, SONAR S-18 [p. 32]). The reason for the inclusion of

this section was due to a transcription error because the trout water reach (09030001-820) does not flow through this PLS section. The DNR corrected this error in 2020 (Hearing Exhibit D, SONAR Exhibit S-26). The reach itself has a very small watershed and partially consists of wetlands or beaver ponds. Furthermore, this reach is disconnected from the trout water by wetlands and a Class 2B stream section. The MPCA has proposed to designate this stream reach Class 2Bdg due to the erroneous designation and evidence indicating that this stream reach is unlikely to support a cold water habitat. Based on this evidence, [40 CFR § 131.10\(g\)\(1\)](#) applies to this reach and it is reasonable to designate this stream reach Class 2Bdg.

Map indicating the location of the proposed use designation (yellow highlighted area) for 09030001-887 (left) and close-up view showing impoundments and the disconnected nature of the reach (right). Figure key: thick purple lines (—) are waters managed for trout; thick pink lines (—) are tributaries to waters managed for trout which are within a PLS section which contains waters managed for trout; narrow, blue lines (—) are Class 2A waters; and narrow green lines (—) are Class 2B/2Bd waters.

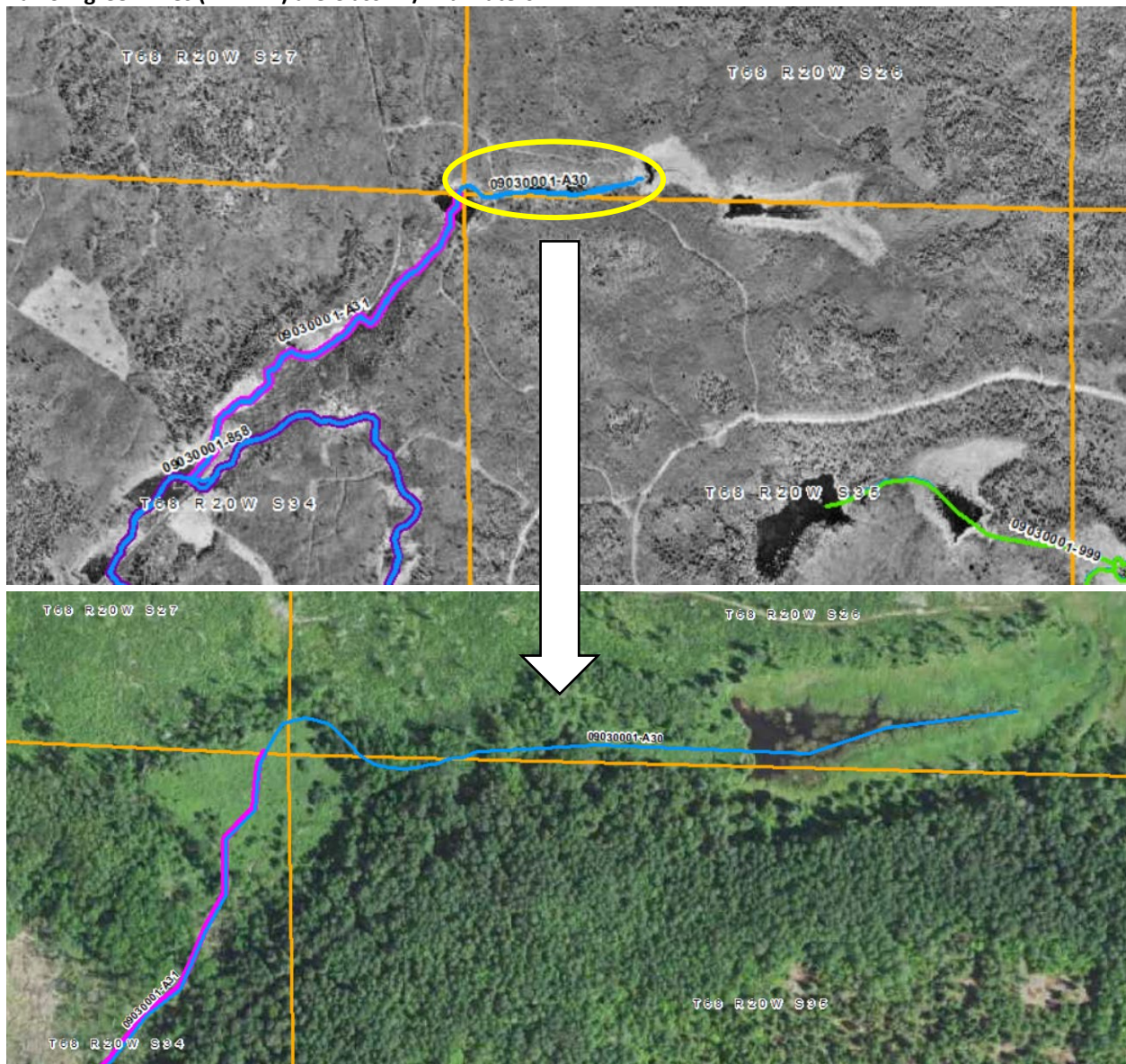


Unnamed creek (Blackduck River Tributary) (09030001-A30): The reach of this unnamed creek, which is contained within PLS sections T68 R20W S26, S27, and S35³, was erroneously included as part of the Class 2A designation for 09030001-820 (Hearing Exhibit D, SONAR S-18 [p. 36]). The reason for the inclusion of these sections was due to a transcription error because the trout water reach (09030001-820) does not flow through these PLS sections. The DNR corrected this error in 2020 and removed PLS sections T68 R20W S26 and S27 (Hearing Exhibit D, SONAR Exhibit S-26). Section T68 R20W S35 was never included on the DNR's trout waters list and the short portion of this stream in this PLS

³ The Technical Support Document (Hearing Exhibit D, SONAR S-18 [p. 36]) did not specifically reference PLS sections T68 R20W S27 and S35, but the reach description is correct (i.e., headwaters to the south line of PLS section T68 R20W S27) and includes the portion in PLS sections T68 R20W S27 and S35.

