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DRAFT LETTER FOR CONSIDERATION OF MAST

March 18, 2021

Cheryl Newton, Acting Regional Administrator  
U.S. Environmental Protection Agency, Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604-3507  
By email only: [newton.cheryl@epa.gov](mailto:newton.cheryl@epa.gov)

Re: EPA Tribal Consultation Regarding MPCA 2020 303(d) List Submission to US EPA.

Dear Administrator Newton:

On March 18, 2021, MAST became aware of the ongoing tribal consultation with the united 11 sovereign tribes in Minnesota with the State of Minnesota, Minnesota Pollution Control Agency and Region 5 EPA, in an effort to list all known impaired wild rice waters. Especially in 2020, these tribes lead a joint effort to press MPCA to list these waters to protect Manoomin, Psin, (Wild Rice), including educational sessions and direct government-to-government consultation with the Governor and Lt. Governor and their agency staff.

These tribal nations have enough written documentation to demonstrate a lack of good faith and meaningful consultation by both MPCA and EPA on this issue. MAST expects that the EPA, more specifically Region 5, is honoring its trust responsibility to tribes by engaging in meaningful tribal consultation with the 11 sovereign nations, meaningful tribal consultation that results in the EPA upholding federal law, which includes ensuring it is approving 303(d) lists with all known impaired waters. The State of Minnesota, the Minnesota Pollution Control Agency has the legal and regulatory responsibility to list impaired wild rice waters, and the Agency must demonstrate meaningful tribal consultation which results in uphold the federal law in every regard. No one should be above the law –least of all regulatory agencies— yet, the Agency refuses to list impaired wild rice waters (lists from 2012, 2014, 2016, 2018, 2020), and continues misstate the tribal position and provide a shortened background of the 2020 list submittal as the only bearing for EPA review, which became known to tribes as recently as March 15, 2021 during a call with EPA. Tribes position has always been that there is no legal or scientific reason ~~to~~ why the MPCA cannot list the waters. In fact, MPCA's own data and 2013 draft impaired waters list proves it.

Commented [R1]: 10.2.20 Kurt Thiede Letter quote

Commented [R2]: Insert citation of legal 40 CFR...

Commented [R3]: Trying to say they only have stuck to recent info.

The 11 sovereign tribes of Minnesota have made clear that protection of wild rice is a top environmental justice issue for Native citizens of this state. MPCA's long history of inaction not only violates the Clean Water Act but demonstrates a disregard for treaty resources. The usufructuary rights guaranteed by treaties between the federal government and the tribes are meant to protect treaty resources into perpetuity. Both state and federal entities must recognize and protect those resources. Clean water is clean water. 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. The lack of action demonstrates that both the EPA and MPCA continue to ignore the tribes' call to protect wild rice, and their trust responsibility to protect treaty guaranteed usufructuary rights for current and future generations to have clean water and sustainable food sources of wild rice.

Commented [R4]: Quote March 3 2021

EPA has given MPCA nine years to send a 303(d) list that includes known impaired wild rice waters. The time for consultation on this issue has long since passed. All Tribes residing in MN have made clear to both MPCA and EPA in writing that MPCA has had enough time to submit their 2020 impaired waters list to US EPA and made clear that the 2020 list must include wild rice waters, and that we will no longer tolerate the intentional omission of impaired wild rice waters by MPCA or EPA, or any delays or dismissal of this issue.

**Commented [R5]:** Partial quote from Kurt theide letter 10.2.21

We ask EPA to promptly reject the 303(d) list to the extent that it excludes ~~impaired~~ wild rice waters known to be impaired for sulfate. We stand with all the signatory tribes the joint tribal position which have asserted, 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. We ask you to expressly require listing of all impaired wild rice waters in accordance with federal law.

**Commented [R6]:** quote

**Commented [R7]:** quote

**Commented [R8]:** quote

We further request that as our trustee, the EPA take all necessary regulatory, punitive or other legal means at its disposal to force the State of Minnesota MPCA to list impaired wild rice waters if it still refuses to do so.

**Commented [R9]:** Edited MLBO sentence (last sentence from their letter). I inserted "State of Minnesota"

Manoomin, Psin (wild rice) is a spiritual food. It sacred to our people, it is a sacred gift from the Creator. Psin, Manoomin is a part of our migration stories, to come to a place where the food that grows naturally upon the waters. It is the *first foods* an infant is fed because of its soft pliable texture and nutrient dense grain. It is a part of our ceremonies and our meals at our community gatherings. Wild rice is inherently a part of who we are as original people, Anishinaabe, Dakota, and we will take up our responsibility to protect it from further degradation and risk of food scarcity.

**Commented [R10]:** Quote from ALJ Hearing

-----Letter in its fullness from March 3-----

Governor Tim Walz individually contacted Minnesota tribal leaders to inform them that MPCA would *not* be including impaired wild rice waters on the 2020 303(d) list and that the draft list would shortly be transmitted to EPA (and this has now occurred). The state takes this action despite extensive efforts of all Minnesota tribes to get the state to finally acknowledge the data and law requiring the listing. Those efforts are detailed in our January 2020 comments on the draft list, which was followed by letters dated April 27, May 8 (from Grand Portage), and October 2, 2020 (two letters), all of which are attached. This is in addition to multiple consultations and other meetings last year. This decision comes after the state sought and received an extension of time from EPA allegedly to allow the state more time to “consider tribal positions”—none of which has been incorporated.

We are beyond disappointed in this decision. The impaired waters list is a key tool for protecting water quality, one that MPCA holds under the federal Clean Water Act. The state is required to list all known, impaired waters. MPCA has years of data confirming the list of wild rice waters known to be impaired for sulfate, meaning they significantly and persistently exceed the state’s wild rice sulfate standard of 10 mg/L and wild rice growth is impaired.<sup>1</sup>

Nevertheless, the Governor has now confirmed MPCA will continue the state’s longstanding and knowing refusal to follow the law and the science when it comes to wild rice waters. Among the reasons Governor Walz gave tribal leaders was that there is a supposed “conflict” between state and federal law. We assume this is a reference to a 2015 Minnesota session law that purported to

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<sup>1</sup> Minn. R. 7050.0224 subp. 2; *see also* Minn. R. 7050.0224, subp. 1 (narrative standard and antidegradation provisions for wild rice waters).

forbid the MPCA from listing impaired wild rice waters until after new rulemaking—a session law that was illegal in the first place, that directed rulemaking that failed upon legal review, and that has by its own terms expired and not been renewed.<sup>2</sup> Moreover, no “conflict” is possible as between state and federal law in matters of Clean Water Act interpretation—federal law controls and any contrary state law is void.<sup>3</sup>

As Region 5 knows, attempts by our state to avoid enforcement of the wild rice sulfate standard are nothing new. But we are particularly saddened that *this* administration has chosen to double down on the bad acts of prior administrations—and then to give tribes an embarrassingly unsupported excuse for doing so. This is a disavowal of this administration’s explicit promises to take tribal voices and concerns into account in major decisions like these, to engage in meaningful government-to-government consultation, and to recognize principles of environmental justice.

Even more insulting, this excuse is *entirely different* than the one that MPCA offered in connection with its draft list. There, MPCA said it was because it had not “finalized methods for identifying waters used for the production of wild rice or for assessing impairment of waters based on the existing wild rice-related standard.”<sup>4</sup> That was despite the fact that the primary pollutant of concern, sulfate, is a conventional pollutant subject to well-established evaluation criteria, and MPCA possesses extensive and readily available information about wild rice waters’ impairments—which require the listing under 40 C.F.R. Section 130.7(b)(5)(iii).

In our letter to MPCA dated April 27, 2020, we reiterated that MPCA’s own conventional-contaminant assessment protocols already provide a methodology the agency is required to apply right now to evaluate those wild rice waters known to be persistently impaired for sulfate. It was by following MPCA’s own 2020 Guidance Manual for Assessing Minnesota Surface Waters that tribal staff assembled a list of impaired wild rice waters, first for the 1854 Ceded Territory and then for the entire state. *See* Ltr. of Grand Portage to MPCA (May 8, 2020), attached. This required nothing more than a tabletop exercise. But the state has offered no substantive response, much less undertaken the work it is charged to do.

EPA has expressly rebuked the agency for offering the same, indefensible excuse in the past. On Minnesota’s 2016 and 2018 303(d) lists, EPA criticized the state’s persistent failure to list impaired wild rice waters: “A lack of a formalized assessment methodology by itself is not a basis for a state to avoid evaluating data or information when developing its Section 303(d) list or to fail to list any water that is appropriate for listing under currently applicable standards.”<sup>5</sup>

<sup>2</sup> 2015 Minn. Laws 1st Spec. Sess. ch. 4, Art. 4, § 136; 2017 Minn. Laws ch. 93, Art. 2, § 149 (Jan. 2019 deadline).

<sup>3</sup> See 40 C.F.R. Section 131.21(e) (state may not enact de facto amendments to or limitation of a federally-approved WQS without EPA approval first); *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987) (under principles of preemption, state law is presumed invalid where it conflicts with federal law); *see also In re Operation of Missouri River Sys. Lit.*, 320 F.Supp.2d 873 (D. Minn. 2004) (even though state “enacted its state water quality standards pursuant to federal law, its state laws must comport with federal law”).

<sup>4</sup> *See* <https://www.pca.state.mn.us/water/minnesotas-impaired-waters-list>.

<sup>5</sup> *See also Env’tl. Law & Policy Ctr. v. United States Env’tl. Prot. Agency*, 415 F. Supp. 3d 775, 779-80 (N.D. Ohio 2019) (internal citations omitted) (where a state “explicitly refuse[s] to assemble and evaluate all existing and readily available water quality-related data and information,” it is a “textbook violation” of a state’s obligations under 40 C.F.R. Sec. 130.7(b)(5)); *see also Sierra Club v. Leavitt*, 488 F.3d 904, 913 (11<sup>th</sup> Cir. 2007) (remanding for additional factfinding to justify 303(d) list because “states are required by the CWA to identify *all* waterbodies that fail to meet

The 11 sovereign tribes of Minnesota have made clear that protection of wild rice is a top environmental justice issue for Native citizens of this state. MPCA's long history of inaction not only violates the Clean Water Act but demonstrates a disregard for treaty resources. The usufructuary rights guaranteed by treaties between the federal government and the tribes are meant to protect treaty resources into perpetuity. Both state and federal entities must recognize and protect those resources. Clean water is clean water. 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.

Commented [R11]: Quoted above

It is now up to the EPA to decide whether to allow the state to continue to facilitate the loss of precious wild rice resources or to instead put a stop to this years-long refusal to enforce the law. We now seek formal consultation with EPA on the 2020 303(d) list. We ask you to promptly reject the list to the extent that it excludes impaired wild rice waters known to be impaired for sulfate. We ask you to expressly require listing of all impaired wild rice waters in accordance with federal law and as outlined in the attached tribal communications. We also ask for discussion on how Region 5 will address this and other persistent failures by MPCA to comply with its obligations under the Clean Water Act.

Commented [R12]: Quoted above line

Sincerely,

*See attached Tribal Leader signature pages*

- c: Gov. Tim Walz (by email only, c/o Patina Park)
- Lt. Gov. Peggy Flanagan (by email only, c/o Patina Park)
- Patina Park, Tribal State Relations Systems Implementation (by email only: patina.park@state.mn.us)
- Laura Bishop, MPCA Commissioner (by email only, Laura.Bishop@state.mn.us)
- Katrina Kessler, MPCA (by email only: katrina.kessler@state.mn.us)
- Helen Waqui, MPCA (by email only: helen.waqui@state.mn.us)
- Catherine Neuschler, MPCA (by email only: catherine.neuschler@state.mn.us)
- Barbara Wester, US EPA Region 5, Office of Regional Counsel (by email only: wester.barbara@epa.gov)
- Tera Fong, US EPA Region 5, Water Division Director (by email only: Fong.Tera@epa.gov)
- Alan Walts, US EPA Region 5, Office of International and Tribal Affairs (by email only: walts.alan@epa.gov)
- Sarah Strommen, MnDNR Commissioner (by email only: commissioner.dnr@state.mn.us)
- Bradley Harrington, MnDNR (by email only: Bradley.Harrington@state.mn.us)

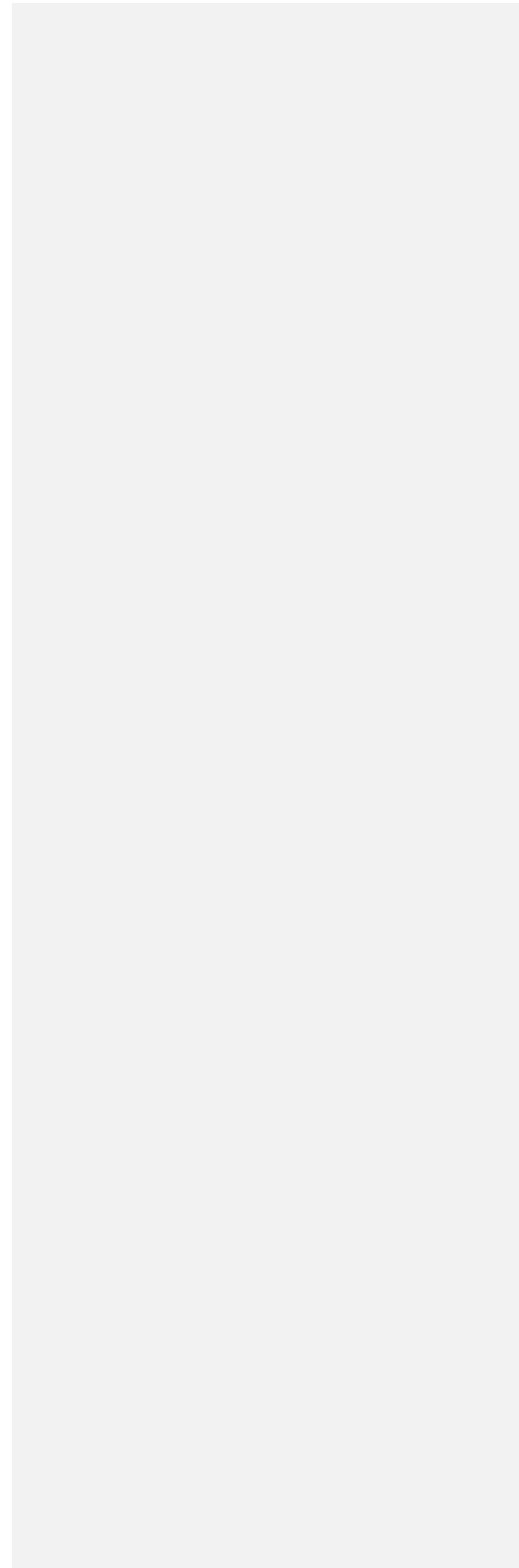
JoAnn Chase, Director, American Indian Environmental Office  
Danny Gogal, Office of Environmental Justice

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water quality standards, 33 U.S.C. § 1313(d)(1)(A)..."); *Potomac Riverkeeper v. Wheeler*, 381 F.Supp.3d 9, 10 (D.C. 2019) (noting EPA rejected state's explanation for certain omissions from the 303(d) list because "the lack of a formalized methodology" for handling particular kinds of data "is not a basis for a state to avoid evaluating data or information when developing its 303(d) list.").

