

Honorable LauraSue Schlatter
Office of Administrative Hearings
P.O. Box 64620
Saint Paul, MN 55164-0620
(Docket 80-90030-34519)

Re: Written comments in support of oral testimony provided by the Grand Portage Band of Lake Superior Chippewa on the MPCA's Statement of Needs and Reasonableness on its proposed approach for sulfate standards to protect wild rice.

Honorable Judge Schlatter:

The Grand Portage Band of Lake Superior Chippewa ("Grand Portage" or "Band") appreciates this opportunity to submit written comments to supplement the oral testimony provided by the Band's Water Quality Specialist, Margaret Watkins, during public hearings held on October 26, 2017. Through this submission, Grand Portage: underscores that manoomin (wild rice) is integral to our spiritual and cultural identity; and reiterates our position that the existing federally approved sulfate criterion for protecting wild rice should be maintained and enforced year-round, as there is no scientifically defensible basis for the standards proposed by the MPCA. In addition, Grand Portage expresses its grave disappointment that, contrary to the specific requests that the Band made during consultations with the MPCA, the MPCA has elected to automatically apply its standards to waters situated entirely within the Band's Reservation. We expressly reaffirm our request that the MPCA exclude our waters from the list of Class 4D waters.

1) Manoomin (wild rice) is integral to Grand Portage's way of life.

As you know, Grand Portage is a federally recognized Indian tribe, as one of the member bands of the Minnesota Chippewa Tribe. The Grand Portage, Fond du Lac and Bois Forte Bands retain hunting, fishing, and other usufructuary rights that extend throughout the entire northeast portion of the state of Minnesota under the 1854 Treaty of LaPointe¹ (the "Ceded Territory"). In the Ceded Territory, all the Bands have a legal interest in protecting natural resources, including wild rice. By virtue of their unique government-to-government relationship with the Minnesota tribes, state² and federal agencies³ have a legal responsibility to maintain those treaty resources.

¹ 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 at <http://digital.library.okstate.edu/kappler/Vol2/treaties/chi0648.htm> (last visited Mar. 10, 2014).

² See, e.g., Executive Order 03-05, "Affirming the Government-to-Government Relationship between the State of Minnesota and Indian Tribal Governments Located within the State of Minnesota."

³ 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

Indeed, wild rice waters are not only protected under the 1854 Treaty but under Minnesota law, as demonstrated through multiple rulemaking processes⁴ and executive orders.⁵

Wild rice is considered sacred by Minnesota tribes.

Wild rice, or manoomin is a sacred food and medicine integral to the religion, culture, livelihood, and identity of the Anishinaabeg. According to our sacred migration story, in the long ago a prophet at the third of the seven fires beheld a vision from the Creator calling the Anishinaabe to move west (to a land previously occupied long ago) until they found the place “where food grows on the water.” The Anishinaabeg of the upper Mississippi and western great lakes have for generations understood their connection to Anishinaabe Akiing (the land of the people) in terms of the presence of this plant as a gift from the Creator. In the words of White Earth’s Tribal Historian, Andy Favorite, “Wild rice is part of our prophecy, our process of being human, our process of being Anishinaabe... we are here because of wild rice. We are living a prophecy fulfilled.”

In our Ojibwe language, manoomin is animate, grammatically referred to as “him/her” not “it”, a non-human being, not just an inanimate “resource.” It is both difficult and of utmost importance to adequately translate and appreciate this worldview in the language of mainstream culture and society with its scientific advisory boards for the study of humans and animals and not plants. According to Anishinaabe author Basil Johnston, “...in essence each plant...was a composite being, possessing an incorporated substance, its own unique soul-spirit. It was the vitalizing substance that gave to its physical form growth, and self-healing.” The Anishinaabeg believe that wild rice will always grow where they live. Menominee chief Chieg Nio’pet said his people did not need to sow rice

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.”).

⁴ See, e.g., Minnesota Session Law 2007, Chapter 7, Article 1, Sect. 168; see also Table 4.1-10A, *Summary of NorthMet Project Site Water Quality Classifications by Water Body*; Minn. R. 7050.0224 subp. 1, which states:

In recognition of the ecological importance of this resource, and in conjunction with Minnesota Indian tribes, selected wild rice waters have been specifically identified [WR] and listed in part 7050.0470, subpart 1. The quality of these waters and the aquatic habitat necessary to support the propagation and maintenance of wild rice plant species must not be materially impaired or degraded. 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.

⁵ See, e.g., Executive Order 03-05, "Affirming the Government-to-Government Relationship between the State of Minnesota and Indian Tribal Governments Located within the State of Minnesota."

because it would follow them wherever they went. He told of how Shawano Lake never had manoomin until the Menominee moved there. Similarly when they were banned from Lake Winnebago, the rice had been plentiful there all but disappeared. Whatever happens to the land and to manoomin happens to the Anishinaabe.

