

From: linda hendrix <halflog@hotmail.com>
Sent: Saturday, November 16, 2019 7:18 AM
To: Nichols, Miranda (MPCA) <miranda.nichols@state.mn.us>
Subject: The St. Croix watershed

Myself and a large number of folks from many counties are concerned about the huge 26000 hogfarm...Suida...which is attempting to come into Burnett and Polk counties in Wisconsin. We are concerned about the impact this IOWAN hogfarm will have on the St. Croix river and its watershed. The Apple and Willow rivers flow through both counties and into the St. Croix. Emerald Sky Dairy, east of New Richmond, has had 3 manure spills. The last one went undetected for months and huge amounts of manure was found in surrounding wetlands. Folks near the spill cleanup area grew sick and ecoli was found in their wells! Emerald Sky was only charged a fine of \$80,000...could have been fined 1 million! They now wish to expand! We need to protect the St. Croix and I believe it will take both Mn and Wi working together to accomplish this...perhaps through legal action. Once these hog farms take hold in Western Wi it will be even harder to get them out.

Please feel free to contact me with any questions....Linda [Hendrix...651-269-5160](tel:651-269-5160)...halflog@hotmail.com

There are numerous sites up and running to educate on this issue...

Knowcafos.org.....St.Croix Co Defending Our Water...and Citizens Organized to protect Lake Superior from Cafos... Thank you for your time.

From: Kim Dupre <duprekk@gmail.com>
Sent: Wednesday, November 20, 2019 5:13 PM
To: Nichols, Miranda (MPCA) <miranda.nichols@state.mn.us>
Subject: St. Croix River Impairment between Stillwater and Taylor's Falls

Ms. Nichols,

Please consider this my comments concerning the proposed listing of the St. Croix River between Stillwater and Taylor's Falls on the Impaired Water's List.

My husband and I have recently relocated back to MN (where he grew up) from 20 years living and working near Emerald, WI.

I am contacting you with my perspective on the recent news concerning the listing of the segment of the St. Croix River between Stillwater and Taylor's Falls on the Impaired Waters list. Since we have recent history in the St. Croix River watershed in St. Croix County, WI....I feel the need to share our experience and concerns with you.

First, our story.....In March 2017 near our home in Emerald, WI (in St. Croix River watershed)....a massive manure spill into wetlands/storm water pond went unreported for 90 days until anonymous tip alerted authorities. The clean up = 3,455 TONS of manure solids (see attached pic - over 3 feet deep in places) and 8 MILLION gallons of liquid manure waters. E.coli readings were 8x higher than when DNR closes beaches. A cluster of homes nearly 3 miles downstream a month later found E.coli in their wells, but WI DNR refused further investigation to confirm sources. How much of that original 275,000 gallon spill got into the St. Croix River?

Read the court documents (attached) and more at <http://www.saveemeraldwater.com/take-action> -

Second.....Per information from the the St. Croix River Association's [webpage](#) (quotes below taken from there)....

"Why doesn't Wisconsin consider this part of the river impaired? Each state is required by the EPA to set its own water quality standards. Water quality data from this segment of river have exceeded the standards set by the state of Minnesota, but not the standards set by the state of Wisconsin"

From MPCA factsheet: "Under normal water flows, roughly two-thirds of the total phosphorus load to lakes and rivers comes from nonpoint sources such as runoff from pasture and croplands, atmospheric deposition and stream bank erosion. Phosphorus loading contributed by runoff from pastures and croplands is largest source of nonpoint phosphorus on a statewide basis. Other nonpoint sources include urban runoff, non-agricultural rural runoff and seepage from individual sewage treatment systems."

Thus.....if Wisconsin has different standards/practices.....wouldn't MN efforts and taxpayer dollars will be wasted if both sides of the river aren't playing by the same set of rules? WI has no

incentive to change their practices on their side of the St. Croix River if their water quality standards are not exceeded. Industrial Ag producers ("Factory Farms" or CAFOs) from Nebraska and Iowa are currently eyeing sites in Western WI in the St. Croix River watershed for expansions and new facilities - watch [video](#)....

As this part of the St. Croix River is covered by the Wild & Scenic Rivers designation (part of the National Park System).....shouldn't the Feds play a role in getting a definitive benchmark that both MN & WI must meet for water quality?

I would love to see a joint effort by both MN & WI and representatives from both political parties put forth the effort to clean up the St. Croix River as they did to build the new bridge in Stillwater that opened in 2016.

I'm attaching some recent news articles dealing with water quality in Wisconsin (Gov. Tony Evers has declared 2019 the "[Year of Clean Drinking Water](#)"). I'm also attaching WI State Senator Patty Schachtner's Clean Water Timeline of Policy & Enforcement document. Senator Schachtner represents much of the St. Croix River watershed in WI.

While I love the cream in my coffee every morning.....I need clean drinking water to make that coffee in the first place.

Thank you.

John & Kim Dupre
17835 Norell Ave N.
Marine on St. Croix, MN 55047
Cell: 651-491-2575

Emerald Sky Dairy Spill
03/31/2017



DNR Case #	0	Lead Officer:	0
Date/Time of Photo:	03/31/2017 9:45AM	Photo Location:	Wetland Pond
Photo #	009	Photo Description:	A yard stick fully submerged in the discharged material. This was on the south end of the wetland pond. The yard stick did not reach the bottom.
Photo Taken By:	Leah Nicol		

Our view: DNR derelict in not alerting La Crosse County about tainted wells

Posted: LaCrosse Tribune, 5/14/17

“Clean air, clean water and healthy landscapes.”

That’s what Wisconsin should stand for.

In fact, those are the first words on the Wisconsin Department of Natural Resources website — as we’ve pointed out in previous editorials expressing concern about the dangers of high-capacity wells and audits showing that the DNR has failed more than 90 percent of the time to enforce water-pollution limits.

Sadly, we need to keep expressing concerns about enforcement of clean water regulations, because the Tribune’s report last week on elevated nitrate levels near a huge hog operation in La Crosse County was very troubling — and the DNR’s response to the potential groundwater problem is embarrassing.

Babcock Genetics has a permit to raise more than 4,000 hogs in the town of Holland near Holmen.

Since at least 2005, according to a report by the Legislative Audit Bureau, the nitrate levels measured in test wells near the hog operation have exceeded limits set by the state — as much as five times that limit as recently as 2010.

While those levels have been improving since 2010, they still don’t comply.

La Crosse County has notified neighboring landowners of potential groundwater contamination, and hundreds of town residents have responded by asking the county to test their water.

Maybe the most troubling part of all, however, was the DNR’s response when La Crosse County officials sought state records documenting groundwater problems near that concentrated animal feeding operation.

Here’s what DNR spokesman Jim Dick told the Tribune: “The DNR doesn’t have a policy regarding notifying municipalities or private well owners in the vicinity when a CAFO violates a permit.”

Let’s pause on that: A state agency that collects data about environmental quality doesn’t care enough about public health to alert people or the counties where they live about a potential problem with the water they drink.

Why not?

Shouldn’t the DNR, shouldn’t someone with the state, care enough about the health of its citizens to alert them to potential problems with drinking water?

Or, is Wisconsin so entirely open for business that it simply doesn’t care about people anymore?

If the state is keeping data on groundwater, why isn't it sharing it willingly with its own counties, its own people, in the spirit of public health?

Instead, the county had to file a request with the state for information about excessive nitrate levels.

The state provided no answer for a couple of months, and then, when it finally did respond, it was vague.

In response, the now-retired county health inspector filed four public-records requests to get answers.

All of this took months.

It's inexcusable. It's outrageous. And, it should prompt legislative review of DNR policy and practices.

The DNR and its leadership should be embarrassed and ashamed. Then again, if they can't be bothered to tell us when there's a potential environmental problem, we can only assume they don't care.

County health officials shouldn't be required to become experts on public-records law in order to find out whether there's a health hazard in their own county.

The state should be forthcoming and transparent — especially when it involves the health of its citizens.

The DNR should not force counties to play games and wait months for an answer.

Monica Kruse, who chairs the La Crosse County Board's Health and Human Services committee, told the Tribune: "I think political decisions are adversely affecting people's health."

That just can't be — not in Wisconsin, where the top of the DNR's website states: "Clean air, clean water, healthy landscapes. These are foundations of Wisconsin's economy, environment and quality of life. They are the assets that separate us from the rest of the pack."

Those are the DNR's words.

It's time the DNR live up to them for the healthy and safety of Wisconsin's citizens.

Clean Water: A Timeline of Policy, Enforcement, and Implications (2011 - Present)

 PATTY SCHACHTNER · THURSDAY, AUGUST 8, 2019 · 9 MINUTES

2011

[Assembly rejects requirements for communities to disinfect their water](#)

“Assembly Republicans on Tuesday voted to reject regulations that would have required all Wisconsin communities to disinfect their drinking systems, while Democrats argued the GOP move would lead to tainted water and more illnesses.”

2012

[Environmental inspections drop in Walker's first year](#)

“In 2011, the first year Walker was in office, inspections fell in the following areas compared with the previous year , according to DNR records: Large farms, 46%; Private wells, 36%; Hazardous waste, 32%; Storm-water runoff, 26%; Solid waste and landfills, 18%; Air quality, 16%; Environmental cleanup sites, 13%.”

[DNR appointee resolved massive waste violation internally instead of referring case to DOJ](#)

“A top political appointee at the state Department of Natural Resources chose not to send a complaint against an Oconomowoc waste hauler to the Department of Justice for prosecution despite findings by agency staff that the company was treating fields with so much human waste from septic tanks it risked poisoning nearby wells, DNR records show.

“Gunderson, a former Republican state representative, received \$750 in campaign contributions from the owner of the company, Richard Herr, and Herr’s wife in 2006 and 2008.”

[Shift in philosophy: DNR writing fewer tickets](#)

“Environmental enforcement activity by the state Department of Natural Resources has dropped dramatically in the past two years, according to data from the agency, with the

number of permit violation notices hitting a 12-year low in 2011.

“DNR officials say the decrease is partly caused by an enforcement staff that's been hit hard by budget cuts.

“But others see a darker side to that approach. Critics, including current employees and recently retired agency officials, say they see tough regulation and enforcement being de-emphasized by politically appointed administrators, and they worry it is happening at the expense of the agency's traditional and legally mandated duties of oversight and environmental protection.”

2014

[Judge blames toxic Kewaunee County wells on ‘massive regulatory failure.’](#)

“An administrative law judge says ‘massive regulatory failure’ led to groundwater contamination in a dairy farming region and the Wisconsin Department of Natural Resources must use its powers to prevent further pollution.

“According to testimony, Boldt noted, 50 percent of the tested private wells in the town are contaminated and at least 30 percent of private wells tested in Kewaunee County. The wells tested positive for contaminants including nitrates and E. coli bacteria.”

“In his ruling, however, Boldt faulted the DNR for failing to use laws that are already in place, such as statutes that give it the authority to require monitoring wells in regions that are more susceptible to pollution because of the underlying geology.”

2015

[Four years later, EPA urged to force Wisconsin to obey U.S. water law](#)

“Since 2011, the state has said it couldn’t meet EPA deadlines, then missed deadlines it set for itself; and over the same period the DNR’s authority has been weakened by changes in state laws, cuts in agency staff, and court rulings the agency has sought, Wright said.

“The petition cites EPA records indicating nearly two-thirds of Wisconsin water polluters are operating under the terms of expired permits because the DNR has a backlog of more than 200 applications for permit renewals.”

[Walker's budget steeply cuts DNR's science bureau](#)

“The bureau has a total of 59.4 budgeted positions, although 9.4 are currently vacant. That would a 31% cut in total budgeted positions and a reduction of nearly 20% of the positions now filled in the bureau.

“All told, Walker's budget would cut 66 positions from the DNR. Of this, more than 25% would come from the science group.”

[Ex-DNR professionals say state leaders endanger water quality](#)

“Dozens of former state Department of Natural Resources scientists and managers say state leaders are endangering water quality by cutting DNR budgets, ignoring effects of climate change, reducing enforcement activity and disregarding scientific and legal issues when approving pollution permits.”

2016

[Fines for pollution fell to 30-year low in 2015](#)

“Fines paid by Wisconsin polluters fell to a 30-year low in 2015 in the latest sign that enforcement of laws protecting the environment has been on the wane in recent years, according to data released Wednesday by a statewide conservation group.”

[Bills rolling back environmental safeguards pass Assembly](#)

“The state Assembly’s Republican majority on Tuesday passed bills including a rollback of lake and wetland protections, new constraints on local power to control pollution and a fundamental change in the way judges handle environmental lawsuits.”

[After Scott Walker's office alerts farm lobby, clean water regulations scaled back](#)

“Responding to strong complaints from Wisconsin’s dairy industry, the state Department of Natural Resources quietly narrowed the scope of rules it is writing to reduce health hazards from hundreds of millions of gallons of manure spread on farm fields each year.

“An industry representative said the DNR’s initial plan for rule-making would have been much too costly, in part because it would have generally reduced the amount of manure that could be applied per acre, requiring dairy operators to obtain more land.”

[DNR Ignoring Its Own Water Pollution Rules, State Audit Finds](#)

“A state audit has found Wisconsin's Department of Natural Resources been lax about monitoring large livestock farms and municipal and industrial wastewater treatment plants, in part because the agency doesn't have enough staff to investigate the potentially dangerous water runoff.

“A Legislative Audit Bureau report released Friday found the DNR didn't consistently follow its own policies when sending enforcement letters about violations. It found the DNR only sent notices for 33 of the 558 instances they should have over the past decade.”

[DNR staffing vacancies rose again last year](#)

“State job vacancies that have been linked to weak regulation of pollution began climbing again last year after falling from a 14-year high after Gov. Scott Walker took office.

“One in five state Department of Natural Resources positions was unfilled in July 2011, the highest vacancy rate in the 2002-2015 period covered by staffing data the DNR provided to the Wisconsin State Journal.”

[AG says DNR went too far in protecting water](#)

“State regulators can't consider the cumulative effect that hundreds of high-capacity wells exert on lakes, streams and groundwater when deciding whether to approve new wells, under a formal opinion issued Tuesday by Attorney General Brad Schimel.

“Issued at the request of Republican lawmakers who complained about delays in state permits for wells that pump 100,000 gallons per day — typically large farms and food processors — Schimel's opinion says a series of court rulings over the years had gradually expanded state authority to protect public waters.”

[DNR, following AG's lead, narrows its review of high-capacity wells](#)

“Wisconsin Republicans won an elusive victory Friday as the Department of Natural Resources quietly agreed to narrow its oversight of high-capacity wells that have been blamed for drying up rivers and shrinking lakes.

“Following guidance provided by state Attorney General Brad Schimel in an opinion issued May 10, the agency will no longer consider the cumulative impact of nearby wells on the aquifer or surface water when deciding whether to permit a well, and it will no longer impose monitoring requirements on well operators.”

[Brad Schimel demotes head of DOJ environmental unit](#)

“Schimel, a Republican who took office in 2015, has faced criticism from conservationists and Democrats for his environmental stances and what they see as excessive partisanship. This year, he issued a formal opinion that had the effect of rolling back state powers to protect water from high-capacity wells.

“Meanwhile, the environmental protection unit’s staff this year [shrunk to its smallest size in 25 years](#), continuing a long-term trend as state regulators sought fewer fines from polluters.”

[Environmental law unit shrinks some more under Brad Schimel](#)

“The Wisconsin Department of Justice environmental protection unit has shrunk to its smallest size in 25 years as state environmental regulators seek fewer fines from polluters.

“Last year, total fines against polluters dropped to their lowest point since at least 1994, falling below \$1 million for only the second time during that period, the data show.”

2017

[More than half of Kewaunee County wells studied contain fecal microbes](#)

“Up to 60 percent of sampled wells in a Kewaunee County study contained fecal microbes, many of which are capable of making people and calves sick, a new scientific study has found.

“The researchers cautioned that the percentage of wells with microbial contamination may be even higher than their data show, since the 131 targeted wells were sampled only once during the study period, from April 2016 to March 2017.”

[One-Third Of Wisconsin CAFOs Operating Under Expired Permits](#)

“Around a third of Wisconsin’s large-scale animal farms, known as concentrated animal feeding operations or CAFOs, are currently operating under expired permits, according to data from the Wisconsin Department of Natural Resources website. Many of the permits expired in 2016.

