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Re: Minnesota Clean Water Act Section 303(d) List
Failure to List Wild Rice Impaired Waters 2016, 2018, and 2020

Dear Administrator Thiede, Director Fong:

WaterLegacy submits this letter on behalf of our members and supporters, whose interests we have represented since 2012 in requesting that the Minnesota Pollution Control Agency ("MPCA") and the U.S. Environmental Protection Agency ("EPA") comply with the Clean Water Act ("CWA") Section 303(d) and list wild rice waters impaired by sulfate pollution in excess of Minnesota's 10 parts per million ("mg/L") wild rice sulfate standard, Minn. R. 7050.0224. Neither MPCA nor EPA have performed their duties in accordance with the CWA. To date, not a single wild rice water has been listed as impaired due to sulfate in excess of Minnesota's lawful numeric (10 mg/L) sulfate water quality standard.

On January 22, 2018, EPA received a copy of WaterLegacy's comments on MPCA's draft 2018 Section 303(d) list. (WaterLegacy 303(d) Exhibits pages ("WL 303(d) Ex.") 1-4). These 2018 comments also attached WaterLegacy's comments and exhibits pertaining to MPCA's 2012, 2014, and 2016 draft Section 303(d) lists. (*Id*. 5-236). In addition, WaterLegacy's 2018 comments attached the Administrative Law Judge ("ALJ") Report and Chief ALJ Report disapproving MPCA's proposals to repeal the wild rice standard, adopt an equation-based rule, and limit wild rice waters to approximately 1,300 identified waters used for the production of wild rice.[1]

This letter comments on MPCA's 2020 draft Section 303(d) list and requests that EPA take the following actions based on the discussion and authorities below, along with the attached exhibits:

[1] *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*, OAH 80-9003-34519, Report of the Administrative Law Judge, (Jan. 9, 2018) and the Chief Administrative Law Judge (Jan. 11, 2018) ("ALJ Report" and "Chief ALJ Report) at WL 303(d) Ex. 237-318.

1. EPA should immediately reject or withdraw any MPCA extensions that delay MPCA's submittal of its 2020 Section 303(d) list for EPA's consideration.

2. EPA should acknowledge that EPA's approval of Minnesota's 2016 and 2018 Section 303(d) lists on January 28, 2019 was arbitrary, not in accordance with law, and unsupported by substantial evidence in failing to find a single Minnesota class 4A water used for the production of wild rice impaired due to sulfate levels in excess of Minnesota's numeric (10 mg/L) water quality standard.

3. EPA should deny approval of Minnesota's draft 2020 Section 303(d) list due to MPCA's failure to list wild rice waters impaired by sulfate in excess of Minnesota's numeric (10 mg/L) water quality standard.

4. EPA should use all available data, in consultation with tribes, to list all Minnesota waters where wild rice is a CWA existing use impaired by sulfate in excess of Minnesota's numeric (10 mg/L) water quality standard.

DISCUSSION

1. EPA's apparent extension of time for MPCA to submit its Section 303(d) is not authorized under the CWA or its implementing regulations.

Neither the CWA nor its implementing regulations authorize EPA to grant a state an "extension" of time for state submittals to EPA.

The CWA and its implementing regulations are explicit about the timing both for state submittals to EPA and for EPA approvals or disapprovals of state submittals under Section 303(d) [33 U.S.C. 1313(d)]. Regulations implementing the CWA require that states' reports on water quality-impaired segments and control strategies must be submitted "regularly by the States to EPA" every two years. 40 C.F.R. § 130.10 (a), (a)(1). CWA regulations have required since 1994 that each state submit to EPA the lists providing "identification and priority setting for water quality-limited segments still requiring TMDLs" on April 1 of every even-numbered year. 40 C.F.R. § 130.7(b), (d)(1). This instruction to the states is repeated on EPA's website.[2]

EPA's Regional Administrator is then required to either approve or disapprove the state's impaired waters listing and TMDL loadings not later than 30 days after the date of submission. 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(2). The Regional Administrator shall approve a state impaired waters list "only if it meets the requirements" of paragraph (b) of the regulation, which specifies how impaired waters must be identified. *Id*. If the EPA Regional Administrator disapproves the state's listing of impaired waters, the EPA shall, not later than 30 days after the date of disapproval (a total of 60 days after the submittal by the state) identify impaired waters in the State. *Id*. EPA must then "promptly issue a public notice seeking comment on such listing" and consider comments before finally transmitting the impaired waters listing to the State. *Id*.

[2] EPA, Overview of Listing Impaired Waters under CWA Section 303(d) available at https://www.epa.gov/tmdl/overview-listing-impaired-waters-under-cwa-section-303d. All online sites in these comments last visited on Oct. 21, 2020.

Nothing in the language of the CWA or its regulations provides for "extensions" to allow states to delay submittal of Section 303(d) impaired waters list. To the contrary, CWA regulations provide for a regular, consistent, and rigorous schedule to prevent either states or EPA from delay in fulfilling their obligations to identify impaired waters and set pollutant loads necessary to implement water quality standards.

Since 2010, when EPA first informed MPCA that the agency was required by law to enforce its wild rice sulfate standard, political pressure has driven MPCA to adopt multiple strategies for delay.[3] We are concerned about the passage of time without a resolution on the important issue of listing wild rice impaired waters. Even if MPCA's objectives are genuine, neither the CWA nor its regulatory framework allow EPA to disregard the timetable provided in law to ensure that progress is made in listing and providing loadings to implement water quality standards in impaired waters.

