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

Katrina Kessler, Commissioner
Minnesota Pollution Control Agency
520 Lafayette Road North
Saint Paul, Minnesota 55155-4194

Re: Minnesota's laws revising the Minnesota Pollution Control Agency's (MPCA) authority to regulate sulfate in NPDES permits

Dear Ms. Kessler:

I am writing regarding the U.S. Environmental Protection Agency's (EPA) review of two Minnesota session laws which, among other effects, impact MPCA's authority to include sulfate controls in National Pollutant Discharge Elimination System (NPDES) permits for discharges into wild rice production waters. Based on our review, we have determined that the session laws constitute a non-substantial change to Minnesota's NPDES program and are inconsistent with the Clean Water Act (CWA). EPA therefore disapproves the program revision affected by these laws as an improper modification to MPCA's authority to implement the NPDES program.

EPA has authority to review statutory or regulatory modifications of a state NPDES program under 40 C.F.R. § 123.62(a), which provides that EPA may initiate a program revision when necessary, including when the controlling state statutory or regulatory authority is modified or supplemented. Our review focused on two Minnesota laws[1]: the "2015 Sulfate Law," Minn. Laws 2015, 1st Spec. Sess., Chapter 4, Article 4, Section 136 at (a)(1)(i)[2] [hereafter 2015 Sulfate Law]; and the "2016 Sulfate Effluent Compliance Law," Minn. Laws 2016, Chapter 165, Section 1 at (a) [hereafter 2016 Sulfate Law]. The details of our review are found in Enclosure A. EPA appreciates Minnesota's assistance with our review, including the Minnesota Attorney General's August 12, 2016 statement (*see* Enclosure B) and a February 11, 2021 meeting between EPA and MPCA.

As described in Enclosure A, our review found that the 2015 Sulfate Law and 2016 Sulfate Law: 1) limited MPCA's ability to include sulfate water quality-based effluent limits in NPDES permits that are required to comply with Minnesota's federally-approved sulfate water quality standard (WQS); and 2) invalidated sulfate effluent limits in any existing state permits,

[1] EPA did not review a third similar 2011 Minnesota law, Minn. Laws 2011, 1st Spec. Sess., Chapter 2, Article 4, Section 32 at (e), because that law's curtailment of sulfate controls in permits was limited to the "extent allowable under the Clean Water Act," and thus does not appear to have modified Minnesota's approved NPDES program.
[2] EPA's review and its findings in this letter are limited to the 2015 law's prohibition on permittee expenditures related to sulfate and do not extend to the remainder of the law which was not related to the Minnesota's approved CWA 402 program. We note that the 2015 Sulfate Law was amended by 2017 Minn. Laws Chapter 93, Article 2, Section 149 at (c) but not the clause reviewed by EPA.

respectively. Because the session laws both limit MPCA's authority to implement its approved NPDES program and improperly modify a facility's existing permit in contravention of the CWA, they constitute an improper modification to MPCA's authority to implement the NPDES program. 40 C.F.R. § 123.62(b)(3). As a result, the effluent limits and permit compliance schedules invalidated by the 2016 Sulfate Law remain subject to any federal enforcement and citizen action as provided for under the CWA. *See* 33 U.S.C. § 1319; 33 U.S.C. § 1365(a)(1).

Accordingly, EPA expects that MPCA's NPDES permits will include effluent limitations to meet all federally-approved WQS as required by the CWA, federal regulations, and EPA-approved Minnesota laws and rules. To this end, EPA urges MPCA to work with State lawmakers in resolving this matter.

Please contact me if you wish to discuss this matter, or your Assistant Commissioner for Water Policy and Agriculture can contact Tera Fong, Water Division Director, at fong.tera@epa.gov or (312) 886-6735.

