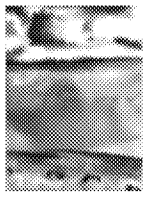

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August 26, 2016

Tinka Hyde, Region 5 Water Quality Division Director
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Mail Code: WW-16J
Chicago, IL 60604-3507

Sent Electronically

RE: Minnesota 2014 and 2016 Draft Clean Water Act Section 303(d) Impaired Waters List

Dear Ms. Hyde,

This letter and its attachments, including WaterLegacy's comment letter to the Minnesota Pollution Control Agency (MPCA) regarding Minnesota's 2016 Draft Section 303(d) Impaired Water List, and Exhibits,[1] are submitted on behalf of WaterLegacy, a Minnesota non-profit organization formed to protect Minnesota's water resources and the communities that rely on them.

As explained in detail in our enclosed WL 2016 Section 303(d) Comment, WaterLegacy has requested since 2012 that MPCA include wild rice/sulfate impaired waters in Minnesota's Section 303(d) list. We've also requested MPCA to list, analyze and study mercury-impaired waters in the Lake Superior Basin; opposed the MPCA's 2013 derailment of the St. Louis River mercury Total Maximum Daily Load (TMDL) study and urged MPCA to resume this TMDL study;[2] and requested that the U. S. Environmental Protection Agency (EPA) adopt rules that would provide Indian tribes with the authority to list impaired waters and implement the TMDL program for reservation waters.[3]

WaterLegacy understands that the EPA has yet neither approved nor disapproved Minnesota's 2014 Draft Section 303(d) Impaired Waters List. The most recent communication from EPA to the MPCA regarding the 2014 Section 303(d) list stated that EPA would complete its review of Minnesota's 303(d) list pursuant to 40 C.F.R. §130.7(d)(2) "upon submittal of the wild rice addendum."[4]

As the EPA is now well aware, in 2015 the Minnesota Legislature prohibited the MPCA from listing wild rice/sulfate impaired waters unless and until amendments to Minnesota's existing sulfate standard of 10 milligrams per liter in wild rice waters "take effect."[5] Even if such

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[1] WaterLegacy's August 26, 2016 Comment on Minnesota 2016 Draft Section 303(d) Impaired Waters List and Exhibits (hereinafter "WL 2016 Section 303(d) Comment") are attached without a letter designation.
[2] See the April 5, 2013 email from WaterLegacy to EPA Region 5 Regional Counsel concerning the MPCA's withdrawal from the St. Louis River mercury TMDL process. (Attachment A)
[3] WaterLegacy's September 5, 2014 Comment on the Clean Water Act, Tribal Eligibility to Administer Regulatory Programs and Streamlining Section 518(e) Treatment as State is enclosed as Attachment B. In 2016, WaterLegacy supported citizen engagement favoring tribal Section 303(d) authority.
[4] See Exhibit 8 to WaterLegacy's attached WL 2016 Section 303(d) Comment.
[5] See 2015 Minn. Laws 1st Spec. Sess. ch. 4, art. 4, §136(a)(2) included in Exhibit 9 to WaterLegacy's attached WL 2016 Section 303(d) Comment.

amending rules were to be adopted by the MPCA, they would not take effect unless approved by the EPA and, potentially, upheld in litigation. Until that time, whenever it may occur, the MPCA is prohibited from providing the EPA with the "wild rice addendum" promised during the course of EPA's review of Minnesota's 2014 Section 303(d) list. The August 12, 2016 statement from the Minnesota Attorney General confirms that the MPCA does not have full or unrestricted authority to perform its obligations under the Clean Water Act to the extent that they require application of Minnesota's existing wild rice sulfate standard.[6]

The EPA identified Minnesota's need to list wild rice/sulfate impaired waters in its review of Minnesota's 2012 Section 303(d) list. In 2014, the EPA provided Minnesota with additional time to rectify the omission from its Section 303(d) of wild rice/sulfate impaired waters. The deficiency in Minnesota's 2014 Section 303(d) list is clear. No wild rice/sulfate impairments are listed. The MPCA, the Minnesota Legislature and the Minnesota Attorney General have all confirmed that no such list or "addendum" is forthcoming. The MPCA does not now have and will not have in the foreseeable future the authority to list wild rice/sulfate impaired waters under Minnesota's existing federally-approved wild rice sulfate standard.

