

STATE OF MINNESOTA  
COUNTY OF RAMSEY

DISTRICT COURT  
SECOND JUDICIAL DISTRICT  
CASE TYPE: Civil, Other

Court File No. 62CV-10-11824

MINNESOTA CHAMBER OF COMMERCE, )  
Plaintiff, )  
 )  
v. )  
PAUL EGER, in his official capacity as COMMISSIONER )  
MINNESOTA POLLUTION CONTROL AGENCY, )  
Defendant, )  
 )  
WATERLEGACY, )  
Applicant for Intervention. )

MEMORANDUM IN  
SUPPORT OF MOTION  
TO INTERVENE  
OF WATER LEGACY

**SUMMARY**

WaterLegacy moves to intervene in this action pursuant to Minn. R. Civ. P. 24.01 or, in the alternative, pursuant to Minn. R. Civ. P. 24.02 in order to protect its mission and the direct interests of its members in the conservation and protection of natural wild rice, which interests may as a practical matter be impaired as a result of the disposition of this action, including declaratory judgment or injunction affecting the Minn. R. 7050.0224 (2010) or its enforcement by the Minnesota Pollution Control Agency (“MPCA”) to protect natural wild rice from sulfate pollution.

WaterLegacy seeks intervention as to every claim made by Plaintiff Minnesota Chamber of Commerce (“Chamber”) and, as indicated in its Notice of Motion and Motion to Dismiss Complaint filed contemporaneously with this Motion, if intervener status is granted by this Court, WaterLegacy would move to dismiss each of Plaintiff’s claims under Minnesota Rules of Civil Procedure 12.02(e).

Minnesota Rules of Civil Procedure 24.01 provides for intervention of right as follows:

Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

The court, further, has the discretion to permit intervention to anyone pursuant to Minn.

R. Civ. P. 24.02, when “the applicant’s claim or defense and the main action have a common question of law or fact,” after considering whether “the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.”

WaterLegacy’s proposed intervention meets the four-part test identified by Minnesota Courts for intervention under Minn. R. Civ. P. 24.01: (1) timeliness, (2) interest relating to the property or transactions, (3) practical impairment, and (4) inadequate representation. *See Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986).

The court will evaluate each of the four factors to determine whether intervention of right should be allowed. *Cf. B E & K Constr. Co. v. Peterson*, 464 N.W.2d 756, 758 (Minn. Ct. App. 1991).

The 1968 amendments adopting Minn. R. Civ. P. 24.01 in its current form were “designed to encourage more extensive use of intervention.” *Avery v. Campbell*, 279 Minn. 383, 389, 157 N.W.2d 42, 46 (1968); *see also Engelrup v. Potter*, 302 Minn. 157, 166, 224 N.W.2d 484, 489 (1974). Minnesota has a “policy of encouraging all legitimate interventions.” *In re Crablex, Inc.*, 762 N.W.2d 247, 251 (Minn. Ct. App. 2009); *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 28 (Minn. 1981). Minnesota has also adopted a liberal standard for organizational standing for the purposes of intervention. *Snyder’s Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 301 Minn. 28, 35, 221 N.W. 2d 162, 164 (1974).

## **DISCUSSION OF GROUNDS FOR INTERVENTION**

### **1. WaterLegacy’s Motion to Intervene is Timely.**

WaterLegacy’s motion for intervention, filed within 20 days of the Complaint – at the earliest opportunity for any response - clearly meets the requirement for timeliness.

### **2. WaterLegacy has Interests Related to the Property or Transaction in this Action.**

WaterLegacy has interests relating to the requests for declaratory and injunctive relief made by the Minnesota Chamber of Commerce (“Chamber”) in this case. In its Complaint, the Chamber seeks to prevent the Minnesota Pollution Control Agency (“MPCA”) from interpreting and enforcing Minnesota Rule 7050.0224, a water quality standard limiting to 10 milligrams per liter (mg/L) the amount of sulfate pollution that can be discharged in waters used for the production of wild rice during the times when wild rice is susceptible to damage from high sulfate levels. In the Complaint, this water quality standard is referred to as the “Wild Rice Rule.”

The Chamber's challenge to application and enforcement of the Wild Rice Rule affects WaterLegacy's interests as a Minnesota non-profit 501(c)(3) environmental organization, formed in response to the threat of pollution and other environmental harm from mining activities and in order to protect the water resources of Minnesota and the communities that depend on them. WaterLegacy is a grassroots non-profit 501(c)(3) organization of over 1,000 members, many of whom hunt, fish, gather natural wild rice and enjoy other outdoor activities in Minnesota, specifically including areas of Northern Minnesota impacted and potentially impacted by mining activities and by the discharge of sulfates into Minnesota waters regulated and potentially regulated under Minn. R. 7050.0224. *See* Affidavit of Paula Maccabee attached herein ("Maccabee Affidavit").

