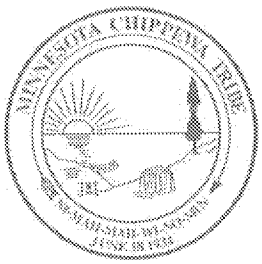
NORMAN W. DESCHAMPE, PRESIDENT
KAREN R. DIVER, VICE PRESIDENT

GARY S. FRAZER, EXECUTIVE DIRECTOR

DONALD FINN, SECRETARY
DAVID C. MORRISON, SR., TREASURER



The Minnesota Chippewa Tribe

Administration
218-335-8581
Toll Free: 888-322-7688
Fax: 218-335-8496
Home Loan
218-335-8582
Fax: 218-335-6925
Economic Development
218-335-8583
Fax: 218-335-8496
Education
218-335-8584
Fax: 218-335-2029
Human Services
218-335-8585
Fax: 218-335-8080

February 7, 2014

John Linc Stine, Commissioner
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, MN 55155-419

Re: Definition of "waters used for the production of wild rice"; wild rice water quality standards

Dear Commissioner Stine:

The Minnesota Chippewa Tribe appreciates having the opportunity to continue discussions with your agency regarding the definition of "waters used for the production of wild rice." We commend the Minnesota Pollution Control Agency (MPCA) for the work done to clarify this definition and to strengthen protection for this critical resource. As you know, wild rice is a culturally significant resource for the tribes in Minnesota. From historical reports,[1] Band member accounts,[2] and current Minnesota Department of Natural Resources ("DNR") and tribal reports,[3] wild rice has declined significantly throughout Minnesota, and in southern Minnesota wild rice has virtually disappeared. Minnesota tribes have a unique relationship with the state regarding the protection of wild rice, as demonstrated through multiple rulemaking processes[4] and executive orders.[5]

---

[1] Jenks, A.E., The Wild Rice Gatherers of the Upper Great Lakes: A Study in American Primitive Economics (Washington: GPO, 1901), available on-line at http://greatlakeswater.uwex.edu/library/articles-and-white-papers/wild-rice-gatherers-upper-lakes-study-american-primitive-economics (last visited Oct. 12, 2012).
[2] Rosemary Berens, Bois Forte Tribal Historic Preservation Officer
[3] *See, e.g.*, 1854 Treaty Authority website, "Wild Rice Survey" (including list of wild rice waters in the 1854 Ceded Territory), available at http://1854treatyauthority.org/wildrice/survey.htm (last visited Oct. 12, 2012); MN DNR website, "Wild rice management," available at http://www.dnr.state.mn.us/wildlife/shallowlakes/wildrice.html (last visited Oct. 12, 2012).
[4] *See, e.g.*, Laws of Minnesota 2007, chapter 7, article 1, section 168
[5] *See, e.g.*, Executive Order 13-10, "Affirming the Government-to-Government Relationship between the State of Minnesota and the Minnesota Tribal Nations: Providing for Consultation, Coordination, and Cooperation."

Maintain the existing sulfate criterion for protection of wild rice waters

Minnesota tribal staff have participated in and followed closely the MPCA's research program related to the existing sulfate criteria for protecting wild rice waters[6]. Our thorough review and interpretation of the research results for the state-led hydroponics studies, the field surveys, the mesocosm studies, and the sediment studies leads to our conclusion that the existing federally approved sulfate criterion is well-supported by multiple lines of evidence, and should be maintained. There is no scientific defensible basis for raising this sulfate limit, which is the clear benchmark required by the US Environmental Protection Agency for considering approval of a revised criterion[7], as was clearly communicated to the Minnesota legislative body in 2011[8].

The MPCA proposed approach for listing wild rice waters is inconsistent with the Clean Water Act

The Minnesota tribes have fundamental concerns regarding MPCA's proposed approach for meeting the intent of the 2011 state legislation that directs the agency to establish criteria considering "history of wild rice harvests, minimum acreage, and wild rice density."[9] In January of 2014, the Fond du Lac, Grand Portage, Leech Lake, White Earth and Bois Forte Bands communicated clear concerns for the agency's proposed 'watch list' approach in letters to MPCA; specifically, that this approach would violate the Clean Water Act (the Act) and Minnesota water quality standards (WQS). The agency had proposed to create a 'watch list' for those wild rice waters listed by the DNR for which the state lacked specific acreage and/or stand density measurements; only those waters with quantified stands would be formally listed as wild rice waters. The DNR list of Minnesota wild rice waters[10] was compiled as part of a legislatively directed study of the threats to wild rice in Minnesota, and represented significant contributions from Minnesota tribal resource management staff. State and tribal staff also explicitly qualified this 2008 compiled listing as 'not comprehensive', and that it would be continuously updated as new data became available.

