

June 20, 2018

Governor Mark Dayton
130 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd
Saint Paul, Minnesota 55155

VIA U.S. MAIL

Re: *Executive Order 18-08 Establishing the Governor's Task Force on Wild Rice*

Dear Governor Dayton:

The Minnesota Chippewa Tribe is a federally recognized Indian tribe comprised of six constituent Bands of Anishinaabe: Bois Forte, Fond du Lac, Grand Portage, Leech Lake, Mille Lacs, and White Earth. Together, we comprise the over 40,000 members of the Minnesota Chippewa Tribe.

The Minnesota Chippewa Tribe appreciates your recent efforts to protect wild rice by ensuring that water quality standards are not undermined. The Minnesota Chippewa Tribe supports the creation of the wild rice task force provided that each of the member reservations of the Tribe be provided a separate seat on the task force.

In a Tribal Executive Committee meeting, held on May 31st in Walker, MN, the Minnesota Chippewa Tribe acted on the attached Resolution 82-18, which authorized each member reservation to appoint an individual to sit on your recently created wild rice task force. For this reason, we ask that you consider adding the seats for these appointments.

Miigwech (thank you) for your consideration of our request.

Sincerely,

A handwritten signature in blue ink, appearing to read 'K. Dupuis', written over a horizontal line.

Kevin R. Dupuis Sr.
President

Attachment:



October 2, 2020

Kurt Thiede, Regional Administrator
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3507
By email only: thiede.kurt@epa.gov

Re: MPCA 303(d) List Submission to US EPA.

Administrator Thiede:

We are concerned that EPA has not communicated directly with the Tribal Leaders, including the members of Minnesota Indian Affairs Council (MIAC), and the Minnesota Chippewa Tribe (MCT), regarding EPA's time extension for Minnesota Pollution Control Agency (MPCA) to submit their final 2020 303(d) list. After Tribal Leaders issued the *Joint Tribal Response Letter to MPCA* dated April 27, 2020, and copied EPA *Re: Exclusion of Impaired Wild Rice Waters from MPCA 2020 303(d) List*, we have eagerly awaited the 303(d) list submittal. We stand firm on our position of MPCA listing the impaired wild rice waters and do not desire to further consult with the agency itself on this specific issue. On Friday July 17, 2020, the Governor and Lieutenant Governor honored the Tribal Leaders' request for a formal government-to-government call, where Grand Portage presented the collective 11 Tribes' position on the importance of clean water for Psin and Manoomin (wild rice), federal and state law, the history of inaction by MPCA, and a call to action regarding submitting the 303(d) list. Recently in August, tribal staff received a response from EPA after bringing up the issue during a MN Tribal Environmental Committee meeting. The response we received is provided below:

“EPA recognizes that the submittal of the final Minnesota 2020 303(d) list and supporting documentation is overdue. MPCA has requested additional time to address the comments submitted by the tribes during the public notice process (January 2020). Since the State has responsibility for assembling a complete list submittal, including responding to comments received, EPA believes it is appropriate to afford the State the extra time requested.

Whenever the final 2020 303(d) list is submitted to EPA, EPA will offer federally recognized tribes the opportunity for tribal consultation. EPA will be sending tribal consultation invitation letters to tribal leadership and will have additional follow-up

*communication with tribal water staff. These communication efforts will commence upon the receipt of the final 2020 303(d) list and supporting documentation from the State. EPA's consultation invitation will be limited to EPA's review of the list and supporting documentation provided by the State. Should tribes have additional comments or concerns regarding the State's pre-submittal draft list, we strongly encourage you to make these concerns known to State officials prior to MPCA's submittal of the list to EPA so that information can be included."*¹

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. We have also made clear that the 2020 list must include wild rice waters, and that we will no longer tolerate MPCA or EPA's delays or dismissal of this issue. Suggesting that it is appropriate to afford the State the extra time requested without providing a date when MPCA must submit the 2020 list is a clear statement about EPA's lack of regard for its Trust Obligations to all twelve Tribes that reside within the boundaries of Minnesota. A trustee is required to preserve and maintain trust assets and must not allow them to "fall into ruin on his watch."² 537 U.S. at 475. This additional insult comes at a time when we have learned that EPA, without Tribal consultation or notification, dropped an enforcement action against US Steel Minntac that was requested in writing by Grand Portage and Fond du Lac in 2011, due to the MPCA's unwillingness to work with EPA. And, that MPCA's Pesticide General permit (NPDES permit) has been inappropriately used by the MN DNR to kill hybrid cattails with Glyphosate at the mouth of the outlet between upper Rice Lake and Lower Rice Lake without proper formal notification to White Earth Reservation. White Earth Leaders have tried to work with both MPCA and EPA, the agencies responsible for issuing the pesticide general permits used in this action, to prevent similar actions and save the wild rice waters within their Reservation to no avail.

EPA is obligated to ensure that MPCA complies with the Act's impaired waters provisions, or commence its own TMDL process.³ EPA approved both the 2016 and 2018 lists in 2019 stating that the Agency reviewed the 24 wild rice waters listed in the MN 7052 rules and none of them were impaired. This "conclusion" was made in spite of the fact that Grand Portage and Fond du Lac sued EPA in 2011 regarding a variance for Mesabi Nugget's discharge into the Partridge River, a known, existing use wild rice water that is not included on the MN 7052 rule list of wild rice waters. EPA is also well aware that the Twin Lakes, polluted by Minntac, are existing use impaired wild rice waters that do not happen to be included on the 7052 rules list, either.

