

Attachment 3: Response to Comments Raised During Consultation on EPA's Review of the Minnesota 2020 Impaired Waters List

In a letter of February 25, 2021,¹ the U.S. Environmental Protection Agency invited federally-recognized Indian Tribes in Region 5 to consult on EPA's review of Minnesota's 2020 Clean Water Act (CWA) Section 303(d) list of impaired waters (Minnesota 2020 Impaired Waters List). Impaired waters on a state or authorized tribe's CWA 303(d) list require the development of Total Maximum Daily Loads (TMDL), which, among other things, may result in changes to discharge limitations or other requirements in National Pollutant Discharge Elimination System (NPDES) permits.

EPA held a consultation teleconference on March 12, 2021, with tribal representatives.² During this teleconference, tribal representatives raised issues that EPA considered in its action to partially approve and partially disapprove the Minnesota 2020 Impaired Waters List submittal on March 26, 2021. Subsequently, in a letter dated March 26, 2021,³ EPA invited federally recognized tribes in Region 5 to consult on EPA's action to add waters to the Minnesota 2020 Impaired Waters List. EPA held a consultation teleconference on April 9, 2021.⁴ On April 27, 2021, EPA added 30 waters to the Minnesota 2020 Impaired Waters List; and, on September 1, 2021, EPA added three additional waters to the Minnesota 2020 Impaired Waters List. On November 5, 2021, after considering public comment and making revisions, determined that one previously listed water did not meet the screening analysis, and EPA transmitted its listing of 32 waters to the State.

In conducting its review of Minnesota 2020 Impaired Waters List, EPA considered the concerns raised by the Tribes as discussed below and as additionally addressed in EPA's *Additions to the Minnesota 2020 Impaired Waters List, Response to Comments* [hereafter, Response to Comments].

¹ Letter from Tera L. Fong, EPA, to Tribal Chairs of the federally recognized tribes in Minnesota, Wisconsin and Michigan, inviting consultation on EPA's Review and Decision on the Minnesota 2020 303(d) List, February 25, 2021.

² Tribal Consultation Call – Minnesota 2020 303(d) List, March 12, 2021.

³ Letter from Tera L. Fong to Tribal Chairs of the federally recognized tribes in Minnesota, Wisconsin and Michigan to consult on EPA's Partial Approval and Partial Disapproval of Minnesota's 2020 303(d) List, March 26, 2021.

⁴ Tribal Consultation Call – Minnesota 2020 303(d) List, April 9, 2021.

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I. Comments on EPA’s Review of the Minnesota 2020 Impaired Waters List

I.a. Comments describing the environmental justice implications of protecting wild rice:

Mille Lacs Band of Ojibwe Letter (March 12, 2021)⁵: We are experiencing a disproportionate share of the harm from the State’s refusal to comply with Federal law. Treating wild rice waters differently is discriminating against wild rice waters, which in turn is discriminating against American Indian people in Minnesota.

Joint Tribal Leader Letter (March 3, 2021)⁶: The 11 sovereign tribes of Minnesota have made clear that protection of wild rice is a top environmental justice issue for Native citizens of this state.

Response I.a: Executive Order 12898⁷ and Executive Order 14008⁸ establish federal executive policy on environmental justice. Executive Order 12898 directed federal agencies to develop environmental justice strategies for implementing environmental justice and to identify and address disproportionately high and adverse human health or environmental effects of their programs on minority and low-income populations to the greatest extent practicable and permitted by law.⁹ Environmental justice, as set forth in EPA’s *Environmental Justice 2020 Action Agenda* and in other EPA guidance, is defined as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.¹⁰ In its review of the Minnesota Impaired Waters List, EPA believes that it has acted consistently with its *Guidance on Considering Environmental Justice During the Development of an Action*¹¹ in

⁵ Letter from Melanie Benjamin, Chief Executive, Mille Lacs Band of Ojibwe, to Cheryl Newton, EPA, March 12, 2021. All comments are quoted directly unless otherwise noted.

⁶ Joint Tribal Letter from Minnesota Tribes to Cheryl Newton, EPA, March 3, 2021.

⁷ Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations*, 59 Fed. Reg. 7629 (February 16, 1994). 1994 Executive Orders webpage, <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>, last visited 11/4/2021.

⁸ Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7619 (January 27, 2021).

⁹ See 59 Fed. Reg. 7629 (February 16, 1994); EPA, Webpage for Executive Order 1298, <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice>, last visited 11/4/21.

¹⁰ EPA, *Environmental Justice 2020 Action Agenda* at 1, https://www.epa.gov/sites/default/files/2016-05/documents/052216_ej_2020_strategic_plan_final_0.pdf, last visited 11/4/2021.

¹¹ See *Guidance on Considering Environmental Justice During the Development of an Action*, May 29, 2015, <https://www.epa.gov/sites/default/files/2015-06/documents/considering-ej-in-rulemaking-guide-final.pdf>, last visited 11/4/2021. The *Guide* provides:

engaging in consultation and coordination with tribal representatives during the process of reviewing and adding waters to the Minnesota 2020 Impaired Waters List, and with CWA Section 303(d)(2) in listing those waters where sulfate exceeds the Minnesota water quality standard for supporting the wild rice designated use. This action is consistent with the goals expressed by tribal representatives during consultation that requested that EPA take action to address the State's failure to list waters subject to the wild rice beneficial use that were impaired for sulfate. Such listing of impaired waters is a prerequisite to the process for defining appropriate measures to return these waters to meeting applicable water quality standards and supporting their beneficial use.

