WaterLegacy

Protecting Minnesota's waters and the communities who rely on them

Testimony of WaterLegacy on H.F. 1000
Environment and Natural Resources Policy and Finance
Tuesday, February 24, 2015
Paula Maccabee, Advocacy Director and Counsel

Introduction

Good morning. Mr. Chair and Committee members. My name is Paula Maccabee and I live at 1961 Selby Avenue in St. Paul. I serve as the Advocacy Director and Counsel for WaterLegacy, a non-profit group formed to protect Minnesota's water resources and the communities that rely on them. Our 10,000 members include people who hunt, fish and gather wild rice, as well as teachers, chemists and biologists. They have identified wild rice as an indicator species for Arrowhead region ecosystems and have made the preservation of natural wild rice a high priority.

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

WaterLegacy is here today to oppose adoption of H.F. 1000 on two grounds. First, the scientific evidence gathered as a result of taxpayer-funded research demonstrates clearly that interference with enforcement of the existing Minnesota wild rice sulfate standard would be

unreasonable and unscientific. Second, legislation preventing the Minnesota Pollution Control Agency (MPCA) from fulfilling its obligations to control sulfate pollution and list wild rice impaired waters would conflict with the Clean Water Act, which is governing federal law. As the U. S. Environmental Protection Agency (EPA) advised in 2011, failure of our State to comply with the Clean Water Act and enforce the wild rice sulfate standard could result in Minnesota's loss of state authority to control water pollution.

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

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

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

To add another layer of scientific protection from pressure to deregulate pollution, the MPCA had a panel of seven international scientists review the wild rice sulfate research in detail. These scientists issued a final report in September 2014. Although they asked for more statistics to tease out sulfate interactions in the environment and told the MPCA that sulfide may be even more toxic than the agency had thought, the peer review panel found Minnesota's research and regulation limiting sulfate to protect wild rice scientifically valid. The panel explained that, just as one must limit mercury to prevent the formation of toxic methylmercury, "sulfide is harmful, but sulfate is what has to be regulated."

ED_005586A_00004220-00002

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

Mr. Chair and Committee members, in your handouts you will find documents and excerpts related to the legality of the proposed legislation. I will summarize this information in the next several minutes.

First, as Committee members may remember from 2011, the EPA has already explained that state law may not interfere with enforcement of federally-approved water quality based effluent limitations in permits, including the wild rice sulfate standard. The EPA's May 13, 2011 letter, a complete copy of which is included in your packet, stated:

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

If the state does not revise the offending permit, the federal government has the power to take over the permit.

The question of whether the wild rice sulfate standard must be enforced in wild rice waters not listed by name in existing rules has been addressed both by the EPA and by a district court. In your packets you can see that the EPA determined in both Keetac and PolyMet environmental review that enforcement of the 10 milligrams per liter wild rice sulfate standard was mandatory, not discretionary, and that the standard must be enforced in waters, such as Swan Lake, Swan River, Hay Creek, Hay Lake and the Partridge River where site-specific data showed the presence of wild rice.

Judge Marrinan concluded in dismissing the Chamber of Commerce lawsuit:

ED_005586A_00004220-00003

> [N]either the Constitution nor Minnesota or federal statutes require a state to list expressly every surface water to which a water quality standard applies. Such a requirement would be particularly absurd in a state such as Minnesota.
>
> On the contrary, the federal Clean Water Act allows for application of water quality standards to water bodies that are implicated without being expressly listed on an individual basis.

Just as enforcing the wild rice water quality standard is mandatory, not discretionary, states are required under Section 303(d) of the Clean Water Act to list impaired waters. The Clean Water Act requires all states to submit for EPA approval every two years a list of impaired waters and to set priorities for plans to clean up those waters. Minnesota had an obligation -- affirmed by EPA -- to release a list of wild rice impaired waters in 2014.

Provisions of H.F. 1000 stating that the MPCA shall not apply the wild rice water quality standard or list wild rice impaired waters until the MPCA adopts rule changes are inconsistent with federal Clean Water Act requirements.

State failure to comply with the Clean Water Act matters. In 2011, the EPA advised the Minnesota Legislature,

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

Federal regulations copied on the last page of our Committee handout provide that the EPA may withdraw state authority to regulate water quality when a State program no longer complies with federal clean water law. Among the circumstances demonstrating non-compliance are failure to issue permits, issuing permits that don't protect beneficial uses, failure to act on permit violations and, "Action by a State legislature or court striking down or limiting State authorities." (40 C.F.R. § 123.63).