Tribal Leaders to EPA  
March 3, 2021  
Page 6 of 6

Radhika Fox, Acting Assistant Administrator, Office of Water  
John Goodin, Director, Office of Wetlands, Oceans and Watersheds  
Karen Gude, Office of Water Tribal Program Manager





Sent via email only

Minnesota Pollution Control Agency  
c/o Steven Theisen [steven.theisen@state.mn.us](mailto:steven.theisen@state.mn.us)  
520 Lafayette Road  
Saint Paul, MN 55155

April 4, 2023

MPCA Pesticide General Permits - Wastewater Permit Reissuance

Dear Mr. Theisen:

Thank you for the opportunity to provide comments on the MPCA re-issuance of the Pesticide General Permit. Grand Portage is a federally recognized Tribe with federally approved water quality standards. As a signatory to the 1854 Treaty of LaPointe<sup>1</sup> that ceded more than six million acres to the United States (the "Ceded Territory"), Grand Portage retains usufructuary rights that extend throughout the entire northeast portion of the state of Minnesota. The 1854 Treaty was not a grant of rights to the Ojibwe, it was a grant of rights from the Ojibwe to non-Indians that allowed settlement and formation of the State of MN.<sup>2</sup> In the Ceded Territory, Tribes serve as Co-managers and stewards of those lands and

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<sup>1</sup> Treaty with the Chippewa, 1854, 10 Stat. 1109, in Charles J. Kappler, ed., *Indian Affairs: Laws and Treaties*, Vol. II (Washington: Government Printing Office, 1904), available on-line at <http://digital.library.okstate.edu/kapplerNol2/treaties/chi0648.htm>

<sup>2</sup> U.S. v. Winans, 1905.

have a legal interest in protecting natural resources.<sup>3</sup> Reservations are retained homelands that were not ceded to the US Government.

**I. EPA delegated NPDES authority to MN and is required by federal law to ensure the State program conforms to federal law.**

The National Pollution Discharge and Elimination System (“NPDES”) permit program was created by the [Clean Water Act \(“CWA”\)](#) in 1972. Management of the program is delegated to States under Section 402 of the Act to perform many permitting, administrative, and enforcement aspects of the program. According to US EPA, MN was delegated NPDES Authority for General Permits on December 15, 1987.<sup>4</sup> However, “[I]n almost all cases, EPA retains authority to implement the program on tribal lands.”<sup>5</sup>

The CWA further provides that, where the US EPA determines that a state is not administering its program in a manner that conforms to the Act, the US EPA must inform the state, request corrective action, and proceed with withdrawing approval of the state program if corrective action is not taken within 90 days of EPA’s request. 33 U.S.C. § 1342(c)(3)(2015) (“Whenever the Administrator determines . . . that a State is not administering a program . . . in accordance with requirements of this section, he *shall* so notify the State and, if appropriate corrective action is not taken . . . the Administrator *shall* withdraw approval of such program.”)

**II. MPCA granted MNDNR authority for the Pesticide NPDES General Permit to issue in public waters permits that do not conform with the CWA.**

The MPCA administers four National Pollutant Discharge Elimination System (NPDES) / State Disposal System (SDS) pesticide general permits that regulate the use of pesticides in and around lakes, rivers,

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<sup>3</sup> See, e.g., Exec. Order 13175-Consultation and Coordination With Indian Tribal Governments (Nov. 6, 2000) (stating "the United States has recognized Indian tribes as domestic dependent nations under its protection, "there is a "trust relationship with Indian tribes," and "[a]gencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.").

<sup>4</sup> US EPA National Pollutant Discharge Elimination System Authority (NPDES) State Program Authority [NPDES State Program Authority | US EPA](#)

<sup>5</sup> US EPA National Pollutant Discharge Elimination System Authority (NPDES) State Program Authority. [NPDES State Program Authority | US EPA](#)



streams, and wetlands. “MPCA considers the Aquatic Plant Management (APM) program administered by the Minnesota Department of Natural Resources (MN DNR) as sufficient to control the discharge of pesticides to meet the conditions of the CWA and the MPCA’s NPDES/SDS Pesticide General Permit. Aquatic vegetative pest control occurs throughout the state, including submergent and emergent vegetation to keep access open to landings and docks, as well as control nuisance algae.”<sup>6</sup>

Since at least 2016, the MN DNR has issued between 20 to 40 permits per year within White Earth and Leech Lake Reservation boundaries to remove wild rice, even in waters where active wild rice restoration is ongoing. Before the pesticide general permit may be reissued, the MPCA must modify the interagency agreement with the MN DNR to ensure that permits for APM (and other NPDES general permits, e.g. construction stormwater permits) are not issued within the boundaries of any Reservation. In addition, US EPA must also ensure the MPCA’s compliance with the delegated CWA NPDES program authority by issuing required corrective actions to prevent the issuance of NPDES general permits certified by the MPCA within the boundaries of any Reservation and insist that discharges upstream of a Reservation have the required 401(a)(2) US EPA certification.

Thank you for the opportunity to provide comments on the MPCA proposed pesticide general permit reissuance.

Sincerely,

*Margaret Watkins*

Margare Watkins

Grand Portage Water Quality Specialist

c. Tera Fong, US EPA Water Division Director

Katrina Kessler, MPCA Commissioner

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<sup>6</sup> MPCA. Pesticide NPDES Permits. [Pesticide NPDES permits | Minnesota Pollution Control Agency \(state.mn.us\)](https://state.mn.us/mn-pca/npdes/pesticides/)



February 24, 2021

Administrative Law Judge Eric Lipman  
Office of Administrative Hearings  
*Submitted online only, OAH Granicus Ideas Website*

Re: Comments on Proposed Amendments to Rules Governing Water Quality Standards, Minnesota Rules chapters 7050 and 7053; Revisor ID No. 4335; OAH Dkt. No. 65-9003-37102.

Honorable Judge Lipman:

The 11 undersigned Minnesota tribes and tribal entities jointly submit these comments opposing the Minnesota Pollution Control Agency (“MPCA’s”) planned amendments to Class 3 & 4 water quality standards at Minnesota Rules chapter 7050s and 7053.<sup>1</sup> Also attached are a summary of the comments that Grand Portage Secretary-Treasurer April McCormick delivered orally at the hearing on February 4 on behalf of Minnesota tribes. These proposed changes would remove longstanding and enforceable numeric limits for pollutants and convert them into harder-to-enforce narrative standards. They ignore the interconnected habitats and needs of aquatic life, terrestrial wildlife, plant life, and humans—all of which depend upon clean water and each other for survival. These changes only look out for the interests of large-scale industrial dischargers who want to limit their regulatory costs, and ignore the best interests of Minnesotans and our waterways.

If passed, these standards have the potential to significantly impair the health of Minnesota waters. That damage will be all the more severe for the state’s tribal citizens, who rely on wild rice, fish, and other treaty-protected resources for subsistence at rates higher than the rest of the population, and who are already subject to disparate impacts because of widespread water pollution. Put another way, these proposed rule changes are a direct violation of the state’s environmental justice commitments. In fact, aspects of the rule change appear to be an indirect attempt to remove protection measures for the state’s wild rice waters—undercutting OAH’s rejection of MPCA’s attempted rollback of wild rice protections in 2018. Unsurprisingly, these proposed changes are also the result of inadequate state consultation with the tribes—a process that the agency has persistently misrepresented.

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<sup>1</sup> The rules to be changed are specifically located at Minn. R. 7050.0140, 7050.0223, and 7050.0224.

Additionally, the agency’s proffered justifications for the rule changes are substantively defective because they lack sufficient scientific or legal basis under the federal Clean Water Act (the “Act”), as well as corresponding state law. The OAH should reject the proposed changes now and save the state further, improper expenditure of resources on defending fundamentally flawed rules—just as the OAH rejected MPCA’s last, industry-supported attempt to limit protections for wild rice waters.<sup>2</sup> If the OAH instead approves these rules as written, we will urge the EPA to disapprove them and we will consider all our other options to uphold the Clean Water Act and keep scientifically-defensible rules in place.

## **I. Tribal coalition.**

It is believed to be unprecedented for this many tribes to submit joint comments on any MPCA rulemaking (in addition to some tribes and tribal agencies submitting separate comments), a fact that should speak for itself as to the importance of this issue to Minnesota’s tribal governments. The four Dakota tribal governments in Minnesota are the Lower Sioux Indian Community, Prairie Island Indian Community, Shakopee Mdewakanton Sioux Community, and Upper Sioux Community (which submits separate comments). The six tribal governments of the Minnesota Chippewa Tribe are the Bois Forte Band of Chippewa, Fond du Lac Band of Lake Superior Chippewa, Grand Portage Band of Lake Superior Chippewa, Leech Lake Band of Ojibwe, Mille Lacs Band of Ojibwe, and White Earth Band of Ojibwe. The Red Lake Nation is also Ojibwe and has separate federal recognition.<sup>3</sup>

In northeastern Minnesota, throughout the entire Arrowhead Region, the Bois Forte, Fond du Lac, and Grand Portage Bands retain usufructuary rights in the lands and waters that were ceded to the United States under the 1854 Treaty of LaPointe (the “1854 Ceded Territory”).<sup>4</sup> These rights were retained to ensure hunting, fishing, and gathering for subsistence, economic, cultural, medicinal, and spiritual needs could continue into perpetuity. Likewise, the Mille Lacs and Fond du Lac Bands retain usufructuary rights under the 1837 Treaty with the Chippewa, and the 1837 Ceded Territory stretches across east central Minnesota into Wisconsin.<sup>5</sup>

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<sup>2</sup> 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... (“Wild Rice Rulemaking”), Rep. of ALJ (Jan. 9, 2018) (“ALJ Report”), available at <https://www.pca.state.mn.us/sites/default/files/wq-rule4-15mm.pdf>; Chief ALJ Order on Rev. (Apr. 12, 2018) (upholding disapproval after MPCA resubmission of rule without required revisions), available at [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); MPCA Notice of Rule Withdrawal (Apr. 26, 2018), available at <https://www.pca.state.mn.us/sites/default/files/wq-rule4-15oo.pdf>. See also GP Cmts. on WR Rule (Oct. 24, 2017), at Ex. H.

<sup>3</sup> Information about all 11 Minnesota tribes can be found at the Minnesota Indian Affairs Council webpage at <https://mn.gov/indianaffairs/index.html> and at each tribe’s website.

<sup>4</sup> 10 Stat. 1109 (Sept. 30, 1854); see also Minnesota Department of Natural Resources (“MN DNR”), Laws and Treaties, at [https://www.dnr.state.mn.us/aboutdnr/laws\\_treaties/index.html](https://www.dnr.state.mn.us/aboutdnr/laws_treaties/index.html).

<sup>5</sup> See *Minnesota, et al. v. Mille Lacs Band of Chippewa Indians, et al.*, 526 U.S. 172 (1999) (confirming off-reservation usufructuary rights under the 1837 Treaty); see also Great Lakes Fish and Wildlife Commission (“GLIFWC”), A Guide to Understanding Ojibwe Treaty Rights (2018), available at <http://www.glifwc.org/publications/pdf/2018TreatyRights.pdf>; MN DNR, Main Treaties Page, available at [https://www.dnr.state.mn.us/aboutdnr/laws\\_treaties/index.html](https://www.dnr.state.mn.us/aboutdnr/laws_treaties/index.html).

In order to fully exercise these rights, abundant and unpolluted natural resources must be available, including water that meets tribal and state water quality standards. The state has a government-to-government relationship with all Minnesota tribes,<sup>6</sup> and state agencies in Minnesota co-manage 1837 and 1854 Treaty resources with signatory tribes.<sup>7</sup> This includes adequate state consultation with the tribal nations, and taking into account tribal comments as a vital part of rulemaking changes. Tribal government requests should be accommodated whenever possible to uphold this government-to-government relationship.

## **II. The Clean Water Act and its enacting regulations provide no legal authority for a state to convert enforceable numeric standards into subjective narrative standards.**

These proposed changes have the potential to result in little to no regulation of discharge into Class 3 & 4 waters that are currently protected under existing standards. The changes would roll back specific numeric protections by using narrative standards. This directly contradicts Clean Water Act regulations that require states and authorized tribes to either establish numerical values based upon EPA guidance or “other scientifically defensible methods,” or “establish narrative criteria or criteria based upon biomonitoring methods *where numerical criteria cannot be established or to supplement numerical criteria.*”<sup>8</sup> There is no legal basis for MPCA’s attempt to remove essentially all Class 3 & 4 numeric standards.

The purpose of the Clean Water Act is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>9</sup> The Act requires states to establish water quality standards that are “sufficient to provide for the protection and propagation of fish, shellfish, and wildlife, as well as recreation in and on the water.”<sup>10</sup> These standards must include designated uses of a waterbody in addition to “water quality criteria necessary to protect those uses.”<sup>11</sup> A state’s water quality criteria correspondingly must be based on “sound scientific rationale.”<sup>12</sup> Moreover, for waters with “multiple use designations,” the criteria “must support the most sensitive use.”<sup>13</sup> Only where a state’s water quality criteria has met the Act’s requirements can EPA approve the criteria.<sup>14</sup>

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<sup>6</sup> See, e.g., Gov. Walz Exec. Order 19-24, “Affirming the Government to Government Relationship between the State of Minnesota and Minnesota Tribal Nations: Providing for Consultation, Coordination, and Cooperation” (Apr. 4, 2019).

<sup>7</sup> Federal agencies also have a legal responsibility to maintain all tribal, treaty-reserved natural resources. See, e.g., Memo. on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021), affirming Exec. Order 13175—Consultation and Coordination With Indian Tribal Governments (Nov. 6, 2000) (stating “the United States has recognized Indian tribes as domestic dependent nations under its protection . . . .,” there is a “trust relationship with Indian tribes,” and “[a]gencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.”), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>.

<sup>8</sup> 40 C.F.R. § 131.11(b) (emphasis added).

<sup>9</sup> 33 U.S.C. § 1251(a).

<sup>10</sup> 33 U.S.C. § 1313(c)(2)(A).

<sup>11</sup> *Id.*

<sup>12</sup> 40 C.F.R. §§ 131.5(a)(2); 131.11(a).

<sup>13</sup> 40 C.F.R. § 131.11(a).

<sup>14</sup> 40 C.F.R. § 131.5(a).

