

## **DECISION DOCUMENT REGARDING THE SULFATE IMPAIRED WATERS EPA IS ADDING TO THE MINNESOTA 2020 CLEAN WATER ACT SECTION 303(d) LIST**

The U.S. Environmental Protection Agency partially approved and partially disapproved Minnesota's 2020 Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*, Section 303(d) list (Minnesota 2020 Section 303(d) list) on March 26, 2021.<sup>1</sup> EPA concluded that Minnesota's list of water quality limited segments (WQLSs) still requiring total maximum daily loads (TMDLs) was complete (Appendix 1 of the March 26, 2021, Decision Document), with the exception of Minnesota's decision to not identify on the Minnesota 2020 Section 303(d) list any WQLSs for sulfate impairment.<sup>2</sup> In the March 26, 2021 Decision Document, EPA stated that Minnesota's decision to exclude these WQLSs with existing and readily available data and information indicating sulfate impairment was inconsistent with Section 303(d) and EPA's implementing regulations.<sup>3</sup>

Consistent with Section 303(d)(2), this Decision Document includes the details of EPA's identification of 30 WQLSs (Appendix 2 of this Decision Document) still requiring TMDLs under Section 303(d) of the CWA and the implementing regulations pursuant to 40 C.F.R. § 130.7. WQLSs identified in Appendix 2 of this Decision Document are the waters that EPA is adding to Minnesota's 2020 Section 303(d) list. As required by 40 C.F.R. § 130.7(d)(2), EPA will issue a public notice providing for a 30-day public comment period regarding these additions. After considering the comments received, EPA plans to issue another decision document responding to comments and potentially revising the list. Because of the short statutory timeframe given for EPA's action and the complexity of these issues, EPA expects that at that time we will provide further clarification as needed on our action.

EPA is in the process of evaluating extensive additional data and information received through consultation with Tribal Governments and is taking no action on other potential wild rice waters and sulfate impairments at this time. Information received to date, with relevant notes, is found in Appendices 3-5. EPA also recognizes that there may be other information in the possession of stakeholders relevant to identifying those waters subject to the "waters used for production of wild rice" beneficial use and associated water quality data. EPA will complete our analysis of the input received from Tribal Governments, along with any additional information received during this public notice and comment period and will issue a supplemental decision addressing any additional sulfate-impaired wild rice waters, as appropriate. If EPA identifies additional waters used for the production of wild rice for which there are sulfate impaired segments, EPA will provide an additional 30-day period for public review and comment on those WQLSs. EPA will provide the exact schedule and deadlines for receiving

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<sup>1</sup> EPA Decision Document for The Partial Approval of Minnesota's 2020 Clean Water Act Section 303(d) List, March 26, 2021 [hereafter EPA 2020 Decision Document].

<sup>2</sup> MPCA, Responses to the 2020 Draft Impaired Waters List, Public Notice Comments (February 25, 2021), p. 2 of 12 [responses to public comments 5, 6, 8, 10, 11, 13, 15, and 19]; Letter from Tera L. Fong, EPA, to Katrina Kessler, MPCA, March 9, 2021; Letter from Katrina Kessler, MPCA, to Tera L. Fong, EPA, March 15, 2021.

<sup>3</sup> EPA 2020 Decision Document at 19. See also Decision Document for the Approval of Minnesota's 2014 Clean Water Act Section 303(d) List [hereafter EPA 2014 Decision Document], Appendix 1 at 9 (May 29, 2018) ("EPA notes that this state law cannot and does not abrogate the State's obligation to complete a list of impaired waters as required by the Clean Water Act, 33 U.S.C. § 1313(d), a federal law. The State is also required to complete its CWA 303(d) list according to the federal regulations promulgated under the Clean Water Act, including 40 C.F.R. § 130.7.").

public comment at the time EPA publishes our notice, as appropriate. Because of the short statutory timeframe given for EPA’s action and the complexity of these issues, EPA expects that at that time we will provide further clarification as needed on our action.

## I. Background

### A. Sulfate Water Quality Standard

Minnesota Rule (Minn. R.) 7050.0430, states that “All surface waters of the state that are not listed in Minn. R. 7050.0470 and that are not wetlands as defined in part 7050.0186, subpart 1a, are hereby classified as Class 2B, 3C, 4A, 4B, 5, and 6 waters.” However, Minn. R. 7050.0224, subpart 1, provides further identification of waters where wild rice is present:

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. The quality of these waters and the aquatic habitat necessary to support the propagation and maintenance of wild rice plant species must not be materially impaired or degraded.

In addition to the other water quality criteria listed in Minn. R. 7050.0224, the second subpart of this rule states that the Class 4A sulfate criterion of 10 mg/L is “applicable to water used for the production of wild rice during periods when the rice may be susceptible to damage by high sulfate.” Minn. R. 7050.0224, subp. 2. Therefore, the State’s criterion at Minn. R. 7050.0224, subpart 2 contains a two-part test: The first part requires that waters designated for the use are those “used for the production of wild rice”; while the second part provides that the sulfate criterion of 10 mg/L will be “applicable to water used for the production of wild rice during periods when the rice may be susceptible to damage by high sulfate.” Id.

During EPA’s review of the State’s 2014 list submittal, Tribes asserted to EPA that the sulfate criterion should be applied to all waters of the State. In response, EPA explained:

EPA agrees that the default designated uses under Minn. R. 7050.0430 (2B, 3C, 4A, 4B, 5, and 6) apply to all waters not specifically designated in Minn. R. 7050.0470 [Minn. R. 7050.0430]. Minn. R. 7050.0430 generally supports the application of the Class 4A criteria to all waters not specified under Minn. R. 7050.0470. However, unlike other water quality criteria listed in Minn. R. 7050.0224, Subp. 2, the applicability of the Class 4A sulfate criterion is further restricted to “water used for the production of wild rice during periods when the rice may be susceptible to damage by high sulfate.” Minn. R. 7050.0224 includes the designation of 24 wild rice waters in Minn. R. 7050.0470, subpart 1. EPA understands that the State of Minnesota has the authority to add additional waters to Minn. R. 7050.0470, subpart 1 but the State has never done so. [citation omitted] EPA notes that there has been uncertainty in the State’s interpretation and application of the existing sulfate criterion over time, such that there is no clear indication that the criterion applies to waters beyond the 24 waters listed in Minn. R. 7050.0470, subpart 1. . . . However, EPA believes that MPCA has consistently communicated that MPCA considers at least the 24

state-designated wild rice waters as waters used for the production of wild rice and, thus, subject to the current sulfate criterion (Minn. R. 7050.0224).

Apart from the waters listed in Minn. R. 7050.0470, subpart 1, there are other sources of documentation which contain information on waters where wild rice is found, although EPA has not been able to directly link this information to the State's water quality standards process, as explained. . . . In light of the uncertainty regarding the State's interpretation as to the applicability of its existing sulfate water quality criterion, EPA finds that it was not unreasonable for the State to decline to assess or list waters outside of the 24 state-designated wild rice waters of Minn. R. 7050.0470, subpart 1. EPA continues to expect that the State will develop an appropriate assessment and listing methodology in conjunction with its approved sulfate criterion.<sup>4</sup>

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<sup>4</sup> EPA, 2014 Decision Document, Appendix 2, EPA Response to Tribal Issues Raised During Tribal Consultation on the Final 2014 Minnesota Clean Water Act 303(d) List at 1. In our 2014 Decision Document, Appendix 1, EPA considered the extensive documentation shared by the Tribes and other stakeholders which identified specific waters that these parties believe are in violation of the current numeric sulfate criterion (10 mg/L). There we noted, "While these entities have put forward various approaches to identifying waters they believe are subject to the sulfate criterion, we are unaware of any mechanism for the State to incorporate these considerations other than the State's CWA Section 303(c) process for determining designated uses of water bodies." See also Chamber I, at \*9 (noting that "available wild rice records and databases that the Minnesota Department of Natural Resources (MDNR) maintains" are only one aspect of MPCA's determination of whether the sulfate criterion applies to a water and that MDNR's list of waters where wild rice has been identified is not equivalent to "an exhaustive list of waters used for the production of wild rice"). Appendix 1 at note 43, citing *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 2012 Minn. Dist. LEXIS 194 (Minn. Dist. Ct., May 10, 2012), *aff'd*, *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 2012 Minn. App. Unpub. LEXIS 1199 (Minn. Ct. App., Dec. 17, 2012). See generally EPA's 2014 Decision Document, Appendix 1, for a discussion of EPA's review of available information, including at note 44, discussing EPA's review of the 2008 MDNR Report; and EPA's 2014 Decision Document, Appendix 2.

