



Testimony of WaterLegacy on S.F.1007 [bill prohibiting application of the wild rice standard]
Senate Environment and Energy Committee
Friday, March 27, 2015
Paula Maccabee, WaterLegacy Advocacy Director and Counsel

Introduction

My name is Paula Maccabee and I serve as the Advocacy Director and Counsel for WaterLegacy, a non-profit group formed to protect Minnesota's water resources and the communities that rely on them. Our 10,000 members include people who hunt, fish and gather wild rice, as well as teachers, chemists and biologists. They have identified wild rice as an indicator species for Arrowhead region ecosystems and have also made the preservation of water quality standards in the face of political pressure a high priority.

WaterLegacy has been active in preserving the wild rice sulfate standard since 2009. We've reviewed thousands of pages of federal and state documents dating back to 1973, when Minnesota's wild rice sulfate standard was adopted. We've served on the Advisory Committee created by the Legislature and have participated at each step of the scientific peer review process. When the Chamber of Commerce sued the State in 2011 to prevent enforcement of the wild rice sulfate standard, WaterLegacy intervened in court. The Chamber's claims were defeated both in district court and at the Minnesota Court of Appeals.

WaterLegacy is here today to oppose adoption of S.F. 1007 on two grounds. First, the scientific evidence gathered as a result of taxpayer-funded research demonstrates that prohibiting enforcement of the existing Minnesota wild rice sulfate standard would be unreasonable. Second, legislation preventing the Minnesota Pollution Control Agency (MPCA) from fulfilling its obligations to control sulfate pollution and list wild rice impaired waters would conflict with the Clean Water Act, which is governing federal law.

1. Minnesota's existing wild rice sulfate standard is reasonable and should be enforced.

In 2011, the MPCA hired the best scientists from the University of Minnesota and engaged in the most comprehensive study of wild rice and sulfate anywhere in the world. As a result of this research, the MPCA concluded in February 2014:

- Sulfate is not directly toxic to wild rice. However, sulfate in the surface water can be converted by bacteria to sulfide in the rooting zone of wild rice.
- Sulfide is toxic to wild rice.
- The 10 mg/L sulfate standard is needed and reasonable to protect wild rice production from sulfate-driven sulfide toxicity.
- The 10 mg/L wild rice sulfate standard should continue to apply to both lakes and streams.

The response of Iron Range legislators to an internal briefing reporting this scientific conclusion by MPCA was swift and critical. The MPCA's proposal was withdrawn and a new conceptual draft was prepared. This draft was provided to a panel of seven international scientists for peer review. The peer review panel issued a final report in September 2014. They told MPCA that sulfate must be regulated to control sulfide. The peer review panel reviewed the MPCA's new concept of substituting a formula for a limit on sulfate pollution. They stated:

It would be useful to have an experiment that examines whether iron would mitigate the ecological effects on wild rice of added sulfide levels. . . MPCA needs to understand the mechanism of toxicity better before claiming to understand how iron mitigates sulfide stress. (Peer Review Report, Summary of Reviewer Discussions, p. 28)

If MPCA is going to make site-specific standards based on iron and sulfate concentrations and compare these conditions with the hydroponics study to determine a NOEC [No Observed Effect Level], the sulfate concentration determined will not be protective. (Peer Review Report, Summary of Reviewer Discussions, p. 32)

Wild rice researchers and independent scientific experts believe the MPCA's new formula is scientifically indefensible. But, the mining industry seems pleased.

The Arkansas Legislature recently went down a similar path. They weakened standards for pollutants, including sulfates and chlorides, as a result of pressure by the El Dorado Chemical Company. Under federal regulations [40 C.F.R. 131.5], the EPA disapproved the weaker standards championed by the chemical company. Our Eighth Circuit Court of Appeals affirmed summary judgment for the EPA this year in a case called *El Dorado Chemical Company v. U.S. EPA* [763 F.3d 950 (8th Cir. 2014)]. The federal appeals court explained that to change a water quality standard, the state has the burden to prove its proposal will be protective of existing uses.

2. The MPCA is obligated under federal law to enforce the existing wild rice sulfate standard and to list wild rice waters that are impaired by sulfate pollution.