Under the Act, the Nation's waters are to be restored and maintained for the protection and propagation of fish, shellfish, and wildlife, and for recreation in and on the water.[11] The goal of a water quality standards program is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.[12] States and authorized Tribes adopt water quality

---

[6] http://www.pca.state.mn.us/index.php/water/water-permits-and-rules/water-rulemaking/minnesotas-sulfate-standard-to-protect-wild-rice.html#assessment

[7] *See, generally,* 40 CFR §§ 131.5, 131.11, and 131.21 (2013).

[8] Letter from USEPA to Sens. Dill, Bakk, May 13, 2011.

[9] Laws of Minnesota 2011, 1st Spec. Sess,, chapter 2, article 4, section 32 –Wild Rice Rulemaking and Research)
https://www.revisor.mn.gov/laws/?id=2&doctype=Chapter&year=2011&type=1

[10] MN DNR "Statewide Inventory of Wild Rice Waters" (2008) available at http://www.dnr.state.mn.us/wildlife/shallowlakes/wildrice.html (last visited Jan. 27, 2014).

[11] *See* 33 U.S.C.§ 1251(a)(2).

[12] *Id.*

standards to protect public health, enhance the quality of water, and serve the purposes of the Clean Water Act[13] and are free to add use classifications, as well as adopt any use classification system they see as appropriate (with the exception of waste transport and assimilation, which are not acceptable uses in any case). Among the uses listed in the Act, there is no hierarchy.

A primary objective for classifying a water body is to designate uses by evaluating and describing the ecosystem. "Designated uses" are based on the relationship and quality, i.e., the integrity, of all ecosystem components. States and authorized Tribes, through their approved WQS, specify appropriate, designated uses in order to achieve and protect existing and potential uses.[14] They can select the level of specificity they desire for identifying designated uses and subcategories of uses. Subcategories of aquatic life uses may be on the basis of attainable habitat, innate differences in community structure and function, or fundamental differences in important community components. Special uses may also be designated to protect particularly unique, sensitive, or valuable aquatic species, communities or habitats.

The current state standard for listing wild rice waters is found at Minnesota Rule 7050.0224, "Specific Water Quality Standards for Class 4 Waters of the State: Agriculture and Wildlife," which at Subpart One states:

> The numeric and narrative water quality standards in this part prescribe the qualities or properties of the waters of the state that are necessary for the agriculture and wildlife designated public uses and benefits. Wild rice is an aquatic plant resource found in certain waters within the state. The harvest and use of grains from this plant serve as a food source for wildlife and humans. In recognition of the ecological importance of this resource, and in conjunction with Minnesota Indian tribes, selected wild rice waters have been specifically identified [WR] and listed in part 7050.0470, subpart 1. 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.

Natural Wild Rice Waters should be classified as a distinct aquatic life use

The fundamental use in §101(a) of the Act for 'protection and propagation of fish, shellfish and wildlife' may also include the protection of aquatic flora. However, the agricultural use class (Minnesota's Class 4 waters) is intended to define *waters that are suitable for the irrigation of crops, consumption by livestock, support of vegetation for range grazing, and other uses in support of farming and ranching and protects livestock and crops from injury due to irrigation*

---

[13] *See EPA's* Water Quality Standards Handbook Chapter 2: *Designation of Uses* (40 CFR 131.10) at http://waterepa.gov/scitech/swguidance/standards/handbook/chapter02.cfm
[14] *See* 40 C.F.R. § 131.10 (2013).

and other exposures.[15] The Minnesota tribes have consistently recommended to the MPCA, during multiple consultation sessions over the past three years specifically focusing on wild rice water quality standards, that natural wild rice stands (manoomin) are more appropriately classified under a distinct aquatic life use (i.e., Minnesota's Class 2 waters). It may be appropriate to leave paddy rice, a true cultivated agricultural product, in Class 4, but it is inaccurate and inherently offensive to Minnesota tribes to classify manoomin as a 'crop', and ecologically ignorant to categorize the naturally occurring hydrology of a natural wild rice bed as "irrigation." Irrigation is defined as "...to supply (dry land) with water by means of ditches, pipes, or streams."[16] This is simply not an appropriate or accurate concept for describing a native plant species growing without cultivation in a natural water body.