See also MPCA, Statement of Need and Reasonableness (SONAR), *Amendment of the sulfate water quality standard applicable to wild rice and identification of wild rice waters*, July 2017 [hereafter MPCA 2017 SONAR], at 28 – 30, 35 – 39ff, describing the history of the State's sulfate criterion and noting:

Minn. R. 7050.0224, subpart 1 currently includes, in addition to general directives about Class 4 waters, a narrative standard that only applies to selected wild rice waters, also referred to as [WR] waters, that are specifically identified in the rule. . . . The current rules apply the wild rice beneficial use to "water used for production of wild rice," but the rules do not specifically identify these waters. Identifying these waters has been a major challenge to the implementation of the existing standard, as identification currently requires a case-by-case evaluation. In 2011, the Minnesota Legislature directed the MPCA to "designate each body of water, or specific portion thereof, to which wild rice water quality standards apply." Legislation also directs the MPCA to establish criteria for waters containing natural beds of wild rice and that the criteria should include (but not be limited to) history of wild rice harvests, minimum acreage and wild rice density.

Id. at 36-38, <https://www.pca.state.mn.us/sites/default/files/wq-rule4-15i.pdf> (last visited 4/24/2021).

We note that there may be an impression that other, non-State entities can make designations pursuant to the State's standard at Minn. R. 7050.0224, and specifically that the Minnesota ALJ's decision identified the ability of Tribes to make designations of waters. See Email from Sara Van Norman, on behalf of Grand Portage Chair Deschampe, to Cheryl Newton, "Consultation Comments on MN Wild Rice Waters to be Added to the 2020 impaired Waters List," April 8, 2021, enclosing letter from Norman Deschampe, Chairman, and April McCormick, Secretary/Treasurer, Grand Portage Band of Lake Superior Chippewa, to Cheryl Newton, Acting Regional Administrator, April 8, 2021, at 3-4. While EPA agrees that Tribes may make designations of waters within the area for which they have approved programs under CWA Section 303(c), Tribes (or neighboring States) may not make designation decisions for each others' waters. The letter also notes that the ALJ

Between 2012 and 2017, MPCA completed steps toward a rulemaking that would have revised the sulfate standard and would have established a list of some 1300 waters that were to be designated for a “wild rice” use (MPCA’s 2017 list of 1300 waters). EPA further notes that MPCA’s 2017 rulemaking effort was relevant to State’s efforts to interpret the beneficial use as it is described in Minn. R. 7050.0470:

The wild rice beneficial use was established in 1973 and is not being changed by this rulemaking. This rulemaking provides, for the first time, a specific list of those waters that demonstrate the wild rice beneficial use. . . . The MPCA is clarifying an existing beneficial use, not changing it. The MPCA is not adopting new or revised designated uses, or removing designated uses. Rather, the MPCA is using available information to, via rulemaking, identify which waters demonstrate the beneficial use.<sup>5</sup>

The rulemaking was abandoned after the rule was deemed flawed on several bases in the State’s administrative review process.<sup>6</sup> While MPCA ultimately neither revised the sulfate criterion, nor adopted the list of designated waters into rule,<sup>7</sup> during its rule development process, MPCA engaged in an extensive review of available information regarding the location and water quality relating to waterbodies supporting natural stands of wild rice.<sup>8</sup>

In explaining why it chose not to include all waters from the various lists and information reviewed when compiling its list of waters subject to the beneficial use, MPCA noted:

While the discussion above describes the sources the MPCA used to identify proposed Class 4D wild rice waters, in some instances information was insufficient to make a determination. In

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decision did not limit the interpretation of the State’s water quality criterion to one State agency (at id.), but EPA notes, without commenting on this assertion, that there is no dispute between the ALJ decision and MPCA’s position that the 2017 list of 1300 waters represents the minimum list to which the State’s criterion applies, as further discussed in Part II.A below.  
<sup>5</sup> MPCA 2017 SONAR at 41.

<sup>6</sup> Chief Administrative Law Judge’s Order on Review of Rules, *In the Matter of the Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Rivers*, April 12, 2018 [hereafter Chief ALJ Order], [https://mn.gov/oah/assets/9003-34519-pca-sulfate-water-quality-wild-rice-rules-chief-judge-reconsideration-order\\_tcm19-335811.pdf](https://mn.gov/oah/assets/9003-34519-pca-sulfate-water-quality-wild-rice-rules-chief-judge-reconsideration-order_tcm19-335811.pdf) (last visited 4/24/21); State of Minnesota Office of Administrative Hearings, *In the In the Matter of the Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Rivers, Minnesota Rules parts 7050.0130, 7050.0220, 7050.0224, 7050.0470, 7050.0471, 7053.0135, 7053.0205, and 7053.0406*, OAH 80-9003-34519, Revisor R-4324, January 11, 2018 [hereafter ALJ Report], <https://www.pca.state.mn.us/sites/default/files/wq-rule4-15mm.pdf> (last visited 4/24/2021).

<sup>7</sup> MPCA, Environmental Analysis and Outcomes Divisions, *Notice of Withdrawn Rules for Proposed Rules Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Waters; Revisor’s ID Number 4324* (April 26, 2018), <https://www.pca.state.mn.us/sites/default/files/wq-rule4-15oo.pdf> (last visited 4/24/2021).

<sup>8</sup> MPCA 2017 SONAR at 41 - 51. Included in the exhibits reviewed by MPCA were the Minnesota Department of Natural Resources (MDNR) study, *Natural Wild Rice in Minnesota – A Wild Rice Study Report to the Legislature* (2008); MDNR *Wild Rice Harvester Survey Report* (2007); Minnesota Wild Rice Management Workgroup List of 350 Important Wild Rice Waters (2010); 1854 Treaty Authority List of Wild Rice Waters; MDNR Aquatic Plant Management Database; MPCA Biomonitoring Field Sites surveys; University of Minnesota field surveys sites (2011-2013); Minnesota Biological Survey Database; information received in MPCA’s 2013 “Call for Data” for locational information on wild rice and sulfate analytical results; MPCA National Pollutant Discharge Elimination System Permit (NPDES) Monitoring Reports; Wild rice waters listed in Minn. R. 7050.0470; Waters identified by MDNR as wild rice waters in 2015; Waters identified through MPCA reviews of other water surveys as listed.

some cases, the MPCA could not identify the location of the water from the information provided. For example, waters in the MDNR 2007 harvester report were listed on a county-by-county basis. For common lake names, multiple waters within a county with the same names were found (for example, Mud Lake, Round Lake, Deer Lake, etc.), and in some cases, the location of the water could not be precisely identified.

In other cases, the MPCA could not correlate the location of a river or stream with a particular waterbody identifier (WID). Some sources of information listed river and stream locations with only Township and Range data. In these cases, the MPCA reviewed available data (aerial photographs, other sources) to identify the WIDs in that county associated with the river or stream. If multiple WIDs associated with the river or stream were found within the county, and the MPCA was unable to find information to correlate specifically with a single WID where rice was located, the water could not reasonably be included as a proposed wild rice water.<sup>9</sup>

MPCA acknowledged that its list “may not include every water in Minnesota where the wild rice beneficial use has existed since November 28, 1975,” and that there “may be wild rice waters but for which there is not yet sufficient information to determine that the beneficial use is demonstrated.”<sup>10</sup> A Chief Administrative Law Judge (ALJ) Order ruled that MPCA’s list was flawed for using a “weight of evidence” standard to screen information the Agency deemed relevant to making a determination of where its new numeric criterion would apply (i.e., the ALJ determined that MPCA had no legislative mandate to necessarily examine stand density, set criteria for determining minimum acreages of wild rice stands, and other clear standards for screening evidence). Thus, the Chief ALJ Order affirmed the ALJ Report finding that the resulting list does not include all waters previously identified where wild rice may be an existing use,<sup>11</sup> and encouraged MPCA to expand its list to include additional waters that might be subject to the wild rice standards currently in effect.<sup>12</sup>

MPCA, as noted above, did not expand the list, adopt the list into rule, or submit it to EPA for review as a revision to the State’s approved water quality standards. In our 2014 Decision Document (issued in 2018), we reviewed this list, among others, and noted

As part of its efforts to revise the sulfate criterion, MPCA identified a draft list of some 1,300 wild rice waters that may be subject to an anticipated revised sulfate criterion and made that draft list available for public notice and comment [citation omitted]. . . . However, the State has not promulgated a revision to the existing standard nor a revision to the waters that are subject to the standard. Thus, the current standard and the waters to which that standard applies are the only relevant subjects of consideration for the 2014 303(d) list.<sup>13</sup>

Absent further action by the State to identify where the wild use applied, EPA’s final action on the 2014, 2016 and 2018 Minnesota Section 303(d) lists reviewed only existing and readily available water quality data for the 24 waters specifically designated as wild rice waters in Minn. R. 7050.0470. While

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<sup>9</sup> MPCA 2017 SONAR at 45.

