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May 28, 2014

Tinka Hyde, Water Division Director (Hyde.Tinka@EPA.gov)
United States Environmental Protection Agency, Region 5
77 W. Jackson Blvd.
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Paul Proto, Environmental Scientist (Proto.Paul@EPA.gov)
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77 W Jackson Blvd
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Dear Ms. Hyde, Mr. Proto:

WaterLegacy is a Minnesota non-profit organization formed to protect Minnesota's water resources and the communities that rely on them. We commented on the Minnesota Pollution Control Agency (MPCA) 2014 Impaired Waters List on February 10, 2014, and our comment letter and Exhibits A and C are attached. We are writing to ask that the U.S. Environmental Protection Agency (EPA) deny approval of the MPCA's 2014 Impaired Waters List pending MPCA's consideration of additional data regarding mercury impairments. We also request that the EPA recommend a timeline for the MPCA to provide a listing of wild rice impaired waters.

WaterLegacy asks that the EPA deny approval of the 2014 Impaired Waters List pending more thorough consideration of information regarding mercury in the water column and mercury in fish in the Partridge River, Embarrass River and Colby Lake. We believe that the rationale provided by the MPCA in rejecting the listing of these waters as mercury impaired waters is insufficient and does not consider all readily available water-quality related data.

We also believe that the MPCA has more than enough information to list at least all of the waters identified in the MPCA August 2013 spreadsheet (*See* Exhibit C, MPCA August 2013 Wild Rice Impairments spreadsheet) as waters used for the production of natural wild rice impaired due to sulfate water quality standard exceedance. We ask that the EPA advise the MPCA to propose listing wild rice impaired waters by August 2014 so that the public can comment and EPA can review Minnesota's complete 2014 Impaired Waters List by the close of the year.

Mercury Impaired Waters

WaterLegacy appreciates the MPCA's addition of Wynne Lake and Sabin Lake to its draft 2014 Impaired Waters List due to mercury impairments. However, WaterLegacy believes that the MPCA's rationale for rejecting proposed listing of the Embarrass River, the Partridge River and Colby Lake as mercury impaired waters is inconsistent with applicable regulations. The MPCA was required under law to assemble and analyze all existing and readily available water quality-related data.

WaterLegacy is puzzled by the MPCA's statement in its responses to our impaired waters comments that the Barr Engineering report *2010c* did not provide assessment of mercury in the Embarrass River. Barr *2010c* included 2009 sampling data showing average total mercury concentrations of 3.7 ng/L and 3.5 ng/L at sites PM12 and PM13 in the Embarrass River. Barr *2010c*, Table 1, p. 15. This data seems more than sufficient to demonstrate that the Embarrass River fails to meet the applicable Great Lakes mercury standard of 1.3 ng/L.

WaterLegacy is also troubled by the implication in the MPCA's response to comments that, if the public has not provided sufficient mercury sampling data for Colby Lake, the Partridge River and the Embarrass River, the Agency will not consider readily available data from other sources to decide whether to list these waters as impaired. The Clean Water Act and its implementing regulations do not entitle state agencies to assume blinders to avoid listing impaired waters.

Federal regulations require that states identify water-quality limited segments requiring waste load allocations, load allocations and total maximum daily loads. 40 C.F.R. §130.7. To identify and set priorities for water-quality limited segments, states must "assemble and evaluate all existing and readily available water quality-related data and information to develop the list." 40 C.F.R. §130.7 (b)(5). At a minimum "all existing and readily available water quality-related data and information" includes waters where dilution calculations or predictive models indicate nonattainment of applicable water quality standards and waters for which water quality problems have been reported by local, state, or federal agencies; or members of the public; or academic institutions. Organizations and groups should be actively solicited for research they may be conducting or reporting. 40 C.F.R. §130.7(b)(5).

Once members of the public had identified the Embarrass River, the Partridge River, Wynne Lake, Sabin Lake and Colby Lake as mercury impaired waters, the MPCA had an obligation to review all existing and readily available data, including data from discharge monitoring reports, data from the Minnesota Department of Natural Resources Mine Water Research Advisory Panel (MWRAP) research in the St. Louis River watershed, and any data collected by the Fond du Lac Band of the Lake Superior Chippewa or other Bands, including fish tissue as well as water column concentrations. We believe that additional data about mercury impairments in these waters should have been solicited by MPCA from MDNR, from tribal researchers, and from commenters as well as sought from its own files.

WaterLegacy has reviewed only a small portion of the MWRAP data sponsored by the Minnesota Department of Natural Resources, which includes the attached spreadsheet from J. Jeremiason's data. This spreadsheet, highlighted to call attention to data for the Embarrass River and Partridge River, contains total mercury data for the Embarrass River and Second Creek/Partridge River. The MWRAP data confirms mercury concentrations far above the 1.3 ng/L standard. We calculated the mean total mercury concentration from Jeremiason's 19 samples for the Embarrass River as 3.2 ng/L and the mean total mercury concentration from his 18 samples for Second Creek/Partridge River as 8.0 ng/L. (*See* Exhibit D, 2013 (MWRAP) Jeremiason Master Sample List).

WaterLegacy requests that the EPA deny approval of the 2014 Section 303(d) Impaired Waters List until the MPCA reviews all readily available data on the mercury impairments identified by the public. We believe that this review will further support the MPCA's proposal to list Wynne

Lake and Sabin Lake and will also result in the 2014 listing of the Embarrass River, Partridge River and Colby Lake as mercury impaired waters.