Our ceremonies and aadizookanag – sacred stories- also tell of our people's relations with this plant. White Earth Anishinaabe, Joe LaGarde, notes that wild rice and water are the only two things required at every ceremony. Manoomin accompanies our celebrations, mourning, initiations, and feasts, as both food and a spiritual presence. It holds special significance in traditional stories, which are told only during ricing time or when the ground is frozen. "In these stories, wild rice is a crucial element in the realm of the supernaturals and in their interactions with animals and humans; these legends explain the origin of wild rice and recount its discovery..." by Wenabozhoo, or Nanabozhoo, the principal manidoo or spirit in our sacred aadizookanag.

*Manoomin is just as central to our future survival as our past. While we try to overcome tremendous obstacles to our collective health, the sacred food of manoomin is both food and medicine. "Wild rice is consequently a very special gift, with medicinal as well as nutritional values- belief reflected in the Ojibwe use of wild rice as a food to promote recovery from sickness as well as for ceremonial purposes."(Vennum 62). Manoomin is inextricably bound to the religion and identity of the Anishinaabeg. This is why these threats are potentially so devastating and why it is essential that the sanctity and integrity of this plant be preserved. If artificially produced or engineered varieties of wild rice were to compromise the Anishinaabe people and our way of life. Joe LaGarde puts it plainly, "If we lose our rice, we won't exist as a people for long. We'll be done."*⁶

Ojibwe people have harvested, protected and restored wild rice waters for more than 500 years.⁷ Historical reports,⁸ Band member accounts,⁹ current Minnesota Department of Natural Resources

⁶ 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 February 15, 2008, pg. 5, available at https://www.google.com/search?q=Wild+Rice+Sacred+food+and+Medicine%2C+Erma+Vizenor%2C+Tribal+Chairwoman%2C+White+Earth+Nation+With+the+participation+of+Carlton+college+Students.&rlz=1C1GGRV_enUS751US751&oq=Wild+Rice+Sacred+food+and+Medicine%2C+Erma+Vizenor%2C+Tribal+Chairwoman%2C+White+Earth+Nation+With+the+participation+of+Carlton+college+Students.+&aqs=chrome..69i57.30427j0j1&sourceid=chrome&ie=UTF-8 (last visited Oct. 20, 2017)

⁷ *Id.*; see also Jenks, A.E., *The Wild Rice Gatherers of the Upper Great Lakes: A Study in American Primitive Economics* (Washington: GPO, 1901), pg. 1040-42, available at <https://archive.org/stream/wildricegatherer00jenk#page/1039/mode/1up>.

⁸ Jenks, A.E., *The Wild Rice Gatherers of the Upper Great Lakes: A Study in American Primitive Economics* (Washington: GPO, 1901), available at

(“MN DNR”) and tribal reports,¹⁰ establish the significant decline of wild rice throughout Minnesota. In response, Tribes in Minnesota have developed federally approved water quality standards (“WQS”) that include criteria to protect manoomin, and research to demonstrate our criteria are science-based and protective.

2) MPCA’s Proposed Wild Rice Criteria are not scientifically defensible.

Minnesota tribal staff have participated in and followed closely the MPCA’s research program related to the existing sulfate criteria for protecting wild rice waters¹¹. Our thorough review and interpretation of the research results for the state-led hydroponics studies, the field surveys, the mesocosm studies, and the sediment studies leads to our conclusion that the existing federally approved 10 milligrams per liter sulfate criterion is well-supported by multiple lines of evidence; thus, it should be maintained and enforced year-round. As we have concluded in previous comments¹², there is no scientifically defensible basis for changing this sulfate limit, which is the clear benchmark required by the US Environmental Protection Agency for considering approval of a revised criterion¹³, and as was clearly communicated to the Minnesota legislative body in 2011¹⁴.

a) Beneficial Use Classification of “wild rice waters”

It is inherently offensive to Minnesota tribes to classify manoomin as a ‘crop’ under the state’s agricultural use class (Minnesota’s Class 4 waters). Minnesota tribes have consistently and unanimously recommended to the MPCA, during multiple consultation sessions specifically focusing on wild rice water quality standards, that natural wild rice stands (manoomin) should be

<http://greatlakeswater.uwex.edu/library/articles-and-white-papers/wild-rice-gatherers-upper-lakes-study-american-primitive-economics> (last visited Oct. 20, 2017).

⁹ Rosemary Berens, Bois Forte Tribal Historic Preservation Officer

¹⁰ See, e.g., 1854 Treaty Authority website, “Wild Rice Survey” (including list of wild rice waters in the 1854 Ceded Territory), available at

<http://1854treatyauthority.org/wildrice/survey.htm> (last visited Oct. 12, 2012); MN DNR website, “Wild rice management,” available at

<http://www.dnr.state.mn.us/wildlife/shallowlakes/wildrice.html> (last visited Oct. 20, 2017).

¹¹ <http://www.pca.state.mn.us/index.php/water/water-permits-and-rules/water-rulemaking/minnesotas-sulfate-standard-to-protect-wild-rice.html#assessment>.