EPA has assisted MPCA contravention of state and federal law by allowing the agency to avoid inclusion of wild rice waters in the 2012, 2014, 2016, and 2018 lists. *CWA § 303(d)(2)*, 33 U.S.C. § 1313(d)(2) requires U.S. EPA to approve or disapprove a state's 303(d) List within 30 days after the state's submission of its list to U.S. EPA. EPA waited for more than one year to

¹ E-mail from Darrel Harmon, US EPA Region 5 Tribal Liaison, Sept. 8, 2020.

² *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003)

³ *Alaska Ctr. for the Env't v. Reilly*, 796 F. Supp. 1374, 1381 (W. D. Wa.1992), *aff'd as Alaska Ctr. for the Env't v. Browner*, 20 F 3d 981 (9th Cir. 1994).

approve the MPCAs 2018 list, and more than three years to approve the 2016 list. By failing to comply with the CWA requirement that it approve or disapprove the 303(d) List by 30 days after its submission, U.S. EPA extended and continues to extend the amount of time before a decision that might trigger the restoration of wild rice waters in MN. The tribes consider this a reprehensible dereliction of trust responsibility as well as the agency's responsibilities under the CWA.

U.S. EPA's ongoing failure to approve or disapprove MPCA's 303(d) List has harmed and continues to harm Tribal members in their use of treaty reserved property rights. *"Reserved property rights, explained by the Supreme Court in 1905 in United States v. Winans, 198 U.S. 371, are not "a grant of rights to the Indians, but a grant of rights from them. In Winters v. United States, 207 U.S. 564 (1908), the Supreme Court applied this principle in a water rights case. These two cases are the basis the "reserved rights doctrine", that recognizes tribes retain those rights of a sovereign government not expressly extinguished by a federal treaty or statute."*⁴

Further, federal law allows Tribes to initiate litigation for EPA's approval of 303(d) lists going back seven years. If EPA continues to stall on behalf of MPCA, Tribes will be forced to take action on EPA's 2014, 2016, and 2018 approvals of the MPCAs 303(d) lists. We believe we have enough written documentation to demonstrate a lack of good faith and meaningful consultation by both MPCA and EPA on this issue. We request a formal response from US EPA to Tribal leaders within 15 days of receipt of this letter that indicates when EPA expects to receive the 2020 MPCA Impaired Waters List and how the Agency intends to uphold Tribal Trust Obligations moving forward.

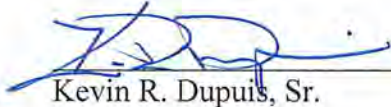
Sincerely,

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 Waquiui, MPCA (by email only: helen.waquiui@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)

⁴ The Federal-Tribal Trust Relationship: Its Origin, Nature, and Scope, Pevar, Stephan L., 2009.

Signature Page - October 2, 2020
Letter to Kurt Thiede, Regional Administrator
Re: MPCA 303(d) List Submission to US EPA



Kevin R. Dupuis, Sr.

Chairman

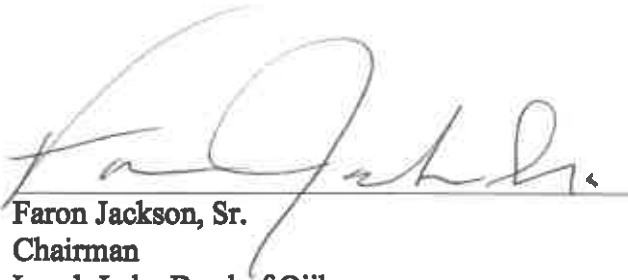
Fond du Lac Band of Lake Superior Chippewa

Signature Page - October 2, 2020
Letter to Kurt Thiede, Regional Administrator
Re: MPCA 303(d) List Submission to US EPA



Robert F. Deschampe
Chairman
Grand Portage Band of Lake Superior Chippewa

Signature Page - October 2, 2020
Letter to Kurt Thiede, Regional Administrator
Re: MPCA 303(d) List Submission to US EPA

A handwritten signature in black ink, appearing to read "Faron Jackson, Sr.", written over a horizontal line.

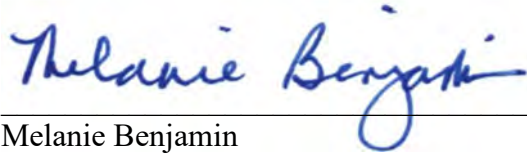
Faron Jackson, Sr.
Chairman
Leech Lake Band of Ojibwe

*Signature Page - October 2, 2020
Letter to Kurt Thiede, Regional Administrator
Re: MPCA 303(d) List Submission to US EPA*



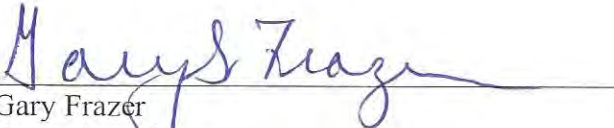
Robert Larsen
President
Lower Sioux Indian Community

*Signature Page - October 2, 2020
Letter to Kurt Thiede, Regional Administrator
Re: MPCA 303(d) List Submission to US EPA*



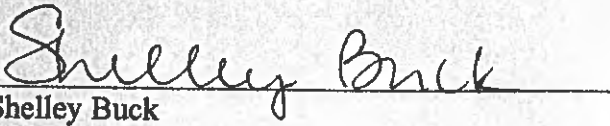
Melanie Benjamin
Chief Executive
Mille Lacs Band of Ojibwe

*Signature Page - October 2, 2020
Letter to Kurt Thiede, Regional Administrator
Re: MPCA 303(d) List Submission to US EPA*

A handwritten signature in blue ink that reads "Gary Frazer". The signature is written in a cursive style and is positioned above a horizontal line.