“Operating a farm with an expired permit is not an uncommon or illegal practice, but it is a source of frustration for farmers and residents concerned about oversight.”

[Walker, Republicans consider eliminating state DNR](#)

“Republicans have long criticized the DNR, saying its pollution and hunting regulations are too strict, making it difficult for businesses to expand and draining the fun from outdoor

sports. Walker's three state budgets cut \$59 million from the DNR and eliminated nearly 200 positions, including half of its science researchers.

"The budgets also have scaled back the stewardship program and removed support for state parks, leaving them to survive on fees. That's created a \$1.4 million deficit in the parks account, and Walker's now mulling raising access fees.

"In 2011 the U.S. Environmental Protection Agency cited 75 deficiencies in how the DNR handles water regulation. Two environmental groups sued the DNR in 2014 to force the agency to adopt federal air pollution standards that were published a year earlier. The agency finally adopted them late last year.

"This past June, state auditors found that the agency wasn't following its own policies for policing pollution from large livestock farms and wastewater treatment plants."

2018

Former dairy lobbyist now runs AG Brad Schimel's environmental protection unit

"Anna J. Wildeman worked as a Wisconsin Dairy Business Association lobbyist and represented dairy interests when they faced complaints about environmental damage from high-capacity wells and manure from 2007 through 2015.

"Manure and nutrients from dairy and other agricultural businesses are the state's most widespread water pollution problem, and they have often been the target of state enforcement efforts the environmental protection unit handles."

Business-backed law would put environmental regulations more firmly in Legislature's hands

"In Gov. Scott Walker's final weeks in office, the state business lobby is trying to enact measures Republican lawmakers failed to pass previously that would place more authority for environmental protections under direct control of the Legislature.

"Critics said new legal standards for certain paperwork could within six months jeopardize programs that enhance fishing, hunting, natural areas and the quality of the state's air and water. Meanwhile taxpayers would face costs for litigation and increased administrative activities, conservation groups said."

Rural America's Own Private Flint: Polluted Water Too Dangerous to Drink

“Rural communities call it their own, private Flint – a diffuse, creeping water crisis tied to industrial farms and slack regulations that for years has tainted thousands of residential wells across the Midwest and beyond.

“In Wisconsin and other Midwestern states where Republicans run the government, environmental groups say that politicians have cut budgets for environmental enforcement and inspections and weakened pollution rules.”

2019

[Hazardous drinking water found in 42% of southwest Wisconsin wells](#)

“The first systematic study of well water in southwest Wisconsin found bacterial and chemical contamination at rates as bad as — and possibly worse than — areas targeted by new state water protection rules.

“Some 42 percent of 301 randomly selected wells tested in Iowa, Grant and Lafayette counties exceed federal health standards for bacteria that can come from animal or human waste, or for a toxic fertilizer residue.

“Walker’s DNR declined to participate in the three-county study, said Scott Laeser, water program director for the nonprofit Clean Wisconsin, which helped coordinate funding. A DNR spokesman declined to comment.”

Clean water is vital to all of us. Regardless of our proximity to a CAFO, the St. Croix River watershed, once it has been compromised, can and will contaminate the water source for all of us. The States of Minnesota and Wisconsin should not be willing to place access to clean water for its citizens in jeopardy for the benefit of very few massive livestock producers. The river flows freely between both states for the enjoyment of everyone. There needs to be statewide moratoriums on the expansion and continuation of permits to CAFOs. The stewards of the St. Croix River need to take action now to prevent the destruction of our access to clean water, clean air and to protect the investments we all have in our property. The coordination and enforcement of regulations on CAFOs must be a burden shared by all entities. The St. Croix River Valley needs to be protected, we can not rely on CAFOs to self monitor.

Thank you.

Beth Wood

2389 Cardinal Drive

New Richmond. WI 54017

bwood@frontiernet.net

-----Original Message-----

From: Woodsways Karen <woodsways@gmail.com>

Sent: Monday, November 25, 2019 3:01 PM

To: Nichols, Miranda (MPCA) <miranda.nichols@state.mn.us>

Subject: Impaired waters

Please speed up protection of the unimpaired waters. Like the wetlands and rivers targeted by Enbridge Line 3 expansion. There is a lot of clean water there. Please keep the hot and poisonous pipeline out. Thankyou Karen heller Verndale MN. 56481 Let's see a blue map of the unimpaired waters so we can be more careful around them.



GRAND PORTAGE RESERVATION TRIBAL COUNCIL

Miranda Nichols (miranda.nichols@state.mn.us)
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, Minnesota 55155

January 14, 2020

Re: Minnesota's 2020 Draft Clean Water Act § 303(d) Impaired Waters List

Dear Ms. Nichols:

The Grand Portage Band of Chippewa (the "Band") hereby submits these comments in connection with Minnesota's Draft 2020 303(d) Impaired Waters List ("Draft List"). Grand Portage is a federally recognized Indian tribe, and in 1996 assumed Treatment-in-the-same-manner-As-a-State ("TAS") status under the Clean Water Act for purposes of administering Water Quality Standards. We have adopted and received federal approval for our water quality standards, and issue 401 certifications.

The Draft List categorically and improperly excludes all Minnesota waters used for the production of wild rice, despite the fact that they are protected by a water quality standard that has been in place since 1973. The Draft List includes an explicit "Disclaimer" that states:

The Minnesota Pollution Control Agency (MPCA) has not finalized methods for identifying waters used for production of wild rice or for assessing impairment of waters based on the existing wild rice-related standard. Consequently, the 2020 303(d) Impaired Waters List does not include any waters assessed as impaired for the sulfate wild rice standard. The MPCA continues to consider next steps for the sulfate standard to protect wild rice. Go to <https://www.pca.state.mn.us/water/protecting-wild-rice-waters> for more information.¹

The cited webpage is to MPCA's Notice of Withdrawal of its failed Wild Rice Rule (dated April 26, 2018). There is no new, pending rulemaking or other "next steps" listed. MPCA has not even attempted to provide a genuine factual or legal justification for excluding these waters from

¹ See <https://www.pca.state.mn.us/water/minnesotas-impaired-waters-list>.



the Draft List.² As discussed below, methods for identifying wild rice waters are well-established, as are means of assessing impairments. This is a political decision that ignores the requirements of the Clean Water Act ("Act"), and it is a continuation of this agency's ongoing refusal to protect an irreplaceable resource.

1. Grand Portage Background.

Grand Portage is one of the six tribal governments of the Minnesota Chippewa Tribe. In northeastern Minnesota, throughout the entire Arrowhead Region, the Bois Forte, Fond du Lac, and Grand Portage Bands retain usufructuary rights in the lands and waters that were ceded to the United States under the 1854 Treaty of LaPointe.³ These rights were retained to ensure hunting, fishing, and gathering for subsistence, economic, cultural, medicinal, and spiritual needs could continue into perpetuity. In order to fully exercise these rights, abundant and unpolluted natural resources must be available, including water that meets tribal and state water quality standards.

The state has a unique government-to-government relationship with all Minnesota tribes, and state agencies in Minnesota co-manage treaty resources with the Bands.⁴ Federal agencies have a legal responsibility to maintain all tribal, treaty-reserved natural resources.⁵

2. CWA Impaired Waters List Requirements.

The purpose of identifying impaired waters under the Act is to prioritize impaired waters based on the severity of the pollution and then calculate a Water Quality Based Effluent Limit ("WQBEL") or Total Maximum Daily Load ("TMDL") to limit pollutants causing the impairments so that applicable water quality standards can be attained.⁶ To achieve this requirement, calculations or predictions that indicate water quality standards ("WQS") designated and existing uses are not being achieved, waters for which water quality problems

² See 40 CFR 130.7(b)(6)(iii).

³ 10 Stat. 1109 (Sept. 30, 1854); see also Minnesota Department of Natural Resources ("MN DNR"), Laws and Treaties, at https://www.dnr.state.mn.us/aboutdnr/laws_treaties/index.html.

⁴ See, e.g., Exec. 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).

⁵ See, e.g., Exec. Order 13175—Consultation and Coordination With Indian Tribal Governments (Nov. 6, 2000) (stating "the United States has recognized Indian tribes as domestic dependent nations under its protection . . . , there is a 'trust relationship with Indian tribes,' and '[a]gencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.'").

⁶ 33 U.S.C. § 1313(d); 40 C.F.R. §130.7(d)(1).



have been reported by the public or other agencies, and waters identified by the state as impaired or threatened in a nonpoint assessment must be identified on the Impaired Waters List.⁷

3. Minnesota's Wild Rice Sulfate Standard.

Since 1973, Minnesota Water Quality Standards ("MN WQS") have included a 10 milligrams per liter ("mg/l") limit on sulfate in waters used for the production of wild rice.⁸ MN WQS designated use of Class 4 waters for the propagation and maintenance of natural stands of wild rice states "[t]he quality of these waters and the aquatic habitat necessary to support the propagation and maintenance of wild rice plant species must not be materially impaired or degraded. *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.*"⁹

The Band has made comments to the MPCA and US Environmental Protection Agency ("US EPA") regarding the exclusion of wild rice waters from the 2012, 2014, 2016, and 2018 impaired waters lists, but WQBELs or TMDLs for these waters have not been initiated. This is despite the fact that MPCA is required to consider the input gathered from tribal consultation in their decision-making processes, with the goal of achieving mutually beneficial solutions.¹⁰ This exclusion is the result of sustained political pressure rather than reasoned decision making, and it violates the Act.

In 2011, the US EPA provided written comments to the MPCA stating that the wild rice sulfate standard must be enforced under the Act. The mining industry at the same time lobbied for legislation to repeal or substantially diminish the State's limit on sulfate pollution in wild rice waters. In contravention of the Act, the Minnesota Legislature passed a 2011 Session Law allocating money for research and setting up an advisory committee overseen by the MPCA in an attempt to create a basis to weaken or repeal Minnesota's wild rice sulfate standard.

Then, in 2012, US EPA approved MPCA's 2012 list of impaired waters because of MPCA assurances that the 2014 list *would* include impaired wild rice waters. But in 2014, MPCA staff stated that they did not know how to assess whether wild rice waters were impaired and would soon develop assessment methodologies. Until those methods were developed, wild rice waters would not be included in the 303(d) list.

⁷ 40 C.F.R. § 130.7(b)(5).

⁸ Minn. R. 7050.0224, subp. 2.

⁹ Minn. R. 7050.0224, subp. 1 (emphasis added).

¹⁰ See, e.g., Exec. Order 19-24.



In 2015, the Minnesota Legislature passed a Session Law forbidding MPCA to include wild rice waters in the 303(d) list, which the Legislature updated again in 2016 and 2017.¹¹ The rule provided that:

(a) Until the commissioner of the Pollution Control Agency amends rules refining the wild rice water quality standard in Minnesota Rules, part 7050.0224, subpart 2, to consider all independent research and publicly funded research and to include criteria for identifying waters and a list of waters subject to the standard, implementation of the wild rice water quality standard in Minnesota Rules, part 7050.0224, subpart 2, shall be limited to the following, unless the permittee requests additional conditions:

(2) the agency shall not list waters containing natural beds of wild rice as impaired for sulfate under section 303(d) of the federal Clean Water Act, United States Code, title 33, section 1313, until the rulemaking described in this paragraph takes effect.¹²

Thereafter, MPCA engaged in rulemaking to repeal the 10 mg/L sulfate standard for the protection for wild rice and replace it with equation-based criteria.¹³ On January 9, 2018, an Administrative Law Judge ("ALJ"), with later concurrence from the Chief ALJ, disapproved the proposal because it:

- failed to meet the definition of a rule;
- failed to consider the proposed rule's burden on Native American communities;
- failed to address the potential conflict between the 10 milligrams per liter standard that both Grand Portage and Fond du Lac have adopted;
- failed to protect public health and welfare by not considering effects related to increased mercury methylation;
- failed to protect downstream waters from degradation;
- failed to demonstrate the proposed rule would protect wild rice; and
- *failed to identify all waters previously identified as wild rice waters by the Minnesota Department of Natural Resources ("MN DNR") and Minnesota Indian Tribes.*¹⁴

Instead of revising the proposed rule, MPCA withdrew it and has made no new proposal. Therefore, the 10 mg/l sulfate standard for waters used for the production of wild rice is still the law.

¹¹ 2015 Minn. Laws 1st Spec. Sess. ch. 4, Art. 4, § 136; 2017 Minn. Laws ch. 93, Art. 2, § 149.

¹² *Id.*

¹³ Available at <https://www.pca.state.mn.us/sites/default/files/wq-rule4-15mm.pdf>.

¹⁴ *Id.* at 68-69.



4. Identification of Specific, Impaired Wild Rice Waters.

As reflected in the ALJ's decision, MPCA is very familiar with the lists of wild rice waters in Minnesota, including those that are impaired, given the extensive records of the DNR, the Bands, and its own files. US EPA Region 5 is also acutely aware of impaired wild rice waters in Minnesota for the same reasons. US EPA is obligated to ensure that MPCA complies with the Act's impaired waters provisions, or commence its own TMDL process.¹⁵

Methods for identifying wild rice waters are well-established, as are means of assessing impairments—in fact, it is possible to evaluate many such waters based upon public data. Therefore, MPCA's claim that it cannot assemble such information because it "has not finalized methods for identifying waters used for production of wild rice or for assessing impairment of waters based on the existing wild rice-related standard" is simply false. Wild rice waters can be identified using the MN DNR's public GIS website, and the sulfate data collected and mapped by the MPCA itself can be overlaid to determine impairments.

By simply cross-referencing these records, out of more than 515 wild rice waters that have been identified just in the 1854 Ceded Territory, Tribal staff have identified three lakes and five stream segments that are impaired due to high concentrations of sulfate. These lakes and streams are listed below in Table 1.