I.b. Comments that EPA has a trust responsibility to protect wild rice as a treaty resource

Joint Tribal Leader Letter (March 3, 2021): MPCA's long history of inaction not only violates the Clean Water Act but demonstrates a disregard for treaty resources. The usufructuary rights guaranteed by treaties between the federal government and the tribes are meant to protect treaty resources into perpetuity. Both state and federal entities must recognize and protect those resources. Clean water is clean water. The EPA has a trust responsibility to tribes and their members. We urge you to protect clean water and manoomin (in Ojibwe)—psin (in Dakota)—wild rice for future generations of our tribal citizens, and for all Minnesotans.

Response I.b: EPA recognizes the importance of respecting tribal treaty rights and its obligation to do so. As EPA explained in its *Guidance for Discussing Tribal Treaty Rights Addendum* to EPA's *Policy on Consultation and Coordination with Indian Tribes*,

The U.S. Constitution defines treaties as part of the supreme law of the land, with the same legal force as federal statutes. Treaties are to be interpreted in accordance with the federal Indian canons of construction, a set of long-standing principles developed by courts to guide the interpretation of treaties between the U.S. government and Indian tribes [citations omitted]. As the Supreme Court has explained, treaties should be construed liberally in favor of tribes, giving effect to the treaty terms as tribes would have understood them, with ambiguous provisions interpreted for their benefit. Only Congress may abrogate Indian treaty rights, and courts will not find that abrogation has occurred absent clear evidence of congressional intent. We note that this Guidance does not create any new legal

A regulatory response to an identified potential EJ concern may require rule-writers to consider whether the regulatory action can and should set a stricter standard or go beyond the basic and ordinarily protective norms to require additional measures in a rule. The Agency's ability to do this, and the appropriateness of doing so, will depend on the Agency's legal authority and whether sufficient evidence of a potential EJ concern has been established, and whether circumstances or factors exist with respect to the particular emissions, exposures or risks addressed by the action that justify setting a stricter standard. An example of the latter might be the need to set a lower threshold of concern for exposure to a pollutant because the exposure-response for that pollutant is altered by disproportionately high exposure to other environmental stressors. These opportunities will become clearer as the Agency gains more experience in this area and as the data, tools and methods to evaluate potential EJ concerns evolve.

Guide at 17.

obligations for EPA or expand the authorities granted by EPA's underlying statutes, nor does it alter or diminish any existing EPA treaty responsibilities.¹²

EPA believes that in engaging in consultation and coordination with tribal representatives during the process of reviewing and adding waters to the Minnesota 2020 Impaired Waters List, EPA was acting consistently with both CWA Section 303(d)(2) and with the protection of tribal treaty rights in listing those waters where sulfate exceeds the Minnesota water quality standard for supporting the wild rice designated use.

I.c. Comments that the State should list sulfate impaired wild rice waters or EPA should do so:

Mille Lacs Band of Ojibwe Letter (March 12, 2021): [This is] is our official request to the EPA to reject the State's submission of the 2020 303(d) list, and require the impaired wild rice waters be included moving forward. We further request that as our trustee, the EPA take all necessary regulatory, punitive or other legal means at its disposal to force the State to list impaired wild rice waters if it still refuses to do so.

Joint Tribal Leaders Letter (March 3, 2021): We ask you to promptly reject the list to the extent that it excludes impaired wild rice waters known to be impaired for sulfate. We ask you to expressly require listing of all impaired wild rice waters in accordance with federal law and as outlined in the attached tribal communications.

Midwest Alliance of Sovereign Tribes (MAST) Letter (March 24, 2021)¹³: We ask you to promptly reject MPCA's 2020 303(d) list to the extent that it excludes wild rice waters known to be impaired for sulfate. We stand with Minnesota tribes in affirming that there are at least 21 known, impaired wild rice waters (or 50 segments, per MPCA methodology) that should be listed on the 2020 303(d) list [emphasis in original]. We ask you to expressly require listing of these and all other known, impaired wild rice waters in accordance with federal law. We further request that as a tribal trustee, EPA take all necessary regulatory, punitive or other legal means at its disposal to force the State of Minnesota to comprehensively project wild rice waters in accordance with state and federal law.

Response I.c: Please see EPA's *Decision Document Regarding the Sulfate Impaired Waters EPA is Adding to the Minnesota 2020 CWA Section 303(d) List (April 27, 2021 Decision Document)* for EPA's explanation of its process for assessing and adding waters to the Minnesota 2020 Impaired Waters List.¹⁴

¹² EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights, 2016, https://www.epa.gov/sites/default/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf, last visited 11/4/2021.

¹³ Letter from Aaron Payment, President Midwest Alliance of Sovereign Tribes, to Cheryl Newton, EPA, March 24, 2021. The reference to 21 wild rice waters comprising 50 segments relates to correspondence between tribal representatives, EPA, and MPCA, and includes, *inter alia*, the following: Letter from Beth Drost, Chairwoman of the Grand Portage Band, and April McCormick, Secretary-Treasurer of the Grand Portage Band, to Laura Bishop, MPCA Commissioner, May 8, 2020, and attachments; Joint Tribal Leader Letter to Kurt Thiede, October 2, 2020, and attachments; and a letter from the Minnesota Tribes to Governor Tim Walz, October 2, 2020, and attachments.