Sincerely,

DEBRA SHORE

Digitally signed by DEBRA SHORE
Date: 2022.02.16 15:44:28 -06'00'

Debra Shore
Regional Administrator & Great Lakes National Program Manager

Enclosures

Enclosure A: A Review of Two Minnesota Sulfate Session Laws

The Clean Water Act (CWA) and federal regulations require states with approved National Pollutant Discharge Elimination System (NPDES) programs to maintain the authority needed to administer their programs in accordance with the CWA at all times. *See* 33 U.S.C. § 1342(c)(2); 40 C.F.R. § 123.63(a). Two Minnesota sulfate session laws -- Minn. Laws 2015, 1st Spec. Sess., Chapter 4, Article 4, Section 136 at (a)(1)(i) [hereafter 2015 Sulfate Law] and Minn. Laws 2016, Chapter 165, Section 1 at (a) [hereafter 2016 Sulfate Law] -- curtail the implementation of Minnesota's sulfate water quality standard (WQS) for wild rice producing waters in state issued NPDES permits. Because these two laws are not consistent with the CWA and its implementing regulations, they constitute an improper modification of Minnesota's approved NPDES program.

The CWA requires states to adopt WQSs subject to approval by the U.S. Environmental Protection Agency (EPA), which remain in effect unless and until EPA approves their modification. 33 U.S.C. § 1313(a) and (c); 40 C.F.R. § 131.2l(a) and (e). Consistent with these authorities, Minnesota promulgated a sulfate WQS of 10 milligrams per liter (mg/L) applicable to waters utilized for the production of wild rice. *See* Minn. R. 7050.0224, subp. 2. Subsequently, EPA approved Minnesota's sulfate WQS. *See* 42 *Fed. Reg*. 56786, 56789 (Sept. 9, 1977). The CWA requires that NPDES permits include any requirements necessary to achieve the state's approved WQS. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1) and (5), made applicable to state programs at 40 C.F.R. § 123.25(a)(15).

Minnesota's 2015 Sulfate Law and 2016 Sulfate Law revise the Minnesota Pollution Control Agency's (MPCA) authority to issue NPDES permits that are protective of Minnesota's federally approved sulfate WQS in at least two significant ways.

First, the 2015 Sulfate Law prevents MPCA from issuing permits that are protective of Minnesota's applicable federally approved sulfate WQS. This law provides in pertinent part, that "the agency shall not require [NPDES] permittees to expend money for design or implementation of sulfate treatment technologies or other forms of sulfate mitigation." Minn. Laws 2015, 1st Spec. Sess., Chapter 4, Article 4, Section 136 at (a)(1)(i). This law prevents MPCA from including effluent limits in NPDES permits that are needed to achieve Minnesota's federally approved sulfate WQS as required by 40 C.F.R. § 122.44(d)(1), on the basis that MPCA "has determined that the Wild Rice Standard is in need of substantial revision and therefore imprudent to apply."[1] Minnesota, however, has not revised the sulfate WQS and the sulfate WQS remains effective for CWA permitting purposes. Therefore, Minnesota's 2015 Sulfate Law is effectively a legislative limit upon MPCA's authority to issue NPDES permits that include effluent limits necessary to meet WQSs, 33 U.S.C. § 1311(b)(1)(C).

[1] *See* Letter from Lori Swanson, Minnesota Attorney General, to Tinka Hyde, Director, Water Division Region 5, August 12, 2016 [found at Enclosure B], at 4: "MPCA believes that it would be unreasonable for it to enforce the sulfate standard in existing permits because requiring compliance with the Standard would result in the expenditure of resources that may ultimately prove unnecessary. MPCA has advised EPA that it is 'pursuing options to reissue delayed mining NPDES permits quickly once there is a revised Wild Rice Standard [citation omitted]. . . . The above-described legislative restriction is strictly limited to the Wild Rice Standard, does not affect other water quality standards or MPCA's authority to enforce those standards, and is only in place until no later than January 15, 2018. In any event, as discussed above, MPCA has determined that the Wild Rice Standard is in need of substantial revision and therefore imprudent to apply."