Table 1. Impaired Wild Rice Waters in the 1854 Ceded Territory

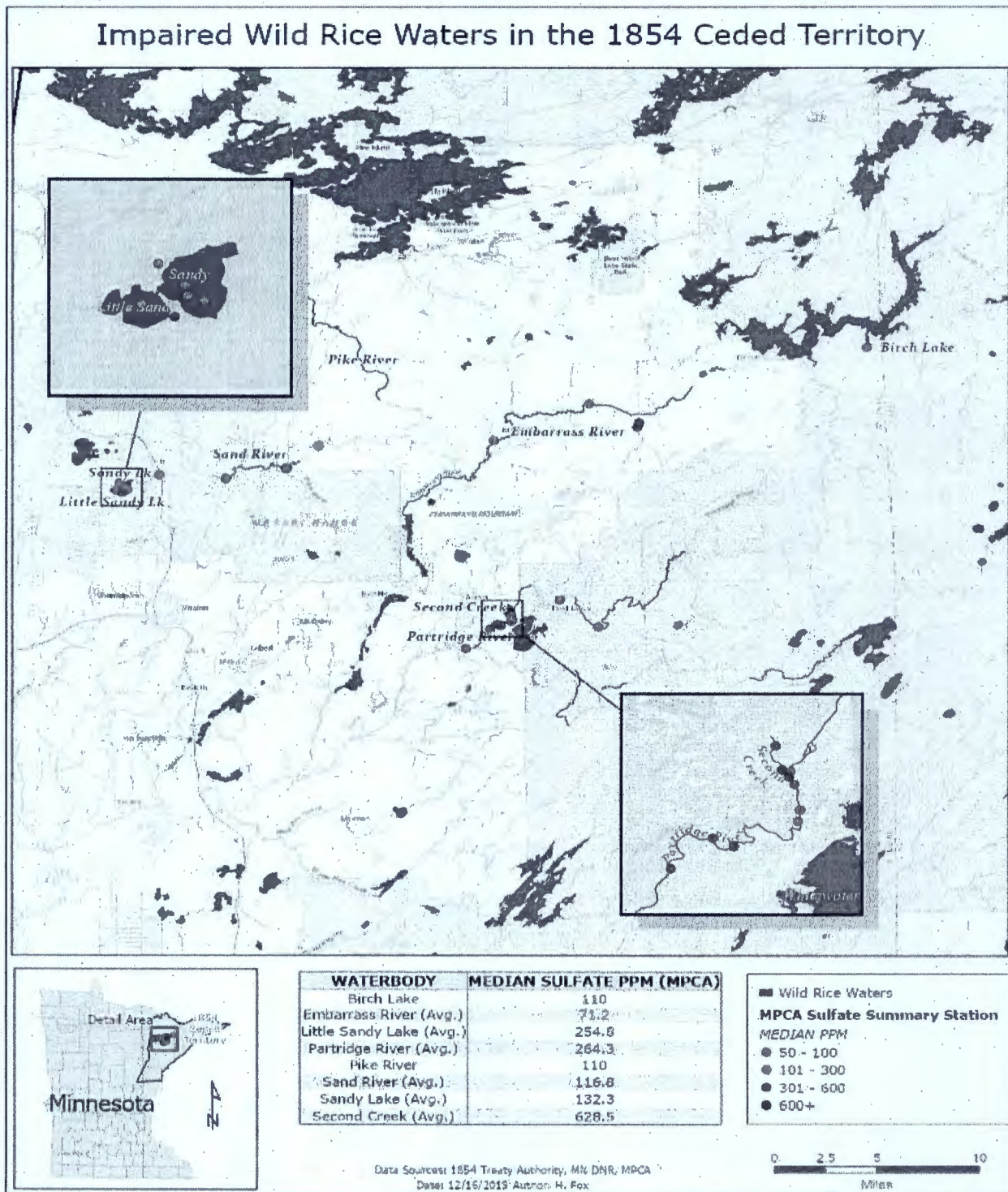
Waterbody	MPCA Measured Average Sulfate Concentrations (mg/l)
Birch Lake	110
Embarrass River	71.2
Little Sandy Lake	254.6
Partridge River	264.3
Pike River	110
Sand River	116.8
Sandy Lake	132.3
Second Creek	628.5

Sulfate data was provided by MPCA, and overlaid on wild rice lakes and stream segments identified by the MN DNR Wildlife feature class downloaded from the MN Geospatial Commons <https://gisdata.mn.gov/dataset/biota-wild-rice-lakes-dnr-wld>, and wild rice survey data from the 1854 Treaty Authority. The data points on the map only depict those monitoring points that have median sulfate concentrations that range from seven to sixty-three times more than the 10 mg/L sulfate standard. Therefore, the map and table presented in these comments

¹⁵ *Alaska Ctr. for the Env't v. Reilly*, 796 F. Supp. 1374, 1381 (W. D. Wa.1992), *aff'd as Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981 (9th Cir. 1994).



should not be considered an exhaustive list of impaired wild rice waters within the 1854 Ceded Territory, or the state.





Additionally, the MN DNR and Bands' lists demonstrate where wild rice is an existing use,¹⁶ and MPCA itself has maintained sulfate concentration data on many such waters. If the sulfate standard is exceeded, the MPCA, according to its own WQS, must include those waters on the 303(d) list and develop a TMDL or WQBEL as required by the Act.

State and federal regulatory agencies plainly have the ability to identify water quality impairments in wild rice waters throughout the state. The impaired waters identified here must be included on the Draft List before it is sent to US EPA for approval, along with all impaired wild rice waters. Thank you for the opportunity to provide comments.

Sincerely,

A handwritten signature in dark ink, appearing to read "Beth Drost", with a long, sweeping horizontal line extending to the right.

Beth Drost
Grand Portage Chairwoman

c: Barbara Wester, US EPA Region 5, Office of Regional Counsel
Tom Short, US EPA Region 5, Water Division Acting Director
Alan Walts, US EPA Region 5, Office of International and Tribal Affairs

¹⁶ Minnesota Department of Natural Resources, Natural Wild Rice in Minnesota: A wild rice study document submitted to the Minnesota Legislature by the Minnesota Department of Natural Resources" (Feb. 15, 2008), available at http://files.dnr.state.mn.us/fish_wildlife/wildlife/shallowlakes/natural-wild-rice-in-minnesota.pdf



The Minnesota Chippewa Tribe

January 8, 2020

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Miranda Nichols (miranda.nichols@state.mn.us)
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, Minnesota 55155

Re: Comments on Minnesota's 2020 Draft Clean Water Act § 303(d) Impaired Waters List.

Dear Ms. Nichols:

The Minnesota Chippewa Tribe ("MCT") hereby submits these comments in connection with Minnesota's Draft 2020 303(d) Impaired Waters List ("Draft List"). Of major concern is the fact that the Draft List categorically and improperly excludes all Minnesota waters used for the production of wild rice, despite the fact that they are protected by a water quality standard that has been in place since 1973. The Draft List includes an explicit "Disclaimer" that states:

The Minnesota Pollution Control Agency (MPCA) has not finalized methods for identifying waters used for production of wild rice or for assessing impairment of waters based on the existing wild rice-related standard. Consequently, the 2020 303(d) Impaired Waters List does not include any waters assessed as impaired for the sulfate wild rice standard. The MPCA continues to consider next steps for the sulfate standard to protect wild rice. Go to <https://www.pca.state.mn.us/water/protecting-wild-rice-waters> for more information.¹

The cited webpage is to MPCA's Notice of Withdrawal of its failed Wild Rice Rule (dated April 26, 2018). There is no new, pending rulemaking or other "next steps" listed. MPCA has not even attempted to provide a genuine factual or legal justification for excluding these waters from the Draft List.² As discussed below, methods for identifying wild rice waters are well-established, as are means of assessing impairments. This is a political decision that ignores the requirements of the Clean Water Act ("Act"), and it is a continuation of this agency's ongoing refusal to protect an irreplaceable resource.

¹ See <https://www.pca.state.mn.us/water/minnesotas-impaired-waters-list>.

² See 40 CFR 130.7(b)(6)(iii).

1. MCT Background.

The MCT is a federally recognized tribal government comprised of the Bois Forte, Fond du Lac, Grand Portage, Leech Lake, Mille Lacs, and White Earth Reservations, which have reserved off-reservation hunting, fishing, and other harvesting, or usufructuary, rights. In northeastern Minnesota, throughout the entire Arrowhead Region, the Bois Forte, Fond du Lac, and Grand Portage Bands retain usufructuary rights in the lands and waters that were ceded to the United States under the 1854 Treaty of LaPointe.³ These rights were retained to ensure hunting, fishing, and gathering for subsistence, economic, cultural, medicinal, and spiritual needs could continue into perpetuity. In order to fully exercise these rights, abundant and unpolluted natural resources must be available, including water that meets tribal and state water quality standards. MCT Ordinance 8, Section 300, states that “water is the primary resource of the natural resource system. Thus protecting the quality and quantity of the water resource is the primary objective of these laws and, further, the interrelationships of water and other natural resources is such that the management of soil, timber, air and mineral resources has both direct and indirect effects upon the quality and quantity of water, fish, wild rice, and wildlife resources.”

The state has a unique government-to-government relationship with all Minnesota tribes, and state agencies in Minnesota co-manage treaty resources with the Bands.⁴ Federal agencies have a legal responsibility to maintain all tribal, treaty-reserved natural resources.⁵

2. CWA Impaired Waters List Requirements.

The purpose of identifying impaired waters under the Act is to prioritize impaired waters based on the severity of the pollution and then calculate a Water Quality Based Effluent Limit (“WQBEL”) or Total Maximum Daily Load (“TMDL”) to limit pollutants causing the impairments so that applicable water quality standards can be attained.⁶ To achieve this requirement, calculations or predictions that indicate water quality standards (“WQS”) designated and existing uses are not being achieved, waters for which water quality problems

³ 10 Stat. 1109 (Sept. 30, 1854); *see also* Minnesota Department of Natural Resources (“MN DNR”), Laws and Treaties, at https://www.dnr.state.mn.us/aboutdnr/laws_treaties/index.html.

⁴ *See, e.g.*, Exec. 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).

⁵ *See, e.g.*, Exec. Order 13175—Consultation and Coordination With Indian Tribal Governments (Nov. 6, 2000) (stating “the United States has recognized Indian tribes as domestic dependent nations under its protection . . . ,” there is a “trust relationship with Indian tribes,” and “[a]gencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.”).

⁶ 33 U.S.C. § 1313(d); 40 C.F.R. §130.7(d)(1).

have been reported by the public or other agencies, and waters identified by the state as impaired or threatened in a nonpoint assessment must be identified on the Impaired Waters List.⁷

3. Minnesota's Wild Rice Sulfate Standard.

Since 1973, Minnesota Water Quality Standards ("MN WQS") have included a 10 milligram per liter ("mg/l") limit on sulfate in waters used for the production of wild rice.⁸ MN WQS designated use of Class 4 waters for the propagation and maintenance of natural stands of wild rice states "the quality of these waters and the aquatic habitat necessary to support the propagation and maintenance of wild rice plant species must not be materially impaired or degraded. *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.*"⁹

MCT Bands have made comments to the MPCA and US Environmental Protection Agency ("US EPA") regarding the exclusion of wild rice waters from the 2012, 2014, 2016, and 2018 impaired waters lists, but WQBELs or TMDLs for these waters have not been initiated. This is despite the fact that MPCA is required to consider the input gathered from tribal consultation in their decision-making processes, with the goal of achieving mutually beneficial solutions.¹⁰ This exclusion is the result of sustained political pressure rather than reasoned decision making, and it violates the Act.

In 2011, the US EPA provided written comments to the MPCA stating that the wild rice sulfate standard must be enforced under the Act. The mining industry at the same time lobbied for legislation to repeal or substantially diminish the State's limit on sulfate pollution in wild rice waters. In contravention of the Act, the Minnesota Legislature passed a 2011 Session Law allocating money for research and setting up an advisory committee overseen by the MPCA in an attempt to create a basis to weaken or repeal Minnesota's wild rice sulfate standard.

Then, in 2012, US EPA approved MPCA's 2012 list of impaired waters because of MPCA assurances that the 2014 list *would* include impaired wild rice waters. But in 2014, MPCA staff stated that they did not know how to assess whether wild rice waters were impaired and would soon develop assessment methodologies. Until those methods were developed, wild rice waters would not be included in the 303(d) list.

In 2015, the Minnesota Legislature passed a Session Law forbidding MPCA to include wild rice waters in the 303(d) list, which the Legislature updated again in 2016 and 2017.¹¹ The rule provided that:

⁷ 40 C.F.R. § 130.7(b)(5).

⁸ Minn. R. 7050.0224, subp. 2.

⁹ Minn. R. 7050.0224, subp. 1 (emphasis added).

¹⁰ See, e.g., Exec. Order 19-24.

¹¹ 2015 Minn. Laws 1st Spec. Sess. ch. 4, Art. 4, § 136; 2017 Minn. Laws ch. 93, Art. 2, § 149.

(a) Until the commissioner of the Pollution Control Agency amends rules refining the wild rice water quality standard in Minnesota Rules, part 7050.0224, subpart 2, to consider all independent research and publicly funded research and to include criteria for identifying waters and a list of waters subject to the standard, implementation of the wild rice water quality standard in Minnesota Rules, part 7050.0224, subpart 2, shall be limited to the following, unless the permittee requests additional conditions:

(2) the agency shall not list waters containing natural beds of wild rice as impaired for sulfate under section 303(d) of the federal Clean Water Act, United States Code, title 33, section 1313, until the rulemaking described in this paragraph takes effect.¹²

Thereafter, MPCA engaged in rulemaking to repeal the 10 mg/l sulfate standard for the protection for wild rice and replace it with equation-based criteria.¹³ On January 9, 2018, an Administrative Law Judge (“ALJ”), with later concurrence from the Chief ALJ, disapproved the proposal because it:

- failed to meet the definition of a rule;
- failed to consider the proposed rule’s burden on Native American communities;
- failed to address the potential conflict between the 10 milligrams per liter standard that both Grand Portage and Fond du Lac have adopted;
- failed to protect public health and welfare by not considering effects related to increased mercury methylation;
- failed to protect downstream waters from degradation;
- failed to demonstrate the proposed rule would protect wild rice; and
- *failed to identify all waters previously identified as wild rice waters by the Minnesota Department of Natural Resources (“MN DNR”) and Minnesota Indian Tribes.*¹⁴

Instead of revising the proposed rule, MPCA withdrew it and has made no new proposal. Therefore, the 10 mg/L sulfate standard for waters used for the production of wild rice is still the law.

4. Identification of Specific, Impaired Wild Rice Waters.

As reflected in the ALJ’s decision, MPCA is very familiar with the lists of wild rice waters in Minnesota, including those that are impaired, given the extensive records of the DNR, the Bands, and its own files. US EPA Region 5 is also acutely aware of impaired wild rice waters in

¹² *Id.*

¹³ Available at <https://www.pca.state.mn.us/sites/default/files/wq-rule4-15mm.pdf>.

¹⁴ *Id.* at 68-69.

Minnesota for the same reasons. US EPA is obligated to ensure that MPCA complies with the Act's impaired waters provisions, or commence its own TMDL process.¹⁵

Methods for identifying wild rice waters are well-established, as are means of assessing impairments—in fact, it is possible to evaluate many such waters based upon public data. Therefore, MPCA's claim that it cannot assemble such information because it "has not finalized methods for identifying waters used for production of wild rice or for assessing impairment of waters based on the existing wild rice-related standard" is simply false. Wild rice waters can be identified using the MN DNR's public GIS website, and the sulfate data collected and mapped by the MPCA itself can be overlaid to determine impairments.

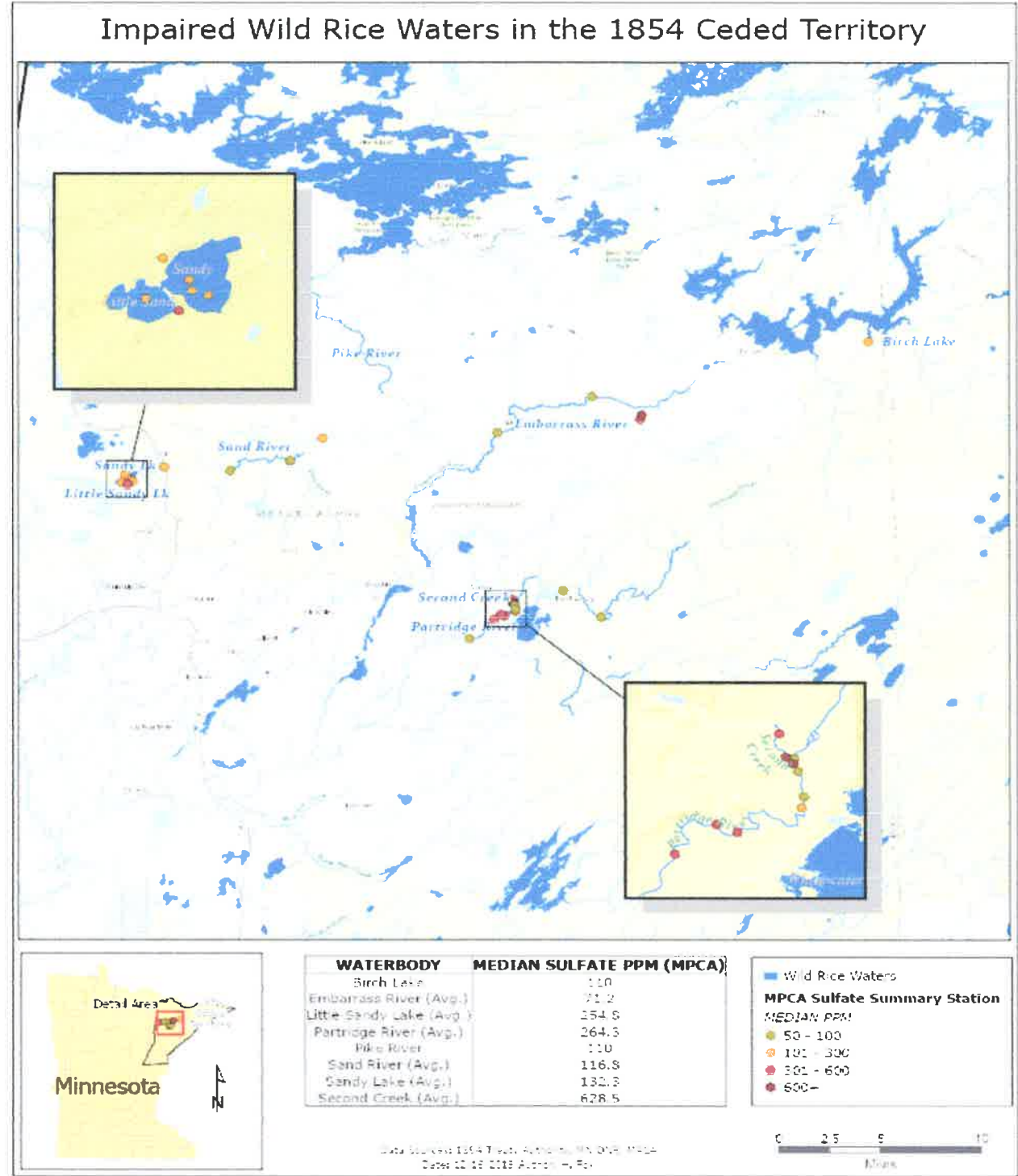
By simply cross-referencing these records, out of more than 515 wild rice waters that have been identified just in the 1854 Ceded Territory, Tribal staff have identified three lakes and five stream segments that are impaired due to high concentrations of sulfate. These lakes and streams are listed below in Table 1.