¹⁴ EPA, *Decision Document Regarding the Sulfate Impaired Waters EPA is Adding to the Minnesota 2020 CWA Section 303(d) List*, April 27, 2021 [hereafter April 27, 2021 Decision Document] generally, and particularly at 6-

I.d. Comments that existing state assessment protocol is sufficient methodology to assess wild rice waters for impairment:

Joint Tribal Leader Letter (March 3, 2021): *In our letter to MPCA dated April 27, 2020, we reiterated that MPCA’s own conventional-contaminant assessment protocols already provide a methodology the agency is required to apply right now to evaluate those wild rice waters known to be persistently impaired for sulfate. It was by following MPCA’s own 2020 Guidance Manual for Assessing Minnesota Surface Waters that tribal staff assembled a list of impaired wild rice waters, first for the 1854 Ceded Territory and then for the entire state. See Letter of Grand Portage to MPCA (May 8, 2020), attached.*¹⁵

Grand Portage Band of Lake Superior Chippewa (Grand Portage) Email and Attachments [text immediately below is from a Grand Portage Letter to MPCA on January 14, 2020] (March 17, 2021)¹⁶: *Methods for identifying wild rice waters are well-established, as are means of assessing impairments-in fact, it is possible to evaluate many such waters based upon public data. Therefore, MPCA's claim that it cannot assemble such information because it “has not finalized methods for identifying waters used for production of wild rice or for assessing impairment of waters based on the existing wild rice-related standard” is simply false. Wild rice waters can be identified using the MN DNR's public GIS website, and the sulfate data collected and mapped by the MPCA itself can be overlaid to determine impairments. By simply cross-referencing these records, out of more than 515 wild rice waters that have been identified just in the 1854 Ceded Territory, Tribal staff have identified three lakes and five stream segments that are impaired due to high concentrations of sulfate. These lakes and streams are listed below in Table 1 [Table 1: Impaired Wild Rice Waters in the 1954 Ceded Territory]. Sulfate data was provided by MPCA, and overlaid on wild rice lakes and stream segments identified by the MN DNR Wildlife feature class downloaded from the MN Geospatial Commons <https://gisdata.mn.gov/dataset/biota-wild-rice-lakes-dnr-wld>, and wild rice survey data from the 1854 Treaty Authority. The data points on the map only depict those monitoring points that have median sulfate concentrations that range from seven to sixty-three times more than the 10 mg/L sulfate standard. Therefore, the map and table presented in these comments should not be considered an exhaustive list of impaired wild rice waters within the 1854 Ceded Territory, or the state.*

Response I.d: Please see EPA’s April 27, 2021 Decision Document at Section III for EPA’s explanation of its process for developing a screening analysis and including EPA’s review of proposed assessment methodologies.¹⁷

11, https://www.epa.gov/sites/default/files/2021-04/documents/2021.4.27_2020_mn_303d_dd_phase_2_.pdf, last visited 11/4/2021. See also EPA Decision Document for The Partial Approval of Minnesota’s 2020 Clean Water Act Section 303(d) List, March 26, 2021 [hereafter March 26, 2021 Decision Document], https://www.epa.gov/sites/default/files/2021-04/documents/2020.3.26_2020_mn_303d_dd_phase_1.pdf, last visited 11/4/2021.

¹⁵ See Letter from Beth Drost, Chairwoman, Grand Portage Band, and April McCormick, Secretary-Treasurer, Grand Portage Band, to Laura Bishop, MPCA Commissioner, May 8, 2020, and attachments.

¹⁶ Email from April McCormick, Secretary-Treasurer, Grand Portage Band, to JoAnn Chase and others, “Consultation with EPA: 303(d) List MPCA submittal for 2020,” March 17, 2021 and attachments.

¹⁷ April 27, 2021 Decision Document at 11-16.

I.e. Waters where wild rice is an existing use should be included in the list of impaired waters.

Grand Portage (March 17, 2021): Additionally, the MN DNR and Bands' lists demonstrate where wild rice is an existing use, and MPCA itself has maintained sulfate concentration data on many such waters. If the sulfate standard is exceeded, the MPCA, according to its own WQS, must include those waters on the 303(d) list and develop a TMDL or WQBEL as required by the Act.

Response I.e: Please see EPA's Response to Comment 9 for a discussion of wild rice as an existing use in relation to the assessment and listing of waters in conjunction with CWA Section 303(d).

I.f. Comments regarding eight example waters and that EPA should list all known impaired wild rice waters

Grand Portage (March 17, 2021)¹⁸: Despite these many efforts to make the tribal position clear, on the consultation call, Region 5 representatives repeatedly characterized the joint tribal request as being for "listing of 8 impaired wild rice waters as stated in January 2020 comments during the public comment period." That is not accurate. We asked for listing of all known, chronically impaired wild rice waters. We originally gave a list of 8 such waters in January 2020, and then 21 (or 50 segments) in May, as examples and based upon our access to MPCA data.

Response I.f: Please see EPA's affirmation that the eight waters were provided as examples in EPA's April 27, 2021 Decision Document.¹⁹

I.g. Comments that Tribes want EPA to base a decision on the "full record"

Grand Portage (March 17, 2021)²⁰: Will EPA consider the full record and respond in detail to the actual content of the tribal comments in making its March 26 decision? The tribal position incorporates the full record, meaning those efforts to ensure MPCA lists impaired wild rice waters in each of the 303(d) list submittals every two years since 2012, as is their legal and regulatory responsibility.

