

August 31, 2023

Commissioner Katrina Kessler

By online submission at MPCA portal and email: [Site-Specific Sulfate Standard Framework - Policy Plan \(commentinput.com\)](#)

Re: Grand Portage Band of Lake Superior Chippewa's Comments on MPCA's Proposed Site Specific Sulfate Standards Framework.

Dear Commissioner Kessler:

Grand Portage comments here regarding MPCA's proposed Site Specific Sulfate Standards Framework. We are profoundly disappointed to see MPCA yet again seek to serve industry interests at the cost of the state's wild rice waters—much less by using a method that is little different than that already rejected by the Office of Administrative Hearings (“OAH”) in 2018.<sup>1</sup>

In fact, MPCA does not actually propose “site-specific criteria” for the protection of wild rice. Instead this proposal is a permit to pollute for publicly-traded corporations that can afford adequate waste-water treatment. This is in spite of Tribal efforts to coordinate, collaborate, and consult with MPCA on issues related wild rice protection and the enforcement of the 10 milligram per liter sulfate standard (“Wild Rice Sulfate Standard”) for at least 20 years.

As a general matter, this process is fundamentally flawed. “Framework development” has here served as a tactic to delay implementation of Clean Water Act (“CWA”) protection and restoration of wild rice waters in Minnesota. The Wild Rice Sulfate Standard has been a Minnesota Rule since 1973 (50 years) but MPCA has failed to even try to implement it in discharge permits with few exceptions.

Now, in this rule making, MPCA claims that “significant natural variability in hydrology and other features of aquatic environments that support wild rice” prevents the MPCA from prescribing “a fixed, step-by-step approach to developing a SSS [site-specific standard] that

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<sup>1</sup> Chief ALJ's Order, In the Matter of the Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Rivers, Minnesota Rules parts 7050.0130, 7050.0220, 7050.0224, 7050.0470, 7050.0471, 7053.0135, 7053.0205 and 7053.0406 (Apr. 12, 2018) at [https://mn.gov/oah/assets/9003-34519-pca-sulfate-water-quality-wild-rice-rules-chief-judge-reconsideration-order\\_tcm19-335811.pdf](https://mn.gov/oah/assets/9003-34519-pca-sulfate-water-quality-wild-rice-rules-chief-judge-reconsideration-order_tcm19-335811.pdf).

would suffice in all circumstances.”<sup>2</sup> But rather than adopt or even consider the established Tribal approach, **MPCA has now proposed to use essentially the same formula and approach to set site-specific sulfate criteria that failed in 2018.**

MPCA’s formula is based on the concentration of sediment iron, organic carbon and sulfide, and hinges on a theory that iron protects wild rice from damage caused by sulfide.<sup>3</sup> But **MPCA’s own webpage cites research that contradicts MPCA’s proposed formula.**<sup>4</sup> Not only is there is no scientific evidence that iron protects wild rice from sulfide damage, **MPCA’s plan would kill wild rice even faster.**

These same mesocosm studies show that iron-sulfide forms a plaque on wild rice roots and smothers the plant:<sup>5</sup>



**Fig. 2** Sulfate-amended (left) and unamended (right) roots.

This research plainly confirms:

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<sup>2</sup> See Framework for developing and evaluating site-specific sulfate standards for the protection of wild rice (June 2023) (“Framework”) at 5, at <https://www.pca.state.mn.us/sites/default/files/wq-s6-66.pdf>.

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

<sup>4</sup> See MPCA, Protecting wild rice waters, *citing* LaFond-Hudson, S., et al., 2018. *Iron sulfide formation on root surfaces controlled by the life cycle of wild rice (Zizania palustris)*. *Biochemistry* 141, 95-106 at <https://doi.org/10.1007/s10533-018-0491-5>, at <https://www.pca.state.mn.us/air-water-land-climate/protecting-wild-rice-waters>.

<sup>5</sup> LaFond-Hudson, S., et al., 2018. *Iron sulfide formation on root surfaces controlled by the life cycle of wild rice (Zizania palustris)*. *Biochemistry* 141, 95-106 at <https://doi.org/10.1007/s10533-018-0491-5>.

We exposed a model annual wetland plant, *Zizania palustris* [wild rice], to elevated sulfate concentrations (3.1 mM) and quantified the development of iron oxide and iron sulfide precipitates on root surfaces throughout the plant life cycle. During the onset of seed production, root surfaces amended with sulfate transitioned within 1 week from iron (hydr)oxide plaques to iron sulfide plaques . . . Sulfate-amended plants produced fewer and lighter seeds with less nitrogen than unamended plants.

Two years ago, MPCA was required by US EPA to list more than 30 wild rice waters on the impaired waters list—more than a decade after MPCA had promised to do so. MPCA’s clear unwillingness to enforce CWA protection for wild rice has been institutionalized in permitting, and rule-making. The Band views the two years since that time, purportedly to work on this SSS, as more stalling and ongoing prevention of NPDES permit implementation of TMDLs and WLAs rather than restoration of wild rice waters.

Wild rice harvest is one aspect of treaty-retained property rights. Treaties are the “supreme law of the land.”<sup>6</sup> The CWA at Section 511(a)(3) provides that the Act “shall not be construed as . . . affecting or impairing the provisions of any treaty of the United States.” The CWA established the structure for regulating discharges of pollutants into the surface waters of the US, with primary administration and implementation of the Act by US EPA and US Army Corps of Engineers, in coordination with tribes and states. The objectives of the CWA are to restore and maintain the chemical, physical, and biological integrity of the nation’s waters and wetlands. US EPA, in its role as the primary administrator of CWA laws and regulations has a fiduciary obligation to ensure CWA WQS approvals and disapprovals are consistent with treaties, statutes, executive orders and other sources of federal law reflecting tribal reserved rights.

Further, CWA Section 303(c)(4)(B) authorizes US EPA, even in the absence of a state submission, to add a new or revised standard if it is necessary to ensure unsuppressed levels of harvest and consumption of reserved resources including wild rice. The loss of wild rice waters and productivity has suppressed Tribal harvest and consumption of wild rice. In 1905, Jenks reported that every tributary to the St. Louis River had wild rice. Not only have the number of locations where wild rice can be found been drastically reduced in many instances the quantity of rice available for harvest has been diminished, too. Immediate protection and restoration of this critical resource is needed to ensure viable harvests for future generations.

Commissioner Kessler: given your tenure with MPCA, you should know that we have been forced to do this too many times. It is insulting for MPCA to ignore uncontested, peer-reviewed research. It is insulting for MPCA to request again and again that Tribes share their Codes, field data, and knowledge, only for MPCA to ignore and reject it. It is insulting for MPCA to repackage the same SSS as the OAH rejected in 2018, itself all but a guarantee of litigation. It is impossible to view this as a good-faith effort to work with Tribes.

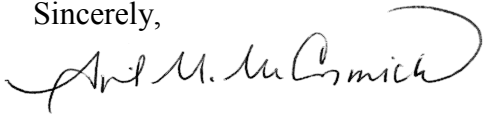
We submit our prior comments on this same topic and incorporate them all again here. We ask that you discard this proposal and immediately begin to enforce the Wild Rice Sulfate Standard as written, in accordance with our long-proposed and scientifically-sound regulatory model,

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<sup>6</sup> US Const., Art. VI, cl.2.

which rests upon requiring polluters to use established and available technologies to clean up their own messes.

Sincerely,

A handwritten signature in black ink, appearing to read "April M. McCormick". The signature is fluid and cursive, with a large loop at the end of the last name.

April McCormick

Secretary-Treasurer

Encl.

c. Debra Shore, US EPA Region 5 Administrator



## Grand Portage List of Prior Comments on Same Topic

Please find below a cursory and incomplete list of written comments provided to MPCA regarding the protection of wild rice from 2010 to present (in some cases including unsigned but final versions where originals have been submitted to MPCA). These comments do not include consultation, coordination, or collaboration that has occurred on-line and face-to-face, nor does it include email correspondence.

1. 2023. April 4. Letter to MPCA from Grand Portage Band of Lake Superior Chippewa regarding MPCA Pesticide General Permits – Wastewater Permit Reissuance.
2. 2021. April 27. Letter to MPCA from US EPA regarding Addition of Water to Minnesota's 2020 List of Impaired Waters under Clean Water Act, Section 303(d).
3. 2021. April 8. Letter to MPCA from Grand Portage Band of Lake Superior Chippewa regarding Comments on MPCA 2020-2021 triennial Standards Review.
4. 2021. March 18. Letter to US EPA Regional Administrator from the Midwest Alliance of Sovereign Tribes regarding EPA Tribal Consultation Regarding MPCA 2020 303(d) List Submission to US EPA.
5. 2021. March 3. Letter to US EPA Regional Administrator from the Minnesota Indian Affairs Council regarding MPCA's 303(d) List Submission to US EPA.
6. 2021. February 24. Letter to the Administrative Law Judge, Office of Administrative Hearings, from ten federally recognized Tribes: Bois Forte, Fond du Lac, Grand Portage, Leech Lake, Lower Sioux Indian Community, Mille Lacs, Minnesota Chippewa Tribe, Prairie Island Indian Community, Red Lake Nation, Shakopee Mdewakanton Sioux Community, White Earth, regarding Comments on Proposed Amendments to Rules Governing Water Quality Standards, Minnesota Rules chapters 7050 and 7053 (MPCA's planned amendments to Class 3& 4 water quality standards).
7. 2020, October 2. Letter to US EPA Regional Administrator from the Minnesota Indian Affairs Council regarding MPCA's 303(d) List Submission to US EPA.
8. 2020. May 8. Letter to MPCA from Grand Portage Band of Lake Superior Chippewa regarding the "Results of Extended Analysis of Data and Listing Wild Rice Waters on MPCA 2020 303(d) List.
9. 2020. April 27. Letter to MPCA from the Minnesota Indian Affairs Council regarding MPCA's Exclusion of Impaired Wild Rice Waters from MPCA 2020 303(d) List.
10. 2020. January 8. Letter to MPCA from the Minnesota Chippewa Tribe regarding Comments on Minnesota's 2020 Draft Clean Water Act § 303(d) Impaired Waters List.
11. 2018. December 18. Tribal Wild Rice Task Force Report. Written by the Twelve Tribes whose homelands lie within the boundaries of MN. The Report responds to the 40th Governor of the State of Minnesota creating a "Wild Rice Task Force" that is *disrespectful and contrary to Executive Order 13-10 ... and directly relegates the Tribes to the status of special interest groups and industry rather than honoring Tribal sovereignty (Minnesota Chippewa Tribe Resolution 107-18)*. The purpose of the Tribal Wild Rice Task Force was to review existing literature, including literature and information based on tradition, culture, and science, that is available to inform the

understanding of the impacts of sulfate or other sulfur compounds on habitat conditions on wild rice, identify information gaps, make recommendations on priorities for wild rice research, and prepare a report with recommendations in a similar fashion to that included in Executive Orders 18-08 and 18-09, providing a report to the Governor by December 15th, 2018.

12. 2018. Expanding the Narrative of tribal Health: The Effects of Wild Rice Water Quality Rule Changes on Tribal Health. Fond du Lac Band of Lake Superior Chippewa Health Impact Assessment.
13. 2018. June 20. Letter to the Governor from the Minnesota Chippewa Tribe regarding Executive Order 18-08 Establishing the Governor's Task Force on Wild Rice.
14. 2017. November 22. Written comments to the Administrative Law Judge, Office of Administrative Hearings from Fond du Lac Bands of Lake Superior Chippewa regarding
15. 2017. October 26. Written Comments to the Administrative Law Judge, Office of Administrative Hearings, in support of oral testimony provided by the Grand Portage Band of Lake Superior Chippewa on the "MPCA's Statement of Need and Reasonableness on its proposed approach for sulfate standards to protect wild rice."
16. 2017. May 25. Letter to MPCA from the Minnesota Indian Affairs Council regarding "Proposed Rule Revision for Minnesota's Sulfate Standard to Protect Wild Rice."
17. 2017. March 15. Letter to MPCA from the Minnesota Chippewa Tribe regarding the MPCAs "Proposed Rule Revision for Minnesota's Sulfate Standard to Protect Wild Rice."
18. 2016. September 6. Letter to MPCA from Grand Portage and Fond du Lac Bands of Lake Superior Chippewa regarding the Draft Technical Support Document: "Refinements to Minnesota's Sulfate Water Quality Standard to Protect Wild Rice, July, 2016."
19. 2016. September 2. Letter to MPCA from Grand Portage regarding the Draft Technical Support Document: "Refinements to Minnesota's Sulfate Water Quality Standard to Protect Wild Rice," July 18, 2016.
20. 2016, August 30. Letter to MPCA from Grand Portage Band of Lake Superior Chippewa regarding the Draft 2016 Minnesota Clean Water Act Section 303(d) Impaired Waters List.
21. 2016. June 28. Letter from US EPA to MPCA regarding "MPCA's Legal Authority to Implement its Authorized NPDES Program While Working Under Laws of Minnesota 2016, Chapter 165, Section 1."
22. 2016. April 5. Letter from US EPA to MPCA regarding "MPCA's Legal Authority to Implement its Authorized NPDES Program While Working Under Laws of Minnesota 2015, 1<sup>st</sup> Spec. Sess. Chapter 4, Article 4, Section 136"
23. 2015. December 18. Letter to MPCA from Grand Portage and Fond du Lac Bands of Lake Superior Chippewa regarding MPCAs March 2015 Proposed Approach for Minnesota's Sulfate Standard to Protect Wild Rice
24. 2015. June. Earth Economics. The Value of Nature's Benefits in the St. Louis River Watershed.

25. 2014, June 20. Kjerland, T., Handbook of Survey Methods for Monitoring Wild Rice.
26. 2014, February 7. Letter to MPCA from the Minnesota Chippewa Tribe regarding the Definition of “waters used for the production of wild rice”; wild rice water quality standards.
27. 2012, October 16. Letter to MPCA from Bois Forte, Grand Portage and Fond du Lac Bands of Lake Superior Chippewa regarding the Definition of “waters used for the production of wild rice.”
28. 2011, May 13. US EPA letter to Minnesota House and Senate Representatives regarding H.F. 1010 and S.F. 1029 to modify or suspend the current, federally-approved water quality standard for wild rice of 10 mg/L.
29. 2011 MPCA promises to add wild rice waters to the 2014 impaired waters list if EPA approves the 2012 list without any impaired wild rice waters.
30. 2010, December 14. Letter to MPCA from Grand Portage and Fond du Lac Bands of Lake Superior Chippewa regarding MPCA Consultation and Communication with Tribes Regarding the Protection of Wild Rice.
31. 2010, January 25. Letter to MPCA from Fond du Lac Band of Lake Superior Chippewa regarding MPCA December 15, 2009, Request for Historical information on Wild Rice.

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 LaPointe<sup>1</sup> (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, state<sup>2</sup> and federal agencies<sup>3</sup> have a legal responsibility to maintain those treaty resources.

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<sup>1</sup> Treaty with the Chippewa, 1854, 10 Stat. 1109, in Charles J. Kappler, ed., *Indian Affairs: Laws and Treaties*, Vol. II (Washington: Government Printing Office, 1904), available at <http://digital.library.okstate.edu/kappler/Vol2/treaties/chi0648.htm> (last visited Mar. 10, 2014).

<sup>2</sup> 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."

<sup>3</sup> See, e.g., Exec. Order 13175—Consultation and Coordination With Indian Tribal Governments (Nov. 6, 2000) (stating "the United States has recognized Indian tribes as domestic dependent

Indeed, wild rice waters are not only protected under the 1854 Treaty but under Minnesota law, as demonstrated through multiple rulemaking processes<sup>4</sup> and executive orders.<sup>5</sup>

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*

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nations under its protection . . . .,” there is a “trust relationship with Indian tribes,” and “[a]gencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.”).

<sup>4</sup> 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.

<sup>5</sup> 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."*<sup>6</sup>

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

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<sup>6</sup> 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](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)

<sup>7</sup> *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>.

<sup>8</sup> 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,<sup>10</sup> 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 waters<sup>11</sup>. 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 comments<sup>12</sup>, 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 criterion<sup>13</sup>, and as was clearly communicated to the Minnesota legislative body in 2011<sup>14</sup>.

**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

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

<sup>9</sup> Rosemary Berens, Bois Forte Tribal Historic Preservation Officer

<sup>10</sup> 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).

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

<sup>12</sup> 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).

<sup>13</sup> See, e.g., 40 CFR §§ 131.5, 131.11, and 131.21.

<sup>14</sup> Letter from USEPA to Sens. Dill, Bakk, May 13, 2011.

classified under Minnesota's Class 2 waters (aquatic life uses).<sup>15</sup> In addition, because irrigation is defined as "...to supply (dry land) with water by means of ditches, pipes, or streams"<sup>16</sup>, 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."<sup>17</sup> 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

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<sup>15</sup> 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.

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

<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> Any lowering of water quality below this full level of protection is not allowed without a use attainability analysis.<sup>22</sup> 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.<sup>23</sup>

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

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<sup>18</sup> 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). <sup>19</sup> See 40 C.F.R. 131.3 (e)-(f); see also Chapter 4, Water Quality Standards Handbook, Protection of Existing Uses.

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

<sup>20</sup> See Chapter 4, Water Quality Standards Handbook, Protection of Existing Uses.

<sup>21</sup> See *id.*

<sup>22</sup> 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).

<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> The objective of that effort was "to consolidate and update existing natural wild rice information and produce an inventory of those waters."<sup>26</sup> The inventory was developed with substantial input from state, federal and tribal representatives, and is considered "the most comprehensive list available."<sup>27</sup> 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.*"<sup>28</sup> 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.<sup>29</sup> 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."<sup>30</sup>

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<sup>24</sup> See 40 C.F.R. Section 131.10(d).

<sup>25</sup> 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.

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

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (emphasis added).

<sup>29</sup> *Id.*

<sup>30</sup> *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.<sup>31</sup>

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.<sup>32</sup> 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.<sup>33</sup> 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

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

<sup>32</sup> See Minn. R. 7050.0224 subp. 1.

<sup>33</sup> 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.<sup>34</sup>

**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.<sup>35</sup> 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.<sup>36</sup> 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

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

<sup>35</sup> 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.

<sup>36</sup> *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.<sup>37</sup>

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.<sup>38</sup>

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

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<sup>37</sup> 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.

<sup>38</sup> SONAR at 58.

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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

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Miranda Nichols ([miranda.nichols@state.mn.us](mailto: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.<sup>1</sup>

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

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





the Draft List.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> Federal agencies have a legal responsibility to maintain all tribal, treaty-reserved natural resources.<sup>5</sup>

### **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.<sup>6</sup> 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

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<sup>2</sup> See 40 CFR 130.7(b)(6)(iii).

<sup>3</sup> 10 Stat. 1109 (Sept. 30, 1854); see also Minnesota Department of Natural Resources ("MN DNR"), Laws and Treaties, at

[https://www.dnr.state.mn.us/aboutdnr/laws\\_treaties/index.html](https://www.dnr.state.mn.us/aboutdnr/laws_treaties/index.html).

<sup>4</sup> 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).

<sup>5</sup> See, e.g., Exec. Order 13175—Consultation and Coordination With Indian Tribal Governments (Nov. 6, 2000) (stating "the United States has recognized Indian tribes as domestic dependent nations under its protection . . .," there is a "trust relationship with Indian tribes," and "[a]gencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.").

<sup>6</sup> 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.<sup>7</sup>

### 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.<sup>8</sup> 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.*"<sup>9</sup>

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.<sup>10</sup> 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.

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<sup>7</sup> 40 C.F.R. § 130.7(b)(5).

<sup>8</sup> Minn. R. 7050.0224, subp. 2.

<sup>9</sup> Minn. R. 7050.0224, subp. 1 (emphasis added).

<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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.*<sup>14</sup>

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.