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

Sulfate data was provided by MPCA, and overlaid on wild rice lakes and stream segments identified by the MN DNR Wildlife feature class downloaded from the MN Geospatial Commons <https://gisdata.mn.gov/dataset/biota-wild-rice-lakes-dnr-wld>, and wild rice survey data from the 1854 Treaty Authority. The data points on the map only depict those monitoring points that have median sulfate concentrations that range from seven to sixty-three times more than the 10 mg/L sulfate standard. Therefore, the map and table presented in these comments should not be considered an exhaustive list of impaired wild rice waters within the 1854 Ceded Territory, or the state.

¹⁵ *Alaska Ctr. for the Env't v. Reilly*, 796 F. Supp. 1374, 1381 (W. D. Wa.1992), *aff'd as Alaska Ctr. for the Env't v. Browner*, 20 F 3d 981 (9th Cir. 1994).



Additionally, the MN DNR and Bands' lists demonstrate where wild rice is an existing use,¹⁶ and MPCA itself has maintained sulfate concentration data on many such waters. If the sulfate standard is exceeded, the MPCA, according to its own WQS, must include those waters on the 303(d) list and develop a TMDL or WQBEL as required by the Act.

State and federal regulatory agencies plainly have the ability to identify water quality impairments in wild rice waters throughout the state. The impaired waters identified here must be included on the Draft List before it is sent to US EPA for approval, along with all impaired wild rice waters. Thank you for the opportunity to provide comments.

Sincerely,



Catherine J. Chavers
President

Cc: Barbara Wester, US EPA Region 5, Office of Regional Counsel
Tom Short, US EPA Region 5, Water Division Acting Director
Alan Walts, US EPA Region 5, Office of International and Tribal Affairs
Bois Forte Band of Lake Superior Chippewa
Fond du Lac Band of Lake Superior Chippewa
Grand Portage Band of Lake Superior Chippewa
Leech Lake Band of Ojibwe
Mille Lacs Band of Ojibwe
White Earth Nation

¹⁶ Minnesota Department of Natural Resources, Natural Wild Rice in Minnesota: A wild rice study document submitted to the Minnesota Legislature by the Minnesota Department of Natural Resources" (Feb. 15, 2008), available at http://files.dnr.state.mn.us/fish_wildlife/wildlife/shallowlakes/natural-wild-rice-in-minnesota.pdf

2833 Itasca ave S

St Mary's Point, Mn 55043

January 12, 2020

Miranda Nichols

MPCA, 520 N. Lafayette Rd

St. Paul, Mn 55155

Subject: Impaired waterways St Croix River

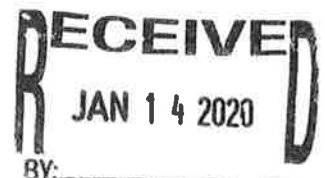
As a city council member of St Mary's Point for 23 years, and having grown up on the St Croix River since 1948 I have experienced the river through meetings, seminars , and swimming in the river myself. The explanation for the high phosphorus levels is rooted in science. The headwaters of the St Croix has a slightly tainted water because of the tamarac trees. They impart a slight acid into the water. This slight acid creates a reddish color. 1830's Indians knew this according to James Taylor Dunn in his book "The St Croix, Midwest Border River".

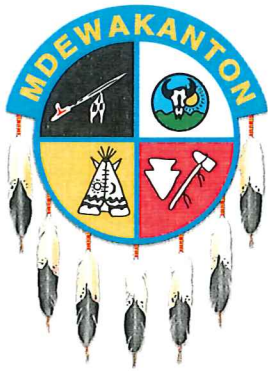
This slight acid has little or no effect upon the river north of Taylor Falls as the river bed is a hard rock. However, starting about a mile south the riverbed turns into a sedimentary rock. The slight acid upon the sedimentary rock has a chemical reaction which creates phosphorus, which encourages algae. St Croix has been known for its algae blooms for centuries.

I think it is unfair to declare the river impaired due to a natural scientific ongoing event. It would be like declaring the Yellowstone river impaired because of the high amounts of sulfur imparted to it from the hot water pools and geysers in Yellowstone National Park.

Sincerely,

Gary Williams





Shakopee Mdewakanton Sioux Community

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Chairman

Keith B. Anderson
Vice-Chairman

Rebecca Crooks-Stratton
Secretary/Treasurer

January 14, 2020

Miranda Nichols, MPCA Coordinator
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, MN 55155
miranda.nichols@state.mn.us

VIA U.S. MAIL & EMAIL

**Re: *Shakopee Mdewakanton Sioux Community: Written Commentary on the Draft
2020 Impaired Waters List***

On behalf of the Shakopee Mdewakanton Sioux Community (the “SMSC”), I submit the following written commentary related to the draft 2020 Impaired Waters List. The SMSC is a federally recognized Indian tribe located in Prior Lake, Minnesota. These comments address the government-to-government relationship between the State of Minnesota and the eleven federally-recognized Indian tribes located within the state. The comments also address the unacceptable omission of waters used for the production of wild rice from the draft list of impaired waters.

I. Need for Improved Government-to-Government Relations

Providing Indian tribes with an opportunity to participate in regular and meaningful consultation is an essential component of maintaining productive tribal-state relations. Tribal consultation is a product of the unique legal and political relationships that exist between Indian tribes and the federal and state governments. These unique relationships have been affirmed by the Constitution of the United States, treaties, statutes, and case law. Effective tribal consultation is premised on clear and concise consultation policies that focus on effective communication, definite responsibilities, and established expectations. Tribal consultation must be timely. It must provide adequate opportunities for Indian tribes to raise their concerns prior to and outside of the traditional notice and comment periods made available to the general citizenry of the state.

In Executive Order 19-24, Governor Tim Walz affirmed the importance of tribal consultation and directed state agencies, including the Minnesota Pollution Control Agency (“MPCA”), to develop, maintain, and implement ongoing consultation policies to gather input from Tribal Nations on issues of mutual interest.¹ Executive Order 19-24 provides that “[a]s

¹ Exec. 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).

appropriate, and at the earliest opportunity, each agency will develop and maintain ongoing consultation with the Minnesota Tribal Nations related to each area where the agency's work intersects with Minnesota Tribal Nations."² As the original inhabitants and first stewards of this land, it is critically important for the state to engage in consultation with the Indian tribes in Minnesota on important issues affecting land and natural resources. This is particularly true when speaking of natural resources of cultural significance, such as wild rice.

To the best of my knowledge, the MPCA has not engaged in tribal consultation with the eleven federally-recognized Indian tribes within the State of Minnesota on this matter.³ The lack of consultation is particularly troubling when considering the repeated instances where Indian tribes have expressed concern regarding the omission of wild rice waters from the list of impaired waters. Tribal nations expressed the exact same concerns regarding the omission of wild rice waters from the list of impaired waters in 2012, 2014, 2016, 2018, and now in 2020. The failure of the MPCA to engage in meaningful consultation with Indian tribes on this topic is contrary to Executive Order 19-24 and disrespectful to us as the original inhabitants and first stewards of the land and waters of the state.

II. The Specific Concerns of Individual Indian Tribes Must Be Considered

The eleven federally-recognized Indian tribes in Minnesota are separate and unique sovereign governments. While organizations such as the Minnesota Indian Affairs Council ("MIAC") are well suited to encourage collaboration between us, such organizations do not speak on behalf of individual tribes on specific issues. Nor should engaging or consulting with MIAC be seen as the functional equivalent of engaging or consulting with the eleven federally-recognized Indian tribes in Minnesota. We utilize our resources in different ways to benefit our specific memberships. We acknowledge the important role that MIAC has with the State of Minnesota and the MPCA must consider MIAC's comments on this issue. However, it is important for the individual concerns raised by any of the eleven federally-recognized Indian tribes in Minnesota to be considered separately and on a government to government basis.

III. Omission of Wild Rice Waters from the Impaired Waters List

§ 303 of the Clean Water Act ("CWA") requires states to apply existing and authorized water quality standards to produce a list of impaired waters.⁴ Since 1973, the State of Minnesota has had a water quality standard that limits sulfate in waters where wild rice is present to 10 mg/L.⁵ Widespread efforts to change the aforementioned water quality standard have failed and it remains in place. I am informed that many of the bodies of water that produce wild rice in Minnesota do not meet the 10 mg/L sulfate standard; these waters are already at risk of

² *Id.* at page 2.

³ Consultation at the federal level by the EPA should not absolve the MPCA from conducting consultation pursuant to Exec. Order 19-24.

⁴ 33 U.S.C. § 1313.

⁵ Minn. R. 7050.0224, Subp. 2; Minn. R. 7050.0220, Subparts 3a(31), 41(31), 5a(19), 6a(14).

negatively impacting wild rice growth. More specific and immediate action to protect these waters is essential.

Inexplicably, the Draft 2020 Impaired Waters List categorically excludes all Minnesota waters used for the production of wild rice from being listed on the impaired waters list. The Draft List states:


The Minnesota Pollution Control Agency (MPCA) has not finalized methods for identifying waters used for production of wild rice or for assessing impairment of waters based on the existing wild rice-related standards. Consequently, the 2020 303(d) Impaired Waters List does not include any waters assessed as impaired for the sulfate wild rice standard...⁶

The methods for identifying wild rice waters and assessing impairments are well-known, have been discussed at length by other parties, and can be established using public data. The MPCA's repeated refusal to include wild rice waters on the impaired waters list based upon the aforementioned reason is unacceptable.

The SMSC supports the efforts of the tribes in Minnesota to include wild rice waters in the list of impaired waters created by the state pursuant to the CWA. The SMSC repeats the request that impaired waters that have been identified by Minnesota tribes as impacting the growth of wild rice be included on the Draft Impaired Waters List before it is sent to the US EPA. Furthermore, the SMSC requests that the MPCA use publicly available data to develop a revised Impaired Waters List that includes wild rice waters. Wild rice is an invaluable resource and gift that deserves specific and broad protections. Wild rice waters must be afforded all of the basic protections that are required under state and federal law.

Thank you for this opportunity to comment.

Sincerely,



Charles R. Vig, Chairman
Shakopee Mdewakanton Sioux Community

⁶ See <https://www.pca.state.mn.us/water/minneesota-impaired-waters-list>.

January 14, 2020

Miranda Nichols
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, MN 55155-4194
miranda.nichols@state.mn.us

Via Email and U.S. Mail

Re: Metropolitan Council Comments on Draft 2020 Impaired Waters List

Dear Ms. Nichols:

The Metropolitan Council submits the following comments to the Minnesota Pollution Control Agency's 2020 draft impaired waters list.

In 2014, after considering substantial scientific data, the MPCA delisted the PFOS impairment in the upper three segments of Pool 2 of the Mississippi River. The MPCA left the PFOS impairment in place in the most downstream segment of Pool 2.¹ This delisting meant that the Council's Metro plant no longer discharged into PFOS impaired waters. While the MPCA has undertaken no additional studies that support expanding the PFOS impairment, the draft 2020 inventory of impaired waters lists the area from Upper Saint Anthony Falls to the St. Croix River (AUID 07010206-814)² as impaired for PFOS. This expanded area includes not only the Council's Metro plant but also the Hastings plant. The 2020 draft impaired waters list also lists the entirety of AUID 814 as impaired for other pollutants including mercury in the water column and nutrient/eutrophication biological indicators, even though the original impairments were only for a portion of AUID 814.

It appears this change occurred when the MPCA created AUID 814 by combining seven Mississippi River segments from the Upper Saint Anthony Falls to the Saint Croix river into a single 41-mile long segment. The Council is not aware of a determination by the MPCA that the

¹ The three segments of Pool 2 that were delisted for PFOS in fish tissue are: (1) Metro WWTP to Rock Island RR Bridge (RM 835 to 830) (AUID 504); (2) Minnesota River to Metro WWTP (RM 844 to 835) (AUID 505); and (3) Lock and Dam # 1 to Minnesota River (AUID 514). See May 29, 2018, EPA Approval of 2014 Impaired Waters List at Appendix 4 available at <https://www.pca.state.mn.us/sites/default/files/wq-iw1-47c-1.pdf>.

The segment that remains impaired is AUID 502 which goes from the Rock Island Railroad Bridge to Lock and Dam #2 (RM 830 to 815.2).

² These comments will refer to AUIDs by the last 3 digits.

scientific data supported expanding impairments from any of the smaller segments to all 41 miles of the new AUID 814.

The Council requests that the MPCA clarify the 2020 inventory of impaired waters to reflect (1) the 2014 PFOS delisting of the upper three segments of Pool 2; and (2) AUID 501 having never been listed for PFOS. The Council also requests that the MPCA clarify the impairment listings in AUID 814 to reflect the geographic scope of the impairment that was originally approved based on the scientific data.

I. *Background*

A. *2014 MPCA PFOS Delisting*

MPCA proposed listing Pool 2 as impaired for PFOS in its 2008 impaired waters list. The 2008 list was approved by EPA on June 10, 2008.

Minnesota law requires the MPCA to “promptly seek the delisting of waters from the impaired waters list when those waters are shown to achieve the designated uses applicable to the waters.” Minn. Stat. § 114D.20, subd. 2(5); *see also* Minn. Stat. § 114D.25, subd. 1(a)(3) (“[MPCA] in accordance with federal TMDL requirements, shall: . . . (3) propose to delist waters from the Environmental Protection Agency impaired waters list.”). Consistent with this mandate, in its draft 2014 impaired waters list the MPCA proposed delisting the PFOS impairment for the upper three segments of Pool 2 (AUIDs 504, 505, & 514). In its April 1, 2014, responses to the draft 2014 Impaired Waters List 30-Day Public Notice Comments on the PFOS delisting the MPCA stated:

In the three most upstream AUIDs in Pool 2, none of the fish collected in 2009 and 2012 exceeded the fish-tissue benchmark of 200 ng/g PFOS. In addition, PFOS concentrations in water collected from these same three AUIDs in 2009, 2011, and 2012 were below the site-specific water quality criterion for Pool 2. Therefore, *based on looking at all of this historical data*, the MPCA has recommended that the three most upstream AUIDs be delisted for PFOS in fish tissue.³

<https://www.pca.state.mn.us/sites/default/files/wq-iw1-47b.pdf> (emphasis added). The MPCA then explained the basis for delisting the three upstream segments of Pool 2 but retaining the PFOS impairment in the downstream segment (AUID 502) stating:

The MPCA has followed its guidelines and rules in determining when PFOS-contaminated waters should be listed as impaired. For the action of delisting, enough certainty exists to support delisting the three most upstream AUIDs of Pool 2, but substantial uncertainty remains with respect to the status of the most downstream assessment unit, as described above. Therefore, the MPCA does not

³ In 2019 the MN Department of Health lowered the one meal per month fish advisory for PFOS to 50 ng/g. None of the fish collected in the three upstream segments in 2012 exceeded this benchmark.

recommend delisting the most downstream assessment unit at this time, but is hopeful that positive trends will continue and that delisting can be justified based on additional data in the future.

The EPA approved the MPCA's PFOS delisting of the upper three segments of Pool 2 when it approved the 2014 impaired waters list on May 29, 2018. In Appendix 4 to the approval of the 2014 impaired waters list, the EPA approved the PFOS delisting of the upper three segments of Pool 2 and noted "New data demonstrates segment meeting water quality standards/targets, therefore, . . . removed from 2014 303(d) list."