Response I.g: As EPA stated during the consultation meeting with Tribes on April 9, 2021,²¹ EPA has considered the historical and current information submitted by tribes and the data considered by MPCA and others in our decision to add certain waters to the Minnesota 2020 Impaired Waters List.²²

¹⁸ Email from April McCormick, Secretary-Treasurer, Grand Portage Band of Lake Superior Chippewa, to JoAnn Chase and others, "Consultation with EPA: 303(d) List MPCA submittal for 2020," March 17, 2021, and attachments.

¹⁹ April 27, 2021 Decision Document at 10.

²⁰ Email from April McCormick, Secretary-Treasurer, Grand Portage Band, to JoAnn Chase and others, "Consultation with EPA: 303(d) List MPCA submittal for 2020," March 17, 2021 and attachments.

²¹ U.S. EPA Notes from April 9, 2021 Tribal Consultation Call Regarding Waters to be Added to Minnesota's 2020 303(d) List at 9.

²² April 27, 2021 Decision Document at 2-11; March 26, 2021 Decision Document at 18-19.

II. Comments from Consultation Following EPA’s Partial Disapproval of the Minnesota 2020 Impaired Waters List

II.a. Comments that EPA should consider the broadest universe of wild rice waters in making listing decisions

Fond du Lac Band of Lake Superior Chippewa (Fond du Lac) Letter (April 15, 2021)²³: . . . [W]e urge EPA to consider the most inclusive and extensive lists of wild rice waters in the state of Minnesota, including those provided by the MN Department of Natural Resources (MNDNR), the 1854 Treaty Authority, and other listings provided by Minnesota tribes who are most knowledgeable about wild rice waters on their reserved lands as well as treaty-protected areas. The authority to identify waters that support wild rice as a protected beneficial use does not solely lie with the MPCA, nor have they committed staff and resources to improving the comprehensiveness of the list they proposed during the 2018 rulemaking.

Fond du Lac Letter (April 15, 2021): The Band also supports EPA’s listing of at least the 21 impaired wild rice waters identified in earlier joint unified tribal comment letters, and other waters for which data exists to confirm exceedances of the state’s sulfate criterion, and meets reasonable assessment criteria.

Grand Portage Letter (April 8, 2021)²⁴: The Band continues to ask that Region 5 identify impaired wild rice waters by cross-referencing not just MPCA’s 2013 list of wild rice waters (“2013 List”) but also the current wild rice lists of the 1854 Treaty Authority. . . any other tribe, and the DNR. [This analysis should also include]. . . all databases, including EQuIS, TEMPO. . . Legacy Act Clean Water Fund, Met Council, USGS, and any other databases to which MPCA or EPA has access [enclosing attachment, dated May 2020, the 1854 Authority ten year study for Sandy Lake and Little Sandy Lake].

White Earth Nation Comment (April 9, 2021)²⁵: EPA should see that there is a unified tribal response here to increase the impaired waters to include protection of wild rice beds. EPA should be fully aware that Tribes have engaged in multiple consultation sessions with the State and the Tribes’ pleas have fallen on deaf ears. White Earth Nation wants to remind EPA of its fiduciary trust responsibility. EPA will hear the unified voices of the tribal leaders and experts.

Mille Lacs Band of Ojibwe Comment (April 9, 2021)²⁶: As we think of wild rice as Ashinabe, it is one of the most important resources in our community. It is about subsistence and must be included in all of their ceremonies. It is very important that these waters get put on the list when impaired. Mille Lacs does not face the same threats as the northern tribes who have copper mining. They have Rice Lake – one of the largest producing lakes – in 2011 there were high levels of sulfate in the lake. It’s important that they get this tested. Mining comes and goes within the State. Some mines close after 30 years they leave waves of destruction behind. Tribes need

²³ Letter from Nancy Schuldt, Water Projects Coordinator, Fond du Lac Environmental Program, to Cheryl Newton, EPA, April 15, 2021, and attachments.

²⁴ Letter from Robert F. Deschampe, Chairman, Grand Portage Band, and April M. McCormick, Secretary-Treasurer Grand Portage Band, to Cheryl Newton, EPA, April 8, 2021, and attachments.

²⁵ U.S. EPA Notes from April 9, 2021 Tribal Consultation Call Regarding Waters to be Added to Minnesota’s 2020 303(d) List at 8-9.

²⁶ U.S. EPA Notes from April 9, 2021 Tribal Consultation Call Regarding Waters to be Added to Minnesota’s 2020 303(d) List at 6-7.

wild rice forever. If the State of Minnesota decides that it won't list waters off the reservations, then EPA should follow its own guidance.

Prairie Island Indian Community Letter (April 16, 2021)²⁷: The EPA has said they are working to evaluate which water segments and/or specific waterbodies need to be included on the list. Prairie Island asks that the EPA look at all available data from MPCA themselves, the Minnesota Department of Natural Resources (MN DNR), and Tribal nations regarding impaired sulfate waters. This includes, but is not limited to the MPCA's 2013 list of wild rice waters, the 1954 Treaty Authority's list of wild rice waters, and the 2008 MN DNR wild rice waters list. This can be cross-evaluated with known sulfate impairments over 10 mg/L according to the MPCA's and EPA's own databases. An example of such a sulfate impairment study producing a list can be found in the 2018 Tribal Wild Rice Task Force Report.

Prairie Island Indian Community Letter (April 16, 2021)²⁸: The data speaks for itself and shows that there are more sulfate impaired waters than just the 24 originally used in the exercise on impaired waters from 24 wild rice waters identified in Minnesota rulemaking in 1998. We ask EPA to look at all current data in determining a conclusive list for 303(d) impaired waters.

