

**STATE OF MINNESOTA
IN COURT OF APPEALS**

*In re Minnesota Pollution Control Agency
Issuance of an NPDES/SDS Permit
to U.S. Steel Corp. for the Minntac
Tailings Basin Area.*

Court of Appeals Case No. _____

**RELATOR’S STATEMENT
OF THE CASE**

1. Court or agency of case origination.

WaterLegacy takes this appeal from the Findings of Fact, Conclusions of Law, and Order (“Findings and Order”) of the Commissioner of the Minnesota Pollution Control Agency (“MPCA”) dated November 30, 2018, granting National Pollutant Discharge Elimination System/State Disposal System (“NPDES/SDS”) permit MN0057207 for the Minntac Tailings Basin Area (the “Permit” or “Minntac Permit”) to U.S. Steel Corp. (“U.S. Steel”), and from the Minntac Permit issued on December 1, 2018.

2. Jurisdictional statement.

a. Statute, rule or authority authorizing certiorari appeal.

Minnesota Statutes § 115.05, subdivision 11 authorizes any person aggrieved by any final decision of the agency of the commissioner, including decisions on issuance of a permit, to obtain judicial review of such order, ruling or decision under Minn. Stat. §§ 14.63-69.

WaterLegacy is a 501(c)(3) non-profit organization founded to protect

Minnesota fresh water resources and the communities that rely on them. WaterLegacy's members include Minnesotans who rely on clean water, fish, and wild rice affected by sulfate pollution, including the sulfate pollution discharged from the Minntac tailings basin. WaterLegacy is an aggrieved person because its core mission and the interests of its members in fishing, gathering wild rice, observing wildlife, recreation, aesthetics, and use and enjoyment of natural resources are adversely affected by the MPCA Findings and Order and issuance of the Minntac Permit.

b. Authority fixing time for obtaining certiorari review.

Minnesota Statutes § 14.63 requires that a petition for a writ of certiorari under sections 14.63-68 must be filed and served within 30 days "after the party receives the final decision and order of the agency." WaterLegacy learned of MPCA's permitting decision as a result of contact from third parties on November 30, 2018. Although WaterLegacy provided detailed comments on the draft Minntac Permit, MPCA did not provide its final decision to WaterLegacy.¹

c. Finality of order or judgment.

The MPCA's November 30, 2018 Findings of Fact, Conclusions of Law and Order issuing the Minntac Permit is a final decision.

¹ WaterLegacy has proceeded with this appeal to ensure that this Court has jurisdiction over this matter, but does not waive any rights to insist that Minnesota state agencies, including the MPCA, directly provide parties with decisions and orders as required by Minnesota Statutes ch. 14.

3. State type of litigation and designate any statutes at issue.

This is a certiorari appeal from a final MPCA decision granting an NPDES/SDS permit for the Minntac tailings basin and applying a Minnesota Session Law to prevent the Agency from requiring expenditures to control sulfate pollution affecting wild rice waters. Pertinent statutes, regulations, and rules include the Clean Water Act, 33 U.S.C. §§1251 *et seq.*, particularly §§ 1311, 1313, 1342, 1344 and 1362; 40 C.F.R. parts 122, 123 and 131; Minnesota Statutes ch. 115 and 116; Minnesota Rules, ch. 7001 and 7050; and 2015 Minn. Laws 1st Spec. Sess. ch. 4, Art. 4, § 136; 2017 Minn. Laws ch. 93, Art. 2, § 149.1.

4. Brief description of claims, defenses, issues litigated and result below:

The Minntac tailings basin was first built to hold taconite tailings in 1966. The facility now covers 8,700 acres. An average of 35 million long tons of tailings are disposed of each year in the Minntac tailings basin. In addition to tailings slurry and taconite process water, the tailings basin collects agglomerator process water, sewage plant discharge, laboratory wastewater, plant non-process water, and runoff from the Minntac plant area, stockpile areas and adjacent uplands.

