UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

GRAND PORTAGE BAND OF LAKE SUPERIOR CHIPPEWA and FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL REGAN, Administrator United States Environmental Protection Agency, Defendants, And MINNESOTA POLLUTION CONTROL AGENCY, COALITION OF GREATER MINNESOTA CITIES, RANGE ASSOCIATION OF MUNICIPALITIES AND SCHOOLS, MINNESOTA CHAMBER OF COMMERCE, CLEVELAND-CLIFFS, INC, and UNITED STATES STEEL CORP. Intervenor Defendants.	Case No: 0:22-cv-01783-JRT-LIB **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

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Defendants United States Environmental Protection Agency ("EPA") and its Administrator Michael Regan respond in opposition to the motion for summary judgment filed by Plaintiffs Grand Portage Band of Lake Superior Chippewa and Fond du Lac Band of Lake Superior Chippewa ("Bands"), Doc. Nos. 88, 90. This memorandum also supports EPA's cross-motion for summary judgment, Doc. No. 99.

INTRODUCTION

In accordance with the Clean Water Act (the "Act"), the State of Minnesota submitted to EPA for review revisions to several of the State's water quality standards. The Act requires States to identify the water quality goals of water bodies within their State by setting designated uses of the State's waters (e.g., aquatic life, agriculture). For each of the designated uses, the States then must set water quality criteria that specify, based on current sound scientific knowledge, the water quality necessary to protect each of those uses. These criteria can be numeric or narrative.

In 2021, Minnesota revised its water quality standards pertaining to two of its seven types of designated uses. Minnesota revised its water quality criteria for protections of the State's industrial

consumption use and its agriculture and wildlife uses. Minnesota had adopted in the 1960s certain numeric water quality criteria to protect these uses. Upon review of these numeric criteria during the revision process, Minnesota could not identify a sound scientific rationale for these criteria. Regarding industrial consumption use, the State determined that the prior numeric criteria did not correspond to any identified water quality needs of industrial users because industrial users typically treat the water to meet their specific needs. Consequently, industrial consumption use depends more on the consistency of water quality to allow for planning and operation of industrial water treatment systems. Thus, Minnesota adopted a narrative criterion to ensure water quality does not cause fouling, scaling, corrosion, or other unsatisfactory conditions for industrial water treatment systems. Minnesota also adopted a "Translator Method" into its water quality standards with numeric threshold values for use in implementing this narrative criterion.

Minnesota also revised its water quality criteria for irrigated agriculture use. Of relevance here, the State removed certain numeric criteria adopted in the 1960s to protect irrigated agriculture use for

crops and vegetation. During its revision process, Minnesota also could not identify a sound scientific rationale for these numeric criteria. The State retained its narrative criterion that requires that the water quality for waters designated for irrigated agriculture permit their use for irrigation without significant damage or adverse effects on any crops or vegetation usually grown in the waters or area. Minnesota also adopted a Translator Method with numeric threshold values for implementing this narrative criterion.

EPA properly found, after reviewing Minnesota's revised water quality standards submission package, that the State's revised water quality standards met applicable Clean Water Act and regulatory requirements. EPA therefore approved those standards. EPA agreed with the State's determination that it lacked a sound scientific rationale to retain the prior statewide numeric criteria adopted in the 1960s. EPA agreed with the State's determination that alternative statewide numeric criteria for industrial consumption and irrigated agriculture uses could not be derived from available sound scientific data and information. EPA agreed that the State's revised narrative criteria and its numeric threshold values in its implementation method for the

narrative criteria would protect the industrial consumption and irrigated agriculture uses for which they are established. All of EPA's findings underlying its approval of Minnesota's revised standards are supported by the record and are neither arbitrary nor capricious.

The Bands challenge EPA's approval of Minnesota's revised water quality standards. But the Bands do not argue that the removed outdated numeric criteria previously associated with industrial consumption use had a sound scientific rationale. Similarly, they do not argue that the removed outdated criteria associated with irrigated agriculture use had a sound scientific rationale.

Instead, the Bands challenge the revised criteria based on the Bands' concerns over protection of aquatic life and wild rice. But Minnesota has distinct narrative and numeric water quality criteria to protect aquatic life and wild rice, which are unaffected by the State's revisions to its water quality standards at issue. The Bands also have numeric and narrative water quality criteria to protect aquatic life and wild rice in reservation waters. Minnesota's criteria for the protection of aquatic life and wild rice and the Bands' criteria for their reservation waters must still be met to protect these resources.

The removal of outdated and scientifically unsupported numeric criteria does not impair the State's or Bands' protections for aquatic life and wild rice. For waters with multiple use designations, e.g., both aquatic life and industrial consumption uses, the criteria must support the most sensitive use. For example, even if aquatic life is the use most sensitive to chlorides, Minnesota's removal of the numeric criterion for chlorides associated with its industrial consumption use does not change the numeric criterion for chlorides that the State previously adopted to protect aquatic life uses. These numeric and narrative criteria associated with aquatic life uses still apply and must continue to be met.

In addition, EPA confirmed that Minnesota's water quality standards include provisions to protect downstream uses. Under EPA's regulations, Minnesota must ensure that upstream sources of pollution in the State meet the State's and the Bands' downstream aquatic life and wild rice water quality standards.

EPA honors and respects tribal reserved rights and resources and acts to ensure that its actions are consistent with tribal treaty rights. It did so here. EPA's approval of Minnesota's revised water quality

standards for industrial consumption and irrigated agriculture uses does not impair the Bands' water quality standards or their asserted tribal reserved rights to wild rice and aquatic resources, primarily because those resources are protected by separate water quality standards.

In sum, the Bands incorrectly argue that the State was required to maintain outdated numeric criteria that lack a sound scientific rationale to protect the industrial and agriculture uses at issue and to protect any other designated uses, including other uses already protected by different criteria. The Court should deny the Bands' motion for summary judgment and grant EPA's cross-motion for summary judgment.