Wild Rice Waters listed by the Minnesota DNR and Tribes are an 'existing use'

Tribal staff have also elevated the importance of distinguishing between a "designated use" and an "existing use" in consultation with the MPCA. An "existing use" can be demonstrated by either a) that fishing/swimming has actually occurred since November 28, 1975, or b) that the water quality is suitable to allow the use to be attained--unless there are physical problems, such as substrate or flow, that prevent the use from being attained.[17] Following, "No activity is allowable under the antidegradation policy which would partially or completely eliminate any existing use *whether or not that use is designated in a State's water quality standards.* The aquatic protection use is a broad category requiring further explanation. *Non-aberrational resident species must be protected, even if not prevalent in number or importance.* Water quality should be such that it results in no mortality and no significant growth or reproductive impairment of resident species. Any lowering of water quality below this full level of protection is not allowed. A use attainability analysis or other scientific assessment should be used to determine whether the aquatic life population is in fact an artifact or is a stable population requiring water quality protection."[18]

Designated uses may be changed only based upon findings of a use attainability analysis that has demonstrated that attaining the designated use is not possible because of naturally occurring pollutant concentrations, natural flow conditions, hydrologic modifications, substantial widespread economic impact resulting from more stringent controls, or human-caused pollution that cannot be remedied. A designated use cannot be removed if the use can be attained by implementing effluent limits and best management practices.[19] Therefore, attainable uses are, at a minimum, the uses (based on the State's system of water use classification) that can be achieved: (1) when effluent limits under sections 301 (b)(l)(A) and (B) and section 306 of the

---

[15] *Id.* at Chapter 2, EPA Water Quality Standards Handbook
[16] Webster's II New College Dictionary (ISBN 0-395-70869-9) 1999. Houghton Mifflin Co.
[17] *See* Chapter 4, Water Quality Standards Handbook, *Protection of Existing Uses*
[18] *Id.*
[19] Per 40 C.F.R. Section 131.10(d), "[w]hen designating uses, States may wish to designate only the uses that are attainable. However, if the State does not designate the uses specified in section 101(a)(2) of the Act, the State must perform a use attainability analysis under section 131.10(j) of the regulation. States are encouraged to designate uses that the State believes can be attained in the future."

Act are imposed on point source dischargers; and (2) when cost-effective and reasonable best management practices are imposed on nonpoint source dischargers.

Minnesota's existing WQS require that the quality of listed and unlisted wild rice waters, and the aquatic habitat necessary to support the propagation and maintenance of wild rice plant species, not be materially impaired or degraded. In other words, Minnesota already requires the listing of *all* wild rice waters, regardless of production—the rules make no distinction based upon productivity.[20] As noted, most of the waters that now appear on MPCA, DNR, and the 1854 Treaty Authority lists *already* have an "existing use" as "waters used for the production of wild rice," whether or not they include an estimate of acres of wild rice present for any given year. These waters must remain on the wild rice waters lists for regulatory purposes. They cannot be pulled off and dropped instead onto the proposed "watch list," in effect, de-listing them as Class 4 waters of the state with the stroke of a pen. The Clean Water Act clearly states that this can only happen after significant process, including a reasoned determination has been made that production of wild rice is a designated use, not an existing use, and based upon the findings of a use attainability analysis, that the designation of "waters used for the production of wild rice" should be eliminated.

If a *designated use* is an *existing use* (as defined in 40 CFR 131.3) for a particular water body, the existing use **cannot be removed** unless a use requiring more stringent criteria is added. However, uses requiring more stringent criteria may **always be added** because doing so reflects the goal of further improvement of water quality. This is entirely consistent with the intent of not only the Clean Water Act goals, but also the intent of the DNR and Tribes in continually updating the list of wild rice waters within the state.

Productivity thresholds are not appropriate for defining wild rice waters

Even if the Act did not prohibit the watch list, it makes no sense as a conservation measure. Minnesota Chippewa Tribe Bands have consistently urged the MPCA to broadly, not narrowly, define wild rice waters, and to be as protective of this diminishing resource as possible. An unnecessarily restrictive list of "waters used for the production of wild rice" is not consistent with the principles of ecosystem management, whereby a management or regulatory agency seeks to maintain ecosystems such as wild rice waters in the appropriate condition to meet that beneficial use, while recognizing that all ecosystems have limited ability to accommodate stressors and still maintain that desired state. Using an arbitrary threshold of productivity to define "waters used for the production of wild rice" ignores the entire body of published scientific research *and* traditional ecological knowledge provided by tribal staff and tribal members that provides substantial evidence of the interannual variability in even traditionally productive waters. Given the scarcity of wild rice productivity and stand density data that the MPCA has compiled at this point in time, it is entirely premature to attempt to incorporate a representative productivity or density metric into the actual definition of a wild rice water body.