¹² Letter from Minnesota Chippewa Tribe to MPCA re: Definition of “waters used for the production of wild rice”; wild rice water quality standards (February 7, 2014); Fond du Lac Band of Lake Superior Chippewa and Grand Portage Band of Lake Superior Chippewa Comments on MPCA’s March 2015 Proposed Approach for Minnesota’s Sulfate Standards to Protect Wild Rice (Dec. 15, 2015); Letter from the Minnesota Chippewa Tribe to the MPCA on the MPCA’s Proposed Rule Revisions for Minnesota’s Sulfate Standard to Protect Wild Rice (March 15, 2017); Letter from the State of Minnesota Indian Affairs Council on the MPCA’s Proposed Rule Revisions for Minnesota’s Sulfate Standard to Protect Wild Rice (May 25, 2017).

¹³ See, e.g., 40 CFR §§ 131.5, 131.11, and 131.21.

¹⁴ Letter from USEPA to Sens. Dill, Bakk, May 13, 2011.

classified under Minnesota's Class 2 waters (aquatic life uses).¹⁵ In addition, because irrigation is defined as "...to supply (dry land) with water by means of ditches, pipes, or streams"¹⁶, it is simply incorrect to infer that the natural hydrology required to grow manoomin is "irrigation". In fact, many waters containing manoomin have been lost to past irrigation practices, including ditching.

Minnesota tribes have steadfastly advised the MPCA that water quality protections for manoomin should focus on **preserving and enhancing the sustainability**, rather than 'production.' This focus is fundamentally consistent with Section 101(a) of the Clean Water Act, 'protection and propagation of fish, shellfish and wildlife' use, which can include the protection of aquatic flora. Therefore, we believe the appropriate classification for manoomin is in Minnesota's Class 2 waters, which apply broadly to the physical, chemical and biological attributes necessary to preserve, enhance, and *sustain* aquatic life.

b) Defining wild rice waters based on density and acreage.

Given the profound loss of manoomin that has already occurred throughout the state and across its historic range, sustaining what stands remain must be the goal of rule-making. Using a minimum stem density or acreage threshold will not sustain manoomin because it gives no consideration to the need to preserve genetic diversity, nor does it recognize either the depletion of manoomin stands due to existing pollutants or the inherent year-to-year variability of healthy, vigorous, productive stands of manoomin that may be experiencing a "bust" season during any single-year monitoring events.

The stem-density and acreage threshold that MPCA proposes is inconsistent with the regimes that MPCA employs to protect other "resources". For example, the MPCA protects trout streams based upon thermal regime and habitat potential rather than estimating the actual number of trout in a waterbody. In fact, the MPCA St. Louis River Stressor ID report concludes that a designated trout stream has been assessed and identified as impaired for its fish community "[b]ased on the *historical presence* of brook trout, . . . *despite* a lack of trout in the more recent monitoring efforts."¹⁷ The MPCA should consistently apply this justification for protecting brook trout *and* manoomin.

MPCA claims there isn't sufficient data to assess whether sparse stands of manoomin are indicative of natural seasonal variability or population decline, and further claims that there is a lack of sufficient data to assess *any* wild rice waters as impaired. Instead, MPCA suggests that sometime in the future, given sufficient data, an index of condition could be developed for

¹⁵ Grand Portage has noted that it may be appropriate to identify paddy rice in Class 4 because—unlike natural wild rice stands as a whole—paddy rice is a true cultivated agricultural product.

¹⁶ Webster's II New College Dictionary (ISBN 0-395-70869-9) 1999. Houghton Mifflin Co.

¹⁷ Minnesota Pollution Control Agency, St. Louis River Watershed Stressor Identification Report: A study of local stressors causing degraded fish and aquatic microinvertebrate communities in the St. Louis River Watershed (Dec. 2016), pg. 265 (emphasis added), available at <https://www.pca.state.mn.us/sites/default/files/wq-ws5-04010201a.pdf> (last visited Oct. 24, 2017).

assessment purposes. But at this time, the agency does not have the data necessary to assess whether parse stands are indicative of the natural seasonal variability or population decline. Moreover, if MPCA surveys a stand of manoomin during a year when density is low, it would not be considered a wild rice water. This is especially problematic because MPCA currently inventories and assesses compliance of waterbodies in each of 80 major watersheds within the state once every ten years.¹⁸ Unless MPCA is willing to dedicate staff time for annual evaluations of wild rice density in every water body on the MN DNR list that has been excluded because they don't have stem density or acreage associated with the record, it is highly probable that the list of wild rice waters will never include many water bodies that should be afforded protection. These arguments demonstrate the need to broadly protect wild rice habitat and significantly expand MPCA's monitoring program rather than relying upon some arbitrary density threshold to determine whether a waterbody is a wild rice water.