BACKGROUND

A. The Clean Water Act and Water Quality Standards

The ultimate objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act establishes a partnership between the federal government and States and Tribes to achieve that

goal. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992); 33 U.S.C. § 1377(e); 40 C.F.R. § 131.8.

The Act requires the establishment of water quality standards "to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." 33 U.S.C. § 1313(c)(2)(A). Water quality standards define the water quality goals of a water body by (i) designating uses (e.g., industrial consumption) for a particular water body or category of water bodies; (ii) setting numeric and/or narrative criteria to protect each of those associated uses; and (iii) establishing provisions to minimize or prevent the degradation of water quality. *Id.* §§ 1313(c)(2)(A); 1313(d)(4)(B); 40 C.F.R. §§ 131.2; 131.6. Any new or revised water quality standard adopted by a State must be submitted to EPA for review. 33 U.S.C. § 1313(c). If EPA determines that the standards meet the requirements of the Act and EPA's regulations at 40 C.F.R. Part 131, EPA approves the standards. *Id.*; *see* 40 C.F.R. § 131.5(a)(1)-(8).

Water quality standards are implemented through several of the Act's programs. The standards serve as a basis for water quality-based effluent limitations for National Pollutant Discharge Elimination

System ("NPDES") permits, which are issued to dischargers of pollutants and set limits on pollutants in the discharges. 33 U.S.C. § 1342; 40 C.F.R. § 131.21(d). All NPDES permits must include technology-based effluent limitations that reflect the pollutant reductions achievable through specified levels of technology. The permits must also include more stringent water quality-based effluent limitations if meeting the technology-based effluent limitation is not enough to attain applicable water quality standards. 33 U.S.C. § 1311(b)(1)(A) and (C); 40 C.F.R. § 122.44(d). Dischargers are required to comply with water quality-based effluent limitations in their NPDES permits that are derived from applicable numeric and narrative water quality criteria. *See* 40 C.F.R. § 122.44(d).

Water quality standards are also implemented through requirements in Section 303(d)(1) of the Act, 33 U.S.C. § 1313(d)(1), which requires States to identify waters where current pollution control technologies alone cannot meet the water quality standards set for that waterbody and to ultimately establish a total maximum daily load for such waterbodies.

1. Designated uses.

States and authorized Tribes[1] first identify the "designated uses" of each waterbody, consistent with the purposes of the Act. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.10(a). The Act states that water quality standards "shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." 33 U.S.C. § 1313(c)(2)(A).

2. Water Quality Criteria

Water quality criteria are "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 C.F.R. § 131.3(b). States must adopt water quality criteria that protect the designated use and that "must be based on sound scientific rationale and must contain sufficient parameters or

[1] EPA is authorized to approve eligible Tribes to administer water quality standards programs, and it has done so for the Bands. 33 U.S.C. § 1377(e); 40 C.F.R. § 131.8. Because this case involves water quality standards adopted by Minnesota, the remainder of this brief refers to the authority of states regarding water quality standards.

constituents to protect the designated use." *Id.* § 131.11(a)(1). For waters with multiple use designations, the criteria must support the most sensitive use. *Id.*

When establishing criteria, states should establish numeric criteria based on EPA guidance under Section 304(a) of the Act, 33 U.S.C. § 1314(a), or other scientifically defensible methods. 40 C.F.R. § 131.11(b)(1). States should establish narrative criteria where numeric criteria cannot be established or to supplement numeric criteria. 40 C.F.R. § 131.11(b)(2).

States are required to include effluent limitations in NPDES permits necessary to achieve both numeric and narrative criteria. *See* 40 C.F.R. § 122.44(d)(1) (specifying methods NPDES permit writers must use in establishing limits necessary to attain narrative criteria). States can develop procedures, sometimes referred to as "Translator Methods," that specify the types of analyses and data that permit writers will utilize to develop water quality-based effluent limitations necessary to attain narrative criteria.

When adopting designated uses and associated criteria, the states must take into consideration the water quality standards of

downstream waters and ensure that their water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters. 40 C.F.R. § 131.10(b).

3. EPA Review of Water Quality Standards

EPA's review of a state's water quality standards involves eight determinations, five of which are relevant to this case:

(1) Whether the State has adopted designated water uses that are consistent with the requirements of the Act;

(2) Whether the State has adopted criteria that protect the designated water uses based on a sound scientific rationale consistent with 40 C.F.R. § 131.11;

(3) Whether the State has followed applicable legal procedures for revising or adopting standards;

(4) Whether State standards that include uses unrelated to the protection and propagation of fish, shellfish, wildlife, and recreation are based on appropriate technical and scientific data and analyses; and

(5) Whether the State submission meets the requirements of other regulatory provisions including those for Great Lake States and Great Lake Tribes.

40 C.F.R. § 131.5(a)(1), (2), (6), (7), (8).[2] If EPA determines that the State's water quality standards are consistent with all the relevant provisions at 40 C.F.R. § 131.5, EPA approves the standards. *Id.*

B. Minnesota Water Quality Standards

Minnesota's water quality standards include seven classifications of designated uses, which Minnesota calls "beneficial uses":

- Domestic consumption (Class 1)
- Aquatic life and recreation (Class 2)
- Industrial consumption (Class 3)
- Agriculture and wildlife (Class 4)
- Aesthetic enjoyment and navigation (Class 5)
- Other uses (Class 6)
- Limited Resource Value waters (Class 7)

[2] The other factors listed in 40 C.F.R. § 131.5(a)(3), (4), and (5) are not relevant to EPA's approval decision.