Courts recognize that this rule means exactly what it says: “states should develop either numerical criteria based upon CWA guidance (or other scientific methods), or narrative criteria, *if numerical criteria cannot be established*. Narrative criteria might also be developed to supplement numerical criteria.”<sup>15</sup> As with all other types of rulemaking, where a state sets aside a prior finding (in this case that numeric criteria are necessary for Class 3 & 4 uses), it can only do so for non-arbitrary reasons, and within the parameters of controlling law.<sup>16</sup> There is no such justification here.

Even if there was a legal basis under the Act for MPCA’s proposal, there is nothing in the record that would justify the extremity of MPCA’s proposal. It is not supported by “current science,” as the agency claims. MPCA’s alleged reason for the changes is that “the diversity of water quality needs for industrial and irrigation use means that identifying protective numeric values for each potential pollutant necessary to protect various wide-ranging industrial and irrigation uses is unreasonable to complete on a statewide basis.”<sup>17</sup> The agency goes on to claim that the changes “move away from the existing one-size-fits-all numeric standard to a narrative standard coupled with a robust implementation approach that takes advantage of available information and tools to implement the WQS as location-specific protective values.” If this is true, then why is the agency not proposing to dispense with *all* numeric criteria for *all* uses, and undertake *solely* site-specific analyses? The reason is that this approach be entirely contrary to the express language of the Act, and it would be unreasonable due to extensive time and effort such an approach would require—something that is well beyond MPCA’s admitted capacity.

MPCA also has not performed the legally-mandated, structured scientific assessment, or a Use Attainability Analysis (“UAA”), to determine if the current, more stringent Class 3 & 4 criteria can be achieved.<sup>18</sup> Under 40 C.F.R. 131.10 (g), a UAA is required to either “designate a use, or remove a use that is *not* an existing use”—which is what MPCA is doing with the proposed rule changes. EPA guidance confirms expressly that a “UAA must be conducted for any water body when a state or authorized tribe designates uses that do not include the uses specified in section 101(a)(2) of the Act or when designating sub-categories of these uses that require less stringent criteria than previously applicable.”<sup>19</sup> The uses at section 101(a)(2) are commonly summarized as “fishable/swimmable” uses.

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<sup>15</sup> See, e.g., *Nat. Res. Def. Council, Inc. v. US EPA*, 16 F.3d 1395, 1403-1404 (4th Cir. 1993) (emphasis added); see also *Nw. Envtl. Advocates v. US EPA*, 855 F. Supp. 2d 1199, 1217-18 (D. Ore. 2012) (EPA violated the Act by approving new, less protective numeric criteria).

<sup>16</sup> *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agency must justify departure where “its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account...”) (internal citations omitted).

<sup>17</sup> State. of Need and Reasonableness, In the Matter of Proposed Revisions of Minnesota Rule Chapters 7050 and 7053, Relating to Water Quality Standards – Use Classifications 3 and 4; Revisor ID No. 04335 (Dec. 12, 2020) (“SONAR”) at 1, available at <https://www.pca.state.mn.us/sites/default/files/wq-rule4-17k.pdf>.

<sup>18</sup> See 40 C.F.R. 131.10 (g) (listing requirement of a use attainability analysis to either “designate a use, or remove a use that is *not* an existing use”); see also US EPA, Use Attainability Analysis (UAA), at <https://www.epa.gov/wqs-tech/use-attainability-analysis-uaa> (“A UAA must be conducted for any water body when a state or authorized tribe designates uses that do not include the uses specified in section 101(a)(2) of the Act or when designating sub-categories of these uses that require less stringent criteria than previously applicable.”)

<sup>19</sup> See EPA, UAA, at <https://www.epa.gov/wqs-tech/use-attainability-analysis-uaa>.

Amazingly, MPCA admits it is not following this mandate: “*To date, the MPCA has not assessed any of the narrative or numeric water quality standards that exist for the Class 3 and 4 beneficial uses.*”<sup>20</sup> The agency justifies this by alleging limited resources—and because the “prime goal” of the Act is to protect fishable/swimmable uses, the agency “believes that resources should be focused on assessing water quality standards for those beneficial uses and those that protect human health (drinking water and aquatic consumption).”<sup>21</sup> But the agency has no discretion to disregard the federal mandate of a UAA for Class 3 & 4 rule changes—again, EPA guidance makes clear that this requirement also applies to *non-101(a)(2)* uses. This defect alone is fatal to the entire rulemaking. Nor has MPCA taken any steps to ensure that the most sensitive use in each Class is protected by the proposed amendments, as discussed further in Sections III and IV.<sup>22</sup>

Moreover, even the claim of limited resources is eyebrow-raising. The agency acknowledges that it has a substantial database of surface water quality data to assess whether a water is suitable for irrigation: “MPCA has collected over 250,000 surface water quality samples for specific conductance statewide,...over 1,700 locations that have been sampled for the cations (Na, Ca, Mg).”<sup>23</sup> Yet MPCA has not even done a tabletop exercise to evaluate this extensive information. MPCA is making a conscious choice to pick and choose between its nonwaivable obligations under the Clean Water Act.

MPCA also argues that “[c]ontested case hearings and litigation are very consuming of staff resources.”<sup>24</sup> But the fact of excessive staff workload (and fear of litigation by permittees) does not provide a legal or scientific justification for a rule change. While tribes empathize with lack of sufficient resources to support important water quality programs, this is not a basis to roll back Class 3 & 4 numeric criteria.

Additionally, MPCA claims that changes are justified due to a claimed “lack of available documentation of the scientific basis used to derive the standards in 1967” and that “[i]t is important that MPCA is able to demonstrate that standards are based on sound science.”<sup>25</sup> Contradictorily, later in the SONAR MPCA acknowledges that there *is* such documentation.<sup>26</sup> Tribes agree that updates to water quality standards are appropriate from time to time—but however outdated the science to support the current standards (which MPCA has not actually established in this record), this does not justify a departure from *any and all* protective, numeric standards.

As discussed throughout these comments, MPCA has also ignored federal anti-backsliding regulations. These proscribe states, in reissuing NPDES permits, from imposing less stringent provisions than appeared in the original permit except in limited circumstances:

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<sup>20</sup> *Id.* at 15-16 (emphasis added).

<sup>21</sup> *Id.*

<sup>22</sup> 40 C.F.R. § 131.11(a).

<sup>23</sup> SONAR at 86.

<sup>24</sup> *Id.* at 101.

<sup>25</sup> *Id.* at 2.

<sup>26</sup> *Id.* at 11.

...interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 122.62.<sup>27</sup>

Ultimately, MPCA's claim that this rollback is based upon the "best current scientific understanding about industrial, irrigation, and livestock and wildlife designated uses"<sup>28</sup> is undermined by the agency's own admissions about the failure of its own review process. MPCA has simply offered no legal basis upon which the OAH can approve these changes.

### **III. MPCA has failed to review the impact of these proposed changes on the Class 4A wild rice use—much less to offer a legal basis for the exclusion.**

Through many conversations and comments in advance of the public process, tribes have voiced concerns about this rulemaking, including that the proposed changes to Class 4A beneficial uses will adversely impact wild rice waters. MPCA response is to say that its "intention" in this rulemaking is not to change the 10 mg/L wild rice sulfate standard—which the agency then characterizes as "contentious" and requiring a "separate rulemaking process"<sup>29</sup>—even though MPCA has expressly confirmed the validity of the standard and there is no ongoing rulemaking.<sup>30</sup> These are mixed messages, to say the least.

Indeed, the rule changes here do not *directly* attack the existing 10 mg/L sulfate limit for wild rice waters. The attack is instead in the refusal even to acknowledge or conduct review of any potential impacts on wild rice waters via this deregulation, which is a contravention of the Act, as further explained in Section II.<sup>31</sup> MPCA treats the Class 4A 10 mg/L wild rice sulfate standard as entirely unconnected to the rest of Class 4A, saying that "the language related to the wild rice subclass is so entwined with the overall Class 4A language that amendments are necessary to differentiate the two."<sup>32</sup> This is despite tribes having pointed out repeatedly that removing most of the numeric

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<sup>27</sup> 40 CFR § 122.44(1)(1).

<sup>28</sup> *Id.* at 3.

<sup>29</sup> SONAR at 62.

<sup>30</sup> *See, e.g., In the Matter of the reissuance of an NPDES/SDS Permit to United States Steel Corporation (U.S. Steel) for its Minntac facility...*, 937 N.W.2d 770, 789 (Minn. Ct. App. 2019), *partially rev'd on other grounds*, Case No. A18-2094, \_\_\_ N.W.2d \_\_\_ (Minn. Feb. 10, 2021) (noting that in briefing MPCA stated that it "would enforce the [10 mg/L] wild rice sulfate water quality standard by imposing a WQBEL on U.S. Steel's surface seepage discharges, if applicable. Based on this representation, if the MPCA determines that WQBELs are required on remand, it would seem to follow that the MPCA would apply the wild rice rule in determining conditions for the NPDES portion of the permit.")

<sup>31</sup> SONAR at 62. The science confirms the need for the 10 mg/L sulfate limit for waters used for the production of wild rice. *See* Minnesota Chippewa Tribe Tribal Wild Rice Task Force Rep. (Dec. 15, 2018) at 23-27 (discussing science), available at <http://mnchippewatribe.org/pdf/TWRTF.Report.2018.pdf>, attached at Ex. A; MN Governor's Task Force on Wild Rice (Jan. 3, 2019) at 32-34 (same), available at <https://www.eqb.state.mn.us/sites/default/files/documents/FINAL%20Governor%27s%20Task%20Force%20on%20Wild%20Rice%20Report%20January%203%202019%20v2.pdf>.

<sup>32</sup> SONAR at 62.

criteria that protect Class 4A beneficial uses in general, and replacing them with weaker narrative criteria that use a “translator” to develop numeric permit limits, allows backsliding and ignores that this will adversely impact wild rice waters.<sup>33</sup> It is also despite uncontested science confirming sulfate is not the only parameter that can negatively affect wild rice waters, as discussed further in Section IV.<sup>34</sup>

Tribes have long requested MPCA protect and restore wild rice using existing Clean Water Act tools including water quality assessments, identification of impaired waters based on assessments (and listing of impaired wild rice waters), setting appropriate effluent limits in NPDES permits, and developing Water Quality Based Effluent Limits (“WQBELs”) for Total Maximum Daily Loads (“TMDLs”) that bring impaired wild rice waters into compliance with water quality standards. In the SONAR, MPCA recognizes these very tools as core to protection of beneficial uses.<sup>35</sup> Yet the agency has applied none of them to wild rice waters.

A key example of this regulatory refusal is that, over the last year, the Minnesota Indian Affairs Council (“MIAC”), the Minnesota Chippewa Tribe, and individual Minnesota tribes have joined together to request that known, impaired wild rice waters finally be added to Minnesota’s 2020 303(d) list, building on ongoing tribal work since at least 2011—and based upon MPCA’s own field data and conventional-pollutant methodology.<sup>36</sup> MPCA’s list was due to US EPA in the spring of 2020, but MPCA sought and received authorization for a delay from EPA due to tribal calls for the listing. But then, in recent weeks, tribal leaders each received a call from Governor Walz stating there would be no listing of any impaired wild rice waters afterall—even though agency staff have admitted impairment. MPCA has confirmed that it has now submitted the list to US EPA for approval—without including any impaired wild rice waters, and without ever having actually provided a written response to the tribes’ detailed submissions on the required technical and legal analysis.

In this rulemaking, again, the agency has singled out wild rice waters for exclusion even from analysis, despite lacking any legal authority to do so. The agency has ignored extensive data in the record confirming that the same salty pollutants, for which Class 4A standards are being rolled back in this proposed rulemaking, have negative impacts on wild rice.

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<sup>33</sup> See, e.g., Grand Portage Cmts. on Planned Class 3 & 4 Rule Changes at 2-3 (Sept. 4, 2020) (“There is nothing in this draft proposal, or MPCA’s previous proposals, that demonstrate wild rice will be protected by allowing higher concentrations of salty parameters for Class 4 beneficial uses.”), Ex. B; GP Cmts. (Apr. 22, 2019) at 3-4 (“Wild rice existing uses will be adversely impacted by the waters the planned amendments to Class 3 and 4 Uses.”), Ex. C (also attaching Ltrs. of D.Keehner (USEPA Dir. of Standards and Health Protection) to D.Smithee (Okla. Water Resources Board) (Sept. 2008)).

<sup>34</sup> Myrbo et.al., Sulfide Generated by Sulfate Reduction is a Primary Controller of the Occurrence of Wild Rice (*Zizania palustris*) in Shallow Aquatic Ecosystems (2017), Ex. E; Myrbo et.al., Increase in Nutrients, Mercury, and Methylmercury as a Consequence of Elevated Sulfate Reduction to Sulfide in Experimental Wetland Mesocosms (2017), Ex. F.

<sup>35</sup> SONAR at 10, 15, 117.

<sup>36</sup> See MCT Cmt. Ltr. on 2020 303(d) List (Jan. 8, 2020); GP Cmt. Ltr. (Jan. 8, 2020); MPCA Ltr. to MIAC (Apr. 15, 2020); Jt. Tribal Ltr. to MPCA (Apr. 27, 2020); GP Ltr. to MPCA (May 8, 2020) and attach.; MPCA Comm’r L.Bishop Email to Tribes (May 15, 2020); Jt. Tribal Ltr. to Gov. Walz (Oct. 2, 2020) and Exs. A-B; Jt. Tribal Ltr. to EPA (Oct. 2, 2020) and Exs. A-B (same); SMSC Ltr. to EPA (Oct. 2, 2020); MPCA Ltr. to MIAC (Nov. 11, 2020), combined at Ex. D; see also GP Cmt. Ltr. on 2018 303(d) List (Jan. 26, 2018), at Ex. I.



Oddly, the SONAR also retreads old territory, defending the agency’s work in support of an equation-based sulfate standard—an approach this entity rightly rejected in the 2018 wild rice sulfate rulemaking.<sup>38</sup> In its detailed 2018 order, the OAH “determined that the proposed rule was insufficiently specific to be approved”<sup>39</sup> and that it was not “rationally related to the Agency’s objective” of “protect[ing] wild rice from the impact of sulfate, so that wild rice can continue to be used as a food source by humans and wildlife.”<sup>40</sup> It is alarming to see the agency wedge this discussion into a SONAR it claims has “nothing to do” with attempts to undermine the 10 mg/L wild rice sulfate standard.