ED_005586A_00004220-00004

WaterLegacy believes it would be better for all stakeholders if the MPCA would proceed more quickly to release its proposals regarding the wild rice rule. However, we believe that the proposed H.F.1000 legislation is part of the problem, not part of the solution. Every time a political fix is proposed to serve the interests of the mining industry and other industrial dischargers, Minnesota slips farther away from science and farther away from Clean Water Act requirements to control sulfate and other pollution in order to protect wild rice, fish, wildlife and other uses of clean water. At some point, Minnesota's legitimacy in serving as the regulator of water pollution discharged by the mining industry will reach the point where our State's authority can no longer be defended or sustained.

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

ED_005586A_00004220-00005

Testimony of WaterLegacy on H.F. 1000
EXCERPTS FROM PERTINENT DOCUMENTS[1]

U.S. EPA, Comments on the Draft Environmental Impact Statement, U.S. Steel Keetac Taconite Mine Expansion Project, near Keewatin in Itasca and St. Louis Counties, Minnesota EIS # 20090419 (Jan. 27, 2010), p. 7:

> *The Draft EIS leaves no doubt that wild rice stands are present in Swan Lake, Swan River, Hay Creek and Hay Lake, and that these water bodies have documented harvesters, despite the MDNR conclusion that the yields range from poor to moderate. As a result of the information provided in the Draft EIS, we understand that the MN sulfate standard of 10 mg/L for the protection of wild rice is applicable. The Draft EIS appears to indicate uncertainty as to whether the 10 mg/L standard is applicable by providing a discussion of other acceptable sulfate ranges of 50 mg/L to 282 mg/L for wild rice growth. The discussion at section 5.4.2 on page 5-46 under "Regulatory Framework" also leaves some doubt as to what standard is applicable by stating, "The current state rule establishes pollutant standards to be used as a guide for determining the suitability of waters for such uses, including the production of wild rice." EPA recognizes the uncertainty in sulfate impacts on wild rice, and supports the gathering of more monitoring and research. However, the current applicable Minnesota water quality standard for sulfate in these waterbodies is 10 mg/L. The Final EIS would be strengthened by including a more detailed discussion addressing the following concerns:*
>
> - *An affirmative statement that the 10 mg/L sulfate criterion is applicable for the four water bodies;*
> - *A discussion of the past monitoring data and exceedance of the 10 mg/L sulfate standard.*

U.S. EPA, Comments on the NorthMet Project - Draft Environmental Impact Statement CEQ# 20090387 (Feb. 18, 2010), p. 15:

> ***Wild rice**. The DEIS does not clearly address whether the Minnesota water quality criterion of 10 mg/L for wild rice waters will apply to the project. The DEIS acknowledges that isolated patches of wild rice were found in the Upper Partridge River, a tributary of the St. Louis River . . . The DEIS concludes, however, that both the proposed action and the Mine Site Alternative would comply with all surface water quality standards along the Partridge River, though the project may cause sulfates to exceed 10 mg/L.*
>
> > ***Recommendation**: The revised/supplemental DEIS should clarify the application of the Minnesota wild rice sulfate water quality standards in Minn. R.Ch. 7050.0220 and 7050.0224, given that the DEIS acknowledges the presence of isolated patches of wild rice in the Upper Partridge River, and describe whether sulfates from the project will impact the St. Louis River. We recommend the revised/supplemental DEIS include the 10*

[1] Please contact Paula Maccabee at 651-646-8890, pmaccabee@justchangelaw.com for additional copied of materials.

ED_005586A_00004220-00006

mg/L sulfate number within the tables of lists of applicable standards and predicted water quality (Page 4.1-141) and include a discussion of how it applies to on-site and downstream waters potentially affected.