section was erroneously added by the MPCA. The reach itself has a very small watershed and largely consists of wetlands or beaver ponds. Furthermore, this reach is disconnected from the downstream trout water tributary by wetlands. The MPCA has proposed to designate this stream reach Class 2Bdg due to the erroneous designation and evidence indicating that this stream reach is unlikely to support a cold water habitat. Based on this evidence, [40 CFR § 131.10\(g\)\(1\)](#) applies to this reach and it is reasonable to designate this stream reach Class 2Bdg.

Map indicating the location of the proposed use designation (yellow highlighted area) for 09030001-A30 (top) and close-up view showing impoundments on the reach (bottom). Figure key: thick purple lines (█) are waters managed for trout; thick pink lines (█) are tributaries to waters managed for trout which are within a PLS section which contains waters managed for trout; narrow, blue lines (█) are Class 2A waters; and narrow green lines (█) are Class 2B/2Bd waters.



C.2. Coldwater use changes segments where more information may be useful

Summary of comments:

The MPCA received a comment requesting additional information regarding how specific information was used to make thermal habitat use designation determinations [USEPA (Hearing Exhibit I)].

MPCA response:

The process for determining the appropriate existing use for a water (i.e., cold water versus warm/cool water) was based on multiple lines of evidence when available. In some cases, a single piece of evidence may be sufficient for this determination when it strongly supports the use designation. For example, the presence of a naturally reproducing population of trout in a stream would be sufficient for a cold water designation regardless of the results of macroinvertebrate monitoring. Similarly, a macroinvertebrate community supporting a large proportion of cold water obligates could be sufficient for designation. As a result, stream reaches with one marginal cold water community may be proposed to be designated cold water or warm/cool water due the results of the other community or other evidence (e.g., temperature data).