The Minntac tailings basin is unlined, is on the edge of the Laurentian Divide, and has an elevated hydraulic head. As a result, large quantities of tailings basin wastewater enter the surficial aquifer beneath the basin and flow

from the basin to the east and to the west. It is undisputed that seepage from the Minntac tailings basin is causing exceedances of Minnesota surface water quality standards in watersheds of the Sand River to the east and Dark River to the west. All waters impacted by the tailing basin are waters of the United States.

Minnesota's federally-approved water quality standards limit specific conductance, total dissolved solids, bicarbonates, and hardness in all surface receiving waters affected by the Minntac tailings basin, limit sulfate in a downstream trout stream and in downstream wild rice waters, and preclude impairment of aquatic biota from discharge. *See* Minn. R. 7050.0150, 7050.0220, 7050.0223, 7050.0224. Specifically, in 1973, Minnesota enacted and the U.S. Environmental Protection Agency ("EPA") approved a water quality standard limiting sulfate in wild rice waters to 10 milligrams per liter ("Wild Rice Sulfate Standard"). Minn. R. 7050.0224, subp. 2.

Since 1967, sulfate discharge from the Minntac tailings basin has decimated what was once dense wild rice in the Sandy Lake and Little Sandy Lake in the Sand River watershed. Elevated concentrations of sulfate, specific conductance, total dissolved solids, bicarbonates and hardness from the Minntac tailings basin have exceeded surface water quality standards in both the Sand River and Dark River watersheds, impacting aquatic life, wild rice, and wildlife uses.

The last NPDES/SDS permit for the Minntac tailings basin was issued

in 1987, expired in 1992, and has been administratively continued since then. Since the permit expired in 1992, the MPCA has spent more than a quarter of a century temporizing with its operators and failing to impose or enforce limits or standards to protect Minnesota water quality. In 2000, the MPCA warned U.S. Steel's predecessor that high sulfate concentrations in the drainage from the Minntac tailings basin were causing exceedances of surface water quality standards. MPCA then advised that a reissued permit was likely to include discharge limits for sulfate, specific conductance, bicarbonates and hardness.

Since this warning nearly two decades ago, no such discharge limits have been imposed. The MPCA and U.S. Steel have entered into a series of agreements under which various means of reducing Minntac tailings basin pollutant levels have been identified. In 2009, US Steel submitted an NPDES/SDS permit application that included plans to construct a 7,000 gallon per minute active water treatment system that would have lowered the tailings basin sulfate concentration to 350 milligrams per liter ("mg/L") within 5 years. No such system was implemented.

In 2010, the MPCA modified the 1987 NPDES/SDS permit for the Minntac tailings basin to allow U.S. Steel to construct a pump-back system to capture and return seepage ("SCRS" system) entering the Sand River. It is undisputed that this system does not achieve compliance with surface water quality standards on the Sand River (east) side of the tailings basin. U.S. Steel estimates that about 700 gallons per minute ("gpm") of Minntac tailings basin

seepage is returned to the basin by the SCRS. However, despite the SCRS system, 1450 gpm of contaminated wastewater on the east side of the tailings basin – more than two-thirds – continues to seep and discharge to the Sand River watershed. U.S. Steel estimates that another 1760 gpm of Minntac tailings basin seepage now discharges to the Dark River watershed through a monitored outfall, surface, and groundwater seepage.

Dam safety monitoring has identified roughly 40 areas of actual or potential surface seepage through or immediately under the tailings basin dam - on both the Sand River and Dark River sides of the tailings basin. Some of these dam perimeter surface seeps are small or intermittent, while larger seeps create ponded features with measurable flows of several hundred gallons per minute into adjacent wetlands and streams.

Under the Clean Water Act (“CWA”) and pursuant to federal delegation of NPDES authority, Minnesota enacts water quality standards, which are subject to EPA approval. *See* 40 C.F.R. §§ 131.5-131.6. Once approved by the EPA, all states are bound to enforce their water quality standards under the CWA. *See* 33 U.S.C. § 1313(c), 40 C.F.R. § 131.3(i).