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

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

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

<sup>14</sup> *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.<sup>15</sup>

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

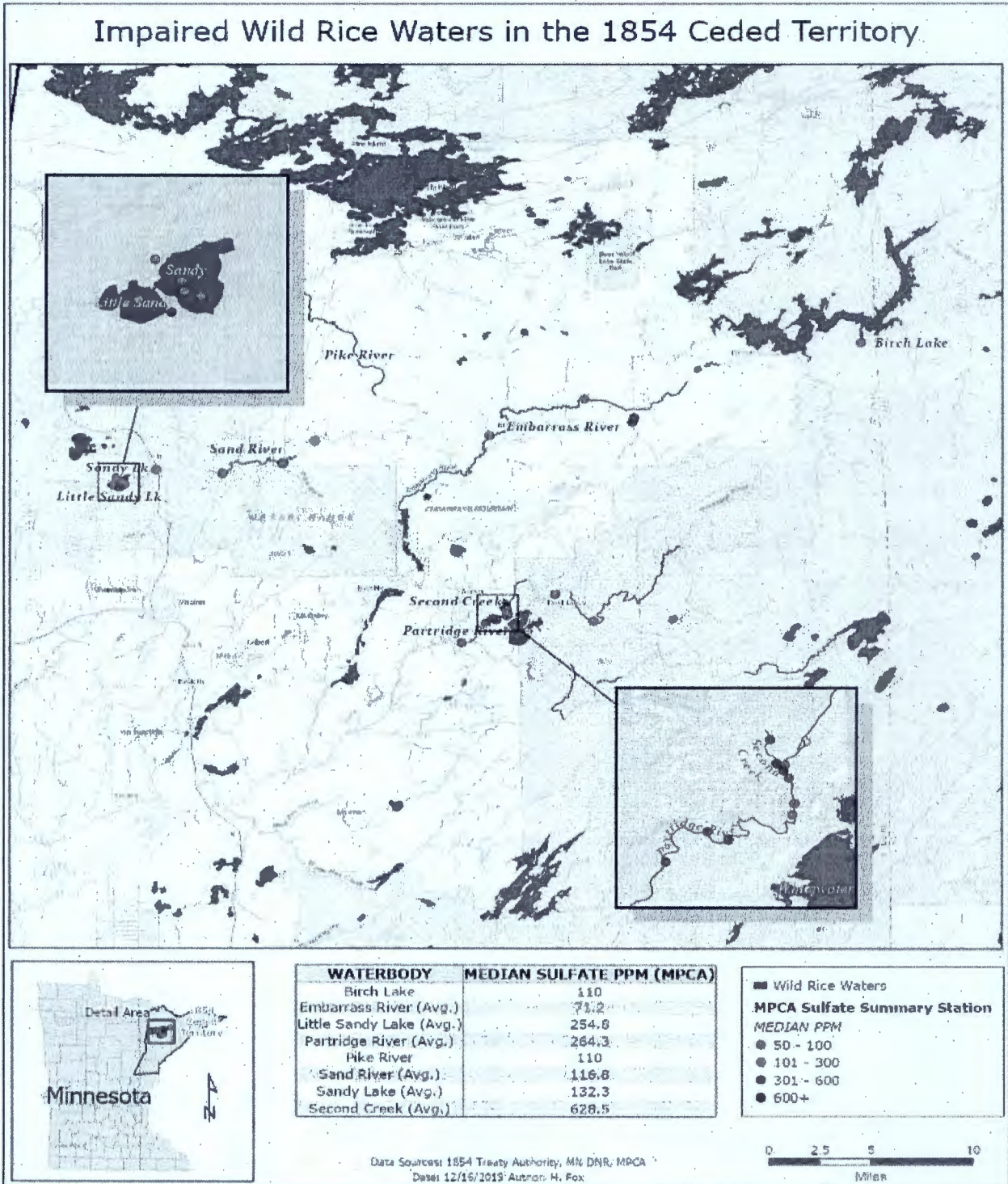
Sulfate data was provided by MPCA, and overlaid on wild rice lakes and stream segments identified by the MN DNR Wildlife feature class downloaded from the MN Geospatial Commons <https://gisdata.mn.gov/dataset/biota-wild-rice-lakes-dnr-wld>, and wild rice survey data from the 1854 Treaty Authority. The 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

<sup>15</sup> *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,<sup>16</sup> 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,

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

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<sup>16</sup> 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](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](mailto: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."<sup>1</sup> EPA disapproves Minnesota's decision not to identify certain WQLSs for sulfate impairment because the existing and readily available data and information for those

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<sup>1</sup> Minnesota Rule 7050.0224, subparts 1 and 2.

WQLSs indicate impairments for the numeric water quality criterion for sulfate.<sup>2</sup> 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](mailto:pfeifer.david@epa.gov).

Sincerely,

Tera L. Fong  
Division Director, Water Division

cc: Catherine Neuschler, MPCA  
Miranda Nichols, MPCA

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

[shannon.holsey@mohican-nsn.gov](mailto:shannon.holsey@mohican-nsn.gov)

DRAFT LETTER FOR CONSIDERATION OF MAST

March 18, 2021

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

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

Dear Administrator Newton:

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

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

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

Commented [R1]: 10.2.20 Kurt Thiede Letter quote

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

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

Commented [R4]: Quote March 3 2021

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

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

We ask EPA to promptly reject the 303(d) list to the extent that it excludes ~~impaired~~ wild rice waters known to be impaired for sulfate. We stand with all the signatory tribes the joint tribal position which have asserted, that according to MPCA's own data and methodology, there are at least 21 known, impaired wild rice waters that should be listed on the 2020 303(d) List. We ask you to expressly require listing of all impaired wild rice waters in accordance with federal law.

**Commented [R6]:** quote

**Commented [R7]:** quote

**Commented [R8]:** quote

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The 11 sovereign tribes of Minnesota have made clear that protection of wild rice is a top environmental justice issue for Native citizens of this state. MPCA's long history of inaction not only violates the Clean Water Act but demonstrates a disregard for treaty resources. The usufructuary rights guaranteed by treaties between the federal government and the tribes are meant to protect treaty resources into perpetuity. Both state and federal entities must recognize and protect those resources. Clean water is clean water. The EPA has a trust responsibility to tribes and their members. We urge you to protect clean water and manoomin (in Ojibwe)—psin (in Dakota)—wild rice for future generations of our tribal citizens, and for all Minnesotans.

Commented [R11]: Quoted above

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

Commented [R12]: Quoted above line

Sincerely,

*See attached Tribal Leader signature pages*

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

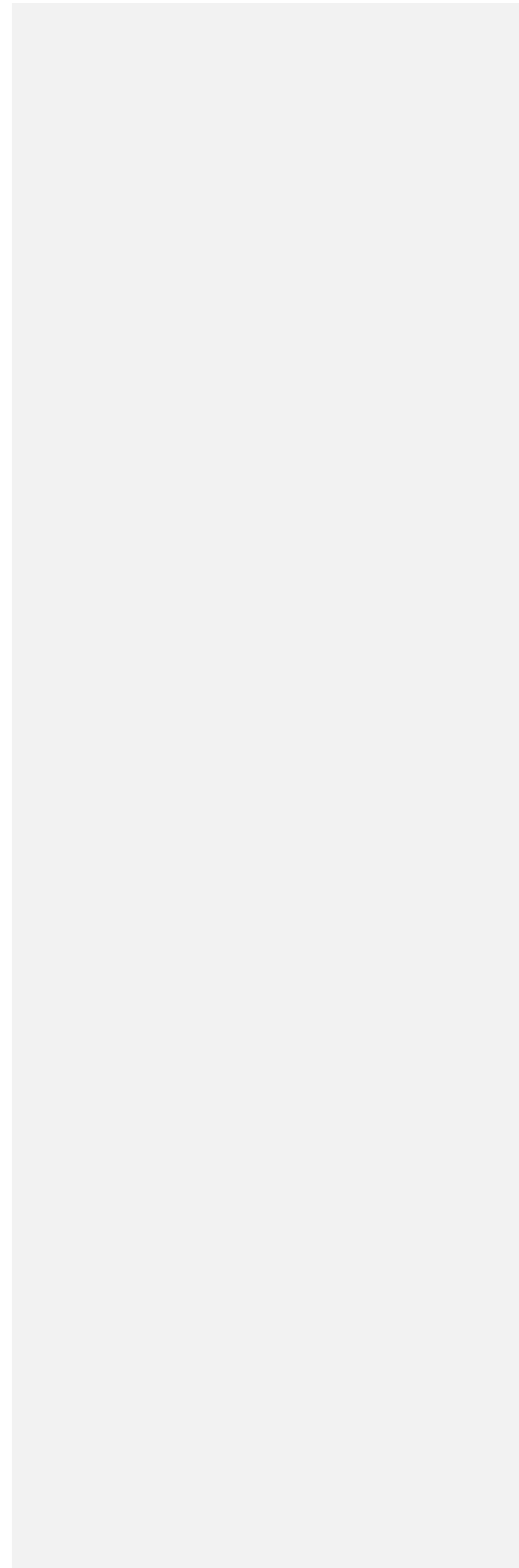
JoAnn Chase, Director, American Indian Environmental Office  
Danny Gogal, Office of Environmental Justice

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

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

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







Sent via email only

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

April 4, 2023

MPCA Pesticide General Permits - Wastewater Permit Reissuance

Dear Mr. Theisen:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

*Margaret Watkins*

Margare Watkins

Grand Portage Water Quality Specialist

c. Tera Fong, US EPA Water Division Director

Katrina Kessler, MPCA Commissioner

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



February 24, 2021

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

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

Honorable Judge Lipman:

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

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

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

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

## **I. Tribal coalition.**

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

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

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<sup>2</sup> In the Matter of the Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Rivers... (“Wild Rice Rulemaking”), Rep. of ALJ (Jan. 9, 2018) (“ALJ Report”), available at <https://www.pca.state.mn.us/sites/default/files/wq-rule4-15mm.pdf>; Chief ALJ Order on Rev. (Apr. 12, 2018) (upholding disapproval after MPCA resubmission of rule without required revisions), available at [https://mn.gov/oah/assets/9003-34519-pca-sulfate-water-quality-wild-rice-rules-chief-judge-reconsideration-order\\_tcm19-335811.pdf](https://mn.gov/oah/assets/9003-34519-pca-sulfate-water-quality-wild-rice-rules-chief-judge-reconsideration-order_tcm19-335811.pdf); MPCA Notice of Rule Withdrawal (Apr. 26, 2018), available at <https://www.pca.state.mn.us/sites/default/files/wq-rule4-15oo.pdf>. See also GP Cmts. on WR Rule (Oct. 24, 2017), at Ex. H.

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

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

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

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

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

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

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

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

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

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

<sup>9</sup> 33 U.S.C. § 1251(a).

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

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

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

<sup>13</sup> 40 C.F.R. § 131.11(a).

<sup>14</sup> 40 C.F.R. § 131.5(a).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>22</sup> 40 C.F.R. § 131.11(a).

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

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

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

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



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

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

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

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

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

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<sup>27</sup> 40 CFR § 122.44(1)(1).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>47</sup> 40 CFR § 131.3(e).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

## **XIII. Conclusion**

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

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

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

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

<sup>114</sup> 40 CFR§131.12(a)(1).

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

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

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

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

Sincerely,

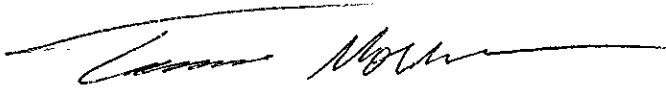
See attached Tribal Leader signature pages

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

*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman

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

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

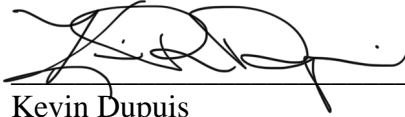
Travis Morrison

Vice-Chair

Bois Forte Band of Chippewa

*Signature Page – February 24, 2020*

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



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Kevin Dupuis  
Chairperson  
Fond du Lac Band of Lake Superior Chippewa

*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman

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



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Robert F. Deschampe

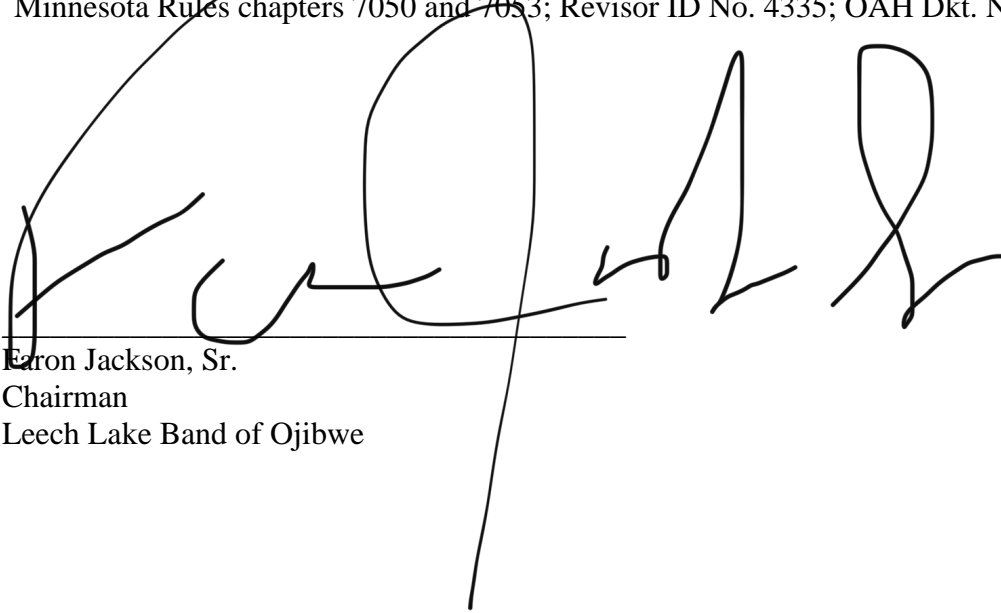
Chairman

Grand Portage Band of Lake Superior Chippewa

*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman

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

A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to read 'Aaron Jackson, Sr.'.

Aaron Jackson, Sr.  
Chairman  
Leech Lake Band of Ojibwe

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*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman

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



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Robert Larsen  
President  
Lower Sioux Indian Community

*Signature Page – February 24, 2021*

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

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

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Melanie Benjamin  
Chief Executive  
Mille Lacs Band of Ojibwe



*Signature Page – February 24, 2021*

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

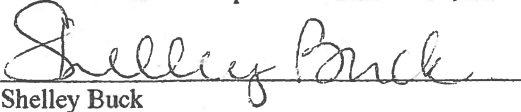
A handwritten signature in cursive script, reading "Gary Frazer", written over a horizontal line.

Gary Frazer  
Executive Director  
Minnesota Chippewa Tribe

*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman

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

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

Shelley Buck

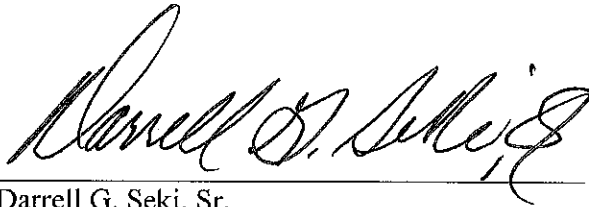
President

Prairie Island Indian Community

*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman

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

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

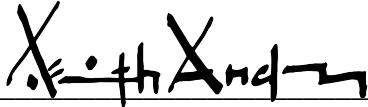
Darrell G. Seki, Sr.

Tribal Chairman

Red Lake Band of Chippewa Indians

*Signature Page – February 24, 2021*

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

A handwritten signature in black ink that reads "Keith Anderson". The signature is written in a cursive style with some stylized flourishes.

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Keith B. Anderson

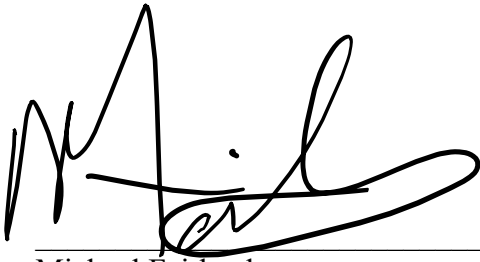
Chairman

Shakopee Mdewakanton Sioux Community

*Signature Page – February 24, 2021*

Office of Administrative Hearings – Administrative Law Judge Lipman

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

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

Michael Fairbanks  
Chairman  
White Earth Nation



# Grand Portage Band of Lake Superior Chippewa

## RESERVATION TRIBAL COUNCIL

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

April 8, 2021

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

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

Dear Administrator Newton:

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

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

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

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





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

The Chief ALJ affirmed this conclusion:

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

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

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

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

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<sup>5</sup> In the Matter of the Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Rivers...("Wild Rice Rulemaking"), Rep. of ALJ (Jan. 9, 2018) ("ALJ Report") at 19-20, 23 ("While not identifying specific reasons for excluding individual water bodies, the Agency acknowledges that it excluded from the proposed rule some water bodies where wild rice has been an existing use."), available at <https://www.pca.state.mn.us/sites/default/files/wq-rule4-15mm.pdf>; Chief ALJ Order on Rev. (Apr. 12, 2018) (upholding disapproval after MPCA resubmission of rule without required revisions), available at [https://mn.gov/oah/assets/9003-34519-pca-sulfate-water-quality-wild-rice-rules-chief-judge-reconsideration-order\\_tcm19-335811.pdf](https://mn.gov/oah/assets/9003-34519-pca-sulfate-water-quality-wild-rice-rules-chief-judge-reconsideration-order_tcm19-335811.pdf); MPCA Notice of Rule Withdrawal (Apr. 26, 2018), available at <https://www.pca.state.mn.us/sites/default/files/wq-rule4-15oo.pdf>.

<sup>6</sup> Chief ALJ Order at 11, *citing* 40 C.F.R. §§ 131.11(h)(1) ("Water quality standards are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.") and 131.3(e) ("Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards."). *See also* 40 C.F.R. §131.3(f) ("Designated uses are those uses specified in water quality standards for each water body or segment whether or not they are being attained.")

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





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

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

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

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

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

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

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

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

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



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

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

#### 4. Specific Methodology

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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



## 6. Conclusion

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

Sincerely,

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

Robert F. Deschampe  
Chairman

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

April M. McCormick  
Secretary/Treasurer

- c: Minnesota Tribal Leaders (by email only)  
Patina Park, Tribal State Relations Systems Implementation (by email only:  
patina.park@state.mn.us)  
Laura Bishop, MPCA Commissioner (by email only, Laura.Bishop@state.mn.us)  
Katrina Kessler, MPCA (by email only: katrina.kessler@state.mn.us)  
Helen 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)

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 31<sup>st</sup> 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](mailto: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."*<sup>1</sup>

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."<sup>2</sup> 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.<sup>3</sup> 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

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

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

<sup>3</sup> *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."*<sup>4</sup>

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)

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<sup>4</sup> 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*



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Kevin R. Dupuis, Sr.

Chairman

Fond du Lac Band of Lake Superior Chippewa

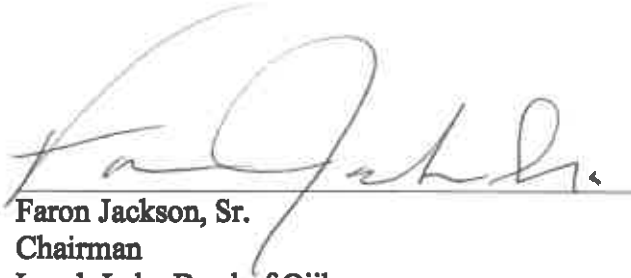
*Signature Page - October 2, 2020*  
*Letter to Kurt Thiede, Regional Administrator*  
*Re: MPCA 303(d) List Submission to US EPA*



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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*



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Robert Larsen  
President  
Lower Sioux Indian Community

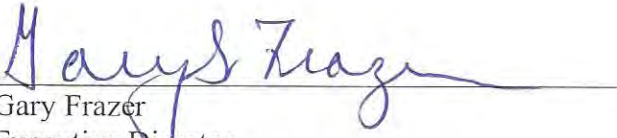
*Signature Page - October 2, 2020  
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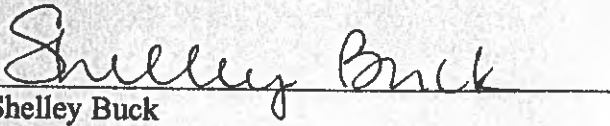
Melanie Benjamin  
Chief Executive  
Mille Lacs Band of Ojibwe

*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

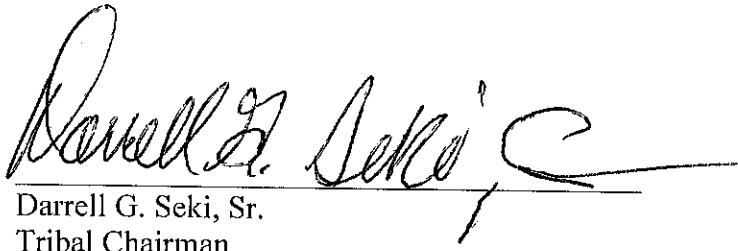
*Signature Page - October 2, 2020*  
*Letter to Kurt Thiede, Regional Administrator*  
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A handwritten signature in cursive script that reads "Shelley Buck". The signature is written in black ink and is positioned above a solid horizontal line.