The number of cold water taxa (i.e., taxa richness) and proportion of cold water obligate macroinvertebrates were used as lines of evidence in these use designation decisions. Cold water preferences for macroinvertebrate taxa were determined from a literature review to identify cold water obligate taxa. In addition, mean-weighted average temperature was determined for taxa using MPCA biomonitoring data. Taxa with low mean-weighted averages for temperature were also included on the list of cold water obligates. The number of taxa and the relative proportion of cold water obligate taxa were used in the use designation decision process. The proportion of cold water taxa were considered to be a better indicator of cold water habitat than the number of taxa. There were no absolute thresholds used to determine the thermal designation for either the richness or proportion metrics. For example, the MPCA did not require that for a stream to be designated Class 2A, it must have at least 10% cold water macroinvertebrate individuals. Best professional judgment was used to determine if the macroinvertebrate data indicated that a cold water habitat was supported in the stream. This is similar to how the fish data were reviewed where best professional judgment combined with other lines of evidence were used when the community did not clearly demonstrate the type of thermal habitat supported. As the MPCA's biomonitoring database grows and more biomonitoring sites have temperature logger data available, the Agency will likely review these data to determine if additional empirical tools can be developed. This may include the development of thresholds coupled with confidence intervals; however, it will likely always be necessary to consider other evidence as part of these decisions.

The USEPA identified four streams with a total of nine stream segments (i.e., WIDs) where additional clarification may be needed. The MPCA can provide additional interpretation of the available data to clarify the reasoning which supports the proposed use designations. As was discussed in the previous paragraph, it is important to consider all lines of evidence in these use designation reviews, especially when one or more lines of evidence are not conclusive on their own. However, some evidence is more reliable than others and is given greater weight. For example, the biological data is given more weight than temperature data in these reviews. Below the MPCA has provided additional interpretation of the available data for each of the reaches identified by the USEPA to clarify the reasoning which supports the proposed use designations.

Spider Creek (04010201-617; 04010201-862; 04010201-863; 04010201-864; 04010201-865 09020103-665)

Supporting documentation: Hearing Exhibit D, SONAR Exhibit S-18 [pp. 25-27 and Appendix A, pp. 002-007]

The USEPA requested additional information on the following items related to the proposed Class 2Bdg designations on Spider Creek: 1) moderate sculpin abundance, 2) presence of multiple coldwater macroinvertebrate taxa, 3) stated as potential for brown trout fishery, and 4) average temperatures below 19°C. The MPCA will address each of these points individually:

- 1) Although mottled sculpin are considered a cold water species, its thermal requirements are not as restrictive as trout and their occurrence does not necessarily demonstrate the presence of a cold water habitat. Their presence, even when abundance is moderate, may be indicative of a cool water habitat and therefore is not used alone to support a cold water designation.
- 2) While some cold water macroinvertebrate taxa were present, they were only present in one of four samples collected in these reaches. In the single sample containing cold water macroinvertebrates, the relative abundance was low (1.8%). Three taxa were present, but this is given lower weight than relative abundance.
- 3) The MPCA does not know the source of this information. The DNR removed the entire length of this stream from the trout waters list (Hearing Exhibit D, SONAR Exhibit S-24) because it was determined that it did not have the potential to support a cold water fishery. The evidence that the DNR used to support this decision was based on temperature logger data and the fact that stocking trout since the 1960s had failed to result in any documented natural reproduction.
- 4) Although monitored summer average temperatures were below 20 °C, there were regular excursions of temperature into the lethal range for brook trout. In addition, greater weight is given to average July temperatures as this is the period when thermal stress is generally greatest. In this section of Spider Creek, several temperature logger deployments measured average July temperatures above 20 °C. These results, indicate that the thermal regime is not suitable for a cold water habitat. Furthermore, it should be noted that temperature data are given less weight than biological information in the use designation review process.

To summarize, these reaches were proposed to be designated Class 2Bd because of low numbers of cold water taxa (including a lack of trout) and temperatures that were not likely to support a cold water habitat. The evidence used to support the use designations for these reaches on Spider Creek were consistent with the overall use designation review process followed by the MPCA (Hearing Exhibit D, SONAR Exhibit S-23).