B. 2016 Impaired Waters List

The 2016 impaired waters list, which was approved by EPA on January 28, 2019, carries forward the PFOS delisting of the upper 3 segments of Pool 2 and lists the most downstream segment of Pool 2 (AUID 502) as impaired for PFOS.

C. MPCA's combination of 41 miles of the Mississippi River into a Single AUID.

In 2016 or 2017, MPCA combined seven AUIDs (AUIDs 501, 502, 503, 504, 505, 513, and 514) into a single 41-mile reach stretching from Upper Saint Anthony Falls to the confluence of the Mississippi and Saint Croix rivers (AUID 814). When the MPCA created the combined AUID 814, the Council did not receive information from the MPCA that the MPCA's intent in creating the expanded AUID was to extend impairments from a single smaller segment to the entire combined 41-mile segment or to relist delisted waters. Similarly, the Council is not aware of the MPCA doing any scientific studies that support expanding existing impairments of smaller segments to the 41-mile segment or relisting PFOS.

D. 2018 Impaired Waters List

The 2018 impaired waters list was approved by EPA on January 28, 2019, at the same time the 2016 list was approved. The 2018 list appears to expand the PFOS impairment (and several other impairments) to the entirety of AUID 814 while simultaneously acknowledging both the 2014 delisting and that there is not a scientific basis for expanding the PFOS impairment beyond AUID 502.

In the 2018 list at lines 632-33 of the tab titled "Changes and Corrections to List," the area from Upper St. Anthony Falls to the Saint Croix River (newly created AUID 814) is listed as impaired for PFOS. The comments column states "Carry forward impairment from 07010206-502." Beyond this single sentence comment, the Council has not found any other discussion in the 2018 list suggesting the MPCA's position is that despite the lack of scientific data supporting application of the PFOS impairment to the entirety of AUID 814, the impairment is expanded to all of AUID 814.⁴ The "Changes and Correction to List" tab conflicts with lines 60-62 of the

⁴ MPCA has a statutory obligation "to make reasonable efforts to provide timely information to the public and to stakeholders about impaired waters that have been identified by the agency." Minn. Stat. § 114D.35, subd. 1.

“Delisted” tab of the 2018 list, which states that the upper three segments of Pool 2 are delisted for PFOS.

Consistent with the continued delisting of the upper three segments of Pool 2 in the “Delisted” tab, the MPCA’s response to 3M’s comment (comment 13) on the draft 2018 list recognizes that the data only support an impairment in the downstream AUID 502. In its response to 3M’s comments, the MPCA states that overall fish tissue concentrations of PFOS in Pool 2 “have generally declined since 2009”, but “one part of Pool 2 (AUID 502) continued to exhibit higher fish contaminant levels.” The MPCA also acknowledges that the data only support listing AUID 502 as impaired stating: “In this case, *the impaired portion of AUID 07010206-502* near the 3M Cottage Grove facility, as evidenced by the MPCA’s most recent available data from that relevant area, is sufficient reason to continue to list the AUID as impaired.” (emphasis added).

The MPCA’s response to 3M’s comments demonstrates that the MPCA’s position in 2018 was that AUID 502 should not be delisted like AUIDs 504, 505, and 514 because the data from the portion of AUID 502 near the 3M Cottage Grove facility still supported an impairment. This position is consistent with the listing of AUIDs 504, 505, and 514 as delisted on the “Delisted” tab of the 2018 impaired waters list.

E. 2020 Draft Impaired Waters List

The draft 2020 impaired waters list at lines 5097 and 5098 of the “2020 Inventory Impaired Waters” tab, lists the Mississippi River from upper Saint Anthony Falls to the St. Croix River (AUID 814) as impaired for PFOS. This conflicts with the “Delisted” tab of the draft 2020 Impaired Waters List. Lines 53-55 of the “Delisted” tab reflect the EPA approved delisting of the upper three segments of Pool 2 (AUIDs 504, 505, & 514).⁵

F. Metropolitan Council Plants in AUID 814

Four Council wastewater treatment plants discharge into the new AUID 814 - Hastings, Metro, Empire, and Eagles Point. As detailed in the chart below, if the MPCA expanded impairments that originally applied to only a portion of the AUID 814 to all of AUID 814, it would expand PFOS, Mercury, fecal coliform, and nutrient/eutrophication impairments to additional Council facilities.

⁵ The 2014 delisting is also reflected in the MPCA’s impaired waters viewer at <https://www.pca.state.mn.us/water/impaired-waters-viewer-iwaw>.

Impairment	MCES WWTP Plants within scope of impairment in 2016	Additional MCES WWTPs within combined AUID 814
PFOS in fish tissue	Eagles Point and Empire WWTPs	Metro and Hastings WWTPs
PFOS in water column	Eagles Point and Empire WWTPs	Metro and Hastings WWTPs
Mercury in water column -AqC	Eagles Point, Empire, and Metro WWTPs	Hastings
Nutrient/eutrophication biological indicators	Eagles Point, Empire, and Metro WWTPs	Hastings
Fecal Coliform	None	Metro, Hastings, Empire, and Eagles Point

If the impairments in the chart above were expanded to cover all of AUID 814, there is a potential for significant impacts on the Council and its ratepayers even though the data show that the portions of the waterbody where the Council is discharging are not impaired and additional regulation of the Council will likely not materially improve water quality.

II. *The MPCA Should Clarify the 2020 Impaired Waters List.*

The MPCA's creation of the 41-mile AUID 814 should not expand existing impairments or relist delisted waters. Instead, to expand an impairment or relist a water, the MPCA should follow the data driven process for listing a waterbody as impaired. The process for assessing and listing a waterbody as impaired involves extensive data collection and analysis and is governed by state and federal law. See, e.g., 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7; Minn. R. 7050.0150.

The MPCA details this process in its October 2019 *Guidance Manual for Assessing the Quality of Minnesota Surface Waters for Determination of Impairment: 305(b) Report and 303(d) List*. Section III of the guidance manual outlines the assessment process for determining whether a water body is impaired. The steps of the assessment process include (1) data compilation; (2) desktop assessment; (3) Watershed Assessment Team; and (4) Professional Judgment Group.⁶ If the MPCA expands the impairments discussed in the chart above and relists PFOS, it will be expanding the scope of the impairments to segments of the river where the MPCA either has not performed these analyses or--in the case of PFOS--where it has performed these analyses and determined that the data do not support an impairment. Such an expansion could have a significant impact on the Council and its ratepayers without a corresponding environmental benefit.

⁶ According to the Guidance Manual, the MPCA only uses the first two steps of this process for assessments based on fish consumption.

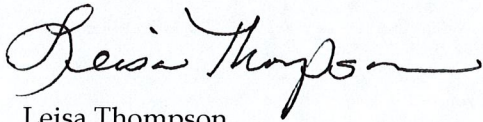
Miranda Nichols
Minnesota Pollution Control Agency

III. Conclusion

The Council does not believe that when the MPCA created the combined AUID 814, it intended to expand existing impairments or relist delisted waters where such actions are not supported by the data.

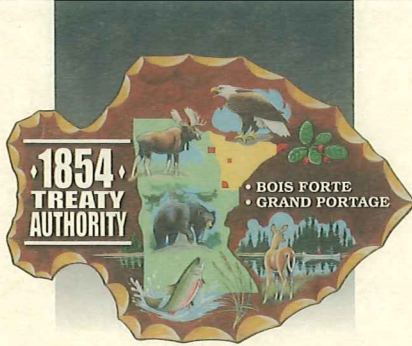
The Council requests that the MPCA clarify the 2020 inventory of impaired waters to reflect (1) the 2014 PFOS delisting of the upper three segments of Pool 2; and (2) AUID 501 having never been listed for PFOS. The Council also requests that the MPCA clarify all impairment listings in AUID 814 to reflect the original approved geographic scope of the impairment. These actions will ensure that the impairments align with the scientific data and prevent any unintended consequences of the creation of the combined AUID 814.

Sincerely,

A handwritten signature in black ink, appearing to read "Leisa Thompson", with a long horizontal flourish extending to the right.

Leisa Thompson
General Manager
Environmental Services

cc: Meredith Vadis



1854 Treaty Authority

4428 HAINES ROAD • DULUTH, MN 55811-1524
218.722.8907 • 800.775.8799 • FAX 218.722.7003
www.1854treatyauthority.org

January 14, 2020

Miranda Nichols (miranda.nichols@state.mn.us)
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, Minnesota 55155

RE: Minnesota's 2020 Draft Clean Water Act § 303(d) Impaired Waters List

Dear Ms. Nichols:

The 1854 Treaty Authority respectfully submits these comments regarding Minnesota's Draft 2020 303(d) Impaired Waters List ("Draft List").

The 1854 Treaty Authority is an inter-tribal natural resource management agency governed by the Bois Forte Band of Chippewa and Grand Portage Band of Lake Superior Chippewa, both federally recognized tribes. The organization is charged to preserve and protect treaty rights and related resources within the 1854 Ceded Territory. Present day northeastern Minnesota is located within the 1854 Ceded Territory including all of Lake and Cook counties, most of St. Louis and Carlton counties, and portions of Aitkin and Pine counties. Bands continue to exercise treaty rights to hunt, fish and gather in the 1854 Ceded Territory. It is vital that resources are available and healthy for the meaningful use of treaty rights. The 1854 Treaty Authority would like to highlight concerns regarding the exclusion of wild rice waters from the Draft List. Please note that these comments are submitted by 1854 Treaty Authority staff with the understanding that member reservations may submit comments from their own perspective.

To the Ojibwe, natural resources are cultural resources. There is no separation between how the bands manage and interact with a resource and how their culture endures; one is dependent on the other. The Bois Forte and Grand Portage bands (as well as the Fond du Lac Band) have retained usufructary rights to these resources within the 1854 Ceded Territory guaranteed by treaty and upheld by supreme law. Wild rice is one of many resources in the 1854 Ceded Territory band members utilize for subsistence and is an integral part of their culture. Wild rice is a declining resource not only within the 1854 Ceded Territory, but throughout Minnesota and the Great Lakes region. Given the importance of wild rice and its decline throughout the state/region, protecting wild rice cannot be overstated. The exclusion of wild rice waters with evidence of impairment from Minnesota's Impaired Waters List(s) by the Minnesota Pollution Control Agency (MPCA) has been an ongoing concern allowing for further degradation/loss of this resource and is not justified. Please find below rational supporting the inclusion of impaired wild rice waters on the Draft List and specific waters that should be included.

Minnesota's Wild Rice Sulfate Standard

Current Standard in Place

Since 1973, Minnesota Water Quality Standards ("MN WQS") have included a 10 milligrams per liter ("mg/L") limit on sulfate in waters used for the production of wild rice.¹ MN WQS designated use of Class 4 waters for the propagation and maintenance of natural stands of wild rice states "[t]he quality of these waters and the aquatic habitat necessary to support the propagation and maintenance of wild rice plant species must not be materially impaired or degraded. *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.*"²

Proposed Standard

In 2011, after the mining industry lobbied for legislation to repeal/diminish the State's limit on sulfate pollution in wild rice waters, the Minnesota Legislature passed [a 2011 Session Law](#) allocating money for research and setting up an advisory committee overseen by the MPCA in an attempt to revisit the 10 mg/L sulfate standard, set a new standard if justified and identify which waters the standard would apply. Years after the study was completed, MPCA engaged in rulemaking to repeal the 10 mg/L sulfate standard for the protection of wild rice and replace it with equation-based criteria.³ On January 9, 2018, an Administrative Law Judge ("ALJ"), with later concurrence from the Chief ALJ, disapproved the proposal for the following reasons:

- failed to meet the definition of a rule;
- failed to consider the proposed rule's burden on Native American communities;
- failed to address the potential conflict between the 10 milligrams per liter standard that both Grand Portage and Fond du Lac have adopted;
- failed to protect public health and welfare by not considering effects related to increased mercury methylation;
- failed to protect downstream waters from degradation;
- failed to demonstrate the proposed rule would protect wild rice; and
- *failed to identify all waters previously identified as wild rice waters by the Minnesota Department of Natural Resources ("MN DNR") and Minnesota Indian Tribes.*⁴

Instead of revising this proposed rule, MPCA withdrew it and has made no new proposal. Given that there has been this proposed rule was disapproved by the ALJ and that there is not a new rule being proposed, the existing 10 mg/L sulfate standard for waters used for the production of wild rice (wild rice waters) is still the law and the water quality standard that should be used to determine whether a wild rice water has been impaired.

¹ Minn. R. 7050.0224, subp. 2.

² Minn. R. 7050.0224, subp. 1 (emphasis added).

³ Available at <https://www.pca.state.mn.us/sites/default/files/wq-rule4-15mm.pdf>.

⁴ *Id.* at 68-69.

Clean Water Act Requirements

According to the Clean Water Act (CWA); the MPCA is required to identify impaired waters through monitoring, prioritize them based on the severity of pollution and then calculate a Water Quality Based Effluent Limit (WQBEL) or Total Maximum Daily Load (TMDL) to limit pollutants causing the impairments so that applicable water quality standards can be attained. This list must be submitted to and approved by the US Environmental Protection Agency (EPA) every even-numbered year. Waters that must be identified on the Impaired Waters list include: areas where calculations or predictions indicate water quality standards are not being met, existing uses are not being achieved, water quality problems have been reported by the public or other agencies, or the state has identified waters as impaired or threatened in a nonpoint assessment. Since the 10 mg/L sulfate water quality standard exists, any wild rice water with a sulfate concentration exceeding 10 mg/L should be included on the Draft List so that a proper WQBEL or TMDL can be calculated/applied for the protection of those waters from further impairment.

Identification of Impaired Wild Rice Waters within the 1854 Ceded Territory

Lists of identified wild rice waters in Minnesota are available on the Minnesota Department Natural Resources public GIS website and 1854 Treaty Authority website ([1854 Ceded Territory Wild Rice Waters List](#)). Within the 1854 Ceded Territory, over 515 waters have been identified as having wild rice. Tribal staff cross-referenced sulfate data provided by the MPCA with the lists mentioned above to identify waters within the 1854 Ceded Territory with sulfate concentration exceeding 10 mg/L (impaired waters) and identified three lakes and five stream segments that are impaired due to high concentrations of sulfate. These lakes and streams are listed below in Table 1 and therefore should/must be included on the Draft List. This list should not be considered exhaustive, but indicative that the appropriate methods and data exist to identify where wild rice is an existing use and which waters are impaired and need to be included on the Draft List.

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

Conclusion

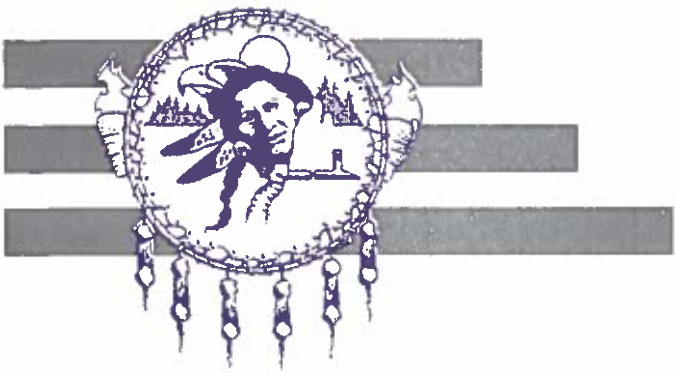
Wild rice is an important cultural and treaty protected resource utilized by bands within the 1854 Ceded Territory for subsistence and is integral to their culture. It is a declining resource throughout Minnesota and the Great Lakes region. Minnesota's Draft 2020 303(d) Impaired Waters List (as well as previous lists) have not included impaired wild rice waters (sulfate concentrations exceeding 10 mg/L), which is not justified and does not meet the State's requirement under the CWA. As mentioned above, there is an existing water quality standard for wild rice waters of 10 mg/L sulfate. Methods and data exist to identify where wild rice is an existing use and which waters are impaired. Tribal staff utilized this data to identify impaired wild rice waters within the 1854 Ceded Territory (Table 1). These and all other impaired wild rice waters must be included on the Draft List before it is sent to US EPA for approval.