**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*



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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*

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

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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](mailto: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.<sup>1</sup> 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.<sup>2</sup> In the April 15 response, MPCA makes the same promise yet

<sup>1</sup> Minn. R. 7050.0224 subp. 1-2.

<sup>2</sup> 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."<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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

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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."

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

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

<sup>5</sup> See 40 C.F.R. Section 131.21(e) (state may not enact *de facto* amendments to or limitation of a federally-approved WQS without EPA approval first); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987) (under principles of preemption, state law is presumed invalid where it conflicts with federal law); *see also In re Operation of Missouri River Sys. Lit.*, 320 F.Supp.2d 873 (D. Minn. 2004) (even though state "enacted its state water quality standards pursuant to federal law, its state laws must comport with federal law").

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.<sup>6</sup> 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.<sup>7</sup> 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

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<sup>6</sup> 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](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>.

<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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)."<sup>10</sup> MPCA uses 10% and 25% exceedance frequencies to assess impairments caused by conventional pollutants based on 1997 EPA guidance.<sup>11</sup>

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."<sup>12</sup>

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."<sup>13</sup> This includes

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<sup>8</sup> 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>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 11.

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

<sup>12</sup> *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).

<sup>13</sup> 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).<sup>14</sup>

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*

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<sup>14</sup> *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 (11<sup>th</sup> Cir. 2007) (remanding for additional factfinding to justify 303(d) list because “states are required by the CWA to identify *all* waterbodies that fail to meet 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](mailto:patina.park@state.mn.us))
- Miranda Nichols, MPCA (by email only: [miranda.nichols@state.mn.us](mailto:miranda.nichols@state.mn.us))
- Helen Waqui, MPCA (by email only: [helen.waqui@state.mn.us](mailto:helen.waqui@state.mn.us))
- Catherine Neuschler, MPCA (by email only: [catherine.neuschler@state.mn.us](mailto:catherine.neuschler@state.mn.us))
- Barbara Wester, US EPA Region 5, Office of Regional Counsel  
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- Tom Short, US EPA Region 5, Water Division Acting Director  
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- Alan Walts, US EPA Region 5, Office of International and Tribal Affairs  
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# The Minnesota Chippewa Tribe

January 8, 2020

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Miranda Nichols ([miranda.nichols@state.mn.us](mailto: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.<sup>1</sup>

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.<sup>2</sup> 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.

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

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> Federal agencies have a legal responsibility to maintain all tribal, treaty-reserved natural resources.<sup>5</sup>

## 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.<sup>6</sup> 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

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<sup>3</sup> 10 Stat. 1109 (Sept. 30, 1854); *see also* Minnesota Department of Natural Resources (“MN DNR”), Laws and Treaties, at [https://www.dnr.state.mn.us/aboutdnr/laws\\_treaties/index.html](https://www.dnr.state.mn.us/aboutdnr/laws_treaties/index.html).

<sup>4</sup> *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).

<sup>5</sup> *See, e.g.*, Exec. Order 13175—Consultation and Coordination With Indian Tribal Governments (Nov. 6, 2000) (stating “the United States has recognized Indian tribes as domestic dependent nations under its protection . . . .,” there is a “trust relationship with Indian tribes,” and “[a]gencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.”).

<sup>6</sup> 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.<sup>7</sup>

### 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.<sup>8</sup> 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.*"<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> The rule provided that:

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<sup>7</sup> 40 C.F.R. § 130.7(b)(5).

<sup>8</sup> Minn. R. 7050.0224, subp. 2.

<sup>9</sup> Minn. R. 7050.0224, subp. 1 (emphasis added).

<sup>10</sup> See, e.g., Exec. Order 19-24.

<sup>11</sup> 2015 Minn. Laws 1<sup>st</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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.*<sup>14</sup>

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

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

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

<sup>14</sup> *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.<sup>15</sup>

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.

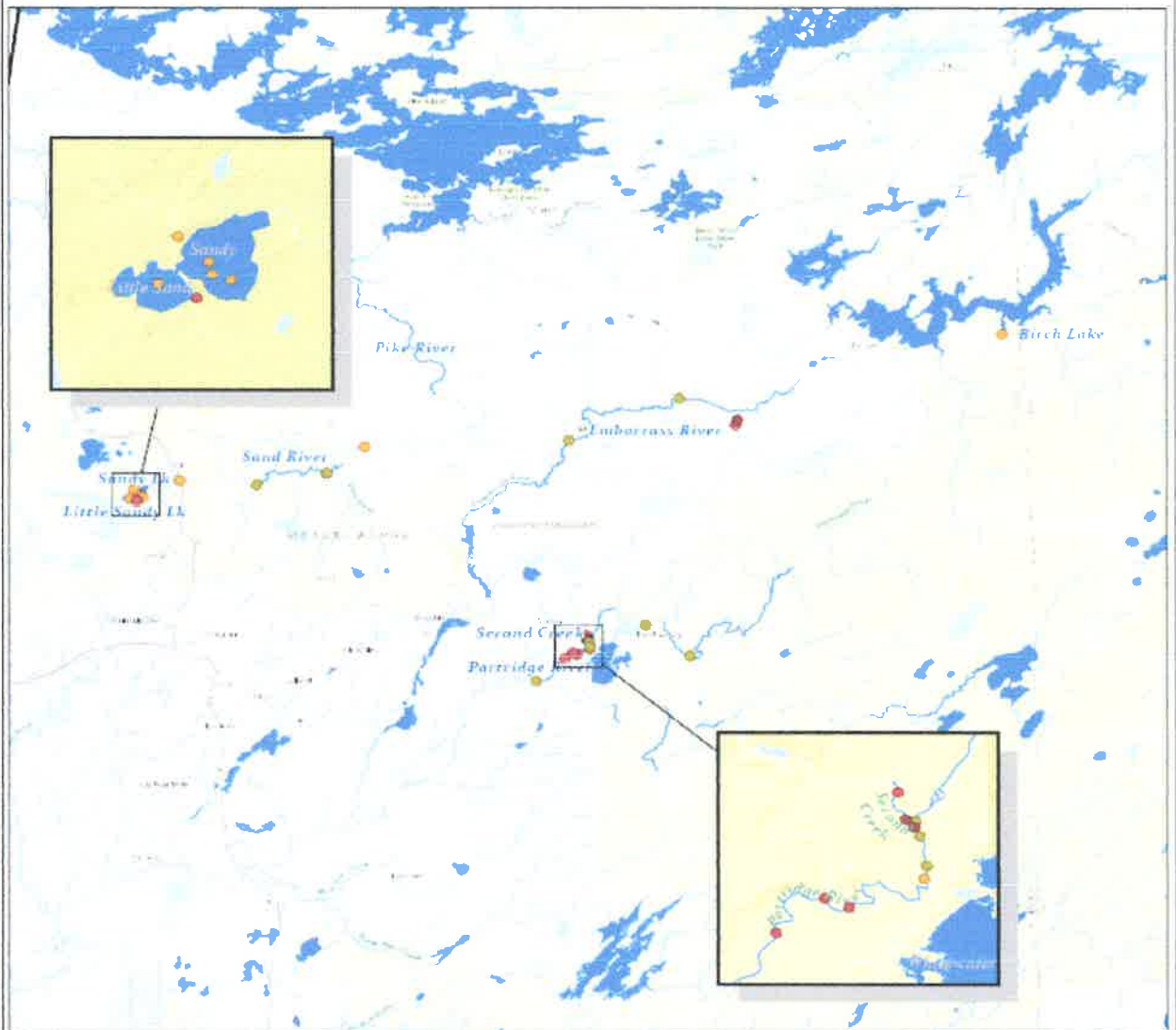
**Table 1. Impaired Wild Rice Waters in the 1854 Ceded Territory**

<b>Waterbody</b>	<b>MPCA Measured Average Sulfate Concentrations (mg/l)</b>
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.

<sup>15</sup> *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,<sup>16</sup> 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

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<sup>16</sup> 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](http://files.dnr.state.mn.us/fish_wildlife/wildlife/shallowlakes/natural-wild-rice-in-minnesota.pdf)



# The Minnesota Chippewa Tribe

March 15, 2017

John Linc Stine, Commissioner  
Minnesota Pollution Control Agency  
520 Lafayette Road North  
St. Paul, MN 55155-419

Re: MPCA's Proposed Rule Revisions for Minnesota's Sulfate Standard to  
Protect Wild Rice.

Commissioner Stine:

The twelve independent sovereign Indian nations in the state of Minnesota appreciate the opportunity to have continuing dialogue with you and the Minnesota Pollution Control Agency (MPCA) regarding the work underway to revise the state's water quality standards protection for wild rice. There is a long history of expressed tribal concern documenting the damages to wild rice in the treaty ceded territories within the State of Minnesota beginning in the 1860's. Over the past several decades, we have participated in numerous state agency-led initiatives regarding wild rice, from previous rulemaking to identifying management and restoration strategies. Our motivation for sitting down at the table with the state to talk about wild rice has always been to forge a common understanding of how precious this singular resource is, and to reinforce a sense of shared responsibility to protect it for future generations. As we have repeatedly communicated to you and your staff, wild rice or *Mahnomin*, as the Ojibwe people call it, or *Psiá*, as it is known by the Dakota people, is the preeminent cultural resource of this region and central to our cultural heritage. We see the severe diminishment of wild rice across its historic range as a call for stronger and broader protections of remaining stands here in Minnesota, its last refuge in the United States.

In previous consultations with MPCA, both formal government to government meetings and informal technical staff meetings, you have hopefully learned much more than you knew before about the unique characteristics of this incomparable and irreplaceable resource. We have shared our knowledge, our stories, and our experiences that come from many centuries of successfully managing and sustainably harvesting this sacred food. We have not been surprised that the research program you conducted has yielded "modern" scientific evidence that wild rice is exceptionally sensitive to sulfate pollution, and that Dr. Moyle's rigorous observational data from decades ago was actually on the mark. Our research, our monitoring and our traditional knowledge concur. We have also emphasized our experience with and concerns for other significant factors that can degrade or destroy natural stands of wild rice, including hydrologic changes, watershed development, invasive species, mechanical damage from motorized watercraft, and the overarching effects of climate change.

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We have made it abundantly clear in our conversations and in written tribal comments that wild rice, in order to survive and thrive into the future, needs stronger and broader protections than just a single water chemistry criterion; one which, in fact, has not been properly implemented in the decades since it was promulgated. We urged your agency to reach across to the Minnesota Department of Natural Resources (MnDNR) and work collaboratively through your complementary regulatory responsibilities to forge meaningful, effective wild rice protections that go beyond a sulfate standard. Both of your agencies have been directed by the state legislature in recent years to examine water quality standards *and* management issues pertaining to wild rice. These past five years would have been a prime opportunity to not only refine and strengthen relevant water quality standards, but also refine and strengthen management, assessment, and restoration goals for this significant shared resource.

Our perspective is that, at this critical point in time, if MPCA were to seriously consider and incorporate the clear and specific recommendations that have come from experienced tribal staff, we could be commenting on revised wild rice water quality rules that:

- Recognize, first and foremost, its priceless value to the people of Minnesota and its exceptional ecological significance;
- Are as inclusive and conservative as possible in designating wild rice waters, recognizing its dramatically diminished occurrence and the need to protect all that we have left;
- Are broadly protective through additional narrative standards that reflect its sensitivity to pollution, habitat degradation and hydrologic alteration – such as those inherent in Aquatic Life Use classification;
- Define what is a sustainable, “harvestable” and generally healthy wild rice condition, and incorporate that by reference with a robust assessment methodology;
- Maintain the existing, simple-to-implement sulfate criterion that has been demonstrated to be protective of the water quality necessary to support wild rice, with rare exceptions afforded the option to demonstrate a site-specific standard that is protective of wild rice in that waterbody.

In addition to what could be defined or revised in Minnesota water quality rules, we have also counseled the agency on the overarching need for a commitment to conduct a comprehensive statewide inventory as quickly as possible. This should have been ongoing throughout the research and rulemaking process; in fact, there is a long history of the state making but not fulfilling this particular commitment. The lack of a common baseline inventory of wild rice waters is a glaring deficiency in the state’s ability to protect wild rice through the broad range of regulatory processes you are responsible for under the Clean Water Act. First, there must be sufficient baseline information on the presence of wild rice across Minnesota waters, including identifying a subset of waters that will be surveyed annually to help capture known variability in wild rice stands.

Second, the agency needs to commit to establishing an assessment methodology for evaluating the condition of wild rice waters, and not simply rely upon a single water quality criterion for determining compliance with this beneficial use. Assessment is a critical step towards identifying impaired wild rice waters, listing them on the state's 303(d) list, and ultimately leading to a process for restoration, if needed. Your expressed rationale for keeping the wild rice beneficial use in Class 4 (Agriculture and Wildlife) is that the original standard defined the beneficial use as a food source for humans and wildlife. You cannot possibly determine whether a wild rice waterbody is meeting *that* beneficial use without **both** monitoring data – of the resource itself - **and** a robust assessment methodology that can determine its condition: healthy, experiencing natural variability; or impaired, showing diminished vigor and productivity. This is no different than the framework your agency employs in its assessment of other beneficial uses, specifically involving biological measurements and analyses of the condition of the resource itself. The tools for developing such an assessment methodology are readily available in your agency's wetland assessment program and the field handbook recently published by Minnesota Sea Grant, which the tribes have advocated you use for stand density surveys that are comparable with ours.

But instead of taking an approach such as outlined above – an approach that honors the ecological and cultural significance of wild rice and respects the knowledge and experience of people who have successfully managed, harvested, and restored wild rice - the MPCA has chosen to develop rule revisions that:

- Fail to acknowledge the unique ecological and cultural characteristics, and thereby a clear and compelling rationale for strengthening Clean Water Act protections;
- Err on the side of *exclusiveness* in designating WR waters, leaving hundreds of waters with an **existing** wild rice use unprotected;
- Conflate the sparse stem density established in your definition of 'wild rice water' with actually complying with the 'harvestable' beneficial use;
- Lack any assessment of the beneficial use, other than compliance with a single water chemistry parameter (problematic for their required responsibility to list impaired waters);
- Propose an arbitrary and narrow application of additional narrative standards protection to a truncated list of 'important wild rice waters', rather than all remaining and equally valuable wild rice waters;
- Are not conservative; the '4WR' distinction seems to favor certain wild rice waters without providing any rationale for why it is more important to protect them than to protect all wild rice waters;
- Propose a complicated, difficult-to-implement equation for deriving site-specific criteria that it itself relies upon data that the state currently does not have.

The MPCA is already seriously behind the information curve in its failure to have an established baseline wild rice inventory in common with the MNDNR, the tribes, wildlife conservation organizations and state rice harvesters. The agency has acknowledged that it will take years to compile sediment and water quality data sufficient to implement this new proposed equation-based standard. There has been no discussion of an assessment methodology that can broadly evaluate the actual condition of our wild rice waters, instead maintaining only a narrow focus on compliance with a single parameter to identify impairment of this beneficial use. Yet, that beneficial use is defined as human and wildlife harvest and consumption! Without broad aquatic life use protection and a comprehensive condition assessment process, there cannot be an adequate water quality standards-based framework for triggering necessary restoration of degraded wild rice waters through either a total maximum daily load study or a watershed restoration strategy.

We know that the MPCA has engaged with numerous stakeholders throughout this process, both through the Wild Rice Advisory Committee and in separate meetings and communications. We know that the legislature has passed several bills severely limiting your agency's ability to implement the existing wild rice water quality standard in permitting or listing of impairments, and shielding dischargers from spending any money on compliance with the existing approved standard. This level of political constraint over the agency's Clean Water Act authorities is shocking, yet no more disturbing than the industry and Chamber of Commerce pressure and disinformation campaign that is behind it, as we have witnessed in Advisory Committee meetings, presentations to their members and supporters, and in their written comments throughout the process. While we would never expect industry or the Chamber of Commerce to champion the protection of wild rice, we certainly hold your agency to a higher standard; it is your core mission to *protect and improve the environment and enhance human health*.

Yet, in your Draft Regulatory Analysis of costs associated with complying with the new rules, you only examine in detail dischargers' potential costs of compliance. There is no balanced analysis that genuinely shows "...a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule", as required by statute. To date, dischargers have borne *zero* costs to comply with the existing wild rice water quality standard, and Minnesota tribes (and any Minnesotan that harvests or eats Minnesota wild rice) have lost undocumented thousands of acres of productive wild rice waters. As we see the proposed rule revisions taking shape, we can only assume that the few potentially affected dischargers will claim undue economic hardship and be granted variances from any calculated sulfate criteria. No additional ecological or habitat protections are being considered or proposed for wild rice waters, nor any bona fide assessment that determines whether the defined beneficial use is being met. Regrettably, we can only conclude that tribes will continue to bear the 'costs' of your proposed rule, and dischargers will benefit.

After more than five years of investigation, literature searches, and experimental research, you now know of many other stressors that can affect the health and sustainability of wild rice in Minnesota lakes and flowages. Yet, sadly, the end result of MPCA's apparent rejection of the recommendations and experience shared by the tribes is that this rule revision process will not result in protection of wild rice for either meeting the MPCA's defined beneficial use, or the Minnesota tribes' expressed values.

We hope you will reconsider the tribes' recommendations before you move to finalize your rule revisions. We know it will take all our efforts, working together, to protect wild rice for future generations.

Sincerely,



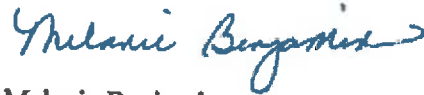
Kevin R. Dupuls, Sr.  
Chairman, Fond du Lac



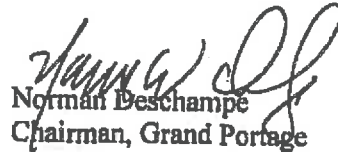
Catherine Chavers  
Chairwoman, Bois Forte



Terrance Tibbetts  
Chairman, White Earth



Melanie Benjamin  
Chief Executive, Mille Lacs Band



Norman Deschampe  
Chairman, Grand Portage



Faron Jackson  
Chairman, White Earth



STATE OF MINNESOTA



# INDIAN AFFAIRS COUNCIL



Website: <http://mn.gov/indianaaffairs/>

John Linc Stine, Commissioner  
Minnesota Pollution Control Agency  
520 Lafayette Road North  
St. Paul, MN 55155-4194

May 25th, 2017

Re: MPCA's Proposed Rule Revisions for Minnesota's Sulfate Standard to Protect Wild Rice.