2. EPA misinterpreted Minn. R. 7050.0224 and EPA's final decisions not to disapprove MPCA's 2016 and 2018 Section 303(d) lists and to list wild rice impaired waters were arbitrary, not in accordance with law, and unsupported by substantial evidence.

The U.S. Administrative Procedure Act ("APA") states that an agency final action is unlawful if the action, findings, and conclusions are arbitrary, capricious, not in accordance with law, or unsupported by substantial evidence. 5 U.S.C. § 706(2). The APA requires that "agency action be reasonable and reasonably explained." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1933 (2020). EPA's was neither.

EPA's Final Decision Document for the Approval of Minnesota's 2016 and 2018 Clean Water Act Section 303(d) Lists on January 28, 2019 ("EPA Decision Document") concluded that there was no reason either to disapprove MPCA's 2016 or 2018 Section 303(d) list or to list any of Minnesota's wild rice waters as impaired due to sulfate in excess of the numeric sulfate standard in Minn. R. 7050.0224. EPA's decision rested solely on its assessment of 24 waters listed in Minn. R. 7050.0470, as stated below:

> In the absence of an assessment by the State of water quality data for the 24 state-designated wild rice waters, EPA independently reviewed water quality data for these 24 waters during its review of the 2016 and 2018 303(d) lists. EPA found that none of the 24 waters had measured sulfate data above the numeric sulfate standard (10 mg/L) for the 2016 and 2018 listing cycles. For this reason and because EPA concludes that there is not a reasonable basis to apply the State's current water quality standard beyond these 24 waters, EPA does not have a reasonable basis to disapprove the 2016 or 2018 303(d) lists for failure to include waters used for the production of wild rice as impaired under Minnesota's currently applicable rules. (EPA Decision Document p. 30, WL 303(d) Ex. 382)

[3] *See* WaterLegacy Petition for Withdrawal of Program Delegation from the State of Minnesota for NPDES Permits Related to Mining Facilities, pp. 2, 21-26, 29 (July 2, 2015), Petition Exhibits in support of Petition for Withdrawal, pp. 394-435, available at https://www.epa.gov/mn/npdes-petition-program-withdrawal-minnesota.

EPA final decision not to list any Minnesota wild rice impaired waters rested on EPA's assertion that only the 24 wild rice waters listed in Minn. R. 7050.0470 are "recognized by the State as waters used for the production of wild rice." (*Id.*). This conclusion was arbitrary, not in accordance with law, and was contrary to the evidence submitted to EPA for its consideration in the review of MPCA's 2016 and 2018 Section 303(d) lists.

A. Minnesota's numeric sulfate standard (10 mg/L) applies to all class 4A designated for which wild rice is an existing use under the CWA.

Under the CWA, Minnesota's numeric sulfate standard applies when the use of waters for wild rice is an existing use since November 28, 1975. *See* 40 C.F.R. § 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."). EPA's novel interpretation of Minnesota's wild rice sulfate water quality standard to apply the numeric sulfate standard (10 mg/L) only to 24 waters listed in Minn. R. 7050.0224 is a clear error of law.

EPA's interpretation is contrary to the plain and unambiguous language of Minn. R. 7050.0224. Such an interpretation has also been rejected in prior EPA Region 5 comments in environmental review and permitting, rejected by Minnesota's ALJ and Chief ALJ in rulemaking, rejected by a Minnesota district court and rejected by the Minnesota Court of Appeals and MPCA in appeal from a permit failing to apply the wild rice sulfate standard to U.S. Steel Minntac Tailings Basin sulfate pollution. EPA's interpretation cannot stand.

1. Plain and unambiguous text of Minn. R. 7050.0224.

The plain text of Minn. R. 7050.0224 precludes exclusion of nearly all class 4A waters from the application of the numeric sulfate standard, as EPA proposed. The plain language of the rule applies to all class 4A waters used for the production of wild rice. The text of Minn. R. 7050.0224, subpart 1 reads as follows:

> The numeric and narrative water quality standards in this part prescribe the qualities or properties of the waters of the state that are necessary for the agriculture and wildlife designated public uses and benefits . . . . 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. . . 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.

The plain text of this rule states first that "selected wild rice waters" are listed in 7050.0470. The ordinary usage of the word "selected" reflects that there are also other wild rice waters not so selected. The American Heritage Dictionary, for example, defines the adjective "select" to mean

"[o]f special quality or value; choice" as in the phrase "select peaches."[4] The listing of selected wild rice waters cannot reasonably be construed to mean that there are no other wild rice waters in Minnesota.

Moreover, the final sentence of subpart 1 unambiguously applies the numeric standards of part 7050.0224 to "waters of the state that have the class 4 designation." The wild rice sulfate numeric standard is contained in subpart 2, which states that it applies to "class 4A waters of the state." The "Class 4A Standard" for sulfates in subpart 2 applies to those waters designated as class 4A waters that are "used for production of wild rice." Minn. R. 7050.0224, subp. 2.

Minnesota's unambiguous regulatory language in Minn. R., 7050.0224 precludes EPA's contrived exclusion from subpart 2 of all class 4A waters of the state where wild rice is an existing use that are not also specially listed in Minn. R. 7050.0470.