WaterLegacy has participated in and will participate in the MPCA's 2008-2012 Triennial Water Quality Review ("Triennial Review") rulemaking process currently underway, which Triennial Review of water quality standards includes review and evaluation of the Wild Rice Rule. WaterLegacy has also participated in and will participate in environmental review, permitting and permit enforcement processes pertaining to the Wild Rice Rule in order to protect and conserve natural stands of wild rice and the fish and birds sustained by the food, habitat and water provided by natural wild rice. *See* Maccabee Affidavit, Exhibits A and B.

To the degree that the wild rice sulfate standard is undermined, enjoined, narrowly construed or in any way not rigorously enforced, WaterLegacy must divert substantial legal and volunteer resources for advocacy and outreach to protect natural wild rice and related Minnesota natural resources. *See* Maccabee Affidavit. Impediments to an organization's activities and mission, including the need to divert organizational resources, create cognizable injuries to the interests of an organization. *Alliance for Metro. Stability v. Metro. Council*, 671 N.W. 2d 905, 914 (Minn. Ct. App. 2003), *citing Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 301 Minn. 28; 221 N.W.2d 162, 167 (Minn. 1974).

WaterLegacy also represents individual members who would suffer a concrete and particularized injury if the Chamber were to prevail in this matter. WaterLegacy members include individuals who harvest natural wild rice in Minnesota, hunt fowl for which Minnesota natural wild rice stands provide food and habitat and fish in Minnesota lakes and rivers, for which natural wild rice provides habitat and improves water quality. Some of the locations where WaterLegacy members conduct these activities are downstream of and vulnerable to pollution

from existing and proposed sulfate discharge, including those of mining companies such as PolyMet and Keetac, specifically cited in the Chamber's Complaint. The interests of WaterLegacy members in ricing, hunting and fishing and consumption of foods related to natural wild rice would be impaired if natural wild rice is not protected from sulfate pollution. *See* Affidavit of Leonard Anderson, Affidavit of Matthew Tyler. The ultimate intended beneficiaries of the Wild Rice Rule certainly include individuals whose ability to gather, hunt and fish are affected by sulfate pollution of wild rice waters.

It is well established that an organization has standing to protect the interests of its members and that actual and concrete injuries from the conduct at issue satisfy the requirements for an injury in fact. *Alliance for Metro. Stability v. Metro. Council, supra*, 671 N.W. 2d at 914-915. The Minnesota Supreme Court has ordered that intervention be granted where the persons represented by an organization were the "ultimate intended beneficiaries of the regulation" challenged by industry and were affected by the regulation to a "disproportionate degree." *Snyder's Drug Stores v. Minn. State Bd. of Pharmacy, supra*, 221 N.W. 2d at 166. *See also S. Minn. Constr. Co. v. Minn. Dep't of Transp.*, 637 N.W.2d 339, 342 (Minn. Ct. App, 2002)(Intervention by union permitted in declaratory judgment action against MnDOT to block independent enforcement of prevailing wage act); *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585 (Minn. 1977) (Intervention by RIP-35E Environmental Defense Fund nonprofit corporation permitted in declaratory judgment action to invalidate 35E statute). In a declaratory judgment action, even persons who may have insufficient interests to file a claim on their own may intervene once the action has been commenced if they have rights that will be affected by final determination of the case. *Burnsville v. Bloomington*, 264 Minn. 133, 136-137, 117 N.W. 2d 746 (1962).

WaterLegacy has interests under Minn. R. Civ. P. 24.01 based on its organizational conservation mission and based on its representation of members who hunt and fish gather wild rice in waters to which sulfates have been and have the potential to be discharged absent rigorous enforcement of the Wild Rice Rule.

### **3. Disposition of this Action as a Practical Matter Would Impair WaterLegacy's Interests.**

Disposition of this action as requested by the Chamber would impair if not preclude enforcement of the Wild Rice Rule to protect natural wild rice from discharge of harmful sulfate

pollution. Among other relief, the Chamber seeks a declaration that the MPCA's application of the Wild Rice Rule is illegal (Complaint, Prayer for Relief ¶¶ A, C, E) and an injunction preventing the MPCA from investigating whether wild rice is present in waters where its members discharge sulfate pollution. (Complaint, Prayer for Relief, ¶ I). The Chamber seeks to restrict application of the Wild Rice Rule to waters used for "agricultural irrigation" (Complaint, Prayer for Relief ¶¶ F, H), a peculiar interpretation that would preclude protection of any stands of natural wild rice, none of which involve "agricultural irrigation." Finally, the Chamber seeks this Court's intervention to dictate terms for an administrative rulemaking process presently underway at the MPCA. (Complaint, Prayer for Relief, ¶¶ D, G).