Commissioner Stine:

The eleven independent sovereign Indian nations in the state of Minnesota appreciate the opportunity to have continuing dialogue with you and the Minnesota Pollution Control Agency (MPCA) regarding the work underway to revise the state's water quality standards protection for wild rice. There is a long history of expressed tribal concern documenting the damages to wild rice in the treaty ceded territories within the State of Minnesota beginning in the 1860's. Over the past several decades, we have participated in numerous state agency-led initiatives regarding wild rice, from previous rulemaking to identifying management and restoration strategies. Our motivation for sitting down at the table with the state to talk about wild rice has always been to forge a common understanding of how precious this singular resource is, and to reinforce a sense of shared responsibility to protect it for future generations. As we have repeatedly communicated to you and your staff, wild rice or *Mahnomin*, as the Ojibwe people call it, or *Psiã*, as it is known by the Dakota people, is the preeminent cultural resource of this region and central to our cultural heritage. We see the severe diminishment of wild rice across its historic range as a call for stronger and broader protections of remaining stands here in Minnesota, its last refuge in the United States.

In previous consultations with MPCA, both formal government to government meetings and informal technical staff meetings, you have hopefully learned much more than you knew before about the unique characteristics of this incomparable and irreplaceable resource. We have shared our knowledge, our stories, and our experiences that come from many centuries of successfully managing and sustainably harvesting this sacred



food. We have not been surprised that the research program you conducted has yielded “modern” scientific evidence that wild rice is exceptionally sensitive to sulfate pollution, and that Dr. Moyle’s rigorous observational data from decades ago was actually on the mark. Our research, our monitoring and our traditional knowledge concur. We have also emphasized our experience with and concerns for other significant factors that can degrade or destroy natural stands of wild rice, including hydrologic changes, watershed development, invasive species, mechanical damage from motorized watercraft, and the overarching effects of climate change.

We have made it abundantly clear in our conversations and in written tribal comments that wild rice, in order to survive and thrive into the future, needs stronger and broader protections than just a single water chemistry criterion; one which, in fact, has not been properly implemented in the decades since it was promulgated. We urged your agency to reach across to the Minnesota Department of Natural Resources (MnDNR) and work collaboratively through your complementary regulatory responsibilities to forge meaningful, effective wild rice protections that go beyond a sulfate standard. Both of your agencies have been directed by the state legislature in recent years to examine water quality standards *and* management issues pertaining to wild rice. These past five years would have been a prime opportunity to not only refine and strengthen relevant water quality standards, but also refine and strengthen management, assessment, and restoration goals for this significant shared resource.

Our perspective is that, at this critical point in time, if MPCA were to seriously consider and incorporate the clear and specific recommendations that have come from experienced tribal staff, we could be commenting on revised wild rice water quality rules that:

- Recognize, first and foremost, its priceless value to the people of Minnesota and its exceptional ecological significance;
- Are as inclusive and conservative as possible in designating wild rice waters, recognizing its dramatically diminished occurrence and the need to protect all that we have left;
- Are broadly protective through additional narrative standards that reflect its sensitivity to pollution, habitat degradation and hydrologic alteration – such as those inherent in Aquatic Life Use classification;
- Define what is a sustainable, “harvestable” and generally healthy wild rice condition, and incorporate that by reference with a robust assessment methodology;
- Maintain the existing, simple-to-implement sulfate criterion that has been demonstrated to be protective of the water quality necessary to support wild rice, with rare exceptions afforded the option to demonstrate a site-specific standard that is protective of wild rice in that waterbody.

In addition to what could be defined or revised in Minnesota water quality rules, we have also counseled the agency on the overarching need for a commitment to conduct a comprehensive statewide inventory as quickly as possible. This should have been ongoing throughout the research and rulemaking process; in fact, there is a long history of the state making but not fulfilling this particular commitment. The lack of a common baseline



inventory of wild rice waters is a glaring deficiency in the state's ability to protect wild rice through the broad range of regulatory processes you are responsible for under the Clean Water Act. First, there must be sufficient baseline information on the presence of wild rice across Minnesota waters, including identifying a subset of waters that will be surveyed annually to help capture known variability in wild rice stands.

Second, the agency needs to commit to establishing an assessment methodology for evaluating the condition of wild rice waters, and not simply rely upon a single water quality criterion for determining compliance with this beneficial use. Assessment is a critical step towards identifying impaired wild rice waters, listing them on the state's 303(d) list, and ultimately leading to a process for restoration, if needed. Your expressed rationale for keeping the wild rice beneficial use in Class 4 (Agriculture and Wildlife) is that the original standard defined the beneficial use as a food source for humans and wildlife. You cannot possibly determine whether a wild rice waterbody is meeting *that* beneficial use without both monitoring data – of the resource itself - and a robust assessment methodology that can determine its condition: healthy, experiencing natural variability; or impaired, showing diminished vigor and productivity. This is no different than the framework your agency employs in its assessment of other beneficial uses, specifically involving biological measurements and analyses of the condition of the resource itself. The tools for developing such an assessment methodology are readily available in your agency's wetland assessment program and the field handbook recently published by Minnesota Sea Grant, which the tribes have advocated you use for stand density surveys that are comparable with ours.

But instead of taking an approach such as outlined above – an approach that honors the ecological and cultural significance of wild rice and respects the knowledge and experience of people who have successfully managed, harvested, and restored wild rice - the MPCA has chosen to develop rule revisions that:

- Fail to acknowledge the unique ecological and cultural characteristics, and thereby a clear and compelling rationale for strengthening Clean Water Act protections;
- Err on the side of *exclusiveness* in designating WR waters, leaving hundreds of waters with an existing wild rice use unprotected;
- Conflate the sparse stem density established in your definition of 'wild rice water' with actually complying with the 'harvestable' beneficial use;
- Lack any assessment of the beneficial use, other than compliance with a single water chemistry parameter (problematic for their required responsibility to list impaired waters);
- Propose an arbitrary and narrow application of additional narrative standards protection to a truncated list of 'important wild rice waters', rather than all remaining and equally valuable wild rice waters;
- Are not conservative; the '4WR' distinction seems to favor certain wild rice waters without providing any rationale for why it is more important to protect them than to protect all wild rice waters;
- Propose a complicated, difficult-to-implement equation for deriving site-specific criteria that itself relies upon data that the state currently does not have.



The MPCA is already seriously behind the information curve in its failure to have an established baseline wild rice inventory in common with the MNDNR, the tribes, wildlife conservation organizations and state rice harvesters. The agency has acknowledged that it will take years to compile sediment and water quality data sufficient to implement this new proposed equation-based standard. There has been no discussion of an assessment methodology that can broadly evaluate the actual condition of our wild rice waters, instead maintaining only a narrow focus on compliance with a single parameter to identify impairment of this beneficial use. Yet, that beneficial use is defined as human and wildlife harvest and consumption! Without broad aquatic life use protection and a comprehensive condition assessment process, there cannot be an adequate water quality standards-based framework for triggering necessary restoration of degraded wild rice waters through either a total maximum daily load study or a watershed restoration strategy.

We know that the MPCA has engaged with numerous stakeholders throughout this process, both through the Wild Rice Advisory Committee and in separate meetings and communications. We know that the legislature has passed several bills severely limiting your agency's ability to implement the existing wild rice water quality standard in permitting or listing of impairments, and shielding dischargers from spending any money on compliance with the existing approved standard. This level of political constraint over the agency's Clean Water Act authorities is shocking, yet no more disturbing than the industry and Chamber of Commerce pressure and disinformation campaign that is behind it, as we have witnessed in Advisory Committee meetings, presentations to their members and supporters, and in their written comments throughout the process. While we would never expect industry or the Chamber of Commerce to champion the protection of wild rice, we certainly hold your agency to a higher standard; it is your core mission to *protect and improve the environment and enhance human health*.

Yet, in your Draft Regulatory Analysis of costs associated with complying with the new rules, you only examine in detail dischargers' potential costs of compliance. There is no balanced analysis that genuinely shows "...a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule", as required by statute. To date, dischargers have borne *zero* costs to comply with the existing wild rice water quality standard, and Minnesota tribes (and any Minnesotan that harvests or eats Minnesota wild rice) have lost thousands of undocumented acres of productive wild rice waters. As we see the proposed rule revisions taking shape, we can only assume that the few potentially affected dischargers will claim undue economic hardship and be granted variances from any calculated sulfate criteria. No additional ecological or habitat protections are being considered or proposed for wild rice waters, nor any bona fide assessment that determines whether the defined beneficial use is being met. Regrettably, we can only conclude that tribes will continue to bear the 'costs' of your proposed rule, and dischargers will benefit.

After more than five years of investigation, literature searches, and experimental research, you now know of many other stressors that can affect the health and sustainability of wild rice in Minnesota lakes and flowages. Yet, sadly, the end result of MPCA's apparent rejection of the recommendations and experience shared by the tribes is that this rule revision process will not result in protection of wild rice for either meeting the MPCA's defined beneficial use, or the Minnesota tribes' expressed values.

We hope you will reconsider the tribes' recommendations before you move to finalize your rule revisions. We know it will take all our efforts, working together, to protect wild rice for future generations.

Sincerely,

A handwritten signature in black ink, appearing to read 'RL Larsen', with a long horizontal flourish extending to the right.

Robert L. Larsen  
President, Lower Sioux Indian Community  
Chairman, Minnesota Indian Affairs Council

cc: Robert A. Kaplan, Acting Regional Administrator US EPA Region 5  
Debra Dirlam, R5 RTOC Member – Lower Sioux Environmental Director  
Seth Moore, R5 RTOC Member – Grand Portage Environmental Director  
Levi Brown, R5 Alternate NTOC Member – Leech Lake Environmental & Lands Director





## GRAND PORTAGE RESERVATION TRIBAL COUNCIL

Norman W. Deschampe - Chairman • Marie Spry - Vice Chair • Dennis B. Morrison - Secretary/Treasurer  
John Morrin - Councilman • Rob Hull - Councilman

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

October 24, 2017

Honorable Judge Schlatter:

The Grand Portage Band of Lake Superior Chippewa (“Grand Portage” or the “Band”) thanks you for the opportunity to provide comments on the proposed Minnesota Pollution Control Agency (“MPCA”) wild rice rules. Wild rice (“manoomin”) is considered sacred to Ojibwe people. Manoomin played a central role in Ojibwe migration stories and is considered a relative, not simply “a resource”. So, the Band’s current effort to preserve manoomin by opposing MPCA’s proposed rule is a continuation of the Band’s ongoing efforts to preserve our cultural identity.

Grand Portage opposes MPCA’s proposed rule because it is scientifically indefensible. This rule will not protect wild rice. Iron does not mitigate sulfide toxicity. Instead, as MPCA’s scientists know, iron-sulfide forms a plaque on wild rice roots and gets taken up by the plant forming blockages that prevent nutrient uptake.

Further, the rule excludes without justification waterbodies that need wild rice protection. The wild rice rule as it is being proposed will only apply to fifty-eight percent of the known wild rice waters in the State, leaving the other forty-two percent for rule-making at a later date. Tribes in the Lake Superior basin know from experience with the 7052 rule—when twenty-four wild rice waters were added in 1998 and MPCA promised but failed to add more waters in the future—that in all likelihood no more waters will be added to the list, ever.

Indeed, while wild rice is treaty-reserved for tribes in the 1854 Ceded Territory, MPCA has denied an updated wild rice waters list that was provided by the 1854 Treaty Authority. MPCA will only accept an out-of-date March 2016 list identifying 393 waters instead of a list of 503 waters updated in March of 2017 without providing any rationale and in spite of requests from the 1854 Treaty Authority. In short, MPCA has contravened the purpose of the Clean Water Act



## GRAND PORTAGE RESERVATION TRIBAL COUNCIL

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by excluding existing wild rice waters listed by both the MN DNR and the 1854 Treaty Authority without providing the required Use Attainability Analysis for excluding these waters.

Finally, Grand Portage wishes to express its grave disappointment that—contrary to the specific requests that the Band made during consultations—MPCA has automatically applied its standards to waters situated entirely within the Band's Reservation. MPCA's decision to require the Band to 'opt out' of the state's standards demonstrates that MPCA did not listen to the Band when we consulted with it in good faith. The Band expressly reaffirms our request that the MPCA exclude our waters from the list of Class 4D waters.

In closing, the proposed rule is not about divisive politics with environmentalists and tribes on one side and industry on the other, with MPCA applying good science to find a "middle ground" that will protect manoomin into the future. Instead, it is about powerful industries stamping out the best available science to protect their bottom line by continuing to release pollutants into the environment at concentrations far above Minnesota water quality standards without being required to install adequate wastewater treatment. The proposed wild rice rule will not protect wild rice and contravenes the Clean Water Act by excluding more than 900 waters from the rule. Thank you for your consideration of our comments.

Please find attached to our cover letter more extensive written comments with citations regarding MPCA's proposed wild rice, previous comments made by Grand Portage and Fond du Lac, and the Minnesota Indian Affairs Council.

Sincerely,

*Dennis B. Morrison*

Dennis Morrison, Secretary/Treasurer

Sent via e-mail only  
[minnesotaoah.granicusideas.com](mailto:minnesotaoah.granicusideas.com)

Administrative Law Judge LauraSue Schlatter  
Office of Administrative Hearings  
P.O. Box 64620  
St. Paul, MN 55164

November 22, 2017

Re: Proposed Rules Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Waters, Minnesota Rules parts 7050.0130, 7050.0220, 7050.0224, 7050.0470, 7050.0471, 7053.0205, and 7053.0406; Revisor's ID Number 4324

OAH Docket No. 80-9003-34519

Dear Ms. Schlatter:

The Fond du Lac Band of Lake Superior Chippewa (the "Band") appreciates this opportunity to comment on Minnesota Pollution Control Agency's ("MPCA") proposed rules amending the state water quality standards applicable to wild rice. As you know, manoomin (the Ojibwe name for wild rice, meaning "the good berry") is an exceptional culturally significant resource for the tribes in Minnesota. From historical reports,<sup>1</sup> Band member accounts,<sup>2</sup> and current Minnesota Department of Natural Resources ("DNR") and tribal reports,<sup>3</sup> manoomin has extensively declined throughout Minnesota, and in southern Minnesota it has virtually disappeared because of dramatic transformations of the landscape and alterations of natural hydrology over the last century. Minnesota tribes have had a unique relationship with the state regarding the protection of manoomin, as demonstrated through multiple rulemaking processes<sup>4</sup> and executive orders.<sup>5</sup>

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<sup>1</sup> Jenks, A.E., *The Wild Rice Gatherers of the Upper Great Lakes: A Study in American Primitive Economics* (Washington: GPO, 1901), available on-line at <http://greatlakeswater.uwex.edu/library/articles-and-white-papers/wild-rice-gatherers-upper-lakes-study-american-primitive-economics> (last visited Oct. 12, 2012).

<sup>2</sup> Rosemary Berens, Bois Forte Tribal Historic Preservation Officer (retired)

<sup>3</sup> *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. 31, 2017).

<sup>4</sup> *See, e.g.*, Minnesota Session Law 2007, Chapter 7, Article 1, Sect. 168

<sup>5</sup> *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."



Fond du Lac Resource Management Division staff have participated in and followed closely the MPCA's research program and rulemaking approach related to the existing sulfate criteria for protecting wild rice waters<sup>6</sup>, including the MPCA's Wild Rice Advisory Committee. 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 sulfate criterion is well-supported by multiple lines of evidence and should be maintained and enforced. As we have concluded in previous comments<sup>7</sup>, there is no scientifically defensible basis for changing the current sulfate limit, which is the clear benchmark required by the US Environmental Protection Agency ("EPA") for considering approval of a revised criterion<sup>8</sup>, and as was clearly communicated to the Minnesota legislative body in 2011<sup>9</sup>.

On two elements of MPCA's draft rule revisions, the Band agrees with the agency's proposals. First, the contorted name of the beneficial use in current rule ("waters used for the production of wild rice") is unnecessarily confusing, and in recent years has been purposefully misinterpreted with the intent to circumvent regulatory controls,<sup>10</sup> albeit unsuccessfully. We support the beneficial use name change to "wild rice waters".<sup>11</sup> Second, the existing rule applies the numeric sulfate standard "during periods when the rice may be susceptible to damage", which had been interpreted on occasion as only during the growing season. Scientific investigations conducted as part of the MPCA's research program, and subsequently with tribal support, have clearly shown that there is no seasonal component in wild rice susceptibility to the effects of sulfate pollution. We support the elimination of that limited seasonal applicability condition.

But other aspects of the MPCA's rule revisions and Statement of Need and Reasonableness ("SONAR") are every bit as disturbing to the Band as the proposed change in the sulfate criterion, and we can only conclude that **these rule revisions will not protect manoomin**. While Fond du Lac provided testimony at the October 26, 2017 hearing at Fond du Lac Tribal and

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<sup>6</sup> <http://www.pca.state.mn.us/index.php/water/water-permits-and-rules/water-rulemaking/minnesotas-sulfate-standard-to-protect-wild-rice.html#assessment>

<sup>7</sup> 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)

<sup>8</sup> *See, generally*, 40 CFR §§ 131.5, 131.11, and 131.21.

<sup>9</sup> Letter from USEPA to Sens. Dill, Bakk, May 13, 2011.

<sup>10</sup> Minnesota Chamber of Commerce, Appellant, vs. Minnesota Pollution Control Agency, Respondent, WaterLegacy, Defendant Intervenor, Respondent, Dec. 17, 2012, at <http://mn.gov/web/prod/static/lawlib/live/archive/ctapun/1212/opa120950-121712.pdf>

<sup>11</sup> However, the Band uses this term in these comments when referring to the existing designated use of manoomin or wild rice waters under State law.

Community College<sup>12</sup>, and the Band has provided substantial information, knowledge and recommendations to the MPCA staff and Commissioner over the past seven years, we are now submitting comprehensive comments for the administrative record that reflect our deep concerns and objections to the direction this rulemaking has taken. These concerns include the MPCA's refusal to provide aquatic life use protection to manoomin in the updated classification, their refusal to apply the narrative standard protection to all wild rice waters, their unsubstantiated and unlawful decision to exclude more than 900 waters with an existing wild rice use from their statutory list of wild rice waters, the fundamental flaws in the proposed equation-based waterbody-specific numeric standard, the failure to address all known sulfate effects to wild rice (as directed by the Minnesota Legislature), and broad concerns about how the standard will be applied and implemented. These proposed rule revisions do not reflect any of the knowledge or expertise that tribal leaders, tribal members and tribal staff have shared with the agency during this latest chapter in our long history of interactions with MPCA over manoomin. It would be an understatement to say that we are disappointed in the lack of consideration of tribal expertise for this rulemaking. The proposed rule revisions also fail to satisfy the criteria required by the Clean Water Act and its implementing regulations to make a change to the existing wild rice standard.

While the MPCA acknowledges that wild rice is a unique resource in the Midwest and plays a key spiritual and cultural role in the Ojibwe traditions, we set out below some additional background on the central importance of this resource to the Band, including the rights retained by the Band under its Treaties with the United States, the expertise that the Band has with regard to wild rice, the federal requirements under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and then set out specific comments related to the proposed rule revisions.

## **I. BACKGROUND.**

Wild rice has a unique role, both historically and currently, in the life of the Chippewa. Wild rice has been a “staple in the Ojibway diet” for hundreds of years.<sup>13</sup> Further, wild rice plays a central role in Chippewa culture and religion:

Traditional Ojibway life elevates rice above being food simply for consumption or barter. Stories and legends, reinforced by the ceremonial use of *manoomin* and taboos and proscriptions against eating it at certain times, show the centrality of wild rice to Ojibway culture. These facts together suggest that wild rice, at least in the past, approached the status of a sacred food.<sup>14</sup>

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<sup>12</sup> Oral testimony from Nancy Schuldt, Fond du Lac Water Projects Coordinator, attached

<sup>13</sup> Thomas Vennum, Jr., *Wild Rice and the Ojibway People* at 58 (Minn. Historical Society Press 1988).

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



Wild rice continues to be of profound importance both as a source of food, and for its role in the culture, traditions and spiritual life of the Chippewa people. Wild rice is relied upon to meet ceremonial and religious needs that define unique aspects of Chippewa culture.