Any addition of pollutants from a point source to waters of the United States is prohibited, except in compliance with the CWA and its regulations. *See* 33 U.S.C. §§ 1311, 1362; 40 C.F.R. §§ 122.1(b)(1), 122.21(c). No State may issue an NPDES permit when the conditions of the permit do not provide for compliance with applicable requirements of the CWA, regulations

promulgated, and water quality standards approved under the Act. *See* 33 U.S.C. §§ 1311, 1313, 1342; 40 C.F.R. §§ 122.4, 122.43, 123.25. State NPDES permits must include conditions needed to achieve water quality standards established under the Act, including narrative as well as numeric standards, and must control all pollutants that are or may be discharged from outfalls and other discharge points that cause or contribute to a violation of State water quality standards. 40 C.F.R. §§ 122.44, 122.45, 123.25.

Minnesota statutes require the MPCA to impose permit conditions for the NPDES program consistent with and, not less stringent than those of the CWA. Minn. Stat. §§ 115.03, subd. 5, 116.03, subd. 2b(j). Minnesota rules preclude issuance of an NPDES/SDS permit that does not contain conditions necessary to achieve compliance with all Minnesota and federal statutes and rules. Minn. R. 7001.1080; *see also* 7001.0140, 7001.0150, 7001.1000.

The MPCA issued a pre-public notice draft NPDES/SDS permit for the Minntac tailings basin on December 5, 2014 and a draft permit on November 15, 2016. On December 21, 2016, U.S. Steel submitted an Application for a Variance pertaining to the Minntac Permit, which MPCA denied. WaterLegacy filed comments and exhibits opposing the 2014 pre-publication draft Permit on December 19, 2014; opposing the 2016 draft Permit on December 23, 2016; and opposing US Steel's Variance Application on January 24, 2018.

The final Minntac Permit issued by the MPCA on November 30, 2018 provides an SDS schedule of compliance to achieve compliance with the state

groundwater standard for sulfate by December 31, 2025. The Permit also requires that the permittee construct a pump-back system similar to that already installed on the Sand River (east) side to return discharge from the Dark River (west) outfall SD001 to the tailings basin.

Despite the requirements of the Clean Water Act and state law implementing Minnesota's delegated authority under the CWA, the MPCA issued a Minntac Permit that fails to apply the federally-approved Wild Rice Sulfate Standard; contains no limits, standards or conditions to control pollutants discharged to surface waters from the Minntac tailings basin through directly connected groundwater; and imposes no limits to control pollutants directly discharged from outfalls or other discharge points on the tailings dam perimeter to wetlands and surface waters of the United States.

The MPCA expressly states that in order to comply with Minn. Laws 2015, 1st Spec. Sess., Ch. 4, Art. 4, Sec. 136 ("2015 Wild Rice Legislation), the "draft permit contains no sulfate limits for wild rice and does not require expenditures related to wild rice sulfate limits." MPCA, NPDES/SDS Fact Sheet, p. 37; *see also* Findings and Order at Attach. B, Item J. That Session Law states that, pending further rulemaking, MPCA shall not take any action to implement the Wild Rice Sulfate Standard that would require a permittee to "to expend money for design or implementation of sulfate treatment technologies or other forms of sulfate mitigation." 2015 Minn. Laws 1st Spec. Sess. ch. 4, Art. 4, § 136; 2017 Minn. Laws ch. 93, Art. 2, § 149.