U.S. EPA Letter to Mr. Bakk and Mr. Dill (May 13, 2011)(Complete copy also attached)

As you know, H.F.I010 and S.F. 1029 propose to modify or suspend the current, federally-approved water quality standard for wild rice waters of 10 mglL, and H.F. 1010-3 (sec. 19, lines 41.15-41.20), specifically sets 50 mglL as the numeric criterion for sulfate in wild rice waters until a new standard is developed. To the extent that any legislation changes the EPA-approved water quality standards for Minnesota, such revised water quality standards must be submitted to EPA for review and approval pursuant to 33 U.S.C. §1313(c)(2)(A), Clean Water Act (CWA) §303(c)(2)(A), and are not effective for CWA purposes, including National Pollutant Discharge Elimination System (NPDES) permits, unless and until approved by EPA (see 40 C.F.R. § 131.21). Should Minnesota wish to submit these to EPA as changes to Minnesota's water quality standards, the federal regulations at 40 C.F.R. § 131.6 provide the submittal requirements. These include, among other things, the methods and analyses conducted to support the water quality standards revisions, including how the revised water quality criteria are sufficient to protect the designated uses (see generally 40 C.F.R. §131 Subpart B, and 40 C.F.R. §§ 131.11 and 131.20). Federal regulations require that criteria be protective of a state's designated uses and EPA's approval is based, among other factors, on determining that there is a scientifically defensible basis for finding that the criteria are sufficient to protect designated uses (see generally 40 C.F.R. §§ 131.5, 131.11, and 131.21). Absent such a showing, EPA would be unable to approve a revised criterion (see generally 40 C.F.R. §131.6(b)). (p. 1-2)

With respect to S.F. 1029, Sec. 62(t), lines 58.4 -58.12 and H.F.1010-3, lines 40.34-41.13, Sec. 18(e) (both of which generally prevent MPCA from including sulfate limitations in permits until a new standard is developed), EPA believes that the effect of these respective provisions will be to prevent MPCA from including water quality based effluent limitations (WQBELs) based on the federally approved criterion in permits issued under the state's authorized NPDES program. A state with a federally authorized NPDES program is required to issue permits that ensure the protection of federally approved water quality standards. See 33 U.S.C. §1311(b)(1)(C), CWA §301(b)(1)(C); and generally, 40 C.F.R. Part 123 (see especially 40 C.F.R. §123.25(a)(1)); and 40 C.F.R. §§122.4 and 122.44(d)(1). Where a state proposes to issue a permit that fails to apply, or to ensure compliance with, any applicable requirement, including WQBELs, EPA has the authority to review and to object to such permit issuance pursuant to its authority under 40 C.F.R. §123.44. . . Pursuant to 40 C.F.R. §122.4(c), the state may not issue a permit over EPA's objection. Where EPA has provided notice of an objection, and where the state has failed to revise the permit to meet EPA's objection, EPA has the authority to issue a federal permit for a potential discharger, pursuant to the authority in 40 C.F.R. §123.44(e). (p. 2)

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

ED_005586A_00004220-00007

program, pursuant to 33 U.S.C. §§1342(c)(2)-(3). (p. 2)

Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency and WaterLegacy, Court File No. 62-CY -10-11824 Hon. Margaret M. Marrinan, Findings of Fact, Conclusions of Law and Order for Judgment (May 10, 2012)

In 2010, the EPA, addressing the issue of sulfate discharge for the Keetac mine expansion and the proposed PolyMet NorthMet mining project, advised Defendant MPCA that the wild rice protection rule must be applied to limit that discharge in receiving waters. Both of those projects affected natural stands of wild rice, rather than agricultural irrigation for cultivated rice. The waters to which this sulfate limit applied included lakes, rivers and creeks not specifically listed as wild rice waters in Minn. R. 7050.0470, Subp. 1. (Finding 10, p. 5)

To determine whether sulfate dischargers are potentially interfering with attaining the wild rice sulfate standard, the MPCA reviews permit applications on a case-by-case basis. Where the data suggests that a discharge has high levels of sulfates upstream of a water identified as one potentially used for production of wild rice, the agency may request dischargers to conduct surveys to determine if the discharge is, in fact, upstream of a water used for production of wild rice. This authority derives from M.S. 115.03, subd. 3 (e) (7) which gives the agency the authority to require owners and operators of such discharge systems to do so. (Finding 12, p. 6)

The MDNR's list of waters where wild rice has been identified is not an exhaustive list of waters used for production of wild rice. Where a permit applicant discharges upstream of a water that is not on the MDNR list, but which has been identified as potentially producing wild rice, the MPCA has requested that the permit applicant conduct a survey of any wild rice stands in the receiving waters to help determine whether the receiving water is a water used for production of wild rice. (Finding 14, p. 6)