Minn. R. 7050.0140 (2017). Class 4 is divided into two subclasses: irrigated agriculture (Class 4A) and livestock and wildlife (Class 4B). *Id.* 7050.0224 (2021).

Each of the seven classifications of designated uses (and each of the two subclasses) has its own set of numeric and narrative criteria for protection of each designated use. *See e.g., id.* 7050.0221-0225 (2017, 2021). The irrigated agriculture subclass has criteria that generally apply to all waters used for irrigation and additional criteria that are applicable only to waters used for the production of wild rice. *Id.* 7050.0224 Subp. 2. The aquatic life use has separate criteria to protect aquatic biota (wild rice is an aquatic plant and so is part of the aquatic biota in waters with wild rice). *Id.* 7050.0140 Subp. 3.

This case arises from EPA's approval of Minnesota's changes to criteria for protection of industrial consumption use and the generally applicable criteria for protection of irrigated agriculture use.[3] Each of these uses and associated criteria are described in more detail below, as

[3] EPA also approved revisions to Minnesota's livestock and wildlife designated use (Class 4B), which replaced a criterion for total salinity with a new criterion for total dissolved solids and new numeric criteria for pH, nitrate, and nitrite, and sulfate. *See* AR0003914-20. The Bands do not directly challenge those revisions in this case.

well as aquatic life use and criteria, which are relevant to the Bands' arguments.

1. Industrial Consumption Use (Class 3).

Minnesota defines its industrial consumption designated use as "all waters of the state that are or may be used as a source of supply for industrial process or cooling water, or any other industrial or commercial purposes, and for which quality control is or may be necessary to protect the public health, safety or welfare." Minn. R. 7050.0140 Subp. 4. Prior to the recent revision of the Class 3 criteria, the State assigned each water body that has an industrial use one of four subclasses that were intended to reflect the water quality needs of the different industries expected to use the water and the level of treatment necessary to support those industries' use. AR0000811-13. The prior criteria consisted of both narrative and numeric criteria that reflected the State's prior determination that the water quality needs for industrial purposes vary based on the industrial processes for which the water is used, and the expected level of water treatment required to make the water suitable for the specific industrial process. AR0000813.

As part of Minnesota's review of its industrial consumption water quality standards, the State evaluated technical information regarding industrial water quality needs. AR0001024-25, 1037-40. Minnesota determined that industries typically account for their varying water quality needs through the selection of treatments that are specific to particular industries and locations. AR0001024-25, 0001038, 0001289. Consequently, industries treat water to achieve their own water quality needs. AR0001024-25. Minnesota retained experts at the University of Minnesota to evaluate the current information regarding the water quality needs for industrial water appropriators. AR0001288-93; AR0001385-413. Minnesota determined, based on current technical literature and surveys conducted by the State, that the greatest water quality need for industry is consistency, which is needed to allow for the design and operation of water treatment systems based on predictable water quality. AR0001024-25; AR0001038-40.

The State revised its water quality standards based on this conclusion. It re-designated all industrial consumption waters with a single Class 3 use classification, rather than having four subclasses of industrial uses. Minn. R. 7050.0470, 7050.0415 (2021). The State also

removed separate criteria to protect each of the subclass uses and replaced those criteria with a single narrative criterion to protect the overall industrial consumption use. AR0000814. The new narrative criterion states, in part, that

> The quality of class 3 waters of the state must be such as to permit their use for industrial purposes to avoid severe fouling, corrosion, or scaling. If the standard in this part is exceeded in waters of the state that have the class 3 designation, it is considered indicative of a polluted condition that is actually or potentially deleterious, harmful, detrimental or injurious with respect to the designated use.

Minn. R. 7050.0223, Subp. 2 (2021). Minnesota concluded that industrial uses would be protected as long as water quality levels are not altered by other users to the extent "that would impair downstream industrial consumption by forcing an industrial appropriator to install new active treatment technologies." AR0000878.

Minnesota also adopted a Class 3 Translator Method that establishes additional requirements to protect industrial consumption use from the effects of severe scaling due to calcium carbonate. AR0001041-42; AR0008715-22 (Industrial Consumption (class 3) Narrative Translator). The Class 3 Translator Method requires that dischargers not increase the hardness in waters that are appropriated for industrial water consumption or, if a discharger does increase

hardness, not to cause the calcium carbonate saturation index to exceed 2.0 in waters that are appropriated for industrial consumption. AR0008719-22.

Minnesota removed numeric criteria for chlorides, hardness, and pH from the industrial consumption criteria. *See* AR0000814. Minnesota adopted these numeric criteria in the 1960s, and the criteria had not been updated since. AR0000811-12. Minnesota determined, following its review of the technical literature regarding water quality requirements for industrial use, that the numeric criteria for chlorides, hardness, and pH are "based on outdated assumptions about what water quality industrial appropriators require and are capable of treating for." AR0001040. Minnesota determined based on technical literature and surveys of industrial facilities that a sound scientific rationale did not support the prior numeric criteria for chlorides, hardness, and pH. AR0001039. Similarly, a lack of sound scientific information on industrial water needs precluded setting revised statewide numeric criteria for chlorides, hardness, or pH. AR0001039-40. The State concluded that it could not specify a single numeric value

for each pollutant that would appropriately protect all waters with an industrial appropriation use. AR0001038.

2. Irrigated Agriculture Use (Class 4A)

The States' Class 4A waters protect irrigation use. Minn. R. 7050.0140; 7050.0224. The irrigation use criteria include both a general standard to protect all crops and vegetation and additional criteria specific to wild rice.

a. General Criteria

Prior to the recent revision of the Class 4A criteria, Minnesota's water quality criteria to protect the general irrigated agriculture use included a general narrative criterion and numeric criteria. The narrative criterion required that the quality of Class 4A waters permit their use for irrigation without significant damage or adverse effects upon any crops or vegetation usually grown in the waters or area. AR0000813. The criteria also included numeric criteria for bicarbonates, pH, specific conductance, total dissolved salts, sodium (collectively, the "salt pollutants"), and boron. *Id.*

Minnesota's revisions to its general irrigated agriculture criteria retained essentially the same language for the narrative criterion. *See* Minn. R. 7050.0224 Subp. 2; AR0003911-12.

