



**Paula Goodman Maccabee, Esq.**

*Just Change Law Offices*

1961 Selby Ave., St. Paul, Minnesota 55104, pmaccabee@justchangelaw.com

Ph: 651-646-8890, Fax: 651-646-5754, Cell 651-775-7128

<http://justchangelaw.com>

January 22, 2018

Miranda Nichols ([Miranda.nichols@state.mn.us](mailto:Miranda.nichols@state.mn.us))

Minnesota Pollution Control Agency

520 Lafayette Road North

St. Paul, Minnesota 55155

RE: Minnesota 2018 Draft Clean Water Act Section 303(d) Impaired Waters List

Dear Ms. Nichols,

The following comments on Minnesota's 2018 Draft Impaired Waters Clean Water Act Section 303(d) List are submitted on behalf of WaterLegacy, a non-profit organization formed to protect Minnesota waters and the communities that rely on them.

WaterLegacy's comments focus on a singular, but important aspect of the Minnesota Pollution Control Agency's (MPCA) responsibility under the Clean Water Act Section 303(d) program. *That is the MPCA's failure to list even a single wild rice water impaired due to sulfate pollution exceeding Minnesota's existing wild rice sulfate water quality standard.*

WaterLegacy has commented to the MPCA since 2012 and has expressed our concerns to the U. S. Environmental Protection Agency (EPA) since 2014 regarding the MPCA's failure to list impaired wild rice waters, despite ample evidence that many Minnesota wild rice waters have sulfate levels in excess of the 10 milligrams per liter (mg/L) water quality standard,<sup>1</sup> including waters where wild rice has been significantly impaired by discharge of high levels of sulfate in wastewater. We have consistently maintained that Minnesota's failure to list impaired wild rice waters violates the Clean Water Act and that the EPA is obligated under the Act<sup>2</sup> to deny approval of Minnesota's draft impaired waters list to the extent that it excludes wild rice waters.

Rather than repeat WaterLegacy's legal and factual arguments yet another time, please find attached with this letter and incorporated herein the following documents:

- 2012-2-20 WaterLegacy Comment Letter to H. Markus, MPCA, regarding Minnesota Draft 2012 List of Impaired Waters (2 pages)
- 2014-2-10 WaterLegacy Comment Letter to M. Nichols, MPCA, Regarding Minnesota Draft 2014 Impaired Waters List with Exhibits (46 pages)
- 2014-5-28 WaterLegacy Letter to T. Hyde and P. Proto, EPA, Regarding Minnesota Draft 2014 Impaired Waters List with Exhibits (20 pages).

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<sup>1</sup> Minn. R. 7050.0224, Subp. 2.

<sup>2</sup> 33 U.S.C. §1313(d)(2); 40 C.F.R. §130.7(d)(2).

- 2016-8-26 WaterLegacy Comment Letter to M. Nichols, MPCA, Regarding Minnesota 2016 Draft Clean Water Act Impaired Waters List with Exhibits (137 pages)
- 2016-8-26 WaterLegacy Letter to T. Hyde, EPA, Regarding Minnesota 2014 and 2016 Draft Clean Water Act Impaired Waters List with Attachments (27 pages).

For the Minnesota Legislature and, apparently, the MPCA as well, it is an inconvenient truth that, since 1973, Minnesota had had a water quality standard that limits sulfate in waters where wild rice is present to 10 mg/L.<sup>3</sup>

It seems to be equally inconvenient to regulators that a State “has a mandatory duty under the Clean Water Act to identify water quality-limited segments and set TMDLs for them. 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.”<sup>4</sup>

Federal law requires that existing and authorized water quality standards must be applied to produce its §303(d) impaired waters list, since “waiting for revisions to the standards would result in continued delays in producing any 303(d) list.”<sup>5</sup> That is precisely what has happened in Minnesota, where powerful interests have opposed the application of Minnesota’s existing wild rice sulfate water quality standard to determine impaired waters and begin the restoration of water quality to preserve the abundance and sustainability of natural wild rice.

Recent reports of Administrative Law Judge (ALJ) LauraSue Schlatter and of the Chief ALJ<sup>6</sup> underscore that Minnesota’s wild rice sulfate water quality standard is the existing and authorized standard that must be applied to produce Minnesota’s §303(d) impaired waters list. The ALJ Report concluded that the proposed repeal of Minnesota’s existing wild rice sulfate standard was unreasonable and violated the Clean Water Act:

The Administrative Law Judge DISAPPROVES the proposed repeal of the 10 mg/L sulfate standard at Minn. R. 7050.0220, subps. 3a, 4a, 5a, 6a and Minn. R. 7050.0224, subp. 2, due to the Agency’s failure to establish the reasonableness of the repeal, and because the repeal conflicts with the requirements 33 U.S.C. § 1313(c), 40 C.F.R. § 131.10(b) (2015) and Minn. R. 7050.0155 (2017).<sup>7</sup>

The Chief ALJ specifically concurred with “with all disapprovals contained in the Report of the Administrative Law Judge dated January 9, 2018,” including the MPCA’s proposals to change Minnesota rules to repeal the 10 mg/L wild rice sulfate standard.<sup>8</sup>

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<sup>3</sup> See Minn. R. 7050.0224, Subp. 2; Minn. R. 7050.0220, Subparts 3a (31), 4a (31), 5a (19), 6a (14).

<sup>4</sup> *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).

<sup>5</sup> *Thomas v. Jackson*, 581 F. 3d 658, 668 (8th Cir. 2009).

<sup>6</sup> *In the Matter of the Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Rivers*, OAH 80-9003-34519 Revisor R-4324, Report of the Administrative Law Judge, Jan. 9, 2018 (“ALJ Wild Rice Standard Report”), and Report of the Chief Administrative Law Judge, Jan. 11, 2018 (“Chief ALJ Wild Rice Standard Report”), is attached with these comments.

<sup>7</sup> *Id.*, ALJ Wild Rice Standard Report, p. 5.

<sup>8</sup> *Id.*, Chief ALJ Wild Rice Standard Report, p. 1, citing proposed changes to Minn. R. 7050.0224, Subp. 2; Minn. R. 7050.0220, Subparts 3a, 4a, 5a, 6a.

Based on the arguments and evidence consistently presented by WaterLegacy during the past six years and based on the recent ALJ Report confirming that the 10 mg/L sulfate standard is the existing and authorized water quality standard that must be applied under the Clean Water Act, WaterLegacy once more requests that the MPCA revise its 2018 Clean Water Act Section 303(d) draft Impaired Waters List to list wild rice waters impaired due to failure to meet Minnesota's wild rice sulfate water quality standard.

Please do not hesitate to contact me if you have any questions regarding WaterLegacy's comments on Minnesota's draft 2018 Impaired Waters List or its attachments.

Sincerely yours,

A handwritten signature in cursive script that reads "Paula J. Maccabee".

Paula Goodman Maccabee  
Advocacy Director and Counsel for WaterLegacy

Enclosures

cc: Barbara Wester, EPA Region 5  
Paul Proto, EPA Region 5