<sup>10</sup> MPCA 2017 SONAR at 58, cited in Chief ALJ Order at 67, who noted that commenters in MPCA’s public comment on the list argued for both the under-inclusiveness and the over-inclusiveness of the list. *Id.*

<sup>11</sup> ALJ Report at 62-69.

<sup>12</sup> ALJ Report at 69, 79.

<sup>13</sup> EPA 2014 Decision Document, Appendix 1 at 6-7.

consistently acknowledging that it was possible that the criterion applied to more than the 24 waters in Minnesota’s rule, EPA declined to apply Minnesota’s sulfate criterion beyond these 24 waters.<sup>14</sup>

## **B. EPA’s Review of the February 25, 2021 Submittal from Minnesota**

EPA received MPCA’s 2020 Section 303(d) List of Impaired Waters still requiring TMDLs, which was submitted as part of Minnesota’s 2020 Integrated Report, on February 25, 2021. EPA reviewed Minnesota’s submittal, including the listing decisions, the assessment methodology, and supporting data and information to determine whether Minnesota reasonably identified waters to be listed as impaired. MPCA received multiple comments regarding the continued absence of a sulfate/wild rice assessment methodology and Minnesota’s failure to assess or list potential sulfate-impaired surface water body segments. The comments submitted during the public comment period cited eight waters as examples of waters used for the production of wild rice and for which readily available data indicated potential impairment for the 10 mg/L sulfate criterion. In response to these comments, MPCA stated that it considered the data and analysis and determined that seven of the eight waters proposed for listing demonstrated sulfate concentrations above 10 mg/L, but Minnesota could not list those waters because Minnesota law bars MPCA from assessing or listing waters against Minnesota’s federally approved 10 mg/L standard.<sup>15</sup>

On March 9, 2021, EPA requested clarification on whether MPCA considered eight waters, identified in public comment, as waters used for the production of wild rice and further explanation of how MPCA evaluated data for those eight waters. MPCA’s March 15 response affirmed that the eight example waters referenced were, “waters used for the production of wild rice” (although not appearing on the list of 24 waters in the State’s rules) and provided MPCA’s analysis of the data submitted by Tribes and reviewed by MPCA in concluding that seven of these eight waters are impaired for sulfate.<sup>16</sup>

The letter noted:

In 2017 the MPCA proposed revisions to the wild rice sulfate standard as part of a rulemaking process [citation omitted]. As articulated in the Statement of Need and Reasonableness (SONAR) for that rule:

*The MPCA is proposing to eliminate this confusing term [“water used for production of wild rice”] and instead identify specifically where the standard applies, i.e., to a “wild rice water” in order to protect the wild rice beneficial use. The MPCA is not proposing to change the beneficial use of wild rice, but is proposing to modify the phrase in order to more clearly articulate the recognized use. The MPCA is proposing to specifically identify the rivers, streams, lakes, and wetlands demonstrating this beneficial use.”*  
[Citation omitted.]

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<sup>14</sup> EPA 2014 Decision Document at 1 and Appendix 1; EPA, Decision Document for the Approval of Minnesota’s 2016 and 2018 Clean Water Act Section 303(d) Lists (January 28, 2019) [hereafter EPA 2016-2016 Decision Document] at 1, 30, and Appendix 1, EPA Responses to Tribal Issues Raised during Tribal Consultation on the final 2016 and 2018 Minnesota Clean Water Act 303(d) Lists; see also EPA Decision Document for Minnesota’s 2012 Section 303(d) List, July 25, 2013.

<sup>15</sup> MPCA, Responses to the 2020 Draft Impaired Waters List, Public Notice Comments (February 25, 2021), p. 2 of 12 [responses to public comments 5, 6, 8, 10, 11, 13, 15, and 19]; Letter from Tera L. Fong, EPA, to Katrina Kessler, MPCA, March 9, 2021; Letter from Katrina Kessler, MPCA, to Tera L. Fong, March 15, 2021.

<sup>16</sup> Letter from Katrina Kessler, MPCA, to Tera L. Fong, EPA, March 15, 2021.

The proposed rule revisions included a list of approximately 1300 waters that the MPCA planned to identify as having the wild rice beneficial use designation [citation omitted]. During the rulemaking, many commenters indicated they felt the MPCA’s proposed list was too narrow, and the Administrative Law Judge reviewing the rule also found that MPCA inappropriately excluded some waters [citation omitted]. As part of its review of the comments from the Tribal leaders, the MPCA concluded that the eight waters submitted should be considered as “waters used for production of wild rice” for the purpose of evaluating impairment status, because: (1) the eight waters presented in the comments received during the comment period for Minnesota’s 2020 Impaired Waters List were on the proposed list in the rulemaking; and (2) based on the fact that the proposed list in the rulemaking could likely be considered the most narrow list of waters that demonstrate the wild rice beneficial use.<sup>17</sup>

The letter detailed MPCA’s efforts to specifically identify the eight waters submitted and evaluate available data “from all available databases” including data received during the period 2009 - 2019.<sup>18</sup> The letter concluded:

The MPCA’s analysis is not a complete assessment, and does not represent a final decision on an appropriate assessment methodology. However, the MPCA finds that it demonstrates that under any reasonable assessment methodology consistent with those already developed by MPCA, all of eight waterbodies demonstrate the beneficial use and seven of the eight waters – all except Birch Lake – would be shown to exceed 10 mg/L sulfate.<sup>19</sup>

The letter enclosed the data reviewed by MPCA and described its review in concluding that that seven of the eight waters would be considered impaired for sulfate.<sup>20</sup>

Following our review of MPCA’s submittal and supporting information, EPA partially disapproved the State’s 2020 list, finding that the State’s decision to exclude the seven waters discussed in the State’s materials was inconsistent with Section 303(d) and EPA’s implementing regulations.<sup>21</sup>

## **II. EPA’s Identification of Water Quality Limited Segments for Inclusion on the Minnesota 2020 Section 303(d) List**

Section 303(d)(1) of the CWA directs states to identify those waters within their jurisdiction for which effluent limitations required by Section 301(b)(1)(A) and (B) are not stringent enough to implement any applicable water quality standard (WQS) and to establish a priority ranking for such waters, considering the severity of the pollution and the intended uses of such waters. The Section 303(d) listing requirement

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<sup>17</sup> Id.

<sup>18</sup> Id. at 2-3. During consultation held by EPA and Minnesota Tribal Leaders on April 9, 2021, Minnesota Tribal Representatives stated that these eight waters had been provided to MPCA as example waters only. See also Email from April McCormick, Secretary Treasurer, Grand Portage Band of Lake Superior Chippewa, to JoAnn Chase and others, March 17, 2021, and attachments.

<sup>19</sup> Id. at 4.

<sup>20</sup> Letter from Katrina Kessler, MPCA, to Tera L. Fong, EPA, March 15, 2021, Attachments 1 and 2.

