

**STATE OF MINNESOTA
IN COURT OF APPEALS**

A18-2094

A18-2095

A18-2159

A18-2163

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.

**Filed December 9, 2019
Reversed and remanded
Cochran, Judge**

Minnesota Pollution Control Agency

William P. Hefner, Jeremy P. Greenhouse, The Environmental Law Group, Ltd., Mendota Heights, Minnesota (for relator/respondent United States Steel Corporation)

Paula Goodman Maccabee, Just Change Law Offices, St. Paul, Minnesota (for relator/respondent WaterLegacy)

Sara K. Van Norman, Van Norman Law, PLLC, Minneapolis, Minnesota; and

Sean Copeland, General Counsel, Seth J. Bichler, Staff Attorney, FDL Band Legal Department, Cloquet, Minnesota (for relator/respondent Fond du Lac Band of Lake Superior Chippewa)

Keith Ellison, Attorney General, Stacey W. Person, Assistant Attorney General, St. Paul, Minnesota (for respondent Minnesota Pollution Control Agency)

Carolyn L. McIntosh (pro hac vice), Squire Patton Boggs (US) LLP, Denver, Colorado; and

Dara D. Mann, Squire Patton Boggs (US) LLP, Atlanta, Georgia (for amicus curiae Iron Mining Association of Minnesota)

Kevin Reuther, St. Paul, Minnesota (for amicus curiae Minnesota Center for Environmental Advocacy)

Jeffrey K. Holth, Joseph F. Halloran, Mark A. Anderson, Michael L. Murphy, Barbara Cole, The Jacobson Law Group, St. Paul, Minnesota (for amici curiae the Grand Portage Band of Lake Superior Chippewa, the Bois Forte Band of Chippewa, the Bad River Band of the Lake Superior Tribe of Chippewa, the Mille Lacs Band of Ojibwe, the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, the Lac du Flambeau Band of Lake Superior Chippewa Indians, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, and the 1854 Treaty Authority); and

Jason Kekek Stark, Hayward, Wisconsin (for amicus curiae the Lac Courte Oreilles Band of Lake Superior Chippewa Indians); and

Andrew Adams III, HOGAN ADAMS PLLC, St. Paul, Minnesota (for amicus curiae the Lac du Flambeau Band of Lake Superior Chippewa Indians)

Considered and decided by Cochran, Presiding Judge; Connolly, Judge; and Johnson, Judge.

S Y L L A B U S

1. We accord deference to the conclusion of the Minnesota Pollution Control Agency (MPCA) that the federal Clean Water Act (CWA) does not govern discharges of pollutants to groundwater because the relevant statutory language is ambiguous and because (a) the MPCA is responsible for administering and enforcing the CWA, (b) the subject matter of the statute falls within the MPCA's areas of expertise, and (c) the MPCA's interpretation is reasonable under the circumstances of this case.

2. Under the plain language of the administrative rules comprising the state's water-quality standards, the standards for class 1 waters provided in Minn. R. 7050.0221

(2017) do not apply to groundwater because groundwater has not been classified as a class 1 water.

OPINION

COCHRAN, Judge

These consolidated certiorari appeals are taken from a November 30, 2018 decision by respondent Minnesota Pollution Control Agency (MPCA) reissuing a National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) permit to United States Steel Corporation (U.S. Steel). The permit governs discharges of pollutants to surface waters and groundwater from a tailings basin at U.S. Steel's Minntac ore processing operation.

U.S. Steel challenges the groundwater conditions of the permit and the MPCA's denial of its requests for a permit-related contested-case hearing and a variance from groundwater-quality standards. WaterLegacy and Fond du Lac Band of Lake Superior Chippewa (the band) argue that the MPCA erred in interpreting the federal Clean Water Act (CWA) and that the permit is not sufficiently protective of area surface waters.

We accord deference to the MPCA's reasonable interpretation of ambiguous provisions of the CWA and conclude that the MPCA did not err in determining that the act does not govern discharges of pollutants to groundwater. But we conclude that the MPCA erred in interpreting the state administrative rules governing water-quality standards by applying the class 1 water-quality standards to groundwater in determining permit conditions. We further conclude that the MPCA's determination that water-quality-based effluent limits are not required for surface discharges under the CWA is unsupported by

substantial evidence. Accordingly, we reverse the decision issuing the permit and remand for further proceedings consistent with this decision.

FACTS

The Minntac Tailings Basin

U.S. Steel operates the Minntac ore processing facility in the city of Mountain Iron in St. Louis County. The facility includes an unlined tailings basin, which has been in operation since approximately 1967. The basin was built on the Laurentian Divide and the headwaters of two rivers: the Dark River, which flows to the west, and the Sand River, which flows to the east. The basin covers approximately 8,700 acres (13.6 square miles). The basin is surrounded by a perimeter dike, made of tailings, that runs along the northern, eastern, and western sides of the basin over a length of 9.1 miles. The southern side of the basin is an existing bedrock high, meaning that the natural ground is higher than the tailings basin.

In addition to tailings, the basin receives wastewater and runoff from the Minntac facility. Water from the basin is recycled for use in taconite processing and returned to the basin, which has caused increasing levels of pollutants in the basin. Water from the basin seeps into area groundwater and surface waters, and has caused exceedances of water-quality standards in area surface waters. Of particular concern and at the heart of this appeal are the sulfate levels in area waters.

Permitting History

The first NPDES/SDS permit for the basin was issued by the MPCA in 1987.¹ The permit authorized discharges to groundwater, the Dark River, and the Sand River to Little Sandy Lake and Sandy Lake. The permit recognized two of the largest seepage points from the basin as outfall 020 on the west toe of the basin and outfall 030 on the east toe. The locations of these outfalls are now the locations of surface-discharge-monitoring stations SD001 and SD002, respectively. The 1987 permit included some effluent limits—restrictions on the amount of particular pollutants that may be discharged—but required only monitoring and study requirements for sulfate. The 1987 permit expired by its terms on July 31, 1992, but the tailings basin continued operations under the 1987 permit, pursuant to Minn. R. 7001.0160 (2017), until a new permit was issued in 2018.