2. EPA's prior consistent interpretations.

EPA's parsing Minnesota's wild rice rule to avoid disapproval of MPCA's 2016 and 2018 Section 303(d) lists in EPA's January 28, 2019 Decision Document is inconsistent with more than a decade of its own prior interpretation. EPA Region 5 comments on the draft environmental impact statement ("DEIS") for the Keetac taconite mine expansion on January 27, 2010 stated, "The Draft EIS leaves no doubt that wild rice stands are present in Swan Lake, Swan River, Hay Creek and Hay Lake . . .As a result of the information provided in the Draft EIS, we understand that the MN sulfate standard of 10 mg/L for the protection of wild rice is applicable." (WL 303(d) Ex. 540). Swan Lake, Swan River, Hay Creek and Hay Lake are not listed in Minn. R. 7050.0470.

EPA Region 5 similarly stated in comments on the DEIS for the PolyMet NorthMet copper-nickel mine on February 18, 2010 that the revised/supplemental DEIS should include the 10 mg/L sulfate number among applicable standards because the "DEIS acknowledges isolated patches of wild rice" in the Upper Partridge River. (WL 303(d) Ex. 555). The Partridge River is not listed in Minn. R. 7050.0470. (WL 303(d) Ex. 560).

EPA Region 5 explained in comments on the draft NPDES permit for the U.S. Steel Corp. Minntac Tailings Basin on December 21, 2016 that Minnesota's wild rice sulfate standard applies to waters for which wild rice production is an existing use. EPA concluded:

> Sandy and Little Sandy Lakes (a.k.a. the "Twin Lakes"), on the east side and downstream of the tailings basin, have been known to produce wild rice historically, as documented by the Minnesota Department of Natural Resources (MNDNR) and in more recent years in a diminished capacity as documented by the 1854 Treaty Authority in their 2016 report. The Sand River and Twin Lakes are downstream waters receiving discharges from the tailings basin and it appears that wild rice production is an existing use in these water bodies as defined by 40 C.F.R. § 131.3(e). Therefore, MPCA needs to include the Sand River in the draft NDPES permit including water quality based limits that will meet all applicable water

[4] Select, American Heritage Dictionary of the English Language, available at https://ahdictionary.com/word/search.html?q=selected

> quality standards [including the state's wild rice standard based on the documented wild rice stands in the Sand River and Twin Lakes, or explain why this standard does not apply]. (WL 303(d) Ex. 574)

Neither Sandy Lake nor Little Sandy Lake are listed in Minn. R. 7050.0470.

In its final Decision Document on January 28, 2019, EPA neither acknowledged its prior conclusions nor provided any rationale for deviating from over a decade of consistent interpretation of Minn. R. 7050.0224 to apply Minnesota's numeric sulfate standard to all waters where production of wild rice is a CWA existing use.

3. Minnesota ALJ Report admissions and conclusions.

In January 2018, WaterLegacy submitted and EPA received the ALJ Report from the wild rice rulemaking process. (WL 303(d) Ex. 1-5, 237-318). The ALJ Report was part of the administrative record for EPA Region 5 review of MPCA's 2018 Section 303(d) list.

In the 2017 rulemaking proceedings, MPCA admitted that there were at least 1,300 wild rice waters meeting even its impermissibly underinclusive definition of waters used for the production of wild rice. This admission was noted repeatedly in the ALJ Report. (ALJ Report, p. 5, ¶¶ 85, 88, 89, 110, 114, 134, 180, 234-35, 259; WL 303(d) Ex. 243, 262-63, 267, 269, 273, 282, 293, 300). The ALJ Report further explained that these 1,300 waters were MPCA-identified "regulated wild rice waters." (*Id*. ¶¶ 88, 180; WL 303(d) Ex. 263, 282)

The ALJ Report then found that MPCA's list was, in fact, underinclusive, stating that MPCA "acknowledges that the wild rice waters in this rulemaking may not include every water in Minnesota where the wild rice beneficial use has existed since November 28, 1975" and that MPCA agrees that "it is likely that not all wild rice waters have been identified." (*Id.* ¶¶ 281-82; WL 303(d) Ex. 305-06). Specifically, the ALJ concluded "that the MPCA's proposed list of wild rice waters . . is defective because it fails to include all waters previously identified by the MDNR and federally recognized Indian tribes as waters where wild rice is an existing use since November 28, 1975." (ALJ Report ¶ 287, WL 303(d) Ex. 306).[5] The ALJ also concluded that MPCA's proposed list of approximately 1,300 waters was underinclusive in violation of CWA implementing regulations 40 C.F.R. §§ 131.3 and .11(h)(1). (ALJ Report, p. 5, WL 303(d) Ex. 243).

The ALJ Report proposed that MPCA could cure the defect in its proposed rule by adding to its list of wild rice waters "all waters previously identified by the MDNR and federally recognized Indian tribes as waters where wild rice is an existing use since November 28, 1975." (*Id.* ¶ 288, WL 303(d) Ex. 307).

[5] The ALJ Report contains two paragraphs marked ¶287 and two marked ¶288. The WL 303(d) Ex. pages indicate which paragraph is cited.