<sup>21</sup> EPA 2020 Decision Document at 19.

applies to waters impaired by point sources and/or nonpoint sources, pursuant to EPA’s long-standing interpretation of Section 303(d).<sup>22</sup>

EPA regulations provide that states do not need to list waters for which the following controls are adequate to implement applicable standards: (1) technology-based effluent limitations required by the CWA, (2) more stringent effluent limitations required by state or local authority, and (3) other pollution control requirements required by state, local, or federal authority.<sup>23</sup>

## **A. Rationale for Identifying Waters as Subject to the Wild Rice Beneficial Use**

Since 2012, EPA has followed a cautious interpretation of Minn. R. 7050.0224 that has focused our review on the 24 waters listed in Subpart 1,<sup>24</sup> mindful that our review of the State’s impaired waters lists was not a review or revision to the State’s water quality standards under Section 303(c), 33 U.S.C. § 1313(c).<sup>25</sup> The Agency has consistently stated, however, that our approach could change: “EPA understands that the State of Minnesota has the authority to add additional waters to Minn. R. 7050.0470, subpart 1 but the State has never done so.”<sup>26</sup> EPA recognizes that throughout this time there have been various compilations by Tribes, state agencies, and stakeholders that seek to identify the list of waters that are subject to the wild rice beneficial use, and including MPCA’s 2017 list of 1300 waters. EPA also recognizes that in 2018, Minnesota’s Chief Administrative Law Judge issued an order that affirmed that MPCA’s 2017 list of 1300 waters was too narrow based on the legislative charge given to MPCA to develop a new sulfate criterion and a list of associated designated waters.

Since 2012, EPA has received numerous comments from Tribes during our consultations with Tribes on our review of the State’s impaired waters lists. We have also received courtesy copies of comments submitted by Tribes and stakeholders providing information regarding potential impairment by sulfate of various waters where wild rice grows.<sup>27</sup>

Since 2012, EPA has also strongly encouraged MPCA to develop an assessment methodology and to engage in a substantive effort to assess and list waters against its current wild rice criterion.<sup>28</sup> The

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<sup>22</sup> U.S. EPA, Office of Water, *Guidance for Water Quality-Based Decisions: The TMDL Process*, EPA 44014-91-001, April 1991 (hereafter, EPA’s 1991 Guidance); U.S. EPA, Office of Water, *EPA Guidelines for Preparation of the Comprehensive State Water Quality Assessments (305(b) Reports) and Electronic Updates: Supplement*, EPA-841-B-97-002B, September 1997.

<sup>23</sup> 40 C.F.R. § 130.7(b)(1).

<sup>24</sup> EPA 2014 Decision Document, Appendix 2 (“EPA believes that MPCA has consistently communicated that MPCA considers at least the 24 state-designated wild rice waters as waters used for the production of wild rice and, thus, subject to the current sulfate criterion (Minn. R. 7050.0224).”); see also EPA 2016 – 2018 Decision Document at 30.

<sup>25</sup> See, e.g., EPA’s 2014 Decision Document, Appendix 2, p. 3-4 (“EPA believes that it is not appropriate to preempt the State’s ongoing and immediate effort of formal revision and promulgation of water quality standards for wild rice, nor is it appropriate to use the assessment process established in CWA § 303(d) to displace the process for establishing and revising water quality standards outlined in CWA § 303(c).”).

<sup>26</sup> EPA 2014 Decision Document, Appendix 2, at 3; EPA 2014 Decision Document, Appendix 1 at 10 (“Therefore, although MPCA may designate waters used for the production of wild rice beyond those listed in Minn. R. 7050.0470, subpart 1, EPA does not believe MPCA has done so at this time.”).

<sup>27</sup> See, e.g., EPA 2012 Decision Document at 29-31; EPA 2014 Decision Document, Appendices 1 and 2; EPA 2016-2018 Decision Document at 30 and Appendix 1.

<sup>28</sup> See EPA 2012 Decision Document at 29-31; EPA 2014 Decision Document, Appendix 1 at 9-11; EPA 2016 – 2018 Decision Document at 30.



preference that the State take the lead in ascertaining the scope of the wild rice use derived in part from the CWA’s recognition of and preference for “the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.” Section 101(b), 33 U.S.C. § 1251(b). Unfortunately, EPA’s expectations have not been realized. State legislation curtailed MPCA’s efforts to list waters against the standard.<sup>29</sup> And although the State made a serious attempt to accomplish a revision to the wild rice criterion in 2017 (including assessing every major list and study of wild rice conducted within State waters, conducting research of its own, holding meetings with Tribes, conducting outreach to stakeholders, and seeking public comment), since the 2018 Chief ALJ Order disapproving the proposed standards revision, there has been no formal revision or clarification of the standard. MPCA withdrew its effort to clarify the wild rice beneficial use and associated criterion,<sup>30</sup> preventing since that date any possible clarification of the wild rice standard or identification of where the beneficial use should apply. This regulatory stasis has prevented the State from carrying out its responsibilities under Section 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A), to identify and assess for impairment those waters that may be subject to the wild rice beneficial use, contrary to the purpose of the CWA. We note that this regulatory inaction has prevented the State from meaningfully addressing the calls from Tribes to protect their judicially affirmed rights to gather wild rice in ceded territory within Minnesota.<sup>31</sup> It has also resulted in the State’s inaction in responding to comments and information regarding sulfate impairments submitted for each listing cycle by stakeholders.

We recognize that in its 2020 list submittal, MPCA has, for the first time, provided clarification on the applicability of the wild rice beneficial use to a universe greater than the 24 waters listed in Minn. R. 7050.0224, subpart 1, as discussed in Section 1.B above.<sup>32</sup> We also recognize MPCA’s statement that it views its 2017 list of 1300 waters (2017 MPCA list) as the minimum universe of waters subject to the wild rice beneficial use and but for state law curtailing the Agency’s authority to list waters as impaired, MPCA would have included seven of these waters on its 2020 list of impaired waters.<sup>33</sup> We further note that the 2018 Chief ALJ Order, while faulting MPCA’s list as too narrow, did not find that MPCA was mistaken in concluding that MPCA’s 2017 list of 1300 waters *were* subject to the beneficial use. Therefore, EPA is revising our previous interpretation of Minn. R. 7050.0224 to be consistent with MPCA’s statement that its 2017 list of 1300 waters is the minimum list of waters to which the wild rice beneficial use applies.

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<sup>29</sup> Wild Rice Water Quality Standards, Chapter 4 – S.F. No. 5 (2015, 1<sup>st</sup> Special Session) (Subsection (a)(2): “the agency shall not list waters containing natural beds of wild rice as impaired for sulfate under section 303(d) of the federal Clean Water Act, United States Code, title 33, section 1313, until the rulemaking described in this paragraph takes effect.”); Sulfate Effluent Compliance, Ch. 165, S.F. No. 3376 (2016, Regular Session).

<sup>30</sup> MPCA, Environmental Analysis and Outcomes Divisions, *Notice of Withdrawn Rules for Proposed Rules Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Waters*; Revisor’s ID Number 4324 (April 26, 2018), <https://www.pca.state.mn.us/sites/default/files/wq-rule4-1500.pdf> (last visited 4/24/2021).

<sup>31</sup> See, e.g., President Biden, Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, January 26, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/> (last visited 4/24/2021); Executive Order 13175 (65 FR 67249, November 9, 2000); Presidential Memorandum: Government-to-Government Relations with Native American Tribal Governments (59 FR 22951, April 29, 1994); EPA Policy for the Administration of Environmental Programs on Indian Reservations (November 8, 1984).

<sup>32</sup> Letter from Katrina Kessler, MPCA, to Tera L. Fong, EPA, March 15, 2021.

<sup>33</sup> *Id.*

Because we acknowledge that the universe of waters potentially subject to the beneficial use may be greater than MPCA’s 2017 list of 1300 waters and requires more time to thoroughly review and analyze the information that we have received on this issue, we are specifically taking no action to approve or disapprove the State’s exclusion from the 2020 Section 303(d) list any other potential wild rice waters or sulfate impairments at this time. Information received to date, with relevant notes, is found in Appendices 3-5. EPA also recognizes that there may be other information in the possession of stakeholders relevant to identifying those waters subject to the “waters used for production of wild rice” beneficial use and associated water quality data. EPA will complete our analysis of the input received from Tribal Governments, along with any additional information received during this public notice and comment period and will issue a supplemental decision addressing any additional sulfate-impaired wild rice waters, as appropriate. If EPA identifies additional waters used for the production of wild rice for which there are sulfate impaired segments, EPA will provide an additional 30-day period for public review and comment on those WQLSs. EPA will provide the exact schedule and deadlines for receiving public comment at the time EPA publishes our notice, as appropriate.

## B. The Eight Waters Considered by MPCA

As discussed above, EPA views MPCA’s affirmation in its March 15, 2021 letter as evidence that MPCA considers those eight waters as waters subject to the beneficial use in Minn. R. 7050.0224, subpart 2; separate from the 24 waters referenced at Minn. R. 7050.0224, subpart 1. These waters are identified in Table 1, below.