In August 2000, the MPCA issued a letter of warning to U.S. Steel, expressing its “concern[] about the existing high sulfate concentrations in the drainage from the Minntac tailings basin” and noting that “[s]ulfate has been identified as a pollutant of concern at the tailings basin since at least 1987.” The letter alleged an exceedance, in area surface waters, of the 10 milligram per liter (mg/L) sulfate limit in Minn. R. 7050.0224, subp. 2 (2017), which is known as the wild rice rule. The MPCA acknowledged that U.S. Steel had requested the MPCA to reevaluate the sulfate limit, but explained that if U.S. Steel wanted

¹ The 1987 permit was issued to USS, a division of USX Corporation. Although the parties do not explain the corporate name changes or succession, there does not appear to be any dispute that U.S. Steel ultimately was the permittee under the 1987 permit.

immediate relief, it would need to seek a variance. In April 2001, U.S. Steel submitted an application for a variance from certain water-quality standards, including the wild rice rule.

Thereafter, the MPCA and U.S. Steel entered into a series of schedules of compliance that variously required U.S. Steel to study the sulfate issue and pursue technologies to reduce the sulfate discharged from the basin. U.S. Steel studied and rejected, with the MPCA's approval, a number of technologies before deciding to pursue a seep-collection-and-return technology. Pursuant to a 2007 schedule of compliance and a 2010 amendment to the 1987 permit, U.S. Steel constructed a seep-collection-and-return system (SCRS) on the Sand River side of the basin. The SCRS is designed to capture seepage and return it to the basin. The SCRS spans approximately 1¾ miles and consists of catch basins at 13 identified seepage locations, sheet-pile cut-off walls downgradient of each catch basin, underground piping, and two pump stations.

In June 2011, U.S. Steel and the MPCA executed the final schedule of compliance under the 1987 permit. The 2011 schedule of compliance required U.S. Steel to monitor seepage on the Dark River side of the basin; to study and report on the feasibility of a Dark River SCRS; and, if determined feasible, to build a Dark River SCRS.

In February 2013, U.S. Steel and the MPCA executed an amendment to the 2011 schedule of compliance. The 2013 amendment added alleged violations of groundwater-quality standards, citing Minn. R. 7060.0400 (2017) and 7050.0221 as setting a 250 mg/L sulfate limit for groundwater. The 2013 amendment required U.S. Steel to submit a groundwater-sulfate-reduction plan.

In December 2014, the MPCA issued a pre-public-notice draft of a reissued permit for the Minntac facility. After receiving comments from U.S. Steel, WaterLegacy, the band, and other noticed entities, and after modifying the draft permit, the MPCA noticed the draft permit for public comment in November 2016. In December 2016, U.S. Steel submitted an application for a variance from certain water-quality standards, and a request for a contested-case hearing on the permit.² On November 30, 2018, the MPCA released its decision reissuing the permit (hereinafter the permit or 2018 permit) and denying U.S. Steel's requests for a variance and a permit-related contested-case hearing.

The 2018 Permit

The 2018 permit distinguishes between “surface seepage,” which “emerges either from the side of the basin dam, or within the vicinity of the toe of the dam, that creates surface flow or ponded features that would not exist in the absence of the tailings basin,” and “deep seepage,” which “enters the underlying surficial aquifer throughout the area of the basin and does not discharge[] to the ground surface adjacent to its source.” Surface seepage is regulated under the federal NPDES portion of the permit, and deep seepage is regulated under the state SDS portion of the permit.

The NPDES portion of the permit authorizes discharges to the Dark River and unnamed wetland tributaries, to the Timber Creek and unnamed wetland tributaries, and to unnamed wetlands north of the basin. The permit does not authorize discharges to the east, based on the MPCA's finding that the Sand River SCRS has eliminated surface discharges

² U.S. Steel also unsuccessfully sought a variance-related contested-case hearing, but does not challenge the denial of that hearing request on appeal.

on the east side of the basin. Discharges to the Dark River are authorized subject to a schedule of compliance requiring U.S. Steel, within 18 months of permit issuance, to build and put into operation the Dark River SCRS to eliminate discharges on the west side of the basin.

The SDS portion of the permit includes groundwater conditions derived from a 250 mg/L sulfate standard for class 1 waters, based on the MPCA's position that all groundwater in the state is class 1 water subject to the standards of Minn. R. 7050.0221. Based on the class 1 sulfate standard, the permit requires that U.S. Steel reduce the sulfate level in groundwater at the property boundary to 250 mg/L by December 31, 2025, and the in-basin sulfate level to 357 mg/L by December 1, 2028. The permit also includes interim study and reporting requirements in relation to reducing sulfate in the basin, and requires U.S. Steel to begin construction on a selected sulfate-reduction technology within 54 months of permit issuance. And the permit requires continued monitoring of the basin and area groundwater and surface waters by U.S. Steel.

These Appeals

U.S. Steel filed certiorari appeals challenging the groundwater conditions in the permit and the denial of a permit-related contested-case hearing (A18-2094), and the denial of its request for a variance from groundwater-quality standards (A18-2095). WaterLegacy (A18-2159) and the band (A19-2163) filed separate appeals challenging the MPCA's determination that the CWA does not regulate discharges from the basin to groundwater and challenging the surface-water conditions in the permit. This court consolidated all four appeals.

ISSUES

I. Did the MPCA err by concluding that the CWA does not govern discharges of pollutants to groundwater?

II. Did the MPCA err by applying the class 1 water-quality standards to groundwater in determining permit conditions?

III. Does substantial evidence support the MPCA's determination that water-quality-based effluent limits for discharges to surface waters are not required in the permit?

IV. Did the MPCA err by failing to include permit conditions relating to Minnesota's wild rice rule?

ANALYSIS

Under the CWA and the State Water Pollution Control Act (WPCA), Minn. Stat. §§ 115.01-.09 (2018 & Supp. 2019), the MPCA is afforded broad power and responsibility to protect waters in this state, including the authority to issue NPDES and SDS permits. *See* 33 U.S.C. § 1342(b) (2012)³; Minn. Stat. § 115.03, subs. 1, 5(a).⁴ As

³ In 2019, Congress passed the Water Infrastructure Improvement Act, Pub. L. 115-436, 132 Stat. 5558-62 (2019), which added subdivisions to 33 U.S.C. §§ 1342 and 1362 (2012). These amendments are not relevant to the issues on appeal.