Plaintiff has not met its burden of proving that the MPCA's application of the wild rice sulfate rule conflicts with statutory authority or is otherwise not rationally related to the legislative goal of protecting the environment. MPCA's application of the wild rice sulfate rule is reasonably related to achieving the legitimate goal of protecting Minnesota's environment. (Conclusion of Law 6, p. 9)

The MPCA's application of the wild rice sulfate rule to protect waters with natural stands of wild rice is also consistent with a number of established legislative policies and statutory duties, among them the duty to ensure that the State of Minnesota maintains its responsibility to administer the federal Clean Water Act in Minnesota. (Conclusion of Law 10, p. 10)

The term "when the rice may be susceptible to damage by high sulfate levels" is straightforward and can be understood using plain language. If wild rice is at a point in its life cycle when sulfates will damage the plant, then the receiving water must not exceed 10 mg/L. Because the rule can be applied based on its plain language, it is not void for vagueness. The goal of the law is to protect production of wild rice in Minnesota. In view of that goal it is reasonable to conclude that the standard applies at a point in the wild rice life

ED_005586A_00004220-00008

cycle when sulfate is found to damage the plant. The rule is not void for vagueness. (Conclusion of Law 22, p. 14)

The fact that the MPCA does not specifically list every body of water to which the wild rice sulfate standard applies neither violates the Due Process clause of the Constitution nor does it exceed MPCA's statutory authority: neither the Constitution nor Minnesota or federal statutes require a state to list expressly every surface water to which a water quality standard applies. Such a requirement would be particularly absurd in a state such as Minnesota. (Conclusion of Law 23, p. 14)

There is no requirement in federal law for the state to list expressly every single water to which a water quality standard applies in order for the standard to apply. On the contrary, the federal Clean Water Act allows for application of water quality standards to water bodies that are implicated without being expressly listed on an individual basis. (Conclusion of Law 30, p. 16).

Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency and WaterLegacy, A12-0950 (Minn. Ct. App. December 17, 2012).

The agency adopted the Wild Rice Rule in 1973 to protect and support the growth of wild rice in Minnesota, and to comply with Clean Water Act requirements set by the U.S. Environmental Protection Agency. (p. 2)

We decline to review whether the agency's permitting decision was arbitrary or capricious, or exceeded its statutory authority, where the agency has made no final permitting decision or where the full administrative process has not been exhausted. . . Thus, we conclude that the Chamber cannot maintain an as-applied challenge to the Wild Rice Rule, and we affirm the district court's grant of summary judgment in favor of the agency and WaterLegacy to the extent it addressed an as-applied challenge. (pp. 8-9)

U.S. EPA, Decision Document for the Approval of Minnesota's 2012 Section 303(d) List (July 25, 2013)

Section 303(d) (1) of the CWA directs States to identify those waters within their jurisdiction for which effluent limitations required by Section 301 (b)(1)(A) and (B) are not stringent enough to implement any applicable water quality standard, and to establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters. The Section 303(d) listing requirement applies to waters impaired by point sources and/or nonpoint sources, pursuant to EP A's long-standing interpretation of Section 303(d). (p. 1)

EPA believes that it is reasonable for MPCA to delay in its assessment of water bodies against the sulfate WQS until the 2014 303(d) list. (p. 30)

ED_005586A_00004220-00009

CLEAN WATER ACT EXCERPTS

Clean Water Act, 33 U.S.C. § 1313(d)
(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision
(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.
(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

Clean Water Act, 33 U.S.C. § 1342(c)
(c)(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.
(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program.

Clean Water Act, 33 U.S.C. § 1319(a)(2)
(a)(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations . . . are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations . . . the Administrator shall enforce any permit condition or limitation with respect to any person—
(A) by issuing an order to comply with such condition or limitation, or
(B) by bringing a civil action under subsection (b) of this section.

ATTACHMENTS

"Counterpoint: The science is clear: Protect our wild rice," *Star Tribune* (February 11, 2015) (2 pages)

U.S. EPA Letter to Mr. Bakk and Mr. Dill (May 13, 2011) (2 pages)

Wild Rice Sulfate Standard Session Law, ch. 2, art 4, sect. 32 (2011) (2 pages)

40 C.F.R. § 123.63. Criteria for withdrawal of State programs. (2015) (2 pages)

ED_005586A_00004220-00010

StarTribune

Counterpoint: The science is clear: Protect our wild rice

Article by: Paula Maccabee
February 11, 2015 - 7:16 PM

Dennis Anderson • Star Tribune,

The Earth is not flat, there is no tooth fairy and sulfate limits are required to protect natural stands of wild rice.