As the tribes have repeatedly expressed during consultations with the MPCA, when developing an appropriate WQS, the importance of distinguishing between a "designated use" and an "existing use" cannot be understated. An "existing use" can be demonstrated by either: a) fishing/swimming has actually occurred since November 28, 1975, or; b) that the water quality is suitable to allow the use to be attained--unless there are physical problems, such as substrate or flow, that prevent the use from being attained.¹⁹ And, no activity is allowable under the antidegradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State's WQS.²⁰ Water quality should be such that it results in no mortality and no significant growth or reproductive impairment of resident species regardless of prevalence or numbers.²¹ Any lowering of water quality below this full level of protection is not allowed without a use attainability analysis.²² So, a use attainability analysis or other scientific assessment should be used to determine whether the aquatic life population is in fact an artifact or is a stable population requiring water quality protection.²³

As such, designated uses may be changed *only* based upon findings of a use attainability analysis that has demonstrated that attaining the designated use is not possible because of naturally occurring pollutant concentrations, natural flow conditions, hydrologic modifications, substantial

¹⁸ Minnesota Pollution Control Agency, St. Louis River Watershed Stressor Identification Report: A study of local stressors causing degraded fish and aquatic microinvertebrate communities in the St. Louis River Watershed (Dec. 2016), pg. 265 (emphasis added), available at <https://www.pca.state.mn.us/sites/default/files/wq-ws5-04010201a.pdf> (last visited Oct. 24, 2017). ¹⁹ See 40 C.F.R. 131.3 (e)-(f); see also Chapter 4, Water Quality Standards Handbook, Protection of Existing Uses.

¹⁹ See 40 C.F.R. 131.3 (e)-(f); see also Chapter 4, Water Quality Standards Handbook, Protection of Existing Uses.

²⁰ See Chapter 4, Water Quality Standards Handbook, Protection of Existing Uses.

²¹ See *id.*

²² Per 40 C.F.R. Section 131.10(d), "[w]hen designating uses, States may wish to designate only the uses that are attainable. However, if the State does not designate the uses specified in Section 101(a)(2) of the Act, the State *must* perform a use attainability analysis under section 131.10(j) of the regulation." (emphasis added).

²³ See Chapter 4, Water Quality Standards Handbook, Protection of Existing Uses.

widespread economic impact resulting from more stringent controls, or human-caused pollution that cannot be remedied. A designated use cannot be removed if the use can be attained by implementing effluent limits and best management practices.²⁴ Therefore, attainable uses are, at a minimum, the uses (based on the State's system of water use classification) that can be achieved: (1) when effluent limits under sections 301 (b)(1)(A) and (B) and section 306 of the Act are imposed on point source dischargers; and (2) when cost-effective and reasonable best management practices are imposed on nonpoint source dischargers.

The MPCA does not rely on a use attainability analysis (or an equivalent study) to identify the waterbodies that need protection. Rather, the MPCA developed a draft list of wild rice waters that excluded waters that did not include estimates of greater than 2 acres of wild rice, unless another resource reference corroborated that water body as 'wild rice water.' In doing so, MPCA in effect 'delisted' wild rice waters with an existing use. For support, the MPCA asserts that, "[g]enerally, the wild rice information from [the resources used to compile the list] was originally gathered to serve a specific program interest and was not intended for regulatory use." Grand Portage vigorously contests MPCA's decision to exclude numerous bodies of water that need wild rice protections from its draft list for two principal reasons.

First, contrary to the MPCA's generalized assertion, the resources used to compile the draft list were intended for regulatory use. The information sources that MPCA used to develop their draft list of wild rice waters included the inventory of wild rice water body locations identified in the MN DNR 2008 report to the state legislature.²⁵ The objective of that effort was "to consolidate and update existing natural wild rice information and produce an inventory of those waters."²⁶ The inventory was developed with substantial input from state, federal and tribal representatives, and is considered "the most comprehensive list available."²⁷ Critically, the purpose of the MN DNR effort was not only to create the inventory and identify potential threats to wild rice, but also to make "recommendations to the legislative committees *with jurisdiction over natural resources on protecting and increasing natural wild rice stands in the state.*"²⁸ Recommendation 5 directed the MN DNR to convene a standing interagency wild rice workgroup to share information and develop recommendations for inventory methodology and trend assessments, education and information outreach, lake planning and management, harvester recruitment and retention, and other management issues as they arise.²⁹ The rationale for that charge was that "Comprehensive protection and management of wild rice involved multiple agencies. Management needs include better inventory information including consistent methodology for trend analysis, documenting natural genetic diversity, and establishing long-term case studies on identified lakes."³⁰

²⁴ See 40 C.F.R. Section 131.10(d).

²⁵ Natural Wild Rice in Minnesota – A Wild Rice Study document submitted to the Minnesota Legislature by the Minnesota Department of Natural Resources, February 15, 2008.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* (emphasis added).

²⁹ *Id.*

³⁰ *Id.*

Therefore, it is reasonable to interpret the MN DNR list as intended for regulatory use. And since 2008, there have been periodic updates to that list, as envisioned. It is not reasonable, or consistent with the Clean Water Act, to sort through the MN DNR list in order to discard those waters that do not have the arbitrary minimum acreage. Further, the fact that the state by its own admission has not collected sufficient data over the past four decades to support *either* the density/acreage threshold or to assess compliance with the existing water quality standards does not justify the proposed beneficial use change without providing a use attainability analysis for almost 1,000 inventoried wild rice waters. The MPCA proposal includes 1,318 waters from the MN DNR list as wild rice waters, 24 of those waters are already listed in the 7050 rule, and 987 waters would not be included due to insufficient density or acreage information.³¹