Unnamed creek (Peters Creek) (04010201-823; 04010201-824)

Supporting documentation: Hearing Exhibit D, SONAR Exhibit S-18 [p. 26 and Appendix A, pp. 008-012]

The USEPA requested additional information on the following items related to the proposed Class 2Bdg designations for the stream reaches on this unnamed creek: 1) no MPCA data, 2) DNR surveys note presence of springs and watercress, and 3) upstream segment classified as 2A. The MPCA will address each of these points individually:

- 1) For thermal habitat use designation reviews, the MPCA does not require that MPCA monitoring data is available if data from other sources is sufficient. In this stream, the information used by the DNR to remove this stream from the trout waters list (Hearing Exhibit D, SONAR Exhibit S-25) was determined to be sufficient to establish the existing use.

- 2) The presence of springs or other indicators of ground water inputs do not independently demonstrate the presence of a cold water habitat. They may be used as supplemental information, but alone they are not sufficient for this determination. This evidence may indicate a potential for a cold water habitat, but if ground water inputs are not of a sufficient amount, the habitat will not be suitable to support cold water aquatic life. In the case of this unnamed stream, the poor health of stocked trout and unsuitable habitat demonstrated that it does not support cold water habitat.
- 3) The presence of an upstream cold water reach does not demonstrate that the downstream segment should be designated Class 2A. Upstream sources of cold water may indicate a potential for a cold water habitat, but this depends on the relative discharge of the upstream reach and conditions in the downstream reach (e.g., sufficient ground water input, stream morphology, stream shading). The habitat and poor health of the stocked trout into the downstream reach demonstrates that it does not support cold water habitat.

To summarize, the two reaches of this unnamed stream were proposed to be designated Class 2Bd based on the poor health of stocked trout and habitat. The evidence used to support the use designations for these reaches were consistent with the overall use designation review process followed by the MPCA (Hearing Exhibit D, SONAR Exhibit S-23).

Unnamed creek (Toad River Tributary) (09020103-665)

Supporting documentation: Hearing Exhibit D, SONAR Exhibit S-18 [p. 40 and Appendix A, pp. 150-155]

The USEPA requested additional information on the following items related to the proposed Class 2Bdg designation for this unnamed creek: 1) presence of multiple coldwater invertebrate taxa, 2) temperatures ~19°C, and 3) DNR notes potential support for brown trout fishery. The MPCA will address each of these points below:

- 1) Although there were 3 cold water obligate macroinvertebrates, they were present in low numbers (2% of the total community). The relative proportion of cold water macroinvertebrates is considered to be more important than taxa richness. The low proportion of macroinvertebrates coupled with the other indicators demonstrated that a cold water habitat is not supported.
- 2) Although monitored summer average temperatures were below 20 °C, temperatures lethal or stressful to brook trout occurred for 1-4% (lethal) and 30-53% (stressful) of the summer. In addition, greater weight is given to average July temperatures as this is the period when thermal stress is generally greatest. In this stream reach, all temperature logger deployments measured average July temperatures above 20 °C. These results, indicate that the thermal regime may not be suitable for a cold water habitat. Furthermore, it should be noted that temperature data are given less weight than biological information in the use designation review process.
- 3) In some of the DNR reports, the DNR did indicate that there was the potential for this stream to support more thermally tolerant cold water species such as brown trout. However, it was the determination of the DNR that a self-sustaining population of brown trout was unlikely to be feasible because previous stockings failed to establish a population and in fact there was very little documented carry over from year to year (i.e., few individuals survived more than a year). As a result, the DNR is not currently stocking this stream for trout. The potential for maintaining a fishery would be dependent on the removal of beaver in this watershed. If such an intervention was undertaken and it did result in a cold water habitat, the MPCA could revisit this

use designation although it would be dependent on continuous intervention of the DNR to remove beaver from this watershed.

To summarize, this reach of an unnamed creek is proposed to be designated Class 2Bdg due to the lack of cold water fish species, a low proportion (2%) of cold water macroinvertebrates in one sample and none in the other, and temperatures indicative of warm conditions. The evidence used to support the use designation for this reach is consistent with the overall use designation review process followed by the MPCA (Hearing Exhibit D, SONAR Exhibit S-23). The commenter noted that this reach had similar thermal conditions to the Dunka River (09030001-987). Although two temperature logger deployments in the Dunka River were similar to this unnamed creek, a third indicated good thermal conditions for trout. Again, it is important to note that temperature is given lower weight compared to the biology. As a result, the MPCA is relying more heavily on the biological information to support use designations. In the case of the Dunka River, the presence of a reproducing population of brook trout was sufficient for a cold water designation. In addition, this was supported by a relatively high proportion of cold water invertebrates (>7% in 2 samples) and one temperature logger deployment indicating cold temperatures. For this unnamed creek, no indicators demonstrated support for a cold water habitat. The presence of some cool water fish species and a low proportion of cold water invertebrates, coupled with temperatures that are periodically stressful or lethal for trout indicate that it is a cool water habitat and therefore the MPCA has proposed to designate it Class 2Bdg.