⁴ As is explained further in section I below, an NPDES permit is required under federal law for discharges of pollutants to navigable waters. *See* 33 U.S.C. § 1311 (2012), 1342(a). An SDS permit is required under state law for a "system of disposing of sewage, industrial waste and other wastes." Minn. Stat. §§ 115.01, .03 (2018 & 2019 Supp.). Facilities like Minntac's tailings basin that both discharge pollutants to navigable waters and constitute disposal systems obtain a combined NPDES/SDS permit from the MPCA. *See* Minn. R. 7001.1010 (2017) (providing that issuance of NPDES permit satisfies requirements to obtain SDS permit).

required by the CWA, the MPCA has adopted water-quality standards. *See* 33 U.S.C. § 1313(a) (2012) (requiring states to adopt water-quality standards); Minn. Stat. § 115.03, subd. 5 (granting the MPCA the authority to adopt standards for purposes of the state’s participation in the NPDES program); Minn. Stat. § 115.44, subd. 2 (2018) (directing MPCA to adopt water-quality standards); Minn. R. 7050.0110-.0470 (2017) (providing water-quality standards for “waters of the state”), 7060.0100-.0900 (2017) (providing water-quality standards for “underground waters”).⁵ NPDES/SDS permits issued by the MPCA must include conditions sufficient to ensure compliance with water-quality standards. *See* 40 C.F.R. § 122.44(d)(1) (2019); Minn. R. 7001.0140 (2017).

The MPCA’s decisions are subject to judicial review under Minn. Stat. §§ 14.63-.69 (2018). Minn. Stat. § 115.05, subd. 11. In reviewing an agency decision under Minn. Stat § 14.69, this court may affirm or remand for further proceedings, or we may reverse or modify the agency’s decision if we determine that it is unsupported by substantial evidence, arbitrary or capricious, or affected by error of law. Minn. Stat. § 14.69; *see also In re City of Owatonna’s NPDES/SDS Proposed Permit Reissuance for Discharge of Treated Wastewater*, 672 N.W.2d 921, 926 (Minn. App. 2004) (discussing standard of review). “[D]ecisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies’ expertise and their special knowledge in the field of their technical training, education, and experience.” *In re Excess Surplus*

⁵ Separate water-quality standards governing the Lake Superior basin are set forth in 7052.0005-.0380 (2017); these standards are not at issue in this case.

Status of Blue Cross & Blue Shield of Minn., 624 N.W.2d 264, 278 (Minn. 2001) (quotation omitted).

I.

We first address an argument by WaterLegacy and the band that the MPCA erred in interpreting the CWA. WaterLegacy and the band assert that the MPCA erred by concluding that the CWA does not apply to discharges from the basin into groundwater (so-called deep seepage), even though the groundwater is hydrologically connected to area surface waters that are “navigable waters” covered by the act. The MPCA contends that the CWA does not extend to discharges to groundwater—even groundwater that is hydrologically connected to navigable waters—and that its decision to regulate deep seepage under the SDS portion of the permit rather than the NPDES portion of the permit is consistent with both federal and state law. U.S. Steel supports the MPCA’s decision to regulate discharges to groundwater only under the state’s SDS permitting program.

The legal issue of whether the CWA applies to discharges conveyed by groundwater to navigable waters has been a subject of disagreement among the federal courts of appeals and is expected to be decided by the United States Supreme Court during its current term. *Compare Hawai‘i Wildlife Fund v. County of Maui*, 881 F.3d 754, 765 (9th Cir. 2018) (holding that discharges to groundwater may be covered by CWA if “fairly traceable from the point source to a navigable water”), *cert. granted sub. nom. County of Maui v. Hawaii Wildlife Fund*, 139 S. Ct. 1164 (2019), and *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018) (holding that discharges to groundwater are within the scope of the CWA where discharges are “sufficiently connected to navigable

waters” and adopting hydrological connection theory developed by the EPA), *with Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 934 (6th Cir. 2018) (holding that discharges to groundwater are not covered by CWA and rejecting hydrological connection theory), *and Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (same). This court is bound by decisions of the United States Supreme Court and the Minnesota Supreme Court, but it is not bound by other federal courts’ opinions, even when interpreting federal statutes. *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 20 (Minn. App. 2003). Because the United States Supreme Court has not yet decided *County of Maui*, and our state supreme court has not addressed the issue of whether discharges to groundwater are covered by the CWA, the issue is subject to our de novo determination. *Id.* at 19-20; *see also In re Gillette Children’s Specialty Healthcare*, 883 N.W.2d 778, 784 (Minn. 2016) (“We review an administrative agency’s interpretation of federal statutes de novo.”).

The dispute over whether the CWA applies to discharges of pollutants that reach navigable waters only after travelling through groundwater centers on the language of certain provisions of the CWA. The CWA generally prohibits the “discharge of any pollutant” without an NPDES permit. *See* 33 U.S.C. §§ 1311(a) (general prohibition), 1342(a)(1) (providing exception for discharges pursuant to a permit). The “discharge of a pollutant” is defined to mean, as relevant here, “any addition of any pollutant *to navigable waters* from any point source.” 33 U.S.C. § 1362(12) (emphasis added).⁶ “[N]avigable

⁶ The MPCA’s permit decision and responses to comments suggest that there is a legal question not only as to whether discharges to groundwater that travel to navigable waters

waters” are defined as “waters of the United States,” *id.* (7), which in turn are broadly defined to include most surface waters, 40 C.F.R. § 122.2 (2019). The regulatory definition of “waters of the United States” does not include groundwater, *see id.*,⁷ and it is generally agreed that groundwaters are not navigable waters. *See Rice v. Harken Expl. Co.*, 250 F.3d 264, 269 (5th Cir. 2001); *Village of Oconomowoc Lake*, 24 F.3d at 965; *see also Hawai‘i Wildlife Fund*, 886 F.3d at 746 n.2 (assuming without deciding that groundwater is neither

are covered by the CWA but also as to whether the tailings basin is a “point source” within the meaning of the CWA. U.S. Steel argues on appeal that the tailings basin is not a point source. Because we conclude that the CWA does not apply to discharges of pollutants to groundwater that is hydrologically connected to navigable waters, we do not need to reach the issue of whether the tailings basin is a point source. We note, however, that the MPCA has treated the tailings basin as a point source for the purpose of regulating surface seepages under the NPDES portion of the permit.