Minnesota's Wild Rice Sulfate Standard has been federally approved for almost half a century. It was upheld in the face of a legal challenge. *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, Court File No. 62-CV-10-11824, 2012 Minn. Dist. LEXIS 194 (Minn. Dist. Ct., Cty. of Ramsey, May 10, 2012). The Standard's proposed repeal was also recently rejected as inconsistent with requirements of the Clean Water Act. *In the Matter of the Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice*, OAH 80-9003-34519, Report of the Chief ALJ (Jan. 11, 2018). The EPA has also specifically interpreted the CWA to prohibit Minnesota legislation that would prevent the MPCA from applying the Wild Rice Sulfate Standard to set sulfate limits in permits. EPA, T. Hyde letter to Sen. Bakk et al. (May 13, 2011).

The MPCA's Findings and Order specifically denies that the Minntac tailings basin is a "point source" under the Clean Water Act. However, the EPA has specifically interpreted the CWA and its implementing regulations to determine that the Minntac tailings basin "is a point source which, according to MPCA's own documentation is discharging pollutants to nearby surface waters in the Sand and Dark River watersheds via direct, unmonitored surface seeps and subsurface pathways." EPA, K. Pierard Comments on the draft Minntac Tailings Basin Permit (Dec. 21, 2016). The EPA has also expressed concerns that a Dark River seepage return system would not resolve water quality exceedances in the Dark River and has opposed efforts to use a pump-back

system to avoid NPDES regulatory control of discharge resulting from tailings basin seepage.

The presence of surface seeps and discharge along the perimeter of the 8,700-acre Minntac tailings basin is undisputed. The EPA has told the MPCA that the CWA requires control of all tailings basin discharges to surface water, including direct discharge from currently unmonitored surface seeps. *Id.*

In issuing the Minntac NPDES/SDS permit, the MPCA has erred, exceeded its statutory authority, and violated the Clean Water Act, its implementing regulations, and state statutes and rules requiring control of water pollution.

5. List specific issues proposed to be raised on appeal

This appeal is brought under the federal Clean Water Act and its implementing regulations and under Minnesota statutes and rules requiring compliance with applicable federal and state pollution control statutes and rules. 33 U.S.C. §§ 1251, *et seq.*, particularly §§ 1311, 1313, 1342, 1344 and 1362; 40 C.F.R. parts 122, 123 and 131; Minnesota Statutes ch. 115 and ch. 116; Minnesota Rules, ch. 7001, 7050. On the basis of these federal and state authorities, the following issues will be raised on appeal:

1. Whether the MPCA erred and exceeded its statutory authority by refusing to apply Minnesota's Wild Rice Sulfate Standard in the Minntac Permit to limit sulfate discharge to wild rice waters.
2. Whether the portion of the 2015 Wild Rice Legislation cited by MPCA to issue the Minntac Permit without compliance with Minnesota's Wild Rice Sulfate Standard is illegal on its face and as

applied because it violates the Clean Water Act and federal delegation of authority to Minnesota under the Act.

3. Whether the MPCA erred as a matter of law in concluding that the Minntac tailings basin is not a “point source” under the Clean Water Act and its implementing regulations.
4. Whether the MPCA erred and exceeded its statutory authority by issuing a Minntac Permit that failed to require that discharge via subsurface flow with a direct hydrologic connection to surface waters comply with applicable surface water quality standards.
5. Whether the MPCA erred and exceeded its statutory authority by issuing a Minntac Permit that failed to require that direct discharge from outfalls and surface seepage on the perimeter of the tailings basin comply with applicable surface water quality standards.
6. Whether the MPCA erred and exceeded its statutory authority by issuing a Minntac Permit with a pump-back system that would redirect surface discharge to groundwater, avoid surface discharge limits, and fail to result in compliance with applicable surface water quality standards.

6. Related appeals.

Relator knows of no pending or related appeals.

7. Contents of record.

No hearing has been held, so no transcript is required. The parties have not prepared an agreed statement of the record under Rule 110.04.

8. Oral argument:

Formal oral argument is requested in St. Paul.

9. Identify the type of brief to be filed.

Formal brief will be filed under Rule 128.02.

10. Names, addresses, and telephone numbers of attorney for appellant

and respondent.

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