East Two River (09030002-648)

Supporting documentation: Hearing Exhibit D, SONAR Exhibit S-18 [p. 37 and Appendix A, pp. 206-210]

The USEPA requested additional information on the following items related to the proposed Class 2Bdg designation on this reach of East Two River: 1) multiple sculpin species and trout sampled in earlier surveys and 2) appears marginal for trout, but summer temperatures ~19°C. The MPCA will address each of these points below:

- 1) There may be some confusion regarding the MPCA's proposed use designation for this reach of East Two River. The confusion with this reach may be the result of the MPCA's proposal to retain the Class 2A designation for part of the reach. For the reach that is proposed to be designated Class 2Bdg (09030002-648), no trout have been collected from this reach as part of DNR or MPCA surveys. Sculpin were present in low numbers, but their presence alone is not used to support a cold water designation (see discussion of Spider Creek above).
- 2) Although monitored summer average temperatures were below 20 °C, temperatures stressful to brook trout occurred for 44% of the summer. In addition, the mean temperature in July was above 21 °C. The MPCA gives more weight to July temperature because this is the period when the highest temperatures are typically recorded. These results, indicate that the thermal regime may not be suitable for a cold water habitat. Furthermore, it should be noted that temperature data are given less weight than biological information in the use designation review process.

The proposed Class 2Bd designation is based on the lack of cold water fish and macroinvertebrates and a thermal regime which does not support a cold water habitat. The evidence used to support the use designation for this reach is consistent with the overall use designation review process followed by the MPCA (Hearing Exhibit D, SONAR Exhibit S-23). It is important to note that the MPCA is only proposing a use designation for part of this stream (09030002-648) and is retaining the Class 2A designation for the upstream reach (09030002-647) which does have demonstrated cold water habitat.

C.3. Clarification for some Lake Superior – South Watershed segments

Summary of comments:

The USEPA asked the MPCA to clarify why there is not a detailed description of the evidence supporting a use designation for Unnamed creek (Encampment River Tributary) (04010102-678) even though this stream reach is included in the “Summary Table Class 2 Proposed Use Designations” [USEPA (Hearing Exhibit I)].

MPCA response:

The reach 04010102-678 (Unnamed creek (Encampment River Tributary)) was incorrectly included in the document “Summary Table Class 2 Proposed Use Designations (wq-rulecl2-2122f)” (Attachment 3) and should be replaced with 04010102-C53 (Unnamed creek (Encampment River Tributary)). The reason for this error was due to the inclusion of 04010102-678 in the draft version of the Technical Support Document that was provided as part of the Request for Comments (Hearing Exhibit A). The MPCA makes a draft version of the Technical Support Document available when the Request for Comments is published to provide stakeholders with detailed information on the draft rule early in the rule making process. A final version of the Technical Support Document is provided on the rule webpage when the Notice of Hearing is published. This updated, final version of the Technical Support Document incorporates changes that result from stakeholder comments and any other changes that may result from the MPCA’s ongoing work on the rule. In this case, maintenance of the MPCA’s waterbody database necessitated a change to the Technical Support Document. When the Request for Comments was published, 04010102-C53 was part of 04010102-678. Following the Request for Comments, the MPCA split a portion of 04010102-678 out and this became 04010102-C53 in the final version of the Technical Support Document (Hearing Exhibit D, SONAR S-18 [p. 25]). Because Attachment 3 was developed as a supplemental document and was not part of the Hearing Record, the nomenclature change was not updated in this document. To summarize the proposed use designation for this unnamed creek, the reach 04010102-678 will retain the Class 2Ag designation and 04010102-C53 will be designated Class 2Bdg. The reasoning for the 04010102-C53 designation is described in detail in the Technical Support Document (Hearing Exhibit D, SONAR S-18 [p. 25]).