The findings and conclusions in the ALJ Report were explicitly confirmed by the Chief ALJ in responding to MPCA's request for review.[6] The Chief ALJ explained, "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." (Chief ALJ Review Order, p. 11, WL 303(d) Ex. 646 (citing 40 C.F.R. §§ 131.3(e), 131.11(h)). The Chief ALJ concluded that MPCA "cannot establish that it is the sole decider of what constitutes an existing use for purposes of federal law" and that in rejecting the MDNR's report and the 1854 Treaty Authority's list, the MPCA was removing waters that "had already been designated as having wild rice as an existing use under federal law." (*Id*.).

4. Minnesota courts and MPCA's statements.

Minnesota courts have also confirmed that EPA's January 28, 2019 interpretation of Minn. R. 7050.0224 is erroneous. The Ramsey County District Court has found that, consistent with the plain language of the water quality standard, **"**Minnesota's Class 4A water quality standards are intended to protect both naturally occurring vegetation grown in the waters themselves and cultivated crops in the area around the water." *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, No. 62-CV-10-11824, 2012 Minn. Dist. LEXIS 194 at *14-15 (Minn. Dist. Ct., Second Judicial Dist., May 10, 2012), (WL 303(d) Ex. 583). In response to mining industry plaintiffs' argument that the sulfate standard could not apply to wild rice waters not specifically listed, the District Court specifically found that even the MDNR list of waters where wild rice has been identified the list of waters is "not an exhaustive list of waters used for the production of wild rice. *Id*. at *1, 9, (WL 303(d) Ex. 580, 582).

In appeals from a U.S. Steel Minntac tailings basin NPDES permit that failed to require compliance with Minnesota's 10 mg/L numeric standard limiting sulfate in wild rice waters, the Minnesota Court of Appeals held that the wild rice rule "is a water-quality standard that is subject to enforcement under the CWA." *In re Issuance of an NPDES/SDS Permit to U.S. Steel Corp*., 937 N.W.2d 770, 788 (Minn. App. 2019). In this U.S. Steel Minntac tailings basin case, MPCA disputed whether permit conditions eliminated surface seepage, and the Court of Appeals found that MPCA lacked substantial evidence that Minntac tailings basin surface discharge had been eliminated. *Id.* at 774, 790. The Court of Appeals further explained that in MPCA's brief to the court, MPCA stated it "would enforce the wild rice water quality standard by imposing a WQBEL on U.S. Steel's surface seepage discharges, if applicable." *Id*. at 789. The Court continued, "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." *Id.*

None of the downstream waters affected by Minntac tailings basin seepage are listed in Minn. R. 7050.0470. However, in an attachment to its Statement of Need and Reasonableness ("SONAR")

[6] *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*, OAH 80-9003-34519, Chief Administrative Law Judge Order on Review of Rules (April 12, 2018) ("Chief ALJ Review Order") at WL 303(d) Ex. 636-51.

for the wild rice rulemaking process,[7] MPCA identified Sandy Lake and Little Sandy Lake – both of which are affected by Minntac tailings basin discharge –as waters used for the production of wild rice. (MPCA SONAR Attach. 2, p. 16, WL 303(d) Ex. 603).

The plain and unambiguous text of Minn. R. 7050.0224, subparts 1-2, the consistent interpretations of EPA Region 5 over the past decade, the ALJ Report on the MPCA wild rice rulemaking proposal, Minnesota courts, and the MPCA itself have all found that Minnesota's sulfate standard applies to class 4A designated waters where there is an existing use for the production of wild rice as defined under the CWA.

B. No evidence supported EPA's Decision Document findings that there were only 24 wild rice waters in Minnesota or that no wild rice waters in Minnesota were impaired due to sulfate exceeding 10 mg/L.

An administrative determination must be based on substantial evidence. 5 U.S.C. § 706(2)(E). EPA's final Decision Document concluding that there was no reason either to disapprove MPCA's 2016 or 2018 Section 303(d) list or to list any of Minnesota's wild rice waters as impaired due to sulfate in excess of the numeric sulfate standard in Minn. R. 7050.0224 was based on EPA's assessment of only 24 Minnesota wild rice waters. (EPA Decision Document p. 30, WL 303(d) Ex. 382).

There is no evidence at all, let alone substantial evidence, that in 2016 or 2018 Minnesota had only 24 wild rice waters where wild rice is an existing use or even only 24 wild rice waters "recognized" by the MPCA.

The ALJ Report provided to EPA with WaterLegacy's 2018 comments clearly stated that MPCA *admitted* during the rulemaking that there are at least 1,300 – and most likely more – wild rice waters in Minnesota regulated by the sulfate water quality standard. (*See* ALJ Report ¶¶ 180, 281-82; WL 303(d) Ex. 282, 305-06). The ALJ Report noted that the Fond du Lac and Grand Portage Bands of Lake Superior Chippewa and WaterLegacy had commented that, by rejecting waters listed in MDNR's 2008 wild rice inventory and in the 1854 Treaty Authority's list of wild rice waters, the MPCA was proposing to "de-list" wild rice waters that had already been designated as waters where wild rice is an existing use. (*Id*. ¶¶269-71, *Id*. 303).

The Chief ALJ has since confirmed in her Review Order that "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." (Chief ALJ Review Order, p. 12, WL 303(d) Ex. 647).