Minnesota's revised criteria for the general irrigated agriculture use included a Class 4A Translator Method. This Translator Method includes specific numeric thresholds that address certain salt pollutants to identify when water quality would prevent a water from being used by an irrigation appropriator. AR0001122-32; AR0008723-31 (Irrigation (class 4) Narrative Translator). The Class 4A Translator Method sets numeric thresholds for sodium adsorption ratio and specific conductance for both sensitive and non-sensitive crops. AR0008730. The sodium adsorption ratio and specific conductance thresholds ensure that water used for irrigation will not cause soil salinity to increase in the root zone to levels that would cause adverse effects to crops. AR0001128-29. The thresholds vary based on the sensitivity of the crops, soil types, and Minnesota climate when irrigation water is used. *Id.*

Minnesota's water quality standards revisions removed the prior numeric criteria for the salt pollutants for the general irrigated

agriculture use. AR0000814. Like the prior industrial consumption use numeric criteria, the numeric criteria for salt pollutants had been adopted in the 1960s and not been updated since. AR0001055-57. The State removed these numeric criteria because the State determined that they were no longer scientifically defensible. AR0001059-61.

Minnesota determined that the best way to protect irrigated agriculture use is through a narrative standard coupled with a robust implementation process that considers a variety of relevant factors. AR0001058. The State found, based on a review of the technical literature, that irrigation water quality needs are influenced by several factors, including crop type, soil type, soil drainage management techniques, precipitation patterns, irrigation practices, and soil mineral content. AR0001070-118. As a result, the State determined that no sound scientific rationale existed to develop revised numeric criteria for general irrigation use. AR0001070 (no "one size fits all" irrigation use numeric criterion will protect for the wide variety of irrigation water quality needs in Minnesota). Minnesota concluded that a narrative criterion would provide an appropriate level of protection that could be

tailored to specific circumstances for irrigated crops of all types, including wild rice. AR0001070.

b. Wild Rice

In recognition of the ecological importance of wild rice, Minnesota specifically identified wild rice waters and adopted narrative and numeric criteria to protect wild rice where it occurs. Minn. R. 7050.0224. The narrative criterion requires that, in specifically identified wild rice waters, the quality of the waters and the aquatic habitat necessary to support the propagation and maintenance of wild rice plant species must not be materially impaired or degraded. *Id.* 7050.0470. The numeric criterion establishes a sulfate standard of 10 mg/L for waters used for the production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels. *Id.* 7050.0224. Minnesota did not revise its wild rice narrative or numeric criteria in this action.

3. Aquatic Life Use (Class 2)

Class 2 aquatic life uses include all waters of the state that support or may support aquatic biota and for which quality control is or may be necessary to protect aquatic or terrestrial life or their habitat or

the public health, safety, or welfare. Minn. R. 7050.0140 Subp. 3. Fish, insects, and plants, such as wild rice, can be part of a water body's aquatic biota.

Minnesota's criteria to protect the aquatic life use include a list of numeric criteria for *over 70* substances, characteristics, or pollutants. Minn. R. 7050.0222 (2021). These include numeric criteria for several salt pollutants. *Id.* The aquatic life criteria also include narrative criteria that

(1) require that "the quality of . . . surface waters shall be such as to permit the propagation and maintenance of a healthy community of . . . aquatic biota," Minn. R. 7050.0222, Subps. 2, 3; and

(2) prohibit discharges of wastes "which may impair the quality of the waters of the state or the aquatic biota of any of the classes [in this section] or in any manner render them unsuitable or objectionable for fishing, fish culture, or recreational uses." Minn. R. 7050.0222, Subp. 7(A).

Finally, Minnesota has biological criteria that employ a method of directly assessing the condition of biological communities in a water body based on field surveys. Minn. R. 7050.0222, Subps. 2d, 3d, and 4d.

Minnesota's aquatic life criteria protect aquatic life in all waters in the State because all the State's waters are designated for aquatic life uses (except for waters designated as Class 7 limited resource waters, which are not relevant here). AR0002985; *see* Minn. R. 7050.0415; 7050.0470. Minnesota made no changes to its aquatic life criteria in this action.

C. Procedural Background

On August 10, 2021, EPA received from Minnesota a rule revision package containing the changes to designated uses and criteria to protect the State's industrial consumption use and agriculture and wildlife uses. AR0003903. The package included the State's technical analysis, the scientific studies and surveys it considered, the public comments it received, and the State' response to public comments. *See* AR0000001-3901.

EPA considered these materials before making its decision. EPA also invited representatives of the eleven tribes in Minnesota to consult on the State's water quality standards revisions. AR0003946. Five tribes participated. *Id.* EPA held conference calls to present the rule revisions and receive the tribes' comments. *Id.* EPA concluded its consultation with the tribes by sending a letter to each participating

tribe that summarized the issues identified by the tribes during consultation and discussed how the tribes' input was considered in EPA's review. *Id.*; AR0008820-32.

On October 8, 2021, EPA approved Minnesota's revisions to its water quality standards for industrial consumption use and agriculture and wildlife uses. AR0003947-48. EPA supported its decision with a 44-page review document explaining its decision and a 13-page response to tribal issues raised during tribal consultation. AR0003903-46; AR00008820-32.