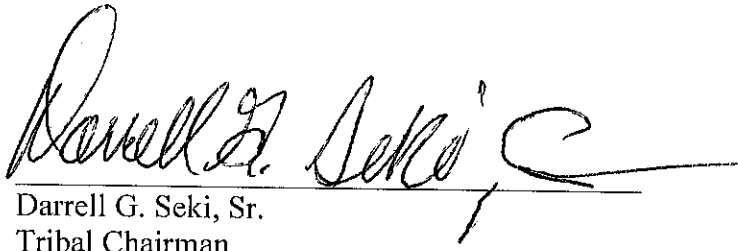
Gary Frazer
Executive Director
Minnesota Chippewa Tribe

Signature Page - October 2, 2020
Letter to Kurt Thiede, Regional Administrator
Re: MPCA 303(d) List Submission to US EPA

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

Shelley Buck
President
Prairie Island Indian Community

*Signature Page - October 2, 2020
Letter to Kurt Thiede, Regional Administrator
Re: MPCA 303(d) List Submission to US EPA*

A handwritten signature in black ink, reading "Darrell G. Seki, Sr.", with a long horizontal flourish extending to the right.

Darrell G. Seki, Sr.
Tribal Chairman
Red Lake Band of Chippewa Indians

Signature Page - October 2, 2020
Letter to Kurt Thiede, Regional Administrator
Re: MPCA 303(d) List Submission to US EPA



Kevin Jensvold
Chairman
Upper Sioux Community

Signature Page - October 2, 2020
Letter to Kurt Thiede, Regional Administrator
Re: MPCA 303(d) List Submission to US EPA



Michael Fairbanks
Chairman
White Earth Nation



Commissioner Laura Bishop
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, MN 55155-4194
By email only: Laura.Bishop@state.mn.us

Re: Exclusion of Impaired Wild Rice Waters from MPCA 2020 303(d) List.

Dear Commissioner Bishop:

As discussed on our call with MPCA staff, the Governor's staff, and you on the morning of April 22, we have received the April 15 response of MPCA Assistant Commissioner Katrina Kessler to the January 8 comments of the Minnesota Indian Affairs Council and other tribes on the draft 2020 303(d) list of Minnesota's impaired waters. We accept your invitation to meet to discuss potential steps before you submit the list to the EPA. All the undersigned tribes hereby formally request a government-to-government consultation on this topic, with leadership on both sides present (including MPCA staff, along with the Governor and Lieutenant Governor, as well as tribal liaisons). We copy the Governor's office here.

I. Response to MPCA's April 15 Letter.

As we said, we appreciate MPCA's offer to collaborate, as well as the past year of positive consultation meetings with MPCA leadership. We also appreciate that MPCA's response takes a respectful tone, and that the agency now acknowledges that the 10 mg/L wild rice sulfate standard is the law and must be followed.¹ But the response entirely ignores most of the January tribal comments, not to mention the long, contentious history of this issue. Minnesota tribes have now made the same comments on four cycles of draft impaired waters lists. MPCA has repeatedly promised to include impaired wild rice waters in the "next" cycle and has given ever-changing reasons for putting off the date.² In the April 15 response, MPCA makes the same promise yet

¹ Minn. R. 7050.0224 subp. 1-2.

² See, e.g., EPA Dec. Doc. For the Approval of Minnesota's 2016 and 2018 Clean Water Act Section 303(d) Lists (Jan. 28, 2019) at 7, available at <https://www.pca.state.mn.us/sites/default/files/wq-iw1-63.pdf>: "In its decision document approving Minnesota's 2012 303(d) and 2014 303(d) lists, EPA explained that MPCA had committed to develop a wild rice/sulfate impaired waters assessment approach to analyze and

again, now for the 2022 list. Minnesota's wild rice waters are being degraded and action is required now, not in two more years.

MPCA's given reason for singling out impaired wild rice waters for exclusion from the 2020 list is that MPCA has 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."³ For all the reasons explained in our January comments, and discussed further below, this makes no sense.

Additionally, while this wasn't mentioned in the draft list itself, on the call, MPCA noted the language in a 2015 Minnesota session law that purported to prohibit listing impaired wild rice waters.⁴ As we explained in our January comments, it is our position that this law by its terms has expired. Even if it had not, however, the session law is illegal and unenforceable under federal Clean Water Act ("CWA") standards.⁵

MPCA in its April 15 letter requests the opportunity to work with tribal staff "to develop an assessment methodology for the existing 10 mg/L wild rice sulfate standard" for the 2022 list. MPCA then identifies the components of an assessment methodology including what waters to assess, how to share reliable data, how much sulfate data is needed for an assessment, if the data should be evaluated using an average or maximum concentration, and the number of exceedances to determine an impairment.