Minnesota recognizes this. As set out in the 2008 Report to the Minnesota Legislature, the DNR stated:

Wild rice (manoomin to the Ojibwe) is a spiritually significant resource for Native Americans in the Great Lakes region, and it has been for centuries. . . . The Ojibwe people have a special cultural and spiritual tie to natural wild rice. Their Migration Story describes how they undertook a westward migration from the eastern coast of North America. Tribal prophets had foretold that this migration would continue until the Ojibwe people found “the food that grows on water” . . . That food was wild rice, known as manoomin, and is revered to this day by the Ojibwe as a special gift from the Creator.<sup>15</sup>

The Fond du Lac Band retains rights to harvest wild rice not only on the Reservation that was established for the Fond du Lac Band by Treaty with the United States in 1854,<sup>16</sup> but also over the lands that the Band aboriginally used and occupied and which were ceded to the United States by Treaties made in 1837 and 1854.<sup>17</sup> In both Treaties, the Chippewa, including the Fond du Lac Band, agreed to cede to the United States, a vast area of the Chippewa’s aboriginal territory. While the United States set aside from the lands ceded, reservations as the Chippewa’s permanent homes, the United States also recognized that the small reservations established for the Chippewa were not alone sufficient to enable the Chippewa to sustain themselves. As a result, the Treaties also reserved to the Chippewa the right to hunt, fish, and gather natural resources, including wild rice, from the lands ceded by the Treaties, which extend over a large part of northeastern Minnesota. The continued existence of Chippewa’s usufructuary rights under these treaties has been recognized and given effect by the federal courts.<sup>18</sup> As a result of these

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<sup>15</sup> Natural Wild Rice in Minnesota, A Wild Rice Study document submitted to the Minnesota Legislature by the Minnesota Department of Natural Resources, at p. 7, Feb. 15, 2008, (citations omitted) available at [http://files.dnr.state.mn.us/fish\\_wildlife/wildlife/shallowlakes/natural-wild-rice-in-minnesota.pdf](http://files.dnr.state.mn.us/fish_wildlife/wildlife/shallowlakes/natural-wild-rice-in-minnesota.pdf)

<sup>16</sup> Treaty with the Chippewa, 1854, 10 Stat. 1109, in Charles J. Kappler, ed., Indian Affairs: Laws and Treaties, Vol. II (Washington: Government Printing Office, 1904), available at <http://digital.library.okstate.edu/kappler/Vol2/treaties/chi0648.htm> (last visited Nov. 16, 2017).

<sup>17</sup> *Id.*; see also Treaty of July 29, 1837, 7 Stat. 536, 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 Nov. 16, 2017).

<sup>18</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Fond du Lac Band of Chippewa Indians v. Carlson*, Civ. No. 5–92–159 (D. Minn., Mar. 18, 1996); *United States v. Bresette*,

Treaties, the Band has legally protected rights and a direct interest in the protection and proper management of the natural resources on which those rights depend.

Minnesota recognizes the impact of the Treaty rights with regard to wild rice. As set out in the DNR's 2008 Report to the Legislature:

the Ojibwe tribes that co-signed the Treaty of 1837 reserved the right to gather wild rice from the lands ceded in that treaty. These include an area that eventually became part of east-central Minnesota. The standing of these off-reservation rights was upheld by the U.S. Supreme Court in 1999.

Similar off-reservation rights are reserved for other Ojibwe tribes in the 1854 ceded territory, in northeastern Minnesota. Rights of traditional tribal harvesting have also been preserved through other agreements between tribes and the U.S. government. For example, in the early 1900s the U.S. began buying lands adjacent to wild rice stands on Minnesota lakes. These were stands that had traditionally been harvested or lands that were to be used as rice camps by the Minnesota Chippewa Tribe (MCT).<sup>19</sup>

The United States Supreme Court further explains how Treaty-reserved rights to hunt, fish and gather over territory ceded were essential terms of the Treaty. Such reserved rights, founded on immemorial custom and practice, were “not much less necessary to the existence of the Indians than the atmosphere they breathed.” *United States v. Winans*, 198 U.S. 371, 381 (1905); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 n. 19 (1983). Usufructuary rights reserved by treaty were “part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment . . .” *Winans*, 198 U.S. at 381. The cession of certain rights did not affect those not ceded, for “the treaty was not a grant of rights to the Indians, but a grant of rights from them, - a reservation of those not granted.” *Id.*; see also *Winters v. United States*, 207 U.S. 564, 576-77 (1908) (holding that Indian water rights are reserved by treaty, not because these rights were expressly reserved, but because they were not included in the cession).

The exercise of these rights requires access to natural resources, including natural resources that are not degraded or contaminated. See *Michigan v. U.S. EPA*, 581 F.3d 524, 525 (7th Cir. 2009) (recognizing that a tribe's “cultural and religious traditions . . . often require the use of pure natural resources derived from a clean environment.”). Treaty rights, environmental health, and tribal culture are all interconnected. Populations with unique connections to the natural

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761 F. Supp. 658, 661-662 (D. Minn. 1991); see also *Lac Courte Oreilles v. Voigt*, 700 F.2d 341, 365 (7th Cir.), cert. denied, 464 U.S. 805 (1983).

<sup>19</sup> 2008 Report to the MN Legislature at 17.

environment, such as Indian tribes, experience impacts that are too often overlooked. The State must consider the impacts that MPCA's rule revision will have on the Band's federally protected Treaty rights.

The EPA has determined that a state's compliance with the CWA and EPA regulations must be considered in light of Indian treaties, because these treaties are the supreme law of the land. The CWA itself provides that it must be read in harmony with treaties, as it "shall not be construed as . . . affecting or impairing the provisions of any treaty of the United States." See Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 Fed. Reg. 85,417, 85,422 (Nov. 28, 2016) (quoting 33 U.S.C. § 1371(a)). Thus, EPA explained that it is "necessary and appropriate to consider tribal treaties to ensure that EPA's actions under the CWA are in harmony with [Indian] treaties." *Id.* at 85,423. In requiring that the State of Washington consider tribal treaty rights when revising certain WQS relating to waters for fish, EPA further explained that the "purpose for which tribes reserved [off-reservation] fishing rights through treaties with the U.S. has important implications for water quality regulation under the CWA. Fundamentally, the tribes' ability to take fish for their subsistence purposes under the treaties would be substantially affected or impaired if it were not supported by water quality sufficient under the CWA to ensure that tribal members can safely eat the fish for their own subsistence." *Id.* Because many of the waters in which treaty-recognized rights could be exercised could not be regulated by tribes, it fell to the EPA to regulate them to protect tribal treaty rights that depended on them. *Id.* Applying those principles, EPA found that "when establishing WQS for these waters [used to harvest fish and shellfish], the tribal members must be considered the target general population for the purposes of setting risk levels to protect the subsistence fishing use." *Id.* This was done to "ensure that the tribes' treaty-reserved right to take fish for subsistence purposes is not substantially affected or impaired . . ." *Id.* This justified EPA's decision that "it is necessary and appropriate" to derive human health criteria that reflects a subsistence level of consumption "that is not artificially suppressed as a result of concerns about pollution or fish contamination where such data are available." *Id.* at 85,425.

In short, EPA's findings show that the CWA must be read consistently with tribal treaty rights so as not to "affect[] or impair[]" them, and that water quality standards must ensure that water quality must be "sufficient under the CWA to ensure that tribal members can safely" consume plants and animals that they are guaranteed for subsistence and cultural reasons under treaties. For that reason, a designated use of Minnesota waters for wild rice, that itself recognizes the importance of wild rice to tribes under their treaties, should properly ensure that "the tribes' treaty-reserved right . . . is not substantially affected or impaired." A water quality standard that killed or significantly harmed the resource on which the tribal members depend would be as destructive to the treaty right as a water quality standard that made that resource unsafe to consume. Minnesota is obligated under the CWA to implement WQS that protect the treaty

resource from being harmed to an extent that substantially affects or impairs the Chippewa's Treaty rights.

As noted above, the Chippewa have significant expertise regarding the proper care and management of wild rice. For centuries, the Chippewa harvested wild rice using measures that ensure the health of wild rice stands. It has been Chippewa knowledge and expertise on the proper management of wild rice waters that has led to measures necessary to ensure the continued health of this unique resource. Chippewa knowledge has been relied on to protect wild rice from, for example, premature harvest, overharvests, and the use of mechanized equipment, all of which threatens permanent loss of wild rice stands.<sup>20</sup> Because of the paramount importance of wild rice, the Chippewa, including the Fond du Lac Band have devoted considerable resources to bringing substantive expertise to all matters affecting wild rice. The Fond du Lac Band has been an active participant in the technical teams that have assisted the State in addressing wild rice management issues for decades. For example, because of his expertise, Thomas Howes, a Fond du Lac Band member who served as a Natural Resource Manager for the Band's Resource Management Division, served on the Technical Team that led to the DNR's 2008 Wild Rice Report to the State Legislature. He, along with other Band officials and staff, have brought that expertise to bear as the MPCA has considered whether revisions to the wild rice rule are warranted and as the MPCA has examined proposed revisions to that rule. Additionally, Nancy Schuldt, Water Projects Coordinator in the Fond du Lac Band's Environmental Program, has 20 years of experience as an aquatic ecologist and water policy professional for the Band. She has a BS in Biology from the University of Dayton, and a MA in Aquatic Ecology from the University of Kansas. She developed the Band's water quality standards and monitoring program, has directed research into fish contaminants and sediment chemistry to characterize mercury impacts to Fond du Lac Band members, collaborated on research into wild rice ecology and toxicity, as well as watershed hydrologic modeling to inform management and restoration efforts. She participates in numerous local, regional, national and binational working groups to ensure the tribal perspective is represented, and initiated a cooperative wastewater management Project with the non-tribal community to protect Big Lake, a heavily developed lake on the Reservation. She initiated the tribe's nonpoint source management program, and leads the Band's environmental review of mining and energy industry impacts to trust resources. The Fond du Lac Band also works closely with other experts on these issues, including: Band members having traditional cultural knowledge regarding wild rice; Darren Vogt, Environmental Director for the 1854 Treaty Authority; Dr. John Pastor, Department of Biology, University of Minnesota, Duluth; and Dr. John Coleman, University of

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<sup>20</sup> See Vennum, *Wild Rice and the Ojibway People*, at 269-270.

Wisconsin and Environmental Director for the Great Lake Indian Fish and Wildlife Commission, among others.

Notwithstanding the Band's federally protected treaty rights and significant expertise related to wild rice, we are deeply troubled to find that MPCA has ignored the Band's substantive comments and expertise. Instead, MPCA's proposed rule improperly relies on an untested "line of scientific inquiry" that does not satisfy the requirements of the Clean Water Act or its implementing regulations to permit a change in the existing wild rice rules.

## II. CLEAN WATER ACT REQUIREMENTS

The Clean Water Act ("CWA") requires that the State "specify appropriate water uses to be achieved and protected." 40 C.F.R. § 131.10(a); 33 U.S.C. § 1313(c)(2). Any changes by the State to these uses, once specified, must comply with the Act. The goal of the water quality standards program under the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's water. 33 U.S.C. § 1251. Water quality standards help translate the broad goals of the CWA into waterbody specific objectives and goals based on the classification of a particular waterbody. An objective of classifying a waterbody is to designate uses by evaluating and describing the ecosystem and the specific purposes or uses of the waterbody as it relates to humans and the environment. Water quality standards must include water quality criteria that protect the designated uses. *Id.* § 131.11(a)(1). The State should establish criteria by "establish[ing] numerical values" based on EPA's CWA § 304(a) guidance, § 304(a) guidance modified to reflect site-specific conditions, or "[o]ther scientifically defensible methods," *id.* § 131.11(b)(1), and by "[e]stablish[ing] narrative criteria or criteria based on biomonitoring methods where numerical criteria cannot be established or to supplement numerical criteria," *id.* § 131.11(b)(2). Minnesota's criteria for protecting wild rice are found in Minn. R. 7050.0224. *See* SONAR at 11. Rule 7050.0224 includes narrative criteria for specifically named waters in subpart 1, and numerical criteria for all surface waters in the State in subpart 2.

The CWA protects both "designated" and "existing" uses of water bodies. "Existing uses" are a subcategory of designated uses, which were attained on a waterbody on or after November 28, 1975, whether or not the use was included in State water quality standards, *id.* § 131.3(e). "Designated uses" are "those uses specified in water quality standards for each water body or segment whether or not they are being attained." 40 C.F.R. § 131.3(f). Designated uses are not dependent on whether or not conditions currently support the use. For example, in Minnesota, trout waters are not protected on the basis of whether there are enough trout for actual harvest, but are protected because there is suitable habitat and physical characteristics for trout to survive. And many waters in Northeastern Minnesota are protected as "trout streams" even though the

Minnesota Department of Natural Resources acknowledges that “North Shore creeks are great scenery but are only fair trout streams.”<sup>21</sup>

Federal CWA regulations give the most protections to existing uses of waterbodies. An existing use cannot be modified or removed unless designated uses are added that require more stringent water quality criteria. *Id.* § 131.10(h)(1).<sup>22</sup> The State *can* remove designated uses that are not “existing” uses, but only if it follows a procedure prescribed by regulation and makes certain findings supporting its decision. If the designated use to be removed is a use specified in § 101(a)(2) of the CWA, which are “the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water,” 33 U.S.C. § 1251(a)(2), then the State must undertake a use attainability analysis (“UAA”) that demonstrates that attaining the designated use is not possible for one of six particular reasons. *Id.* § 131.10(j) (incorporating by reference *id.* § 131.10(g)(1)-(6)). These reasons are:

- (1) Naturally occurring pollutant concentrations prevent the attainment of the use;  
or
- (2) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; or
- (3) Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or
- (4) Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use; or
- (5) Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or
- (6) Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact.

*Id.* § 131.10(g)(1)-(6). (These same requirements apply to the removal of a sub-category of a designated use. *Id.* § 131.10(j)(2).) But a designated use cannot be removed if the use can be attained by implementing effluent limits and best management practices. *Id.* § 131.10(h)(2).

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<sup>21</sup> See [http://www.dnr.state.mn.us/fishing/trout\\_streams/north\\_shore.html](http://www.dnr.state.mn.us/fishing/trout_streams/north_shore.html) (last visited Nov. 16, 2017).

<sup>22</sup> Additionally, Minnesota’s CWA antidegradation policy, provides that “existing uses and the level of water quality necessary to protect existing uses *shall be maintained and protected*”) Minn. R. 7050.0250(A) (emphasis added). See 40 C.F.R. § 131.12(a)(1) (requiring implementation of antidegradation policy).

Although a State is *not* required to conduct a UAA when it wishes to remove a designated use that is not described in § 101(a)(2) of the Clean Water Act, *id.* § 131.10(k)(3), it must still submit documentation to the EPA justifying how its consideration of the use and value of water for the uses listed in 40 C.F.R. § 131.10(a) appropriately supports its removal action or revision of a designated use – which can be in the form of a UAA, but need not be, *Id.* § 131.10(k)(3). The § 131.10(a) uses are “the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation.” *Id.* § 131.10(a).

Whether or not a UAA is required, the State must then provide public notice and an opportunity for a public hearing on its decision. 40 C.F.R. § 131.20(b). These must comply with provisions of State law and the EPA’s public participation regulation. *Id.* (incorporating by reference 40 C.F.R. pt. 25). The proposed revision and supporting analyses must be made available to the public in advance of the hearing. *Id.* The proposed revision is then submitted to the EPA for review. *Id.* § 131.20(c). As described above, the EPA will only approve water quality criteria if they are “based on sound scientific rationale” and “contain sufficient parameters or constituents to protect the designated use.” *Id.* § 131.11(a)(1); *see Miccosukee Tribe of Indians of Fla. v. U.S. EPA*, 105 F.3d 599, 602 (11th Cir. 1997) (standards apply to new or revised water quality criteria). These criteria should take the form of numerical criteria that “[e]stablish numerical values” based on 304(a) Guidance, 304(a) Guidance modified to reflect site-specific conditions, or “[o]ther scientifically defensible methods,” *id.* § 131.11(b)(1), as well as narrative criteria “based upon biomonitoring methods where numerical criteria cannot be established or to supplement numerical criteria,” *id.* § 131.11(b)(2)

### **III. COMMENTS ON THE PROPOSED RULE**

A. MPCA should have considered reclassifying wild rice waters as Class 2 waters.

The revised rule proposal to create a new wild rice waters subclass, Class 4D, does not recognize the uniqueness of the wild rice beneficial use as MPCA claims, but only helps MPCA segregate these waterbodies for purposes of implementing its newly created sulfide/sulfate standard. SONAR at 35. The proposed new standard for listing wild rice waters in Minnesota Rule 7050.0224 at Subpart Five states:

The standards in items B and C apply to wild rice waters identified in part 7050.0471 to protect the use of the grain of wild rice as a food source for wildlife and humans. The numeric sulfate standard for wild rice is designed to maintain sulfide concentrations in pore water at 120 micrograms per liter or less. The commissioner must maintain all numeric sulfate standards for wild rice waters on a public Web site.

This standard, however, improperly limits the beneficial uses of wild rice.

During this rule revision process, the MPCA had both the authority and opportunity to take a hard look at all existing rules related to the protection of wild rice, and fundamentally improve and modernize state rules in light of new research and their growing understanding of the ecological requirements of wild rice. That is their role and charge under their delegated Clean Water Act authorities. The agency should have considered tribal recommendations that elevate the unique qualities and characteristics of manoomin beyond simply “food”. For this specific shared resource, the tribes are the experts in monitoring, managing, protecting and restoring manoomin. We have had numerous discussions with the agency about the role that manoomin plays as an indicator of healthy, diverse, highly functioning aquatic ecosystems. Its presence in a waterbody is evidence of good to excellent biological/ecological condition, while conversely, its absence in a waterbody where it was historically present is indicative of a degraded condition.

Further:

Wild rice is tremendously important to the biodiversity of the lakes and rivers it is associated with. The dense stalks provide roosting and loafing areas and brood cover for a variety of waterfowl species, and nesting habitat for other bird species. The long, nutritious grains are a large part of the diet of many migratory birds. Mammals such as the muskrat utilize the tender stalks of wild rice for both food and in the creation of their lodges. The rice beds provide habitat for many other species from invertebrates to large mammals such as the moose. Indeed wild rice benefits a large number of species due to the structure, cover, or food sources it contributes to the wetland.

...Other parts of the Wild Rice plant also provide sustenance. Wood Ducks often pull their flowers and geese and swans consume young shoots, germinating seeds, and mature stems and leaves, sometimes to the detriment of the stands. Rice beds also provide nursery areas for small fish, frogs, and other aquatic prey items for Common Loon, Great Blue Heron, and other piscivorous bird species.

Water quality also benefits from wild rice through its ability to bind loose soils, tie up nutrients, and act as a buffer by slowing winds across shallow wetlands. By stabilizing water quality, algal blooms are reduced and water clarity is increased.<sup>23</sup>

Indeed, Minnesota has expressly recognized this. In the 2008 report to the MN Legislature, the Minnesota Department of Natural Resources found:

As directed by the legislature, the wild rice study document focuses on natural wild rice. For this study, we define natural wild rice as native species of wild rice (*Zizania*) that are

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<sup>23</sup> <http://www.nativewildricecoalition.com/>, supported by the National Institute of Food and Agriculture, US Department of Agriculture.



growing in public waters and are not subject to cultivation. The simplest description of natural wild rice in Minnesota is that it is an annual aquatic grass that produces an edible grain.

This simple description, of course, does not do justice to this unique and valuable plant. History is replete with examples of its importance to wildlife and value to humans both nutritionally and culturally. Wild rice (manoomin to the Ojibwe) is a spiritually significant resource for Native Americans in the Great Lakes region, and it has been for centuries. Nowhere has this grain been more important, nor had a richer history, than in Minnesota. No state harbors more acres of natural wild rice than Minnesota (Moyle and Krueger 1964). No other native Minnesota plant approaches the level of cultural, ecological, and economic values embodied by natural wild rice.<sup>24</sup>

The 2008 Report further directly addresses the broader ecological value that wild rice has, stating:

The value of natural wild rice to wildlife has been long appreciated by American Indians and was marveled at by early European explorers (Jenks 1900). Jonathan Carver traveled through eastern portions of North America in the 1760s and observed of wild rice that “the sweetness and nutritious quality of it attracts an infinite number of wild fowl of every kind which flock from distant climes to enjoy this rare repast, and by it become inexpressively fat and delicious” (Stoddard 1957).