Leech Lake Band of Ojibwe Letter (April 16, 2021)²⁹: LLBO would also like to submit a list of wild rice lakes and a list of wild rice streams in the 1855 Ceded Territory (see email attachment) for inclusion in Minnesota's list of wild rice waters. It is LLBO's recommendation that these lists be added to the lists of wild rice waters identified by the Minnesota Department of Natural Resources, Wildlife Division and the 1854 Treaty Authority that were recently submitted to US EPA for review of sulfate impairment. However, LLBO would like to reiterate that any wild rice waters on the Minnesota Department of Natural Resources, Wildlife Division list that are wholly within Tribal boundaries should not be included in US EPA's analysis for the determination of sulfate impairment.

Mille Lacs Band of Ojibwe Letter (April 19, 2021)³⁰: Manoomin (wild rice) is critical to our survival as Anishinaabe. Proper identification of historical and current Manoomin water bodies is imperative. Because these bodies of water are so critical, they must be held to a higher standard; more specifically with regard to sulfate that threatens its existence. The impact of sulfate is more detrimental than any of the other pollutants that degrade Manoomin habitat. If Manoomin is lost due to insufficient sulfate standards, it may never recover. These are treaty-ceded trust resources and need to be protected.

Response II.a: As EPA stated during the consultation meeting on April 9, 2021,³¹ EPA has considered the historical and current information submitted by tribes and the data

²⁷ Letter from Shelley Buck, Tribal Council President, Prairie Island Indian Community, to Tera L. Fong, EPA, April 16, 2021.

²⁸ Letter from Shelley Buck, Tribal Council President, Prairie Island Indian Community, to Tera L. Fong, EPA, April 16, 2021.

²⁹ Letter from Benjamin Benoit, Environmental Director, Leech Lake Band of Ojibwe, to Tera Fong, et al., EPA, April 16, 2021, with attachments.

³⁰ Letter from Melanie Benjamin, Chief Executive, Mille Lacs Band of Ojibwe, to Cheryl Newton, EPA, April 19, 2021.

³¹ U.S. EPA Notes from April 9, 2021 Tribal Consultation Call Regarding Waters to be Added to Minnesota's 2020 303(d) List at 9.

considered by MPCA and others in its decision making relating to the Minnesota 2020 Impaired Waters List.³²

II.b. Comments Regarding Specific Waters

II.b.1. Birch Lake/Bob's Bay

Fond du Lac Letter (April 15, 2021): We specifically urge Region 5 to include Bob Bay (Birch Lake) in the list of impaired wild rice waters. The state agencies, including MN DNR, have been studying and modeling the toxic runoff from the former LTV Dunka Mine since the 1980's when it was first recognized as a serious water quality problem resulting from inadequate control of seepage from mine wastes.

Grand Portage Letter (April 8, 2021): Request to list Bob Bay of Birch Lake: "DNR field reports confirm extremely elevate[d] levels of sulfate in Bob Bay of Birch Lake."

Response II.b.1: Please see EPA's Response to Comments at 2.b.3 and Appendix 6 for a discussion and information EPA considered regarding Birch Lake and Bob's Bay.

II.b.2. Comments on the Mississippi River

Prairie Island Indian Community Comment (April 9, 2021)³³: "Prairie Island Indian Community (PIIC) agrees that EPA should list all wild rice waters that are impaired. EPA has been given the data. For them, at PIIC, the sulfate levels in the Mississippi River should justify listing these waters as impaired. As Chairwoman Chavers has said, PIIC has finally gotten some wild rice plantings to stick. They also deal with dam flooding. They are trying to protect wild rice waters."

Prairie Island Indian Community Letter (April 16, 2021)³⁴: Prairie Island consistently has found high sulfate levels on average of 80 mg/L in North and Sturgeon Lakes, waters bordering and surrounding Tribal lands. These backwater lakes receive direct flow from the Mississippi River, as the Mississippi River carries many pollutants in its channel due to confluence with tributaries upstream of Prairie Island waters. This data can be obtained through the WQX.

Response II.b.2: EPA considered water quality data from the Water Quality Exchange (WQX) for Sturgeon Lake (25-0017-01) and determined that this waterbody meets EPA's screening analysis criteria, including demonstrated sulfate concentrations above 10 mg/L. See data for this segment in Appendix 2A. See also Response to Comments at 2.b.1. EPA added this water to the Minnesota 2020 Impaired Waters List on September 1, 2021. For a discussion of EPA's Screening Analysis see EPA's April 27, 2021 Decision Document at Section III.

North Lake (25-0017-04) did not meet the Screening Analysis criteria because this water is not included in MPCA's 1300 Waters List. See also Appendix 3. For a discussion of the role of the MPCA 1300 Waters List in EPA's Screening Analysis, please see Response to Comment 1.d.2. EPA emphasizes that the universe of waters potentially subject to the

³² See April 27, 2021 Decision Document at 2-11; March 26, 2021 Decision Document at 18-19.

³³ U.S. EPA Notes from April 9, 2021 Tribal Consultation Call Regarding Waters to be Added to Minnesota's 2020 303(d) List at 7.