D. Comments related to the use review process and requirements for evidence supporting use designations

Relates to:

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Hearing Exhibit D (SONAR) discussion at:

Section 2, Review of tiered aquatic life uses for streams [pp. 10-12];

Section 2, Review of cold and warm/cool water aquatic life uses for streams [pp. 12-13];

Section 3, Public participation and stakeholder involvement [pp. 13-16].

Other relevant documents:

Hearing Exhibit D, SONAR Exhibit S-18: Amendments to aquatic life (Class 2) use designations for streams (+appendices);

Attachment 2 MPCA Detailed Responses to Comments 3/8/2023

OAH Docket No. 23-9003-37415

Revisor ID No. R-4692

Hearing Exhibit D, SONAR Exhibit S-23: Technical Guidance for Reviewing and Designating Aquatic Life Uses in Minnesota Streams and Rivers;

Hearing Exhibit D, SONAR Exhibit S-21: Tiered Aquatic Life Uses (TALU) rule Statement of Need and Reasonableness (SONAR);

Hearing Exhibit D, SONAR Exhibit S-11: State Register, 16 October 2017. Volume 42, Number 16. [pp. 441-451];

Hearing Exhibit D, SONAR Exhibit S-29: State Register, 1 June 2020. Volume 44, Number 49. [p. 1416];

Hearing Exhibit F: The Notice of Hearing as mailed and as published in the State Register on December 12, 2022;

Attachment 4: Report of the Administrative Law Judge in the Matter of the Proposed Amendments to MPCA Water Quality Standards relating to Tiered Aquatic Life Uses and Modification of Class 2 Beneficial Uses [p. 68];

Attachment 5: Report of the Administrative Law Judge In the Matter of the Proposed Amendments to Rules of the MPCA Governing Water Quality Standards – Class 2 and Class 7 Use Designations; Minnesota Rules Chapter 7050 [p. 39];

Attachment 6: EPA's Review of Revisions to Minnesota's Water Quality Standards: Tiered Aquatic Life Uses and Biological Criteria (Minn. R. ch. 7050 and 7052);

Attachment 7: EPA's Review of Revisions to Minnesota's Class 2 and Class 7 Beneficial Use Designations Minn. R. 7050.0420 and 7050.0470 Under Section 303(c) of the Clean Water Act.

Summary of comments:

The MCEA stated that they did not consider the supporting documentation to be sufficient to support a Use Attainability Analysis (UAA) where the proposed use was less protective than the current use [MCEA (Hearing Exhibit I)]. Specifically, the commenter asks how restorability of ditches is determined. The same commenter also requested that the Agency make use of all available data and that these data be available to the public in a manner that is “sufficiently interpreted for the public” [MCEA (Hearing Exhibit I)].

MPCA response:

The technical documentation for the use designations in this rule amendment reasonably describe the proposed designated uses in a manner that is consistent with the CWA and which meets the requirements specified in [40 CFR § 131.10](#). The proposed use designations and supporting documentation is clearly explained in the Technical Support Document (Hearing Exhibit D, SONAR Exhibit S-32) and an interactive map⁴ is provided to assist with the description of the materials. The technical documentation provided in this rule to support the proposed use designations is sufficient because it is comparable to previous use designation rules which were approved by the USEPA. Specifically, in the Tiered Aquatic Life Uses (TALU) rule adopted in 2017 (Hearing Exhibit D, SONAR Exhibit S-11) and the Class 2 and 7 rule adopted in 2020 (Hearing Exhibit D, SONAR Exhibit S-29), the MPCA provided similar justification for use designations and these were determined to be adequate and reasonable by the Administrative Law Judge (Attachments 4 and 5). Furthermore, both previous use designation rules were reviewed and approved by the USEPA (Attachments 6 and 7) indicating that this documentation is adequate to fulfill the CWA's requirements for designating beneficial uses.