⁷ In 2015, the Department of Defense and the Environmental Protection Agency adopted amendments to the definition of “waters of the United States” that expressly exclude groundwater. *See* 80 Fed. Reg. 37054, 37114 (June 29, 2015) (the 2015 rule). A number of states, not including Minnesota, brought actions in federal district courts successfully asserting the invalidity of the 2015 rule. *See Georgia v. Wheeler*, No. 2:15-cv-00079, 2019 WL 3949922, at *32 (S.D. Ga. Aug. 21, 2019) (granting summary judgment, continuing preliminary injunctive relief, and remanding to agency for further proceedings); *Texas v. United States Env’tl. Prot. Agency*, 389 F. Supp. 3d 497, 506 (S.D. Tex. 2019) (same); *North Dakota v. United States Env’tl. Prot. Agency*, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015) (granting preliminary injunctive relief). In response, the federal agencies unsuccessfully sought to add a delayed effective date to the 2015 rule. *See* 83 Fed. Reg. 5200 (Feb. 6, 2018) (adopting applicability-date rule); *Puget Soundkeeper All. v. Wheeler*, No. C15-1342-JCC, 2018 WL 6169196, at *7 (W.D. Wash. Nov. 26, 2018) (vacating applicability-date rule); *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 969-70 (D.S.C. 2018) (granting nationwide injunction against applicability-date rule). Because Minnesota was not a party to any of the federal actions challenging the 2015 rule, it appears that the 2015 rule is effective in Minnesota. *See* Laura Gatz, Cong. Research Serv., R45424, “Waters of the United States” (WOTUS): Current Status of the 2015 Clean Water Rule (Dec. 12, 2018), <https://crsreports.congress.gov/product/pdf/R/R45424> (explaining that the 2015 rule is in effect in 22 states, including Minnesota, and enjoined in 28 states). We need not decide this issue, however, because there is no dispute that—whether simply omitted or expressly excluded—groundwaters are not waters of the United States.

a point source nor navigable water under the CWA). But dispute has developed over whether there is a “discharge of a pollutant” when pollutants are released from a point source and travel through groundwater before reaching navigable waters. *See Ky. Waterways*, 905 F.3d at 933 (describing disagreement among federal courts of appeals).

We begin our statutory analysis by determining whether the statutory language at issue has plain meaning or is ambiguous. *See In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for Discharge of Treated Wastewater*, 731 N.W.2d 502, 516 (Minn. 2007) (*Annandale*). Although we generally accord deference to decisions of administrative agencies, we will not defer to an agency’s interpretation of unambiguous statutes and administrative rules. *Id.* But if a statute or rule is ambiguous, we may accord deference to the reasonable interpretation by an agency charged with administering the statute or rule. *Id.*; *see also A.A.A. v. Minn. Dep’t of Human Servs.*, 832 N.W.2d 816, 822 (Minn. 2013) (identifying agency interpretation as one appropriate factor to consider in interpreting ambiguous statute); *Greene v. Comm’r of Minn. Dep’t of Human Servs.*, 755 N.W.2d 713, 722 (Minn. 2008); *cf.* Minn. Stat. § 645.16 (2018) (providing that court may consider administrative interpretations of ambiguous statutes).

We conclude that the statutory definition of “discharge of a pollutant” is ambiguous because it is subject to more than one reasonable interpretation, as evidenced by the split among the federal courts of appeals. *See Walgreens Specialty Pharmacy, LLC v. Comm’r of Revenue*, 916 N.W.2d 529, 533 (Minn. 2018) (“A statute is ambiguous if it is susceptible to more than one reasonable interpretation.” (quotation omitted)).

Under one reasonable interpretation, discharges from a point source to hydrologically connected groundwater are governed by the CWA because they are discharges *from* a point source and *to* a navigable water, and there is no language in the statute requiring a direct connection between a point source and a navigable water. *See Upstate Forever*, 887 F.3d at 650 (holding that plain language of CWA does not require discharge directly into waters of the United States); *cf. Rapanos v. United States*, 547 U.S. 715, 743, 126 S. Ct. 2208, 2227 (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)).⁸

Under a second reasonable interpretation, discharges from a point source to hydrologically connected groundwater are not governed by the CWA because the CWA

⁸ Courts adopting this first reasonable interpretation have relied on the above-quoted statement by Justice Scalia, writing for a plurality of the Supreme Court in *Rapanos*, 547 U.S. at 743, 126 S. Ct. at 2227. In *Rapanos*, the Court addressed a challenge to an EPA enforcement action based on an individual’s failure to obtain a permit under 33 U.S.C. § 1344 before backfilling wetlands. 547 U.S. at 719-23, 126 S. Ct. at 2214-16. A plurality of the Court held that the permitting requirements of section 1344 do not extend to wetlands connected to navigable waters only by transitory puddles or ephemeral flows of water. *Id.* at 739, 126 S. Ct. at 2225. In addressing arguments that the plurality’s holding would adversely impact permitting under 33 U.S.C. § 1342 (the NPDES program), Justice Scalia wrote: “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.’” *Id.* at 743, 126 S. Ct. at 2227 (quoting 33 U.S.C. § 1362(12)(A)). In other words, Justice Scalia recognized that courts have upheld the regulation of discharges of pollutants that flow through multiple point sources. *Id.* at 742-45, 126 S. Ct. at 2227-28. The *Rapanos* case did not address whether discharges to groundwater are covered by the CWA. Thus, although we cite Justice Scalia’s analysis as supporting one reasonable interpretation of the language at issue in this case, we do not believe that *Rapanos* is dispositive of the issue here. *See, e.g., Ky. Waterways*, 905 F.3d at 935-36 (distinguishing *Rapanos*).

“addresses only pollutants that are added ‘to navigable waters *from* any point source.’” *Ky. Waterways*, 905 F.3d at 934 (quoting 33 U.S.C. § 1362(12)(A)); *see also id.* (noting that “effluent limitations,” which are the “heart of the CWA’s regulatory power,” are “restrictions on the amount of pollutants that may be ‘discharged from point sources *into* navigable waters,’” and that “[t]he term ‘into’ indicates directness” and “leaves no room for intermediary mediums to carry the pollutants” (quoting 33 U.S.C. § 1362(11) (2012)); *Village of Oconomowoc Lake*, 24 F.3d at 965 (“Neither the Clean Water Act nor the EPA’s definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters.”).

Having concluded that “discharge of a pollutant” is ambiguous, we must determine whether to accord deference to the MPCA’s interpretation that the language does not encompass discharges to groundwater, regardless of any hydrological connection to surface waters. *See In re Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit*, 763 N.W.2d 303, 312-13 (Minn. 2009); *Annandale*, 731 N.W.2d at 516. We conclude that deference is warranted because (1) the MPCA is responsible for administering and enforcing the CWA, (2) the subject matter of the statute falls within the MPCA’s areas of expertise, and (3) the MPCA’s interpretation is reasonable under the circumstances of this case. *See Alexandria*, 763 N.W.2d at 313 (listing factors for consideration in determining level of deference afforded); *see also Greene*, 755 N.W.2d at 722 (recognizing that deference to an agency’s interpretation of a statute that it administers is appropriate in complex regulatory areas). The reasonableness of the MPCA’s interpretation is evidenced not only by the decisions of federal courts that have adopted it, but also by the MPCA’s

own analysis in the record. As the MPCA explained, the regulatory framework established by the CWA relies principally on effluent limits at the point of discharge and that regulatory framework has no reasonable application to groundwater discharges, which are diffuse by nature. It is therefore appropriate to accord deference to the MPCA's interpretation.

