



*Via Public Comment Webpage*

July 31, 2023

Minnesota Pollution Control Agency  
520 Lafayette Road  
Saint Paul, MN 55155-4914

**Re: Proposed MPCA Framework for developing and evaluating site-specific sulfate standards for the protection of wild rice**

To Whom It May Concern:

Wild rice is a precious and iconic resource in our state. It is embedded in the culture, history, and lifeways of the Tribal Nations who have lived here since time immemorial and continue to exercise treaty rights in their Ceded Territories. It provides food and habitat for fish, waterfowl, and other wildlife. It cleans water of excess nitrogen and phosphorus. And it provides important economic benefits for communities where it is grown and harvested. No state has more acres of natural wild rice than Minnesota, and citizens across the state hold dear its nutritional and cultural value.

Despite its importance and historical abundance in Minnesota, wild rice has faced increasing threats to its survival over the past several decades. Sulfate pollution in particular is devastating to wild rice stands. MPCA has known about the impacts of sulfate pollution since at least 1973, when it enacted the 10 mg/L sulfate standard, backed by rigorous scientific testing and EPA approval. Yet, that standard has rarely been enforced.

The Minnesota Center for Environmental Advocacy encourages MPCA to implement and enforce the wild rice standard, in consultation with Tribal Nations. These Nations are most affected by pollution of wild rice and possess extensive scientific and regulatory expertise, as well as traditional ecological knowledge, that will best inform any rulemaking or policy initiative intended to protect wild rice.

While MCEA applauds MPCA's long-overdue initiative to begin implementing the standard, MCEA has some concerns about MPCA's current proposal. In light of these concerns, MCEA requests that MPCA consider whether this framework would be adequately protective.

**1. The proposed framework lacks clear guidance.**

First, the proposals' vague guidance for deviation from the 10 mg/L criterion is concerning. Rather than providing clear parameters or steps to be followed when deviating from the presumptive standard, the proposed framework describes multiple approaches and makes recommendations, leaving much to agency discretion and eliminating the certainty that could be provided by the current numeric standard if it were enforced.

The framework states that, due to the complexity wild rice biology, sulfur biogeochemistry, and hydrological variability, “MPCA is unable to prescribe a fixed, step-by-step approach to developing a [site-specific standard] that would suffice in all circumstances.”<sup>1</sup> But the Clean Water Act requires MPCA to develop criteria that protect designated uses “based on sound scientific rationale.”<sup>2</sup> MPCA and EPA have already found that the 10 mg/L standard is based on sound scientific rationale, and an administrative law judge rejected an attempt to deviate from that standard in 2018. If there is not enough scientific data available to prescribe clear standards for site-specific variability, MPCA should enforce the 10 mg/L standard instead.

## **2. The Clean Water Act requires protection of historical wild rice waters, not merely those that have been unaffected by pollution.**

Additionally, this framework should not be used in a way that will effectively remove the wild rice beneficial use from waters that have currently or historically produced wild rice. The primary objective of the Clean Water Act is to “*restore and maintain* the chemical, physical, and biological integrity of the Nation’s waters.”<sup>3</sup> Accordingly, water quality standards must protect “existing uses,” and existing beneficial uses cannot be removed without conducting a use attainability analysis.<sup>4</sup> “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.”<sup>5</sup>

The proposed framework does not appear to adequately protect historical wild rice waters. The framework states that the beneficial use protected requires that the wild rice “produce enough nutritious, filled seeds to provide for the growth of future generations of wild rice in that environment” and survive through boom-bust cycles “without trending towards local extirpation.”<sup>6</sup> The framework mentions historical data only in passing. MPCA should work with Tribal Nations to ensure that historical wild rice waters are not overlooked when designing or implementing the sulfate standard. Otherwise, wild rice waters that have recently been impacted by pollution may be overlooked.

## **3. MPCA must consult with all affected Tribal Nations.**

Consultation and coordination with Tribal Nations is essential to any meaningful implementation of wild rice protections, and these comments are not intended to override or contradict any Tribal concerns. The State of Minnesota has a government-to-government relationship with Tribal Nations that requires meaningful consultation on regulatory decisions

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<sup>1</sup> Proposed Framework, at 5.

<sup>2</sup> 40 C.F.R. § 131.11(a).

<sup>3</sup> 33 U.S.C. § 1251(a) (emphasis added). *See also* 33 U.S.C. § 1313 (stating that water quality standards shall “*enhance* the quality of water and serve the purposes of this chapter”) (emphasis added)).

<sup>4</sup> 40 C.F.R. § 131.10.

<sup>5</sup> 40 C.F.R. § 131.3(e).

<sup>6</sup> Proposed Framework, at 3.

that affect tribal resources.<sup>7</sup> Meaningful consultation is more than a discussion; it is a form of dialogue in which the recommendations of Tribal Nations are incorporated into decisionmaking and governments attempt to achieve consensus.<sup>8</sup> Further, Tribal Nations possess expertise that is essential to effective government decisionmaking.<sup>9</sup> Only by working together can MPCA best ensure sound protections that protect wild rice for all Minnesotans.

Thank you for your time and consideration.

Sincerely,

/s/ Melissa Lorentz

Melissa Lorentz

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<sup>7</sup> Minn. Stat. § 10.65; Executive 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>8</sup> See Indigenous Peoples Subcomm. of the Nat'l Env'tl. Justice Advisory Council, *Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making*, at 3, 5 (2000), available at [https://www.epa.gov/sites/production/files/2015-03/documents/ips-consultation-guide\\_0.pdf](https://www.epa.gov/sites/production/files/2015-03/documents/ips-consultation-guide_0.pdf) (describing consultation responsibilities of the federal government).

<sup>9</sup> See, e.g., *In re City of Cohasset's Decision on Need for an Env'tl. Impact Statement for Proposed Frontier Project*, 985 N.W.2d 370, 384 & n.14 (Minn. Ct. App. 2023) (recognizing that tribal government expertise is entitled to "significant weight" in environmental review).