We agree that these are appropriate components of a methodology and look forward to working with MPCA to hone them further for the 2022 list cycle. As MPCA staff already know, those elements are all part of the existing methodology Fond du Lac and Grand Portage water quality programs use to evaluate wild rice waters' sulfate levels within their respective reservations. Per the request on the call, we have provided these guidelines again via email.

Nevertheless, we reiterate that MPCA's own conventional-contaminant assessment protocols, discussed below, *already* provide a methodology the agency is required to apply right now. It was by following MPCA's own guidance that tribal staff assembled its preliminary list of impaired wild rice waters in the 1854 Ceded Territory. In all of those waters, impairment levels were many times higher than the 10 mg/L sulfate threshold, with the lowest at 71.2 mg/L (Embarrass River) and the highest at 628.5 mg/L (Second Creek). Waiting any longer to list these and other wild rice

assess water quality data for potential impairment of its sulfate criterion for the 2014 listing cycle. MPCA's 2016 and 2018 303(d) submittals did not include this assessment."

³ See <https://www.pca.state.mn.us/water/minnesotas-impaired-waters-list>.

⁴ 2015 Minn. Laws 1st Spec. Sess. ch. 4, Art. 4, § 136; 2017 Minn. Laws ch. 93, Art. 2, § 149.

⁵ 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").

waters with prolonged and/or chronic impairment until the methodology is “perfect” is neither necessary nor legally sufficient.

MPCA suggests in the April 15 letter that there is more work to do before it is possible to know which wild rice waters should be assessed. But the Minnesota Department of Natural Resources and tribal agency staff have long since developed and updated lists of state waters where wild rice is an existing use.⁶ The Office of Administrative Hearings expressly found in 2018 that all wild rice waters identified on the DNR and 1854 Treaty Authority lists are, indeed, wild rice waters within the meaning of Minnesota law.⁷ Those are the waters to assess.

As for MPCA’s proposal that we “share data,” tribal agencies already do so. For decades, Minnesota tribes and intertribal agencies have elevated to MPCA concerns for the protection and restoration of wild rice across our reservations, ceded territories, and traditionally harvested waters. Since at least 2005, we have called attention to the MPCA’s failure to implement and enforce the wild rice sulfate standard in water quality permits. We have urged MPCA to work with DNR to collect the data necessary to verify wild rice waters, and to develop metrics for reporting and assessing the condition of wild rice waters. We have provided water quality data and documentation of wild rice waters, supported the development of and implemented a standardized method for surveying wild rice stand density and estimating annual biomass, and actively engaged in consultation with both state agencies on how best to manage, protect, and restore wild rice.

Our survival as tribal people is intimately tied with the survival of wild rice. So we will always share data and expertise on wild rice with state agencies in order to work to maintain the resource. In return, we ask that MPCA staff and leadership thoroughly review the data and analysis we provide, collaborate in good faith, and enforce the law.

II. Existing MPCA Methodology.

In our January comments, we explained the methodology tribal staff applied in assembling its list of impaired wild rice waters in the 1854 Ceded Territory. MPCA did not acknowledge either the methodology or the tribal findings in its April 15 response. Therefore, we detail it further here.

Sulfate is a conventional pollutant. For such pollutants, as in past versions of the guidance, the MPCA 2020 Guidance Manual for Assessing Minnesota Surface Waters states that “[t]he MPCA generally uses data collected over the most recent 10-year period for all the water quality assessments considered for 303(d) impairments” to ensure a variety of flow and weather conditions

⁶ DNR, Minnesota’s Wild Rice Waters (Feb. 15, 2008), available at https://files.dnr.state.mn.us/fish_wildlife/wildlife/wildrice/statewide-inventory-wild-rice-waters.pdf; 1854 Authority Wild Rice Survey, available at <https://www.1854treatyauthority.org/wild-rice/wild-rice-survey.html>.

⁷ OAH, *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 WQS Proceeding”), ALJ Rep., OAH 80-9003-34519 (Jan. 9, 2018) at 68-69; *see also* *Wild Rice WQS Proceeding*, Rep. of Chief ALJ (Apr. 12, 2018), available at <https://www.pca.state.mn.us/water/protecting-wild-rice-waters>.

are represented. However, a full 10 years of data are not required to make an assessment.⁸ Most often, data for assessments are queried from MPCA's water quality data management system, EQUIS (Environmental Quality Information System) in order to make sure that data used in assessment decisions has been collected and analyzed using requirements specified in an EPA approved Quality Management Plan.⁹

If sufficient data are available, MPCA is to compare individual parameters with numeric and narrative standards to determine if the parameters meet or exceed MPCA's criteria. The quality of the assessment is then ranked based on the amount of data available, the area the data covers, and when the data was collected. Then it is assigned a low, medium, or high quality rating. In the end, "[f]or some parameters, the parameter-level evaluation is equivalent to the final use assessment decision (e.g., aquatic consumption)."¹⁰ MPCA uses 10% and 25% exceedance frequencies to assess impairments caused by conventional pollutants based on 1997 EPA guidance.¹¹

Following this guidance, and given the sulfate data already known, MPCA need only conduct a tabletop exercise to determine what wild rice waters to include on the 2020 list. MPCA should pull sulfate data from EQUIS and cross-reference the results with the DNR and 1854 Authority wild rice waters lists. It should also evaluate other records, such as discharge monitoring reports for dischargers known to be releasing sulfate into wild rice waters. All wild rice waters that have sulfate exceedances of 25% or more above the 10 mg/L wild rice sulfate standard should then be placed on the 2020 list. Given the relative ease with which tribal staff were able to evaluate MPCA's data for the 1854 Ceded Territory, there is no reason that MPCA cannot perform this query statewide now.