In addition to having undisputed evidence of Minnesota's thousands of wild rice waters, EPA had before it in 2016 and 2018 evidence that MPCA had already identified in August 2013 at least 47 wild rice waters impaired due to sulfate levels above Minnesota's numeric (10 mg/L) sulfate

[7] MPCA SONAR, Amendment of the sulfate water quality standard applicable to wild rice and identification of wild rice waters (July 2017), Attachment 2, Proposed Waters by Basin and the Sources Used to Demonstrate the Beneficial Use (Mar. 21, 2017) at WL 303(d) Ex. 588-631.

standard. In August 2013, as a result of communications with MPCA, EPA knew of MPCA's assessment for sulfate in waters used for the production of wild rice in preparation for MPCA's 2014 Section 303(d) list. (WL 303(d) Ex. 632-33). In addition, WaterLegacy included MPCA's August 2013 chart identifying at least 47 known wild rice impaired waters in comments sent to EPA in 2014, 2016 and 2018. (WL 303(d) Ex. 11, 50-52, 62-64, 76, 128-30, 140-42, 193-95).

EPA's final Decision Document finding no basis to disapprove MPCA's draft 2016 and 2018 Section 303(d) list arbitrarily failed even to consider the evidence before it of wild rice impaired waters identified by MPCA.

EPA's listing of these Minnesota wild rice beneficial use impaired waters is long overdue. The CWA required EPA to disapprove MPCA's draft 2016 and 2018 Section 303(d) lists 30 days after receiving them. 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(2). Then, after EPA's disapproval, EPA was required to identify the missing wild rice impaired waters within 30 additional days and provide notice and an opportunity for public comment. *Id*. Using the last possible date for EPA action and considering only MPCA's draft 2018 Section 303(d) list submitted on April 11, 2018 (EPA Decision Document, p. 6, WL 303(d) Ex. 358) the CWA required EPA to list Minnesota wild rice impaired waters in June of 2018. From a broader perspective, since at least 2012, EPA has known of MPCA's failure to list a single wild rice impaired water and has withheld and delayed its oversight responsibility to implement the CWA.

The APA not only requires reviewing courts to determine whether agency action is unlawful; the Act also authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). EPA was required by 2018, if not before, to disapprove MPCA's Section 303(d) lists for failure to list wild rice impaired waters and to list Minnesota wild rice impaired waters. To rectify its unreasonable delay, EPA now has the duty to list Minnesota wild rice waters with sulfate concentrations above 10 mg/L as impaired waters.

3. EPA must deny approval of Minnesota's draft 2020 Section 303(d) list due to MPCA's failure to list any wild rice waters impaired by sulfate in excess of Minnesota's numeric (10 mg/L) water quality standard.

The CWA was enacted to restore and maintain the integrity of the Nation's waters and to strengthen the pollution abatement system when states either failed to develop water quality standards or failed to implement and enforce them. *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020); *EPA v. California ex rel. State Water Res. Control Bd*., 426 U.S. 200, 202-03 (1976).

States are required to submit their lists of water quality-limited segments and priority rankings to the EPA every two years. 40 C.F.R. § 130.7(d)(1). The EPA has the duty of approving or disapproving the lists. 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(2). If the EPA disapproves a state's impaired waters list or a TMDL, the EPA must issue its own list or TMDL. *Sierra Club, Inc. v. Leavitt*, 488 F.3d at 908; 33 U.S.C. §§ 1313(d)(2);40 C.F.R. § 130.7(d)(2).

Listing impaired waters when a state has failed to comply with the CWA is among EPA's non-discretionary duties. Although MPCA has advanced various rationales for its failure to list wild rice impaired waters, they are invalid.

A. MPCA's 2020 draft Section 303(d) list must be disapproved because Minnesota's numeric (10 mg/L) sulfate water quality standard is valid and enforceable for purposes of the CWA.

As explained previously, pursuant to Minn. R. 7050.0224, the CWA, and the CWA's implementing regulations, Minnesota's numeric (10 mg/L) sulfate water quality standard applies to class 4A waters that have been used for the production of wild rice at any time since November 28, 1975.

The CWA requires not only that states establish water quality standards for waterbodies within their boundaries. 33 U.S.C. § 1313(a)-(c); 40 C.F.R. §§ 130.2(d), 131.4(a). States must also identify all waterbodies within their boundaries that do not meet or are not expected to meet water quality standards. *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 913 (11th Cir. 2019); 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. §§ 130.2(j), 130.7(b)(1).

Although MPCA resisted its application for many years, it is clearly established that Minnesota's numeric (10 mg/L) sulfate water quality standard for wild rice waters is a valid water quality standard that must be enforced by MPCA under the CWA. Under Article VI of the United States Constitution, laws of the United States "shall be the supreme Law of the Land" notwithstanding anything to the contrary in the laws of any state. A state law that conflicts with federal law is "without effect." *Maryland v. Loui*siana. 451 U.S. 725, 746 (1981). The CWA, specifically, is sufficiently comprehensive that pre-emption may be presumed. *Int'l Paper Co. v. Ouellette*. 479 U.S. 418, 491 (1987). A state law is invalid when it "actually conflicts" with the Act or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. 491-92.

The Water Division Director of EPA Region 5 advised Minnesota legislators in May 13, 2011 that Minnesota's "federally-approved water quality standard for wild rice waters" of 10 mg/L must be enforced under the CWA. (WL 303(d) Ex. 634). Any change in the wild rice sulfate standard would only be effective for CWA purposes if the change was submitted to EPA for review and approved by EPA as sufficient to protect designated uses. (*Id*. 634-35 (citing 33 U.S.C. §1313(c)(2)(A); 40 C.F.R. §§ 131.5, .6, .11, .21)). EPA has also affirmed in its January 28, 2019 Decision Document, "Minn. 7050.0224 subparts 1 and 2) remains the States federally-approved standard and EPA expects the State to assess waters against its current sulfate criterion specifically those waters that are recognized by the State as waters used for the production of wild rice." (EPA Decision Document p. 30, WL 303(d) Ex. 382).

