



Fond du Lac Band of Lake Superior Chippewa Resource Management Division

Administration; Conservation Enforcement; Environmental; Fisheries
Forestry; Land Information; Natural Resources; Wildlife

Submitted via online portal (<https://mpca.commentinput.com/?id=ZPmRDdtNH>)
Minnesota Pollution Control Agency
Commissioner Katrina Kessler
520 Lafayette Road
Saint Paul, MN 55155

January 12, 2024

RE: Minnesota Clean Water Act Section 303(d) Draft 2024 Impaired Waters List

Dear Commissioner Kessler,

The Fond du Lac Band of Lake Superior Chippewa appreciates this opportunity to provide comments on the MPCA Clean Water Act Section 303(D) Impaired Waters List.

After more than ten years of urging the MPCA to assess and list wild rice waters that are impaired for noncompliance with the sulfate criterion (10 ppm), we are thankful that the agency is making demonstrable progress on listing these impairments. Fond du Lac fully supports MPCAs proposal to add the twenty waters listed below to the final Minnesota 2024 Impaired Waters List,¹ but also requests that one additional waterbody, Dark Lake (69-0790-000) be included.

Bear Lake (24-0028-00)

Birch Lake (69-0003-00)

Buffalo River (09020106-594)

Cannon River (07040002-501)

Clearwater River (86-0252-02)

Dunka River (09030001-987)

Elizabeth Lake (34-0022-02)

Embarrass River (04010201-B00)

Green Lake (34-0079-00)

Hill River (09020305-539)

Little Rabbit Lake (18-0139-00)

North Twin Lake (31-0190-00)

Orwell Lake (56-0945-00)

Pearl Lake (73-0037-00)

Poplar River (09020305-518)

Rice Lake (Minnesota R.) (10-0078-00)

Rice Lake (Crow R.) (73-0196-00)

Sturgeon River (09030005-527)

Tilde Lake (09030005-527)

Trout Lake (31-0216-00)

There is certainly a sufficient data record available that demonstrates a sulfate impairment for wild rice in Dark Lake, from NPDES permit-required monitoring data provided by US Steel Minntac

¹ MPCA Draft 2024 Impaired Waters List, available at <https://www.pca.state.mn.us/air-water-land-climate/minnesotas-impaired-waters-list>, excerpt of all Wild Rice Producing Waters Impaired for Sulfate (2024 Draft).

at SW003 and SW005.² MPCA has additional data records from the University of Minnesota LacCore Limnological Research Center (under contract with MPCA to conduct field surveys prior to wild rice rulemaking); the Minnesota Department of Natural Resources (findings by a botanist working for the Minnesota Biological Survey), Barr Engineering (2013 field surveys done in response to MPCA direction), and other sources.

However, now that MPCA has identified a number of impaired wild rice waters in successive 303(d) lists, the Agency must develop “priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.” 33 U.S.C. § 1313(d)(1)(A). Next, MPCA must establish Total Maximum Daily Loads (TMDL’s) “in accordance with the priority ranking.” *Id.* at § 1313(d)(1)(C). This “priority ranking including waters targeted for TMDL development within the next two years” must be submitted biennially to EPA. 40 C.F.R. § 130.7(d). 33 U.S.C. § 1313(d)(1)(C) (ii) provides “TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards as identified pursuant to [paragraph \(b\)\(1\)](#) of this section”, and must conduct a robust public review process.

Although tribes in Minnesota continue to communicate with the agency broadly and consistently about CWA protections for this critically important cultural and subsistence resource, we are not aware of any priority ranking list MPCA may have developed for impaired wild rice waters and emphasize that developing TMDLs for them is long overdue. It would be both practical and feasible for MPCA to prioritize restoration of the majority of these impaired wild rice waters, by expediting the issuance and enforcement of NPDES permits with water quality-based effluent limits (WQBELs) for sulfate that will attain compliance with the state’s sulfate criterion. Not only is that MPCA’s obligation under the state’s Clean Water Act authorities, it is paramount to demonstrating good faith with Minnesota tribes on our shared responsibilities to protect and restore treaty-protected resources.

Similarly, Minnesota tribes are also dismayed at the MPCA’s failure to prioritize and complete waterbody-specific mercury TMDLs, when many of the state’s waters listed as impaired for mercury in fish (some for more than 25 years) have no identified plan for TMDL development. While Minnesota has listed nearly 1300 waterbodies as impaired for mercury, the majority of those impaired waters are under an EPA-approved TMDL (Minnesota’s Statewide Mercury TMDL). However, MPCA’s Draft 2024 Impaired Waters List includes 425 waterbodies impaired for aquatic consumption due to mercury in the water column or in fish exceeding Minnesota’s water quality standards.³ Each of these waterbodies are categorized as EPA Consolidated Assessment and Listing Methodology (“CALM”) Category 5, meaning that the water body is impaired but no TMDL study has been approved by EPA. Of these 425 mercury-impaired waterbodies without an approved TMDL, 75 waterbodies are identified by MPCA as Commitment Group 1 priority, meaning that “MPCA commits to having in-progress TMDLs during the next two-year period (October 1, 2024–September 30, 2026).”⁴

² Discharge Monitoring Data for U.S. Steel Minntac Tailings Basin Dark River Sites (2013-2023), Exhibit 12, from Wastewater Data available at:

<https://public.tableau.com/app/profile/mpca.data.services/viz/WastewaterDataBrowser/FrontPage>

³ MPCA Draft 2024 Impaired Waters List, *supra*, all Mercury Impaired Waters on MPCA’s “2024 TMDL List” (“Mercury TMDL Waters”).