III. Legal Issues.

MPCA's "disclaimer" on the draft list and in its April 15 response that lack of methodology prevents listing of any impaired wild rice waters now also does not comport with federal law and guidance. MPCA has offered this same, flawed rationale to EPA in the past and has been rebuked. Although EPA approved Minnesota's 2016 and 2018 303(d) lists, EPA criticized MPCA'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."¹²

Under CWA regulations, "[e]ach State shall assemble and evaluate all existing and readily available water quality-related data and information to develop the [303(d)] list."¹³ This includes

⁸ MPCA 2020 Guidance Manual for Assessing the Quality of Minnesota Surface Waters (Oct. 2019) at 10, available at <https://www.pca.state.mn.us/water/minnesotas-impaired-waters-list>.

⁹ *Id.*

¹⁰ *Id.* at 11.

¹¹ *Id.*

¹² *Id.* at n.1. *See also id.* at 27-29 (noting MPCA did not adequately address public comments on the exclusion of impaired wild rice waters in connection with both the 2016 and 2018 303(d) lists).

¹³ 40 C.F.R. Section 130.7(b)(5).

“all of the existing and readily available data and information” about different categories of waters, including “waters for which water quality problems have been reported by local, state, and federal agencies. 40 C.F.R. Sec. 130.7(b)(5)(iii). 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. Section 130.7(b)(5).¹⁴

MPCA’s “disclaimer” does not constitute a legal rationale to ignore the existing and readily available data and information confirming impairments to wild rice waters. MPCA’s omission of known, impaired wild rice waters from the 2020 303(d) list would constitute a “textbook violation” of the CWA.

IV. Conclusion

The undersigned Minnesota tribes look forward to continuing to work with MPCA to improve the 2022 impaired waters list. But MPCA must enforce the law now. **MPCA must include on the 2020 impaired waters list all wild rice waters for which existing data confirm sulfate concentrations 25% or more above 10 mg/L, and where the data set indicates chronic or prolonged exceedance of the standard.** If MPCA excludes these waters from the final version of the list, the undersigned Minnesota tribes will urge the EPA to disapprove and take appropriate steps under CWA regulations, and will consider other legal options to protect Minnesota’s wild rice waters. Conversely, as we said on the call: if MPCA stands with Minnesota tribes on this, we will stand with you if MPCA’s inclusion of impaired wild rice waters on the 2020 list is challenged. Thank you.

Sincerely,

See attached Tribal Leader signature pages

¹⁴ *Envtl. Law & Policy Ctr. v. United States Env'tl. Prot. Agency*, 415 F. Supp. 3d 775, 779-80 (N.D. Ohio 2019) (denying EPA motion to dismiss 303(d) challenge under APA and CWA; discussing Ohio’s refusal to list open waters of Lake Erie as impaired despite extensive data confirming toxic algae blooms); *see also Sierra Club v. Leavitt*, 488 F.3d 904, 913 (11th 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 water quality standards, 33 U.S.C. § 1313(d)(1)(A); states cannot shirk this responsibility simply by claiming a lack of current data.”); *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”).

- 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)
- Miranda Nichols, MPCA (by email only: miranda.nichols@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)
- Tom Short, US EPA Region 5, Water Division Acting Director
(by email only: Short.Thomas@epa.gov)
- Alan Walts, US EPA Region 5, Office of International and Tribal Affairs
(by email only: walts.alan@epa.gov)



The Minnesota Chippewa Tribe

January 8, 2020

Administration
218-335-8581
Toll Free: 888-322-7688
Fax: 218-335-8496
Home Loan
218-335-8582
Fax: 218-335-6925
Economic Development
218-335-8583
Fax: 218-335-8496
Education
218-335-8584
Fax: 218-335-2029
Human Services
218-335-8586
Fax: 218-335-8080

Miranda Nichols (miranda.nichols@state.mn.us)
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, Minnesota 55155

Re: Comments on Minnesota's 2020 Draft Clean Water Act § 303(d) Impaired Waters List.