**Table 1: Eight waters affirmed by MPCA as “waters used for the production of wild rice,” in the March 15, 2021 letter**

Waterbody Name	Assessment Unit Identifying Number (AUID)
Birch Lake	69-0003-00
Embarrass River	04010201-579
Embarrass River	04010201-A99
Embarrass River	04010201-B00
Little Sandy Lake	69-0729-00
Partridge River	04010201-552
Pike River	09030002-503
Sand River	09030002-501
Sandy Lake	69-0730-00
Second Creek	04010201-952

Tribal Leaders have unequivocally communicated to EPA that these eight waters were given to MPCA “as examples and based upon our access to MPCA data,”<sup>34</sup> (emphasis in original) and that Minnesota Tribal representatives followed their submittal of these eight waters with an analysis of a larger set of “21 (or 50 segments) in May, as examples and based upon our access to MPCA data.”<sup>35</sup>

<sup>34</sup> Email from April McCormick, Secretary Treasurer, Grand Portage Band of Lake Superior Chippewa, to JoAnn Chase and others, “Consultation with EPA: 303(d) list MPCA submittal for 2020,” March 17, 2021, and attachments. See also letter from Robert Larson, Chair, Minnesota Indian Affairs Council, to Miranda Nichols, MPCA, March 11, 2021.

<sup>35</sup> Id. (noting “that the Excel spreadsheet attached here is part of the Grand Portage letter of May 8, 2020. All signatory tribes in later correspondence confirmed that letter reflected the joint tribal position—namely, that according to MPCA’s own data and methodology, there are at least 21 known, impaired wild rice waters that should be listed on the 2020 303(d) List.”).

### **C. Additional Waters Identified for Inclusion on the Section 303(d) List that are on the 2017 MPCA List**

As noted above, EPA is revising our previous interpretation of Minn. R. 7050.0224 to be consistent with MPCA’s statement that its 2017 list of 1300 waters is the minimum list of waters to which the wild rice beneficial use applies. Through EPA’s consultation, Tribes identified additional waters as potential candidates for listing, some of which appear on MPCA’s 2017 list. Information regarding these waters is set out in comments EPA received related to our tribal consultation, listed in Appendix 3. These waters were reviewed using EPA’s screening analysis (Section III of this Decision Document) and the results of that review are reflected in Appendix 2.

### **D. Additional Waters that are not on the 2017 MPCA List**

Through EPA’s consultation with Tribes, additional waters outside the universe of the 2017 MPCA list of 1300 waters were also identified by Tribes (Appendix 3). Because we acknowledge that the universe of waters potentially subject to the beneficial use may be greater than the list of 1300, we are specifically taking no action to approve or disapprove the State’s exclusion from its Section 303(d) list any other potential wild rice waters or sulfate impairments at this time. Information received to date, with relevant notes, is found in Appendices 3-5. EPA also recognizes that there may be other information in the possession of stakeholders relevant to identifying those waters subject to the “waters used for production of wild rice” beneficial use and associated water quality data. EPA will complete our analysis of the input received from Tribal Governments, along with any additional information received during this public notice and comment period and will issue a supplemental decision addressing any additional sulfate-impaired wild rice waters, as appropriate. If EPA identifies additional waters used for the production of wild rice for which there are sulfate impaired segments, EPA will provide an additional 30-day period for public review and comment on those WQLSs. EPA will provide the exact schedule and deadlines for receiving public comment at the time EPA publishes our notice, as appropriate.

## **III. EPA’s Screening Analysis for Assessing Waters to Add to the Minnesota 2020 Section 303(d) List**

### **A. Consideration of Existing and Readily Available Water Quality-Related Data and Information**

Since our review of Minnesota’s 2012 section 303(d) list, EPA has requested that MPCA develop a methodology for assessing sulfate impairments associated with the wild rice beneficial use.<sup>36</sup> MPCA has never developed such a methodology.<sup>37</sup> MPCA has recently stated, however that “Any formalized methodology would include detailing which waters MPCA considers to be waters used for the production of wild rice and the evaluation of data for comparison to the 10 mg/L sulfate criterion.”<sup>38</sup>

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<sup>36</sup> See EPA 2012 Decision Document at 29-31; EPA 2014 Decision Document, Appendix 1 at 9-11; EPA 2016 – 2018 Decision Document at 30.

<sup>37</sup> Letter from Katrina Kessler to Tera Fong, March 15, 2021.

<sup>38</sup> Id.

Additionally, during consultation with Tribal Leaders, EPA received input regarding recommendations for developing screening methodologies.<sup>39</sup>

EPA considered existing and readily available sulfate data from the following sources:

- EPA’s Water Quality Portal (WQP) (<https://www.waterqualitydata.us/>);
- EPA’s How’s My Waterway (<https://www.epa.gov/waterdata/how-s-my-waterway>);
- Minnesota’s publicly accessible water quality data from MPCA’s Surface Water Data Portal (<https://webapp.pca.state.mn.us/surface-water/search>) and, MPCA’s Surface Water Mapping Tool; (<https://mpca.maps.arcgis.com/apps/webappviewer/index.html?id=c3ad23220f60416fadcc117f82ba05e3>);
- Quality Assured and Quality Controlled (QA/QC’d) data sets from the Metropolitan Council (i.e., Met Council), United States Geological Survey (USGS), and MPCA’s TEMPO database (permittee data);
- Water quality data shared by Tribes with supporting documentation of quality assurance/quality control for the data provided to EPA as listed in Appendix 3; and
- Water quality data shared by outside parties, as listed in Appendix 4.

Because of the short statutory timeframe given for EPA’s action and the complexity of these issues, EPA expects to provide further clarification and respond to comments, as appropriate, on this approach.

In developing our methodology for screening information related to waters where MPCA has stated that the beneficial use applies (i.e., the MPCA 2017 list of 1300 waters) or other waters submitted to EPA for review, EPA considered the information described below for our analyses of sulfate data<sup>40</sup> for lake and stream segments. We also note that during Tribal consultation, EPA received extensive comments from Tribal representatives regarding recommendations for developing a screening methodology, as noted above. EPA considered this information, together with information from MPCA and others, in developing our screening methodology for today’s action. We expect to issue a supplemental decision document to address public comments received during the comment period and will provide further clarification on our screening methodology as needed at that time.

#### **Period of Record:**

EPA considered sulfate data collected within the 10-year period (2008-2018), specifically during the time period of October 1, 2008 to September 30, 2018. In circumstances when there were minimal sulfate data available between October 1, 2008 to September 30, 2018, EPA reviewed existing and readily available sulfate data collected in the year preceding (2007-2008) and the year following (2019) the October 2008 to September 2018 time period on a case-by-case basis in order to more completely characterize sulfate conditions in lake and stream segments over the previous 10 year period and to

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<sup>39</sup> See, e.g., Email from Sara Van Norman, on behalf of Grand Portage Chair Deschampe, to Cheryl Newton, “Consultation Comments on MN Wild Rice Waters to be Added to the 2020 impaired Waters List,” April 8, 2021, enclosing letter from Norman Deschampe, Chairman, and April McCormick, Secretary/Treasurer, Grand Portage Band of Lake Superior Chippewa, to Cheryl Newton, Acting Regional Administrator, April 8, 2021, at 4-6; Email from Nancy Schuldt, Fond du Lac Band, to Cheryl Newton, “Fond du Lac input to EPA impaired wild rice waters draft list,” April 19, 2021, at 2.

<sup>40</sup> EPA notes, in Section III and subsequent Sections of this Decision Document, whenever EPA uses the term “sulfate data,” this term applies to water quality data that has documented and sufficient quality assurance and quality control.

assess as many waters used for the production of wild rice as possible. The 10-year period (2008-2018) is consistent with the time period which MPCA considered in developing its 2020 list.<sup>41</sup>

EPA also explored historical sulfate data (i.e., sulfate data collected outside of the suggested October 1, 2008 to September 30, 2018 time period) in order to understand the sulfate concentration trends over time. While EPA's assessment determinations generally examined existing and readily available sulfate data of the previous 10 year time period, EPA did account for consistent, historical exceedances of the 10 mg/L sulfate criterion in our overall review of water quality conditions for individual lake and stream segments. Where there were historical data for a particular lake or stream segment, this historical consideration involved looking at all of the data for a segment, regardless of year, to better understand the historical water quality conditions.