STANDARD OF REVIEW

The Bands bring this action under the Administrative Procedure Act ("APA"). Doc. No. 1 ¶ 6. The APA provides that a court, when reviewing final agency action, shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Agency action violates this standard if

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. *El Dorado Chem. Co. v. EPA,* 763 F.3d 950, 955-56 (8th Cir. 2014); *Nebraska v. EPA*, 812 F.3d 662, 666 (8th Cir. 2016). An agency action will be upheld as long as there is a "rational connection between the facts found and the choice made." *Minn. Ctr. for Env't Advoc. v. Forest Serv.*, 914 F. Supp. 2d 957, 964 (D. Minn. 2012) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). A court gives agency decisions a "high degree of judicial deference" and must consider whether EPA's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Mo. Limestone Producers Ass'n, Inc. v. Browner*, 165 F.3d 619, 621 (8th Cir. 1999); *Minn. Ctr. for Env't Advoc.,*.914 F. Supp. 2d at 964.

Courts owe their highest deference to technical matters within EPA's area of expertise. *See Nebraska*, 812 F.3d at 670. When the resolution of a dispute involves primarily issues of fact, and "analysis of the relevant information 'requires a high level of technical expertise, [the court] must defer to the informed discretion of the responsible

federal agencies.'" *Friends of the Norbeck v. U.S. Forest Serv.*, 661 F.3d 969, 975-76 (8th Cir. 2011). In these circumstances, "[i]f an agency's determination is supportable on any rational basis, [the court] must uphold it." *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618, 628 (8th Cir. 2005) ("*Mo. River*"); *see Nat'l Parks Conservation Ass'n v. McCarthy*, 816 F.3d 989, 994 (8th Cir. 2016).

Summary judgment is appropriate in judicial review of agency action under the APA because the administrative record establishes the facts, and the issues are therefore suitable for disposition through summary judgment. *Minn. Ctr. for Env't Advoc.*, 914 F. Supp. 2d at 965.

ARGUMENT

Congress structured the Clean Water Act to give States, not the federal government, the primary role in setting water quality standards. *El Dorado Chem. Co.,* 763 F.3d at 953 ("states assume the primary role in determining water quality standards"). The Act allows States to decide what criteria to adopt to protect their designated uses and, for the pollutants at issue here, the form that the criteria take, in accordance with the Act and EPA's regulations. EPA's responsibility is

to review whether the state-developed criteria are scientifically sound and contain sufficient parameters or constituents to protect the state's designated uses. *Nat'l Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1399 (4th Cir. 1993) ("EPA sits in a reviewing capacity of the state-implemented standards"). If EPA finds the criteria satisfy these conditions and if the requirements of 40 C.F.R. § 131.5 are met, it approves the criteria.

EPA, upon receipt of Minnesota's revised industrial consumption and irrigated agriculture water quality standards, reviewed multiple scientific studies, analyzed data, and identified where reliable information was unavailable. *See* AR0003903-38. EPA reasonably concluded that Minnesota's revised criteria were based on sound scientific rationales, contained sufficient parameters to protect the designated uses, were supported by the administrative record, and were consistent with the requirements of the Act. *Id.* EPA's determination is supportable on a rational basis and the Court should uphold it, especially when, as in this EPA approval, the agency "is acting within its own sphere of expertise." *Nat'l Parks Conservation Ass'n*, 816 F.3d at 994; *see also Sanitary Bd. of City of Charleston v. Wheeler*, 918 F.3d 324,

330 (4th Cir. 2019) ("EPA's review of state water quality standards 'requires the sort of scientific judgement that is the hallmark of agency discretion.'").

The Bands fall far short of establishing that EPA's technical determinations supporting approval of Minnesota's revised criteria are not "supportable on any rational basis." *See Nat'l Parks Conservation Ass'n*, 816 F.3d at 994; *Mo. River*, 421 F.3d at 628. EPA confirmed that Minnesota's revised industrial consumption and irrigated agriculture criteria will protect those designated uses. Instead, the Bands focus on protection of aquatic life and wild rice. Aquatic life and wild rice are protected by separate numeric and narrative criteria that Minnesota did not revise or submit to EPA for review in this proceeding. The Bands' arguments do not show EPA's approval was arbitrary or capricious.

I. State Water Quality Criteria Must Be Based on a Sound Scientific Rationale.

For the pollutants at issue here, the Act does not require that water quality criteria be expressed as numeric limits. *See* 33 U.S.C.

§§ 1313(c)(2), (d)(4)(B).[4] Water quality criteria may be "expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 C.F.R. § 131.3(b). Whether narrative or numeric, criteria must be based on a "sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." 40 C.F.R. § 131.11(a)(1). In addition, the statutory provision under which EPA reviews and either approves or disapproves state water quality standards, 33 U.S.C. § 1313(c)(3), does not distinguish between narrative and numeric criteria.

Narrative criteria are appropriate in circumstances where numeric criteria cannot be established based on Clean Water Act Section 304(a) guidance or other scientifically defensible methods. 40 C.F.R. § 131.11(b)(2). They can also supplement numeric criteria. *Id.* Although EPA's regulations encourage states to adopt numeric criteria, neither the Act nor EPA's regulation requires them as a general matter

[4] The Act requires the establishment of numeric criteria for toxic pollutants, subject to certain exemptions. 33 U.S.C. § 1313(c)(2)(B).

for the pollutants at issue here. No specific circumstances here indicate that narrative criteria will fail to protect the applicable designated uses.

Contrary to the Bands' arguments, neither the Act nor EPA regulations mandate numeric criteria except when numeric criteria are "infeasible" or "not possible."[5] Bands' Br. at 21 ("infeasible—a bar [EPA's] own regulations set for the adopting narrative criteria"); *see also* Bands' Br. at 17, 23, 24. Feasibility focuses on whether something is capable of being done. *See* https://www.merriam-webster.com/dictionary/feasible. EPA's regulations for criteria do not mention feasibility. A state regulator may be capable of deriving numeric criteria based on any number of factors. But those criteria would not meet legal requirements unless the water quality criteria selected protect the designated use based on a sound scientific rationale. 40 C.F.R. § 131.11.

