



Via Public Comment Webpage

September 4, 2023

Commissioner Katrina Kessler
Minnesota Pollution Control Agency
520 Lafayette Road
Saint Paul, MN 55155-4914

Re: Proposed MPCA Framework for developing and evaluating site-specific sulfate standards for the protection of wild rice

Dear Commissioner Kessler,

The Minnesota Center for Environmental Advocacy and undersigned organizations appreciate the extended comment period on the Minnesota Pollution Control Agency’s (“MPCA’s”) proposed framework for developing site-specific sulfate standards in wild rice waters. However, this brief comment period falls short of a full public process. Despite the great public interest demonstrated in the 2017 wild rice rulemaking, this proposal has been developed with little notice or engagement with citizens. It is imperative that MPCA engage in a meaningful public process, as well as meaningful consultation with Tribal Nations and review by the U.S. Environmental Protection Agency (“EPA”) before implementing any plan that could weaken the 10 mg/L standard. As written, the proposed framework would allow removal of the standard without scientifically defensible parameters and fail to protect wild rice waters.

1. Minnesotans have demonstrated a strong interest in protecting wild rice, and efforts to repeal the 10 mg/L standard have been rejected.

Wild rice is of profound cultural, historic, nutritional, and environmental value to the State of Minnesota and sovereign Tribal Nations. Accordingly, standards for protecting wild rice were enacted early in MPCA’s implementation of the Clean Water Act. MPCA adopted the 10 mg/L standard in 1973 based on longstanding research establishing that sulfate levels exceeding this threshold are a serious detriment to wild rice.¹ EPA reviewed and affirmed the 10 mg/L standard as necessary to comply with the Clean Water Act’s mandates. Since then, the importance of regulating sulfate has been reinforced with evidence that sulfate also enables mercury methylation, leading to mercury bioaccumulation that causes serious health effects in animals and humans.²

Unfortunately, Minnesota’s enforcement of the wild rice standard has long been hampered by private interests who sought to avoid permit limitations. Following demands by EPA and Tribal Nations, MPCA took steps to enforce the standard around 2010. The Minnesota Chamber of Commerce, on behalf of mining companies—U.S. Steel, Cleveland Cliffs, Mesabi Mining, and

¹ *In re Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Rivers*, OAH No. 80-9003-34519, ¶ 7 (Jan. 9, 2018) (hereinafter “ALJ Report”).

² *See id.* ¶ 219.

PolyMet—responded with unsuccessful litigation.³ In 2011, the Legislature directed MPCA to revisit the standard in an effort to excuse private interests from compliance.⁴ Under political pressure, MPCA proposed repealing the 10 mg/L standard in favor of the equation-based standard that MPCA has revived as part of the current proposed framework.

The rulemaking that ensued in 2017 drew the interest of thousands of citizens, who submitted written comments and oral testimony demanding MPCA retain and enforce the 10 mg/L standard. In 2018, an administrative law judge (“ALJ”) rejected MPCA’s proposed rule, finding that it would violate the Clean Water Act and state law.

In the face of challenges raised by the public concerning increased mercury methylation, further harm to wild rice, and degradation of waters due to algae blooms as a result of elevated sulfate standards, the MPCA has failed to make an affirmative presentation of facts which demonstrate that, in establishing standards which would allow increased levels of sulfate in wild rice waters, it is protecting the public health or welfare, enhancing the quality of water, and ensuring that the proposed water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters, as required by federal and state law.⁵

The ALJ emphasized that the Clean Water Act requires states to enact water quality standards to “*enhance* the quality of water.”⁶ The ALJ further observed that the equation-based standard failed to provide certainty to the regulated community and that MPCA had underestimated the likelihood of litigation challenging the rulemaking.⁷

Since the ALJ rejected MPCA’s proposed rule, Tribal Nations, EPA, and citizens have continued demanding enforcement of the 10 mg/L standard, while multiple mining companies have continued to resist compliance. Now, faced with permit limits, Cleveland Cliffs and U.S. Steel have requested site-specific standards that could allow discharges up to 40 times the standard.⁸ In response, MPCA now revives aspects of its former proposal, despite volumes of citizen input that occurred during the 2017 rulemaking. The resulting framework is yet another proposal that would effectively eviscerate the 10 mg/L standard and fail to protect wild rice.