Dear Ms. Nichols:

The Minnesota Chippewa Tribe ("MCT") hereby submits these comments in connection with Minnesota's Draft 2020 303(d) Impaired Waters List ("Draft List"). Of major concern is the fact that the Draft List categorically and improperly excludes all Minnesota waters used for the production of wild rice, despite the fact that they are protected by a water quality standard that has been in place since 1973. The Draft List includes an explicit "Disclaimer" that states:

The Minnesota Pollution Control Agency (MPCA) has not finalized methods for identifying waters used for production of wild rice or for assessing impairment of waters based on the existing wild rice-related standard. Consequently, the 2020 303(d) Impaired Waters List does not include any waters assessed as impaired for the sulfate wild rice standard. The MPCA continues to consider next steps for the sulfate standard to protect wild rice. Go to <https://www.pca.state.mn.us/water/protecting-wild-rice-waters> for more information.¹

The cited webpage is to MPCA's Notice of Withdrawal of its failed Wild Rice Rule (dated April 26, 2018). There is no new, pending rulemaking or other "next steps" listed. MPCA has not even attempted to provide a genuine factual or legal justification for excluding these waters from the Draft List.² As discussed below, methods for identifying wild rice waters are well-established, as are means of assessing impairments. This is a political decision that ignores the requirements of the Clean Water Act ("Act"), and it is a continuation of this agency's ongoing refusal to protect an irreplaceable resource.

¹ See <https://www.pca.state.mn.us/water/minnesotas-impaired-waters-list>.

² See 40 CFR 130.7(b)(6)(iii).

1. MCT Background.

The MCT is a federally recognized tribal government comprised of the Bois Forte, Fond du Lac, Grand Portage, Leech Lake, Mille Lacs, and White Earth Reservations, which have reserved off-reservation hunting, fishing, and other harvesting, or usufructuary, rights. 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.³ These rights were retained to ensure hunting, fishing, and gathering for subsistence, economic, cultural, medicinal, and spiritual needs could continue into perpetuity. 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. MCT Ordinance 8, Section 300, states that “water is the primary resource of the natural resource system. Thus protecting the quality and quantity of the water resource is the primary objective of these laws and, further, the interrelationships of water and other natural resources is such that the management of soil, timber, air and mineral resources has both direct and indirect effects upon the quality and quantity of water, fish, wild rice, and wildlife resources.”

The state has a unique government-to-government relationship with all Minnesota tribes, and state agencies in Minnesota co-manage treaty resources with the Bands.⁴ Federal agencies have a legal responsibility to maintain all tribal, treaty-reserved natural resources.⁵

2. CWA Impaired Waters List Requirements.

The purpose of identifying impaired waters under the Act is to prioritize impaired waters based on the severity of the pollution and then calculate a Water Quality Based Effluent Limit (“WQBEL”) or Total Maximum Daily Load (“TMDL”) to limit pollutants causing the impairments so that applicable water quality standards can be attained.⁶ To achieve this requirement, calculations or predictions that indicate water quality standards (“WQS”) designated and existing uses are not being achieved, waters for which water quality problems

³ 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.

⁴ *See, e.g.*, 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).

⁵ *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.”).

⁶ 33 U.S.C. § 1313(d); 40 C.F.R. §130.7(d)(1).

have been reported by the public or other agencies, and waters identified by the state as impaired or threatened in a nonpoint assessment must be identified on the Impaired Waters List.⁷

3. Minnesota's Wild Rice Sulfate Standard.

Since 1973, Minnesota Water Quality Standards ("MN WQS") have included a 10 milligram per liter ("mg/l") limit on sulfate in waters used for the production of wild rice.⁸ MN WQS designated use of Class 4 waters for the propagation and maintenance of natural stands of wild rice states "the quality of these waters and the aquatic habitat necessary to support the propagation and maintenance of wild rice plant species must not be materially impaired or degraded. *If the standards in this part are exceeded in waters of the state that have the class 4 designation, it is considered indicative of a polluted condition which is actually or potentially deleterious, harmful, detrimental, or injurious with respect to the designated uses.*"⁹

MCT Bands have made comments to the MPCA and US Environmental Protection Agency ("US EPA") regarding the exclusion of wild rice waters from the 2012, 2014, 2016, and 2018 impaired waters lists, but WQBELs or TMDLs for these waters have not been initiated. This is despite the fact that MPCA is required to consider the input gathered from tribal consultation in their decision-making processes, with the goal of achieving mutually beneficial solutions.¹⁰ This exclusion is the result of sustained political pressure rather than reasoned decision making, and it violates the Act.

In 2011, the US EPA provided written comments to the MPCA stating that the wild rice sulfate standard must be enforced under the Act. The mining industry at the same time lobbied for legislation to repeal or substantially diminish the State's limit on sulfate pollution in wild rice waters. In contravention of the Act, the Minnesota Legislature passed a 2011 Session Law allocating money for research and setting up an advisory committee overseen by the MPCA in an attempt to create a basis to weaken or repeal Minnesota's wild rice sulfate standard.

Then, in 2012, US EPA approved MPCA's 2012 list of impaired waters because of MPCA assurances that the 2014 list *would* include impaired wild rice waters. But in 2014, MPCA staff stated that they did not know how to assess whether wild rice waters were impaired and would soon develop assessment methodologies. Until those methods were developed, wild rice waters would not be included in the 303(d) list.

In 2015, the Minnesota Legislature passed a Session Law forbidding MPCA to include wild rice waters in the 303(d) list, which the Legislature updated again in 2016 and 2017.¹¹ The rule provided that:

⁷ 40 C.F.R. § 130.7(b)(5).

⁸ Minn. R. 7050.0224, subp. 2.