⁴ The MPCA webpage for the rule (<https://www.pca.state.mn.us/get-engaged/use-designations-for-some-stream-reaches>) includes an interactive map of the draft beneficial use designations. This map was available for the Request for Comments in 2021 and it has remained an active tool for stakeholders throughout the rulemaking process.

The technical summaries (Hearing Exhibit D, SONAR Exhibit S-18 [pp. 21-166]) detail the evidence used to support the proposed use designation decisions, but necessarily do not include every piece of evidence or data point used in these decisions. These decisions may be supported by thousands of temperature measurements, detailed lists of species collected from these and nearby streams, and many pages of reports by the DNR and MPCA. The MPCA is dedicated to being transparent and encourages the public to review this information and engage with MPCA staff if there are concerns with draft or proposed designated use changes. To this end, the MPCA began formal public engagement on these use designations on April 5, 2021, when the Request for Comments was placed on public notice which included a draft version of the Technical Support Document with the evidence supporting these draft use designations. The public was encouraged to comment on this draft rule and to contact the Agency if stakeholders had additional questions or would like to meet (Hearing Exhibit D, SONAR [p. 15]). By making the draft list of use designations and the reasoning behind these decisions available more than a year before the Notice of Hearing was published (Hearing Exhibit F), the MPCA was seeking public partners in these decisions.

Regarding the specific process for determining if a ditch can be reasonably restored, this is described in the “Technical guidance for designating aquatic life uses in Minnesota streams and rivers” (Hearing Exhibit D, SONAR Exhibit S-23). One important consideration in UAA studies is whether a waterbody that does not meet minimum water quality goals can be feasibly restored⁵ through controls on point and nonpoint source pollution. As described in the technical guidance document for reviewing use designations, this determination for Modified Uses largely focuses on the extent of the channelization and the status of the overall watershed in which the stream reach is located. For example, short, ditched sections within a largely intact (i.e., unchannelized) watershed would not be considered eligible for a Modified Use. Such reaches represent sections that may be restored because the restoration of relatively short reaches is feasible and because there is not extensive ditching within the watershed which would preclude attainment even if the reach was restored. It should be noted that as part of the UAA process, most stream reaches that are reviewed, either retain the General Use or are assigned a more protective use. Reaches that were reviewed and which retain the General Use are found in Appendix B of the Technical Support Document (Hearing Exhibit D, SONAR Exhibit S-18). Within this table of 374 stream reaches (3530 miles), the MPCA has recommended that the current use designation (i.e., General Use) be retained. These stream reaches include ditches with good biology, good habitat, or restorable habitat. An example of a stream considered to be restorable in this table is Elm Creek (07020009-631). The stream channel for this stream consists of a mix of natural and altered (i.e., ditched) channels. Monitoring data on a channelized reach demonstrated that the biology does not meet the General Use goals and that habitat is limiting attainment of these goals. However, the MPCA recommended that the General Use be retained for this stream because the short, altered reaches on this stream would be categorized as feasibly restorable under the CWA. Another important consideration in UAA studies is whether the General Use is an existing use.⁶ For ditches, this includes a determination of whether channel alteration occurred before November 28, 1975. For example, an unnamed creek (07020009-566) was determined to have poor biology and limiting habitat, but the

⁵ “At a minimum, uses are deemed attainable if they can be achieved by the imposition of effluent limits required under sections 301(b) and 306 of the Act and cost-effective and reasonable best management practices for nonpoint source control.” 40 CFR § 131.10(d)

⁶ “Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.” 40 CFR § 131.3(e)

Attachment 2 MPCA Detailed Responses to Comments 3/8/2023

OAH Docket No. 23-9003-37415

Revisor ID No. R-4692

channel was created after the existing use date. As a result, this ditch retains the General Use designation. The determination that the ditch was created after the existing use date was based on publicly available aerial photos. These sources included the United States Geological Survey Earth Explorer tool (<https://earthexplorer.usgs.gov/>) and the DNR Landview tool (<https://www.dnr.state.mn.us/maps/landview/index.html>). The technical guidance document (Hearing Exhibit D, SONAR Exhibit S-23) provides an explanation of the required review steps taken by the MPCA before proposing use designations.