Second, the 2016 Sulfate Law invalidates sulfate effluent limits in existing NPDES permits. In particular, the 2016 Sulfate Law provides that for NPDES permits meeting certain requirements:

> (1) the final sulfate limits resulting from implementation of the wild rice water quality standard in Minnesota Rules, part 7050.0224, subpart 2, are no longer valid; and
>
> (2) any compliance schedule permit conditions related to those final limits are no longer valid.

Minn. Laws 2016, Chapter 165, Section 1 at (a). According to the Minnesota Attorney General, the 2016 Sulfate Effluent Compliance Law aimed to remove effluent limits and a related schedule of compliance from the U.S. Steel Keetac facility.[1] Thus the 2016 Sulfate Law invalidated both the sulfate water quality-based effluent limits and compliance schedule related to those limits in contravention of the CWA and federal regulations. These include those federal requirements that NPDES permits include effluent limits necessary to achieve federally approved WQSs and incorporate schedules of compliance requirements where authorized under federal and state law. *See* 40 C.F.R. §§ 122.44(d)(1) and (5).[2] The 2016 law also circumvents federal regulations for modifying or revoking and reissuing permits (40 C.F.R. § 124.5(c)); public notice and comment procedures for permits (40 C.F.R. § 124.10); EPA's permit review (40 C.F.R. § 123.44); and the *Memorandum of Agreement between EPA and MPCA for the Approval of the State NPDES Permit Program*.[3]

Therefore, the 2016 Sulfate Law is a legislative limit upon MPCA's authority to issue NPDES permits that include effluent limits necessary to meet WQSs, 33 U.S.C. § 1311(b)(1)(C), and to implement permitting procedures consistent with the CWA, 33 U.S.C. § 1342(b)(3) and (4). Accordingly, the NPDES permit effluent limits and compliance schedules, invalidated by that law, remain subject to any federal enforcement and citizen action as provided for under the CWA. *See* 33 U.S.C. § 1319; 33 U.S.C. § 1365(a)(1).

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[1] Letter from Lori Swanson, Attorney General, State of Minnesota, to Tinka Hyde, Division Director, U.S. EPA (August 12, 2016).

[2] 40 C.F.R. 124.5(c) (*Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA)*).
(1) If the Director tentatively decides to modify or revoke and reissue a permit under 40 CFR 122.62 (NPDES), 144.39 (UIC), 233.14 (404), or 270.41 (other than § 270.41(b)(3)) or § 270.42(c) (RCRA), he or she shall prepare a draft permit under § 124.6 incorporating the proposed changes. The Director may request additional information and, in the case of a modified permit, may require the submission of an updated application. In the case of revoked and reissued permits, other than under 40 CFR 270.41(b)(3), the Director shall require the submission of a new application. In the case of revoked and reissued permits under 40 CFR 270.41(b)(3), the Director and the permittee shall comply with the appropriate requirements in 40 CFR part 124, subpart G for RCRA standardized permits.
(2) In a permit modification under this section, only those conditions to be modified shall be reopened when a new draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. When a permit is revoked and reissued under this section, the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

[3] *See Memorandum of Agreement Between the United States Environmental Protection Agency and the Minnesota Pollution Control Agency for the Approval of the State NPDES Permit Program* (May 7, 1974), Section II, Agreement, Sections 124.44(d) (Schedule of Compliance in Issued NPDES Permits); and 124.72 (Modification, Suspension and Revocation of NPDES Permits).

Enclosure B: Minnesota Attorney General August 12, 2016 Letter

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota
ST. PAUL, MN 55155

LORI SWANSON
ATTORNEY GENERAL

August 12, 2016

Tinka Hyde
Director, Water Division
United States Environmental Protection Agency
Regional Administrator
77 West Jackson Boulevard
Chicago, IL 60604-3590

VIA U.S. MAIL AND E-MAIL

Re: MPCA's Legal Authority to Implement its Authorized NPDES Program

Dear Director Hyde:

On April 5, 2016, you requested the Minnesota Pollution Control Agency ("MPCA") "provide an updated Attorney General's statement to explain whether the current scope of MPCA's authority remains adequate to issue permits in compliance with all applicable [Clean Water Act] requirements, including whether MPCA continues to have adequate authority to implement all of its federally approved water quality standards consistent with [Clean Water Act] Section 301(b)(1)(C)." You stated that legislation enacted in 2015 by the Minnesota Legislature "appears to modify and/or revise the authority of the State to administer its [National Pollutant Discharge Elimination System] program and implement its federally approved water quality standards." On June 28, 2016, you sent MPCA a second request to "provide an additional updated Attorney General's statement to explain whether the current scope of MPCA's authority remains adequate to enforce all conditions in those [National Pollutant Discharge Elimination System] permits to which the law is expected to apply." You reference legislation enacted by the Minnesota Legislature in 2016 and state it "appears to invalidate water quality based effluent limits and compliance schedules for sulfate that were included in certain [National Pollutant Discharge Elimination System] permits issued by the MPCA." You requested the Attorney General statements be provided by August 12, 2016.

I provide the following in response to both requests.

As you are aware, the Clean Water Act ("CWA") requires States to adopt water quality standards. *See* 33 U.S.C. § 1313(a). Pursuant to the CWA, Minnesota adopted such water quality standards in 1973, which are codified as Minn. R. ch. 7050. The U.S. Environmental

Protection Agency ("EPA") approved these standards in 1977, including the sulfate standard applicable to "waters used for production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels," which is codified as Minn. R. 7050.0224, subp. 2 ("Wild Rice Standard" or "Standard"). *See* 42 *Federal Register* 56786-03. Minnesota is the only State that has adopted a water quality standard for sulfate relating to waters containing wild rice. MPCA has expansive authority to issue and enforce National Pollutant Discharge Elimination System ("NPDES") permits. *See* Minn. Stat. chs. 115 and 116; Minn. R. chs. 7050, 7052 and 7053.

Under the CWA, "water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish and wildlife, recreation in and on the water, and agriculture, industrial and other purposes including navigation." *See* 40 C.F.R. § 131.2. The CWA further directs that the "State shall from time to time, but at least once every three years, hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." *See* 40 C.F.R. § 131.20. Once approved by the EPA, a State standard will continue in effect unless EPA approves a change. *See* 40 C.F.R. § 131.21(e). Neither the CWA nor its regulations, however, address what a State should do if it determines that an existing standard is in need of material revision and significant expenditures would unnecessarily be required of permittees to comply with the existing deficient standard.

The history of the Wild Rice Standard is described in *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, No. A12-0950, 2012 WL 6554544 (Minn. Ct. App. Dec. 17, 2012) ("MCC"). MPCA applied the Wild Rice Standard for the first time in 1975 to set a wastewater discharge sulfate limit for the Minnesota Power Clay Boswell steam power plant facility. *Id* at 2. In 2009 and 2010, MPCA began taking steps to apply the Standard in the mining areas of northern Minnesota. *MCC* at 2. MPCA began a process to determine *where* the Wild Rice Standard should be enforced by asking certain mining companies to conduct surveys to detect the presence of wild rice in waters to which their facilities discharge wastewater to determine whether they are subject to the Wild Rice Standard for future permitting actions. *Id.* For the first time since 1975, in 2010 MPCA relied upon the Wild Rice Standard to set a discharge limitation in a permit for U.S. Steel. *Id.* MPCA's interpretation of the Wild Rice Standard as applicable to protect natural (uncultivated) wild rice was challenged in the *MCC* case. *Id.* At around the same time, related concerns were raised by MPCA and others regarding the accuracy of the science behind the Standard and how to define "waters used for production of wild rice." *See https://www.pca.state.mn.us/sites/default/files/wq-s6-40b.pd.*

In response to these concerns, the Minnesota Legislature enacted legislation appropriating money and requiring MPCA to "adopt and implement a wild rice research plan using the money appropriated to contract with appropriate scientific experts." Minn. Laws 2011, 1st Spec. Sess., Chapter 2, Article 4, Section 32 at (d) ("2011 Wild Rice Legislation"). This

legislation temporarily restricted MPCA from requiring permittees "to expend funds for design and implementation of sulfate treatment technologies," but provided for an exception if necessary to comply with "federal law." *Id.* The 2011 Wild Rice Legislation further provided that "nothing shall prevent the [MPCA] 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." *Id.* Based in part on the 2011 legislation, the *MCC* decision concluded that the issues raised in the case were moot. *MCC* at 9.