Sulfate Impaired Wild Rice Waters

WaterLegacy has requested for more than two years that wild rice waters impaired due to exceedance of the 10 mg/L sulfate standard be listed without delay on Minnesota's Section 303(d) Impaired Waters List. Documents received by WaterLegacy through the Minnesota Data Practices Act suggest that this year's delay in listing wild rice impaired waters until criteria for "waters used for the production of wild rice" are resolved was a response to industry pressure.

As reflected in our comments submitted on February 10, 2014, WaterLegacy agrees with the statement made in the MPCA's letter to U.S. Steel Corporation on November 8, 2103 that the MPCA is authorized to determine whether a water body is an impaired water used for the production of wild rice on the basis of information developed about the particular water. (*See* Exhibit A, MPCA Letter to USS, November 8, 2013). The 2011 legislation pertaining to rulemaking review of the wild rice sulfate standard does not affect the MPCA's obligation under the Clean Water Act to designate and protect impaired waters.

There is also no requirement in law that regulated parties must agree to the methodology used to list impaired waters or that the desire to amend definitions through rulemaking supersedes a state's obligation to designate impaired waters. WaterLegacy is concerned that the MPCA's 2014 listing of wild rice impaired waters is being held hostage until a rulemaking definition of "waters used for the production of wild rice" has been negotiated.

WaterLegacy believes that the assessment criteria developed by the MPCA for its preliminary listing of wild rice impaired waters are under-inclusive. But, Minnesota must move forward and, for the first time in its history, demonstrate a willingness to consider sulfate-polluted waters as wild rice impaired waters. We urge the EPA to require that the MPCA proceed without further delay to list as wild rice impaired waters at least the "low-hanging fruit" identified in August 2013. These wild rice impaired waters include:

Embarrass River (Embarrass Lake to St. Louis River)
Partridge River (Headwaters to S. Louis River)
Sandy River (Headwaters - Sandy Lake to Pike River)
St. Louis River (Oliver Bridge to Pokegama River)
St. Louis River (Mission Creek to Oliver Bridge)
Bostick Creek (Headwaters to Lake of the Woods)
County Ditch 12 (Headwaters to T113 R36W S8 north line)
Rice Creek (Rice Lake to Elk River)
Long Prairie River (Fish Trap Creek to Crow Wing River)
Rice Creek (Headwaters to Maple River)
Chippewa River (Watson Sag to Minnesota River)
Chippewa River (Unnamed Creek to E. Br. Chippewa River)
Chippewa River (E. Br. Chippewa River to Shakopee Creek)
Chippewa River (Cottonwood Creek to Dry Weather Creek)
Chippewa River (Stowe Lake to Little Chippewa river)
Cannon River (Pine Creek to Belle Creek)

Cannon River (Headwaters to Cannon Lake)
Cannon River (Byllesby Dam to Little Cannon River)
Cannon River (Belle Creek to split near mouth)
Cedar Island Lake (North Portion)
Cedar Island Lake (South Portion)
Fourth Lake
Esquagama Lake
East Vermillion Lake
Trout Lake
Elizabeth Lake (Main Basin)
Swan Lake (West Bay)
Swan Lake (Main Basin)
Preston Lake
Embarrass Lake
Lady Slipper Lake
Monongalia Lake (Main Basin)
Monongalia Lake (Middle Fork Crow)
Crow River Mill Pond (East)
Hay Lake
Big Stone Lake
Lac Qui Parle (NW Bay)
Lac Qui Parle (SE Bay)
Mina Lake
Pearl Lake
Sandy Lake
Little Sandy Lake
Marsh Lake
Lillian Lake
Lobster Lake
Sturgeon Lake
Long Lake

WaterLegacy has suggested in our February 2014 comments that the MPCA also include in the 2014 Impaired Waters List several waters identified in the PolyMet SDEIS as wild rice waters with excessive sulfates. Based on data in Table 4.2.2-3 on page 4-37 of the SDEIS, these include: Second Creek, Sabin Lake, and Wynne Lake.

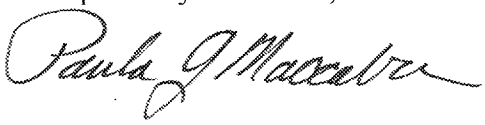
WaterLegacy believes this above list would reflect a very limited portion of Minnesota's wild rice impaired waters. However, the listing process is intended to be iterative, and we would support continued rigorous analysis to identify impairments, control sulfate releases and restore conditions that comply with the numeric and narrative water quality standards that were enacted in Minnesota Rules Chapter 7050.0224, subparts 1 and 2 to protect natural stands of wild rice.

Conclusion

For the reasons explained above, WaterLegacy requests that the EPA deny approval of Minnesota's partial 2014 Impaired Waters List until the MPCA has considered the full range of readily available data regarding mercury impairments in the Embarrass River, Partridge River

and Colby Lake. We also request that EPA advise the MPCA to proceed without further delay to identify wild rice waters impaired due to sulfate exceedances. An August 2014 deadline for the MPCA's revised proposal on mercury impairments and the MPCA's proposal of wild rice impaired waters is suggested to ensure that Minnesota can propose, the public can comment, and the EPA can review the state's complete impaired waters list before the end of 2014.

Respectfully submitted,



Paula Goodman Maccabee
Advocacy Director/Counsel for WaterLegacy

Enclosures: February 2014 WaterLegacy Comment, Exhibit A, Exhibit C
Exhibit D 2013 MWRAP Data Spreadsheet