Thank you for the consideration of our comments.

Sincerely,



Millard Myers
Executive Director



Joseph Wildcat, Sr.
PRESIDENT

January 14, 2020

Ms. Miranda Nichols
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, Minnesota 55155

Dear Ms. Nichols:

The Lac du Flambeau Tribe and the Lac du Flambeau Wild Rice Department is aware that the Minnesota Pollution Control Agency (PCA) is accepting comments on its draft 2020 Impaired Waters List (also known as the 303(d) list). These comments are submitted by Lac du Flambeau Tribe and the Lac du Flambeau Wild Rice Department policy staff, and should be construed as comments by this individual member Tribe.). However, our Tribe also supports comments made by GLIFWC (in which we are a part of) and the comments provided by the Minnesota Tribe.

As you may know, the Lac du Flambeau Band of Lake Superior Chippewa Indians is a signatory member of the 1854 Treaty tribes of Michigan, Minnesota, and Wisconsin. These tribes retain reserved hunting, fishing, and gathering rights in territories ceded to the United States in various treaties, rights that have been reaffirmed by federal courts, including the US Supreme Court. The ceded territories extend over portions of Minnesota, Wisconsin, and Michigan.

The primary concern with the State's draft list is that it explicitly excludes wild rice waters that do not meet the current sulfate water quality standard for wild rice waters. Despite the fact that new methods of identifying wild rice waters have not been finalized, a set of wild rice waters have long been identified by the DNR and the 1854 Treaty Authority. The lack of a revised Wild Rice Rule is not an excuse to exclude identified rice waters that are well known to be important areas of wild rice production and to be impaired due to sulfate contamination.

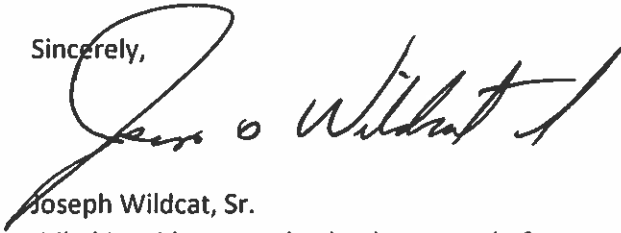
An exhaustive analysis of this issue is contained in a comment letter from the Minnesota Chippewa Tribe. That letter recounts the history of this issue and identifies a small number of waters that are very clearly impaired. As that letter suggests, the waters identified are likely a small subset of the full list of impaired waters, but it demonstrates that there are ways to identify at least some of the waters that should not be ignored simply because a new rule is not yet in place.

**Lac du Flambeau Band
of Lake Superior Chippewa Indians**

P.O. Box 67 - Lac du Flambeau, Wisconsin 54538 • (715) 588-3303 • FAX (715) 588-7930

The PCA cannot hide behind its failed new wild rice rule and thereby compound its failure to protect wild rice by excluding it from the 303(d) list. Wild rice waters impaired by sulfate must be included.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Wildcat Sr.", written in a cursive style.

Joseph Wildcat, Sr.
Tribal President, Lac du Flambeau Band of
Lake Superior Chippewa Indians

A handwritten signature in black ink, appearing to read "Joe Graveen", written in a cursive style.

Joe Graveen
Program Manager
Lac du Flambeau Wild Rice
Cultural Enhancement Department



January 14, 2020

VIA E-MAIL ONLY

Miranda Nichols
Minnesota Pollution Control Agency
520 Lafayette Road North
Saint Paul, MN 55155-4194

RE: Comments – 2020 Impaired Waters List

Dear Ms. Nichols:

I am writing on behalf of the Coalition of Greater Minnesota Cities (“CGMC”), an organization of 100 cities across the state, to comment on the 2020 Impaired Waters List. Our member cities play an important stewardship role in protecting Minnesota’s waters through their wastewater, stormwater and drinking water facilities, and stand to be impacted by the Minnesota Pollution Control Agency’s (“MPCA” or “Agency”) determinations in this list and the accompanying Guidance Manual.

We have an overarching concern with the Agency’s continued use of five-day biochemical oxygen demand (“BOD₅”) and dissolved oxygen (“DO”) flux as a basis for indication of nutrient impairment in surface waters. Significant new evidence has come to light since the MPCA formally adopted the River Eutrophication Standards (“RES”) on June 24, 2014, that demonstrates neither BOD₅ nor DO flux are reliable indicators of nutrient impairment. However, this is the basis currently being used by the Agency in the evaluation and listing of waters in the 2020 Impaired Waters process.¹

In a memorandum published on November 19, 2014 by the *Standard Methods* joint editorial board, the experts responsible for the development and use of the BOD₅ test incorporated by MPCA into the RES, confirmed that it is improper to use BOD₅ as an impairment response criterion for nutrients. Furthermore, MPCA’s own Guidance Manual from 2016 acknowledges that BOD₅ and DO flux should not be used as nutrient impairment indicator unless it was tied to chlorophyll-a.² In response to comments dated December 1, 2016, MPCA stated that the technical support

¹ See Guidance Manual for Assessing the Quality of Minnesota Surface Waters for Determination of Impairment: 305(b) Report and 303(d) List, 2020 Assessment and Listing Cycle, Minnesota Pollution Control Agency, 22-24, 67-72 (Oct. 2019), available at <https://www.pca.state.mn.us/sites/default/files/wq-iw1-04k.pdf>.

² Guidance Manual for Assessing the Quality of Minnesota Surface Waters for Determination of Impairment: 305(b) Report and 303(d) List, 2020 Assessment and Listing Cycle, Minnesota Pollution Control Agency, 22 (July 2016) (attached).

document used to develop the RES “speaks to the intended linkage of biochemical oxygen demand and diel DO flux to sestonic algae.”³

The CGMC maintains its objection to the use of BOD₅ and DO flux as indicators of impairment. As currently articulated in the most recent agency Guidance,⁴ the use of these parameters as impairment indicators results in additional waters being added to the list erroneously, and by extension, results in the expenditure of already scarce public resources amounting to no gain in environmental protection.

We thank the Agency for the opportunity to submit comments in this matter. If you have any questions about the CGMC or our concerns on this matter, please contact me at anelson@willmarmn.gov or [320-979-4927](tel:320-979-4927). To coordinate a discussion with our group about these issues, please contact CGMC’s attorney for this matter, Elizabeth Wefel, at 651-259-1924 or eaawefel@flaherty-hood.com.

Sincerely,



Audrey Nelsen, Willmar City Councilor
President, Coalition of Greater Minnesota Cities

³ Minnesota Pollution Control Agency Responses to the 2016 Draft Impaired Waters List Public Notice Comments, 11 (Dec. 1, 2016) (attached).

⁴ See Guidance Manual for Assessing the Quality of Minnesota Surface Waters for Determination of Impairment: 305(b) Report and 303(d) List, 2020 Assessment and Listing Cycle, Minnesota Pollution Control Agency, 22-24 (Oct. 2019), available at <https://www.pca.state.mn.us/sites/default/files/wq-iw1-04k.pdf>.

GREAT LAKES INDIAN FISH & WILDLIFE COMMISSION

P. O. Box 9 • Odanah, WI 54861 • 715/682-6619 • FAX 715/682-9294

• MEMBER TRIBES •

MICHIGAN

Bay Mills Community
Keweenaw Bay Community
Lac Vieux Desert Band

WISCONSIN

Bad River Band
Lac Courte Oreilles Band
Lac du Flambeau Band

MINNESOTA

Fond du Lac Band
Mille Lacs Band



January 14, 2020

Ms. Miranda Nichols
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, Minnesota 55155

Dear Ms. Nichols:

The Great Lakes Indian Fish and Wildlife Commission (GLIFWC) is aware that the Minnesota Pollution Control Agency (PCA) is accepting comments on its draft 2020 Impaired Waters List (also known as the 303(d) list). These comments are submitted by GLIFWC's policy staff, and should not be construed as precluding comments by its member Tribes individually.

As you may know, GLIFWC is an intertribal natural resource agency exercising delegated authority from 11 federally recognized Indian tribes in Michigan, Minnesota, and Wisconsin. These tribes retain reserved hunting, fishing, and gathering rights in territories ceded to the United States in various treaties, rights that have been reaffirmed by federal courts, including the US Supreme Court. The ceded territories extend over portions of Minnesota, Wisconsin, and Michigan.

The primary concern with the State's draft list is that it explicitly excludes wild rice waters that do not meet the current sulfate water quality standard for wild rice waters. Despite the fact that new methods of identifying wild rice waters have not been finalized, a set of wild rice waters have long been identified by the DNR and the 1854 Treaty Authority. The lack of a revised Wild Rice Rule is not an excuse to exclude identified rice waters that are well known to be important areas of wild rice production and to be impaired due to sulfate contamination.

An exhaustive analysis of this issue is contained in a comment letter from the Minnesota Chippewa Tribe. That letter recounts the history of this issue and identifies a small number of waters that are very clearly impaired. As that letter suggests, the waters identified are likely a small subset of the full list of impaired waters, but it demonstrates that there are ways to identify at least some of the waters that should not be ignored simply because a new rule is not yet in place.

Ms. Miranda Nichols
January 14, 2020
Page 2

The PCA cannot hide behind its failed new wild rice rule and thereby compound its failure to protect wild rice by excluding it from the 303(d) list. Wild rice waters impaired by sulfate must be included.

Sincerely,

A handwritten signature in black ink, reading "Michael J. Isham, Jr." in a cursive script.

Michael J. Isham, Jr.
Executive Administrator

From: Thiel, Casey - NRCS-CD, North Branch, MN <casey.thiel@mn.nacdnet.net>

Sent: Tuesday, January 14, 2020 3:24 PM

To: Nichols, Miranda (MPCA) <miranda.nichols@state.mn.us>

Cc: Anderson, Pam (MPCA) <pam.anderson@state.mn.us>; Engel, Lee (MPCA) <lee.engel@state.mn.us>; Alms, Eric (MPCA) <eric.alms@state.mn.us>

Subject: Delisting Review for 2020 Impaired Waters List

Miranda - May I request a delisting review as part of draft 2020 Impaired Waters List comment period? I am interested in South Center and North Center Lakes.

Data collected in 2016 (1 of the 2 sites on North Center), 2017, 2018, and 2019 and submitted to MPCA indicate these lakes are meeting eutrophication standards.

2019 Data appears to meet all 3 parameters at all 3 monitoring locations.

Please let me know if further information is needed to complete this request.

Thank you,
Casey Thiel

Casey Thiel

Water Resource Specialist | Chisago SWCD
38814 Third Avenue North Branch, MN 55056
651/674-2333 | casey.thiel@mn.nacdnet.net
www.chisagoswcd.org

Fond du Lac Band of Lake Superior Chippewa

Resource Management Division

1720 Big Lake Rd
Cloquet, MN 55720
Phone (218)878-7101
Fax (218)878-7130



Administration
Conservation
Enforcement
Environmental
Forestry
Fisheries
Natural Resources
Wildlife

Miranda Nichols
miranda.nichols@state.mn.us
Minnesota Pollution Control Agency
520 Lafayette Rd N
St. Paul, MN 55155

January 14, 2020

Re: Minnesota's Draft 2020 303(d) List of Impaired Waters

Ms. Nichols:

The Fond du Lac Band of Lake Superior Chippewa (the Band) appreciates this opportunity to review and comment on the Minnesota Pollution Control Agency's (MPCA) 2020 draft Impaired Waters List. As we have consistently commented in past biennial assessments since 2012, the Band is very interested in not only the identification of impairments through monitoring and assessment, but also the full restoration of all applicable Clean Water Act and Minnesota Rules beneficial uses. Given our status as a federally recognized Indian tribe, with delegated authorities under the Clean Water Act (CWA) for waters of the Reservation, and the off-reservation retained hunting, fishing and gathering rights secured through the 1854 Treaty of LaPointe¹, we reiterate our longstanding concerns for the number of waters in the state with unaddressed impairments for mercury in water and fish, and the continuing failure of the MPCA to fulfill its obligations under the CWA to list impairments for wild rice waters and undertake the necessary restorative actions.

Significant progress has been made by most mercury-emitting sectors under the 2007 statewide mercury TMDL and the 2008 TMDL Implementation Plan, towards meeting the mercury emissions reductions goals that are to be achieved by 2025. However, many waterbodies that the Band relies upon for fish as part of a traditional subsistence diet, including the St. Louis River and its tributaries, will still not meet safe unrestricted fish consumption levels under the statewide TMDL. Waterbodies and river reaches in this watershed that have already been listed as impaired for mercury were scheduled for TMDLs to be completed by 2019, but clearly MPCA did not meet that deadline after having withdrawn from a multi-agency toxics TMDL study in 2013. Other watershed reaches first identified in the 2016 Impaired Waters List (Partridge River, Cloquet River, West Two River, East Two River, Swan River) are not scheduled for TMDL completion until 2029. The proposed timeline for addressing these mercury impairments is unacceptably prolonged, as human health and wildlife effects are clearly at imminent risk. More specifically, the MPCA doesn't appear to have a plan for addressing these mercury impairments.

¹Treaty with the Chippewa, 1854, 10 Stat. 1109, in Charles J. Kappler, *ed.*, *Indian Affairs: Laws and Treaties*, Vol. II (Washington: Government Printing Office, 1904), available on-line at: <http://digital.lib.arkstate.edu/kappler/Vol2/treaties/chi0648.htm>

Although the Embarrass River and Whiteface River, listed in the 2016 Appendix A, will apparently meet mercury standards under the approved statewide TMDL, the Band remains highly skeptical of this prediction until actual mercury emission reductions from regional sources are documented. And by far the largest regional mercury sources in northeastern Minnesota are the taconite facilities.

Through our active participation in the Mercury TMDL Implementation Work Group, the Band is well aware of the sector-specific mercury reduction requirements that must occur in order to achieve the overall statewide mercury emissions goal of 793 lbs/year. The taconite sector was required to submit their facility-specific mercury emissions reduction plans at the end of 2018, and MPCA has had their reduction plans in-house for review for over a year. The Band has also been reviewing those plans, and while not surprised, we are disappointed to see that most of the facilities informed the agency that they would not be able to meet their reduction targets because of the complexity and expense of mercury capture technology – despite more than ten years of research and pilot testing of technologies that were largely funded through state and federal dollars. Once again, this industry appears to be telling the MPCA which environmental regulations and controls it is willing (or not) to abide by. There should be no “social license to operate” associated with any company or industry that is not taking care of the environment and is in fact working specifically to weaken the regulations that apply to their operations.

Mercury in fish tissue and mercury in water column continue to be far and away the greatest proportion of impairments in the state’s inventory of impaired waters. MPCA needs to provide the public with their clear strategy for ensuring that both the statewide mercury TMDL reduction goals are met, and the remaining mercury-impaired waters (waters with concentrations greater than 0.572 mg/kg are added to the TMDL List and not Appendix A) have expedited TMDL studies and implementation plans. At this point, the Band is discouraged to hear, time and again, from MPCA staff who are coordinating the state’s Watershed Restoration and Protection Strategies (WRAPS) program that mercury impairments are not being prioritized. This is fundamentally unacceptable.

Once again, the Band specifically urges the MPCA to resume, with the state, federal and tribal partners, a comprehensive St. Louis River watershed-wide mercury TMDL study that will lead to restoration of all the mercury-impaired reaches and tributaries through whatever regulatory and non-regulatory means necessary to reduce mercury methylation and bioaccumulation in fish. The Band is, as always, a willing partner in this effort. The agency’s response to this same recommendation in our comments on the draft 2018 Impaired Waters List is not adequate or responsive to the full picture:

“The MPCA is concerned about the levels of mercury in the St. Louis River. Although significant mercury emission and discharge reductions that benefit all waters are being made under the existing statewide TMDL and water quality standard, the St. Louis River is one of the 10% of state waters where the mercury problem will not be fully solved by the

statewide TMDL. In these waters, mercury is more available to the food chain, resulting in higher levels of mercury in fish tissue. In 2013, the MPCA identified the need for further research into mercury loading, mercury methylation, and bioaccumulation of mercury in fish tissue. This information is needed to fully understand the situation in the St. Louis River, and therefore to complete and implement a scientifically sound mercury TMDL for the River. Data collection and funding for MPCA's mercury-in-rivers research project ended June 30, 2017; however, analysis and interpretation of the chemical and biological data are continuing among MPCA staff and the academic collaborators on the project. A specific completion date has not been established. The MPCA plans to resume the St Louis River mercury TMDL process once this additional research is completed. MPCA continues to work with the partners in the St. Louis River TMDL effort to gather and share information in preparation for a future TMDL. We appreciate your willingness to re-engage with us at that time."

