

WILD RICE RULEMAKING
Summary of Issues -- January 2013

RULEMAKING BACKGROUND

The first subpart of the wild rice rule (Minnesota Rule 7050.0224) sets a narrative standard that prevents the material impairment or degradation of “the aquatic habitat necessary to support the propagation and maintenance of wild rice plant species.” The second subpart of the rule sets the specific limit for sulfates of 10 milligrams per liter (mg/L) “applicable to water used for production of wild rice during periods when the rice may susceptible to damage by high sulfate levels.”

The Minnesota Chamber of Commerce, on behalf of the mining industry, challenged the wild rice sulfate standard in a lawsuit, claiming that the rule should only apply to paddy rice and not to natural stands of wild rice and that the rule is not specific enough about the waters to which the standard applies or the time period when the standard applies. WaterLegacy intervened in this lawsuit, and the industry’s challenge has, thus far, been rejected by a Minnesota district court and the Minnesota Court of Appeals.

The mining industry also argued to the Minnesota Legislature that the sulfate limit of 10 milligrams per liter (mg/L) is too stringent. The Legislature enacted a 2011 Session Law addressing various questions raised by industry. The Legislature directed that the appropriateness of the 10 mg/L sulfate standard should be evaluated through research supervised by the MPCA using an advisory group; this process is underway. The Legislature also directed the MPCA to clarify in rule both where and when the 10 mg/L sulfate limit applies.

The wild rice sulfate limit only applies to “water used for the production of wild rice.” The current MPCA rulemaking process will define this phrase more precisely.

APPLICABLE LAWS

Any Minnesota water quality standard must comply with the federal Clean Water Act. Under the Clean Water Act, standards must protect beneficial uses of water that were in existence on November 28, 1975 or have been in existence at any time since then. These are called “existing uses.”

The current Minnesota wild rice rule language and the 1997 record when the rule was amended explain that the existing use of wild rice waters is to provide a food source for wildlife as well as humans, to serve as an ecological resource, and to preserve genetic diversity. Any rule that would only protect stands of wild rice currently large enough to be used for human harvest would fail to protect existing uses and would violate the Clean Water Act.

In addition to Clean Water Act, treaties with Indian tribes protect tribal rights to gather wild rice in territories ceded to the United States that are now part of the State of Minnesota.

PROPOSALS FOR RULE CHANGE

The MPCA has not provided a specific recommendation for the rule definition. However, the Agency has suggested that it will set criteria for minimum acreage and minimum density of wild rice, without which a water body will not be considered a “water used for the production of wild rice.” The MPCA believes that such criteria are required by the 2011 Minnesota Session Law, ch. 2, art. 4, sect. 32, par. (a) and (b). WaterLegacy, tribal and other environmental stakeholders are concerned that such criteria would fail to protect existing beneficial uses and would violate the Clean Water Act.

In 2008, the Minnesota Department of Natural Resources (MDNR) prepared a report to the Legislature, *Natural Wild Rice in Minnesota*, identifying approximately 1,292 lakes or river/stream segments as containing natural stands of wild rice. Tribal sources and additional MDNR field research have identified additional wild rice waters. The MPCA’s initial proposal to the Wild Rice Advisory Committee suggested that only 777 of the 1,292 waters identified by the MDNR in 2008 be considered “waters used or the production of wild rice,” since others don’t specify the number of acres of coverage of wild rice in that water body.¹ Other waters would be placed on a “watch list,” requiring proof of current acreage and density exceeding a specified level for wild rice to be protected from excessive sulfates.

The MPCA has acknowledged that handbooks for other beneficial uses (such as trout streams) don't require a certain density of fish, so long as there is evidence that finding a fish is not an “anomaly.” WaterLegacy has requested that all existing wild rice waters identified by MDNR and tribal research be designated as “waters used for the production of wild rice” and that all waters containing natural wild rice be protected unless the finding of wild rice is an anomaly (e.g. planted in order to block a project).

More than 790 citizens have signed postcards or petitions asking the MPCA to broadly protect wild rice in rulemaking, by acting as follows:

- 1) list additional lakes, streams, creeks, rivers and wetlands on which natural wild rice grows and has grown within the Lake Superior Basin and in all other Minnesota watersheds; 2) protect natural wild rice for wildlife uses and preservation of genetic diversity as well as protecting larger and more accessible stands used for human harvest; 3) protect waters where wild rice has grown since the November 28, 1975 Clean Water Act "existing use" date and protect waters where wild rice was harvested by tribes, whose right to harvest is protected by treaties.

It must also be recognized that size and density of wild rice stands fluctuate from year to year, and natural wild rice has been impaired in many waters since the November 28, 1975 date of Clean Water Act. Placing a burden of proof on citizens, tribes or regulators to prove a certain size of wild rice stands would result in failure to protect wild rice under the Clean Water Act.

¹ See MDNR, *Natural Wild Rice in Minnesota* (2008), p. 53 regarding the number of inventoried locations where acreage is or is not specified.