MPCA attempted to repeal the 10 mg/L wild rice sulfate water quality standard in 2017 and replace the standard with an equation-based standard. This repeal was disapproved by the ALJ and by the Chief ALJ in January 2018 on the grounds that "the repeal conflicts with the requirements" of the CWA and its regulations at 33 U.S.C. § 1313(c), 40 C.F.R. § 131.10(b). (Chief ALJ Report, pp. 1-2 and ALJ Report, p. 5; WL 303(d) Ex. 237-38, 243). MPCA's proposed

rule repeal, thus, was defective under Minn. R. 1400.2100(D), prohibiting a rule that conflicts with other applicable law. (ALJ Report ¶226, *Id.* 291). MPCA's proposed rule change was also unreasonable in proposing a repeal without a replacement standard that is equally or more protective of wild rice waters and, thus, defective under Minn. R. 1400.2100(B). (*Id*. ¶ 227, *Id*.).

Minnesota courts have also found that MPCA must enforce the wild rice sulfate standard. Minnesota's Ramsey County District Court explained, that "MPCA's application of the wild rice sulfate rule to protect waters with natural stands of wild rice" is consistent with MPCA's "duty to ensure that the State of Minnesota maintains its responsibility to administer the federal Clean Water Act in Minnesota." *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, No. 62-CV-10-11824, 2012 Minn. Dist. LEXIS 194 at *15 (WL 303(d) Ex. 583). The Minnesota Court of Appeals has recently held that the wild rice rule "is a water-quality standard that is subject to enforcement under the CWA." *In re Issuance of an NPDES/SDS Permit to U.S. Steel Corp*., 937 N.W.2d at 788.

B. Any claim by MPCA of insufficient methodology is pretextual as well as an insufficient legal basis for failure to list Minnesota wild rice impaired waters.

The CWA requires that states identify all waterbodies within their boundaries that do not meet or are not expected to meet water quality standards. *See* 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. §§ 130.2(j), 130.7(b)(1). States "cannot shirk this responsibility simply by claiming a lack of current data." *Sierra Club, Inc. v. Leavitt*, 488 F.3d at 913. EPA has agreed, "A lack of a formalized assessment methodology by itself is not a basis for a state to avoid evaluating or using data or information when developing its 303(d) list or to fail to list any water that is appropriate for listing under currently applicable standards (EPA Decision Document Appx. 1, p. 2; WL 303(d) Ex. 384).

By now, it is clear that any claim that a "formalized assessment methodology" must be developed before wild rice waters can be listed is mere pretext for delay. Although MPCA attempted to repeal the 10 mg/L wild rice sulfate water quality standard in order to replace it with a complex equation-based standard, that effort has failed. Determining wild rice impaired waters requires no more than a conventional surface water quality sampling for average sulfate concentrations. MPCA, the 1854 Treaty Authority, and tribes have been collecting and analyzing precisely that type of data for decades.

In addition to disapproving the repeal of Minnesota's 10 mg/L wild rice sulfate water quality standard, the ALJ and Chief ALJ also disapproved MPCA's proposed equation-based sulfate standard on the grounds that it was not rationally related to the MPCA's objective in the rulemaking proceeding. (Chief ALJ Report, pp. 1-2 and ALJ Report, p. 5; *Id.* at 237-38, 243). The ALJ found that the equation-based rule proposed by MPCA "fails to provide the values necessary to insert into the proposed equation to calculate individualized standards for each wild rice water body. Therefore, if the rule is enacted as proposed, there will be no standards when the rule becomes effective." (ALJ Report ¶ 246, *Id*. 296).

Given that the ALJ found MPCA's proposed rule "unconstitutionally void for vagueness" because it "cannot be calculated" without values for iron and organic carbon (*Id*. ¶¶ 247-48, *Id*.), it is not

surprising that MPCA believed that its proposed methodology was "insufficient" to identify wild rice impaired waters. But that ship sailed more than two years ago.

After the ALJ rejected its proposed rule, MPCA provided additional submissions and requested the Chief ALJ to review the ALJ Report and make 22 proposed changes, all of which were rejected in the Chief ALJ Review Order on April 12, 2018. (Chief ALJ Review Order, p. 15, WL 303(d) Ex. 650). MPCA then withdrew its proposal for new rulemaking on April 26, 2018, stating the agency would work with legislators "to determine an alternative path forward." (WL 303(d) Ex. 652). The Minnesota Legislature made two attempts to repeal the wild rice sulfate water quality standard in May 2018, both of which were vetoed by Minnesota's Governor. (WL 303(d) Ex. 654-57).

There is a single path forward. That path requires that MPCA (or EPA if MPCA fails to do so) must list all wild rice waters where surface water concentrations of sulfate exceed 10 mg/L.

4. EPA must use all available data, in consultation with tribes, to list wild rice waters impaired by sulfate above Minnesota's numeric (10 mg/L) water quality standard.