In fact, many of the reasons for disapproving the proposed equation-based wild rice sulfate rules apply with equal force here. There, the OAH listed the defects as follows:

- MPCA failed to demonstrate that repealing and replacing the current 10 mg/L sulfate standard would be “at least as protective” of wild rice, which is both a Clean Water Act and a state antidegradation requirement.<sup>41</sup>
- MPCA “failed to recognize the proposed rule’s burden on the Native American community” and “[l]oosening the sulfate standard for the state’s designated waters could degrade the quality of the Bands’ wild rice waters.”<sup>42</sup>
- The OAH disapproved the MPCA’s proposed list of wild rice waters, “concluding that the MPCA’s approach excluded hundreds of water bodies previously on lists from the DNR and other sources, including the 1854 Treaty Authority’s 2016 and 2017 lists of wild rice waters,” which the OAH determined violated the federal prohibition against removing a designated use if such a use is an existing use.<sup>43</sup>

Likewise, neither of the proposed narrative agricultural and industrial use criteria are “at least as protective” as existing rules. The disproportionate burden on Native people is the same as in 2018. As noted, the revisions seek to change designated use classifications without a UAA. Rule implementation will require years, if not decades, and will be a burden on MPCA’s capacity in permitting. Application of the rules will be limited to a small portion of agricultural and industrial use waters, but will profoundly degrade wild rice waters.

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<sup>38</sup> SONAR at 190.

<sup>39</sup> ALJ Rep. at 58, Finding 247. *See also Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 107 (Minn. Ct. App. 1991) (“A rule, like a statute, is void for vagueness if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement”) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

<sup>40</sup> ALJ Rep. at 58, Finding 246.

<sup>41</sup> *Id.* at 52-53, Findings 223-225.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

**IV. Despite MPCA’s failure to conduct the review, the science already confirms that the proposed Class 4A rules will not protect wild rice or other known, culturally important resources.**

Again, MPCA has stated that this rule making “will not change the wild rice sulfate standard,” which is currently at Class 4A, and is an agricultural use. But all other Class 4A criteria apply to wild rice, too—not just the sulfate limit. Wild rice waters are also protected by a narrative standard stating that “[t]he 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.” Tribes have expressed concern that the proposal to eliminate numeric criteria for bicarbonates, pH, specific conductance, total dissolved salts, and sodium, and to then replace them with a general narrative standard, will negatively affect wild rice, which may be the most sensitive beneficial and existing use in Class 4A waters. MPCA tries to sidestep this entire argument, claiming that they evaluated the possibility of using “a single conservative numeric water quality standard that protects irrigation under the most sensitive irrigation conditions that could occur” in the state, but “found it to be unreasonable.”<sup>44</sup> As with its UAA argument, MPCA also incorrectly characterized the comments as “relying on the requirement under the CWA that water quality standards developed to protect aquatic life or human health” but that “the CWA does not require presumptive protection of the most sensitive species for developing non-101(a)(2) use water quality standards,” like the agricultural and industrial uses at issue here.<sup>45</sup>

This intentionally-simplistic approach ignores both the science and the law, as well as the actual content of comments about wild rice waters. Section 3.14 of the US EPA Water Quality Standards Handbook under the heading “Criteria for Agricultural and Industrial Designated Uses” provides that states and authorized tribes may also establish criteria specifically designed to protect designated uses and should ensure that they apply the criteria that are protective of the most sensitive use of the water body, as required by 40 CFR 131.11(a).<sup>46</sup> Furthermore, the CWA requires, at a minimum, that existing uses be protected.<sup>47</sup> Wild rice is *both* an existing and designated use in Minnesota water quality standards.

MPCA also contradicts itself. MPCA first states that “[i]t does not appear that the numeric values established in the general Class 4A water quality standards are critical to the protection of wild rice.”<sup>48</sup> But then the agency reveals that its own scientists have investigated “Minnesota wetland plant response to salinity stressors: conductivity, chloride, and sulfate,” including wild rice.<sup>49</sup> The agency concluded that a preliminary concentration of conductivity expected to kill 95% of

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<sup>44</sup> SONAR at 40.

<sup>45</sup> *Id.*

<sup>46</sup> US EPA Water Quality Standards Handbook (“EPA WQS Handbook”) at 3.14, available at <https://www.epa.gov/sites/production/files/2014-10/documents/handbook-chapter3.pdf>.

<sup>47</sup> 40 CFR § 131.3(e).

<sup>48</sup> SONAR at 190-191.

<sup>49</sup> *Id.* at 191. Specific conductivity (or conductance) means the volume of ions in water as measured by passing electrical current through a water sample, a simple and reliable testing method. It detects inorganic dissolved solids like chloride, nitrate, sulfate, phosphate, sodium, magnesium, calcium, iron, and aluminum. The higher the level of ions, the higher the toxicity of the water. See EPA, National Aquatic Resource Surveys, Indicators, Conductivity, at <https://www.epa.gov/national-aquatic-resource-surveys/indicators-used-national-aquatic-resource-surveys>.

wild rice is 407  $\mu\text{S}/\text{cm}$  statewide.<sup>50</sup> But then the agency endorses a translator approach to rationalize allowing conductance concentrations up to 3,000  $\mu\text{S}/\text{cm}$ —*almost an order of magnitude higher than what the agency itself estimates would kill 95% of wild rice in a given water body*. Nevertheless, the agency goes on to conclude that its “interim approach to protecting aquatic life should be sufficient for both macroinvertebrates and wetland plants,” including wild rice.<sup>51</sup> Put another way, the agency is refusing to acknowledge the science regarding conductance confirms that these rule changes will have profound, direct, and negative impacts on wild rice. The Class 4A rules are and must remain protective of the wild rice use *now*—not under an interim or future Class 2 aquatic life beneficial use protections—which, as proposed, would themselves be profoundly insufficient to protect the wild rice use.

Water quality standards criteria are intended to address unacceptable adverse effects from both short-term (acute) and long-term (chronic) exposure, with the objective of protecting aquatic life from lethal as well as sub-lethal effects (e.g., immobility, slower growth, reduced reproduction). Criteria are designed to be protective of the vast majority of aquatic species in an aquatic community (i.e., 5th percentile of tested aquatic animals representing the aquatic community). As a result, the designated uses and their associated criteria may be considered as assessment endpoints.”<sup>52</sup> Simply stated, allowing concentrations of conductivity to exceed by one-order of magnitude the concentration that would kill 95% of wild rice in a given waterbody is neither legally nor scientifically defensible.

Put yet another way, the proposed changes to Class 3 & 4 criteria will unquestionably increase the allowable concentrations of salts that can be discharged into surface water (like chloride, sodium, carbonate and sulfate, magnesium and calcium). The proposed rule lacks any meaningful analysis of the potential for these increased salty discharges to hurt other, more sensitive, beneficial uses including not just Class 4 wild rice waters but also waters with the Class 2 aquatic life use, discussed further in Section V and elsewhere in these comments. MPCA has only looked at it from perspective of industrial and agricultural dischargers while ignoring other uses or existing impairments—over years of tribal and other comments to the contrary.

Tribes have also raised questions about the wholesale changes to, and in some cases, eliminations of, use subclassifications. According to EPA guidance, states “are required to designate uses considering, at a minimum, those uses listed in section 303(c) of the Clean Water Act (i.e., public water supplies, propagation of fish and wildlife, recreation, agriculture and industrial purposes, and navigation).”<sup>53</sup> The EPA goes on to state that:

However, flexibility inherent in the State process for designating uses allows the development of subcategories of uses within the Act’s general categories to refine and clarify specific use classes... (i) if States adopt subcategories that do not require

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<sup>50</sup> *Id.* at 191. “ $\mu\text{S}/\text{cm}$ ” means micromhos per centimeter, a unit of ionic measure.

<sup>51</sup> *Id.*

<sup>52</sup> US EPA Water Quality Standards Key Concepts, Supplemental Module, Aquatic Life Criteria, available at <https://www.epa.gov/wqs-tech/supplemental-module-aquatic-life-criteria#:~:text=Summary-,Aquatic%20life%20criteria%20are%20estimates%20of%20concentrations%20of%20pollutants%20in,%2C%20mortality%2C%20reduced%20reproduction.>

<sup>53</sup> US EPA Water Quality Standards Handbook at 2.3.

criteria sufficient to fully protect the goal uses in section 101(a)(2) of the Act (see section 2.1, above), a use attainability analysis pursuant to 40 CFR 131.10(j) must be conducted for waters to which these subcategories are assigned.<sup>54</sup>

This again underscores that MPCA is attempting, in this rulemaking, to avoid doing the necessary work of a UAA, sidestepping the requirement under the CWA to fully protect the goal uses in section 101(a)(2) of the Clean Water Act, as discussed in Section II above.

The science confirms repeatedly that MPCA's changes to Class 4A rules *will* affect wild rice waters. But the agency has done no research on what increased salty discharges will do to downstream wild rice waters. The danger to wild rice and other sensitive uses under this proposal is both profound and unjustifiable.

#### **V. The proposed rules fail to study the potential impacts on aquatic insects under Class 2B.**

MPCA also failed to study the potential impacts on benthic invertebrates (aquatic insects), which are very sensitive to salts. Allowing increases in chloride and other salts in upstream Class 3 & 4 waters could kill the aquatic insects there—which also kills the fish that eat those insects in downstream Class 2B waters. Indeed, the impacts of this rulemaking would only compound Minnesota's issues with salty parameter discharges due to the continued reliance on salts for de-icing and dust suppression. In addition, rising water temperatures resulting from climate change can increase the toxicity of certain salts for aquatic life. But despite tribal requests, there is no analysis of those impacts. This approach is even more detrimental because it is proposed at the same time MPCA is continuing to refuse to implement aquatic life conductivity criteria, despite the science being clear. MPCA's own 10-year assessments of watersheds monitoring and assessment database shows just how specific conductance impairs aquatic life, and illustrate that these existing impairments have gone unaddressed without numeric protections.<sup>55</sup> MPCA has more than enough information to set numeric specific conductance values to protect aquatic life—it just refuses to do so because that would be unpopular with industry.

The SONAR itself attaches a 2015 Johnson and Johnson report (supported by EPA's independent analysis) that determined that a protective specific conductance concentration for aquatic insects in northeastern Minnesota—meaning the maximum safe limit—would be approximately 300  $\mu\text{S}/\text{cm}$ .<sup>56</sup> Additionally, MPCA's stressor identification study of the St Louis River documented concentrations of specific conductance exceeding 2,000  $\mu\text{S}/\text{cm}$ , and validated the substantial reductions in macroinvertebrate populations statewide at specific conductance concentrations at or above 500  $\mu\text{S}/\text{cm}$ .<sup>57</sup> It was this research that guided the Fond du Lac Band in establishing a US

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<sup>54</sup> *Id.*

<sup>55</sup> MPCA, St. Louis River Watershed Stressor Identification Rep. (Dec. 2016), at <https://www.pca.state.mn.us/sites/default/files/wq-ws5-04010201a.pdf>; MPCA, Minnesota's Impaired Waters and TMDLs, Approved TMDLs and Wraps (Jan. 2021) at <https://www.pca.state.mn.us/sites/default/files/wq-iw1-13c.pdf>.

<sup>56</sup> SONAR at Ex. S-10 at 272.

<sup>57</sup> MPCA, St. Louis River Watershed Stressor Identification Rep. (Dec. 2016) at 34 fig. 3, at <https://www.pca.state.mn.us/sites/default/files/wq-ws5-04010201a.pdf>.

EPA-approved water quality standard for specific conductance of 300  $\mu\text{S}/\text{cm}$  to protect reservation waters, including a portion of the St. Louis River.<sup>58</sup>

Instead of setting conductivity criteria that would be protective of aquatic insects, MPCA proposes to relax these criteria. Specific conductance would be allowed to increase from an instantaneous maximum of 1,000  $\mu\text{S}/\text{cm}$  up to 3,000  $\mu\text{S}/\text{cm}$  averaged over a 122-day period.<sup>59</sup> This means the instantaneous maximum concentration could far exceed 3,000  $\mu\text{S}/\text{cm}$ —which essentially guarantees destruction of aquatic insects that need maximum levels of 300  $\mu\text{S}/\text{cm}$  or less.

Additionally, MPCA’s St. Louis River Watershed Stressor Report documents elevated sulfate concentrations as high as 751 mg/L.<sup>60</sup> The report briefly discusses studies that have established direct sulfate toxicity to aquatic insects at concentrations as low as 124 mg/L in (soft) waters, such as those found in northeastern Minnesota.<sup>61</sup> The report further opines that “[t]he lack of a water quality standard in Minnesota presents challenges in building a defensible case for or against sulfate as a stressor to fish and macroinvertebrate communities.”<sup>62</sup>

Here, instead of developing a protective sulfate standard for aquatic life, MPCA has instead proposed a 600 mg/L sulfate standard in Class 4A that it claims would serve to protect cows from the adverse impacts of high concentrations of sulfate—but is a level that kills aquatic insects. MPCA’s refusal to acknowledge the known impacts of such a profoundly high sulfate limit on aquatic insects is inexcusable and must be rejected.

## **VI. MPCA has likewise ignored potential impacts on forest resources.**

Tree farms are an existing use of importance to tribes that is supposed to be protected under the agricultural use umbrella under Class 4A. But MPCA has not even evaluated these impacts. Many tribes rely upon nurseries for seedlings to meet forest management plans. Salt damage has been documented for several trees that are culturally important to the Minnesota tribes such as white cedar, sugar maple, and paper birch. White cedar is damaged by salts sprayed onto foliage and added to the soil.<sup>63</sup> In particular, a greenhouse study found significant foliage discoloration and

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<sup>58</sup> SONAR at Ex. S-10 at 272; Fond du Lac Band of Lake Superior Chippewa Water Quality Standards of the Fond du Lac Reservation, Ord. #12/98 (as amended July 8, 2020), at Sec. 301(k) (“Existing mineral quality shall not be altered by municipal, industrial and in-stream activities or other waste discharges so as to interfere with the designated uses for a water body. Since aquatic biota in this ecoregion are known to be sensitive to the effects of elevated ionized substances (cations and anions) in the water, the specific conductance in all waters of the Reservation shall not exceed an annual average continuous exposure of 300  $\mu\text{S}/\text{cm}$ . Exceedances of this numeric criterion are indicative of polluted conditions.”), at <http://www.fdlrez.com/government/ords/12-98WaterQualityStandard2020.07.pdf>.

<sup>59</sup> SONAR at 67.

<sup>60</sup> St. Louis River Watershed Stressor Identification Rep. at 305, Sec. 5.15.3

<sup>61</sup> St. Louis River Watershed Stressor Identification Rep. at 41 at Table 9.