In addition to according deference, we observe that the MPCA's interpretation is consistent with the statutory framework and with the legislative history of the CWA. With respect to statutory framework, we note that there are express references to groundwater in other provisions of the CWA, which makes telling the omission of such a reference from the statutory provisions governing NPDES permits. *See Exxon Corp. v. Train*, 554 F.2d 1310, 1322 (5th Cir. 1977) (explaining that provisions of CWA addressing groundwater evidence a “pattern . . . of federal information gathering and encouragement of state efforts to control groundwater pollution—but not of direct federal control over groundwater pollution”); *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1318 (D. Or. 1997) (noting that “when Congress wanted certain provisions of the CWA to apply to groundwater, it stated so explicitly” and that “section 1342, which establishes the NPDES permitting system, makes no reference to groundwater”). And with respect to the legislative history, we note that although an amendment was offered to extend the CWA's coverage to groundwater, that amendment was rejected. *See Exxon*, 554 F.2d at 1325-29 (detailing legislative history). We agree with courts that have concluded that this legislative history evidences congressional intent that the CWA “would leave control of groundwater pollution exclusively to the states.” *Exxon*, 554 F.2d at 1329; *see also Umatilla*, 962 F. Supp. at 1318 (“[T]he CWA's

legislative history suggests that Congress did not intend to regulate groundwater in any form.”)

For these reasons, we conclude that the MPCA did not err in interpreting the term “discharge of a pollutant,” and we therefore reject WaterLegacy and the band’s assertion that the MPCA erred by not regulating discharges from the basin to groundwater, so-called deep seepage, under the NPDES portion of the permit.

II.

We next turn to U.S. Steel’s argument that the MPCA erred in setting conditions related to groundwater quality in the SDS portion of the permit, specifically that U.S. Steel reduce the sulfate level in groundwater at the property boundary to 250 mg/L by December 31, 2025, and the in-basin sulfate level to 357 mg/L by December 1, 2028. These limits are designed to meet the EPA’s secondary drinking water standards for sulfate and total dissolved solids (the secondary standards). U.S. Steel argues that groundwater is not subject to the secondary standards because groundwater is governed by chapter 7060 of the Minnesota Rules, Minn. R. 7060.0100-.0900, which does not require compliance with the secondary standards. The MPCA counters that chapter 7060 must be read in conjunction with chapter 7050, Minn. R. 7050.0110-.0470, and that, read together, the rules plainly designate all groundwater as class 1 waters, which are subject to the secondary standards under Minn. R. 7050.0221, subp. 1. The MPCA alternatively argues that, if the rules are ambiguous, this court should defer to its reasonable interpretation of them.

The parties’ dispute in this regard requires us to interpret and apply the state’s water-quality standards. We must first determine whether the regulatory language is plain

or ambiguous. *Annandale*, 731 N.W.2d at 516. We begin that task by reviewing the regulatory framework of chapters 7050 (waters of the state) and 7060 (underground waters). *See Alexandria*, 763 N.W.2d at 310-11 (noting that, in determining existence of ambiguity, words and phrases should not be read in isolation, but rather in context of regulation as a whole). These regulations were adopted pursuant to requirements of the CWA and the WPCA. *See* 33 U.S.C. § 1313 (requiring water-quality standards); Minn. Stat. § 115.44, subd. 2 (directing MPCA to “group the designated waters of the state into classes, and adopt classifications and standards of purity and quality therefor”).

Chapter 7050 begins with a section on scope, providing that it “appl[ies] to all waters of the state, both surface and underground.” Minn. R. 7050.0110. The chapter next defines several classifications for waters of the state—classes 1 through 7, and numerous subclasses—based on best use and need, and it provides standards for each of the classes. Minn. R. 7050.0140, .0221-.0227. Most relevant in this case, Minn. R. 7050.0140, subp. 2, defines class 1 waters for use for “domestic consumption” and specifies that “[d]omestic consumption includes all waters of the state that are or may be used as a source of supply for drinking, culinary or food processing use.” And Minn. R. 7050.0221, subp. 1(B) provides that the class 1 water-quality standards are the federal primary and secondary drinking-water standards. The parties agree that the secondary drinking-water standards include a 250 mg/L limit for sulfate.

Chapter 7050 finally “classif[ies] all surface waters within or bordering Minnesota and designate[s] the beneficial uses for which th[ose] waters are protected.” Minn. R. 7050.0110; *see also* Minn. R. 7050.0400-.0470 (making such classifications). The

classification is made either by individual name or by category. For example, Lake Vermillion is classified as a class 1C, 2Bd, and 3C water. Minn. R. 7050.0470, subp. 2(B)(96). Wetlands, as defined in Minn. R. 7050.0186, subp. 1a(B), that are not individually listed are classified as class 2D, 3D, 4C, 5, and 6 waters. Minn. R. 7050.0425. And a catch-all provision classifies all surface waters not individually listed and not wetlands as class 2B, 3C, 4A, 4B, 5, and 6 waters. Minn. R. 7050.0430, subp. 1 (excepting waters in Boundary Waters Canoe Area Wilderness and Voyageurs National Park, which are addressed in subparts 2 and 3 of the same rule).

Chapter 7050 does not assign a classification to groundwater. The only classification of groundwater is made in chapter 7060, by Minn. R. 7060.0400. That rule provides that “all underground waters are best classified for use as potable water supply in order to preserve high quality waters by minimizing spreading of pollutants, by prohibiting further discharges of wastes thereto, and to maximize the possibility of rehabilitating degraded waters for their priority use.” Minn. R. 7060.0400. Chapter 7060 also includes a nondegradation policy and standards applicable to groundwater. Minn. R. 7060.0500-.0600.

In summary, chapter 7050 does not include any language classifying groundwater as a class 1 water. Part 7050.0140 defines classes 1 through 7, and parts 7050.0221-.0227 set forth water-quality standards applicable to each class. Finally, the classification of specific waters “are listed in parts 7050.0400 to 7050.0470.” Minn. R. 7050.0140, subp. 1. Those classifications only apply to surface waters, not to groundwater. Minn. R.