EPA is obligated by the CWA and its implementing rules to list as impaired any wild rice water where sulfate concentrations exceed 10 mg/L. In this process, EPA must consult with tribes and use all available data both to identify Minnesota waters where wild rice is an existing use. *See* 40 C.F.R. 130.7(b)(5), (6)(iii).

A copy of MPCA's SONAR Attachment 2 identifying waters that MPCA has admitted are wild rice waters is attached with these comments. (WL 303(d) Ex. 588-631). In addition, these comments attach the inventory of wild rice waters from MDNR's 2008 Report on Natural Wild Rice in Minnesota (WL 303(d) Ex. 658-89) and the current list of Wild Rice Waters in 1854 Territory prepared by the 1854 Treaty Authority (WL 303(d) Ex. 690-700). These authoritative lists of waters where wild rice is an existing use since November 28, 1975 are available data that must be used to identify Minnesota wild rice waters. Further, field research funded by MPCA, field surveys provided by permittees, and conclusions reached by EPA and other state and federal regulatory agencies in environmental review and permitting[8] also provide available data on wild rice waters that must be assessed for compliance with Minnesota's numeric (10 mg/L) sulfate standard in accordance with the CWA.

It is estimated that, when duplicates are removed, there are approximately 2,300 Minnesota waterbodies or segments of waterbodies that have an existing use for wild rice.

In addition, EPA must also review all available data and assessments identifying wild rice waters that are impaired due to sulfate levels above Minnesota's numeric (10 mg/L) water quality standard.

[8] *See e.g.,* MDNR et al., NorthMet Mining Project and Land Exchange Final Environmental Impact Statement, pp. 4-32 to 4-37 (Nov. 2015) (WL 303(d) Ex. 701-08) concluding that Second Creek is a waterbody with wild rice where the 10 mg/L standard applies.

In August 2013 MPCA identified 47 waters used for the production of wild rice impaired due to sulfate concentrations exceeding Minnesota's 10 mg/L numeric sulfate standard[9] as listed below:

Embarrass River (Embarrass Lake to St. Louis River)
Partridge River (Headwaters to S. Louis River)
Sandy River (Headwaters - Sandy Lake to Pike River)
St. Louis River (Oliver Bridge to Pokegama River)
St. Louis River (Mission Creek to Oliver Bridge)
Bostick Creek (Headwaters to Lake of the Woods)
County Ditch 12 (Headwaters to T113 R36W S8 north line)
Rice Creek (Rice Lake to Elk River)
Long Prairie River (Fish Trap Creek to Crow Wing River)
Rice Creek (Headwaters to Maple River)
Chippewa River (Watson Sag to Minnesota River)
Chippewa River (Unnamed Creek to E. Br. Chippewa River)
Chippewa River (E. Br. Chippewa River to Shakopee Creek)
Chippewa River (Cottonwood Creek to Dry Weather Creek)
Chippewa River (Stowe Lake to Little Chippewa river)
Cannon River (Pine Creek to Belle Creek)
Cannon River (Headwaters to Cannon Lake)
Cannon River (Byllesby Dam to Little Cannon River)
Cannon River (Belle Creek to split near mouth)
Cedar Island Lake (North Portion)
Cedar Island Lake (South Portion)
Fourth Lake
Esquagama Lake
East Vermillion Lake
Trout Lake
Elizabeth Lake (Main Basin)
Swan Lake (West Bay)
Swan Lake (Main Basin)
Preston Lake
Embarrass Lake
Lady Slipper Lake
Monongalia Lake (Main Basin)
Monongalia Lake (Middle Fork Crow)
Crow River Mill Pond (East)
Hay Lake
Big Stone Lake
Lac Qui Parle (NW Bay)
Lac Qui Parle (SE Bay)
Mina Lake
Pearl Lake

[9] The chart from which this list is taken is available at WL 303(d) Ex. 50-52, 62-64, 76, 128-30, 140-42, 193-95.

Sandy Lake
Little Sandy Lake
Marsh Lake
Lillian Lake
Lobster Lake
Sturgeon Lake
Long Lake

The 2018 Tribal Wild Rice Task Force Report ("Tribal Report") (WL 303(d) Ex. 709-82) provides a summary of datasets available to analyze sulfate concentrations in wild rice waters. This summary (*Id*. 742) is copied below:

Table 1. Summary of Datasets Used to Analyze Average Water Body Sulfate Concentrations

Agency	Area of Data Collection	Number of Sulfate Measurements	Number of Discrete Locations	Years of Collection
Minnesota Pollution Control Agency	St. Louis and Itasca Counties	7,198	906	1974-2016
1854 Treaty Authority	1854 Ceded Territories	309	43	2007 - 2017
Fond du Lac Band of Lake Superior Chippewa	Fond du Lac Reservation	741	39	1998 - 2017
Leech Lake Band of Ojibwe	Leech Lake Reservation	644	80	2012 - 2018
Mille Lacs Band of Ojibwe	Mille Lacs Reservation	55	12	2010 - 2017
Grand Portage Band of Ojibwe	Grand Portage Reservation	1,547	32	2000 - 2018
Minnesota Pollution Control Agency	Mississippi River in Minnesota	1,808	87	1973 - 2017
Prairie Island Indian Community	Lower Mississippi River and backwater pools	325	8	2014 - 2017

The Tribal Report also documents (*Id*. 755) some of the largest sulfate dischargers to wild rice waters by volume and distance as well as by the concentration of average sulfate discharge. This data, in Table 3 of the Tribal Report copied on the next page, could assist EPA in setting priorities for assessment and listing of wild rice impaired waters.