<sup>62</sup> *Id.* at 435

<sup>63</sup> Foster, A.C., Maun, M.A., Effects of highway deicing agents on *Thuja occidentalis* in a greenhouse, *Can. J. Bot.* 56, 2760-2766 (1978), at <https://doi.org/10.1139/b78-329>; Foster, A.C., Maun, M.A., Effect of Two Relative Humidities on Foliar Absorption of NaCl, *Can. J. Plant Sci.* 60, 763-766 (1980), at <https://doi.org/10.4141/cjps80-111>; Hofstra, G., Hall, R., Injury on roadside trees: leaf injury on pine and white cedar in relation to foliar levels of sodium and chloride, *Can. J. Bot.* 49, 613-622 (1971), at <https://doi.org/10.1139/b71-097>; Kutscha, N.P., Hyland, F., Langille, A.R., Salt Damage to Northern White-Cedar and White Spruce, *Wood Fiber Sci.* 9, 191-201 (1977), at

root tip burn at sodium chloride soil concentrations above 0.93 mg/g (930 ppm, ~1453  $\mu\text{S}/\text{cm}$  of specific conductance).<sup>64</sup> A nursery study found that 15 weeks of spraying cedar foliage with 5ml of 100ppm NaCl (~156  $\mu\text{S}/\text{cm}$  of specific conductance) during the dormant season damaged 90% of foliage.<sup>65</sup>

The sensitivity of sugar maples to salt damage has been noted since at least the 1950s when road salt was tied to regional maple declines in New England.<sup>66</sup> Although sugar maple may mitigate low salt concentrations by shedding their deciduous leaves, high salt concentrations lead to death more quickly than other tree species.<sup>67</sup> Indeed, several authors list sugar maple as moderately to very sensitive to salt damage.<sup>68</sup> Consequences of salt exposure include stunted shoot growth and root decline.<sup>69</sup>

Although salt damage to paper birch is less well documented, recent research has demonstrated long-term reduction in paper birch survival and recruitment attributable in part to road salt application over a 20 year period.<sup>70</sup> This reduction occurred under a relatively low soil sodium concentration of 103 ppm (estimated NaCl equivalent of specific conductance: ~408  $\mu\text{S}/\text{cm}$ ).

Salt damage has also been documented to trees that are commercially important to tribal forestry operations as well as the broader Minnesota forest industry. Red pine, white pine, and white spruce are valuable sawtimber species in northern Minnesota, and quaking aspen is the most harvested and most valuable pulpwood species in northern Minnesota. Salt damage to all four of these

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<https://wfs.swst.org/index.php/wfs/article/view/962>; Lumis, G.P., Hofstra, G., Hall, R., Roadside Woody Plant Susceptibility to Sodium and Chloride Accumulation During Winter and Spring, *Can. J. Plant Sci.* 56, 853-859 (1976), at <https://doi.org/10.4141/cjps76-138>.

<sup>64</sup> Foster, A.C., Maun, M.A., Effects of highway deicing agents on *Thuja occidentalis* in a greenhouse, *Can. J. Bot.* 56, 2760-2766.

<sup>65</sup> Kutscha, N.P., Hyland, F., Langille, A.R., Salt Damage to Northern White-Cedar and White Spruce. *Wood Fiber Sci.* 9, 191-201.

<sup>66</sup> Horsley, S.B., Long, R.P., Bailey, S.W., Hallett, R.A., Wargo, P.M., Health of Eastern North American Sugar Maple Forests and Factors Affecting Decline, *North. J. Appl. For.* 19, 34-44 (2002), at <https://doi.org/10.1093/njaf/19.1.34>; Sucoff, E., Effect of Deicing Salts on Woody Vegetation along Minnesota Roads (Technical Bulletin No. 303, 1975), Minnesota Agricultural Experiment Station, at <https://conservancy.umn.edu/handle/11299/200958>; Westing, A.H., Sugar maple decline: An evaluation, *Econ. Bot.* 20, 196-212 (1966), at <https://doi.org/10.1007/BF02904015>.

<sup>67</sup> Holmes, F.W., Salt injury to trees, *Phytopathology* 51:712-718 (1961).

<sup>68</sup> Dirr, M.A., Selection of Trees for Tolerance to Salt Injury. *J. Arboric.* 209-216 (1976), at <http://joa.isa-arbor.com/request.asp?JournalID=1&ArticleID=1415&Type=2>; Shortle, W.C., Rich, A.E., Relative sodium chloride tolerance of common roadside trees in southeastern New Hampshire. *Plant Dis. Report.* 54, 360-2 (1975), at <https://babel.hathitrust.org/cgi/pt?id=mdp.39015001262701&view=1up&seq=384>; Sucoff, E., Feller, R., Kanten, D., Deicing Salt (Sodium Chloride) Damage to *Pinus resinosa*, Ait. *Can. J. For. Res.* 5, 546-556 (1975), at <https://doi.org/10.1139/x75-080>.

<sup>69</sup> Guttay, A.J.R., Impact of Deicing Salts upon the Endomycorrhizae of Roadside Sugar Maples, *Soil Sci. Soc. Am. J.* 40, 952-954 (1976), at <https://doi.org/10.2136/sssaj1976.03615995004000060038x>; Shortle, W., Kotheimer, J., Rich, A., Effect of salt injury on shoot growth of sugar maple, *Acer saccharum*. *Plant Dis. Report.* 56, 1004-1007 (1972), at <https://babel.hathitrust.org/cgi/pt?id=mdp.39015001262750&view=1up&seq=470>.

<sup>70</sup> Willmert, H.M., Osso, J.D., Twiss, M.R., Langen, T.A., Winter road management effects on roadside soil and vegetation along a mountain pass in the Adirondack Park, New York, USA. *J. Environ. Manage.* 225, 215-223 (2018), at <https://doi.org/10.1016/j.jenvman.2018.07.085>.

commercially important species is well documented, especially to the spruce and pine.<sup>71</sup> Significant damage to pine and spruce foliage has been observed at soil conductance values of 0.16 dS/m (160 µS/cm).<sup>72</sup>

All of these culturally or commercially important tree species are widely grown by Minnesota forestry, horticultural, and shade tree nurseries and therefore would be impacted by the new irrigation standards. Moreover, trees of these species in woodlands adjacent to irrigated fields are exposed to irrigation water through overspray. Because none of these species are listed in Table 17 of the SONAR (“Sensitive crops to excess salinity”), they would be subject to the 3,000 µS/cm standard. However, the evidence is clear that damage can occur to these species under field conditions at conductivities as low as ~160 µS/cm, with serious damage occurring for some species between 400-1500 µS/cm. Therefore, the proposed Agricultural Class 4A conductivity standard would fail to protect these culturally and commercially important existing nursery uses.

## **VII. Class 4B Waters wildlife amendments contravene federal water quality standards guidance.**

Under Minnesota Rule 7050.0224 at subpart 3, the beneficial use is described as simply “use by livestock and wildlife,” and includes a narrative standard that the water quality is such that livestock and wildlife can use the water “without inhibition or injurious effects.” In EPA’s Water Quality Standards Handbook, the guidance around use classification stipulates that in addition to the Section 101(a)(2) “fishable/swimmable” aquatic life uses, water quality standards should “consider the use and value of State waters for public water supplies, *propagation of fish and wildlife*, recreation, agriculture and industrial purposes, and navigation.”<sup>73</sup> This clearly conveys that the CWA principle behind establishing a wildlife use is to *broadly* protect wildlife health and sustainable populations. However, MPCA has stated in this rulemaking that the Class 4B wildlife use is *narrowly* intended to apply only to water that is “consumed” by livestock and wildlife.<sup>74</sup> MPCA’s redrafting of federal law is improper.

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<sup>71</sup> Bryson, G.M., Barker, A.V., Sodium accumulation in soils and plants along Massachusetts roadsides, *Commun. Soil Sci. Plant Anal.* 33, 67-78 (2018), at <https://doi.org/10.1081/CSS-120002378>; Goodrich, B.A., Koski, R.D., Jacobi, W.R., Condition of Soils and Vegetation Along Roads Treated with Magnesium Chloride for Dust Suppression, *Water, Air, Soil Pollut.* 198, 165-188 (2009), at <https://doi.org/10.1007/s11270-008-9835-4>; Goodrich, B.A., Koski, R.D., Jacobi, W.R., Roadside Vegetation Health Condition and Magnesium Chloride (MgCl<sub>2</sub>) Dust Suppressant Use in Two Colorado, U.S. Counties, *Arboric. Urban For.* 34, 252-259 (2008), at <http://joa.isa-arbor.com/request.asp?JournalID=1&ArticleID=3054&Type=2>; Hall, R., Hofstra, G., Lumis, G.P., Effects of Deicing Salt on Eastern White Pine: Foliar Injury, Growth Suppression and Seasonal Changes in Foliar Concentrations of Sodium and Chloride, *Can. J. For. Res.* 2, 244-249 (1972), at <https://doi.org/10.1139/x72-040>; Lumis, G.P., Hofstra, G., Hall, R., Roadside Woody Plant Susceptibility to Sodium and Chloride Accumulation During Winter and Spring, *Can. J. Plant Sci.* 56, 853-859 (1976), at <https://doi.org/10.4141/cjps76-138>; Sucoff, E., Effect of Deicing Salts on Woody Vegetation along Minnesota Roads (Technical Bulletin No. 303); Sucoff, E., Feller, R., Kanten, D., Deicing Salt (Sodium Chloride) Damage to *Pinus resinosa*, *Ait. Can. J. For. Res.* 5, 546-556.

<sup>72</sup> Bryson, G.M., Barker, A.V., Sodium accumulation in soils and plants along Massachusetts roadsides, *Commun. Soil Sci. Plant Anal.* 33, 67-78 (2002). <https://doi.org/10.1081/CSS-120002378>.

<sup>73</sup> US EPA Water Quality Standards Handbook at 2.1 (emphasis added), at <https://www.epa.gov/wqs-tech/water-quality-standards-handbook>

<sup>74</sup> SONAR at 47-48.

MPCA recognizes that wildlife has the potential to use any water in the state. The agency asserts that “the livestock and wildlife designated use protects waters for current and future use by terrestrial animals.”<sup>75</sup> MPCA subsequently states “[g]iven that the data available for wildlife species is limited, it is reasonable to use these livestock data as surrogates for wildlife data. The MPCA is reasonably choosing a value that protects the most sensitive livestock species.”<sup>76</sup>

This is an unjustifiable leap. The almost total lack of wildlife-specific data in MPCA’s record precludes any confidence in the agency’s assumption. Furthermore, if the standards associated with the uses are only applied when and where there is a water appropriations permit, they by nature do not serve to protect wildlife across the state. By only applying standards to water at the point of intake, these revised standards by nature cannot be said to apply statewide. There is no scientifically defensible basis for the claim that these revised standards are protective of wildlife.

### **VIII. The proposed rule changes fail to take into account wildlife impacts from mercury methylation.**

MPCA maintains that Class 2 mercury limits are protective of wildlife in their “consumption of aquatic organisms,” seemingly suggesting there is no need to include mercury criteria in Class 4. This narrow rationale directly contradicts EPA guidance, which mandates:

Development of water quality criteria to protect wildlife may be important because terrestrial and avian wildlife species that are dependent on the aquatic food web may be exposed to aquatic contaminants via dietary exposure. This exposure pathway can be particularly important for bioaccumulative pollutants, which accumulate in tissues of aquatic organisms at levels greater than water column concentrations. Bioaccumulation is defined as the accumulation of chemicals in the tissue of organisms through any route including ingestion or direct contact with contaminated water.<sup>77</sup>

In other words, the potential for exposure is *not* to be measured solely through “consumption” of aquatic organisms.

An additional problem is that sulfate and chloride are heavier than water and can therefore create what is called a chemocline. A chemocline is a distinct boundary in a body of water, marked by a steep concentration gradient, separating layers of water with different chemical compositions or concentrations. Chemoclines can partially or completely eliminate the ability of lakes to turn over. Typically, lakes turn over in the spring and fall, mixing water from the bottom to the surface. By vertically mixing water, oxygen and nutrients are moved to areas for uptake by aquatic organisms. When a waterbody is healthy, sediments bind excess nutrients and metals making them inaccessible for uptake by aquatic organisms. However, sediments that contain elevated chloride and sulfate can become oxygen depleted and release toxic metals and nutrients into the water column making them bioavailable for aquatic organisms. Further, when sulfate releases mercury

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<sup>75</sup> *Id.* at 47.

<sup>76</sup> *Id.* at 48.

<sup>77</sup> US EPA Water Quality Standards Handbook at 3.11.



from sediments the rate of conversion to methylmercury increases. But MPCA does not consider this issue.

MPCA's failure to regulate mercury contamination and bioaccumulation within the Class 4 Wildlife standards is inconsistent for Minnesota waters within the Lake Superior Basin, to say the least. EPA's Water Quality Guidance for the Great Lakes System describes a methodology applicable to the Great Lakes System for developing criteria for the protection of avian and mammalian wildlife from "adverse effects resulting from the ingestion of water and aquatic prey."<sup>78</sup> The Great Lakes Initiative, or GLI, methodology is similar to the methodology used to derive non-cancer human health criteria, in that "separate wildlife values are derived for birds and mammals using taxonomic class-specific toxicity data and exposure data for five representative Great Lakes wildlife species"—bald eagle, herring gull, belted kingfisher, mink, and river otter—which are likely to experience the highest exposures to bioaccumulative contaminants through the aquatic food web in the Great Lakes.<sup>79</sup> In addition, the EPA published the Great Lakes Water Quality Initiative Technical Support Document for Wildlife Criteria (1995), which includes the methodology for deriving wildlife values for pollutants with limited toxicological data to derive a value for only one of the two taxonomic classes specified (birds and mammals).<sup>80</sup> Yet MPCA has followed none of the mandatory GLI methodology for the Great Lakes System.

The agency rightly asserts that it is "reasonable for Minnesota to include standards that are more similar to states that also intend the standards to protect for livestock and wildlife drinking the water"<sup>81</sup>—MPCA just doesn't follow its own suggestion. In Table 37 of the SONAR, the agency compares wildlife standards among states and tribes in Region 5 or bordering Minnesota. Grand Portage and Fond du Lac, who have federal Treatment-in-the-Same-Manner-as-a-State and promulgate their own water quality standards, include the GLI wildlife criterion for mercury in their water quality standards. MPCA offers no basis for failing to do so, too.

Despite MPCA's characterization of their new Class 3 & 4 standards as being reasonable and necessary for protecting wildlife, because the proposed rules do not incorporate the derived protective mercury wildlife criterion in Class 4, they are not supported by significant body of peer-reviewed science or longstanding EPA guidance.

#### **IX. The proposed changes to Class 3 are impermissible due to their failure to consider scaling and corrosion impacts.**

The proposed changes to Class 3 waters will also allow backsliding and degradation of water quality. Amendments to Class 3 standards include: removing all numeric standards for chloride, hardness, calcium carbonate, and pH; replacing numeric standards with a single narrative standard; consolidating the beneficial use protection to a single Class 3 designation; and

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<sup>78</sup> 40 CFR 132 at App'x D, Sec. I(A), Great Lakes Water Quality Initiative Methodology for the Development of Wildlife Criteria.