2. The proposed framework would weaken the wild rice sulfate standard without adequate scientific support, in violation of the Clean Water Act.

The proposed framework suffers from many of the same defects as the proposed rule. The ALJ criticized the proposed rule, in part, because it was overly vague and granted MPCA too much discretion, leaving citizens and regulated parties guessing as to what would be allowed. The

³ *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, A12-0950, 2012 WL 6554544, at *1 (Minn. Ct. App. Dec. 17, 2012).

⁴ 2011 Minn. Laws, 1st Spec. Sess., ch. 2, art. 4, § 32.

⁵ ALJ Report ¶ 226.

⁶ 33 U.S.C. § 1313 (emphasis added); ALJ Report ¶¶ 223, 226.

⁷ ALJ Report ¶¶ 80-81, 98-99.

⁸ Chloe Johnson, *Two Minnesota Iron Mines Want Exemption from State Pollution Rule Designed to Protect Wild Rice*, Star Tribune (Aug. 19, 2023).

proposed framework similarly lacks predictability. Rather than clear guidelines, the framework offers a set of “recommendations” with various potential pathways toward a site-specific standard. MPCA provides no certainty as to how the framework will be applied. If implemented, agency staff and the public will be burdened by review of disparate proposals with no clear metrics.

The framework states that, due to complexities, “MPCA is unable to prescribe a fixed, step-by-step approach to developing a [site-specific standard] that would suffice in all circumstances.”⁹ If MPCA is unable to articulate an approach supported by sound scientific rationale, then altering the 10 mg/L standard is not warranted.

Further, the framework resurrects the defective equation that generated controversy at the time of the rulemaking. MPCA cited the work of Dr. John Pastor for that equation, which is based on the concentration of iron and inorganic carbon in the sediment. But Dr. Pastor himself has demonstrated that MPCA’s equation was based on faulty assumptions.¹⁰ Additionally, MPCA has failed to account for continued research on the interactions between iron and sulfate, which shows that sulfate continues to be harmful in the presence of iron in sediments. Peer-reviewed literature shows that adding sulfate to waterbodies with high levels of iron coats wild rice roots, interfering with the quality and production of wild rice seed.¹¹ Notwithstanding Dr. Pastor’s criticisms and the growing literature, MPCA has revived that equation in this framework as a “line of evidence” that can support a site-specific deviation from the 10 mg/L standard. The equation is not based on sound scientific rationale and should be rejected as a basis for weakening the standard.

The framework also fails to correctly define the wild rice beneficial use. The Clean Water Act requires MPCA to protect all uses of the water that existed at the time of the Act.¹² But the proposed framework allows applicants to use evidence that wild rice is not *currently* declining as evidence that current discharge levels are protective. The framework fails to recognize that wild rice was historically more abundant in many locations. Federal law requires protection of those waters in their historical state, even if not currently achieved.

Finally, Minnesota waters are already impaired by sulfate,¹³ and allowing sulfate discharge above current levels would unlawfully cause further degradation. In addition to harming wild rice, sulfate is contributing to mercury methylation that is harming infants in the Lake Superior basin.¹⁴ The Clean Water Act instructs MPCA to take steps to “enhance” the quality of the water.¹⁵ By

⁹ Proposed Framework, at 5.

¹⁰ John Pastor, *Technical Review Comments on MPCA’s Proposed Flexible Standards for Sulfate in Wild Rice Beds* (2017).

¹¹ *Id.* at 3-4.

¹² 33 U.S.C. § 1251(a)(2) (stating directive to “restore and maintain” the nation’s waters); 40 C.F.R. § 131.10(h)(1); *see* 40 C.F.R. § 131.3(e) (defining “existing use”).

¹³ EPA, *Decision Document Regarding the Sulfate Impaired Waters EPA Is Adding to the Minnesota 2020 Clean Water Act Section 303(d) List* (2021).

¹⁴ Minn. Dep’t of Health, *Mercury Levels in Blood from Newborns in the Lake Superior Basin* (2011).