Provisions of S.F. 1007 stating that the MPCA shall not apply the wild rice water quality standard or list wild rice impaired waters until the MPCA adopts rule changes are inconsistent with federal Clean Water Act requirements. As Committee members may remember from 2011, the EPA has already explained that state law may not interfere with enforcement of federally-approved water quality based effluent limitations in permits, including the wild rice sulfate standard. The EPA's May 13, 2011 letter, which is included in your packet, stated:

A state with a federally authorized NPDES program is required to issue permits that ensure the protection of federally approved water quality standards. Where a state proposes to issue a permit that fails to apply, or to ensure compliance with, any applicable requirement, including WQBELs [water quality based effluent requirements], EPA has the authority to review and to object to such permit issuance pursuant to its authority.

If the state issues a permit that does not ensure compliance with the existing wild rice sulfate standard, the federal government has the power to take over the permit.

The mining industry's challenge to the wild rice sulfate standard has been all over the news this month. In an interview this week with Minnesota Public Radio (now available on line) discussing the existing sulfate limit of 10 milligrams per liter in wild rice waters, Governor Mark

Dayton stated that U.S. Steel has “made it very clear that they’re not going to agree to a permit that has a standard of 10.”

The Clean Water Act does not allow polluters to choose which regulations they will or will not comply with and does not support states when they cave in to industry pressure instead of enforcing the law. In 2011, the EPA advised the Minnesota Legislature,

[S]hould EPA determine that a state is not administering its federally approved NPDES program in accordance with requirements of the CWA, EPA has the authority to require the state to take corrective action, and if necessary, to withdraw authorization of the program.

Federal regulations copied in your packet explain that the EPA may withdraw State authority to regulate water quality when a State program no longer complies with federal clean water law. Among the circumstances demonstrating non-compliance are failure to issue permits, issuing permits that don’t protect beneficial uses, failure to act on permit violations and, “Action by a State legislature or court striking down or limiting State authorities.” (40 C.F.R. § 123.63). This is only right. Laws were made to protect all of us, not just the profits of the powerful.

My Dad died one year ago. He used to tell me to stand up to bullies. Every time a political fix is proposed to serve the interests of the mining industry, Minnesota slips farther away from my Dad’s common sense and farther away from Clean Water Act requirements to control pollution to protect wild rice, fish, and the ecological and human communities that depend on clean water. At some point, Minnesota’s legitimacy in serving as the regulator of mining industry pollution will reach the point where our State’s authority can no longer be defended or sustained.

I would be pleased to answer any questions posed by the Committee.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

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CHICAGO, IL 60604-3590

MAY 13 2011

REPLY TO THE ATTENTION OF:

W-15J

The Honorable Thomas M. Bakk
Minnesota Senate
147 State Office Building
100 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, Minnesota 55155-1606

The Honorable David Dill
Minnesota House of Representatives
147 State Office Building
100 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, Minnesota 55155-1606

Dear Mr. Bakk and Mr. Dill:

I am writing in response to your May 9, 2011 letter, in which you requested that the U.S. Environmental Protection Agency provide its views of two draft bills, which would alter the Minnesota Pollution Control Agency's (MPCA) implementation of the current, federally-approved water quality standard of 10 mg/L sulfate for wild rice waters. Because you requested a prompt response, we are able to offer only general comments that focus on two aspects of the bills.

As you know, H.F.1010 and S.F. 1029 propose to modify or suspend the current, federally-approved water quality standard for wild rice waters of 10 mg/L, and H.F. 1010-3 (sec. 19, lines 41.15-41.20), specifically sets 50 mg/L as the numeric criterion for sulfate in wild rice waters until a new standard is developed. To the extent that any legislation changes the EPA-approved water quality standards for Minnesota, such revised water quality standards must be submitted to EPA for review and approval pursuant to 33 U.S.C. §1313(c)(2)(A), Clean Water Act (CWA) §303(c)(2)(A), and are not effective for CWA purposes, including National Pollutant Discharge Elimination System (NPDES) permits, unless and until approved by EPA (see 40 C.F.R. §131.21). Should Minnesota wish to submit these to EPA as changes to Minnesota's water quality standards, the federal regulations at 40 C.F.R. §131.6 provide the submittal requirements. These include, among other things, the methods and analyses conducted to support the water quality standards revisions, including how the revised water quality criteria are sufficient to protect the designated uses (see generally 40 C.F.R. §131 Subpart B, and 40 C.F.R. §§ 131.11 and 131.20). Federal regulations require that criteria be protective of a state's designated uses and EPA's approval is based, among other factors, on determining that there is a scientifically

defensible basis for finding that the criteria are sufficient to protect designated uses (see generally 40 C.F.R. §§ 131.5, 131.11, and 131.21). Absent such a showing, EPA would be unable to approve a revised criterion (see generally 40 C.F.R. §131.6(b)). An EPA decision to approve water quality standards would be available for judicial review.