<sup>79</sup> *Id.*

<sup>80</sup> Great Lakes Water Quality Initiative Technical Support Document for Wildlife Criteria (1995) at Sec. 1, at <https://www.epa.gov/gliclearinghouse/great-lakes-initiative-technical-support-documents>.

<sup>81</sup> SONAR at 165.

incorporating by reference the translator methodology for implementing the narrative standard.<sup>82</sup> The Class 3 translator is only intended to avert “*water quality conditions that prevent attainment of the industrial consumption (Class 3) designated use with respect to scaling.*”<sup>83</sup> Although the stated goal of the changes to Class 3 rules is to protect the industrial consumption designated use by ensuring the downstream potential for calcium scaling will not negatively affect existing industrial appropriators, the agency claims it “currently has no indications that any industrial appropriators are experiencing calcium scaling at levels of concern.”<sup>84</sup>

But in fact, MPCA is well aware of industrial concerns regarding scaling, as well as corrosion. U.S. Steel, for its Minntac taconite operation published an Environmental Impact Statement in 2004 to support a water management plan aimed at reducing the concentrations of sulfate, chloride, total dissolved solids, fluoride, and hardness.<sup>85</sup> The reason was that corrosion that was negatively impacting operations through increasing maintenance and capital costs.

Another aspect of this that has not been assessed is the potential impacts to downstream community drinking water sources. Corrosion can increase toxic metals in drinking water that then require community drinking water plants to institute corrosion control methods to prevent a situation similar to Flint, Michigan, where residents were subjected to high concentrations of lead due to their corrosive source water.<sup>87</sup>

Current Class 3C Industrial Standards provide that waters “shall be such as to permit their use for industrial cooling and materials transport without a high degree of treatment being necessary to avoid severe fouling, corrosion, scaling, or other unsatisfactory conditions.”<sup>88</sup> Scaling is only one aspect of current protections. By removing protection for severe fouling, corrosion, and other unsatisfactory conditions, the MPCA would allow backsliding in NPDES permits and violate state antidegradation rules.

Loading limits for Class 3C waters in the current rule allow a range of numeric criteria for chloride from 50 mg/L for subclass 3A, to 250 mg/L for subclass 3C.<sup>89</sup> The current chloride threshold of 250 mg/L in subclass 3C to prevent scaling, severe fouling, corrosion, and other unsatisfactory conditions is five times higher than 3A criteria intended to protect the use of industrial water that “shall be such as to permit their use without chemical treatment, except softening for groundwater, for most industrial purposes, except food processing and related uses, for which a high quality of water is required.”<sup>90</sup> Current numeric criteria ranges for hardness are 50 mg/L for subclass 3A, up

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<sup>82</sup> *Id.* at 13.

<sup>83</sup> MPCA, Draft Industrial Consumption Narrative Translator at 1 (emphasis added), available at <https://www.pca.state.mn.us/sites/default/files/wq-rule4-17g.pdf>. Scaling means calcium carbonate precipitation due to high water hardness.

<sup>84</sup> SONAR at 74-75.

<sup>85</sup> US Steel Minntac Water Inventory Reduction Environmental Impact Statement (Sept. 2004) at 2, available at <https://www.pca.state.mn.us/sites/default/files/minntac-deis.pdf>.

<sup>87</sup> New York Times, *Flint’s Water Crisis Started Five Years Ago. It’s Not Over Yet.* (Apr. 25, 2019)

<https://www.nytimes.com/2019/04/25/us/flint-water-crisis.html#:~:text=Flint%20officials%20had%20failed%20to,the%20blood%20of%20many%20residents>, Ex. G.

<sup>88</sup> SONAR at 13.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

to 500 mg/L for subclass 3C.<sup>91</sup> The concentration at which hardness is currently limited to prevent scaling, severe fouling, corrosion, and other unsatisfactory conditions is 500 mg/L, one order of magnitude more concentrated than Class 3A.

The new narrative translator proposes to define hardness limits in NPDES permits using existing discharge levels only to prevent an *increase* in loading. This would allow those entities that are already far exceeding current hardness standards to continue unabated—with new wiggle-room to increase calcium loading, and without having to control chloride.<sup>92</sup> This is the definition of impermissible backsliding. Moreover, as explained in Section II, combining the four existing industrial categories would only be permissible under the Clean Water Act and state rules if MPCA extended the *most protective* criteria from the current Class 3A and 3D beneficial use categories. MPCA has gone the opposite way, impermissibly seeking to allow *higher* concentrations of pollutants than the *least protective* criteria in category 3C.

A further problem is that, although prioritizing large water consumers and dischargers is appropriate, limiting the translator analysis to *only* entities that had or have a water appropriations permit is not compliant with the Clean Water Act. All NPDES permits must go through an analysis to determine their reasonable potential to exceed water quality standards.<sup>93</sup> It is a violation of the Act to limit the assessment to determine the reasonable potential to exceed water quality standards to a downstream industrial intake. NPDES permit limits are set based on the concentration of water pollutants *in a discharge*, not *at an intake* of another industry that may be many miles downstream of a discharge that has the reasonable potential to violate water quality standards. Additionally, suggesting that the translator be incorporated by reference into the rule because it “allows MPCA to more conveniently make changes if they are needed”<sup>94</sup> without going through rulemaking and additional public scrutiny, is without any legal or scientific basis. Again, this aspect of the proposed rules fails under the most basic requirements of the Act. EPA guidance states that “[m]ost water quality criteria are expressed as numeric, or quantitative, parameters... expressed in this way specify the precise, measurable levels of particular chemicals or conditions allowable in a water body. *When pollutants cannot be precisely measured, narrative criteria are used to express a parameter in a qualitative form.*”<sup>95</sup> These changes must be rejected.

## **X. This rule change is not legally necessary to accommodate the needs of industrial and Publicly-Owned Treatment Works (“POTWs”).**

According to MPCA’s preliminary cost analysis, compliance with current Class 3 & 4 water quality standards has the potential to cause substantial economic hardship to NPDES permittees,

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<sup>91</sup> *Id.*

<sup>92</sup> MPCA, Draft Industrial Consumption Narrative Translator at 3.

<sup>93</sup> 40 CFR 122.4(d)(1)(i): Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional or toxic pollutants) which are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

<sup>94</sup> SONAR at 37.

<sup>95</sup> US EPA Water Quality Standards Key Concepts, Module 3: Numeric and Narrative Criteria, available at <https://www.epa.gov/wqs-tech/key-concepts-module-3-criteria#tab-5>.

particularly municipal dischargers.<sup>96</sup> However, MPCA has already resolved this issue by developing an electronic variance application for excess salts specifically made for municipalities.<sup>97</sup> This streamlined, automated calculator aggregates economic data and pollution control technology cost estimates to evaluate variance eligibility. Based on results from the automated calculator, MPCA stated in the SONAR that *every municipality* (98 cities) that has a reasonable potential to exceed water quality standards for salty discharges would be eligible for a variance from water quality standards, and therefore “it is reasonable to assume that every facility with a Class 3 and 4 limit would also be eligible.”<sup>98</sup> So even if they were legal or scientifically supported, which they are not, the changes are not necessary to provide POTWs recourse.

The agency also assessed taconite operations for variance eligibility, and they are in a significantly different situation than POTWs. ArcelorMittal, USA (“AM”); Cleveland-Cliffs, Inc. (“CC”); and U.S Steel Corporation (“USS”) are the parent companies of all of the taconite mines in Minnesota. MPCA correctly concluded that “[a]ctive treatment would be required to treat taconite related discharges to below the Class 3 and 4 WQS.”<sup>99</sup> MPCA correctly concluded that there was no demonstration of substantial economic impacts under the variance analysis because “finances can be leveraged for complying with existing water quality standards” from these parent companies “for their subsidiary taconite mines in Minnesota.”<sup>100</sup> Because taconite producers cannot demonstrate substantial financial impacts, they are not entitled to variances.<sup>101</sup>

Furthermore, the existing Class 3 & 4 criteria for industrial and agriculture uses are considered attainable because they can be achieved if technology based standards are imposed on point source dischargers (as provided in sections 301(b)(1)(A) and (B)) and 306 of the CWA), along with cost-effective and reasonable best management practices imposed on nonpoint source dischargers. Relaxing criteria, while the concentrations of salts build in surface and groundwater, only increases the financial burden for industry and municipalities when and if the agency requires compliance with water quality standards.

Another distinction is that large industrial dischargers have direct and negative impacts *on* POTWs. Taconite is the most significant source of mercury in the Lake Superior basin and yet operators are not required to have a mercury reduction strategy. Nearby community residents that are not connected to community water supplies either must suffer from polluted groundwater or install home drinking water treatment systems that can cost thousands of dollars.

Every day that large industrial sources are allowed to operate without wastewater treatment costs Minnesota residents near these operations hundreds of thousands of dollars for additional, future pollution treatment for both wastewater and community drinking water. An example of the result of uncontrolled discharges from taconite pollution is the experience of Chisholm, Buhl, Kinney

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<sup>96</sup> MPCA Class 3 and 4 Water Quality Standards Revision Technical Support Document (Jan. 2019) at 8, available at <https://www.pca.state.mn.us/sites/default/files/wq-rule4-17d.pdf>.

<sup>97</sup> SONAR at 130.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 143.

<sup>100</sup> *Id.* at 162.

<sup>101</sup> *Id.* at 149.

and Great Scott Townships, which have seen taconite mining operations pass down expenses to taxpayers for a new wastewater treatment system of approximately \$21 million to treat mercury. The district leveraged funding from several public sources, including:

- 2005 Minnesota Bonding Bill: \$1.7 million design grant;
- Minnesota Public Facilities Authority: \$12 million construction grant, an \$8.1 million low-interest loan plus about \$4.8 million for inflow & infiltration (“I & I”) removal projects; and
- Iron Range Resources and Rehabilitation Board Funds: \$5.5 million construction grants.<sup>102</sup>

In any case, MPCA’s analysis demonstrates that community wastewater discharges would *not* be adversely impacted by compliance with existing rules—the overall regulatory scheme provides various forms of support. The analysis also demonstrates that the taconite industry *can* afford to implement wastewater treatment for their discharges, and must do so to comply with existing water quality standards.

Finally, entirely missing from the analysis are the costs associated with loss of natural capital. Yet natural capital provides for indispensable economic development and quality of life benefits. Flood protection is one straightforward example of ecosystem services. When wetlands functions are lost, the economic damages of flooding can include job losses, infrastructure repairs, reconstruction costs, restoration costs, property damage, and death.<sup>103</sup> Subsistence foods such as fish and wild rice require clean water. Clean water also provides economic benefits to users because of reduced treatment costs. The proposed changes are not legally necessary to meet permittees’ needs.

#### **XI. Meaningful consultation between MPCA and tribal leaders “with the goal of achieving mutually beneficial solutions” has not occurred.**

Due to the government-to-government relationship between tribes and the state, MPCA provides advance notice to tribes of permit and rulemaking, with opportunities for consultation, as well as offering staff-level engagement. Tribes provided comments to MPCA regarding the proposed changes to Class 3 & 4 water quality standards in March 2019 and September 2020.<sup>104</sup> While there have been multiple contacts and conversations, the consultation process has fallen severely

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<sup>102</sup> MPCA, On Point Newsletter (Dec. 2015), “Strategic planning helps sewer district go above and beyond in northern Minnesota,” available at [https://content.govdelivery.com/accounts/MNPCA/bulletins/12c728c?mnpeca\\_150](https://content.govdelivery.com/accounts/MNPCA/bulletins/12c728c?mnpeca_150). The Minnesota Public Facilities Authority manages three large revolving loan funds that have received federal capitalization grants and state match appropriations; Minnesota Public Facilities Authority 2015 Annual Report, at <https://www.leg.state.mn.us/lrl/agencies/detail?AgencyID=1326>; The Iron Range Resources and Rehabilitation Board receives most of its funding from taxes on taconite mining in its service area; Office of the Minn. Legislative Auditor, Iron Range Resources and Rehabilitation Board (IRRRB) Evaluation Report (Mar. 2016), at <https://www.auditor.leg.state.mn.us/ped/pedrep/irrrb2016.pdf>.

<sup>103</sup> Great Lakes Indian Fish and Wildlife Commission, Earth Economics, The Value of Nature’s Benefits in the St. Louis River Watershed (June 2015), available at <https://www.glifwc.org/Events/Earth%20Economics%20St%20Louis%20River%20Project%20Report.pdf>.

<sup>104</sup> See, e.g., Exs. B-C (GP comment ltrs.).

short. The deficit is not in the fact that the state and the tribes do not agree—that is, indeed, sometimes inevitable even after a robust consultation process—but here there has been a failure of agency process. MPCA appears to have confused quantity of contacts with quality. This is not meaningful consultation.

The SONAR provides a brief discussion about consultation and coordination with tribes, specifically citing Governor Walz’s Executive Order 19-24, which requires state agencies to “consider the input gathered from tribal consultation into their decision-making processes, with the goal of achieving mutually beneficial solutions.”<sup>105</sup> Here, however, the agency has simply informed tribes of their plans after making them, despite the profound and negative impacts of those plans on tribal communities.

As the SONAR confirms, and as discussed above, in the course of this consultation, tribes have suggested that MPCA use existing Clean Water Act tools to protect wild rice by: (1) listing impaired wild rice water on the 2020 303(d) list;<sup>106</sup> (2) ensuring wild rice is protected by adequate limits in NPDES permits; (3) enforcing NPDES permit limits; and (4) moving natural wild rice waters out of agricultural beneficial uses and into aquatic life beneficial uses.<sup>107</sup> These efforts would go a significant distance to mitigate the impacts of the proposed Class 3 & 4 rule changes (while not addressing the standalone legal and scientific issues with the current proposal). But none of these things are being done. It is deeply frustrating that the MPCA has pursued none of the measures requested by tribal nations—all of which are rooted in the law and science. This undercuts all other relationship building this administration and agency have sought to do with tribes.

The SONAR also mischaracterizes the consultation process, stating that only Grand Portage requested consultation—ignoring Fond du Lac’s consultation request—and then seriously understating Grand Portage’s position.<sup>108</sup> The MPCA also notes that this same section of the SONAR was shared with tribes in advance of the formal rule proposal—but that round seems to have been nearly meaningless because, despite receiving correction on a number of statements from the tribal nations, the SONAR was still published with misstatements.<sup>109</sup>

Despite all of this, in the SONAR, as it does elsewhere, the agency has continually made claims to the effect that it seeks to “work together” and “collaborate” with tribes on “the protection and restoration of wild rice in Minnesota, including the wild rice sulfate standard.”<sup>110</sup> In fact, tribes have been working with MPCA since the mid-1990’s to develop comprehensive wild rice protection and restoration plans. Beginning in 2004, tribes, MPCA and the US EPA met to discuss implementation of the sulfate standard to protect wild rice in industrial NPDES permits where known downstream wild rice waters have elevated concentrations of sulfate. Since then,

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<sup>105</sup> SONAR at 82.