The agency cannot simply dismiss the urgent need to address this fundamental deficiency by referring to an endless and non-systematic series of data collection efforts. It is somewhat disingenuous to refer to the mercury-in-rivers project, under which data collection concluded in 2017 but "analysis and interpretation" is still ongoing, as the trigger for resuming the St. Louis River TMDL process. The MPCA withdrew from the multi-agency cooperative TMDL process *seven years ago*, claiming that there was insufficient data or appropriate modeling methodology available and "committing" to filling those gaps. The Band and other cooperative agencies, along with a number of respected mercury researchers, recognize that there is substantially more mercury data and knowledge of the St. Louis River watershed than virtually anywhere else in the state, and it is time to systematically focus our efforts on restoring this mercury impaired watershed.

The second major issue that the Band highlights in our comments on the draft 2020 Impaired Waters List is the continued failure of MPCA to list wild rice waters that are known to be impaired (i.e., not meeting the state's federally approved sulfate criterion). This omission is not inadvertent, it is a chronic deficiency in the state's listing process. The Band first identified this deficiency in our comments on the 2012 draft 303(d) list, and has continued to do so in each of our biennial comment letters on the state's draft impaired waters lists. For example, our comments submitted on the draft 2016 list included:

"The Disclaimer published in the 2016 Impaired Waters List regarding MPCA's failure to establish an assessment methodology for wild rice waters does not in any way absolve the agency of its obligations under the CWA. The state made a commitment after the 2012 Impaired Waters List to expedite an assessment methodology for wild rice waters in time for drafting the 2014 Impaired Waters List, in response to numerous comments on this missing element. EPA supported that commitment in their decision document on the 2012 Impaired Waters List."

But the draft 2014 impaired waters list also failed to list any impairments for wild rice waters, despite the agency's initial development of an assessment methodology and

preliminary list of wild rice impairments in August 2013. EPA initially deferred approval of the agency's 2014 Impaired Waters List until the MPCA submitted an addendum of wild rice impaired waterbodies. Although the Band is fully aware of legislation passed by the Minnesota Legislature in 2015 prohibiting the agency from listing wild rice impaired waters under CWA Section 303(d), that legislation, unfortunately, is in direct conflict with the Clean Water Act.

In the MPCA responses to comments on the 2018 Impaired Waters List, the agency responded to our call for listing impaired wild rice waters as follows:

"The MPCA is continuing to evaluate all available options following the January 9, 2018 Administrative Law Judge report pertaining to the proposed revisions to the wild rice sulfate standard. MPCA intends to proceed with the rule revision process, as prescribed by Minnesota state law, for updating the wild rice-related standard. Once the standard revision rulemaking is complete, MPCA staff will work on methods for assessment of waters for the wild rice sulfate standard. MPCA is committed to assessing wild rice waters once this process is complete."

This response signals to the Band and to the public that MPCA does not intend to implement the existing water quality standards, in contravention of the agency's delegated authorities under the CWA. The 2020 draft list not only maintains but also underscores this deficiency, and categorically excludes assessment of all Minnesota waters used for the production of wild rice, despite the fact that they are protected by a water quality standard that has been in place since it was approved in 1973. The 2020 Draft List includes an explicit "Disclaimer" that states:

"The Minnesota Pollution Control Agency (MPCA) has not finalized methods for identifying waters used for production of wild rice or for assessing impairment of waters based on the existing wild rice-related standard. Consequently, the 2020 303(d) Impaired Waters List does not include any waters assessed as impaired for the sulfate wild rice standard. The MPCA continues to consider next steps for the sulfate standard to protect wild rice. Go to <https://www.pca.state.mn.us/water/protecting-wild-rice-waters> for more information.²"

The cited webpage links to MPCA's Notice of Withdrawal of its failed Wild Rice Rule (dated April 26, 2018), but no proposed or pending rulemaking or other "next steps" are identified. The agency does not even attempt to provide a factual or legal justification for excluding these waters from the Draft List.³ The Band and other Minnesota tribes and tribal agencies have repeatedly shared our approach for identifying wild rice waters and standardized methodology for assessing impairments. This exclusion of impaired wild rice waters is plainly a political decision that ignores the requirements of the Clean Water Act

² See <https://www.pca.state.mn.us/water/minnesotas-impaired-waters-list>.

³ See 40 CFR 130.7(b)(6)(iii).

and Minnesota Rules, and it is a continuation of this agency's ongoing failure to protect an irreplaceable resource.

The Minnesota Department of Natural Resources and Minnesota tribal/tribal agency staff have developed and updated lists of state waters where wild rice is an existing use.^{4,5} The MPCA has collected quality-assured sulfate data across the state through routine monitoring. By simply cross-referencing these records, tribal staff were able to identify three lakes and five stream segments within the 1854 Ceded Territory that are impaired for sulfate. Those waterbodies are listed below in Table 1.

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

This simple desktop assessment exercise (provided by Grand Portage Band staff) only identifies those known wild rice waterbodies where median sulfate concentrations range from seven to sixty-three times greater than the applicable 10 mg/L sulfate criterion. Consequently, while this proposed list of impaired wild rice waters is not exhaustive for either the state or the 1854 Ceded Territory, it does represent a set of waters where wild rice is clearly an existing use, and the state's federally approved sulfate standard is clearly and consistently exceeded. The MPCA is required to consider information provided through tribal consultation in their decision-making process, with the goal of achieving mutually

⁴ Minnesota Department of Natural Resources, Natural Wild Rice in Minnesota: A wild rice study document submitted to the Minnesota Legislature by the Minnesota Department of Natural Resources" (Feb. 15, 2008), available at http://files.dnr.state.mn.us/fish_wildlife/wildlife/shallowlakes/natural-wild-rice-in-minnesota.pdf

⁵ <http://www.1854treatyauthority.org/wild-rice/wild-rice-survey.html>

beneficial solutions.⁶ The Band maintains that these waters must be included on the state's Impaired Waters List, and the MPCA must develop a TMDL or establish water quality based effluent limits where necessary. Until any revised wild rice rules are approved by USEPA, the existing approved rules must be implemented. Further, the USEPA is obligated to ensure that MPCA complies with the Clean Water Act's impaired waters provisions, or commence its own TMDL process⁷.

The Fond du Lac Band, along with other Minnesota tribes and intertribal agencies, has persistently elevated our concerns for the protection and restoration of wild rice across our reservations, ceded territories and traditionally harvested waters directly to the agency for decades. Further, since at least 2005, we have called attention to the MPCA's failure to implement and enforce their existing, federally-approved wild rice sulfate criterion in water quality permits. We have urged the agency to work with the Minnesota DNR to collect the data necessary to verify wild rice waters, and to develop metrics for reporting and assessing the condition of wild rice waters. We have provided water quality data and documentation of wild rice waters across our ceded territories, supported the development of and implemented a standardized method for surveying wild rice stand density and estimating annual biomass, and actively engaged in consultation with both state agencies on how best to manage, protect and restore wild rice. And yet, in 2020, the MPCA still has not invested the time, effort and resources necessary to adequately monitor, assess, and protect wild rice through its various CWA authorities: permitting, enforcement of water quality standards, identification and restoration of impairments. It is long past time for the agency to address these deficiencies, and an appropriate first step would be to recognize impaired wild rice waters through the CWA 303(d) listing process and take the necessary actions to restore this beneficial use.

Sincerely,



Nancy Schuldt, Water Projects Coordinator
Fond du Lac Environmental Program

Cc: Tom Short, USEPA Region 5
Alan Walts, USEPA Region 5
Paul Proto, USEPA Region 5
David Pfeifer, USEPA Region 5
Barbara Wester, USEPA Region 5

⁶ See, e.g., Exec. Order 19-24.

⁷ *Alaska Ctr. for the Env't v. Reilly*, 796 F. Supp. 1374, 1381 (W. D. Wa.1992), *aff'd as Alaska Ctr. for the Env't v. Browner*, 20 F 3d 981 (9th Cir. 1994).

January 14, 2020

VIA E-MAIL ONLY

Miranda Nichols
Minnesota Pollution Control Agency
520 Lafayette Road
St. Paul, MN 55155
Miranda.Nichols@state.mn.us

Re: Comments from the City of Osakis on the Draft 2020 Impaired Waters List

Dear Ms. Nichols:

Please accept the attached technical comments on the Draft 2020 Impaired Waters List from Hall & Associates on behalf of the City of Osakis.

The City of Osakis (“the City”) appreciates the Minnesota Pollution Control Agency’s (“MPCA”) efforts to work with the City to approve our sampling plan, collect and analyze new data, and to de-list Faille Lake. We support MPCA’s de-listing decision for Faille Lake in the manner consistent with the attached comments.

The City remains committed to operating its wastewater treatment facility to limit phosphorus loading to Faille Lake consistent with past efforts and additionally, to implementing a voluntary offset program that will ensure protection of Faille Lake and all other downstream waters.

Thank you for consideration of our comments. The City looks forward to continuing to work with MPCA on issues associated with water quality in Faille Lake and Lake Osakis. Should you have any questions or require additional information, please do not hesitate to contact me at (651) 225-8840 or via email and dmmarx@flaherty-hood.com.

Thank you.

Very truly yours,

Daniel M. Marx,
Attorney for the City of Osakis

cc. Mayor Keith Emerson, City of Osakis
William T. Hall, Hall & Associates

HALL & ASSOCIATES

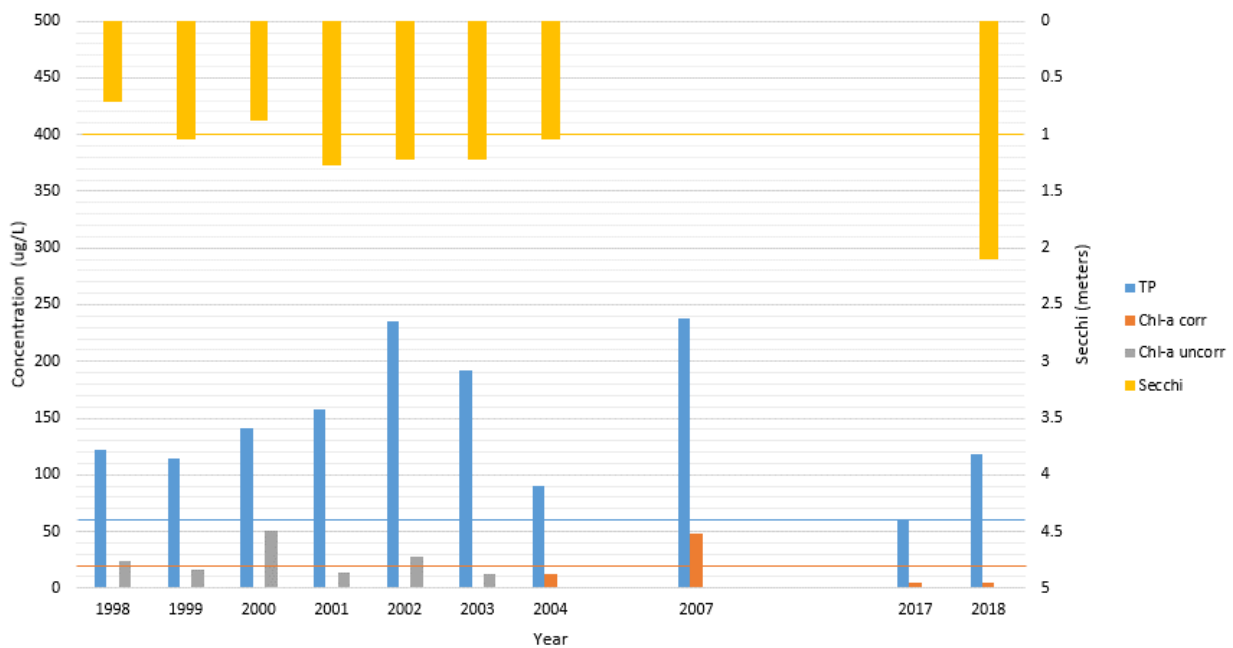
Comments on Draft 2020 Impaired Waters List (wq-iw1-65)

The draft 2020 Impaired Waters List for the state of Minnesota includes the proposed de-listing of Faille Lake (AUID 77-0195-00) for Aquatic Life/Recreation due to nutrients. The reason provided for the proposed de-listing is that the applicable water quality standards have been attained due to restoration activities. Background information on MPCA's proposal to remove Faille Lake from the 303(d) Impaired Waters List was included in a September 12, 2019 memorandum from Pam Anderson to Miranda Nichols. The City of Osakis provides the following comments on the proposed de-listing. In summary, while we certainly agree that the system should be delisted since it clearly meets applicable nutrient criteria, we do not agree that this occurred due to "restoration activities" nor does the administrative record support this position. It is apparent that the original listing was based on incomplete and erroneous data. Therefore, we would ask that this conclusion contained in the delisting justification be revised to indicate that the original impairment listing was in error.

- Faille Lake Should be De-Listed

As discussed in the memorandum from MPCA (Pam Anderson), the de-listing request was submitted by Attorneys for the City of Osakis in October 2018 based on recent data collected by the City on water quality in the Lake. These data were summarized in Figure 1 from the memorandum, presented below.

Figure 1. Period of record data from Faille Lake



The lake was originally listed as impaired for Lake Eutrophication Standards (LES) in 2006. The original listing data were compared to recent data in Table 1 from the memorandum, with excerpts from that table illustrated below.

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Table 1. Lake Eutrophication Standards

Assessment Period	TP (µg/L)	Chl-a (µg/L)	Secchi (meters)
1996 – 2005	166	22.5	1.1
2017 – 2018	97	4.9	2.1

These data show that, for the period of record, Faille Lake exceeds the total phosphorus criteria for the lake (60 µg/L), but the response variables (chlorophyll-a - < 20 µg/L; secchi depth - > 1.0 m), which are a direct measure of the use support, are both attained.

The City of Osakis collected water quality monitoring data in 2019 for Faille Lake. These data are summarized below and show that Faille Lake continues to exceed the total phosphorus LES criteria, but the response variables are well below the LES requirements. (Table 2)

Table 2 – 2019 Faille Lake Water Quality Data

Sample Date	TP (mg/L)	Chl-a (µg/L)	Secchi (meters)
6/05/2019	0.034	8.17	2.3
6/18/2019	0.143	5.29	1.8
7/11/2019	0.183	9.61	1.6
7/30/2019	0.276	11.35	1.4
8/15/2019	0.202	9.99	1.9
8/28/2019	0.176	9.61	1.8
Average	0.169	9.00	1.8

- Basis for De-Listing Misplaced

As described in the Agency's "Guidance Manual for Assessing the Quality of Minnesota Surface Waters for Determination of Impairment: 305(b) Report and 303(d) List", there are four ways in which water bodies are removed from the 303(d) List. (Guidance at 47)

- 1) If, during subsequent monitoring or the development of the TMDL study, new and reliable data or information indicates that the water body is no longer impaired and is meeting water quality standards. Such a water body would be delisted before a TMDL plan was completed.
- 2) If a TMDL assessment and preliminary plan for reducing the sources of pollution is completed and approved by the EPA.
- 3) If the sources of impairment are determined to be not caused by a pollutant or nonanthropogenic in origin.
- 4) If it was determined that a reach was placed on the list in error.

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It is important to note that in scenarios 2 and 3 above, the water body is still impaired and still appears on the Impaired Waters Inventory (until such time as the water body supports all its beneficial uses), but because a TMDL study is not required that water body is not included on the 303(d) List.