The Clean Water Act, EPA's application of its own regulations and case law all confirm that existing water quality standards must be used to list a state's impaired waters. As the Eight Circuit Court of Appeals explained in *Thomas v. Jackson*, 581 F. 3d 658, 668-669 (8th Cir. 2009),

> The EPA counters that applicable water quality standards remain in effect until the new standards are approved. See 40 C.F.R. § 131.21(e) ("A State or authorized Tribe's applicable water quality standard for purposes of the Act remains the applicable standard until EPA approves a change, deletion, or addition to that water quality standard, or until EPA promulgates a more stringent water quality standard."). . . we defer to the EPA's reasonable application of its own regulations. We also note that Plaintiffs' suggestion could be counterproductive, as waiting for revisions to the standards would result in continued delays in producing any § 303(d) list. Concerns that a particular list will be based on imperfect, though approved, standards are mitigated by the periodic nature of the list.

The EPA is obligated under the Clean Water Act and implementing regulations to disapprove a State's deficient impaired waters submission within 30 days. 33 U.S.C. §1313(d)(2); 40 C.F.R. §130.7(d)(2). Even if the EPA may have once held out hope that Minnesota would submit a "wild rice addendum" to the 2014 Section 303(d) list despite MPCA's years of delay, the passage of Minnesota's "Wild Rice Water Quality Standards" Session Law in 2015 and the Minnesota Attorney General Statement sent to EPA on August 12, 2016 have now obliterated any remaining whisper of that hope. Federal action can wait no longer.

On this record, the EPA must immediately disapprove Minnesota's 2014 Draft Section 303(d) submittal. Within 30 days after that disapproval, under the Clean Water Act and implementing regulations, the EPA must promulgate its own list of Minnesota wild rice/sulfate impaired waters

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[6] Minnesota Attorney General Statement Regarding MPCA's Legal Authority, August 12, 2016, available at EPA, *NPDES Petition for Program Withdrawal in Minnesota*, https://www.epa.gov/mn/npdes-petition-program-withdrawal-minnesota.

and provide notice and an opportunity for comment on that list. 33 U.S.C. §1313(d)(2); 40 C.F.R. §130.7(d)(2).

States have a mandatory duty under the Clean Water Act to identify water quality-limited segments and set TMDLs for them, and "the EPA also has a nondiscretionary duty to ensure the state's compliance with these terms, or to initiate its own TMDLs process if [a State] fails to do so." *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).

The EPA must disapprove a state listing of water quality-limited segments that fails to meet the requirements of the Clean Water Act and implementing regulations. In response to EPA's claim that it had "no duty to reach a particular result" in reviewing a State's Section 303(d) list, the court in *American Canoe Ass'n v. U.S. EPA*, 30 F. Supp. 2d 908, 918 (E.D. Va. 1998), held,

> EPA is simply wrong. EPA's own regulations state that the "Administrator shall approve a list developed under [40 C.F.R.] § 130.7(b) that is submitted after the effective date of this rule *only if* it meets the requirements of § 130.7(b)." 40 C.F.R. § 130.7(d)(2) (emphasis added). Section 130.7(b) sets out the requirements for state identification of water-quality limited segments still requiring TMDLs--in other words, § 303(d) lists.

Minnesota's Section 303(d) list fails to meet federal requirements that all water quality-limited segments that don't meet water quality standards or that don't protect fish and wildlife[7] must be listed, and the requirement that all existing and readily available water quality-related data and information be used to develop the impaired waters list. 40 C.F.R. §130.7(b)(1)-(5). Minnesota has been required for decades to apply the existing 10 mg/L sulfate limit to list wild rice/sulfate impaired waters and implement TMDLs to remedy these impairments. EPA must now step in to ensure that Minnesota complies with Section 303(d) of the Clean Water Act and its implementing regulations.