<sup>106</sup> See Ex. D (tribal correspondence regarding listing of impaired wild rice waters on the 2020 303(d) List).

<sup>107</sup> *Id.*; see also Exs. B-C (GP Cmts.).

<sup>108</sup> SONAR at 183 (claiming “Grand Portage staff indicated that their key concern was ensuring that their comments had been heard and considered by the MPCA.”); compare GP Cmts. (Sept. 4, 2020), Ex. B (detailed scientific and legal objections to proposed changes); GP Cmts. (Apr. 22, 2019), Ex. C (same).

<sup>109</sup> GP Cmts. (Sept. 4, 2020), Ex. B.

<sup>110</sup> SONAR at 5.

tribes participated in MPCA’s advisory panel on wild rice; tribal leaders consulted with the then-MPCA Commissioner regarding the proposed equation-based standard and other proposed changes to the rules that protect wild rice; tribes have provided written comments about proposed rule amendments, NPDES permit reissuance, and various actions associated with environmental review of proposed projects; and tribes have litigated over these issues. Tribes have additionally come together to submit a full report to the state on this topic, the 2018 Tribal Wild Rice Task Force Report.<sup>111</sup> But very little has changed. Tribal comments have been relegated beneath the comments of other stakeholders who are not governments. The deficits in the tribal consultation process speak for themselves.

## **XII. The proposed rule changes ignore environmental justice standards and includes no analysis of impacts on treaty resources.**

MPCA says it is concerned about environmental justice. Tribes have made clear that protection of wild rice is a top environmental justice issue for Native citizens of this state. Yet MPCA’s Environmental Justice Map does not even show wild rice waters,<sup>112</sup> and for all the reasons discussed in Sections III and IV, MPCA here treats those waters as unimportant.

The problem is not just the lack of analysis of impacts on existing uses for wild rice and aquatic life. *No change to any water quality standards should happen without analysis of impacts on treaty resources.* That is a core principle of environmental justice when it comes to tribal interests. That analysis goes beyond soliciting tribal comments and consultation—it is an obligation of the agency to do an independent, in-depth analysis. MPCA’s own Environmental Justice Framework requires comprehensive modelling, qualitative and quantitative analysis, and assessment of cumulative impacts.<sup>113</sup> But none of this crucial work has been done here.

## **XIII. Conclusion**

The volume of defects in these proposed rules is staggering. MPCA’s proposed amendments to the Class 3 & 4 Rules contravene federal antidegradation requirements requiring that “[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.”<sup>114</sup> State and federal NPDES authority is limited to discharge permits, not water intake systems. The idea that compliance monitoring would or should occur at an industrial or agricultural intake that may be miles downstream of a discharge that is violating Minnesota water quality standards is not NPDES-compliant. It does not provide protection of the existing uses of the water between one major industrial or agricultural discharge and the next entity large enough to have a MN DNR water appropriations permit. Furthermore, the proposed amendments are not intended to protect the most sensitive uses in each designated use class. Instead of protecting the existing and most sensitive uses, and without doing a UAA, MPCA proposes to change the designated uses in each use class and relax existing criteria to reduce the

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<sup>111</sup> Ex. A.

<sup>112</sup> SONAR at 181 and 182.

<sup>113</sup> MPCA Env’t Justice Framework (Dec. 17, 2015), available at <https://www.pca.state.mn.us/sites/default/files/p-gen5-05.pdf>.

<sup>114</sup> 40 CFR§131.12(a)(1).

need for NPDES permit limits. At the same time, it would eliminate potential industrial requirements to install adequate wastewater treatment.

These amendments effectively eliminate numeric protections for wild rice waters, without ever even attempting to evaluate the impacts and by pretending protection will be provided by Class 2 criteria, even though wild rice is a Class 4A Beneficial Use. The amendments would allow methylmercury concentrations to increase in fish, wildlife, and, ultimately, people, and they would elevate the risk of high salinity, creating corrosion issues—the same thing that caused high concentrations of lead to be released into Flint, Michigan’s drinking water. This kind of deregulation also risks creating chemoclines in lakes causing habitat destruction from depleted oxygen and the release of nutrients and toxic metals into the water column. The risks are unacceptable.

Additionally, MPCA has misrepresented consultation with Minnesota tribes in the SONAR, and the tribal issues with these proposed rules. Instead of meaningful consultation to develop scientifically-defensible and Clean Water Act-compliant regulations, MPCA simply informed and updated tribes as the agency progressed down a bad path.

This is about deregulation, not protecting water quality. While we agree that MPCA’s water quality standards should be updated periodically to better support aquatic life, the environment, and human health, these revisions will do just the opposite. For all of the reasons cited above, the OAH should reject all the proposed amendments to Class 3 & 4 rules.

Sincerely,

See attached Tribal Leader signature pages

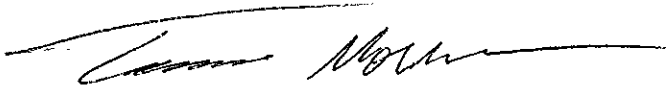
- c: Gov. Walz (by email only c/o Patina Park)
- Lt. Gov. Peggy Flanagan (by email only c/o Patina Park)
- Patina Park, Tribal State Relations Systems Implementation  
(by email only: [patina.park@state.mn.us](mailto:patina.park@state.mn.us))
- Laura Bishop, MPCA Commissioner (by email only: [Laura.Bishop@state.mn.us](mailto:Laura.Bishop@state.mn.us))
- Katrina Kessler, MPCA (by email only: [katrina.kessler@state.mn.us](mailto:katrina.kessler@state.mn.us))
- Helen Waquiu, MPCA (by email only: [helen.waquiu@state.mn.us](mailto:helen.waquiu@state.mn.us))
- Catherine Neuschler, MPCA (by email only: [catherine.neuschler@state.mn.us](mailto:catherine.neuschler@state.mn.us))
- Barbara Wester, US EPA Region 5, Office of Regional Counsel  
(by email only: [wester.barbara@epa.gov](mailto:wester.barbara@epa.gov))
- Tera Fong, US EPA Region 5, Water Division Director  
(by email only: [Fong.Tera@epa.gov](mailto:Fong.Tera@epa.gov))
- Alan Walts, US EPA Region 5, Office of International and Tribal Affairs  
(by email only: [walts.alan@epa.gov](mailto:walts.alan@epa.gov))
- Cheryl Newton, Acting EPA Region 5 Regional Administrator  
(by email only: [newton.cheryl@epa.gov](mailto:newton.cheryl@epa.gov))



*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman

Re: Comments on Proposed Amendments to Rules Governing Water Quality Standards,  
Minnesota Rules chapters 7050 and 7053; Revisor ID No. 4335; OAH Dkt. No. 65-9003-37102.

A handwritten signature in black ink, appearing to read "Travis Morrison", written over a horizontal line.

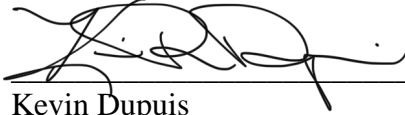
Travis Morrison

Vice-Chair

Bois Forte Band of Chippewa

*Signature Page – February 24, 2020*

Office of Administrative Hearings – Administrative Law Judge Lipman  
Re: Comments on Proposed Amendments to Rules Governing Water Quality Standards,  
Minnesota Rules chapters 7050 and 7053; Revisor ID No. 4335; OAH Dkt. No. 65-9003-37102.



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Kevin Dupuis  
Chairperson  
Fond du Lac Band of Lake Superior Chippewa

*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman

Re: Comments on Proposed Amendments to Rules Governing Water Quality Standards,  
Minnesota Rules chapters 7050 and 7053; Revisor ID No. 4335; OAH Dkt. No. 65-9003-37102.



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Robert F. Deschampe

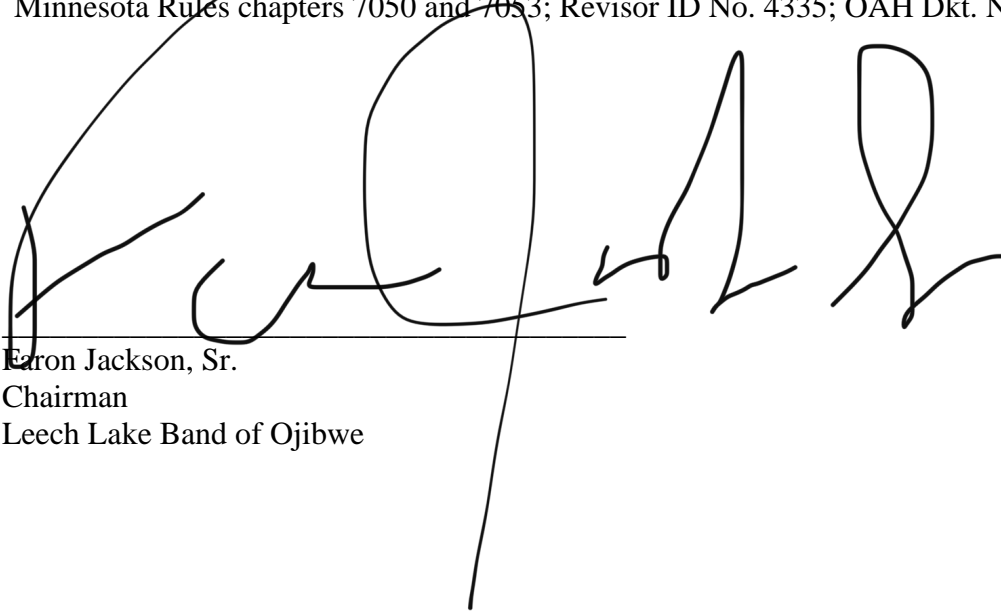
Chairman

Grand Portage Band of Lake Superior Chippewa

*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman

Re: Comments on Proposed Amendments to Rules Governing Water Quality Standards,  
Minnesota Rules chapters 7050 and 7053; Revisor ID No. 4335; OAH Dkt. No. 65-9003-37102.

A large, stylized handwritten signature in black ink, consisting of several loops and a long vertical stroke extending downwards.

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Aaron Jackson, Sr.  
Chairman  
Leech Lake Band of Ojibwe

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*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman

Re: Comments on Proposed Amendments to Rules Governing Water Quality Standards,  
Minnesota Rules chapters 7050 and 7053; Revisor ID No. 4335; OAH Dkt. No. 65-9003-37102.



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Robert Larsen  
President  
Lower Sioux Indian Community

*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman

Re: Comments on Proposed Amendments to Rules Governing Water Quality Standards,

Minnesota Rules chapters 7050 and 7053; Revisor ID No. 4335; OAH Dkt. No. 65-9003-37102.

A handwritten signature in blue ink that reads "Melanie Benjamin". The signature is written in a cursive style and is contained within a thin blue rectangular border.

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Melanie Benjamin

Chief Executive

Mille Lacs Band of Ojibwe

*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman  
Re: Comments on Proposed Amendments to Rules Governing Water Quality Standards,  
Minnesota Rules chapters 7050 and 7053; Revisor ID No. 4335; OAH Dkt. No. 65-9003-37102.

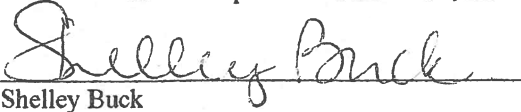
A handwritten signature in cursive script, reading "Gary Frazer", written over a horizontal line.

Gary Frazer  
Executive Director  
Minnesota Chippewa Tribe

*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman

Re: Comments on Proposed Amendments to Rules Governing Water Quality Standards,  
Minnesota Rules chapters 7050 and 7053; Revisor ID No. 4335; OAH Dkt. No. 65-9003-37102.

A handwritten signature in cursive script that reads "Shelley Buck". The signature is written in black ink and is positioned above a horizontal line.

Shelley Buck

President

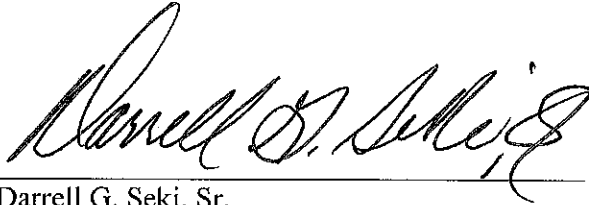
Prairie Island Indian Community



*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman

Re: Comments on Proposed Amendments to Rules Governing Water Quality Standards,  
Minnesota Rules chapters 7050 and 7053; Revisor ID No. 4335; OAH Dkt. No. 65-9003-37102.

A handwritten signature in black ink, appearing to read "Darrell G. Seki, Sr.", written in a cursive style. The signature is positioned above a horizontal line.

Darrell G. Seki, Sr.

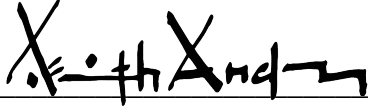
Tribal Chairman

Red Lake Band of Chippewa Indians

*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman

Re: Comments on Proposed Amendments to Rules Governing Water Quality Standards,  
Minnesota Rules chapters 7050 and 7053; Revisor ID No. 4335; OAH Dkt. No. 65-9003-37102.

A handwritten signature in black ink that reads "Keith Anderson". The signature is written in a cursive, somewhat stylized font. The first name "Keith" is written in a smaller, more compact script, while "Anderson" is written in a larger, more prominent script. The signature is positioned above a horizontal line.

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Keith B. Anderson

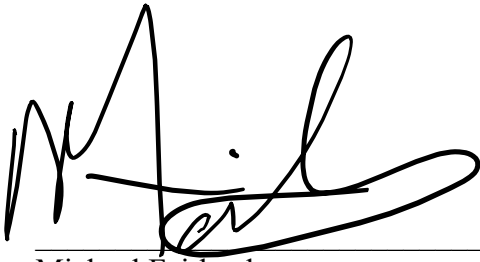
Chairman

Shakopee Mdewakanton Sioux Community

*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman

Re: Comments on Proposed Amendments to Rules Governing Water Quality Standards,  
Minnesota Rules chapters 7050 and 7053; Revisor ID No. 4335; OAH Dkt. No. 65-9003-37102.

A handwritten signature in black ink, appearing to read "Michael Fairbanks", written over a horizontal line.

Michael Fairbanks  
Chairman  
White Earth Nation



# Grand Portage Band of Lake Superior Chippewa

## RESERVATION TRIBAL COUNCIL

83 Stevens Road, PO Box 428  
Grand Portage, Minnesota 55605  
Tel. (218) 475-2277 • Fax (218) 475-2284

April 8, 2021

Cheryl Newton, Acting Regional Administrator  
U.S. Environmental Protection Agency, Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604-3507  
*By email only:* newton.cheryl@epa.gov

Re: Comments in Advance of March 9 Tribal Consultation on EPA Partial Disapproval of MPCA 2020 303(d) List.