After receiving the funding from the 2011 Wild Rice Legislation, the MPCA contracted with the University of Minnesota to research how sulfate affects wild rice. *See https://www.pca.state.mn.us/water/wild-rice-sulfate-standard-study.* The research was based on a scientific protocol developed in 2010-2011 by the MPCA in consultation with your agency, Minnesota Tribes, and the Minnesota Department of Natural Resources as well as input from interested and affected stakeholders. *Id.*

In 2014, MPCA published the initial results of its research, which demonstrated that sulfate is not directly toxic to wild rice, but it can be converted into sulfide, which is toxic. The research supported material revisions to the Standard. *See* "Wild Rice Sulfate Standard Study Preliminary Analysis" at *https://www.pca.state.mn.us/sites/default/files/wq-s6-42w.pdf; See also* "Wild rice study reveals more questions for state officials," at *https://www.mprnews.org/story/2014/03/12/wild-rice-study.* The study found that the presence of iron in the water may mitigate the conversion of sulfate to sulfide. The research also found instances where higher levels of sulfate in waters did not result in high levels of the toxic sulfide. *See https://www.pca.state.mn.us/sites/default/file/wqetc.* The Study determined that site-specific standards may be needed for some waters particularly where sulfate is more efficiently converted to sulfide and/or sediment iron levels are not sufficient to mitigate sulfide concentrations. *Id.*

In December 2014, MPCA sought feedback on a preliminary proposed permit that required U.S. Steel to comply with the existing Standard at its "Minntac" facility. *See https://timberjay.com/stories/us-steel-fighting-stricter-pollution-rules,11955.*

In the 2015 legislative session, Minn. Laws 2015, 1st Spec. Sess., Chapter 4, Article 4, Section 136 ("2015 Wild Rice Legislation") was enacted. The 2015 Wild Rice Legislation prohibits MPCA from taking any actions to implement the standard that would require a permittee "to expend money for design or implementation of sulfate treatment technologies or other forms of sulfate mitigation." *Id.* at (a)(1). The legislation did not provide an exception for enforcement necessary to comply with federal law as the 2011 legislation did, but the 2011 Wild Rice Legislation was not repealed. *Id.* The 2015 legislation requires MPCA to complete rulemaking to promulgate a new Wild Rice standard by January 15, 2018. *Id.* at (c). In 2016, the Legislature enacted a statute that essentially applied the substance of the 2015 legislation to

the U.S. Steel Keetac facility, which was subject to a "schedule of compliance" requiring it to take actions necessary to comply with the Standard. Minn. Laws 2016, Ch. 165, sec. 1. The legislation does not apply or restrict the issuance, reissuance or enforcement of any future permits. MPCA has advised this Office that the Keetac facility is idled.

Minnesota Governor Mark Dayton signed the 2011, 2015 and 2016 legislation relating to the revision of the Wild Rice Standard. He publically stated that the Standard is "antiquated" and "not even based on current science directly related to the conditions we're trying to deal with." *See http://www.mprnews.org/story/2015/03/25/mpca-wild-rice.* MPCA similarly has stated that "using the same limit for every river or lake where wild rice grows doesn't make sense, because many factors influence whether wild rice will thrive." *See http://www.mprnews.org/story/2015/03/25/mpca-wild-rice.* MPCA has also stated that "[n]o single sulfate value would be protective of wild rice at all sites." Based on its research, MPCA is developing an equation to calculate appropriate values on a site-by-site basis, reflecting its expert conclusion that higher levels of iron can lead to less sulfide, and higher levels of organic carbon can lead to more sulfide. *See https://www.pca.state.mn.us/sites/default/files/wq-s6-43k.pdf.* In March of 2015, MPCA "announced that it wants to eliminate the current standard of 10 milligrams of sulfate per liter of water in wild rice waters, and begin to apply different standards to different waters based on their chemical makeup." *See https://www.minnpost.com/environment/2015/05/despite-pressure-lower-minntac-sulfate-emissions-status-quo-could-last-awhile.*