⁹ Minn. R. 7050.0224, subp. 1 (emphasis added).

¹⁰ See, e.g., Exec. Order 19-24.

¹¹ 2015 Minn. Laws 1st Spec. Sess. ch. 4, Art. 4, § 136; 2017 Minn. Laws ch. 93, Art. 2, § 149.

(a) Until the commissioner of the Pollution Control Agency amends rules refining the wild rice water quality standard in Minnesota Rules, part 7050.0224, subpart 2, to consider all independent research and publicly funded research and to include criteria for identifying waters and a list of waters subject to the standard, implementation of the wild rice water quality standard in Minnesota Rules, part 7050.0224, subpart 2, shall be limited to the following, unless the permittee requests additional conditions:

(2) the agency shall not list waters containing natural beds of wild rice as impaired for sulfate under section 303(d) of the federal Clean Water Act, United States Code, title 33, section 1313, until the rulemaking described in this paragraph takes effect.¹²

Thereafter, MPCA engaged in rulemaking to repeal the 10 mg/l sulfate standard for the protection for wild rice and replace it with equation-based criteria.¹³ On January 9, 2018, an Administrative Law Judge (“ALJ”), with later concurrence from the Chief ALJ, disapproved the proposal because it:

- failed to meet the definition of a rule;
- failed to consider the proposed rule’s burden on Native American communities;
- failed to address the potential conflict between the 10 milligrams per liter standard that both Grand Portage and Fond du Lac have adopted;
- failed to protect public health and welfare by not considering effects related to increased mercury methylation;
- failed to protect downstream waters from degradation;
- failed to demonstrate the proposed rule would protect wild rice; and
- *failed to identify all waters previously identified as wild rice waters by the Minnesota Department of Natural Resources (“MN DNR”) and Minnesota Indian Tribes.*¹⁴

Instead of revising the proposed rule, MPCA withdrew it and has made no new proposal. Therefore, the 10 mg/L sulfate standard for waters used for the production of wild rice is still the law.

4. Identification of Specific, Impaired Wild Rice Waters.

As reflected in the ALJ’s decision, MPCA is very familiar with the lists of wild rice waters in Minnesota, including those that are impaired, given the extensive records of the DNR, the Bands, and its own files. US EPA Region 5 is also acutely aware of impaired wild rice waters in

¹² *Id.*

¹³ Available at <https://www.pca.state.mn.us/sites/default/files/wq-rule4-15mm.pdf>.

¹⁴ *Id.* at 68-69.

Minnesota for the same reasons. US EPA is obligated to ensure that MPCA complies with the Act’s impaired waters provisions, or commence its own TMDL process.¹⁵

Methods for identifying wild rice waters are well-established, as are means of assessing impairments—in fact, it is possible to evaluate many such waters based upon public data. Therefore, MPCA’s claim that it cannot assemble such information because it “has not finalized methods for identifying waters used for production of wild rice or for assessing impairment of waters based on the existing wild rice-related standard” is simply false. Wild rice waters can be identified using the MN DNR’s public GIS website, and the sulfate data collected and mapped by the MPCA itself can be overlaid to determine impairments.

By simply cross-referencing these records, out of more than 515 wild rice waters that have been identified just in the 1854 Ceded Territory, Tribal staff have identified three lakes and five stream segments that are impaired due to high concentrations of sulfate. These lakes and streams are listed below in Table 1.

