

No. _____

**State of Minnesota
Supreme Court**

In the Matter of the reissuance of an NPDES/SDS Permit to United States Steel Corporation (U.S. Steel) for its Minntac facility and response to Contested Case Hearing requests filed by U.S. Steel and the Minnesota Center for Environmental Advocacy (“MCEA”)

And In the matter of the Application for Variance from Water Quality Standards in the proposed NPDES/SDS permit, MPCA's Preliminary Determination to Deny the Variance Request and U.S. Steel's Contested Case Hearing request on the Variance Denial

**PETITION FOR SUPREME COURT REVIEW
OF RELATOR/RESPONDENT WATERLEGACY**

(Case Nos. A18-2094, A18-2095, A18-2159, A18-2163: Date of Decision December 9, 2019)

Paula G. Maccabee (MN #129550)
JUST CHANGE LAW OFFICES
1961 Selby Avenue
St. Paul, MN 55104
(651) 646-8890
pmaccabee@justchangelaw.com

*Attorney for Relator/Respondent
WaterLegacy*

Stacey W. Person (MN #0351349)
MINNESOTA ATTORNEY
GENERAL
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 757-1412
stacey.person@ag.state.mn.us

*Attorney for Respondent
Minnesota Pollution Control Agency*

Sara K. Van Norman (MN #0339568)
VAN NORMAN LAW, PLLC
1010 West Lake Street, Suite 100-130
Minneapolis, MN 55408
(612) 299-1794
sara@svn.legal

Sean Copeland (MN #387142)
FOND DU LAC BAND LEGAL
DEPT.
Fond du Lac Reservation
1720 Big Lake Rd.
Cloquet, MN 55720
(218) 878-7393
seancopeland@fdlrez.com

*Attorneys for Relator/Respondent
Fond du Lac Band
of Lake Superior Chippewa*

William P. Hefner (MN #0258349)
Jeremy Greenhouse (MN #0328443)
THE ENVIRONMENTAL LAW
GROUP, LTD.
2263 Waters Drive
Mendota Heights, MN 55120
(612) 378-3700
whefner@envirolawgroup.com
jgreenhouse@envirolawgroup.com

*Attorney for Relator / Respondent
United States Steel Corporation*

INTRODUCTION

WaterLegacy requests review of the published decision of the Court of Appeals (Cochran, Presiding Judge; Connolly, Judge; and Johnson, Judge) pertaining to the Minnesota Pollution Control Agency's ("MPCA") issuance of a water pollution permit to United States Steel Corporation ("USS") for the Minntac tailings basin. The Court of Appeals ruled on two issues which neither the Minnesota Supreme Court nor the Minnesota Court of Appeals had previously decided. Its holdings were categorical, rather than specific to the particular case before it.

The Court of Appeals held that the MPCA *had* the discretion to determine that the federal Clean Water Act and its implementing regulations do not apply to control any pollution discharged to wetlands, rivers and lakes through groundwater, no matter how direct the connection between the discharge and violation of surface water quality standards. The Court of Appeals then held that MPCA *lacked* discretion to read Minnesota rules setting drinking water standards to impose numeric limits on pollution of groundwater. Taken together, the Court of Appeals' decisions would have devastating and statewide effects on Minnesota's authority to regulate pollution through groundwater to surface water and pollution to groundwater itself.

STATEMENT OF LEGAL ISSUES

1. For decades, the EPA, along with most federal courts, has interpreted the federal Clean Water Act (“CWA”) and EPA’s rules implementing the CWA to apply when pollution is discharged to surface water through directly connected groundwater. The EPA also determined, based on specific facts about Minntac tailings basin pollution and hydrology, that the CWA must be applied to regulate Minntac subsurface discharge. Did the Court of Appeals err in granting MPCA discretion to find that the CWA did not apply to *any* discharge of pollution to surface water through groundwater, rejecting the weight of precedent and disregarding EPA’s long-standing interpretations of the CWA and EPA’s specific findings for the Minntac tailings basin?

The Court of Appeals rejected most federal precedent and disregarded EPA’s long-standing analysis of the CWA and EPA’s specific findings pertaining to Minntac tailings basin pollution to grant MPCA discretion to deny the CWA applies to any discharge of pollutants to Minnesota wetlands, lakes and streams through directly connected groundwater.

2. MPCA applied drinking water standards adopted in Minnesota rules to regulate discharge of Minntac tailings basin sulfate pollution to groundwater. Did the Court of Appeals err in denying MPCA discretion to read Minnesota rules to apply drinking water standards to groundwater?

The Court of Appeals held that MPCA lacked the discretion under Minnesota rules to apply drinking water standards to any Minnesota groundwater.