³⁴ Letter from Shelley Buck, Tribal Council President, Prairie Island Indian Community, to Tera L. Fong, EPA, April 16, 2021.

beneficial use may be greater than MPCA's 1300 Waters List and EPA is taking no action to approve or disapprove any potential wild rice waters or sulfate impaired waters not included in the final Minnesota 2020 Impaired Waters List, but rather EPA will continue to share information with the State and coordinate with the State and interested tribes regarding further development of information supportive of the State's continuing efforts to expand its assessment and listing of such waters.

II.c. Comments that EPA should consider wild rice survey data collected by dischargers

Fond du Lac Letter (April 15, 2021): Additionally, we urge Region 5 to request from MPCA, if you have not already acquired them, reports from the permitted taconite facilities (Arcelor, Hibbing Taconite, Minntac, Mesabi Nugget, United Taconite) from wild rice surveys they were required by the agency to conduct in approximately the 2009-2011 timeframe. . . this series of industry-conducted wild rice surveys includes a report for the Dunka Mining Area, with more recent data confirming exceedances of the sulfate criterion in Birch Lake; this report is included as Attachment 3 to our comments.

Response II.c: Please see April 27, 2021 Decision Document at Section III for EPA's explanation of its Screening Analysis for assessing impairment and for adding waters to the Minnesota 2020 Impaired Waters List, including EPA's discussion of its review of readily available and existing sulfate data and sampling thresholds.³⁵

II.d. Comments Regarding the State's proposed methodology from MPCA March 15, 2021 Letter.

Grand Portage Letter (April 8, 2021): The Tribe disagrees with the following: (1) MPCA's "proposed minimum sample size of 10 over 10 years"; (2) "it is not reasonable or acceptable to use a mean, median, or average concentration for this analysis for any purpose other than supporting best professional judgment"; (3) the MPCA 2020 Guidance "does not provide an express methodology for sulfate."

Grand Portage Letter (April 8, 2021): [This is a summary, not full quote] The Tribe proposes the following methodology (1) five observations over three of the last 10 years and all are 25% or more beyond the limit (or 12.5 mg/L) for sulfate, a wild rice water must be listed as impaired; (2) if there are at least three readings over a period of at least one year and all are 25% or more beyond the limit (or 12.4 mg/L) for sulfate, a wild rice water must be listed as impaired; (3) if there are at least two observations of an exceedance in any two years of the last 10 years and both are at or above three times the standard (30 mg/L), a wild rice water either must be listed as impaired or a reasonable justification must be offered for not listing it.

Grand Portage Letter (April 8, 2021): Map Submission of 27 GIS maps "of all known wild rice waters in Minnesota".

*Prairie Island Indian Community Letter (April 16, 2021)*³⁶: As stated in the 2021 Guidance Manual for Assessing the Quality of Minnesota Surface Waters for Determination of Impairment: 305(b) Report and 303(d) List document submitted with this rulemaking, sulfate is considered a conventional pollutant. Table 1, page 12, of the guidance manual states the criteria that MPCA

³⁵ April 27, 2021 Decision Document at 11-18.

³⁶ Letter from Shelley Buck, Tribal Council President, Prairie Island Indian Community, to Tera L. Fong, EPA, April 16, 2021.

themselves used for evaluating impaired waterbodies on this list. We ask that EPA use this same criteria in evaluating sulfate impairments in wild rice waters.

Response II.d: Please see EPA’s April 27, 2021 Decision Document at Section III for EPA’s explanation of its Screening Analysis for assessing impairment and for adding waters to the Minnesota 2020 Impaired Waters List.³⁷

II.e. Comments that Tribes are seeking to list more than eight waters

Grand Portage Comment (April 9, 2021)³⁸: “The Grand Portage map, which was given to MPCA, showed eight waters that had high sulfate levels and that these were located in the north part of the ceded territory. They are noting that all of the tribes have impacted wild rice waters where wild rice is receding and is having trouble being retained. This illustration presents a picture that is much broader than 7 or 8 waters. It also impacts Dakota tribes in the southern part of the state. Is not a regional or tribal issue, it is an issue that benefits all Minnesotans. There is no legal or scientific reason that these waters should not be listed. Grand Portage hopes that EPA will realize how big an issue this is for all of us.

Response II.e: Please see Response I.f above.

II.f. Comments that Tribes need increased funding to assess wild rice waters

Mille Lacs Band of Ojibwe Letter (April 19, 2021): The Mille Lacs Band of Ojibwe respectfully requests that the EPA follow its own guidance and conduct its own analysis to ensure Minnesota properly assess wild rice waters for sulfate in coordination with tribes. This coordination could include additional funding to the willing Tribes for sampling off-reservation waters within their ceded territories in Minnesota. Once these waters are sampled and an impairment is identified, the process should lead to the addition of these respective water bodies to Minnesota’s Impaired Waters List. To reiterate, Tribes need sufficient funds to perform these vital monitoring activities. The overall goal is: All of these water resources need to be investigated and protected, no matter the methodology.

Response II.f: EPA appreciates and acknowledges this comment. EPA encourages interested tribes to discuss funding options to support sampling, monitoring, and further study utilizing grant programs as appropriate, including opportunities pursuant to CWA Section 106 and Great Lakes program funding.

II.g. Comments that EPA should lead a scientific review panel for wild rice research review

Bois Forte Band of Chippewa³⁹ (April 20, 2021): We would like to see EPA coordinate and lead a scientific oversight panel. Panel members would review and develop standardized methods and processes to be used in focused, future studies of wild rice-sulfate interactions. Given the substantial biological and spatial variability inherent within the wild rice plant and environmental conditions under which it grows, it seems to us that method standards are

³⁷ April 27, 2021 Decision Document at 11-18.