Both migrating and resident wildlife rely on the nutritious and abundant seeds of natural wild rice. One acre of natural wild rice can produce more than 500 pounds of seed. These seeds have long been recognized as an important source of food during fall migrations (McAtee 1917). Martin and Uhler (1939) listed wild rice as the ninth most important source of food for ducks throughout the United States and Canada, and the third most important source of food for ducks in the eastern portions of the continent. . . . Although the value of wild rice to mallards, wood ducks, and ring-necked ducks is most commonly recognized, other ducks such as black ducks, pintail, teal, wigeon, redheads, and lesser scaup also use stands of wild rice (Rossman et al. 1982, Huseby 1997).

The stems of wild rice provide nesting material for such species as common loons, red-necked grebes, and muskrats; and critical brood cover for waterfowl. The entire wild rice plant provides food during the summer for herbivores such as Canada geese, trumpeter swans, muskrats, beaver, white-tailed deer, and moose (Martin et al. 1951, Tester 1995). In addition, rice worms and other insect larvae feed heavily on natural wild rice. These, in turn, provide a rich source of food for blackbirds, bobolinks, rails, and wrens. In the spring, decaying rice straw supports

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<sup>24</sup> 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, available at [http://files.dnr.state.mn.us/fish\\_wildlife/wildlife/shallowlakes/natural-wild-rice-in-minnesota.pdf](http://files.dnr.state.mn.us/fish_wildlife/wildlife/shallowlakes/natural-wild-rice-in-minnesota.pdf)

a diverse community of invertebrates and thus provides an important source of food for a variety of wetland wildlife including birds, small fish, and amphibians. Indeed, every stage of growth of natural wild rice provides food for wildlife (McAtee 1917, Stoudt 1944).

As a result, wild rice lakes and streams are breeding and nesting areas for many species. More than 17 species of wildlife listed in the MNDNR's Comprehensive Wildlife Conservation Strategy (2006) as "species of greatest conservation need" use wild rice lakes as habitat for reproduction or foraging (Henderson 1980, Martin et al. 1951) . . .

Natural wild rice has other ecological values as well. Emergent aquatic plants such as wild rice, bulrush, and cattails protect shorelines and provide habitat for fish (Radomski and Goeman 2001). Dense stands of wild rice stabilize loose soils and form natural windbreaks that can limit the mixing of soil nutrients into the water column (Meeker 2000). In addition, natural wild rice has relatively high requirements for nutrients such as phosphorus and nitrogen (Oelke et al. 2000). During periods of rapid growth, which occurs in spring and summer, the plants sequester these nutrients. Thus stands of natural wild rice counter the effects of nutrient loading and the potential increases in algal growth and lake turbidity.<sup>25</sup>

The broad ecological benefits of wild rice require a proper classification of these waterbodies under the Clean Water Act. The fundamental purpose of the CWA is the "protection and propagation of fish, shellfish and wildlife," 33 U.S.C. §101(a), which includes aquatic life and the protection of aquatic flora. However, Minnesota's Class 4 waters, which cover agricultural and wildlife uses, is intended to define *waters that are suitable for the irrigation of crops, consumption by livestock, support of vegetation for range grazing, and other uses in support of farming and ranching and protects livestock and crops from injury due to irrigation and other exposures.*<sup>26</sup> The Minnesota Tribes have consistently recommended to the MPCA, during multiple consultation sessions over the past four years specifically focusing on wild rice water quality standards, that natural wild rice stands (manoomin) should be more accurately classified as a distinct aquatic life use (e.g., Minnesota's Class 2 waters). We noted that it may be appropriate to leave paddy rice, a true cultivated agricultural product, in Class 4, but it is inherently offensive to Minnesota Tribes to classify manoomin as a 'crop', and we objected to construing the naturally occurring hydrology of a natural wild rice bed as "irrigation". Irrigation is defined as ". . . to supply (dry land) with water by means of ditches, pipes, or streams."<sup>27</sup> This is simply not an appropriate or reasonable paradigm for classifying a native plant species growing without cultivation in a natural water body.

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<sup>25</sup> *Id.* at 8-10

<sup>26</sup> *Id.* at Chapter 2, EPA Water Quality Standards Handbook

<sup>27</sup> Webster's II New College Dictionary (ISBN 0-395-70869-9) 1999. Houghton Mifflin Co.

Fond du Lac and other tribal staff have consistently held up the state's water quality protection framework for trout streams as a model for how the agency can use its CWA authorities to protect manoomin. Aquatic life use can apply to plant or animal species, or assemblages of related species (e.g., warm-water fishery). MPCA protects trout streams as a separate aquatic use class (2A) based upon the *thermal and habitat potential that a lake or stream could support trout*. Further, a trout lake or stream is not protected based on the number of trout that have been shocked in that waterbody on any given year. For example, the MPCA St. Louis River Stressor ID report<sup>28</sup> concludes for Wyman Creek, a designated trout stream that has been assessed as impaired for its fish community: "Based on the historical presence of brook trout, Wyman Creek remains a designated trout stream, despite a lack of trout in the more recent monitoring efforts." The MPCA should consistently apply this conservative justification for protecting both brook trout *and* manoomin.

The Band has regularly advised the MPCA that water quality protections for manoomin should focus on **preserving and enhancing the sustainability of the resource**, not the anthropocentric construct of "production." We maintain that the appropriate classification for manoomin is in Minnesota's Class 2 waters, with its own separate subclassification. We believe it should be protected under the relevant CWA aquatic life use standards, which apply broadly to the physical, chemical and biological attributes necessary to sustain and not degrade aquatic plant and animal species. MPCA has never provided the Band with any rationale for refusing to protect manoomin as a distinct aquatic life use, only asserting that "it disagrees". They do maintain that "all waters being proposed as wild rice waters are also protected as Class 2 waters and are protected by Class 2 standards," SONAR at 23, but that statement does not explain or justify why it is not reasonable to simply and clearly define wild rice waters as Class 2 waters with a distinct aquatic life use. The undisputed recognition of the broad ecological benefits of wild rice, and the requirements of the Clean Water Act, call for this result.

- B. MPCA does not adequately explain or justify why the proposed rule's narrative standard only applies to 24 wild rice waters and not all listed wild rice waters.

MPCA proposes to limit the narrative standard to only 24 named water bodies, and not include others, as the MPCA promised to do when the narrative standards were first adopted, is not rational. *See In re Proposed Permanent Rules Relating to Miss. River Corridor Critical Area*, No. OAH 8-9014-33236, 2016 WL 6216528, at \*14 (Minn. Off. Admin. Hr'gs Aug. 10, 2016) (citing *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. 1991)). This is especially true in light of the original purpose of adopting the narrative

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<sup>28</sup> <https://www.pca.state.mn.us/sites/default/files/wq-ws5-04010201a.pdf> (last accessed Nov 19 2017)

standards, which was to affirm the Agency's policy of working "in concert" with Minnesota Indian tribes.

This aspect of the wild rice water quality rules – the limited number of water bodies to which the narrative standard was applied – is a relic of the 1997-98 rulemaking for waters in the Lake Superior basin. The MPCA insisted, despite dissent from the Tribes who participated in consultation and dialogue with the agency over this rulemaking, that the Tribes specifically identify "significant wild rice waters" in the Lake Superior Basin to be documented in Minn. R. 0470. The Tribes at the time clearly communicated their objective for protecting all remaining wild rice waters in the Basin, in the ceded territories, and across the state because of its diminishing range and its irreplaceable cultural significance. While the agency's intent at the time was apparently beneficent<sup>29</sup>, they have failed to follow through with commitments made:

Finally, the proposed amendments specifically listing the wild rice waters in Minn. R. 7050.0470 and the inclusion of the wild rice narrative language in Minn. R. 7050.0224 are needed because: 1) they are viewed as initial steps in a broader process intended to provide greater public awareness as to the ecological importance of this unique plant species; 2) they provide further support for the study of the physical, chemical and biological factors that are needed to support wild rice development; and 3) the proposed wild rice amendments represent an affirmation of the MPCA's commitment to work in concert with the American Indian Bands on environmental issues of mutual concern.

...The proposed listing of the 24 wild rice waters in Chapter 7050 is specific to a select number of waterbodies within the Lake Superior Basin that have current and/or historic stands of wild rice. No additional numerical standards for wild rice protection purposes are being proposed during the present rulemaking effort. It is the current intent of the MPCA to participate in ongoing studies and assessments of the wild rice plant and wild rice habitat protection issues. MPCA staff also plan to continue to work the MDNR and the various Bands to identify additional wild rice waters on a statewide basis.

...The listing of these waters and the proposed narrative wild rice waters standard in Minn. R. 7050, in and of themselves, will not automatically translate into greater protection levels that are afforded to this plant species. Rather, increased protection of natural wild rice stands will happen as a result of a continued dialogue and information exchange between interested and affected parties.

At the time of that rulemaking, MPCA was even considering other factors that affect the health and sustainability of wild rice, especially hydrology. The narrative standard broadly addresses that issue, as it directly pertains to protecting the necessary habitat. The agency recognized the

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<sup>29</sup> See, e.g., Excerpts from 1997 GLI SONAR; MPCA Staff Initial Post-Hearing Response Excerpts-1997 (Procedural Document 36)

need for continued research into factors that can impact the year-to-year successes and failures of natural stands of wild rice, but concluded:

“...it is not reasonable to delay this *minimal first step* (emphasis added) to address the overall decline in the number and a real distribution of wild rice stands. More than adequate data exists to show that water levels are an integral element in creating appropriate environments for continued wild rice growth...MPCA staff are committed to working with interested parties on continued research, development of natural wild rice BMPs and evaluation of applicable standards (e.g. sulfates) but a need exists to move forward with the proposed amendments. The MPCA’s proposal to begin listing the wild rice waters and to prevent material degradation of those waters is a reasonable and rational first step in that longer process.”<sup>30</sup>

The agency clearly reached a conclusion during rulemaking twenty years ago that this narrative standard was necessary and reasonable to protect wild rice, and that there was sufficient data existing to support it. However, two decades later despite the opportunity to make changes, MPCA is proposing to retain the narrative standard<sup>31</sup> in the current rule and its narrow application to that arbitrary list of 24 selected wild rice waters, notwithstanding the vehement position expressed by Fond du Lac and other Minnesota Tribes that this broadly protective standard should apply to all wild rice waters. MPCA states that its proposal is reasonable and that:

In recognition of the ecological importance of the wild rice resource, and in conjunction with Minnesota Indian tribes, selected class 4D 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 propagation and maintenance of wild rice plant species must not be materially impaired or degraded.

The MPCA has not honored or fulfilled the commitments they explicitly made with the Tribes in the 1997-98 rulemaking: to move beyond that initial first step, to participate in studies and assessments of wild rice habitat protection, to identify other statewide wild rice waters, to work in concert with the American Indian Bands on environmental issues of mutual concern. By failing to do so, they have acted contrary to the purported purpose of the narrative criteria without giving any rational basis for doing so. Nor has MPCA explained why it has frozen the narrative criteria at these 24 wild rice waters. There is nothing mystical or unique about these 24 wild rice waters with regards to their capacity to maintain the species, and in fact, tribal consultation and tribal comments during this rulemaking process have consistently made it clear

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<sup>30</sup> *Id.*

<sup>31</sup> Minn.R. 7050.0224, Subp. 6. Class 4D[WR]; selected wild rice waters

that we believe ALL wild rice waters must be protected to the greatest extent possible. Neither the Tribes nor agency scientists would argue that it's reasonable to expect that protecting these 24 waters will ensure the propagation and maintenance of wild rice plant species. Rather, the MPCA should reaffirm the conclusion they reached in the previous rulemaking, and *at a minimum*, apply the broad narrative standard protection to all wild rice waters in Minnesota.

C. MPCA should designate wild rice water as Outstanding Resource Value Waters.

The Band believes that wild rice waters throughout the state of Minnesota should be designated Outstanding Resource Value Waters, as we have done with our reservation manoomin waters, thereby providing comprehensive protection under the state's anti-degradation requirements.

D. MPCA's proposed process and standards for identifying wild rice waters are inadequate and do not comply with the CWA.

The Band finds the MPCA's process for identifying wild rice waters insupportable. Its fundamental flaws can be traced back to the failure of the agency to ever monitor or assess the wild rice waters of the state under their CWA responsibilities and despite past commitments to Minnesota Tribes. Because wild rice waters have not been inventoried, monitored, assessed or protected through regulatory controls for sulfate under the existing standards, many more once-harvestable stands have been degraded or destroyed since the effective date of the CWA. Wild rice waters that appear on the DNR list with diminished remnant stands that may not meet the agency's arbitrary acreage threshold or are insufficient to support human harvest should not be excluded because MPCA has failed to enforce existing rules.

The MPCA's proposed rule revision should be disapproved because it conflicts with applicable law and is illegal under the CWA. *See* Minn. R. 1400.2100(D)-(E). It also conflicts with the State's anti-degradation policy. *See id.* 7050.0250(A) (existing uses "shall be maintained and protected"). The proposed rule, under the guise of "clarifying" a State regulation, removes existing and designated uses from water bodies within the State. This can only be done in compliance with the CWA and its implementing regulations, which prescribe the narrow circumstances in which existing and designated uses can be removed. Because the MPCA has failed to comply with the CWA and its requirements, its proposed rule should be rejected.

1. *The MPCA's Proposed Rule Removes Designated Uses from Water Bodies, Including Existing Uses*

The CWA mandates the continued designation and listing of all wild rice waters, regardless of their specific production or use unless the reclassification process is followed. Minnesota's wild rice rules currently 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. So Minnesota already requires the listing of all wild rice waters regardless of production, *see* Minn. R. 7050.0224 subp. 1, because only the presence of wild rice or wild rice habitat is required. MPCA’s failure to include all wild rice water presently recognized on its list of wild rice waters in the proposed rule revisions violates the standards of the CWA.

This element of the proposed rule is being promulgated in response to the Legislature’s directive that the new rule “*designate* each body of water, or specific portion thereof, to which wild rice water quality standards apply . . . .” 2011 Minn. Sess. Law Servs. 1 Sp. ch. 2, art. 4 § 32(a)(2) (emphasis added); *see id.* § 32(b) (requiring the MPCA to consult with the MDNR, Minnesota Indian tribes, and “other parties” before “designating waters containing natural beds of wild rice as waters subject to a standard”). To that end, the Proposed Rule “remov[es]” the designated use of “waters used for the production of wild rice” from its current categorization as a Class 4A water designation, SONAR at 35, places it in the new Class 4D, *id.*, renames it “wild rice waters,”<sup>32</sup> applies the new sulfate standard, and deletes the current sulfate standard for Class 4A waters, Proposed Minn. R. 7050.0224 subpt. 2. But, rather than move all wild rice waters into Class 4D wholesale, the proposed rule provides that a water body is now only a “wild rice water” if it is specifically identified in Proposed Minn. R. 7050.0471.. Proposed Minn R. 7050.0130 subpt. 6c; *see* SONAR at 15 (under the proposed rule, the wild rice standard “does not apply until a water is specifically identified in rule. [sic]”). Proposed Minn. R. 7050.0471 provides an exclusive list of “wild rice waters,” identified by major drainage basin and water identification number. *See id.* 7050.0471 subpt. 1. Waters not included on the list can only be added by petitioning the commissioner of the MPCA to consider adding new waters, as part of the triennial review of the State’s CWA water quality standards. *Id.* 7050.0471 subpt. 2. MPCA’s proposed list includes 1,271 wild rice waters, *id.* 7050.0471 subpts. 3-9, but excludes over 900 waterbodies previously recognized and identified by the Minnesota Department of Natural Resources (“MDNR”) and tribal inventories identified in the MDNR’s 2008 report to the Legislature, *See* Minn. Dep’t of Natural Resources, *Natural Wild Rice in Minnesota*, App. B (2008), SONAR Ex. 21 (“2008 MDNR Report”). As we explain below, this removes the designated use of “used for the production of wild rice” or “wild rice waters” from those waters without a UAA justification of non-attainment, which is required by the CWA.

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<sup>32</sup> “[C]hanging the phrasing does not alter the scope or effect of the existing beneficial use.” *See* SONAR at 34.



The objective of the 2008 MDNR Study was “to consolidate and update existing natural wild rice information and produce an inventory of those waters.” *Id.* at 52. The Study included an inventory of wild rice waters which was developed with substantial input from state, federal and tribal representatives, and although it is considered “the most comprehensive list available,” it underrepresents rivers, streams and ditches with wild rice and a large number of listed waters do not contain wild rice acreage estimates.” (*Id.*) The MPCA improperly compounded this under-inclusion problem by excluding waters listed in the report that did not include more than two acres of wild rice, unless another resource reference corroborated that water body was a “wild rice water.”

The more than 900 excluded waterbodies have the “designated use” of wild rice waters because that use was “specified in water quality standards” for those waters, 40 C.F.R. § 131.3(f), when the State designated all surface waters in the state as Class 4A waters used for the production of wild rice. *See* Minn. R. 7050.0410 (incorporating by reference Minn. R. 7050.0470) (applying Class 4A designation to all listed waters); *id.* 7050.0430 (applying Class 4A designation to all unlisted surface waters “that are not wetlands as defined in” Minn. R. 7050.0186 subpt. 1a).<sup>33</sup> Now, because they are not included in Proposed Minn. R. 7050.0471, these 900 water bodies have had the “designated use” of wild rice waters stripped from them.

Moreover, the water bodies were “designated” as wild rice waters when they were included on the inventory of wild rice water body locations identified in the 2008 MDNR report to the Legislature. The objective of that effort was “to consolidate and update existing natural wild rice information and produce an inventory of those waters.” It was then used for regulatory purposes, including the implementation of State water quality standards by the MPCA.

The MPCA asserts that “[g]enerally, the wild rice information from these resources was originally gathered to serve a specific program interest and was not intended for regulatory use.” To the contrary, the MDNR list was “intended for regulatory use.” The purposes of developing the list were 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.*” 2007 Minn. Sess. Law Serv.

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<sup>33</sup> Although the cultural and ecological importance of manoomin requires that wild rice waters be designated as Class 2, as discussed above, a “designated use” is determined by whether the State has designated that use in its water quality standards, *see* 40 C.F.R. § 131.3(f) (designated uses are those uses “specified in water quality standards for each water body or segment”). Because the State has designated all its waters as Class 4 or 4A waters, removal of those designated uses, or a sub-category, must comply with the CWA’s procedural requirements.

ch. 57 § 163(3) (emphasis added). Recommendation 5 directed the MDNR 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. 2008 MDNR Report at 4. The rationale for that charge was that “[c]omprehensive protection and management of wild rice involved multiple agencies. Management needs to include *better inventory information* including consistent methodology for trend analysis, documenting natural genetic diversity, and establishing long-term case studies on identified lakes.” *Id.* (emphasis added). Since 2008, there have been periodic updates to that list, as intended, including a broad update in 2013.

The 2008 MDNR Study list was also actually used by MPCA for regulation of water quality. After 2008, the MPCA used the list to review water discharge permits, to ensure that pollution discharges did not violate water quality standards for “waters used for the production of wild rice.” *See Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, No. 62-CV-10-11824, 2012 WL 2872026, at ¶¶12-14 (Minn. Dist. Ct. May 10, 2012), *aff’d* No. A-12-0950, 2012 WL 6554544 (Minn. Ct. App. Dec. 17, 2012). As part of the permit review process, “the MPCA reviews . . . available wild rice records and databases that the MDNR maintains” to determine whether the “water qualifies as a water used for production of wild rice . . .” *Id.* at ¶¶13-14. MPCA does not use the list as an exhaustive source, and can review other information, such as “consultation with aquatic plant biologists at the MDNR,” “information received from external stakeholders, including, but not limited, to, Native American tribes and environmental groups” and “information received by the discharge,” to determine whether the water “has been identified as potentially producing wild rice.” *Id.* ¶14. The MPCA has treated the 2008 MNDR list as presumptively valid, and in permitting decisions where external evidence must be used to verify that waters are used for production of wild rice, it “has requested that the permit applicant conduct a survey of any wild rice stands in the receiving waters to help determine whether the receiving water is a water used for production of wild rice.” *Id.* ¶15.