STATEMENT OF CRITERIA SUPPORTING REVIEW

This case merits review under Minn. R. Civ. App. P. 117, subd. 2 (a), (d)(1) and (d)(2) because the questions (1) whether the MPCA has the obligation to regulate discharge of pollutants through groundwater to surface waters under the CWA and, (2) whether the MPCA has the authority under Minnesota rules to control

contamination of groundwater in violation of drinking water standards are important questions never previously addressed by Minnesota appellate courts. The Court of Appeals has proposed new principles of interpretation that could lead to uncontrolled pollution whenever industrial wastewater is discharged through or to groundwater.

STATEMENT OF THE CASE

WaterLegacy appealed from MPCA's reissuance of National Pollutant Discharge Elimination System/State Disposal System ("NPDES/SDS") Permit for the Minntac tailings basin ("Minntac Permit"). MPCA issued Findings of Fact, Conclusions of Law and Order on November 30, 2018, and issued the Minntac Permit on December 1, 2018. WaterLegacy's appeal was driven by the realization that the Minntac tailings basin may be Minnesota's most egregious example of uncontrolled discharge of pollutants to nearby wetlands, rivers and lakes through directly connected groundwater.

MPCA defended its decision not to regulate Minntac tailings basin pollution to comply with surface water quality standards by claiming that pollution discharged from the Minntac basin through streams and wetlands covered by its own tailings was "deep seepage" outside the coverage of the CWA. USS does not dispute that the Minntac tailings basin discharges millions of gallons of untreated seepage each day, which seepage "enters the surficial aquifer beneath the basin and flows as groundwater from the basin to the west and east," impacting the Sand River, Admiral Lake, Little Sandy Lake, Sandy Lake, Timber Creek and the Dark River. (*See* Addendum

(“ADD”) 38, 39, 41). MPCA, also, “does not deny that groundwater from the Tailings Basin is affecting certain surface waters that are ‘waters of the United States,’” and admits on the basis of hydrology and site characteristics that there are “no other anthropogenic sources of the pollution.” (ADD 35, 36).

EPA reviewed the draft Minntac Permit, emphasizing, “EPA's longstanding position is that a discharge from a point source to jurisdictional surface waters that moves through groundwater with a direct hydrological connection comes under the purview of the CWA’s permitting requirements.” (ADD 43). EPA then found the “tailings basin is discharging pollutants to the surrounding surface waters. . .via subsurface flow which has a direct hydrologic connection.” (ADD 44).

If MPCA’s “deep seepage” fiction is sufficient to avoid Minntac tailings basin compliance with the CWA and Minnesota surface water quality standards adopted pursuant to the CWA, then fish, wild rice, and human health will not be protected from future sulfide mining pollution and other industrial wastewater discharged through groundwater to navigable waters of the United States.

BRIEF ARGUMENT

- 1. This Court should review the decision that MPCA need not comply with the CWA to control industrial discharge of pollutants to surface waters through groundwater no matter how direct the connection between discharge and violation of surface water quality standards.**

The Court of Appeals made several errors of law in its categorical decision to exclude application of the CWA to Minntac tailings basin pollution. Its decision

conflated the question of whether the CWA applies to prevent pollution of groundwater itself (which it does not), with the question of whether NPDES permits issued under the CWA must control pollution of navigable surface waters when facts show a direct hydrological connection between discharge of pollutants and the surface waters affected. (ADD 12-14, 17). These issues are distinct.

The only U.S. States Supreme Court decision on point holds the CWA governs pollution added to navigable waters through waters that are, themselves, not covered by the CWA. *Rapanos v. United States*, 547 U.S. 715, 743, 126 S. Ct. 2208, 2227, 165 L. Ed. 2d 159 (2006) (“The Act does not forbid the ‘addition of any pollutant *directly* to navigable waters from any point source,’ but rather the ‘addition of any pollutant *to* navigable waters.”) (quoting 33 U.S.C. § 1362(12)(A)). The weight of precedent, including decisions of the Second, Fourth, Fifth, Ninth and Tenth Circuits have found the CWA applies based on a fact-specific determination of whether there is a direct hydrological connection between discharge through groundwater and affected navigable waters. *See e.g. Upstate Forever v. Kinder Morgan Energy Ptnrs., L.P.*, 887 F.3d 637, 651, 652 (4th Cir. 2018) (citing Fifth, Ninth and Tenth Circuit cases).¹ The Court of Appeals rejected this precedent to find that MPCA had the discretion to categorically exclude CWA coverage. (ADD 3, 16-17).

¹ A Ninth Circuit case pending at the U.S. Supreme Court involving injection of pollution deep into groundwater wells “fairly traceable,” rather than directly connected to surface water, may or may not affect issues in this case. *Hawai’i Wildlife Fund v. Cnty. of Maui*, 886 F. 3d 737, 749 (9th Cir. 2018), *cert. granted sub nom. Cnty. of Maui v. Hawai’i Wildlife Fund*, No. 18-260, 139 S. Ct. 1164, 203 L. Ed. 2d 196 (Feb. 19, 2019); *argued* Nov. 6, 2019.