7050.0110, .0400-.0470. As noted above, the only classification of groundwater is found in chapter 7060.

Despite the absence of any language in chapter 7050 classifying groundwater as a class 1 water, the MPCA contends that chapter 7060's classification of groundwater "for use as potable water supply" compels the conclusion that all groundwater is classified as a class 1 water under chapter 7050. The argument is based primarily on comparisons that the MPCA draws between the WPCA definition of potable water and the regulatory description of class 1 waters. *Compare* Minn. Stat. § 115.01, subd. 14 (defining "potable water" as "water which is or may be used as a source of supply for human consumption, including drinking, culinary use, food processing, and other similar purposes, and which is suitable for such uses in its untreated state or when treated using generally recognized treatment methods"), *with* Minn. R. 7050.0140, subp. 2 (providing that, for purposes of class 1 waters, "[d]omestic consumption includes all waters of the state that are or may be used as a source of supply for drinking, culinary or food processing use, or other domestic purposes and for which quality control is or may be necessary to protect the public health, safety, or welfare"). Put another way, the MPCA argues that because both class 1 waters and groundwater are classified for consumption, groundwater is a class 1 water. But, contrary to the MPCA's argument, the use of distinct language generally connotes distinct meaning. *See, e.g., Nelson v. Schlener*, 859 N.W.2d 288, 294 (Minn. 2015) ("When the Legislature uses different words, we normally presume that those words have different meanings."). And nowhere in chapter 7060 or chapter 7050 is groundwater classified as a class 1 water.

The MPCA also relies on the language in Minn. R. 7060.0200, providing that Minn. R. 7050.0100-.0220 apply to groundwater. But Minn. R. 7050.0221, which adopts the secondary standards for class 1 waters, is not included in the list of rules incorporated by reference for groundwater. And the provisions that are incorporated by reference do no more than set forth use classifications and standards for those classifications. As is discussed above, the actual classifications of particular waters are made in Minn. R. 7050.0400-.0470, and those classifications are limited to surface waters.⁹ If the MPCA had intended to apply the secondary standards to groundwater, it could have included Minn. R. 7050.0221 in the list of rules incorporated by reference in Minn. R. 7060.0200. It did not. Instead, the MPCA adopted a nondegradation policy and narrative water-quality standards for groundwater. *See* Minn. R. 7060.0500-.0600.

We acknowledge that some language in chapters 7050 and 7060 seems to anticipate the classification of some or all groundwater as a class 1 water. For instance, Minn. R. 7050.0221 includes three different subclasses (1A, 1B, and 1C) of class 1 waters and provides guidance on how groundwater should be assigned to the different subclasses. *See, e.g.,* Minn. R. 7050.0221, subp. 2 (providing that class 1A criteria “will ordinarily be restricted to underground waters with a high degree of natural protection”). That rule also

⁹ Prior to the 1984 amendments to chapter 7050, the MPCA might have argued that it could treat groundwater as class 1 waters, without further rulemaking, under Minn. R. 7050.0160 (1983) (providing that, until all waters were classified, MPCA would consider unclassified state waters as waters of the highest quality consistent with their actual or potential use). *But see* Minn. Stat. § 14.05 (2018) (requiring agencies to adopt rules in accordance with administrative procedure act). In any event, the MPCA repealed rule 7050.0160 in 1984. *See* 9 Minn. Reg. 913 (Oct. 29, 1984).

provides that certain class 1 standards are not applicable to groundwater. *See* Minn. R. 7050.0221, subp. 1(B). The MPCA may well have intended to classify some or all groundwater as class 1 water, but it points to no provision in the rules that actually makes that classification.¹⁰ And we are not free to make the classification under the guise of interpreting the rules. *Cf. Rohmiller v. Hart*, 811 N.W.2d 585, 590 (Minn. 2012) (“We cannot add words or meaning to a statute that were intentionally or inadvertently omitted.”).

We also acknowledge the parties’ various arguments about the rulemaking history. U.S. Steel relies on a 1973 Statement on Proposed WPC 22, emphasizing the MPCA’s decision not to adopt numeric criteria for groundwater but instead to make groundwater subject to a nondegradation standard. WaterLegacy and the band argue that reliance on that document is inappropriate because the EPA had not yet adopted the secondary standards in 1973. Because we base our decision on the structure and language in the rules, we need not resolve disputes over the rulemaking history. We observe, however, that the relevant structure and language of the rules have been substantially the same since 1973, when the MPCA promulgated separate rules classifying groundwater and surface waters. *See* WPC 22 (groundwater), 24 (intrastate waters), 25 (interstate waters). The contemporaneous adoption of these three separate chapters of rules, by water type, supports our conclusion that the class 1 standards do not apply to groundwater.

¹⁰ The MPCA cites to a 2007 Statement of Need and Reasonableness (SONAR) containing its own assertion that all groundwater is class 1 water. The SONAR, of course, is not a rule with the force and effect of law. *Cf.* Minn. Stat. § 14.38, subd. 1 (2018) (providing that properly promulgated rules have force and effect of law).

In sum, we conclude that chapters 7050 and 7060 unambiguously do not classify groundwater as class 1 waters and that the MPCA therefore erred by applying class 1 water-quality standards to determine groundwater conditions in the permit. Accordingly, we reverse and remand for the MPCA to determine appropriate groundwater conditions for the permit based on the applicable groundwater-quality standards and the nondegradation policy that U.S. Steel acknowledges applies to discharges from the tailings basin.¹¹ Based on this disposition, we need not reach U.S. Steel’s alternative challenges to the MPCA’s denials of its requests for a permit-related contested-case hearing and for a variance from groundwater-quality standards.

III.

We next address arguments related to the NPDES portion of the permit. WaterLegacy and the band argue that the MPCA erred by failing to include water-quality-based effluent limits in the permit. The band additionally argues that several determinations by the MPCA in relation to the NPDES permit are unsupported by substantial evidence. These related arguments go to the heart of the MPCA’s obligations in administering the NPDES permitting program.

“[T]he CWA requires that all NPDES permits for point sources incorporate limitations necessary to satisfy the state’s promulgated water quality standards.”

¹¹ This opinion does not address or purport to restrict the MPCA’s authority to regulate groundwater sulfate levels under any applicable provision of chapter 7060 or chapter 7053 (setting forth rules applicable to discharges to state waters). Our holding is limited to a determination that groundwater has not been classified as a class 1 water and therefore the standards in Minn. R. 7050.0221 are not applicable to groundwater.

