



OFFICE OF THE ATTORNEY GENERAL

State of Minnesota

ST. PAUL, MN 55155

LORI SWANSON
ATTORNEY GENERAL

RECEIVED

August 12, 2016

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NPDES PROGRAMS BRANCH
EPA, REGION 5

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

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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.pdf>.

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

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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-strict-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

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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.

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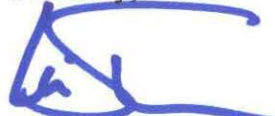
MPCA also believes that it has adequate authority to revise the applicable Standard, and once the Standard is revised (subject to EPA approval), it will have full and unrestricted authority to enforce the Standard. Accordingly, under these unique circumstances, and in accordance with MPCA's expert opinion 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 Env'tl. 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 Env'tl. 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