Second, the MPCA's efforts to 'delist' waterbodies based on an existing use are inconsistent with Minnesota's current WQS (and the Clean Water Act). Indeed, current Minnesota WQS require that the quality of listed and unlisted wild rice waters, and the aquatic habitat necessary to support the propagation and maintenance of wild rice plant species, not be materially impaired or degraded. In other words, Minnesota already requires the listing of *all* wild rice waters, regardless of production—the rules make no distinction based upon productivity.³² All of the waters that are included on MPCA, MN DNR, and the 1854 Treaty Authority lists already have the "existing use" as "wild rice waters" whether or not they include an estimate of acres of manoomin present during any given year. These waters must remain on the wild rice waters lists for regulatory purposes. As noted, the Clean Water Act clearly states that removing a designated use can only happen based on the findings of a use attainability analysis concluding that the waters used for the production of wild rice should be eliminated. If a *designated use* is an *existing use* (as defined in 40 CFR 131.3) for a particular water body, the existing use cannot be removed unless a use requiring more stringent criteria is added.³³ Of course, uses requiring more stringent criteria may always be added because doing so reflects the goal of further improvement of water quality. This is entirely consistent with the intent of the Clean Water Act goals, and the intent of the MN DNR and Tribes efforts to continually update the list of wild rice waters within the state. But the MPCA's efforts to exclude without justification 1,011 wild rice waters from the existing lists of protected waters thwart the purpose of the Clean Water Act and the Band's effort to protect Minnesota's existing wild rice habitat.

c) Interpretation of research results

Grand Portage supports MPCA's reliance on multiple lines of evidence for considering rule revisions. However, we do not agree with the state's proposed approach to use an equation to derive site-specific 'protective values' for sulfate. We believe the state's multi-pronged research program affirmed the protectiveness of the existing 10 mg/l sulfate criterion, and negated the application of any seasonal exemption for sulfate loadings to wild rice waters. It appears that the MPCA also believed that to be the case, until undue political pressure was brought to bear, and

³¹ Minnesota Pollution Control Agency, Excel Spreadsheet of the Wild Rice Waterbodies Inventory (Jan. 20, 2017).

³² See Minn. R. 7050.0224 subp. 1.

³³ 40 CFR 131.10 (k)(2)

the agency unexpectedly delayed the release of their preliminary interpretation of their research findings, ultimately releasing a substantially modified interpretation.³⁴

d) MPCA's inability to implement proposed site-specific equation

MPCA is unlikely to be able to implement the proposed formula due to all of the data that must be collected for site specific criteria for every wild rice waterbody. Based on MPCA's efforts to implement other site-specific criteria, we do not believe that the that MPCA has enough staff, time, and resources to implement the criteria even within the estimated ten year time-period that MPCA suggested was possible during the August 18th, 2016, Wild Rice Advisory Committee meeting. As this rule is proposed, no protection would be afforded to known wild rice waters until site specific criteria can be developed and implemented. Even for the 1,318 waters that MPCA kept on the list, this is an enormous and expensive task.

3) The MPCA must remove the waters situated within Grand Portage's reservation from the list of Class 4D waters.

Although MPCA states that multiple consultations with tribes in Minnesota occurred, the meetings were used to notify tribes of MPCA's intentions rather than to garner, listen, and respond to tribal input. Examples of this can be found in the definition of wild rice waters and the sheer number of wild rice waterbodies that have been excluded from the proposed list, as discussed above. Also, MPCA's Statement of Need and Reasonableness ("SONAR") demonstrates the lack of meaningful consultation.

In its SONAR, MPCA automatically lists waters situated within a tribe's reservation as Class 4D waters subject to the state's WQS, unless a tribe specifically requests that their waters not be included on the list.³⁵ To begin, Grand Portage vigorously contests the notion that tribes, including tribes with federally-approved WQS, must 'opt-out' of the state applying its WQS on waters situated wholly within the Band's Reservation. MPCA's 'opt-out' requirement not only contradicts the Band's consistent opposition to the MPCA's proposed WQS, but also offends the Band's inherent civil regulatory jurisdiction over our waters. What's more, throughout consultation, Grand Portage consistently stated that the Band has federally approved WQS, including criteria to protect wild rice, and that our WQS would apply to waters wholly within our Reservation. Yet, contrary to those express statements, the MPCA lists the Band's waters as Class 4D waters.³⁶ Grand Portage finds MPCA's decision to list the Band's waters in the rule and require use to remove them in writing offensive, as it demonstrates that the MPCA did not listen to the Band during consultation.

Consistent with its prior communications to the MPCA, Grand Portage does not wish to have any wild rice waters that are wholly within the Reservation to be included in MPCA's proposed wild

³⁴ Emails between Jamie Tincher and MPCA Commissioner John Linc Stine, Feb. 26, 2014, first obtained through FOIA from Mpls. Star Tribune.

³⁵ Minnesota Pollution Control Agency, Statement of Need and Reasonableness: Amendment of the sulfate water quality standard applicable to wild rice and identification of wild rice waters (hereinafter referred to as "SONAR") July, 2017, at pgs. 53-54.