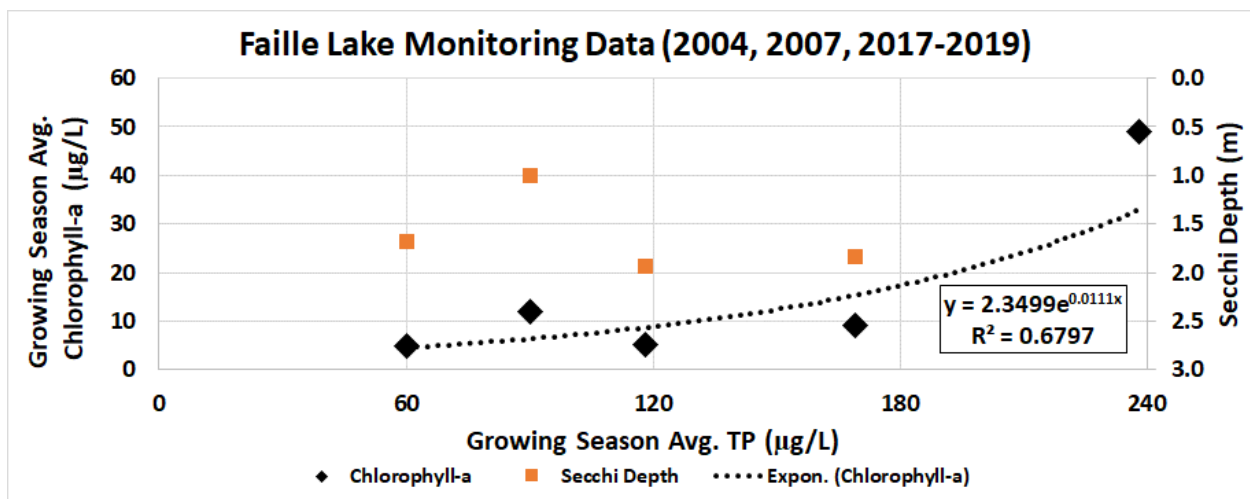
The draft Impaired Waters List identifies “Applicable WQS attained due to restoration activities” (Item #1 in the list above) as the reason for de-listing. In support of this justification, the 2019 Memorandum cited information provided by the City of Osakis wherein the City indicated that it would maintain current operations at the WWTP to limit the amount of TP reaching Faille Lake, maintain its lake monitoring program to keep track of conditions in the lake that may warrant additional measures, and implement an offset program (as necessary).

The City provided this information to address the requirement for delisting contained in the Guidance Manual, which makes the following statement regarding delisting. For a waterbody that was listed as impaired but is no longer impaired:

- If TP exceeds the standard and corrected chl-a AND Secchi meet the standard, and an improving trend in TP is observed or management activities are in place to maintain improved chl-a or Secchi observations, the lake may be delisted. This will require the local entity to provide information that details how the response conditions will be met over time.

(Guidance at 49)

The “management activities” in place to maintain improved chlorophyll-a and Secchi observations have less to do with improving TP trends and more to do with the fact that the lake does not respond to phosphorus loading in the manner presumed by the Agency. Lake monitoring data since 2004, which only contains monitoring for chlorophyll-a corrected for pheophytin, shows that the response criteria will be achieved for summer average TP concentrations exceeding 180 µg/L.



As illustrated in the figure above, the response conditions for chlorophyll-a and Secchi Depth will be far below the LES even when ambient TP concentrations approach 180 µg/L. The

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historical data for the lake show that it will meet this concentration as a long-term average under existing loading conditions which vary from 50 kg to 470 kg on an annual basis.

- Basis for De-Listing Should Be Revised to “Listing Error”

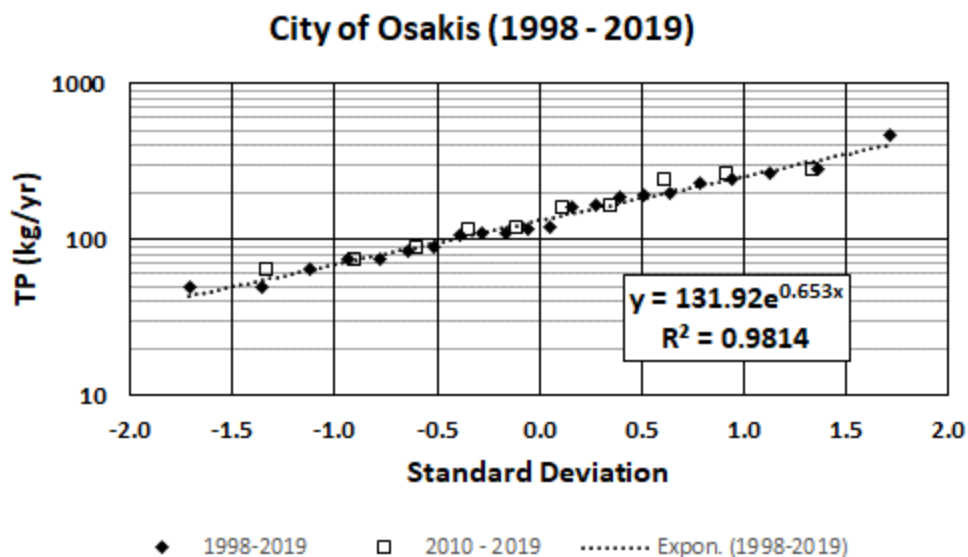
The basis for listing Faille Lake as impaired is summarized above in the table from the September 12, 2019 Memorandum. For the assessment period (1996 – 2005), the lake exceeded the TP target (166 µg/L versus a target of 60 µg/L) and the chlorophyll-a target (22.5 µg/L versus a target of 20 µg/L) while meeting the Secchi depth target (1.1 m versus a target of 1.0 m). Note, however, that the monitoring data primarily reported chlorophyll-a uncorrected for pheophytin. All but one observation for the assessment period reported chlorophyll-a concentrations *uncorrected for pheophytin*. The only chlorophyll-a measurement corrected for pheophytin showed a chlorophyll-a concentration of 12 µg/L, well below the target. As the adopted rule was based on chlorophyll-a corrected data, it was improper to use this information in the first instance.

The Memorandum attempts to dismiss the concern regarding corrected chlorophyll-a, wherein it states “The rule language is not specific on the type of chlorophyll-a used; the agency preference is corrected for pheophytin-a.” This is plainly incorrect as the Guidance Manual is very clear regarding the form of chlorophyll-a to be evaluated in assessing LES use attainment and use impairment – corrected chlorophyll-a (chl-a corrected for pheophytin). (See, Guidance Manual at 44 regarding the minimum data requirements for use assessment determinations). The Guidance Manual would not be able to make this statement if it was not consistent with the way the LES were derived. Therefore, it is clear that at the time of the original impairment listing assessment, the data were insufficient to make a determination as to whether the response criteria were exceeded. The more recent data, which consists solely of corrected chlorophyll-a results, shows that the summer average level of chlorophyll-a in the lake is well below the LES threshold. Consequently, the reason for de-listing should be specified as correction of a listing error.

- Additional Considerations

The City’s response to the Agency committed to maintaining current operations for controlling the discharge of total phosphorus, continue to monitor the lake, and implement an offset program (as necessary). Facility operations were evaluated using a statistical evaluation of performance data for total phosphorus. The annual TP discharge from the facility was assessed using the procedures in EPA’s Technical Support Document for Water Quality-based Toxics Control (the “TSD”; 1991). These data are illustrated in the chart below.

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The chart provides a comparison between the entire historical discharge record (1998 – 2019) and the discharge record over the last decade. The analysis shows that facility performance has remained unchanged over this time period. We anticipate that future performance will be similar as the City continues to maintain its current operations.

The data for the entire historical discharge record, as well as the data for the most recent 10 years, are log-normally distributed. Using the procedures in the TSD¹, the mean and coefficient of variation were determined for the data set. These estimates are illustrated below along with estimates of the 95th percentile and 99th percentile annual loads expected for the data distribution.

Parameter	Value
Observations	22
Estimated Mean	157.2 kg TP/year
Coefficient of Variation	0.65
95 th Percentile Annual Load	349 kg TP/year
99 th Percentile Annual Load	523 kg TP/year

When the wasteload allocation for the City of Osakis was initially developed (City of Osakis Effluent Limitations Summary, July 8, 2010) based on a discharge to Clifford Lake, the Agency estimated the current load from the City at 217 kg/year and noted that this load amounts to only 5.9% of the annual lake load. The justification for imposing the initial (2012) phosphorus limitation was determined to be in error, as Clifford Lake is a wetland, not a lake. The subsequent TMDL Revision (March 2016) recognized Clifford Lake as a wetland and evaluated

¹ When data are lognormally distributed, the mean, variance, and coefficient of variation may be estimated using the mean and variance of the log-transformed data. See the TSD, Appendix E at E-8.

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the effect of the City's discharge on Faille Lake. This evaluation used a TP wasteload of 216.8 kg/year and presented information showing that the effective load from the City to Faille Lake was 5.6% of the annual lake load. (See, TMDL Revision, Table 4 at 72).

As shown above, the actual long-term average TP load (157.2 kg/year) is approximately 25% less than previously estimated and amounts to 4% of the overall TP load to Faille Lake. This amount of the load is inconsequential to the expected lake response. Under lower flow conditions, when residence time in the lake is increased and adverse response is most likely, the load from the WWTP will also be less than the proposed allocation. Under higher flow conditions when effluent loads increase, the residence time in Faille Lake is significantly reduced and adverse response is not possible due to the short system detention time (a few days). This effect of reduced detention time was independently confirmed by MPCA's bathtub modeling.

Therefore, in summary, the change in listing should be attributed to an initial calculation error which relied upon inappropriate data. Subsequent data confirm that the response variables (corrected chlorophyll-a and Secchi depth) comply with LES requirements and the system has, at best, a weak response to nutrient inputs.



CLEVELAND-CLIFFS INC.

200 Public Square, Suite 3300, Cleveland, OH 44114
P 216.694.5700 clevelandcliffs.com

January 13, 2020

[Delivered electronically only]

Dear Ms. Nichols,

I appreciate the opportunity to comment on the Minnesota Pollution Control Agency's (MPCA) Draft 2020 Impaired Water List. As I understand the requirement for the MPCA to prepare an impaired water list, also known as the Integrated Report, for approval by EPA is required by Clean Water Act sections 303(d) and 305(b). Section 303(d) requires that the state "identify those waters within its boundaries for which the effluent limitations ... are not stringent enough to implement any water quality standard applicable to such waters." Section 305(b) requires the state to submit a report regarding the status of all waters to assess attainment of the national goals of fishable and swimmable waters. As MPCA points out in the *Guidance Manual for Assessing Quality of Minnesota Surface Water for Determination of Impairment: 305(b) Report and 303(d) List*, the "Inventory of Impaired Waters includes those waters needing a TMDL plan, those for which a plan has already been developed and approved by EPA, and water bodies that do not require a TMDL (impaired by a non-pollutant alteration [4C] such as a dam or impoundment, or impaired because natural background exceeds the standard where impacts from human activity are insignificant [4D]." (p. 2)

With this in mind, I am writing to specifically comment on the proposed 303(d) listing of Long Lake Creek, AUID 04010201-A25, in St. Louis County. I want to raise three issues regarding timeliness, representativeness, appropriateness of the listing.

Timeliness

The proposed 303(d) listing of Long Lake Creek is based on a single sampling event from 2009. Is it still appropriate for MPCA to propose the 303(d) listing and subsequent development of a TMDL based on data from a single sampling event from over ten years ago?

Representativeness

Our staff at United Taconite are familiar with the location where the MPCA conducted the single sampling event in 2009. The location is a farm field where cattle are allowed to freely roam, including several stream crossings. Their characterization of the area is that Long Lake Creek has been impacted by cattle crossings causing sedimentation and other issues. I am concerned that the sampling location is not representative of the entirety of Long Lake Creek and that the sedimentation may be the primary cause of the low M-IBI score. Please see the attached photos showing the stream and cattle.

Appropriateness

A 303(d) listing requires that MPCA make a determination that more stringent effluent limitations are required to implement applicable water quality standards. It is not clear from the information provided in the Integrated Report that this determination has been made, and if it has what supporting information has been used.

Summary

Because of the above concerns, I respectfully ask that MPCA and EPA consider removing Long Lake Creek from the 303(d) list. It does seem appropriate that Long Lake Creek remain on the 305(b) list in the Integrated Report based on the data from 2009. However, I think that additional data from a new location that is not impacted by cattle should be obtained before Long Lake Creek is considered for 303(d) listing. If the low M-IBI score is due to localized sedimentation, a determination of 303(d) listing would be inappropriate since the need for more stringent effluent limitations and a TMDL would not be necessary to address the cause. This would also address the issue of timeliness of the data from 2009.

Thank you in advance for consideration of my comments.



Rob Beranek

Senior Staff – Water Regulatory Affairs

Cleveland-Cliffs, Inc.

Rob.beranek@clevelandcliffs.com

Comments Regarding Long Lake Creek [AUID 04010201-A25] - Photo 1



Comments Regarding Long Lake Creek [AUID 04010201-A25] - Photo 2





U. S. Steel Corporation
Minnesota Ore Operations
P.O. Box 417
Mt. Iron, MN 55768



CERTIFIED MAIL 7018 3090 0001 9999 0344

January 13, 2020

Miranda Nichols
Minnesota Pollution Control Agency
520 Lafayette Rd. N.
St. Paul, MN 55155

**RE: U. S. Steel Corporation – Minnesota Ore Operations
Draft 2020 Impaired Waters List (wq-iw1-65), and
2020 Guidance Manual for Assessing the Quality of Minnesota Surface Waters for
Determination of Impairment 305(b) Report and 303(d) List (wq-iw1-04k)**

Dear Ms. Nichols,

These comments are submitted by U. S. Steel—Minnesota Ore Operations (U. S. Steel) regarding the 2020 Guidance Manual for Assessing the Quality of Minnesota Surface Waters for Determination of Impairment 305(b) Report and 303(d) List (wq-iw1-04k) ("Assessment Guidance Manual"). The Minnesota Ore Operations are comprised of the Keetac facility in Keewatin, Minnesota and the Minntac facility in Mountain Iron, Minnesota. Keetac and Minntac are iron mining facilities in Northeastern Minnesota which produce taconite pellets for use in the production of steel. Both facilities currently discharge to waters of the state and either have, or potentially will, utilize assessment methods for demonstration of impairment status of those waters. Therefore, U. S. Steel has a vested interest in the Assessment Guidance Manual.

The specific sections of the Assessment Guidance Manual that U. S. Steel is commenting on are (1) Section V, Subsection B, Number 1, Item e and (2) Section V, Subsection B, Number 2. These sections address biological indicators and data requirements and determination of impaired condition, respectively. These two sections should include more detail and/or context related to the evaluation and application of multiple Index of Biotic Integrity (IBI) scores from the same watercourse. This includes both macroinvertebrate (M-IBI) and fish (F-IBI) IBI scores. MPCA should consider the following comments and requests:

1. How should the resulting M-IBI and F-IBI scores be handled when multiple scores are calculated in the same watercourse? This additional context will benefit parties who are generating long-term, multi-year M-IBI and F-IBI datasets. Questions for the MPCA to consider include:

- Should all M-IBI scores (all stations, all years) be averaged together for that watercourse?
 - Should the median M-IBI score be used when comparing to M-IBI biocriteria thresholds?
2. Presentation of a hypothetical example in the guidance document such as a watercourse (a northern headwater stream, for example) that has multiple biological survey stations and has been surveyed for benthic macroinvertebrates and fish for multiple years.
 3. Two of the five M-IBI stream groups are categorized using one stream gradient (i.e., either Riffle/Run or Glide/Pool) and M-IBI biocriteria vary slightly for Riffle/Run and Glide/Pool categories. The same watercourse could have both Riffle/Run and Glide/Pool reaches, and as such, calculations of the IBI scores should account for this.
 4. Regarding Figure 2 on page 22 (per the footer), consider linking or citing to a publication that includes the 90% upper and lower confidence interval data for M-IBI and F-IBI score benchmarks. This information is not readily available.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in cursive script that reads "Lawrence Sutherland". The signature is written in dark ink and is positioned above the printed name.

Lawrence Sutherland
General Manager – Minnesota Ore Operations
United States Steel Corporation

Cc: Chrissy Bartovich, U. S. Steel Minnesota Ore Operations
Tom Moe, U. S. Steel Minnesota Ore Operations
Eric Williams, U. S. Steel Environmental Affairs
Nicole Benoit, P.E., U. S. Steel Environmental Affairs
Mark Mustian, U. S. Steel Legal Counsel