MPCA believes that it has made significant progress towards completion of the scientific studies regarding a new Wild Rice Standard and states it will commence the formal rulemaking process soon. *See https://www.pca.state.mn.us/sites/default/files/wq-rule4-15a.pdf.* The CWA provides States with the authority to revise water quality standards. 40 C.F.R. § 131.20. MPCA, on behalf of the State of Minnesota, is exercising this authority regarding the Wild Rice Standard, based on its scientific evidence indicating that the existing standard requires substantial revision. MPCA believes it would be unreasonable for it to enforce the sulfate standard in existing permits because requiring compliance with the Standard would result in the expenditure of resources that may ultimately prove unnecessary. MPCA has advised EPA that it is "pursuing options to reissue delayed mining NPDES permits quickly once there is a revised Wild Rice Standard." *See* July 13, 2016 letter from MPCA to EPA. MPCA has apprised this Office that it is "evaluating each site to determine what data could be gathered during this interim period to ensure [it] ha[s] all data necessary to move expeditiously on reissuances once there is a revised wild rice standard."

The above-described legislative restriction is strictly limited to the Wild Rice Standard, does not affect other water quality standards or MPCA's authority to enforce those standards, and is only in place until no later than January 15, 2018. In any event, as discussed above, MPCA has determined that the Wild Rice Standard is in need of substantial revision and therefore imprudent to apply.

MPCA also believes that it has adequate authority to revise the applicable Standard, and once the Standard is revised (subject to EPA approval), it will have full and unrestricted authority to enforce the Standard. Accordingly, under these unique circumstances, and in accordance with MPCA's expert opinion regarding the deficiencies of the current Standard, I agree with MPCA that it has adequate authority to implement federal law by revising the current Standard that MPCA believes is deficient and then enforcing it as modified.

This analysis is supported by court decisions holding that the CWA is to be given a reasonable interpretation which is not parsed and dissected with the meticulous technicality applied in testing other statutes and instruments. *See Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 292 (D.C. Cir. 1981). The EPA has the ability to be flexible with regard to revision of State water quality standards, and has exercised this discretion in other cases.

Indeed, if a State fails to fix a deficient water quality standard, 40 C.F.R. § 131.22 requires EPA to replace it with a federal standard in 90 days, but EPA's decision to delay replacement was upheld when EPA reasonably provided Montana more time to modify a deficient standard. *See American Wildlands v. Browner*, 94 F. Supp. 2d 1550, 1165 (D. Colorado 2000) (Montana's stated intention given weight in decision upholding EPA's decision to allow Montana extra time to submit an amended water quality standard). Minnesota's legislation does not allow substantially more time for MPCA to revise the Wild Rice Standard than was allowed for Montana to complete its revision. *Id.* The D.C. Circuit has also recognized that sometimes "it is logical that EPA should refrain from acting until the states have completed an initial effort to update the standards as they deem appropriate." *See Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 294 (D.C. Cir. 1981) ("EPA's task of determining the need for revised or new salinity standards to meet the Act's requirements would be greatly simplified by its temporary deference.")

Based on the above facts and circumstances of this matter and legal analysis, including the representations of MPCA and the deference owed to its expertise regarding the subject Standard, it is my opinion that the laws of the State of Minnesota provide adequate authority for MPCA to carry out the program elements in 33 U.S.C. § 1342 pertaining to water quality standards.

Sincerely,

LORI SWANSON
Attorney General