³⁸ U.S. EPA Notes from April 9, 2021 Tribal Consultation Call Regarding Waters to be Added to Minnesota’s 2020 303(d) List at 6.

³⁹ Letter from Cathy Chavers, Chairperson, Bois Forte Band of Chippewa, to Tera L. Fong, EPA, April 20, 2021.

essential to minimize potential experimental error, reduce environmental interaction variability, and reach a widely-accepted level of confidence in received results.

Response II.g: EPA appreciates and acknowledges this comment. Please see the discussion of roles of states and authorized tribes regarding the primary responsibility to act under Section 101(b) of the CWA in EPA’s April 27, 2021, Decision Document.⁴⁰ EPA will continue to look to Minnesota to take primary responsibility for assessing and listing waters for impairment and remains ready to provide oversight as well as technical assistance to the State and to tribes in this process.

III. Comments on EPA’s April 27, 2021 Action Adding 30 Waters to the Minnesota 2020 Impaired Waters List

III.a. Comments regarding specific waters

III.a.1. Birch Lake:

Fond du Lac Letter (June 29, 2021)⁴¹: *The Band urges EPA to include the identified WQLS in Birch Lake and the Kawishiwi River . . . on the 2020 List of Impaired Wild Rice Waters. In the case of Birch Lake, we are concerned about uncontrolled legacy mining waste currently impacting known wild rice stands, while a newly proposed copper-nickel sulfide mine in the watershed is undergoing environmental review.*

Joint Tribal Letter (June 30, 2021)⁴²: *[Requesting that Birch Lake and the Kawishiwi River should be listed]. To overcome this 40-year data deficit [cited by MPCA], both the 1854 Treaty Authority and Northern Minnesotans for Wilderness (“NMW”) collected samples from Birch Lake in Dunka Bay and Bob’s Bay as well as a few tributaries to Birch Lake and the Kawishiwi River. The results of the 2020 and 2021 sampling events demonstrate that concentrations of sulfate from the 1970’s are similar to present-day concentrations, and that both Bob’s Bay and Dunka Bay in Birch Lake are historically and currently sulfate WQLSs of the Kawishiwi River system. This is sufficient, at a minimum, to justify listing Bob’s Bay in Birch Lake on the 2020 List. With only three modern samples from Dunka Bay, we request EPA’s review and determination using both historical and modern data.*

Grand Portage Email (September 20, 2021)⁴³: *Grand Portage is submitting copies of sulfate data collected from Birch Lake by the US Geological Survey, and the final 2021 Birch Lake sulfate sampling results from the 1854 Treaty Authority. The Geological Survey sulfate data can be found under the tab “Provisional WQ 6-23-2021” in the Birch Lake 2021 Sonde Data. Please consider this data part of our comments on the 2020 Impaired Waters List. On behalf of Grand Portage, we are again expressly asking that Bob’s Bay and Dunka Bay in Birch Lake be included on the 2020 Impaired Waters List.*

⁴⁰ Please see April 27, 2021 Decision Document at 8-9. *See id.* at 2-11 for EPA’s evaluation of the State’s listing history with respect to wild rice and sulfate.

⁴¹ Letter from Nancy Schuldt, Water Projects Coordinator, Fond du Lac Environmental Program, to Paul Proto, June 30, 2021.

⁴² Letter from Tribal Leaders to Paul Proto, EPA, June 30, 2021.

⁴³ Email from Margaret Watkins, Grand Portage Band, to Paul Proto, EPA, September 20, 2021, and attachments.

Response III.a.1: Please see EPA’s Response to Comments at 2.b.3 and Appendix 6 for a discussion of Birch Lake and Bob’s Bay.

III.a.2. Segments of the St. Louis River:

Fond du Lac Letter (June 29, 2021): The Band urges EPA to include the identified WQLS . . . in the estuary of the St. Louis River on the 2020 List of Impaired Wild Rice Waters. . . . Regarding the lower St. Louis River, tribes are leading multi-agency (tribal/state/federal) efforts to restore critically diminished stands of historically abundant wild rice as part of the St. Louis River Area of Concern remediation and restoration plan, but our efforts are hampered in part by elevated sulfate loadings from upstream sources.

Joint Tribal Letter (June 30, 2021): While it is uncertain as to whether wild rice grew historically in the [St. Louis] river reaches between the mining-impacted section and the steep-gradient reach that ultimately flows into the estuary, it is common knowledge that wild rice flourished in the 12,000-acre estuary well into the 20th century. The St. Louis River estuary (Spirit Island, specifically) was the sixth stopping place in the Ojibwe migration story, one of the places where the migration prophecies were fulfilled (the place where “food grows upon the water”). Remnant stands remain today in the estuary, and St. Louis River Area of Concern (AOC) restoration objectives specifically include establishing substantial acreage of sustainable wild rice. Federal, state, and tribal agencies are actively working to restore wild rice in suitable habitat throughout the estuary, but are having limited success due to multiple factors, including sulfate concentrations consistently above the wild rice criterion. Several reaches of the St. Louis River within the estuary have sufficient data to support listing on the 2020 wild rice impaired waters list, and other reaches would likely meet assessment thresholds for listing in the next biennial list with targeted monitoring.