The Court of Appeals also failed to consider long-standing EPA interpretations requiring CWA compliance. *See e.g. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations* 56 FR 64876, 64982 (Dec. 12, 1991) (CWA “requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwater and surface waters. . .because such discharges are effectively discharges to the directly connected surface waters.” Its decision failed even to mention EPA comments finding a direct hydrological connection between Minntac tailings basin pollution and violations of water quality standards in affected surface waters. (*See* ADD 11-18).

State standards adopted under the CWA have a federal character, and “EPA’s reasonable, consistently held interpretation of those standards is entitled to substantial deference.” *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992). In Minnesota, “the position advanced by EPA is compelling evidence” of how CWA regulations may be interpreted. *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for Discharge of Treated Wastewater*, 731 N.W.2d 502, 521 (Minn. 2007). A state “has no authority to create a permit exemption from the CWA for discharges that would otherwise be subject to the NPDES permitting process.” *N. Plains Res. Council v. Fid. Expl. & Dev. Co.*, 325 F.3d 1155, 1164 (9th Cir. 2003). Deference to a state is only appropriate “so long as it appears after careful consideration that the state agency determination is consistent with EPA’s requirements and is otherwise rational.” *Voigt v. Coyote Creek Mining Co., LLC*, 329 F. Supp. 3d 735, 771 (D. N. Dak. 2018).

The Court of Appeals' deference to MPCA to deny CWA protection of surface waters through directly connected groundwater must be reviewed. This decision will prevent future NPDES permit controls on any sulfide mining or other industrial wastewater discharged adjacent to wetlands, a riverbank, or a lake to seep directly through shallow groundwater and contaminate Minnesota surface waters.

2. This Court should review the decision that Minnesota rules preclude MPCA control of pollution of groundwater that violates primary or secondary drinking water standards incorporated in Minnesota rules.

Where the Court of Appeals' decision *allowed* MPCA broad discretion to remove federal CWA protection of surface waters from Minntac tailings basin pollution through directly connected groundwater, the Court *denied* MPCA discretion to interpret its own Minnesota rules to apply drinking water standards and protect groundwater itself from Minntac pollution. This equally broad decision would have far-reaching impacts on existing and future MPCA permits seeking to protect Minnesota groundwater as a source of clean drinking water.

The MPCA, supported by WaterLegacy and the Fond du Lac Band of Lake Superior Chippewa, sought to apply drinking water standards adopted in Minnesota rules to control sulfate discharged to groundwater from the Minntac tailings basin in violation of these standards. In 2008, Minnesota Rule 7050.0221, subpart 1, incorporated both federal primary drinking water standards (setting limits for highly toxic pollutants such as arsenic, lead, atrazine and benzene) and secondary drinking

water standards (setting limits for sulfate, among other pollutants)² to protect Minnesota groundwater and Class 1 surface water for use drinking water.

The Court of Appeals not only rejected WaterLegacy's view that the plain language of Minnesota rules *requires* MPCA to protect groundwater according to drinking water standards. *See* Minn. R. 7050.0140, subp. 2; 7050.0221, subp. 1-4; 7060.0400. Its decision went much further and held that there was no ambiguity in MPCA's rules that would allow MPCA to regulate groundwater to apply the numeric limits on pollutants contained in drinking water standards. (ADD 24).

The Court of Appeals accepted USS's novel arguments that "potable" water and "drinking" water cannot have the same meaning, that no Minnesota groundwater has been classified as drinking water, and that no Minnesota rules apply numeric limits to protect groundwater. (ADD 20-23).

Although the Court of Appeals didn't discuss the implications of its decision on other permits or other federal drinking water standards adopted in Minnesota Rule 7050.0221, subpart 1, its ruling would have staggering effects on MPCA's authority to protect Minnesota groundwater not just from sulfate pollution, but from highly toxic chemicals governed by the same rules.

WaterLegacy respectfully requests an order granting review of the decisions of the Court of Appeals undermining protection of Minnesota waters from pollution:

² *See* EPA, Drinking Water Contaminants – Standards and Regulations, www.epa.gov/dwstandardsregulations, last visited Jan. 6, 2020.

both pollution of wetlands, lakes and streams through directly connected groundwater and direct pollution of groundwater itself.

Dated: January 8, 2020

Respectfully submitted,

/s/ Paula G. Maccabee

Paula Goodman Maccabee (#129550)

Just Change Law Offices

1961 Selby Avenue

St. Paul, Minnesota 55104

Phone: (651) 646-8890

pmaccabee@justchangelaw.com

Attorney for WaterLegacy

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 117 subd. 3, was produced with a proportional 13-point font in Microsoft Word 2019, and that the length of this document, excluding exempted parts, is 1998 words.

Dated: January 8, 2020

/s / Paula G. Maccabee

Paula G. Maccabee