### **Seasonality:**

The sulfate criterion to protect wild rice states that the 10 mg/L criterion is, "applicable to water used for production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels." However, the scientific evaluation of sulfate conducted by MPCA to support its 2017 rule revisions found that wild rice is vulnerable to elevated sulfate concentrations year-round,<sup>42</sup> and the existing standards does not specify or define a time when wild rice is susceptible to damage by high sulfate levels. Therefore, EPA did not exclude sulfate data from consideration based on the season in which the data were collected.

### **Data Evaluation for Sulfate:**

Typically, chemical specific water quality criteria are based on studies that expose a test organism to a range of concentrations of a toxicant to determine the relationship between the dose and the adverse effect in the organism.<sup>43</sup> Unlike typical chemical-specific criteria, Minnesota's existing 10 mg/L sulfate criterion is based on empirical observations correlating the presence and absence of wild rice stands with low levels of alkali salts, with wild rice tending to be present in waters with sulfate concentrations less than 10 mg/L, and absent in waters with concentrations greater than 10 mg/L.<sup>44</sup>

In Minnesota, the chemical nature of the water seems to be the principle factor affecting the natural distribution of wild rice. This crop tolerates the entire carbonate (total alkalinity) range of Minnesota waters (5 to 250 p.p.m.), but is intolerant of sulphates [sic]. No large stands of rice occur in waters having a SO<sub>4</sub> content greater than 10 p.p.m., and rice generally is absent from water with more than 50 p.p.m.<sup>45</sup>

Minnesota's 2017 rulemaking described the Minnesota's 10 mg/L criterion this way:

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<sup>41</sup> MPCA, *Guidance Manual for Assessing the Quality of Minnesota Surface Waters for Determination of Impairment: 305(b) Report and 303(d) List, 2020 Assessment and Listing Cycle* (February 2021, at 10 (Period of Record), <https://www.pca.state.mn.us/sites/default/files/wq-iw1-04k.pdf> (last visited 4/27/2021).

<sup>42</sup> MPCA 2017 SONAR at 81-82.

<sup>43</sup> EPA, *Water Quality Standards Handbook*, Chapter 3, <https://www.epa.gov/wqs-tech/water-quality-standards-handbook>; (last visited 4/27/2021).

<sup>44</sup> See John B. Moyle, Wild Rice in Minnesota, 8 *Journal of Wildlife Management* (July 1944): 177-184, [https://www.jstor.org/stable/3795695?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/3795695?seq=1#metadata_info_tab_contents) (last visited 4/27/2021). MPCA's reviews of the relationship of sulfate to wild rice is publicly available: see, e.g., MPCA "Wild Rice Sulfate Standard Study" with associated links; <https://www.pca.state.mn.us/water/wild-rice-sulfate-standard-study> (last visited 4/27/2021).

<sup>45</sup> Id.

The existing 10 mg/L standard was derived based largely on data collected in the 1930s and 1940s, which showed a correlation between areas where wild rice grew and areas with lower levels of sulfate in the water.<sup>46</sup>

As noted in Chapter 3 of EPA’s *Water Quality Standards Handbook*, water quality criteria are comprised of three elements: a magnitude (the maximum allowable concentration of the pollutant), a duration (i.e., over what period of time should data be averaged to appropriately evaluate exposure and risk) and a return frequency (i.e., how often can the criterion be exceeded without resulting in an impairment of the use the criterion is intended to protect).<sup>47</sup> Minnesota’s existing water quality criterion only specifies the magnitude of the criterion (i.e., 10 mg/L) and does not address either the duration or return frequency. In its proposed rulemaking, Minnesota attempted to establish a magnitude, duration and return frequency, proposing an annual average as the duration and a return frequency of no more than once in ten years:

In general, numeric water quality standards (also called numeric water quality criteria) include three components: magnitude, duration, and frequency [citation omitted]. The number itself is the magnitude, the averaging time of the standard is the duration, and the frequency is how often the magnitude may be exceeded before the standard is considered to be violated. The current wild rice sulfate standard sets a very clear magnitude (10 mg/L). However, it is vague about the duration of the standard (“during periods when the rice may be susceptible to damage by high sulfate levels”) and does not speak to the frequency of the standard. The proposed revisions specify a magnitude, define the duration as an annual average, and set a one in ten-year frequency.<sup>48</sup>

In light of the analysis of its criterion contained in MPCA’s 2017 SONAR, EPA applied similar principles to evaluating the available toxicity data for waters used for the production of wild rice while also trying to use as much of the existing and readily available data as possible to assess the attainment status of as many wild rice waters as possible. EPA evaluated whether there was an exceedance of the numeric 10 mg/L sulfate criterion generally relying on the following minimum data requirements consistent with a focus on long-term sulfate concentrations and a one in 10 year return frequency:

- EPA generally considered data collected over the time period of October 1, 2008 to September 30, 2018, consistent with Minnesota’s 2020 Guidance Manual; and
- EPA identified sites as impaired if the data showed consistent exceedances of the sulfate criterion over time to be generally consistent with Minnesota’s recommendation of an annual average, while also being sensitive to limitations on the available data:
  - The sulfate dataset included sulfate data from two separate years, at a minimum, within the time period;
  - The sulfate dataset included five individual sulfate samples; and
  - The sulfate dataset demonstrated consistent exceedance of the numeric 10 mg/L sulfate criterion during the data collection time period (2008-2018) approximating Minnesota’s

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<sup>46</sup> MPCA 2017 SONAR at 65.

<sup>47</sup> EPA, *Water Quality Standards Handbook*, Chapter 3, <https://www.epa.gov/wqs-tech/water-quality-standards-handbook> (last visited 4/27/2021).

<sup>48</sup> MPCA 2017 SONAR at 15.

annual average, i.e., more than half of the individual sulfate samples in the total dataset (after averaging multiple samples in a single day) for a lake or a stream segment should be greater than 10 mg/L.

During EPA's review of readily available and existing sulfate data, EPA did consider sulfate data sets with less than five individual sulfate samples. Additionally, EPA considered sulfate data sets which demonstrated less than half of the individual sulfate samples were greater than 10 mg/L. For certain lake and stream segments, EPA considered the historical sulfate data during our review of sulfate data. EPA conducted this historical review on a case-by-case basis in order to best understand the water quality conditions over time. Moreover, EPA, in certain instances, considered water quality conditions in upstream and downstream segments of certain lakes and stream segments. These considerations were intended to aid in EPA's characterization of sulfate water quality conditions in certain hydrologic systems.

**Determination of impaired condition:**

EPA's analyses of existing and readily available sulfate data for individual lake and stream segments incorporated the following screening analysis:

- The number of total observations per assessment unit (i.e., AUID);
- If there were multiple samples collected on the same day at the same sampling location, then EPA averaged those samples to one sulfate concentration to represent that day/location, consistent with MPCA's approach outlined in its March 15 communication;
- If there were multiple samples collected on the same day, in the same AUID, but at different sampling locations/stations, then EPA used the maximum sample value collected from all of the stations in that AUID to represent the sulfate concentration for that AUID, consistent with MPCA's approach outlined in its March 15 communication; and
- Statistical analyses EPA generated to better understand the duration and frequency components of the existing and readily available sulfate concentration data set for each site included:
  - The number of total observations greater than the numeric 10 mg/L sulfate criterion;
  - A percentage calculation of the number of total observations in that AUID which are greater than the numeric 10 mg/L sulfate criterion;
  - The calculated mean and the standard deviation of the sulfate data set for that AUID; and
  - The minimum and maximum values of the sulfate data set for that AUID.

EPA considered all the above characteristics in our screening analysis of existing and readily available sulfate data. We chose not to focus solely on one component of the screening analysis to determine impairment; rather we took a holistic view of the existing and readily available sulfate concentration data. Where EPA deviated from these procedures, we have so noted in Appendix 2. As noted above, we expect to issue a supplemental decision document to address public comments received during the comment period and will provide further clarification on our screening methodology as needed at that time.

## IV. Tribal Consultation

Pursuant to Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments* and with the *EPA Policy on Consultation and Coordination with Indian Tribes (May 2011)*,<sup>49</sup> EPA engaged in tribal consultation on our review of additional waters to be considered for finalizing the 2020 Minnesota Section 303(d) list action.<sup>50</sup> On April 9, 2021, EPA hosted a consultation call with ten federally-recognized Tribes from Minnesota and representatives from two tribal organizations to obtain tribal input on EPA’s addition of impaired wild rice waters to Minnesota’s 2020 Section 303(d) list following EPA’s partial disapproval of the list on March 26, 2021.