With respect to S.F. 1029, Sec. 62(f), lines 58.4 - 58.12 and H.F.1010-3, lines 40.34-41.13, Sec. 18(e) (both of which generally prevent MPCA from including sulfate limitations in permits until a new standard is developed), EPA believes that the effect of these respective provisions will be to prevent MPCA from including water quality based effluent limitations (WQBELs) based on the federally approved criterion in permits issued under the state's authorized NPDES program. A state with a federally authorized NPDES program is required to issue permits that ensure the protection of federally approved water quality standards. See 33 U.S.C. §1311(b)(1)(C), CWA §301(b)(1)(C); and generally, 40 C.F.R. Part 123 (see especially 40 C.F.R. §123.25(a)(1)); and 40 C.F.R. §§122.4 and 122.44(d)(1). Where a state proposes to issue a permit that fails to apply, or to ensure compliance with, any applicable requirement, including WQBELs, EPA has the authority to review and to object to such permit issuance pursuant to its authority under 40 C.F.R. §123.44. Should EPA object to a state-proposed permit, the state or any interested person would be provided 90 days (from the date on which EPA makes a specific objection) to request a public hearing on the objection, consistent with 40 C.F.R. §123.44(e). EPA would hold such a hearing, pursuant to the procedures outlined in 40 C.F.R. §§123.44(e)-(f). Pursuant to 40 C.F.R. §122.4(c), the state may not issue a permit over EPA's objection. Where EPA has provided notice of an objection, and where the state has failed to revise the permit to meet EPA's objection, EPA has the authority to issue a federal permit for a potential discharger, pursuant to the authority in 40 C.F.R. §123.44(e). Additionally, should EPA determine that a state is not administering its federally approved NPDES program in accordance with requirements of the CWA, EPA has the authority to require the state to take corrective action, and if necessary, to withdraw authorization of the program, pursuant to 33 U.S.C. §§1342(c)(2)-(3).

I hope you find this information helpful.

Sincerely,



for Tinka G. Hyde
Director, Water Division

Anita-

Please make
copies for:

- Chris
- Robie
- Tom

2.

ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR Data is current as of February 19, 2015

[Title 40](#) → [Chapter I](#) → [Subchapter D](#) → [Part 123](#) → [Subpart D](#) → §123.63

Title 40: Protection of Environment

[PART 123—STATE PROGRAM REQUIREMENTS](#)

[Subpart D—Program Approval, Revision, and Withdrawal](#)

§123.63 Criteria for withdrawal of State programs.

(a) In the case of a sewage sludge management program, references in this section to “this part” will be deemed to refer to 40 CFR part 501. The Administrator may withdraw program approval when a State program no longer complies with the requirements of this part, and the State fails to take corrective action. Such circumstances include the following:

(1) Where the State's legal authority no longer meets the requirements of this part, including:

(i) Failure of the State to promulgate or enact new authorities when necessary; or

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) Where the operation of the State program fails to comply with the requirements of this part, including:

(i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

(ii) Repeated issuance of permits which do not conform to the requirements of this part; or

(iii) Failure to comply with the public participation requirements of this part.

(3) Where the State's enforcement program fails to comply with the requirements of this part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or

(iii) Failure to inspect and monitor activities subject to regulation.

(4) Where the State program fails to comply with the terms of the Memorandum of Agreement required under §123.24 (or, in the case of a sewage sludge management program, §501.14 of this chapter).

(5) Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits.

(6) Where a Great Lakes State or Tribe (as defined in 40 CFR 132.2) fails to adequately incorporate the NPDES permitting implementation procedures promulgated by the State, Tribe, or

EPA pursuant to 40 CFR part 132 into individual permits.

(b) [Reserved]

[48 FR 14178, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985, as amended at 54 FR 23897, June 2, 1989; 60 FR 15386, Mar. 23, 1995; 63 FR 45123, Aug. 24, 1998]

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