A recent commentary on wild rice and pollution from an official of Minnesota Power ("For sulfate limits, stick to the science," Jan. 29) respected neither sulfate limits nor science. In order to defend a major paying customer for its coal-generated power, Minnesota Power misrepresented the impacts of decades of sulfate pollution from the U.S. Steel Minntac tailings disposal facility.

The evidence is clear that sulfate pollution from the Minntac facility has devastated downstream beds of natural wild rice in Minnesota's Little Sandy and Sandy lakes. There are decades of discharge-monitoring reports that document how sulfate pollution from the Minntac tailings facility (there is no other nearby sulfate source) has exceeded Minnesota's water quality standard by more than an order of magnitude.

Wild rice is Minnesota's state grain, an important tribal resource, and a vital plant to support aquatic life, ducks and mammals. The state has permanently lost tens of thousands of acres of this resource. Resource managers believe wild rice is in crisis.

Four years ago, with the support of the mining industry, some members of the Minnesota Legislature tried to eliminate the state's water quality standard that protects wild rice from sulfate pollution. However, the U.S. Environmental Protection Agency (EPA) stepped in to safeguard our water quality. The EPA explained that it is illegal under the federal Clean Water Act to weaken or remove a water quality standard unless there is good science showing the standard is not needed.

Minnesota then spent over $1 million to provide rigorous scientific research on whether our sulfate limit of 10 milligrams per liter (mg/L) is needed to protect natural stands of wild rice. State regulators hired the best scientists from the University of Minnesota and made sure that they could do their research objectively.

Based on this recent, targeted scientific research, the Minnesota Pollution Control Agency (MPCA) reached the following conclusions in February 2014:

• Sulfate is not directly toxic to wild rice. However, sulfate in the surface water can be converted by bacteria to sulfide in the

rooting zone of wild rice.

• Sulfide is toxic to wild rice.

• The 10 mg/L sulfate standard is needed and reasonable to protect wild rice production from sulfate-driven sulfide toxicity.

• The 10 mg/L wild rice sulfate standard should continue to apply to both lakes and streams

To add another layer of scientific protection from special-interest pressure to deregulate pollution, the MPCA had a panel of seven scientists from around the world review the wild rice sulfate research in detail. These scientists issued a final report in September 2014.

Although the wild rice peer review panel asked for more statistics to tease out sulfate interactions in the environment and told the MPCA that sulfide may be even more toxic than the agency had thought, the panel found Minnesota's research and regulation limiting sulfate to protect wild rice scientifically valid. The peer reviewers explained that, just as one must limit mercury to prevent the formation of toxic methylmercury, "sulfide is harmful, but sulfate is what has to be regulated."

Powerful interests can claim otherwise, but the scientific evidence shows that sulfate pollution must be controlled to protect natural wild rice.

Thankfully, if one believes in science, control over sulfate pollution is possible. Technology to treat polluted mine discharge has been used extensively across the United States. Wild rice and aquatic habitats can be protected if Minnesota regulators require water quality treatment at the Minntac tailings facility and other pollution sources.

We have the tools in our hands to prevent environmental degradation; now all we need is the courage to stick with the science.

Paula Maccabee is the advocacy director for WaterLegacy and serves on the MPCA Wild Rice Standards Study Advisory Committee.

© 2015 Star Tribune

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAY 13 2011

REPLY TO THE ATTENTION OF:
W-15J

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

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

Dear Mr. Bakk and Mr. Dill:

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

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

Recycled/Recyclable • Printed with Vegetable Oil Based Inks on 100% Recycled Paper (50% Postconsumer)

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

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

I hope you find this information helpful.

Sincerely,

for Tinka G. Hyde
Director, Water Division

Anita-
Please make copies for:
- Chris
- Robie
- Tom.
L.

MINNESOTA SLIP LAWS
ENACTED AT THE 2011 FIRST SPECIAL SESSION (2011-2012)

2011 MINNESOTA CHAPTER LAW 2

2011 MINNESOTA SENATE FILE NUMBER 3

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

. . .

ARTICLE 4

. . .

Section 32. WILD RICE RULEMAKING AND RESEARCH.