WaterLegacy suggests that the MPCA's August 2013 preliminary list of wild rice impaired waters may serve as a starting point for the EPA to list wild rice/sulfate impaired waters in the State of Minnesota.[8] Tribal consultation and readily available data on ambient sulfate standards in wild rice waters provided to the MPCA in response to the 2013 solicitation for wild rice/sulfate assessments[9] should allow prompt listing of wild rice/sulfate impaired waters. In compliance with the law, we request that EPA promulgate its list of Minnesota wild rice/sulfate impaired waters within 30 days of disapproving Minnesota's 2014 Draft Section 303(d) list.

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[7] Minnesota's wild rice sulfate water quality standard protects wildlife pursuant to Minnesota Rule 7050.0224, Subp. 1. *See* the attached Order of Judge Marrinan granting summary judgment to uphold the wild rice sulfate standard, "The rationale underlying the Wild Rice Rule (Minn. R. 7050.0224, subp. 2) is found in the subparagraph preceding it: since wild rice is a food source for both wildlife and humans, the quality of the waters and the aquatic habitat necessary to support its propagation and maintenance must not be materially impaired or degraded." *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 2012 Minn. Dist. LEXIS 194 (Minn. D. C. 2nd Jud. Dist., May 12, 2010), slip op. 13, *aff'd* 2012 Minn. App. Unpub. LEXIS 1199 (Minn. Ct. App., Dec. 17, 2012), Attachment C.

[8] Provided in Exhibits 3, 4 and 9 to WaterLegacy's attached WL 2016 Section 303(d) Comment.

[9] Attachment D contains proposals and summaries prepared by the MPCA for the Wild Rice Advisory Committee soliciting data to list wild rice/sulfate impaired waters. This wild rice and sulfate data, which was posted on the MPCA website at http://www.pca.state.mn.us/ktqh1083 in 2013, is no longer available online.

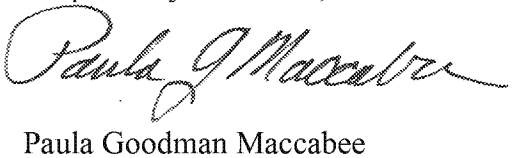
WaterLegacy also requests that the EPA review Minnesota's 2016 Draft Section 303(d) list in light of EPA's disapproval of the 2014 Draft Section 303(d) list. Minnesota's 2016 list should be partially approved so that new impaired waters listings, including mercury impairments in the Lake Superior Basin, become effective immediately, but disapproved to the extent it fails to list wild rice/sulfate impaired waters. The EPA, in issuing this partial approval, should specifically state that wild rice/sulfate impaired waters promulgated by the EPA as a result of the disapproval of Minnesota's 2014 Draft Section 303(d) list will become part of Minnesota's approved 2016 Section 303(d) list as soon as EPA's review process is completed.

WaterLegacy would further request that the EPA begin an inquiry regarding MPCA's delays in application of the TMDL program to rectify mercury impairments that pose serious health risks in the Lake Superior Basin. The EPA should require that the MPCA demonstrate, by the time of Minnesota's 2018 Draft Section 303(d) impaired waters listing, that it has resumed the St. Louis River mercury TMDL, has set an accelerated target date to complete the load allocation process for the St. Louis River watershed, and has prioritized TMDL program completion to prevent further bioaccumulation of toxic methylmercury in fish throughout the Lake Superior Basin.

WaterLegacy would finally request that EPA Region 5 leadership advocate for prompt final adoption of the proposed rule on "Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act" published in the Federal Register this past January. 81 FR 2791 (Jan. 19, 2016). Adoption of this rule would help address the downstream threats to tribal health and welfare resulting from water quality impairments, including mercury impairments in the St. Louis River watershed.

WaterLegacy appreciates the EPA's continuing oversight under the Clean Water Act and its implementing regulations to protect Minnesota fish, wildlife and human health and to prevent violations of Minnesota's federally-approved water quality standards. Applicable laws, policies and precedents require the EPA to act now to identify and restore Minnesota's impaired waters.

Respectfully submitted,



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Enclosures

cc: Peter Swenson, EPA Region 5, Wetlands and Watersheds Branch Chief
Paul Proto, EPA Region 5, Watersheds Section
Barbara Wester, EPA Region 5, Regional Counsel