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[5] The Bands incorrectly assert that EPA regulations allow States to adopt "narrative water quality criteria *only if numeric criteria cannot be established*." Bands' Br. at 10 (emphasis in original). Even if sound scientific numeric criteria can be established, which is not the case here, EPA's regulations allow states to adopt narrative criteria so long as such criteria are based on a sound scientific rationale and there are sufficient parameters or constraints to protect the designated use. 40 C.F.R. § 131.11(a), (b).

After EPA reviewed the information submitted by Minnesota, EPA agreed with the State's determination that the scientific research and data did not support the State's outdated numeric criteria and were insufficient to derive new statewide numeric criteria to replace them. AR0003922, AR0003924. Simply because numeric criteria once existed, Bands' Br. at 23, does not mean that numeric criteria based on a sound scientific rationale in accordance with 40 C.F.R. § 131.11(a)(1) can currently be established.

An Oregon district court's decision in *Northwest Environmental Advocates v. EPA*, 855 F. Supp. 2d 1199 (D. Or. 2012), does not stand for the proposition for which the Bands cite it. The Bands state that the court found that EPA violated the Act when it approved "narrative criteria when numeric criteria could be established (as evidenced by the fact they were already in place)." Bands' Br. at 24. In the Oregon case, EPA approved numeric criteria for temperature that were based on a sound scientific rationale and also a narrative natural conditions criterion. The court addressed whether the narrative criterion supplemented the numeric criteria. *Nw. Env't Advocs.*, 855 F. Supp. 2d at 1217. The court held that EPA's approval of the challenged narrative

criterion violated the Act because it allowed a numeric translation of the narrative natural conditions criterion to "supplant," rather than supplement, the otherwise applicable numeric temperature criterion for a particular water body without undergoing EPA review and approval or disapproval, as required by 33 U.S.C. § 1313(c). *Id.* at 1217-18. The court held that "the replacement of one numeric standard with another less-protective *numeric standard* cannot be viewed as 'supplementing' the first standard." *Id.* at 1218 (emphasis added). This reasoning has no application here because EPA did not approve numeric criteria to supplant other numeric criteria when approving Minnesota's revised standards.

Finally, the costs associated with complying with water quality criteria are not a relevant regulatory factor in EPA's decision. *See* 40 C.F.R. §§ 131.5, 131.11; *Miss. Comm'n on Nat. Res. v. Costle*, 625 F.2d 1269, 1277 (5th Cir. 1980). Minnesota's "main goal for this rule revision is that the standards reflect the latest scientific understanding of how water quality affects the ability to use the water for those industrial and agricultural purposes (or beneficial uses)." AR0000802. The existence of a sound scientific rationale is a primary factor in EPA's

evaluation of water quality criteria. *See* 40 C.F.R. § 131.5(a)(1), (2), (4). The costs of compliance with the revised criteria may, as the Bands observe, be lower, but that is not an impermissible outcome if prior costs were incurred to comply with criteria that lacked a sound scientific rationale.

II. EPA's Approval of Minnesota's Criteria for Protecting the Industrial Consumption Use Was Reasonable and Fully Consistent with EPA's Regulations Requiring that Water Quality Criteria Are Scientifically Sound and Protect the Designated Use.

To protect its industrial consumption use, Minnesota replaced numeric criteria that lacked a sound scientific rationale with a narrative criterion to avoid severe fouling, corrosion, or scaling. It also included a Translator Method with a numeric benchmark to address severe scaling. EPA reasonably concluded that Minnesota's revision from certain numeric criteria to a narrative criterion was consistent with EPA's regulatory requirements to protect *industrial consumption use*.

EPA's conclusion is supported by the record. EPA agreed that Minnesota demonstrated that current sound scientific knowledge regarding industrial water quality requirements no longer supports the

State's prior criteria for chlorides, hardness, and pH. AR0003922. EPA further agreed that a sound scientific rationale to establish updated statewide numeric criteria for those parameters did not exist. AR0003922. The Court should defer to EPA's rational technical judgments, which are supported by the record. *See Nat'l Parks Conservation Ass'n*, 816 F.3d at 994 (8th Cir. 2016).

EPA's approval of the removal of outdated numeric criteria is supported by the record. The prior numeric criteria for industrial consumption use were adopted in the 1960s, and neither Minnesota nor EPA can now provide scientifically defensible explanations for those numeric standards today. AR0000811-12; AR0001037-40; AR0003922. As explained above, *supra* at 17-18, Minnesota reviewed the available literature and determined that the prior numeric criteria for chlorides, hardness, and pH were "based on outdated assumptions." AR0001040. Scientific peer reviewers of the numeric criteria commissioned by the State agreed that the prior chlorides and hardness criteria were "based on an outdated understanding of industrial water treatment theory [and] practice" and none of the peer reviewers was aware of any professional or technical guidelines to support the continued use of

those numeric criteria. AR0001778, 1789, 1794, 1800; *see* AR0001776-1809.

EPA also found that Minnesota's revised narrative criterion and the relevant requirements included in the Translator Method protect industrial uses and are based on a sound scientific rationale. AR00003922. The industrial consumption narrative criterion still requires the regulation of any pollutant—including the pollutants for which numeric criteria existed previously—wherever necessary to permit the use of surface waters for industrial purposes. AR0003923. These findings satisfy EPA's review requirements. *Mo. Coal. for Env't Found. v. Wheeler*, No. 2:19-cv-04215-NKL, 2021 WL 2211446, at *9 (W.D. Mo. June 1, 2021) ("Congress has cabined EPA's role to determining whether the State's proposal is protective of designated uses based on sound scientific rationale").