Tribes also submitted written comments to EPA.<sup>51</sup> EPA accepted tribal comments and input in the development of our list of waters that EPA added to the Minnesota 2020 Section 303(d) list (Appendix 2 of this Decision Document).

Since at least 2012, Minnesota Tribal Leaders and representatives have raised to EPA their concerns that MPCA has not assessed or listed waters for the nonattainment of the numeric criterion for the sulfate water quality standard. The State’s failure to assess and list these waters does not arise from an absence of tribal input into the State’s Section 303(d) listing process. On the contrary, Tribal Leaders (as well as some stakeholders) have offered substantive comments to MPCA during each listing cycle on the lack of a methodology for assessing sulfate impairment and the lack of waters proposed for listing. EPA has, as noted above, also consistently urged the State to develop an assessment and listing process for these waters. EPA notes that the concerns of Tribal leaders have unfortunately, with respect to the assessment and listing of wild rice waters, gone virtually unaddressed by MPCA specifically and by Minnesota generally.<sup>52</sup>

Concerns raised by Tribal Leaders have only heightened over the past decade.<sup>53</sup> These concerns include:

- That MPCA’s failure to list waters as impaired against its sulfate criterion is contrary to Section 303(d)<sup>54</sup>;

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<sup>49</sup> *EPA Policy on Consultation and Coordination with Indian Tribes*, May 4, 2011.

<https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf> (last visited 3/23/21).

<sup>50</sup> EPA letter to Tribal Leaders, February 25, 2021.

<sup>51</sup> See Appendix 3: Compilation of Selected Documents Submitted by Tribes to EPA.

<sup>52</sup> See, e.g., Email from Sara Van Norman to Barbara Wester, “GP/Impaired Waters List: communication,” March 18, 2021, including a chronology of the State of Minnesota Governor’s office’s communications with Minnesota Tribal Leaders regarding the 2020 Minnesota Section 303(d) list.

<sup>53</sup> For a compilation of concerns raised by Minnesota Tribal Leaders, in addition to the voluminous information that has been provided to EPA since 2012, see Appendix 3: Compilation of Selected Documents Submitted by Tribes to EPA.

<sup>54</sup> This position has been articulated in numerous comments. See, e.g., Tribal Leaders letter to Kurt Thiede, Regional Administrator, October 2, 2020; see also Tribal Leaders letter to Governor Tim Walz, October 2, 2020 (“MPCA must keep its promises to tribes and include known, impaired wild rice waters on the 2020 Impaired Waters List.”); Tribal Leaders letter to Commissioner Laura Bishop, MPCA, April 27, 2020 (“Minnesota tribes have now made the same comments on four cycles of draft impaired waters lists. MPCA has repeatedly promised to include impaired wild rice waters in the ‘next’ cycle and has given ever-changing reasons for putting of this date.”); EPA, Notes from April 9, 2021 Tribal Consultation Call Regarding Minnesota’s 303(d) List.



- The ongoing failure to list waters as impaired against the State’s sulfate criterion has harmed and continues to harm Tribal Members in their use of treaty reserved property rights<sup>55</sup>;
- The protection of wild rice is a primary environmental justice issue for Native American citizens of Minnesota<sup>56</sup>;
- Wild rice is a sacred food to the Chippewa/Ojibwe peoples and the State’s current regulatory inaction threatens to further diminish an already impaired resource<sup>57</sup>;
- EPA’s federal trust responsibility supports EPA’s efforts to list wild rice waters as impaired against the sulfate criterion to safeguard this treaty reserved resource<sup>58</sup>;
- Any assessment and listing effort should take into account all available information, including the large body of information compiled by Tribes since at least 2012<sup>59</sup>;
- MPCA should not be precluded from listing waters because of the lack of a formal assessment methodology<sup>60</sup>; and
- Any assessment and listing effort must include a concerted effort to increase MPCA’s sampling effort to collect meaningful data regarding assessment of the universe of wild rice waters of interest to the Tribes.<sup>61</sup>

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<sup>55</sup> Tribal Leaders raised these issues in multiple communications. See, e.g., Tribal Leaders letter to Kurt Thiede, Regional Administrator, October 2, 2020; Tribal Leaders letter to Cheryl Newton, Acting Regional Administrator, March 3, 2021 and attachments; Letter from Benjamin Benoit, Leech Lake Band of Ojibwe, Environmental Director, to Tera Fong, et al., April 16, 2021, and attachments.

<sup>56</sup> Tribal Leaders raised these issues in multiple communications. See, e.g., Tribal Leaders letter to Cheryl Newton, Acting Regional Administrator, March 3, 2021 and attachments.

<sup>57</sup> Tribal Leaders raised these issues in multiple communications. See, e.g., Email from Sara Van Norman, on behalf of Grand Portage Chair Deschampe, to Cheryl Newton, “Consultation Comments on MN Wild Rice Waters to be Added to the 2020 impaired Waters List,” April 8, 2021, enclosing letter from Norman Deschampe, Chairman, and April McCormick, Secretary/Treasurer, Grand Portage Band of Lake Superior Chippewa, to Cheryl Newton, Acting Regional Administrator, April 8, 2021, with attachments.

<sup>58</sup> Tribal Leaders raised these issues in multiple communications. See, e.g., id., and Email from Sara Van Norman to Cheryl Newton, Acting Regional Administrator, enclosing attachments to the Tribal Leaders’ letter to EPA of March 3, 2020. (“The EPA has a trust responsibility to tribes and their members. We urge you to protect clean water and manoomin (in Ojibwe)—psin (in Dakota)—wild rice for future generations of our tribal citizens, and for all Minnesotans.”).

<sup>59</sup> Tribal Leaders raised these issues in multiple communications. See, e.g., Letter from Shelley Buck, President, Prairie Island Indian Community, to Tera Fong, R5 Water Division Director, April 16, 2021; Email from April McCormick, Secretary Treasurer, Grand Portage Band of Lake Superior Chippewa, to JoAnn Chase and others, “Consultation with EPA: 303(d) list MPCA submittal for 2020,” March 17, 2021, and attachments; Email from Sara Van Norman, on behalf of Grand Portage Chair Deschampe, to Cheryl Newton, “Consultation Comments on MN Wild Rice Waters to be Added to the 2020 impaired Waters List,” April 8, 2021, enclosing letter from Norman Deschampe, Chairman, and April McCormick, Secretary/Treasurer, Grand Portage Band of Lake Superior Chippewa, to Cheryl Newton, Acting Regional Administrator, April 8, 2021, with attachments.

<sup>60</sup> Tribal Leaders raised these issues in multiple communications. See, e.g., Letter from J. Catherine Chavers, President, Minnesota Chippewa Tribe, to Miranda Nichols, MPCA, January 8, 2020; Tribal Leaders letter to Cheryl Newton, Acting Regional Administrator, March 3, 2021.

<sup>61</sup> Tribal Leaders raised these issues in multiple communications. See, e.g., Letter from Nancy Schuldt, Water Projects Coordinator, Fond du Lac Environmental Program, to Cheryl Newton, Acting Regional Administrator, April 15, 2021.

## V. Information Provided by Other Parties

On April 14, 2021, EPA received a letter from WaterLegacy that included water quality information related to waters potentially impaired for sulfate.<sup>62</sup> These waters are catalogued in Appendix 4.

## VI. Conclusions

Waters assessed and determined to be impaired are found in Appendix 2.

EPA also recognizes that there may be other information in the possession of stakeholders relevant to identifying those waters subject to the “waters used for production of wild rice” beneficial use and associated water quality data. EPA will complete our analysis of the input received from Tribal Governments, along with any additional information received during this public notice and comment period and will issue a supplemental decision addressing any additional sulfate-impaired wild rice waters, as appropriate. If EPA identifies additional waters used for the production of wild rice for which there are sulfate impaired segments, EPA will provide an additional 30-day period for public review and comment on those WQLSs. EPA will provide the exact schedule and deadlines for receiving public comment at the time EPA publishes our notice, as appropriate. Because of the short statutory timeframe given for EPA’s action and the complexity of these issues, EPA expects that at that time we will provide further clarification as needed on our action.

## VII. Public Notice

EPA considered tribal input received by EPA on or before April 19, 2021 in developing the list of waters that we are publishing today.