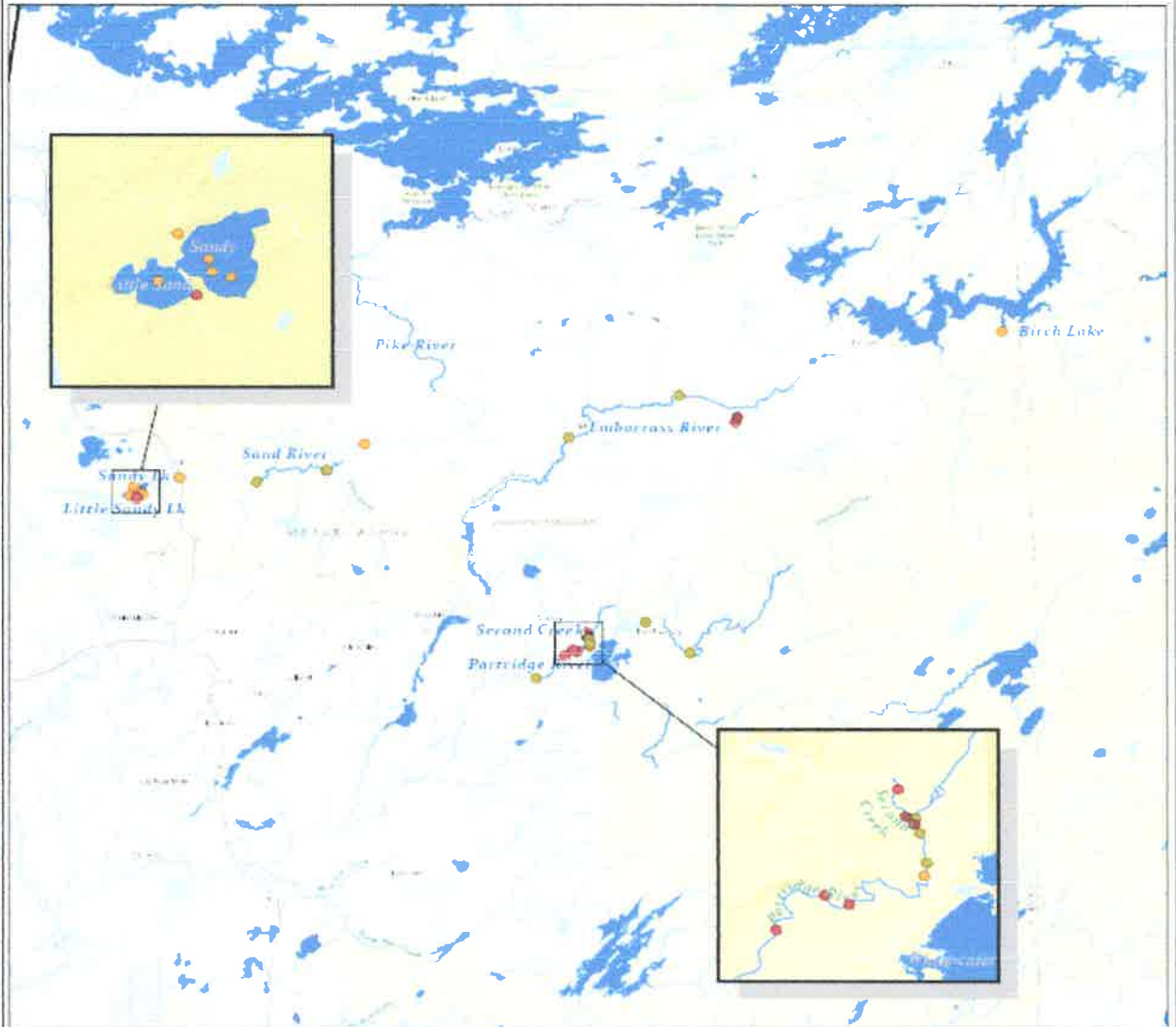
Table 1. Impaired Wild Rice Waters in the 1854 Ceded Territory

Waterbody	MPCA Measured Average Sulfate Concentrations (mg/l)
Birch Lake	110
Embarrass River	71.2
Little Sandy Lake	254.6
Partridge River	264.3
Pike River	110
Sand River	116.8
Sandy Lake	132.3
Second Creek	628.5

Sulfate data was provided by MPCA, and overlaid on wild rice lakes and stream segments identified by the MN DNR Wildlife feature class downloaded from the MN Geospatial Commons <https://gisdata.mn.gov/dataset/biota-wild-rice-lakes-dnr-wld> , and wild rice survey data from the 1854 Treaty Authority. The data points on the map only depict those monitoring points that have median sulfate concentrations that range from seven to sixty-three times more than the 10 mg/L sulfate standard. Therefore, the map and table presented in these comments should not be considered an exhaustive list of impaired wild rice waters within the 1854 Ceded Territory, or the state.

¹⁵ *Alaska Ctr. for the Env't v. Reilly*, 796 F. Supp. 1374, 1381 (W. D. Wa.1992), *aff'd as Alaska Ctr. for the Env't v. Browner*, 20 F 3d 981 (9th Cir. 1994).

Impaired Wild Rice Waters in the 1854 Ceded Territory



WATERBODY	MEDIAN SULFATE PPM (MPCA)
Birch Lake	110
Embarrass River (Avg.)	71.2
Little Sandy Lake (Avg.)	154.6
Partridge River (Avg.)	264.3
Pike River	110
Sand River (Avg.)	116.3
Sandy Lake (Avg.)	132.3
Second Creek (Avg.)	628.5

■ Wild Rice Waters
MPCA Sulfate Summary Station
MEDIAN PPM
● 50 - 100
● 100 - 300
● 300 - 600
● 600+

Data Sources: 1854 Treaty, Minnesota DNR, MPCA
 Date: 12-18-2018 Author: M. Fox



Additionally, the MN DNR and Bands' lists demonstrate where wild rice is an existing use,¹⁶ and MPCA itself has maintained sulfate concentration data on many such waters. If the sulfate standard is exceeded, the MPCA, according to its own WQS, must include those waters on the 303(d) list and develop a TMDL or WQBEL as required by the Act.

State and federal regulatory agencies plainly have the ability to identify water quality impairments in wild rice waters throughout the state. The impaired waters identified here must be included on the Draft List before it is sent to US EPA for approval, along with all impaired wild rice waters. Thank you for the opportunity to provide comments.

Sincerely,



Catherine J. Chavers
President

Cc: Barbara Wester, US EPA Region 5, Office of Regional Counsel
Tom Short, US EPA Region 5, Water Division Acting Director
Alan Walts, US EPA Region 5, Office of International and Tribal Affairs
Bois Forte Band of Lake Superior 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
White Earth Nation

¹⁶ Minnesota Department of Natural Resources, Natural Wild Rice in Minnesota: A wild rice study document submitted to the Minnesota Legislature by the Minnesota Department of Natural Resources" (Feb. 15, 2008), available at http://files.dnr.state.mn.us/fish_wildlife/wildlife/shallowlakes/natural-wild-rice-in-minnesota.pdf