Alexandria, 763 N.W.2d at 309; *see also* 40 C.F.R. § 122.44(d)(1); Minn. R. 7001.0140, subp. 1. These limitations, calculated with reference to the water-quality standards of receiving waters, are known as water-quality-based effluent limitations, or WQBELs. *See In re 401 Water Quality Certif.*, 822 N.W.2d 676, 685 (Minn. App. 2012). Generally, the MPCA must include a WQBEL if it determines that a discharge has “the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.” 40 C.F.R. § 122.44(d)(1)(i); *see also Minn. Ctr. for Env'tl. Advocacy v. City of Winsted*, 890 N.W.2d 153, 157 (Minn. App. 2017).

The MPCA determined that WQBELs were not required in the NPDES portion of the permit because the Sand River SCRS has stopped all surface seepage on the east side of the basin, and the Dark River SCRS, when built, will stop all surface seepage on the west side of the basin.¹² In other words, the MPCA determined that, once the Dark River SCRS is operational, there will be no discharges to surface waters that could cause a reasonable potential to exceed water-quality standards necessitating WQBELs in the NPDES permit. Thus, the MPCA’s finding that the Sand River SCRS has stopped all discharges to the east side of the basin is central to its determination that WQBELs are not

¹² The MPCA also determined that WQBELs were not necessary with respect to any surface seepage to the north of the basin because there is no reasonable potential to exceed water-quality standards in receiving waters north of the basin. This determination is not challenged on appeal.

required in the permit. The band asserts that this finding is not supported by substantial evidence.¹³

“A decision is supported by substantial evidence when it is supported by (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn. 2002). Our responsibility in determining whether there is substantial evidence to support an agency decision is “to examine the evidence on which [the] conclusions are based and determine whether they are well founded.” *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 828 (Minn. 1977). In applying the substantial-evidence test, a reviewing court must “determine whether the agency has adequately explained how it derived its conclusion and whether that conclusion is reasonable on the basis of the record.” *In re Application of Minn. Power*, 838 N.W.2d 747, 757 (Minn. 2013) (quotation omitted); *see also Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984) (“The substantial evidence test requires a reviewing court to evaluate the evidence relied upon by the agency in view of the entire record as submitted.”). “If an administrative agency engages in reasoned decision making, the court will affirm, even though it may have

¹³ The band also asserts that the MPCA’s statement that it has identified all known receiving waters is unsupported by substantial evidence because the tailings basin continues to discharge to the Sand River. The MPCA’s determination not to identify the Sand River as a receiving water is based on its finding that the Sand River SCRS has eliminated all surface seepage on the east side of the basin. Thus, we focus on the issue of whether there is substantial evidence to support that finding.

reached a different conclusion had it been the factfinder.” *Cable Commc’ns Bd.*, 356 N.W.2d at 669. “The court will intervene, however, where there is a ‘combination of danger signals which suggest the agency has not taken a hard look at the salient problems’ and the decision lacks ‘articulated standards and reflective findings.’” *Id.* (quoting *Reserve Mining*, 256 N.W.2d at 825) (other quotation omitted).

In its brief, the MPCA cites three documents in support of its assertion that “[t]he Sand River SCRS has eliminated all surface water discharges to the Sand River Watershed since becoming fully operational.” First, it cites a November 2011 inspection report in which an MPCA inspector states: “There has been no discharge at SD002 after June, 2010, when the seep collection and return system became fully operational.” Second, it cites an April 2016 discharge monitoring report in which U.S. Steel checked a box indicating “No Discharge/No Flow for Monitoring Period” for SD002. And third, it cites U.S. Steel’s 2011 permit application, which states that “all surface water discharges to the Sand River watershed have been eliminated” by the Sand River SCRS and that “[u]pon operation of the Dark River [SCRS], all surface water discharges from the Minntac tailings basin will have effectively been eliminated.”

The 2011 and 2016 inspection and monitoring reports may provide substantial evidence that the SCRS has stopped flow at SD002, a monitoring station at a discrete location on the east side of the basin. But the MPCA does not explain how cessation of flow at SD002 means that all surface seepage on the entire east side of the basin has been eliminated, particularly given that the SCRS spans 1¾ miles and was intended to address surface seepage at 13 distinct locations along the east side of the basin. Nor do U.S. Steel’s

conclusory statements in its 2011 application provide any evidentiary support for the MPCA's determination in 2018 that the Sand River SCRS has eliminated surface discharges, or that the Dark River SCRS will do so in the future.

During oral argument, the MPCA cited two additional documents, 2018 EPA and MPCA inspection reports, which generally describe the operation of the SCRS. Nothing in these reports supports the MPCA's finding that the Sand River SCRS has eliminated all surface seepage on the east side of the basin. In fact, both of the reports identify circumstances in which the SCRS has failed to capture seeps.

The band asserts that the Sand River SCRS has not entirely eliminated surface seepage, and it cites a number of documents in the record in support of this assertion. In particular, the band relies on U.S. Steel's 2017 Tailings Basin Status Report, which includes a summary of an inspection of the tailings basin perimeter performed by U.S. Steel. The purpose of that inspection was, in part, to "inspect and document the condition of any discrete surface seeps emanating from the tailings basin perimeter dike in comparison to previous inspections." The inspection summary includes photographs of ponded water at various locations, including one just outside of the Sand River SCRS. The band also relies on letters from the Great Lakes Indian Fish and Wildlife Commission that include photos of ponded water near the basin. And the band relies on an EPA inspection report that includes test results of water samples revealing comparably high sulfate levels inside and outside of the SCRS. These documents cited by the band tend to suggest continued surface seepage from the Sand River side of the basin. The MPCA has not explained why the documents are not evidence of surface seepage.