¹⁵ 33 U.S.C. 1313(c)(2)(A).

enacting a framework that would explicitly provide for a weakening of the standard, MPCA would put both wild rice and public health at risk.

3. MPCA must ensure meaningful Tribal consultation, EPA review, and citizen involvement.

The history of the wild rice standard demonstrates a strong public interest. MPCA should not pursue another pathway that could weaken the standard without more fully engaging all interested parties, including Tribal Nations, federal regulators, and citizens.

First and foremost, MPCA cannot adequately represent the interests of Minnesota citizens unless it proceeds in a manner that upholds the government-to-government relationship between the State of Minnesota and Tribal Nations. MPCA must ensure meaningful consultation with all Tribal Nations who have an interest in wild rice, in both the finalization of any framework and the development of any site-specific standard. Meaningful consultation includes not only listening but also *implementation* of Tribal recommendations.¹⁶ MPCA itself stands to gain from effective consultation—as Minnesota courts have recognized, Tribal governments possess regulatory expertise entitled to solicitude.¹⁷

Additionally, MPCA should submit the proposed framework to EPA for review. EPA rules state that policies “generally affecting the[] application and implementation” of water quality standards are subject to EPA review and approval.¹⁸ It is imperative that EPA weigh in on this framework, especially given EPA’s efforts to prompt MPCA to enforce the 10 mg/L standard. As the Minnesota Supreme Court recently observed in rejecting efforts to end-run EPA comments critical of the PolyMet water permit, “the views of the EPA represent the views of a co-regulator with unquestioned technical expertise and oversight authority regarding the implementation of the [Clean Water Act].”¹⁹ EPA review of the framework will facilitate early discussion of issues likely to arise in the process of implementing the proposed framework in individual permits.

Finally, full citizen engagement is warranted before MPCA makes a decision on this framework or implements any site-specific standard. If MPCA intends to set forth a course of conduct for all permit applicants, a formal rulemaking with public participation is warranted. And in the implementation of any site-specific standard, MPCA must ensure that the public has notice

¹⁶ Indigenous Peoples Subcomm. of the Nat’l Env’tl. Justice Advisory Council, *Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making*, at 3, 5 (2000).

¹⁷ *In re the Denial of Contested Case Hearing Requests & Issuance of National Pollutant Discharge Elimination System / State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project*, No. A19-0112, 2023 WL 4919533, at *28 (Minn. Aug. 2, 2023) (McKeig, J., concurring); *In re City of Cohasset’s Decision on Need for an Env’tl. Impact Statement for Proposed Frontier Project*, 985 N.W.2d 370, 384 (Minn. Ct. App. 2023).

¹⁸ 40 C.F.R. § 131.13.

¹⁹ *In re the Denial of Contested Case Hearing Requests & Issuance of National Pollutant Discharge Elimination System / State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project*, 2023 WL 4919533, at *18.

of any permit proposals that would deviate from the 10 mg/L standard. It is disturbing that MPCA did not explain, when it requested feedback on this framework, that two mining companies had already requested standards that would allow sulfate in excess of the 10 mg/L limit. This creates the appearance that industrial interests had an early opportunity to influence the proposal while the public has been relegated to comment on the result, near the end of the process. Given the great public interest in the protection of wild rice, information on requests for site-specific deviations should be transparently provided so that citizens can track and respond to such proposals.

In the meantime, MPCA must enforce the 10 mg/L standard in all waters that currently or historically have supported wild rice. Anything less would fail to protect the health and welfare of Minnesota citizens.

Sincerely,

s/Melissa Lorentz

Melissa Lorentz

Staff Attorney

Minnesota Center for Environmental Advocacy

mlorentz@mncenter.org

Submitted also on behalf of the following organizations:

Center for Biological Diversity

Clean Up the River Environment

Hastings Environmental Protectors

Lutheran Advocacy – Minnesota

Minnesota Division, Izaak Walton League of America

Minnesota Interfaith Power and Light

Resilient Cities and Communities

Save Lake Superior Association

Save Our Sky Blue Waters

Sierra Club North Star Chapter

Vote Climate

W.J. McCabe Chapter, Izaak Walton League of America