Whether disposition of an underlying action may impair or impede an intervenor's ability to protect its interests "should be viewed from a practical standpoint rather than one based upon strict legal criteria." *Minneapolis Star & Tribune, supra*, 392 N.W. 2d at 207; *BE & K Constr. Co. v. Peterson*, 464 N.W. 2d 756, 758 (Minn. Ct. App. 1991) (Reversing trial court's denial of union's right to intervene).

Enforcement of Minnesota's Wild Rice Rule by the MPCA, including its application in waters containing natural stands of wild rice, its application to mining activities, and the MPCA's issuance and enforcement of wastewater discharge permits to ensure compliance with this Rule, as a practical matter, is necessary to protect WaterLegacy's and its members' interests in the conservation and protection of natural wild rice in Minnesota. Although citizens may also have the right to litigate when natural resources are impaired or degraded, WaterLegacy and its members rely heavily on the technical expertise and resources of the MPCA and the administrative procedures used by the agency to investigate the presence and susceptibility of natural wild rice, determine discharge limits for sulfates and other pollutants and enforce permit limitations to prevent and control sulfate pollution in wild rice waters. Plaintiff's claims in this matter would impair the efficacy of the MPCA and the interests of WaterLegacy and its members in protecting natural wild rice.

#### **4. WaterLegacy's Intervention is Necessary to Adequately Represent its Interests.**

Finally, although WaterLegacy shares some interests with the Commissioner of the MPCA in the enforcement of the Wild Rice Rule, WaterLegacy also has interests that diverge from those of the MPCA. WaterLegacy would not be adequately represented by existing parties.

Examples of the divergence of interests are reflected in WaterLegacy's advocacy to the MPCA. WaterLegacy has been and continues to be a participant seeking specific outcomes in the current 2008-2012 Triennial Review Process, in which the MPCA is reviewing the Wild Rice Rule. WaterLegacy has advocated that the wild rice sulfate standard of 10 mg/L be preserved for natural wild rice, that this limit be enforced on a uniform basis year-round rather than seasonally, and that the Wild Rice Rule be applied to protect a wide range of areas where natural wild rice is present or has historically grown. WaterLegacy's advocacy positions have been documented in a report entitled *Preserve Minnesota's Wild Rice Standard* submitted on or about November 1, 2010; in a meeting convened between MPCA staff, WaterLegacy members and other advocates for the conservation of natural wild rice on November 4, 2010; and in a letter to the Supervisor of the MPCA's Water Quality Standards Unit on December 27, 2010. See Maccabee Affidavit, Exhibit A and Exhibit B attached herein. WaterLegacy's interests, while they are in some ways similar to those of the MPCA, are distinct from the interpretations and positions taken by the agency in rulemaking and enforcement of the Wild Rice Rule.

Due to these divergent interests, WaterLegacy would not be adequately represented if it were not permitted to intervene. In *Costley v. Caromin House, Inc.*, 313 N.W. 2d 21 (Minn. 1981) the Minnesota Supreme Court reversed the district court's denial of intervention to four mentally retarded persons in a case where neighbors challenged the construction of a home for mentally retarded adults in the city of Two Harbors. The Court rejected the finding made below that the residents were "adequately represented" by the entity seeking to build the project, quoting Wright & Miller, *Federal Practice & Procedure*, §1909, at 524 (1972):

If [the applicant's] interest is similar to, but not identical with that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but he ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee.

*Costley v. Caromin House, supra*, 313 N.W. 2d at 28. The Court stated, "We have followed the policy of encouraging all legitimate interventions" *Id.*, citing *Engelrup v. Potter, supra*, 302 Minn. at 166, 224 N.W.2d at 489; *Avery v. Campbell, supra*, 279 Minn. at 389, 157 N.W.2d at 46. Since the applicants had the necessary interests and were inadequately represented, denial of intervention was not justified. The Court further found that intervention would not unduly delay or prejudice the rights of other parties. *Costley v. Caromin House, supra*, 313 N.W. 2d at 29.

5. **Permissive Intervention of WaterLegacy is also Appropriate.**

In addition to meeting the four-part test for intervention as of right under Minn. R. Civ. P. 24.01, WaterLegacy's intervention should be permitted as a matter of this court's discretion pursuant to Minn. R. Civ. P. 24.02. WaterLegacy's defense and the main action have common questions of law or fact and its participation will not delay this matter and may, in fact, contribute to its prompt and efficient resolution.

**CONCLUSION**

WaterLegacy's intervention is timely; pertains to an interest relating to the subject of this litigation that would be impaired from a practical standpoint by its disposition; and is needed for adequate representation of its interests. Intervention of right should be granted under Minn. R. Civ. P. 24.01. WaterLegacy's intervention is also appropriate in the exercise of this Court's discretion under Minn. R. Civ. P. 24.02.

On the authorities and information provided herein and the attached affidavits and exhibits, WaterLegacy requests that its Motion to Intervene be granted.

DATED: January 6, 2011

Respectfully submitted:

JUST CHANGE LAW OFFICES

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