³⁶ *Id.* at 54.

rice rule. Specifically, the MPCA must exclude Cuffs Lake, Mount Maud Wetland, Teal Lake, and the “unnamed (Grd Portage)” stream from the proposed list of Class 4D waters.

Listing 1,318 wild rice waterbodies instead of 2,329 wild rice waterbodies due to “lack of data” is disingenuous and indefensible. These water bodies were listed by the MN DNR at the request of the MN Legislature. And, the MN DNR list has been updated every year since 2008. Moreover, the 1854 Treaty Authority provided a 2017 update of wild rice waters within the 1854 Ceded Territories where Grand Portage, Fond du Lac, and Bois Forte have hunting, fishing, and gathering rights. MPCA has refused to recognize the additional waters on this list and suggests that these waters could be added to the Class 4D list “at a later date”. Further, MPCA and Grand Portage have a Cooperative Agreement signed in 1996 for shared waters that MPCA is apparently ignoring.³⁷

MPCA states in the SONAR that:

The MPCA acknowledges that the wild rice waters identified in this rulemaking may not include every water in Minnesota where the wild rice beneficial use has existed since November 28, 1975. Although the MPCA has made reasonable use of the information available to develop and justify the proposed list of Class 4D wild rice waters, there are additional waters that may be wild rice waters but for which there is not yet sufficient information to determine that the beneficial use is demonstrated. The MPCA has therefore developed a list of waters for which there is “insufficient information” at this time to justify including them in the proposed rules. This list was created for informational purposes and future reference, but is not a part of this rulemaking. The MPCA is confident that in the future, additional Class 4D wild rice waters will be identified, either through the MPCA’s own assessment and monitoring activities or from outside sources, and there will be a need for future rulemaking to add them to Minn. R. 7050.0471.³⁸

However, based on our experiences in 1998, when only 24 waters were listed and MPCA failed to follow through on their promise to add more, we do not believe any additional waters will ever be added to the list. The 7052 rules still list only the original 24 wild rice waters and no effort has been made by MPCA to add additional waters in the Lake Superior basin since 1998.

4) Conclusion

Across Minnesota, Tribes have already seen an enormous diminishment of wild waters since 1976 when the Clean Water Act was enacted. Minnesota, Wisconsin and Michigan have some of the last wild rice in the world. The range of wild rice in Minnesota has been diminished from presence throughout the State to the northeastern third, with only a few wild rice waters remaining in southeastern and northwestern Minnesota. In Michigan, wild rice was almost extirpated. Tribes continue to work to restore wild rice there but the process is slow and not

³⁷ Cooperative Agreement between the Grand Portage Band of Chippewa and the Minnesota Pollution Control Agency, July 16, 1996, Approved by the United States Environmental Protection Agency, Region 5.

³⁸ SONAR at 58.

Draft Grand Portage Band proposed wild rice rule cmts

October 2017

pg. 11

always successful. In northern Wisconsin there are some wild rice waters. However, the vast majority of remaining stands of wild rice are found here in northeastern Minnesota.

Grand Portage urges the MPCA to ere on the side of protecting manoomin by enforcing the existing federally approved 10 milligrams per liter sulfate standard—year-round—in all wild rice waters that the MN DNR has already listed and that the 1854 Treaty Authority has identified. And, we would like to remind MPCA that Grand Portage has federally approved water quality standards that include the 10 milligrams per liter sulfate criterion to protect wild rice. Therefore, the Band will apply its own standards—and not the state’s standards—to protect manoomin on Grand Portage’s waters.

Sincerely,

Norman W. Deschampe
Grand Portage Chairman



GRAND PORTAGE RESERVATION TRIBAL COUNCIL

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

January 14, 2020

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

Dear Ms. Nichols:

The Grand Portage Band of Chippewa (the "Band") hereby submits these comments in connection with Minnesota's Draft 2020 303(d) Impaired Waters List ("Draft List"). Grand Portage is a federally recognized Indian tribe, and in 1996 assumed Treatment-in-the-same-manner-As-a-State ("TAS") status under the Clean Water Act for purposes of administering Water Quality Standards. We have adopted and received federal approval for our water quality standards, and issue 401 certifications.

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

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



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. Grand Portage Background.

Grand Portage is one of the six tribal governments of the Minnesota Chippewa Tribe. 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.

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

² See 40 CFR 130.7(b)(6)(iii).

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 milligrams 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 "[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. *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

The Band has 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.

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.



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:

(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.

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

¹² *Id.*

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

¹⁴ *Id.* at 68-69.