Furthermore, the Minnesota tribes with authorized water quality standards would *not* move to a less-inclusive definition or less-protective criterion even if the state adopted it. So the "watch

[20] *See* Minn. R. 7050.0224 subp. 1.

list" would also likely mean an end to an ongoing, cooperative, state-tribal conservation effort and would likely have a ripple effect on other aspects of these relationships, as wild rice is of such central importance to the Bands. As a practical matter, the result would be that the state and tribes would no longer maintain the same wild rice waters lists (at least within the 1854 Ceded Territory and on the reservations), which would undoubtedly create both administrative and permitting problems.

The "watch list" approach would have additional consequences, including delays in the environmental review process for projects with the potential to affect wild rice waters. Minnesota's wild rice waters, whether designated by the state or not, are also federally protected as tribal traditional cultural properties under Section 106 of the National Historic Preservation Act (NHPA).[21] The NHPA requires not only that a project with the potential to impact traditional cultural properties must carefully analyze potential impacts, but also stipulates that appropriate mitigation must be done or a project cannot proceed. If the same waters are not also listed at the state level, it will create a disconnect between the state and federal permitting processes and records, to the detriment of applicants, tribes, and agencies alike.

The Legislative directive can be fulfilled through MPCA's watershed-based monitoring and assessment processes

MPCA should instead continue to list all wild rice waters *regardless* of current levels of production, and should simply add productivity measurements to their assessment database as they become available over time. This is appropriately accomplished through the state's established ten-year cycle for major watershed assessments. MPCA assesses state waters through physical, chemical and biological monitoring. Biological evaluations provide a more precise statement of which species exist in a water body and therefore should be protected, determine the biological health of the water body, and determine the species that could potentially exist in the water body if the physical and chemical factors impairing a particular use were corrected. Over time, with adequate data, the MPCA should be able to make reasonably specific recommendations concerning the natural potential of a water body, levels of attainability consistent with this natural potential, confirm appropriate use designations, and identify impairments. The MPCA can most directly and appropriately address the legislative requirement for considering minimum acreage and wild rice density **through their established monitoring and assessment processes**, rather than struggling to clarify it in the definition of the wild rice designated use.

MPCA should expedite the listing of impaired wild rice waters

We also urge MPCA expedite the listing of "impaired" wild rice waters in order to ensure that water-quality-based effluent limits can be applied to discharges that exceed WQS criteria - just as Minnesota Rules already mandate. Any water body that is currently listed by the DNR, 1854 Treaty Authority, or MPCA as a wild rice water body, and is known to exceed Minnesota sulfate WQS for wild rice, should be designated as "impaired."[22] This would be consistent with the

---

[21] *See* 36 C.F.R. §§ 800 *et seq.* (2013)
[22] *See* Minn. R. 7050.0224 subp. 1.

MPCA's approach to designating any other type of impairment with assigned numeric or narrative criteria.

Conclusion

Natural stands of wild rice (manoomin) should be protected as a distinct Class 2 aquatic life use in Minnesota WQS, and the existing sulfate criteria (10 mg/l) should be maintained for this use class. Paddy rice may continue to be appropriately designated for protection under the Class 4 agricultural use. Narrowly defining waters used for the production of wild rice, based upon an arbitrary measure of human harvest potential, is inconsistent with Clean Water Act requirements. Creating a "watch list" to determine if waters already known as "wild rice waters," and listed by on the MN DNR, MPCA, or 1854 Treaty Authority, but that do not have estimated acreages, is also inconsistent with the Act. In order to protect and restore wild rice waters, natural variability in stand density and annual changes in location of stands in both streams and lakes must be acknowledged. The legislative mandate to consider wild rice acreage and stand density is most appropriately dealt with as an integral part of the MPCA's water body monitoring and assessment programs, not as a component of the water quality standard definition.

The goal should be continuing to build an inventory of natural wild rice waters that facilitates both conservation and monitoring, and that will dovetail with other procedures the MPCA is already implementing to require dischargers to do improved quality-assured monitoring. And properly listing impaired wild rice waters will ensure that water quality based effluent limits can be applied to dischargers that exceed Minnesota WQS criteria for the protection of these waters.

Sincerely,

Norman W. Deschampe
President

cc. Patricia Engelking, MPCA
Katrina Kessler, MPCA
Shannon Lotthammer, MPCA
Susan Hedman, US EPA
Tinka Hyde, US EPA
Linda Holst, US EPA