Now, however, the MPCA proposes to flip the use of the list on its head. The proposed new rules treat waters that were designated as wild rice waters as presumptively *not* used for wild rice, if they fail to meet the arbitrary two-acre threshold, and to exclude them from coverage entirely if the MPCA’s choice of “corroborating” evidence does not establish a “beneficial” use. By excluding previously-designated water bodies from its new proposed list, the MPCA is necessarily “removing designated uses” from them because they are no longer under the protection of the numerical water quality standard that once applied to them.

Manoomin has also been gathered from many of the excluded water bodies since 1975. By excluding these waters, then, the State has also removed existing uses from water bodies. This is

not immediately clear from reviewing the SONAR, because the State uses the term “beneficial” uses, which may include both “designated” and “existing” uses as those terms are defined in federal regulations. *Compare* Minn. R. 7050.0140 subpt. 5 (Class 4 waters include “all waters of the state *that are or may be used* for any agricultural purpose . . . or by waterfowl or other wildlife”) (emphasis added) *with* 40 C.F.R. § 131.3(e) (existing uses are “those uses actually attained” in a water body) *and* § 131.3(f) (designated uses are uses specified in water quality standards “whether or not they are being attained). During consultation and technical meetings with the MPCA, tribal staff repeatedly elevated the importance of distinguishing between a “designated use” and an “existing use,” but the MPCA fails to note this distinction in its decision-making, and only recognizes it superficially in passing in the SONAR. *See* SONAR at 41.

2. *The MPCA’s Removal of Designated and Existing Uses Does Not Comply with Federal or State Regulations*

By “winnowing” the list, the MPCA in effect “delisted” Minnesota wild rice waters with an existing use, because it excludes water bodies that the State recognized as wild rice waters, and that were designated for that purpose under Minnesota regulations. But under 40 C.F.R. § 131.10, if a designated use is an existing use for a particular water body, the existing use cannot be removed unless a use requiring more stringent criteria is added.<sup>34</sup> Yet the State’s “winnowing” of the list effectively removes those existing uses without adding a use with more stringent criteria, in violation of the CWA.

The State justifies its “winnowing” by claiming that it removed all waters that included less than two acres of wild rice, but then added back waters if other evidence “corroborated” the “beneficial use” of those waters.<sup>35</sup> As a first principle, it is **not** consistent with the Clean Water Act, to ‘winnow’ the MDNR list according to some arbitrary minimum acreage which has no ecological relevance. The MPCA’s removal of uses must be “scientifically defensible,” 40 C.F.R. § 131.11(b)(1)(iii), but nowhere in the SONAR does the MPCA justify its decision with reference to any scientific method. Its only justification is that “[w]aters identified in the MDNR 2008 report with wild rice acreage estimates greater than two acres are included in the MPCA

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<sup>34</sup> However, 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 not only the CWA goals, but also the intent of the DNR and Tribes in continually updating the list of wild rice waters within the state.

<sup>35</sup> Because the State’s designation of “beneficial uses” does not distinguish between “existing” and “designated” uses, as described above, it is not clear whether the State included all water bodies with an existing use on its list.

proposed wild rice water list, based on the MPCA's reasonable assumption that two acres is sufficient rice to demonstrate the beneficial use." SONAR at 42; *see id.* at 46. The State provides no explanation for why this assumption is "reasonable," and in fact it is particularly questionable in light of the large amount of evidence that many waters with less than two acres of manoomin are harvestable – evidence that the State itself recognizes. *Id.* at 46. Further, the fact that the state has neglected to collect sufficient inventory or monitoring data over the past four decades to support *either* their arbitrary acreage threshold or the existing water quality standards to protect this specific beneficial use, is not in and of itself justification for the de facto delisting of hundreds of inventoried wild rice waters.

Moreover, the methodology described in the SONAR violates the CWA because it will not identify all of the existing uses of surface water in the State, causing the removal of "existing uses" from some water bodies without the substitution of more stringent criteria. The MPCA's improper winnowing of the existing list is not cured by a process that calls for corroborating information as a precondition of restoring the delisted water bodies to the 2008 list. Such a process leaves significant gaps of time in which wild rice was, or may have been, gathered in water bodies on or after November 28, 1975. The MPCA also excluded some corroborating evidence from consideration without explanation. In particular, according to the SONAR, the MPCA did not include all of the waters listed on the 1854 Treaty Authority's March 24, 2016 list of wild rice waters, SONAR Ex. 24, but does not say why. SONAR at 48. In addition, the MPCA improperly relied on an out-of-date 1854 Treaty Authority list. The March 24, 2016 list which MPCA uses has been superseded by the latest list, dated March 29, 2017, which identifies 114 additional wild rice waters in the portion of Minnesota ceded by the 1854 Treaty<sup>36</sup>. As the 1854 Treaty Authority explained in their November 21, 2017 comments on the MPCA's Proposed Rule, the new rule will not apply to 106 wild rice locations that the Authority has identified since March 2016. Moreover, the State admits that its methodology for identifying existing uses may fail, because it provides a process for parties to add water bodies to its list in the future by proving that a water has been used for wild rice in the past. *See* SONAR at 60.<sup>37</sup>

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<sup>36</sup> See 1854 Treaty Auth., Wild Rice Waters in 1854 Ceded Territory 11 (Mar. 29, 2017), available at <http://www.1854treatyauthority.org/management/biological-resources/fisheries/reports.html?id=102&task=document.viewdoc>

<sup>37</sup> The State's proposed process for amending its list of water bodies in the future if a party can prove existing uses, *see* SONAR at 60, does not cure this deficiency. The CWA regulations do not allow the State to remove existing uses in exchange for a promise to add them back later if it is convinced it made a mistake.

Minnesota's antidegradation policy also requires the State to maintain and protect "existing uses and the level of water quality necessary to protect existing uses." Minn. R. 7050.0250(A). By removing these existing uses and excluding water bodies with existing wild rice use from the water quality standards, the State will allow manoomin in those water bodies to be exposed to higher levels of sulfide. This will degrade the resource and further reduce the number of water bodies available for gathering.<sup>38</sup>

MPCA is also improperly removing designated uses from water bodies that lack existing uses. As noted in Section II above, § 101(a)(2) 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 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.<sup>39</sup> 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.

Additionally, the State's approach to designated uses that may not be existing uses is also deficient. The SONAR says that a UAA is not required because the State is not removing a designated use, SONAR at 41, but only "clarifying an existing beneficial use." But as explained above, the State is removing a designated use from many water bodies. In fact, MPCA acknowledges that it is not including all previously identified or recognized wild rice waters in its list, *see e.g.*, SONAR at 48 ("MPCA included *most* of the 393 lakes and river segments included on the 1854 Treaty Authority's list of waters"). When a State removes a designated use from a water body, and that use is one specified in § 101(a)(2) of the Clean Water Act, then the

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<sup>38</sup> The aquatic life protection use is a broad category requiring further explanation. *Non-aberrational resident species must be protected, even if not prevalent in number or importance.* Water quality should be such that it results in no mortality and no significant growth or reproductive impairment of resident species. Any lowering of water quality below this full level of protection is not allowed... 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."

<sup>39</sup> Pursuant to 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. States are encouraged to designate uses that the State believes can be attained in the future."

State must undertake a UAA to justify its decision. 40 C.F.R. § 131.10(j)(2); *see* 40 C.F.R. § 131.10(k)(3) (describing when UAA not required). Section 101(a)(2) of the CWA, *codified at* 33 U.S.C. § 1251(a)(2), describes the purposes of the CWA as “the protection and propagation of fish, shellfish, and wildlife” and “provid[ing] for the recreation in and on the water . . . .” *Id.* Those purposes are implicated by the designated use of wild rice waters and so a UAA is required.

The designated use that the State is removing here is “waters used for the production of wild rice.” As explained above, wild rice use is a distinct aquatic life use (Minnesota’s Class 2), and so the designated use of wild rice water serves the purpose of “protection and propagation of fish, shellfish, and wildlife,” as described in CWA § 101(a)(2). Even though the State does not agree with the Band’s position that wild rice use is a Class 2 use, the State does recognize that wild rice “serve[s] as a food source for wildlife” with “ecological importance” in addition to its special cultural and religious significance for Indian tribes, Minn. R. 7050.0224 subpt. 1, and classifies wild rice waters as a subcategory of Class 4 waters, which are needed for wildlife. *See id.* Even under the State’s own position on the classification of wild rice use, then, the State is proposing to remove a designated use that is necessary for the “protection and propagation of fish, shellfish, and wildlife,” and the State must undertake a UAA to explain why its removal of the designated use from waters without existing uses is justified because the State cannot attain use under one of the six factors described in 40 C.F.R. 131.10(g).

Even if the SONAR could be construed as a UAA – contrary to the State’s own representation that it has not prepared a UAA, *see* SONAR at 41-42 – it is not sufficient to remove designated uses. That is because the SONAR does not attempt to explain why the water bodies removed from protections cannot attain the designated use of “water used for the production of wild rice.” Instead, the SONAR explains the exclusion of these waters on two other bases: That the MPCA could not identify the location of a particular water from information provided by the MDNR, tribes, or the public, *id.* at 45, or because the MPCA assumed that the water could not demonstrate a beneficial use according to its own evaluation of the MPCA’s 2008 list or corroborating evidence, *id.* at 46-47. The State’s explanations do not show whether the designated use cannot be attained under the § 131.10(g) criteria.

As previously noted, most of the waters that currently appear on MPCA, MDNR, and 1854 Treaty Authority lists *already* have an “existing use” as “waters used for the production of wild rice,” whether or not they include an estimate of acres of wild rice present for any given year. All of these waters were also designated as wild rice waters under the State’s regulations. These waters must be retained on the wild rice waters list, Minn. R. 7050.0471, unless the State complies with the requirements of the CWA and its implementing regulations. Without following these procedures, the State cannot exclude them from the proposed list, in effect de-

listing them as “wild rice waters of the state,” with the mere stroke of a pen. The CWA requires the State to make a reasoned determination that no existing uses are being removed without more stringent criteria being applied to those waters, and that designated uses are only being removed based upon the findings of a UAA that the designated use of wild rice waters cannot be attained for the reasons prescribed by federal regulation. As none of this has occurred, the State’s proposed rule change is contrary to federal law, illegal, and cannot be adopted under the State’s own regulatory standards.

- E. MPCA’s proposed numeric sulfate standard is not reasonable or sufficient to protect wild rice waters.

The Band acknowledges and supports MPCA’s reliance on multiple lines of evidence for considering the need for updates to the sulfate standard: field surveys, laboratory hydroponic experiments, mesocosm experiments, supplemented by rooting zone profiles that characterize sulfate, sulfide and iron in both field sites and mesocosms, and the sediment incubation experiments that challenged the presumption that seasonal application of a sulfate criterion is protective. This approach for reviewing and revising water quality standards and criteria is substantially more robust and defensible than simply using short term hydroponics experiments.

However, we do **not** agree with the state’s proposed approach that uses an equation to derive site-specific “protective values” for sulfate because it is not “based on sound scientific rationale,” 40 C.F.R. § 131.11(a)(1), or “scientifically defensible methods,” *id.* § 131.11(b)(1)(iii), as required by the regulations implementing the CWA. We believe the state’s multi-pronged research program actually affirmed the protectiveness of the existing 10 mg/l sulfate criterion, and clearly negated the application of any seasonal exemption for sulfate loadings to wild rice waters. Although not disclosed in the SONAR, the records released under the Minnesota Data Practices Act show that as of February 2014, the MPCA had concluded, based on the scientific study done, that the existing 10mg/l standard was proper and should remain in effect.<sup>40</sup> However, undue political pressure – not scientific study – was brought to bear from members of

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<sup>40</sup> See *Iron Range Rebellion Halted Wild Rice Initiative*, Minnesota Star Tribune (April 6, 2014) (reporting, based on records from the MPCA, that the MPCA was “set to announce on Feb. 27 [2014] that, after three years of debate and \$1.5 million in taxpayer paid research, it would issue a preliminary recommendation that the 40-year old rule protecting wild rice ‘was reasonable and should remain in effect.’”)



the state legislature in late February 2014,<sup>41</sup> and the agency, as a result, unexpectedly did not release their preliminary interpretation of their research findings. The Commissioner conceded that the MPCA “changed course in response to ‘frustrated’ legislators who feared that even a preliminary recommendation by his agency would have a major chilling effect on mining firms and other employers important for their districts.”<sup>42</sup> But he further added that “State scientists have not changed their view that, at least so far, the scientific research supports the current wild rice standard.”<sup>43</sup>

A possible new approach was discussed during the convening of the MPCA’s 2014 Scientific Peer Review Panel for the wild rice sulfate rule. Several of the peer reviewers recommended that it would be useful to have experimental data pertaining to iron, sulfate and sulfide interactions. The September 2014 Final Report explained that “[i]t would be useful to have an experiment that examines whether iron would mitigate the ecological effects on wild rice of added sulfide levels. Additionally, current models do not account for the effects from oxygenated rhizospheres and iron plaques on root systems. MPCA needs to understand the mechanism of toxicity better before claiming to understand how iron mitigates sulfide stress.”<sup>44</sup>

As set out below, the Fond du Lac Band actively supported research regarding this approach, and it is clear that the assumptions underlying the approach reflected in the proposed rule are fundamentally flawed and do not alter the MPCA’s February 2014 conclusion that the existing standard of 10mg/l best protects wild rice. Nevertheless, politics, not science, ultimately led to MPCA’s release of a substantially modified interpretation set out in the proposed rule— one that is not supported by sound scientific analysis. For the reasons set out below, the proposed rule should be disapproved.

1. *On-going research by the Band challenges MPCA’s assumptions that iron concentrations in sediment are protective.*

The MPCA asserts that porewater sulfide is a “significant controller of the ability of wild rice populations to persist and thrive”, based upon results from their three-year research program.

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<sup>41</sup> *Id.* The exhibits to the SONAR that list all of the meetings, conferences, presentations, discussion that the MPCA has had with the stakeholders in this process omits the meeting that it held with the members of the State Legislature from the Iron Range in late February early March of 2014

<sup>42</sup> *Iron Range Rebellion*, Minnesota Star Tribune (April 6, 2014)

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

<sup>44</sup> Summary Report of the Meeting to Peer Review MPCA’s Draft Analysis of the Wild Rice Sulfate Standard Study, Submitted to MPCA by Eastern Research Group, Inc. Sept. 25, 2014. Summary of Discussions, p. 28

However, the objective of their research program was not to examine all of the factors that control wild rice populations, it was “to enhance understanding of the effects of sulfate on wild rice and to inform a decision as to whether a revision of the wild rice sulfate standard is warranted,” per direction from the Minnesota Legislature.

Fond du Lac has supported additional years of mesocosm research by Dr. John Pastor at the University of Minnesota Duluth, taking advantage of the experimental array that had been established to detect sulfate effects over time on wild rice at varying concentrations<sup>45</sup>. The wild rice populations in those same mesocosms have now experienced three more growing seasons of exposure to continued sulfate loading (at the same concentrations as earlier years), providing confirmation of the cumulative and adverse effect of sulfate loading at lower concentrations<sup>46</sup>. New mesocosms were established that incorporated experimental treatments with the addition of iron in order to discern the predicted ameliorative effects of iron on the sulfide produced in the high-sulfate treatment tanks<sup>47</sup>. During the course of these experiments, it was observed that wild rice roots in tanks with more than 50 mg/l sulfate had become blackened.

A third experiment was initiated in 2016 that aimed at quantifying the development of iron sulfide (FeS) root plaques.<sup>48</sup> The results confirmed that accumulation of FeS plaques on roots of plants grown under high sulfate concentrations increased very rapidly and suddenly in midsummer at the time that wild rice plants are beginning to flower and take up additional nutrients for the ripening seeds. By the end of the growing season, FeS concentrations were two orders of magnitude higher on black root surfaces than in the surrounding sediment. Plants with the black FeS plaques on their roots produced fewer and smaller seeds containing less nitrogen *Id.* at (Fig. 5), perhaps because the plaques potentially impair the uptake of nitrogen. This suggests that even if the precipitation of FeS in the bulk sediment reduces aqueous sulfide and partly ameliorates sulfide toxicity to seedlings, precipitation on the root surfaces somehow impedes seed formation, perhaps by blocking nutrient uptake.

These results clearly refute the MPCA’s fundamental assumption for their equation-based sulfate standard that sufficient porewater iron will protect wild rice plants from adverse effects of sulfate

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<sup>45</sup> John Pastor *et al.*, Effects of sulfate and sulfide on the life cycle of *Zizania palustris* in hydroponic and mesocosm experiments, *Ecological Applications*, 27(1), 2017, pp. 321-336.

<sup>46</sup> John Pastor, Progress Report on Experiments on Effects of Sulfate and Sulfide on Wild Rice, June 13, 2016, attached.

<sup>47</sup> John Pastor, Progress Report on Experiments on Effects of Sulfate and Sulfide on Wild Rice, June 30, 2017, attached.

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

loading by binding the reduced sulfide. Since this fundamental assumption is incorrect, the proposed formula that relies on it is not “scientifically defensible,” and the politically-motivated adoption of the standard is not based on a “sound scientific rationale.” Because the proposed rule violates the CWA’s regulations, it cannot be approved. Additionally, because wild rice populations grown in the high-sulfate treatment mesocosms rebounded when sulfate loading ceased, the ongoing experiments provide compelling, if not conclusive, evidence that natural stands of wild rice could in fact be restored if sulfate loading was controlled through permit limits and wastewater treatment.

2. *Evidence that 120 ug/l sulfide may not be sufficiently protective (TSD Appendix 5,6)*

The SONAR at p. 67 states that EPA’s general guidelines on effect concentrations recommend the use of an EC 20 or EC 25 to protect aquatic communities (assemblages of species) from chronic exposure to a chemical. This was the agency’s justification in their 2014 preliminary analysis for proposing to base their “protective” sulfide concentration on the EC20, and suggesting that 300 µg/L sulfide was the appropriate threshold for harmful effects to wild rice. MCPA’s initial approach was contradicted by the findings of the MCPA Peer Review panel, with which the Band concurs.

According to EPA guidance specific to deriving numeric criteria to protect aquatic organisms:<sup>49</sup>

To be acceptable to the public and useful in field situations, protection of aquatic organisms and their uses should be defined as prevention of unacceptable long-term short-term effects on (1) commercially, recreationally, and other important species.

Monitoring programs intended to be able to detect unacceptable effects should be tailored to the body of water of concern so that necessary samples are obtained at enough times and places to provide adequate data on the populations of the important species, as well as data directly related to the reasons for their being considered important.

The amount of decrease in the number of taxa or number of individuals in an assemblage that should be considered unacceptable should take into account appropriate features of the body of water and its aquatic community. Because most monitoring programs can only detect decreases of more than 20 percent, any statistically significant decrease should usually be considered unacceptable. The insensitivity of most monitoring programs greatly limits their usefulness for studying the validity of criteria because unacceptable changes can occur and not be detected. Therefore, although limited field

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<sup>49</sup> Guidelines for Deriving Numerical National Water Quality Criteria for the Protection Of Aquatic Organisms and Their Uses PB85-227049 (December 2010 electronic version of the 1985 Guidelines)

studies can sometimes demonstrate that criteria are underprotective, only high quality field studies can reliably demonstrate that criteria are not underprotective.

The Final Plant Value should be obtained by selecting the lowest result from a test with an important aquatic plant species in which the concentrations of test material were measured and the endpoint was biologically important.