Table 3. Top 16 Dischargers by Volume from MPCA SONAR

Permit Number	Facility Name	Facility Type	Discharge MGD	Discharge CFS	Average Discharge Sulfate Concentration (mg/l)	Distance to Wild Rice (miles)	Draft Wild Rice Water Name
MN0001007	Minnesota Power – Boswell Energy Center	Industrial	161.80	250.34	**586**	0	Blackwater Lake
MN0000990	Minnesota Power – Laskin Energy Center	Industrial	125.4	194.02	**489**	6	Partridge River
MN0049760	Hibbing Taconite Co – Tails Basin Area	Industrial	4.41 - 65	6.82 - 100.57	**62.6** (Little Fork River) **35** (Mississippi River at Grand Rapids)	2	Shannon Lake
MN0069078	Mesabi Mining Area	Industrial	58.4	90.36	**176**	1	Partridge River
MN0029882	Met Council – Blue Lake WWTP	Domestic	42	64.98		0	Blue Lake
MN0055948	Keewatin Taconite Operations – Tailings	Industrial	32.4	50.13	**177**	10	Hay Lake
MN0042536	Cliffs Erie – Hoyt Lakes Mining Area	Industrial	27.45	42.47	**269**	4	Second Creek
MN0044946	United Taconite LLC - Thunderbird Mine	Industrial	27.37	42.35			St. Louis River
MN0046981	Northshore Mining Co – Peter Mitchell	Industrial	24.11	37.3	**112.3** (Rainy River) **22.7** (St. Louis River)	3	Dunka River
MN0057207	US Steel Corp – Minntac Tailings Basin Area	Industrial	17.11	26.47	**1054**	2	Little Sandy Lake
MN0022080	Grand Rapids WWTP	87% Industrial 13% Domestic	15.2	23.52		1	Mississippi River - Grand Rapids
MN0031879	US Steel Corp – Keetac	Industrial	10.17	15.74	**64.8**	9	Leighton Lake
MN0030147	Winona WWTP	Domestic	9.6	17.84		6	Blue lake
MN0001465	Hibbing Taconite Co	Industrial	1.44 - 7.92	2.28 - 12.25		8	St. Louis River Mississippi River-Brainerd
MN0059633	ArcelorMittal Minorca Mine Inc - Laurentian	Industrial	7.9	12.22	**62.8** (Vermillion River), **274** (St. Louis River)	0	St. Louis River
MN0067687	Mesabi Nugget Delaware LLC	Industrial	7.29	11.28	**437**	7	Partridge River

Finally, tribes in Minnesota identified 1854 Ceded Territory wild rice impaired waters in their comments on MPCA's draft 2020 Section 303(d) list (WL 303(d) Ex. 323, 330, 338, 349):

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

Since submitting their comments on MPCA's draft 2020 Section 303(d), some tribal scientists have identified 51 wild rice impaired waterbodies and waterbody segments extending beyond the1854 Ceded Territory based on MPCA locational and sulfate data. This additional list of wild rice impaired waters is attached with these comments. (WL 303(d) Ex. 783-84).

Needless to say, all of the inventories, data, and assessments cited above and attached as exhibits to these comments are available to MPCA and EPA to list Minnesota wild rice impaired waters.

For decades, MPCA has resisted the application of Minnesota's federally-approved wild rice sulfate water quality standard for purposes governed by the CWA, including limiting sulfate discharge affecting navigable waters of the United States and listing wild rice impaired waters. EPA has, on several occasions, advised MPCA that its permits failed to comply with the CWA or that violations of the numeric (10 mg/L) water quality standard for sulfate in wild rice waters should be enforced.

However, in each case, when push came to shove, EPA declined its oversight role and failed to object to permits, to conduct enforcement activities, or most pertinent to these comments, to disapprove draft Section 303(d) lists that failed to identify even a single wild rice impaired water. However, EPA's duties to disapprove impaired waters lists that violate the CWA are non-discretionary. EPA must disapprove MPCA's draft 2020 Section 303(d) list and must list Minnesota wild rice impaired waters in compliance with the CWA and its implementing regulations.

CONCLUSION

Based on the preceding discussion and Exhibits 1-26 (WL 303(d) Ex. 1-784) attached with these comments, WaterLegacy requests that the EPA take the following actions:

1. Reject any MPCA extensions that delay MPCA's submittal of its draft 2020 Section 303(d) list for EPA's consideration.

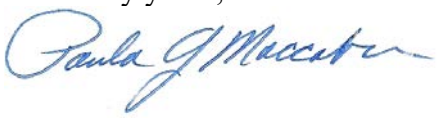
2. Acknowledge that EPA's approval of Minnesota's 2016 and 2018 Section 303(d) lists on January 28, 2019 was unlawful and unsupported by substantial evidence.

3. Deny approval of Minnesota's draft 2020 Section 303(d) list due to MPCA's failure to list wild rice waters impaired by sulfate in excess of Minnesota's numeric (10 mg/L) water quality standard.

4. Use all available data, in consultation with tribes, to list Minnesota wild rice impaired waters impaired by sulfate in excess of Minnesota's numeric (10 mg/L) water quality standard.

Please do not hesitate to contact me if you have any questions regarding these comments.

Sincerely yours,



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