Beyond what is required by state and federal regulations for use designations, the MPCA continuously strives to improve the information available to the public to assist them in understanding rule amendments. As a result, several improvements have been made to the rule documentation for the proposed rule amendments based on public comments from previous rules (e.g., 2017 TALU rule and 2020 Class 2 and 7 rule). This included adding additional information to the use designation review summaries (i.e., assessment and stressor identification results) and the addition of an interactive map which included requested features (e.g., Public Land Survey layer, street map). Specific to the current rule, the MPCA received comments as part of the Request for Comments and the Triennial Review comment period (Hearing Exhibit D, SONAR Exhibit S-18 [pp. 15-16]). Based on these comments, the MPCA made changes to the draft documentation including: 1) providing additional data used to support thermal designation decisions (see Hearing Exhibit D, SONAR Exhibit S-18, Appendix A), 2) adding information to UAA summaries to describe the feasibility of restoration for specific ditched waters, 3) adding language to clarify use designations for subset of stream reaches erroneously designated as Class 2A and which lack biomonitoring data, and 4) adding a list of waterbodies for which the General Use was confirmed (see Hearing Exhibit D, SONAR Exhibit S-18, Appendix B). Lastly, the MPCA posted on the rule webpage, additional information about permitted municipal wastewater facilities that was requested during the public comment period for the Notice of Hearing (Hearing Exhibit K.8). The MPCA will continue to consider comments and improve our documentation of rule amendments to maximize the accessibility and usefulness of this information for the public.

E. Comments related to coordination with other agencies

Relates to:

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins).

Relevant documents:

Attachment 8: The use of the tiered aquatic life use (TALU) framework to designate beneficial life uses for drainage ditches and altered watercourses.

Summary of comments:

The MCEA recommended that the MPCA should improve coordination with the DNR to ensure that water quality and aquatic life are considered as part of drainage maintenance projects [MCEA (Hearing Exhibit I)].

MPCA response:

The MPCA agrees that it is important to coordinate water quality protection and restoration efforts with the DNR and other entities involved with and interested in the management of water quality. The management of waters maintained for drainage is complicated by the involvement of landowners and

multiple organizations at different levels of government with varying jurisdictions (Attachment 8 [pp. 18-20]). As a result, implementation of Minnesota Drainage Law ([Minn. Stat. § 103E](#)) in a manner that provides for drainage, but also protects water quality requires cooperation between federal, state, county, and local government entities. Programs such as “One Watershed, One Plan” (<https://bwsr.state.mn.us/one-watershed-one-plan>) is an example of an effort to coordinate actions that impact water quality. The MPCA works to coordinate water quality management with entities which administer Minnesota Drainage Law including watershed districts and counties. The Agency will continue to promote this coordination and seek additional opportunities to collaborate with entities responsible for drainage maintenance to ensure that water quality and beneficial uses are protected.

F. Comments regarding coordination with Tribal nations

Relates to:

Minn. R. 7050.0470 (Classifications for surface waters in major drainage basins)

Hearing Exhibit D (SONAR) discussion at:

Section 6, Meaningful involvement [pp. 28-29, 33-34];

Section 7, Notice plan [pp. 34-36].

Summary of comments:

The MCEA commented on the need for the MPCA to coordinate with Tribal nations on rules that may impact subsistence fishing and drinking water [MCEA (Hearing Exhibit I)].

MPCA response:

Overall, the result of this rule is improved water quality management of these waters by assigning the correct goals for these waters. However, the MPCA is always interested in collaborating with Tribal nations to ensure that water quality management work in Minnesota provides benefits to Tribes and considers the interests of indigenous peoples. The MPCA fulfilled all requirements regarding notifying tribes in Minnesota of this rule (Hearing Exhibit D, SONAR [pp. 34-36]) and encouraged discussion and feedback on the draft rules. The MPCA also performed an equity analysis to determine if the costs or consequences of the proposed rule would be disproportionately borne by low-income populations and communities of color. This review did not identify any communities that would be disproportionately impacted by this rule (Hearing Exhibit D, SONAR [pp. 28-29]).