The MPCA Peer Review panel had suggested using a more conservative protective concentration than the generic guidance (e.g., EC10 or EC5) because the goal was to protect a single species, not a community where multiple species may fill the same ecological niche. They proposed adopting a working hypothesis that less than 75 µg/L may be the threshold for adverse effects, but also stated it could be as low as 20-50 µg/L; this was based upon their review of the field survey data. In this rulemaking, MPCA is now proposing to use the more conservative EC10, and calculated various “protective” sulfide concentrations based upon different representations of sulfide exposure. The agency has defined their “protective” sulfide concentration as an effect concentration at which some “minimal effect” is allowed, and provides justification for their determination that 120 µg/L sulfide is the appropriate EC10 “protective” porewater sulfide concentration. They acknowledge that all of the lines of evidence used to relate porewater sulfide to the presence or absence of wild rice have large confidence intervals, but arrive at 120 µg/L as their proposed “protective” level of sulfide.

Field survey data would best characterize the conditions under which wild rice populations are self-perpetuating over many generations, but at this time MPCA simply does not have sufficient data to show that *any* wild rice water body is self-perpetuating. To be more conservative (i.e., protective) a lower EC value should be used; we agree with the Scientific Peer Review team recommendation that an EC<sub>5</sub> be considered. A relevant example is the field-based benchmark conductivity standard that EPA developed for the Appalachian coal mining region; that Scientific Advisory Board-approved process used an ‘extirpation coefficient’ of 5, in order to protect aquatic communities from degradation as compared to reference streams. This EC<sub>5</sub> represented an aquatic life endpoint concentration of a contaminant (in this case, conductivity) above which 5% of the expected native macroinvertebrate taxa were ‘missing’ or extirpated from the waterbody. Research confirmed that substantial aquatic life effects have already occurred when conductivity levels reached 500 µS/cm,<sup>50</sup> so the benchmark was set at 300 µS/cm, which was generally protective of biological condition.

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<sup>50</sup> Pond, G.J., M.E. Passmore, F.A. Borsuk, L. Reynolds, and C.J. Rose. 2008. Downstream Effects of Mountaintop Coal Mining: Comparing Biological Condition Using Family- and Genus-Level Macroinvertebrate Bioassessment Tools. *J. N. Am. Benthol. Soc.* 27(3):717-737.

In Figure 2 of the SONAR (Empirical examination of the average proportion of sites with wild rice above or below a given porewater sulfide concentration), MPCA calls attention to a dip in the line representing “a notable reduction in the proportion of sites with rice”, and implies that confirms their determination that 120 µg/L sulfide is actually protective of wild rice. However, this is not in fact evidence of a change in response of wild rice (presence) to sulfide concentration; it is only an artifact of the number of samples with a concentration near 120 µg/L. MPCA suggests that this represents some change in the rate of response, but their change point analysis has such a broad 95% confidence interval (25-368 µg/L) that it should not be relied upon. The Peer Review panel’s observation of apparent adverse effects at substantially lower sulfide concentrations is supported by the MPCA’s field survey dataset, which shows a decline in wild rice abundance at approximately 75µg/L.

The comments submitted by the Superior National Forest dated November 15, 2017, also illustrate the flaws in the MPCA’s untested equation. As the Superior National Forest correctly noted, the equation was developed in part to address the costs of treating wastewater, even though “economic considerations are not to be considered when setting a water quality standard.” Superior National Forest Comments at 12. The Superior National Forest then tested the equation by applying data for some of the sites in the field data set. That analysis clearly showed that the equation “sets unrealistic values” including extremely high sulfate standards in some cases, a “large ranges of values for the same site” that “makes compliance determination difficult,” and sulfate standards that in some cases exceed the drinking water standard for sulfate. Superior National Forest Comments at 13. These erratic results simply confirm that the use of the equation in proposed rule will not “protect the designated use” of wild rice waters in Minnesota. See 40 C.F.R. § 131.11(a)(1).

The Band maintains that any measurable diminishment in wild rice should be considered significant, and the “protective” sulfide threshold should be set at the concentration where a negative correlation between wild rice presence and sulfide concentration becomes evident. This is especially important to protect the Chippewa treaty rights.<sup>51</sup> We assert that the EC5 or even the “no effect” concentration (NOEC) is the reasonable protective concentration, when holistically considering the ecology of wild rice, its vastly diminished geographic range, its natural annual variability in production, and the adverse effects of other well-known stressors such as hydrologic alterations, invasive species, and climate change. These are all important aspects of

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<sup>51</sup> See Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 Fed. Reg. 85,417, 85,422 (Nov. 28, 2016) (quoting 33 U.S.C. § 1371(a)).

wild rice ecology for which the Tribes have shared knowledge of with the MPCA, as distinct and compelling reasons for incorporating wild rice population studies that could validate either the existing or any proposed revised sulfate criterion. This is consistent with the Peer Review panel recommendation.

3. *Lack of ecologically relevant endpoint.*

EPA's guidelines document for aquatic life use criteria also states:

The Final Plant Value should be obtained by selecting the lowest result from a test with an important aquatic plant species in which the concentrations of test material were measured and the *endpoint was biologically important* (emphasis added).

It is problematic that MPCA has failed to provide any data, or even propose a monitoring plan for collecting data, that is directly related to their defined use: a harvestable food source for humans and wildlife. For a waterbody to serve as a harvestable food source for humans or wildlife, it must have a sustained population of wild rice from year to year, with allowances or understanding of natural cyclical variability. To demonstrate that a given wild rice water is actually meeting that designated use would require population or stand density surveys over time, which the Band has long encouraged the MPCA in collaboration with its sister agency, the DNR, to conduct. We have shared with MPCA a simple, straightforward, standardized field methods protocol for doing just that<sup>52</sup>, one that was developed along methods used by the 1854 Treaty Authority in their long-term wild rice monitoring program, and that we and nearly 20 other Tribes across the upper Great Lakes are currently using to collect wild rice monitoring data on our tribal waters. However, the agency maintains that they do not have sufficient staff or resources to carry out that level of monitoring.

But, just as importantly, the agency has also neglected to validate their proposed equation-derived "protective" sulfate standard with any kind of study or analysis that could positively correlate the calculated standard with some measure of the health or condition (biological integrity) of the wild rice water. This is the type of analysis necessary to demonstrate that the calculated "protective" sulfate standard is indeed protective of the resource. Instead, the sole means for assessment for wild rice waters that MPCA is proposing is compliance with the equation-derived "protective" sulfate concentration.; that approach is circular logic, not

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<sup>52</sup> Kjerland, T., 2015, Wild Rice Monitoring Field Guide. The University of Minnesota Sea Grant Program, Publication #SH15. ISBN 978-0-9965959-0-2.

biologically important evidence. Despite consistent recommendations from the Band that the MPCA define a biologically relevant endpoint for assessing whether wild rice waters are meeting their designated use, the agency is stubbornly moving forward with a revised water quality standard for wild rice that has never been demonstrated to be protective of the use, never mind indicative of biological or ecological integrity, as the CWA requires.

Additionally, in the Band's discussions about the ecological significance of manoomin, we have strongly suggested using a floristic quality index approach to actually monitor the condition of the state's wild rice waters. The concept of species conservatism is the foundation for a floristic quality assessment ("FQA"), and each native plant species has been assigned a *coefficient of conservatism* ("C"), generally following the methodology in Swink and Wilhelm.<sup>53</sup> Coefficients of conservatism range from 0 – 10 and represent an estimated probability that a plant species is likely to occur in a landscape relatively unaltered from what is believed to be pre-European settlement condition (i.e., not degraded). Plant species that have narrow habitat requirements and/or little tolerance to disturbance have high C-values and vice versa. The MPCA has already fully developed the FQA for use in Minnesota's wetlands,<sup>54</sup> and established the C-value for wild rice as an "8", indicating its presence in a waterbody is indicative of a high-quality condition.

In accordance with the MPCA's stated commitments during the 1998 rulemaking, the agency should develop a productivity index, similar to the FQA or other appropriate plant indices, defining ranges that incorporate acreages or linear extents (GIS polygons) and densities representative of the range of natural variability. This would address the legislative direction on defining 'size of stand' metrics. Consistent with the agency's approach for monitoring and assessing aquatic life use in the state's other critical water resources<sup>55</sup>, the MPCA could reasonably consider establishing a biocondition gradient that defines an ecologically relevant range of condition that can be measured according to standard methodology, such as the Kjerland manual. This could be supplemented by historic record (oral histories, harvester surveys, sediment record), number of years of survey, exceedences of water quality criteria, etc., to accurately assess whether: a) the stand is diminishing, at which point they would pursue the stressor identification process and identify approaches for removing the impairment and restoring the resource; or, b) the stand is relatively healthy, reflecting natural oscillation, and attaining its designated use. Indeed, this level of effort is a necessary component for assessment

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<sup>53</sup> Swink, F. A. and G. S. Wilhelm. 1994. Plants of the Chicago Region, fourth edition. Morton Arboretum, Lisle, Ill.

<sup>54</sup> Milburn, S. A., M. Bourdaghs, and J. J. Husveth. Floristic Quality Assessment for Minnesota Wetlands. Minnesota Pollution Control Agency, St. Paul, Minn.

<sup>55</sup> See, e.g., <https://www.pca.state.mn.us/water/tiered-aquatic-life-uses-talu-framework>



which MPCA has not done as part of its rulemaking process. Compliance with an untested sulfate standard is simply insufficient for assessing the health and integrity of a wild rice water.

4. *The numeric sulfate standard, which is predicated solely on the toxic effects of sulfide in sediment pore water, ignores other harmful effects of sulfate on wild rice waters.*

MPCA is deliberately ignoring other sulfate effects on wild rice, such as its interaction with phosphorus, which can lead to eutrophication and degradation of wild rice populations, despite explicit direction from MN Legislature to explore the correlation between wild rice and sulfate levels to better understand the way(s) in which sulfate affects wild rice. This well-known limnological response was also clearly recognized during the Peer Review process.(TSD Appendix 1). Yet MPCA intentionally omits data from sites that did not have “sufficient transparency” to support wild rice, in its analyses for identifying a protective sulfide concentration (TSD p. 64), and maintains that the EC 10 estimate of 91µg/L sulfide calculated *without* the turbid waters is more defensible than the EC 10 estimate of 58 µg/L sulfide calculated with them included. The agency claims that elevated sulfide is not responsible for the lack of wild rice when transparency is inadequate to support wild rice. This statement is inaccurate, at best; in the case of the excluded waters, sulfide is not *directly* responsible for the lack of wild rice (i.e., toxic effects), but it most certainly is *indirectly* responsible for the lack of wild rice by diminishing water clarity and affecting seed germination and early growth. This scenario should certainly be accounted for in MPCA’s proposed rule revisions, and this indirect sulfate effect should be acknowledged. The discrepancy between calculated EC 10 concentrations when turbid waters are included or excluded only provides further justification for a lower protective sulfide concentration to be used.

MPCA has also deliberately excluded any analysis or evaluation of sulfate effects on mercury methylation and bioaccumulation, despite this clear adverse relationship. Wild rice waters also provide nursery, forage and refuge habitat for a wide variety of fish species, many of which are also traditionally harvested and consumed by Band members and Minnesota sportfishers. Elevated sulfate clearly and adversely contributes to our mercury-impaired waters, and this adverse effect should also be taken into consideration when determining a “safe” level of sulfate loading to any waterbody, wild rice waters included. It is not legal, under the CWA, to permit additional pollutant loads that would cause or contribute to an exceedance of water quality standards in waters that are already impaired. 40 C.F.R. § 122.44(d)

MPCA went into great depth (TSD Appendix 2) to defend their assumptions quantifying wild rice as a food source for waterfowl, but the agency simply does not evaluate any potential adverse effects of sulfate loading on the nutritional quality of wild rice as an important food source for humans. However, the more recent research results from Dr. Pastor and his graduate

student, Sophie LaFond-Hudson, appear to demonstrate the physical inhibition of nutrient uptake by the adherence of iron sulfide plaques on the roots of wild rice plants, at the specific point in the plant's life cycle when they are directing all of their energy into reproduction (flowering and seed formation). Given that earlier experimental mesocosm treatments showed that excess sulfate (reduced to sulfide) led to reduced seed size, biomass and seed production, it is justified and relevant to consider that sulfate loading may correlate with reduced nutritional quality in wild rice. MPCA's narrow focus on only direct sulfide toxicity effects to wild rice is an inadequate response to the Legislature's instruction, and is not scientifically defensible.

5. *MPCA's proposed application and implementation of the numeric sulfate standard is flawed and there is not sufficient evidence to show that it will protect wild rice waters.*

MPCA is proposing to apply the new equation-derived numeric sulfate standard as an annual average, on the basis that 1) sulfide toxicity is not instantaneous; it occurs over time and exposure to biogeochemical processes that transform sulfate to sulfide, and 2) the annual average is consistent with the data and empirical statistical relationship upon which the equation is based. The agency points out that EPA recommends maximum pollutant concentrations in water quality standards only if the pollutant is directly toxic to the plant or animal species. The Band would argue that in all probability there exists an acute toxic sulfide concentration for wild rice, but MPCA has not experimentally or in any other manner derived it. In the SONAR (p. 80), the agency points out that it wasn't until the third year of the mesocosm experiments (Pastor et al, 2017) that wild rice growth and reproduction was significantly affected by the 100 mg/L treatment, but it is also the case that the 300 mg/L and 150 mg/L treatment mesocosms showed significant adverse effects in the first and second years. And the iron sulfide plaques that formed in the newer experimental treatments appeared relatively quickly at the point in the growing season when the wild rice plants ceased to release oxygen at the root zone. This suggests that there actually may be a discrete time in the growing season when wild rice plants are exceptionally vulnerable to the effect of sulfate loading and reduction to sulfide.

Regarding the second point, the MPCA argues that surface water grab samples used to develop the equation "were taken in a fashion that approximated random samples of the waterbodies, and therefore, approximated the average sulfate concentration." (SONAR p. 80) But these were single (one-time) grab samples that were then related to sediment organic matter and iron via the binary logistic regression. They do not represent any natural seasonal variability in sulfate concentration, and certainly do not represent any anthropogenic variability in sulfate concentrations that may result from fluctuating (volume and concentration) wastewater discharges from a regulated facility. It stretches credibility to argue that the field data grab samples "are almost like averages", and then contend that implementing the standard as an

annual average is consistent with the way that the standard was derived. Permitted dischargers could essentially “flush” higher sulfate waters periodically, or strategically time their effluent monitoring sample collection to keep their annual average concentration below their sulfate permit limit. They could be compliant with their permit requirements but still put downstream receiving wild rice waters at risk.

The MPCA also assumes that the variables known to control porewater sulfide (sulfate, sediment organic carbon, and sediment iron) are in steady state. However, the vast majority of their study sites did not receive point source discharges that would cause significant fluctuations in sulfate concentrations over time (SONAR p. 80). Clearly, facilities that should require a sulfate effluent limit in their permit are not only affecting sulfate concentrations in receiving waters with their current uncontrolled releases, but over time, their sulfate loading could conceivably diminish the available pool of sediment iron, which may not be replenished at the rate of reaction with sulfide. MPCA simply does not have the scientific evidence to support their steady-state assumption.

MPCA claims (SONAR p. 82) that average concentrations of sulfate above the allowable standard in one year out of ten would not have a significant impact on wild rice populations in the long run, citing Dr. Pastor’s experiments in support of this conclusion. While the agency must consider the allowable frequency of excursions as part of revising its water quality standards, it should also be stated clearly that Dr. Pastor’s experiments were not designed to determine what that frequency might be. The MPCA’s decision to allow a one-in-ten year excursion from the annual average sulfate limit is premature and requires further experiments designed specifically to determine what frequency of excursions would not harm the long term sustainability of wild rice populations.

The final rationale provided for allowing a one-in-ten year excursion from the annual average sulfate limit improperly interprets 1854 Treaty Authority long term field data (SONAR p. 83). The MPCA refers to the example of Kettle Lake in Carlton County suffering a complete loss of wild rice during the 2012 extreme flood event, but the following year experiencing a higher than average stem density. The agency references the existence of a viable seed bank in natural wild rice waterbodies that allows recolonization even when environmental disturbance eliminates all growing plants in a single season. The MPCA cannot assume that this natural resilience of wild rice will be realized if an anthropogenic disturbance such as excessive pollutant loading occurs. The only existing data that is relevant to that issue are the latest mesocosm results (Pastor progress report, June 2017), where only about half of the high sulfate treatment mesocosms rebounded when the sulfate loadings ceased. It is not scientifically justified to assume that natural long-term variability (the “boom-bust cycle”) equates to assurance that wild rice waters will easily recover from a year of sulfate loading above a protective concentration. There are no

guarantees that other stressors won't overwhelm a wild rice water's ability to rebound simply because of its seed bank.

- F. MPCA must remove all wild rice waters within the Fond du Lac Reservation from its list under the rule revisions.

The MPCA proposed list of where the wild rice water quality standard applies includes waters that are completely or partly within Indian reservations. The MPCA states that it will not list waters within reservation boundaries if specifically requested by a tribe during the public comment period. The Fond du Lac Band here advises the MPCA that the State's water quality standards for wild rice should **not** apply to waters that are completely or partly within the Fond du Lac Reservation. The Fond du Lac Band has Treatment as a State status ("TAS") under the CWA, and, as such, has jurisdiction over reservation waters. The Fond du Lac Band has been and will continue to regulate and enforce the Band's water quality standards for all waters that are wholly or partly within the Reservation, including the water quality standards necessary to protect wild rice, which the Band believes are more protective of this critically important resource.

Furthermore, all of Minnesota's wild rice waters, whether designated by the state or not, are also federally protected as tribal traditional cultural properties under Section 106 of the National Historic Preservation Act (NHPA).<sup>56</sup> The NHPA requires not only that a project with the potential to impact traditional cultural properties must carefully analyze potential impacts, but also stipulates that appropriate mitigation must be done or a project cannot proceed.

- G. The proposed rule would leave the Chippewa bearing a disproportionate share of the negative environmental consequences.

The environmental justice analysis in the SONAR is also flawed. As set out in the SONAR, the MPCA's environmental justice policy, which is similar to that established by the US EPA, states:

The Minnesota Pollution Control Agency will, within its authority, strive for the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

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<sup>56</sup> See 36 C.F.R. §§ 800 *et seq.*

Fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental, and commercial operations or policies.

SONAR at 134. In the SONAR, the MPAC also correctly recognizes that

An aspect of wild rice that affects the review of potential disproportionate impact is its singular importance to the Ojibwe and Dakota people. No other natural or environmental resource in Minnesota is so central to the heritage of a group of people; and the generally marginalized status of native culture makes this even more critical. Wild rice is certainly of economic importance to native harvesters and valued as a source of food, but it is also a very important spiritual component of native culture. . . .

the cultural and spiritual importance of rice could be seen as making any diminishment of rice an impact that disproportionately falls upon Native American communities. Several Minnesota tribes feel that such a disproportionate impact does exist.

SONAR at 135.

The MPCA then concludes that because, in its view, the proposed new standard for wild rice “provide more accurate protection” it will “not have any negative effect on the growth, harvesting, or sustainability of wild rice. It will not exacerbate any existing disproportionate impacts or environmental justice concerns.” SONAR at 134-135. The conclusion is wrong because its premise is wrong. For the reasons detailed above, the proposed new rule will not be more protective of wild rice. The proposed rule will reduce the number of waterbodies that have a designated/existing use for the production of wild rice without complying with the standards required by the Clean Water Act. The proposed rule replaces a clearly determinable objective numeric standard that has been demonstrated effective to protect wild rice, and substitutes an equation that is based on a series of assumptions which have not yet been tested. These, and the other flaws discussed above, mean that the proposed rule is less protective than the existing rule. Given the recognized and well-established importance of wild rice to the Chippewa people, it is the Chippewa who “will bear a disproportionate share of the negative environmental consequences” of the proposed rule, if adopted.

We look forward to further consultation with the MPCA on this rulemaking, and reviewing major changes in the proposed rule as the agency considers the comments received.

Sincerely,

Handwritten signature of Nancy Scholdt in blue ink.