Significantly, the Bands do not challenge any of EPA's determinations or conclusions regarding the water quality criteria necessary to protect industrial consumption use. The Bands do not argue that any of the prior numeric criteria are necessary to ensure that industrial appropriators may use state waters. They do not

identify any scientific basis for those prior numeric standards or offer any scientific rationale for revised statewide numeric standards to protect industrial consumption use. Instead, the Bands argue that the numeric criteria adopted in the 1960s for industrial consumption uses must be retained to protect aquatic life and wild rice. For the reasons explained below, *infra* at Section IV, EPA disagrees and, in any event, this is not grounds to find EPA's approval of Minnesota's revised criteria for industrial consumption use arbitrary or capricious.

III. EPA's Approval of Minnesota's Criteria for Protecting the Irrigated Agriculture Use Was Reasonable and Fully Consistent with EPA's Regulations Requiring that Water Quality Criteria Are Scientifically Sound and Protect the Designated Use.

Minnesota's revised water quality criteria for general irrigated agriculture use employ a combination of narrative criterion and numeric thresholds to protect the use. The narrative criterion requires water quality that permits irrigation without significant damage or adverse effects upon any crops or vegetation. Minnesota developed a Translator Method for implementation of this narrative criterion that includes specific numeric thresholds for sodium adsorption ratio and specific conductance where there are irrigation appropriators. EPA

reasonably approved these criteria as meeting requirements of the Act and its regulations.

EPA found that Minnesota had demonstrated that its revised Class 4A narrative criterion was based on sound scientific rationale and provided sufficient protection for the general irrigated agriculture designated use. AR0003912-14. Similar to the industrial consumption use criteria, an important factor in EPA's approval of the general irrigated agriculture use criterion is whether updated, scientifically defensible numeric criteria for this use could be established. EPA confirmed the absence of a sound scientific rationale to establish updated statewide numeric criteria for those parameters because of the variability of local factors throughout the state. AR0003924.

EPA also reviewed Minnesota's selection of numeric sodium adsorption ratio and specific conductance thresholds in its Translator Method to protect irrigated agriculture. Minnesota based its Translator Method on the 2011 *Agricultural Salinity Assessment and Management* manual, a reference text in the agricultural field. AR0003912. EPA reviewed comments that expressed concern that the specific conductance and sodium adsorption ratio values that were included in

the Translator Method would not be protective of all sensitive crops and plants culturally important to the Tribes. AR0003913. Although the scientific literature identified lower values of specific conductance to protect certain sensitive plants, EPA agreed that Minnesota considered the soil types and climate in Minnesota and that Minnesota has a lower salinization potential and receives more rainfall during the growing season than the areas used to derive lower values in the literature. *Id.* Therefore, EPA agreed that Minnesota's finding that the lower values of specific conductance in the scientific literature were not necessary to protect sensitive crops or culturally important plants and trees, including those for which tribes hold asserted reserved rights. AR0003913-14. EPA's judgment regarding whether the data do, or do not, support a position, should be upheld unless it is irrational. *See Cent. S. D. Co-op Grazing Dist. v. Dep't of Agric.*, 266 F.3d 889, 894 (8th Cir. 2001).

EPA also reviewed Minnesota's removal of several numeric standards for salt pollutants and reasonably found that their removal met the Act's requirements. These numeric criteria were adopted in the 1960s, and Minnesota also incorporated by reference recommendations

in a United States Department of Agriculture Handbook published in 1954 to provide guidance in western states where average annual precipitation is less than that in Minnesota. AR0003923; AR0001057-58. EPA reviewed Minnesota's lengthy discussion of the current technical literature on irrigation and the University of Minnesota report, AR0003923-24; AR0001070-1118, and determined that current sound scientific knowledge no longer supports the State's prior numeric criteria for salt pollutants because those criteria do not consider the effects of local factors, such as crop type and soil type, on crop toxicity. AR0003924. After reviewing the State's revised criteria, EPA concluded that there was not a sound scientific rationale available to develop statewide revised numeric criteria for salt pollutants to protect the general irrigated agriculture designated use, consistent with EPA regulations. This Court's role is not to substitute its judgment for that of EPA, and EPA's conclusion is supported by the record.

The Bands misplace reliance on excerpts from the University of Minnesota study. The Bands claim that the University of Minnesota study recommended maintaining some of Minnesota's existing standards. Bands' Br. at 25. EPA expressly addressed this issue in its

review and found that, although the University of Minnesota study identified a set of salinity tolerance thresholds for various crops typically grown in Minnesota, the University researchers also determined that the water quality requirements for irrigated crops vary based on the specific crop species, soil type, and crop uptake interactions. AR00003923. The University of Minnesota report recommended that, because of the variability among individual crops, it would be "necessary to explore questions of soil characteristics and crop needs and tolerance to avoid crop toxicity," which the University of Minnesota report did not undertake. AR0001319. The administrative record shows that current state of scientific data does not provide a sound rationale for setting statewide numeric criteria for irrigated agriculture uses. AR00003924.

EPA concluded that the State's narrative criterion to protect all types of crops and vegetation, together with the sodium adsorption ratio and specific conductance numeric thresholds in the Translator Method, is protective of the irrigation designated use, based on a sound scientific rationale and consistent with the Act's regulations. AR0003914. The State's Class 4A narrative criterion still requires the regulation of salt

pollutants wherever necessary to permit the use of surface waters for irrigation purposes. AR0003925. EPA's decision is well-reasoned and supported by the record, and is neither arbitrary nor capricious.