Pursuant to 40 C.F.R. § 130.7(d)(2), EPA will issue a public notice providing for a 30-day public comment period regarding the addition of the 30 sulfate-impaired waters to Minnesota’s Section 303(d) List in Appendix 2. The public is invited to provide comment on the details included in this Decision Document and to present any additional information which may be relevant to this topic and EPA’s action.

Commenters interested in sharing comments about individual waters should include the following information in their comment to EPA:

- Clear identification of the assessment unit identification (or AUID), for the stream segment or lake to be added or considered by EPA;
- Explanation of and evidence for whether waters are or are not “waters used for the production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels” as that designation is used in Minnesota’s existing water quality standards at Minn. R. 7050.0224;

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<sup>62</sup> Email from Paula Maccabee, WaterLegacy, “Data Pertaining to EPA Listing of 2020 Minnesota Wild Rice Waters,” with attachments.

- What water quality data supports that specific waters are or are not in exceedance of the 10 mg/L sulfate criteria (e.g., Minnesota data from its Surface Water Data portal or other data sources); and
- Any documentation of quality assurance/quality control for sulfate data provided to EPA.

Following the close of the 30-day public comment period, EPA will consider all the input received, make any appropriate revisions, and transmit any final additions to Minnesota. EPA will respond to input received from Tribes through tribal consultation and any public comments received during the public comment period.

For access to documents included in Appendices 3-5, interested parties should contact Paul Proto ([proto.paul@epa.gov](mailto:proto.paul@epa.gov)) and EPA will provide a link to a FTP website where documents referenced in Appendices 3-5 can be downloaded.

## **Appendices**

**Appendix 1:** MPCA’s List of approximately 1,300 proposed wild rice waters (updated April 2021)

**Appendix 2:** Waters EPA is adding to the Minnesota 2020 Section 303(d) List (April 26, 2021)

**Appendix 3:** Compilation of Selected Documents Submitted by Tribes to EPA

**Appendix 4:** Compilation of Information Submitted by Outside Parties

**Appendix 5:** Other Information Relevant to this Action

## **Appendix 3: Compilation of Selected Documents Submitted by Tribes to EPA**

1. EPA Decision Document for Minnesota’s 2012 Section 303(d) List, July 25, 2013 – Response to Tribal Comments and Tribal Comments received.
2. EPA, *Decision Document for the Approval of Minnesota’s 2014 Clean Water Act Section 303(d) List* (May 29, 2018) – Response to Tribal Comments and Tribal Comments received.
3. EPA, Decision Document for the Approval of Minnesota’s 2016 and 2018 Clean Water Act Section 303(d) Lists (January 28, 2019) - Response to Tribal Comments and Tribal Comments received.
4. Letter from Catherine J. Chavers, President, Minnesota Chippewa Tribe, to Miranda Nichols, MPCA, January 8, 2020.
5. Tribal Leaders letter to Kurt Thiede, Regional Administrator, October 2, 2020.
6. Letter from Kurt Thiede, Regional Administrator to Tribal Leaders, October 30, 2020.
7. Tribal Leaders letter to Cheryl Newton, Acting Regional Administrator, March 3, 2021.
8. Email from Sara Van Norman to Cheryl Newton, Acting Regional Administrator, enclosing attachments to the Tribal Leaders’ letter to EPA of March 3, 2020.
9. Letter from Melanie Benjamin, Chief Executive, Mille Lacs Band of Ojibwe, to Cheryl Newton, Acting Regional Administrator, March 12, 2021.
10. Email from April McCormick, Secretary Treasurer, Grand Portage Band of Lake Superior Chippewa, to JoAnn Chase and others, “Consultation with EPA: 303(d) list MPCA submittal for 2020,” March 17, 2021, and attachments.
11. Email from Sara Van Norman to Barbara Wester, “GP/Impaired Waters List: communication,” March 18, 2021.
12. EPA, *Decision Document for The Partial Approval of Minnesota’s 2020 Clean Water Act Section 303(d) List*, March 26, 2021.
13. Letter from Tera L. Fong, EPA, to Katrina Kessler, MPCA, March 9, 2021.
14. Letter from Katrina Kessler, MPCA, to Tera L. Fong, EPA, March 15, 2021.
15. Email from April McCormick, Secretary Treasurer, Grand Portage Band of Lake Superior Chippewa, to JoAnn Chase and others, March 17, 2021, and attachments.
16. Email from Sara Van Norman, on behalf of Grand Portage Chair Deschampe, to Cheryl Newton, “Consultation Comments on MN Wild Rice Waters to be Added to the 2020 impaired Waters List,” April 8, 2021, enclosing letter from Norman Deschampe, Chairman, and April McCormick, Secretary/Treasurer, Grand Portage Band of Lake Superior Chippewa, to Cheryl Newton, Acting Regional Administrator, April 8, 2021, with attachments.
17. EPA Notes from Tribal Consultation Call Regarding Minnesota’s 2020 CWA 303(d) List.
18. Letter from Nancy Schuldt, Water Projects Coordinator, Fond du Lac Environmental Program, to Cheryl Newton, Acting Regional Administrator, April 15, 2021, and attachments.
19. Letter from Benjamin Benoit, Leech Lake Band of Ojibwe, Environmental Director, to Tera Fong, et al., April 16, 2021, and attachments.
20. Letter from Shelley Buck, President, Prairie Island Indian Community, to Tera Fong, R5 Water Division Director, April 16, 2021.

21. Email from Nancy Schuldt, Fond du Lac Band, to Cheryl Newton, “Fond du Lac input to EPA impaired wild rice waters draft list,” April 19, 2021, with attachments.
22. Email from Eric Krumm, Leech Lake Band of Ojibwe, “Leech Lake Band of Ojibwe Comment Letter on the Partial Rejection of Minnesota’s 303(d) List and Lists of Wild Rice Waters for Sulfate Review, April 19, 2021, with attachments.
23. Email from Melanie Benjamin, Chief Executive, Mille Lacs Band of Ojibwe, to Cheryl Newton, “Mille Lacs Band of Ojibwe – attachment,” April 20, 2021.

## **Appendix 4: Compilation of Information Submitted by Outside Parties**

### **April 9, 2021 Email from WaterLegacy**

Attachments to Email:

- Sulfate data summaries-All WIDs Spreadsheet
- Potential Additional WR Waters SulfateDataSummary Spreadsheet

### **April 14, 2021 Email from WaterLegacy**

Attachments to Email:

- Process of Analysis (Word document)
- WL Lakes Spreadsheet (MPCA Sulfate Data Summaries, WRW Lists)
- WL Rivers Spreadsheet (MPCA Sulfate Data Summaries, WRW Lists)
- WL Additional Lakes Spreadsheet (Notes on MPCA Spreadsheet)
- Attachment A MPCA 2017 Draft WRW List (Advisory Committee)
- Attachment B MPCA 2013 Draft WRW Impaired Waters List (Advisory Committee)
- Attachment C MPCA Surface Water Data Download (Specific Lakes and Streams)
- MPCA Spreadsheets Received April 9, 2021

## Appendix 5: Other Information Relevant to this Action

1. MPCA, Statement of Need and Reasonableness (SONAR), *Amendment of the sulfate water quality standard applicable to wild rice and identification of wild rice waters*, July 2017. (<https://www.pca.state.mn.us/water/protecting-wild-rice-waters>)
2. MPCA, Environmental Analysis and Outcomes Divisions, *Notice of Withdrawn Rules for Proposed Rules Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Waters; Revisor's ID Number 4324* (April 26, 2018). (<https://www.pca.state.mn.us/sites/default/files/wq-rule4-1500.pdf>)
3. EPA Decision Document for Minnesota's 2012 Section 303(d) List (July 25, 2013).
4. EPA, Decision Document for the Approval of Minnesota's 2014 Clean Water Act Section 303(d) List (May 29, 2018).
5. EPA, Decision Document for the Approval of Minnesota's 2016 and 2018 Clean Water Act Section 303(d) Lists (January 28, 2019).
6. Letter from Tera L. Fong, EPA, to Katrina Kessler, MPCA, March 9, 2021.
7. Letter from Katrina Kessler, MPCA, to Tera L. Fong, EPA, March 15, 2021, with Attachments 1 and 2.
8. EPA Decision Document for The Partial Approval of Minnesota's 2020 Clean Water Act Section 303(d) List, (March 26, 2021).