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 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

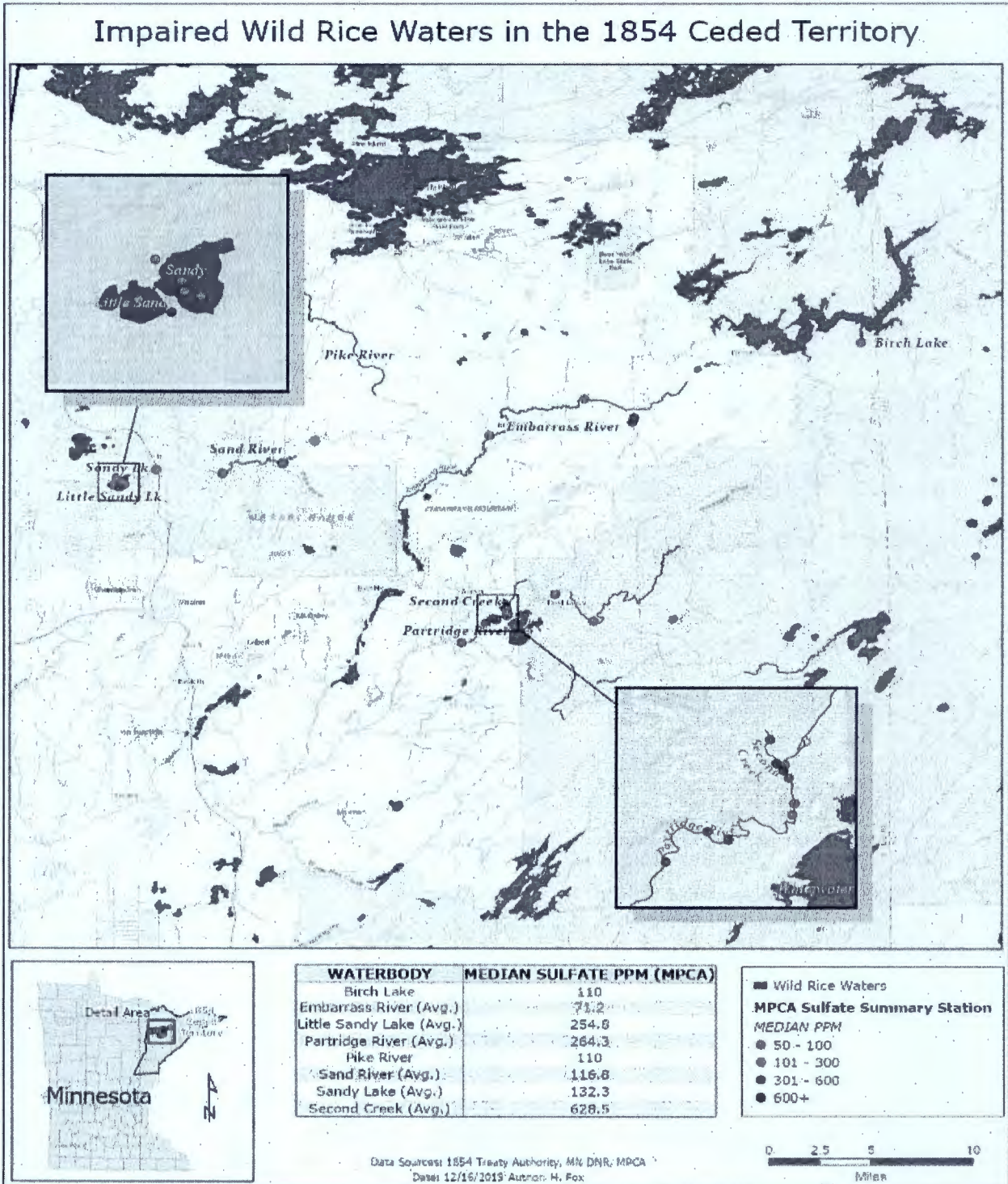
Waterbody	MPCA Measured Average Sulfate Concentrations (mg/l)
Birch Lake	110
Embarrass River	71.2
Little Sandy Lake	254.6
Partridge River	264.3
Pike River	110
Sand River	116.8
Sandy Lake	132.3
Second Creek	628.5

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

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).



should not be considered an exhaustive list of impaired wild rice waters within the 1854 Ceded Territory, or the state.





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,

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

Beth Drost
Grand Portage Chairwoman

c: 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

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



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:
W-15J

Robert F. Deschampe, Chairman
Grand Portage Band of Lake Superior Chippewa
P.O. Box 428
Grand Portage, Minnesota 55605

Re: Minnesota's 2020 List of Impaired Waters under Clean Water Act, Section 303(d)

Dear Chairman Deschampe:

In a letter of February 25, 2021, the U.S. Environmental Protection Agency invited federally-recognized Indian tribes in Region 5 to consult on EPA's review of Minnesota's 2020 Clean Water Act Section 303(d) List of Impaired Waters. Minnesota assessed the condition of state waters and added those waters that it determined to be impaired to the Minnesota 2020 Impaired Waters List. Impaired waters on this list require the development of Total Maximum Daily Loads, which, among other things, may result in changes to discharge limitations or other requirements in National Pollutant Discharge Elimination System permits.

EPA held a consultation teleconference with tribal representatives on March 12, 2021. During this teleconference, tribal representatives raised issues that EPA considered in its action to partially approve and partially disapprove the Minnesota 2020 Impaired Waters List on March 26, 2021. Subsequently, in a letter of March 26, 2021, EPA invited federally recognized Indian tribes in Region 5 to consult on EPA's action to add waters to the Minnesota 2020 Impaired Waters List. EPA held a consultation teleconference on April 9, 2021. On April 27, 2021, EPA added thirty (30) waters to the Minnesota 2020 Impaired Waters List; and, on September 1, 2021, EPA added three (3) additional waters to the Minnesota 2020 Impaired Waters List. On November 4, 2021, after considering public comment and making revisions, EPA determined that one previously listed water did not meet the screening analysis, and EPA transmitted its final listing of 32 waters to the State (Attachment 1).