Response III.a.2: EPA considered water quality data for the St. Louis River estuary segment (69-1291-04) and determined that this waterbody met EPA’s screening analysis criteria and demonstrated sulfate concentrations above 10 mg/L. EPA added this water to the Minnesota 2020 Impaired Waters List on September 1, 2021. Please see EPA’s April 27, 2021, Decision Document, Section III for a discussion of EPA’s Screening Analysis. See also EPA’s Response to Comment 6.7 and Appendices 2A and 3.

III.a.3. Perch Lake

Grand Portage Email (July 9, 2021)⁴⁴: Attached Perch Lake data in Excel spreadsheet.

Response III.a.3: EPA considered water quality data for Perch Lake (69-0688-00) and determined that this waterbody met EPA’s screening analysis criteria (i.e., Section III of the April 27, 2021, Decision Document) and demonstrated sulfate concentrations above 10 mg/L. EPA added this water to the Minnesota 2020 Impaired Waters List on September 1, 2021. See also EPA’s Response to Comments 6.6 and Appendices 2A and 3.

III.a.4. EPA should consider wild rice survey data collected by dischargers

Fond du Lac Letter (June 29, 2021): We also urge the agency to carefully consider all wild rice survey data collected by Minnesota taconite facilities at the explicit direction of the MPCA in the

⁴⁴ Email with attachments from Margaret Watkins, Grand Portage Band, to Paul Proto, July 9, 2021.

2008-2012 time period specifically to assist the state agency in identifying wild rice waters that were potentially impacted by mining pollution, so that their long-expired NPDES/SDS permits could be updated with appropriately protective water quality-based effluent limits (WQBELs). Unfortunately, after ten years, the tribes are still awaiting the issuance of modern and protective water quality discharge permits for these facilities, and the clear degradation or in some cases, extirpation of downstream wild rice stands continues unabated.

Response III.a.4: Please see EPA’s April 27, 2021, Decision Document, Section III for a discussion of EPA’s Screening Analysis. See also Response II.c above.⁴⁵

III.a.5. Other Waters that EPA Should Consider Adding to the Minnesota 2020 Impaired Waters List Beyond the 1,300

Joint Tribal Letter (June 30, 2021): 19 additional waterbodies or waterbody segments should be added to the draft EPA 303(d) list. These waters were not assessed because they were not included in the 1,300 waters identified solely by MPCA as wild rice waters in 2017. But all appear on other wild rice waters lists, there is sufficient testing data in the state’s databases, and pursuant to EPA’s 2020 methodology, all should be listed now.

Response III.a.5: Please see EPA’s April 27, 2021 Decision Document, Section III for a discussion of EPA’s Screening Analysis, including the role of MPCA’s 1300 Waters List as a screening factor.⁴⁶

III.b. EPA should direct MPCA to conduct more monitoring

Joint Tribal Letter (June 30, 2021): The 40 wild rice waters in this table [Appendix 1] appear to be sulfate impaired, but there simply are not enough samples collected to reasonably make the determination. These waters must be monitored and assessed for the next 303(d) listing cycle. The Tribes jointly ask EPA to direct MPCA to conduct field testing or to otherwise ensure that sufficient field data for assessment is collected.

Joint Tribal Letter (June 30, 2021): Tribes identified 10 other waters where there are no recent samples collected for verification. These waters must also be monitored to determine if listing on the next impaired waters list is appropriate. The Tribes likewise ask EPA to require field testing for these waters. [Appendix 1 D of the Tribal Comment Letter of 6/30/2021.]

Response III.b: EPA appreciates and acknowledges this comment. Please see EPA’s discussion of role of states and authorized tribes regarding the primary responsibility to act under Section 101(b) of the CWA in its April 27, 2021 Decision Document.⁴⁷ EPA will continue to look to Minnesota to take primary responsibility for assessing and listing waters for impairment and remains ready to provide oversight as well as technical assistance to Minnesota and to tribes in this process.

III.c. EPA should direct MPCA to stop listing waters in Indian country

Joint Tribal Letter (June 30, 2021): MPCA has continued to assess waters wholly within Reservation boundaries for impairment status without Tribal input despite multiple objections

⁴⁵ April 27, 2021 Decision Document at 11-18.

⁴⁶ April 27, 2021 Decision Document at 8-11.

⁴⁷ April 27, 2021 Decision Document at 8-11.

and requests from Tribal staff. States do not have the jurisdictional authority over waters wholly within Reservation boundaries and should only participate in their assessment at the behest of Tribes, in the spirit of cooperation between the state and the sovereign Tribal Nation(s). In fact, the assessment of shared jurisdictional waters should also be accomplished through a collaborative effort. However, the state of Minnesota has been inconsistent in their efforts to engage Tribes in that regard.

Response III.c: EPA notes that during the March 12, 2021 consultation, tribal representatives expressed concern that MPCA continues to list impaired waters in Indian country. As stated in our preamble to our Decision Document on the Minnesota 2020 Impaired Waters List, EPA is taking no action to approve or disapprove Minnesota’s List with respect to those waters that are within Indian country. EPA’s longstanding position is that absent a specific authorization, states do not have the authority to implement federal environmental programs in Indian country, and EPA’s review of a state CWA Section 303(d) list excludes waters that are located in Indian country. EPA, or an eligible Indian tribe, as appropriate, has authority under CWA Section 303(d) with regard to such waters. EPA’s approval of Minnesota’s 2020 Impaired Waters List does not extend to any waters in Indian country. EPA takes no position regarding whether the State can carry out activities in Indian country under its own state authorities outside the scope of the federal CWA.⁴⁸

⁴⁸ March 26, 2021 Decision Document at 1-2 and 19.