⁴ MPCA Draft 2024 Impaired Waters List, *supra*, General Notes Tab.

Clean Water Act regulations require states to provide the priority ranking for TMDLs “including waters targeted for TMDL development within the next two years.” 40 C.F.R. § 130.7(b)(4). In Section 130.7, paragraph (c) is entitled “Development of TMDLs and individual water quality based effluent limitations.” This paragraph describes not merely the development of, but the *establishment* of TMDLs “at levels necessary to attain and maintain applicable narrative and numerical WQS with seasonal variations and a margin of safety.” 40 C.F.R. § 130.7(c) (emphasis added). Prioritization and completion of these waterbody-specific mercury TMDLs must be accelerated.

Fond du Lac would point out that, generally, many of these 425 mercury impaired waterbodies are important fisheries resources for tribal members, and the failure to timely address the mercury impairments disproportionately impacts tribal people. More specifically, our longstanding engagement with MPCA on addressing the mercury impairment in the St. Louis River watershed where we share CWA jurisdiction with the states of Minnesota and Wisconsin only underscores our frustration with the **exceedingly slow** pace of progress on this issue. Having served fifteen years ago on the Statewide Mercury TMDL Implementation Work Group, we are all too aware of the primary need for all mercury-emitting sectors to meet their sector reduction goals as defined in the Implementation Plan. Those specified mercury emissions reductions for the taconite sector must first be met, and then *additional* actions or controls must be implemented to achieve compliance with both the state’s and tribe’s mercury standards.

Finally, the Band is concerned that MPCA’s TMDL Prioritization Framework attributes the source of mercury in fish tissue solely to mercury “emitted into the atmosphere [that] deposits in lakes and streams and accumulates in fish”, and apparently assumes that limiting mercury air emissions without addressing other exacerbating factors will result in mercury water quality standards attainment by 2025.⁵ But the agency is well aware of the role that sulfate discharges play in increasing both mercury release from sediments and wetlands, and facilitating the methylation of mercury that leads to bioaccumulation. In 2006, MPCA shared with the Minnesota tribes their plan to minimize sulfate *expressly* to reduce impairments due to methylmercury in fish tissue:

It is important to minimize the effect of sulfate on MeHg [methylmercury] and P [phosphorus] because Minnesota’s water quality is threatened by these chemicals state-wide. Federal NPDES permitting regulations prohibit the authorization of wastewater discharges that may cause or contribute to water quality impairments. Numerous water bodies in the state are listed as impaired because the MeHg concentrations in fish tissues make the fish unsuitable for frequent human consumption. Similarly, numerous water bodies are impaired because of excess P concentrations.⁶

We have seen clear and convincing evidence that excess sulfate loading to aquatic ecosystems contributes to wild rice toxicity, mercury methylation and bioaccumulation, and internal phosphorus loading that contributes to eutrophication and harmful algal blooms. Yet, to date, MPCA has completely failed to address these clear and evidence-based relationships between sulfate loading and multiple water quality impairments, including mercury bioaccumulation. Until MPCA includes sulfate pollution controls as a component of the implementation of mercury TMDLs, we

⁵ MPCA TMDL Prioritization Framework.

⁶ MPCA Strategy to Address Indirect Effects of Elevated Sulfate on Methylmercury Production and Phosphorus Availability, Final, Oct. 19, 2006.

will not see currently impaired waters attain compliance with Minnesota water quality standards, and traditional lifeways will continue to be at risk.

In conclusion, Fond du Lac supports the addition of the twenty new impaired wild rice waters proposed by MPCA, and recommends one additional wild rice water (Dark Lake) for inclusion on the Minnesota 303(d) list for sulfate impairments. We also encourage the MPCA to develop a priority ranking list and begin to develop TMDLs for these and other impaired wild rice waters with the highest priority before the 2026 Impaired Waters List is drafted. Additionally, we urge MPCA to explicitly recognize that mercury impairments are exacerbated by other factors, including sulfate pollution, and to implement controls on sulfate loading to attain compliance with mercury WQS in any mercury-impaired watershed affected by sulfate discharges.

Sincerely,

A handwritten signature in blue ink that reads "Nancy Schuldt". The signature is written in a cursive, flowing style.

Nancy Schuldt, Water Projects Coordinator
Fond du Lac Environmental Program