In conducting its review of the Minnesota 2020 Impaired Waters List, EPA considered the concerns raised by Tribes as discussed in Attachment 3, and as further explained in the Response to Public Comments at Attachment 2 and its associated appendices.

If you have any questions, please contact Mr. David Pfeifer, Chief, Watersheds and Wetlands Branch, at (312) 353-9024 or pfeifer.david@epa.gov.

Sincerely,

 Digitally signed by TERA
FONG
Date: 2021.11.04
08:40:08 -05'00'

Tera L. Fong
Division Director, Water Division

cc: Catherine Neuschler, MPCA
Miranda Nichols, MPCA

Attachments:

Attachment 1: Letter to the Minnesota Pollution Control Agency enclosing the Waters Added by U.S. EPA to the Minnesota 2020 Impaired Waters List

Attachment 2: EPA Additions to the Minnesota 2020 Impaired Waters List - Response to Public Comments and Appendices

Attachment 3: Response to Comments Raised in During Consultation on EPA's Review of the Minnesota 2020 Impaired Waters List



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

WW-16J

Ms. Katrina Kessler
Assistant Commissioner
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, Minnesota 55155-4194

Re: Minnesota 2020 List of Impaired Waters under Clean Water Act, Section 303(d)

Dear Ms. Kessler:

The U.S. Environmental Protection Agency received the Minnesota Pollution Control Agency's (MPCA) 303(d) List of Impaired Waters still requiring Total Maximum Daily Loads (TMDLs), which was submitted as part of Minnesota's 2020 Integrated Report, on February 25, 2021. EPA has carefully reviewed Minnesota's submittal, including the listing decisions, the assessment methodology, and supporting data and information to determine whether Minnesota reasonably identified waters to be listed as impaired. EPA is partially approving and partially disapproving Minnesota's 2020 list.

Based on its review, EPA approves Minnesota's 2020 Section 303(d) List (Appendix 1 of the Decision Document for the Partial Approval) because Minnesota's decisions for those waters listed in Appendix 1 are consistent with Clean Water Act (CWA) Section 303(d) and EPA's implementing regulations. EPA also reviewed Minnesota's decisions not to list water segments based on Minnesota's conclusion that the readily available data and information do not require the identification of those water bodies as impaired. With the exceptions noted in the following paragraph, Minnesota's decision not to list these water bodies is reasonable.

EPA reviewed Minnesota's decision not to list water quality limited segments (WQLSs) based on Minnesota's conclusion that Minnesota state law bars MPCA from assessing or listing waters against Minnesota's federally-approved 10 mg/L standard applicable to "waters used for production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels."¹ EPA disapproves Minnesota's decision not to identify certain WQLSs for sulfate impairment because the existing and readily available data and information for those

¹ Minnesota Rule 7050.0224, subparts 1 and 2.

WQLSs indicate impairments for the numeric water quality criterion for sulfate.² Minnesota's decision to exclude these waters is inconsistent with CWA Section 303(d) and the implementing regulations.

EPA will identify for inclusion on the list those WQLSs still requiring TMDLs under Section 303(d) of the CWA and the implementing regulations pursuant to 40 C.F.R. § 130.7. Consistent with Section 303(d)(2), the details of EPA's disapproval decision, particularly the identification of 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, will be provided in a separate document to be published within thirty days of today's decision. Pursuant to 40 C.F.R. § 130.7(d)(2), EPA will issue a public notice providing for a 30-day public comment period regarding the addition of sulfate-impaired waters to Minnesota's CWA Section 303(d) List. After considering any comments received, EPA may make revisions, as appropriate, and will transmit its listings to Minnesota.

EPA's approval/disapproval authority extends only to the waterbodies and causes of impairment listed in Category 5 of the IR (State's Section 303(d) List), with the exception of any waters that are within Indian Country as defined in 18 U.S.C. § 1151. EPA is taking no action to approve or disapprove Minnesota's list with respect to any waters that are within Indian Country. EPA, or eligible Indian Tribes, as appropriate, will retain responsibilities under Section 303(d) for those waters.

I appreciate the continuing dialogue on these issues and look forward to our continued partnership in addressing the challenges of water quality in Minnesota. EPA will share any comments received on the public notice of the additions to Minnesota's CWA Section 303(d) List, and I and my staff will continue to collaborate with you and your staff as you prepare your 2022 list. Thank you for your attention to this matter. If you have any questions, please contact Mr. David Pfeifer, Chief, Watersheds and Wetlands Branch, at (312) 353-9024 or pfeifer.david@epa.gov.

Sincerely,

Tera L. Fong
Division Director, Water Division

cc: Catherine Neuschler, MPCA
Miranda Nichols, MPCA

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