Dear Administrator Newton:

In advance of our consultation this Friday, the Grand Portage Band of Lake Superior Chippewa (the “Band”) wanted to express in writing our immense gratitude to Region 5 for its decision on March 26 to partially reject MPCA’s 2020 303(d) List (the “2020 List”) due to its exclusion of any impaired, off-reservation wild rice waters. There is already extensive, if not uniformly collected, information about many wild rice waters known to be impaired for sulfate (meaning they significantly and persistently exceed the state’s wild rice sulfate standard of 10 mg/L and wild rice growth is impaired).<sup>1</sup> These impaired wild rice waters must be listed under 40 C.F.R. Section 130.7(b)(5)(iii). Region 5 agreed with Minnesota tribes that MPCA’s persistent failure to comply with the Clean Water Act is unacceptable and has taken an important first step toward recognizing and addressing impairments to Minnesota’s irreplaceable wild rice waters.

The Band also wishes to provide written comments to aid Region 5 in the agency’s own analysis. As Region 5 said in its March 26 decision, over the 30 days from the March 26 decision, EPA is working to “identify for inclusion on the list those WQLSs [Water Quality Limited Segments] still requiring TMDLs [Total Maximum Daily Loads] under Section 303(d) of the CWA and the implementing regulations pursuant to 40 C.F.R. § 130.7.” This includes identifying “specific waters for inclusion on the list based on the review of Minnesota’s compliance with the statutory and regulatory requirements and other relevant information submitted to Minnesota....”

The Band has also reviewed MPCA Assistant Commissioner Katrina Kessler’s March 15 letter to Region 5 Water Division Director Tera Fong, which sets out possible methodologies for evaluating impairments in these waters (although MPCA continues to claim it is barred from such a listing by the 2015 session law, an error that we have discussed in past comments). The Band provides the following to assist Region 5 and welcomes ongoing staff-level discussion.

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<sup>1</sup> Minn. R. 7050.0224 subp. 2; *see also* Minn. R. 7050.0224, subp. 1 (narrative standard and antidegradation provisions for wild rice waters).





The Administrative Law Judge concludes that the MPCA’s proposed list of wild rice waters at [proposed rule section] is defective because it fails to include all waters previously identified by the MDNR and federally recognized Indian tribes as waters where wild rice was an existing use since November 28, 1975. The MPCA’s approach, in using a “weight-of-evidence” standard to identify waters such as those with “lush stands of wild rice” that would meet its criteria for “the beneficial use as a wild rice water” violates federal law, which prohibits removing an existing use for wildlife unless more stringent criteria are applied.<sup>5</sup>

The Chief ALJ affirmed this conclusion:

Federal law delegates to states the authority to establish designated uses of waters and to establish water quality criteria to protect those designated uses in bodies of water. States are prohibited from removing a designated use, if such a use is an “existing use,” unless a use with more stringent criteria is added. An existing use is one “actually attained in the water body on or after November 28, 1975, whether or not it is included in the water quality standards.”<sup>6</sup>

The Chief ALJ went on to explain that, contrary to its claims, MPCA does not hold unilateral power to determine an existing use even as between Minnesota state agencies:

The Agency’s authority is not as clear as it asserts. Minn. Stat. §§ 115.03, subd. 1(b) and 115.44 address the Agency’s authority to classify waters, not specifically to determine existing uses for purposes of the CWA. While federal law provides that “the state” may determine existing uses, it does not specify which agency within a state has that unique authority.<sup>7</sup>

Moreover, the Chief ALJ confirmed that there is no question that Indian tribes *also* have the authority to recognize existing uses:

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<sup>5</sup> 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... (“Wild Rice Rulemaking”), Rep. of ALJ (Jan. 9, 2018) (“ALJ Report”) at 19-20, 23 (“While not identifying specific reasons for excluding individual water bodies, the Agency acknowledges that it excluded from the proposed rule some water bodies where wild rice has been an existing use.”), available at <https://www.pca.state.mn.us/sites/default/files/wq-rule4-15mm.pdf>; Chief ALJ Order on Rev. (Apr. 12, 2018) (upholding disapproval after MPCA resubmission of rule without required revisions), available at [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); MPCA Notice of Rule Withdrawal (Apr. 26, 2018), available at <https://www.pca.state.mn.us/sites/default/files/wq-rule4-15oo.pdf>.

<sup>6</sup> Chief ALJ Order at 11, *citing* 40 C.F.R. §§ 131.11(h)(1) (“*Water quality standards* are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.”) and 131.3(e) (“*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.”). *See also* 40 C.F.R. §131.3(f) (“*Designated uses* are those uses specified in water quality standards for each water body or segment whether or not they are being attained.”)

<sup>7</sup> *Id.* at 12 (internal citations omitted).



*Even if the MPCA can establish that its authority trumps that of the DNR or any other state agency, it cannot establish that it is the sole decider of what constitutes an existing use for purposes of federal law. The CWA specifically authorizes certain Indian tribes to make designations as well. The Fond du Lac Band and the Grand Portage Band of Lake Superior Chippewa are both authorized to do so based on approved agreements with the federal government regarding water quality standards. Both Bands agreed that, in rejecting the DNR's report and the 1854 Treaty Authority's list, the MPCA was removing waters that the Bands had already designated as having wild rice as an existing use under federal law.<sup>8</sup>*

And while not at issue in the failed 2018 rulemaking, there is no question that EPA retains inherent authority to both recognize existing uses and to rely upon the designations of same by state and tribal agencies. Therefore, in performing its analysis, the Band asks that Region 5 identify impaired wild rice waters by cross-referencing not just MPCA's 2013 List, but also the current lists of the 1854 Treaty Authority (a joint governmental program of the Bois Forte and Grand Portage Bands),<sup>9</sup> any other tribes, and the DNR.<sup>10</sup>

### **3. Known, Reasonably Available Information on Sulfate Impairments in Wild Rice Waters**

Tribes in January and April 2020 comments, and the Band in its May 8, 2020 letter, did the analysis MPCA was supposed to do (albeit only on the limited MPCA field testing data to which the Band had access and using a conservative methodology). We continue to maintain that these 21 waters must all be included on the 2020 List, along with any other impaired wild rice waters for which Region 5 has data and which fall within reasonable testing methodology.

EPA should run this review all databases, including, EQUIS, TEMPO (which is understood to contain permittee data, including discharge monitoring reports), Legacy Act Clean Water Fund, Met Council, USGS, and any other databases to which MPCA or EPA has access. We also attach the sulfate testing data summaries upon which we ran the May 2020 analysis as we received them in native Excel form.<sup>11</sup>

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<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> Note that additional wild rice waters, identified and documented through field research, have been added to tribal lists even since 2018. *See, e.g.*, 1854 Treaty Authority Wild Rice Survey (listing and mapping 521 lakes and river stretches within the 1854 Ceded Territory, the Arrowhead region of northeastern Minnesota), available at <https://www.1854treatyauthority.org/wild-rice/wild-rice-survey.html>; *see also* 2008 DNR Wild Rice Waters List, available at [https://files.dnr.state.mn.us/fish\\_wildlife/wildlife/wildrice/statewide-inventory-wild-rice-waters.pdf](https://files.dnr.state.mn.us/fish_wildlife/wildlife/wildrice/statewide-inventory-wild-rice-waters.pdf).

<sup>10</sup> The Band also notes that there may be no need to resolve any real or perceived discrepancies between these lists for purposes of the 2020 List—there is significant overlap between all these wild rice lists and the list of known, impaired wild rice waters is a relatively small subset.

<sup>11</sup> *See Ex. B.*



In addition, we attach the 1854 Authority's ten-year study results for Sandy Lake (WID 69-0730-00) and Little Sandy Lake (WID 69-0729-00).<sup>12</sup> Both of these also appear in MPCA's March 2021 letter.

Finally, we send additional public data to support the listing of Birch Lake (AUID 69-0003-00), the one impaired wild rice water that MPCA expressly excluded in its March 2021 letter.<sup>13</sup> DNR field reports confirm extremely elevated levels of sulfate in Bob Bay of Birch Lake.<sup>14</sup>

#### 4. Specific Methodology

In the attachments to the March 2021 letter, MPCA details proposed methodology (Attachment 2) and results (Attachment 1). Its stated purpose was to review field data to determine which wild rice waters show potential or severe impairment at 12.5 mg/L or above. The Band offers the following comments on MPCA's approach.

First, the Band disagrees with MPCA's proposed minimum sample size of 10 over 10 years. MPCA incorrectly claims this is "consistent with other water quality assessment data and EPA recommendations."<sup>15</sup> This is not correct. MPCA's 2020 Guidance Manual for Assessing the Quality of Minnesota Surface Waters for Determination of Impairment ("2020 Guidance") *does not* require 10 observations over 10 years for other conventional pollutants.<sup>16</sup> Nor would that be a reasonable requirement where MPCA's field testing for sulfate in wild rice waters has been inconsistent. Moreover, if sulfate exceedance is well above 12.5 mg/L, even if there are relatively few observations, it would be unreasonable and dangerous to wait years for more data rather than listing the waters now.

Second, it is not reasonable or acceptable to use a mean, median, or average concentration for this analysis for any purpose other than supporting best professional judgment. As stated in the Guidance, for conventional pollutants, a water chemistry parameter indicating the potential for *severe* impairment is established where results: (1) exceed the standard in 25% or more of the samples; and (2) the concentration of the samples exceed the criteria by 25% or more. A water chemistry parameter indicating a *potential* impairment is shown where results: (1) exceed the standard in 10 to 25% of the samples collected; and (2) the sample concentration exceeds the criteria by at least 10% and less than 25%.<sup>17</sup> The same limits should apply to sulfate in wild rice waters.

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<sup>12</sup> See Ex. C.

<sup>13</sup> See Ex. D (Feb. 15, 2021 Cmts. of Bruce and Maureen Johnson on MPCA Proposed Rule Change to Class 3 & 4 Water Quality Standards), available at. These comments discuss field research at LTV Steel's former Dunka Taconite Mine site, which discharges sulfate to downstream surface waters, including Bob Bay of Birch Lake. *Id.* at 12, 24 (discussing DNR field testing confirming concentrated sulfate at the bottom of this bay ranging from 310-500 mg/L sulfate even during summer).

<sup>14</sup> *Id.*

<sup>15</sup> Attach. 2, Ex. A.

<sup>16</sup> MPCA 2020 Guidance at 42 (using eight points over two years); 46 (using five observations over three of the last 10 years for metals, chloride, and ammonia), at <https://www.pca.state.mn.us/sites/default/files/wq-iw1-04k.pdf>.

<sup>17</sup> *Id.* at 12.





Third, the 2020 Guidance does not provide an express methodology for sulfate (an intentional omission), so Region 5 must apply professional best judgment and use more than one approach—even if the methodology may evolve over time and additional field data may be available in future. As the Guidance recognizes: “The necessary number and type of samples can vary considerably from one situation to another and the determination of adequacy for the purpose of assessment will necessarily involve considerable professional judgment.”<sup>18</sup>

The Band proposes Region 5 use the following methodologies (which differ from those MPCA applies in its March 2021 letter), all of which are generally in accordance with the 2020 Guidance for conventional pollutants:

- If there are five observations over three of the last 10 years and all are 25% or more beyond the limit (or 12.5 mg/L) for sulfate, a wild rice water must be listed as impaired. This is in line with the 2020 Guidance for another salty parameter, chloride,<sup>19</sup> and is also in line with best professional judgment.
- If there are at least three readings over a period of at least one year and all are 25% or more beyond the limit (or 12.5 mg/L) for sulfate, a wild rice water must be listed as impaired. Three data points provide reliability and the period of at least one year confirms that an impairment is persistent. This is also in accordance with best professional judgment.
- If there are at least two observations of an exceedance in any two years of the last 10 years and both are at or above three times the standard (30 mg/L), a wild rice water either must be listed as impaired or a reasonable justification must be offered for not listing it. This is because both professional standards and logic dictate that magnitude of the exceedance is enough to demonstrate a chronic impairment, despite limited data points. Conversely, the closer the exceedances are to the actual criteria means more data points are needed to confirm an exceedance. Looking at a concentration that is three times higher than the criterion greatly reduces the likelihood of a false negative even with a relatively small dataset, and there would have to be several events where the concentration is shown at or below the criteria to pull it out of an impaired range.

## 5. Maps of Wild Rice Waters and Testing Sites

Concurrently with the submission of these comments, the Band is proud to share both with all other tribes in the state, Region 5, and state copyees a link to 27 detailed GIS maps of all known wild rice waters in Minnesota, as identified on the 1854 Authority and 2008 DNR wild rice lists. The Band’s GIS specialist prepared these and it is a work in progress. Also provided is a geodatabase that includes the data used in making this statewide map series. Additionally, these also depict sulfate data points per the latitude/longitude data in the MPCA data provided to the Band and that the Band presented in its May 2020 letter. It is the Band’s hope that these maps will function as a helpful tool in this and other efforts to protect this precious resource.

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<sup>18</sup> *Id.* at 17; *see also* 36 (same).

<sup>19</sup> *Id.* at 46.



## 6. Conclusion

The Band again thanks Region 5 for its action to partially deny the 2020 List and hopes that these comments will assist you in your current evaluation. Staff is also standing by to discuss and respond to any questions you may have. We note that other tribes may also be submitting written comments, and we also expect to provide follow-up comments once Region 5 issues the list of impaired wild rice waters.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert F. Deschampe".

Robert F. Deschampe  
Chairman

A handwritten signature in blue ink, appearing to read "April M. McCormick".

April M. McCormick  
Secretary/Treasurer

- c: Minnesota Tribal Leaders (by email only)  
Patina Park, Tribal State Relations Systems Implementation (by email only:  
patina.park@state.mn.us)  
Laura Bishop, MPCA Commissioner (by email only, Laura.Bishop@state.mn.us)  
Katrina Kessler, MPCA (by email only: katrina.kessler@state.mn.us)  
Helen Waquiu, MPCA (by email only: helen.waquiu@state.mn.us)  
Catherine Neuschler, MPCA (by email only: catherine.neuschler@state.mn.us)  
Barbara Wester, US EPA Region 5, Office of Regional Counsel  
(by email only: wester.barbara@epa.gov)  
Tera Fong, US EPA Region 5, Water Division Director (by email only: Fong.Tera@epa.gov)  
Alan Walts, US EPA Region 5, Office of International and Tribal Affairs  
(by email only: walts.alan@epa.gov)  
Sarah Strommen, MnDNR Commissioner (by email only: commissioner.dnr@state.mn.us)  
Bradley Harrington, MnDNR (by email only: Bradley.Harrington@state.mn.us)