The MPCA urges this court to defer to its expertise on this issue. But deference is warranted only where the agency has engaged in reasoned decision-making. *Cable Commc'ns Bd.*, 356 N.W.2d at 669. In this case, there is nothing in the MPCA's order granting the permit or the permit itself to indicate that the MPCA engaged in any actual analysis of whether the Sand River SCRS has completely eliminated surface seepage on the east side of the basin, such that WQBELs are not required in the NPDES permit. Rather, it seems to have simply ignored or overlooked evidence in the record that could suggest a contrary conclusion. On this record, we can only conclude that the MPCA has failed to take the requisite "hard look" at the issue of whether WQBELs are required in the NPDES permit, and, accordingly, we must intervene. *Reserve Mining*, 256 N.W.2d at 825 (quotation omitted). We reverse and remand to the MPCA for further development of the record as warranted, for the MPCA to make substantiated findings regarding the effectiveness of the Sand River SCRS, and for the MPCA to redetermine, on those substantiated findings, whether WQBELs are required in the NPDES permit. *See Minn. Ctr. for Env'tl. Advocacy v. Comm'r of Minn. Pollution Control Agency*, 696 N.W.2d 95, 105 (Minn. App. 2005) (reversing and remanding based on agency's failure to give more than conclusory consideration to project alternative).¹⁴

¹⁴ Because we reverse and remand for redetermination of the issue of whether WQBELs are required, we do not reach WaterLegacy's related argument that, even assuming the Dark River SCRS will be effective, interim WQBELs are required for the Dark River side of the basin. We also do not reach the band's arguments regarding the sufficiency of the permit's monitoring requirements, which may be adjusted by the MPCA depending on its redetermination of whether WQBELs are required.

IV.

We finally address arguments by WaterLegacy and the band regarding the wild rice rule. Adopted in 1973, the wild rice rule is part of Minn. R. 7050.0224, which sets forth water-quality standards for class 4 surface waters. At issue in this case is subpart 2 of the rule, which provides a 10 mg/L sulfate limit that is “applicable to water used for production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels.” Minn. R. 7050.0224, subp. 2. WaterLegacy and the band assert the MPCA was required to, but did not, apply the 10mg/L sulfate limit in setting the conditions in the permit.

The wild rice rule is a water-quality standard that is subject to enforcement under the CWA, including through the NPDES permitting program. *See* 33 U.S.C. § 1313; 40 C.F.R. § 122.44(d)(1). In recent years, however, the Minnesota Legislature has directed the MPCA to limit its enforcement of the wild rice rule and ultimately to replace it.

In 2011, the legislature passed a law requiring the MPCA to engage in study and adopt new wild rice water-quality standards, and to limit enforcement of the existing rule until new rules were adopted. 2011 Minn. Laws 1st Spec. Sess. ch. 2, art. 4, § 32, at 783-85. The 2011 legislation did not include a deadline for adoption of new rules. In 2015, the legislature passed a law requiring the MPCA to adopt new rules by January 15, 2018, and providing that

implementation of the wild rice water quality standard in Minnesota Rules, part 7050.0224, subpart 2, shall be limited to the following, unless the permittee requests additional conditions:

(1) when issuing, modifying, or renewing national pollutant discharge elimination system (NPDES) or state disposal system (SDS) permits, the agency shall endeavor to protect wild rice, and in doing so shall be limited by the following conditions:

(i) the agency shall not require permittees to expend money for design or implementation of sulfate treatment technologies or other forms of sulfate mitigation; and

(ii) the agency may require sulfate minimization plans in permits; and

(2) the agency shall not list waters containing natural beds of wild rice as impaired for sulfate under section 303(d) of the federal Clean Water Act, United States Code, title 33, section 1313, until the rulemaking described in this paragraph takes effect.

2015 Minn. Laws 1st Spec. Sess. ch. 4, art. 4, § 136, at 2094-95. In 2017, the legislature extended the deadline for adopting new rules to January 15, 2019. 2017 Minn. Laws ch. 93, art. 2, § 149, at 742.

The MPCA drafted new rules, but they were disapproved by the chief administrative law judge of the office of administrative hearings in January 2018, and the MPCA “withdrew the Wild Rice rule from the rulemaking process to allow for more work on the implementation process.” In response to comments on the permit, the MPCA stated that it “continues to support the scientific basis developed in the rulemaking and believes clarification of the rule’s application is needed, such as adopting the waters to which the standard applies into the rule.” The MPCA also stated that, “[b]y the time the investigation required by the [2018 Minntac] permit is complete, the MPCA expects to have greater clarity on the appropriate wild rice standard.”

WaterLegacy and the band argue that the wild rice rule remains effective and must be enforced under the CWA notwithstanding the Minnesota Legislature’s attempt to limit

its implementation. In response, the MPCA reiterates its argument that no WQBELs are required in the NPDES portion of the permit because the permit eliminates all discharges that are likely to cause an exceedance of water-quality standards. But we have concluded that the MPCA failed to take the requisite “hard look” at whether WQBELs are required in the permit and are remanding for the MPCA to redetermine the issue. In its brief to this court, the MPCA states that it “would enforce the wild rice sulfate water quality standard by imposing a WQBEL on U.S. Steel’s surface seepage discharges, if applicable.” Based on this representation, if the MPCA determines that WQBELs are required on remand, it would seem to follow that the MPCA would apply the wild rice rule in determining conditions for the NPDES portion of the permit. Thus, while we reverse the failure to include WQBELs as explained in section III, any further determination on the applicability of the wild rice rule would be premature.¹⁵

With respect to the SDS portion of the permit, the MPCA argues that it is precluded from enforcing the wild rice rule by the 2015 legislation. We agree that the wild rice rule cannot, under current law, be the basis for conditions requiring the expenditure of funds in the SDS permit. *See* 2015 Minn. Laws 1st Spec. Sess. ch. 4, art. 4, § 136, at 2094-95. With respect to the state permitting program, the legislature was free to, and has, overridden the wild rice rule. *See, e.g., Special Sch. Dist. No. 1 v. Dunham*, 498 N.W.2d 441, 445 (Minn. 1993) (“It is elemental that when an administrative rule conflicts with the plain

¹⁵ We accordingly do not address U.S. Steel’s argument that the wild rice rule does not apply because no waters near the facility have been designated as subject to Minn. R. 7050.0224, subp. 2.

meaning of a statute, the statute controls.”); *see also Kimberly-Clark Corp. & Subsidiaries v. Comm’r of Revenue*, 880 N.W.2d 844, 850 (Minn. 2016) (“What the legislature has authority to enact it obviously has like authority to amend or even to repeal.” (quotation omitted)). Accordingly, to the extent that WaterLegacy and the band assert that the MPCA erred by not including conditions in the SDS portion of the permit based on the wild rice rule, we reject that assertion.

D E C I S I O N

The MPCA did not err by regulating discharges to groundwater only under the SDS portion of the permit. The MPCA did err by applying water-quality standards for class 1 waters to groundwater in determining conditions in the SDS portion of the permit. And the MPCA’s determination that WQBELs are not required in the NPDES portion of the permit is not supported by substantial evidence. Accordingly, we reverse the MPCA’s decision reissuing the permit and remand for further proceedings consistent with this decision.

Reversed and remanded.