(a) Upon completion of the research referenced in paragraph (d), the commissioner of the Pollution Control Agency shall initiate a process to amend Minnesota Rules, chapter 7050. The amended rule shall:

(1) address water quality standards for waters containing natural beds of wild rice, as well as for irrigation waters used for the production of wild rice;

(2) designate each body of water, or specific portion thereof, to which wild rice water quality standards apply; and

(3) designate the specific times of year during which the standard applies.

Nothing in this paragraph shall prevent the Pollution Control Agency from applying the narrative standard for all class 2 waters established in Minnesota Rules, part 7050.0150, subpart 3.

(b) "Waters containing natural beds of wild rice" means waters where wild rice occurs naturally. Before designating waters containing natural beds of wild rice as waters subject to a standard, the commissioner of the Pollution Control Agency shall establish criteria for the waters after consultation with the Department of Natural Resources, Minnesota Indian tribes, and other interested parties and after public notice and comment. The criteria shall include, but not be limited to, history of wild rice harvests, minimum acreage, and wild rice density.

(c) Within 30 days of the effective date of this section, the commissioner of the Pollution Control Agency must create an advisory group to provide input to the commissioner on a protocol for scientific research to assess the impacts of sulfates and other substances on the growth of wild rice, review research results, and provide other advice on the development of future rule amendments to protect wild rice. The group must include representatives of tribal governments, municipal wastewater treatment facilities, industrial dischargers, wild rice harvesters, wild rice research experts, and citizen organizations.

(d) After receiving the advice of the advisory group under paragraph (c), consultation with the commissioner of natural resources, and review of all reasonably available and applicable scientific research on water quality and other environmental impacts on the growth of wild rice, the commissioner of the Pollution Control Agency shall adopt and implement a wild rice research plan using the money appropriated to contract with appropriate scientific experts. The commissioner shall periodically review the results of the research with the commissioner of natural resources and the advisory group.

(e) From the date of enactment until the rule amendment under paragraph (a) is finally adopted, to the extent allowable under the federal Clean Water Act or other federal laws, the Pollution Control Agency shall exercise its authority under federal and state laws and regulations to ensure, to the fullest extent possible, that no permittee is required to expend funds for design and implementation of sulfate treatment technologies. Nothing shall prevent the Pollution Control Agency from including in a schedule of compliance a requirement to monitor sulfate concentrations in discharges and, if appropriate, based on site-specific conditions, a requirement to implement a sulfate minimization plan to avoid or minimize sulfate concentrations during periods when wild rice may be susceptible to damage.

(f) If the commissioner of the Pollution Control Agency determines that amendments to Minnesota Rules are necessary to ensure that no permittee is required to expend funds for design and implementation of sulfate treatment technologies until after the rule amendment described in paragraph (a) is complete, the commissioner may use the good cause exemption under Minnesota Statutes, section 14.388, subdivision 1, clause (3), to adopt rules necessary to implement this section, and Minnesota Statutes, section 14.386, does not apply, except as provided in Minnesota Statutes, section 14.388.

(g) Upon completion of the rule amendment described in paragraph (a), the Pollution Control Agency shall, if necessary, modify the discharge limits in the affected wastewater discharge permits to reflect the new standards in accordance with state and federal regulations and shall exercise its powers to enter into schedules of compliance in the permits.

(h) By December 15, 2011, the commissioner of the Pollution Control Agency shall submit a report to the chairs and ranking minority members of the environment and natural resources committees of the house of representatives and senate on the status of implementation of this section. The report must include an estimated timeline for completion of the wild rice research plan and initiation and completion of the formal rulemaking process under Minnesota Statutes, chapter 14.

Note: Session law was presented to the Governor on July 19, 2011 and signed by the Governor on July 20,2011

ELECTRONIC CODE OF FEDERAL REGULATIONS

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

Title 40 → Chapter I → Subchapter D → Part 123 → Subpart D → §123.63

Title 40: Protection of Environment
PART 123—STATE PROGRAM REQUIREMENTS
Subpart D—Program Approval, Revision, and Withdrawal

---

§123.63 Criteria for withdrawal of State programs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EPA pursuant to 40 CFR part 132 into individual permits.

(b) [Reserved]

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

For questions or comments regarding e-CFR editorial content, features, or design, email ecfr@nara.gov.
For questions concerning e-CFR programming and delivery issues, email webteam@gpo.gov.