IV. EPA Reasonably Determined that Minnesota's Revised Water Quality Standards Will Protect the Most Sensitive Uses.

For waters with multiple use designations, a state's criteria must support the most sensitive use. 40 C.F.R. § 131.11(a); *see Fla. Wildlife Fed'n, Inc. v. Jackson*, 853 F. Supp. 2d 1138, 1165 (N.D. Fla. 2012) (most sensitive use is the use that would require the most stringent criteria in that water body). Minnesota's water quality standards include criteria that protect not only industrial consumption and irrigated agriculture uses but also separate criteria that provide necessary protections for other uses, such as aquatic life and human health, and wild rice. *See* Minn. R. 7050.0140. These additional uses may often be more sensitive than the industrial consumption and irrigated agriculture uses. Because those additional uses are protected by separate criteria, the removal of the prior numeric criteria for industrial consumption and irrigated agriculture uses will not undercut

protections for aquatic life and wild rice when those uses are more sensitive. 40 C.F.R. § 131.11(a); *id.* § 131.11(b)(2).

EPA evaluates whether a state's revised criteria protect the most sensitive use by considering whether the criteria are holistically protective. *See Mo. Coal.*, 2021 WL 2211446, at *10 (EPA taking a holistic view of the proposed standards); *El Dorado Chem. Co.*, 763 F.3d at 959 (the Act endorses a holistic approach to the nation's waterways). When a sound scientific rationale does not currently exist to establish numeric criteria for a pollutant to protect one or more designated uses, EPA will consider whether other elements of water quality standards, including narrative criteria, provide the necessary protection for designated uses. 40 C.F.R. § 131.11(a)(1); *id.* § 131.11(b)(2).

Courts have upheld EPA's holistic consideration of both numeric and narrative criteria in assessing whether most sensitive uses are protected. For example, in *Natural Resources Defense Council v. EPA*, 16 F.3d 1395, 1404-05 (4th Cir. 1993), the Fourth Circuit reviewed EPA's approval of criteria for dioxin in Maryland and Virginia. These criteria included numeric criteria to protect human health uses and narrative criteria to protect aquatic life uses. The court upheld EPA's

approval of the numeric criteria to protect those states' intended human health uses even though separate narrative criteria protecting aquatic life uses may require more stringent controls in some cases than would be required under the numeric human health criterion alone. *Id.* at 1404-05.

The court rejected the argument that states have an obligation under the Act to adopt a single numeric criterion to protect against all identifiable effects to all uses. *Id.* at 1404. Instead, states can rely on narrative criteria when necessary to protect a more sensitive use. *Id.* at 1405; *see Mo. Coal.*, 2021 WL 2211446, at *10 (numeric criteria can protect aquatic life and, to the extent other uses are more sensitive, the State can rely on existing narrative criteria to protect those more sensitive uses).

The Bands' objections to EPA's approval of the revised water quality standards based on protection of sensitive uses mirror the argument rejected by the courts in *Natural Resources Defense Council* and *Missouri Coalition*. Minnesota already has numeric and narrative criteria to protect aquatic life and wild rice that were not revised by the State's revised standards. If, for a given parameter, the use associated

with aquatic life or wild rice protection is the most sensitive use in a water body, the State's criteria associated with that resource should provide the necessary protections. The Act does not require Minnesota to retain numeric standards for industrial consumption use that lack an adequate scientific basis to protect other uses, like aquatic life, that have their own protective criteria. Thus, contrary to the Bands' assertion, Bands' Br. at 18, and as explained below, EPA reviewed and concluded that removal of numeric criteria would not adversely affect aquatic life and wild rice.

A. Aquatic Life Uses are Protected.

The Bands incorrectly argue that EPA arbitrarily approved the removal of criteria pertaining to salt pollutants associated with industrial consumption and agriculture uses because Minnesota's water quality standards will no longer protect aquatic life uses. Bands' Br. at 28-33. This argument fails for numerous reasons.

First, aquatic life uses are protected by the corresponding numeric, narrative, and biological aquatic life criteria, which are the legally and technically appropriate means to protect those uses. EPA's

approval did not change the substance of Minnesota's previously EPA-approved aquatic life standards.

Second, there is no current sound scientific rationale to support statewide numeric criteria in Minnesota for salt pollutants, other than chlorides, to protect aquatic life uses. Minnesota considered current sound scientific knowledge regarding ion (salt) toxicity and determined that existing information was inadequate for the purpose of deriving statewide numeric ion criteria, other than for chlorides, to protect aquatic life. *See, e.g.,* AR0001193. EPA concurred. AR0003927-28. EPA published Section 304(a) guidance that recommends criteria for chlorides (an ionic pollutant) to protect aquatic life uses, which Minnesota previously adopted. Minn. R. 7050.0222. In this situation, Minnesota is obligated to enforce its numeric limits for chlorides as well as its narrative criteria to address other ions to protect aquatic life uses.

Third, EPA explained that removal of the prior numeric chlorides criteria for industrial consumption will not impair aquatic life uses. AR0003936. The Bands incorrectly argue that Minnesota's revised standards will allow chloride levels that "will either impair or kill various species native to these waters." Bands' Br. at 32. But the

State's acute and chronic aquatic life chloride criteria, which were adopted to protect aquatic life, are unchanged and must still be met. AR0003936. In addition, for every NPDES discharger evaluated by Minnesota, the numeric aquatic life chloride criteria and not the outdated industrial consumption chloride numeric criteria were the controlling chloride water quality criteria for setting effluent limits for dischargers. AR0000909; AR0002687-2714. The removal of the industrial consumption numeric criteria will have no effect on protection of aquatic life and the level of compliance required in NPDES permits.

Fourth, EPA reviewed the current data and determined that ion toxicity is complex and dependent on multiple factors. EPA is continuing to evaluate the scientific understanding of ion toxicity to inform the development, under Section 304(a) of the Act, of national recommended aquatic life criteria for ions and the appropriate form of ion criteria. AR0003927 & n. 25 (citing scientific articles). Because a sound scientific rationale for statewide numeric criteria for ions other than chlorides did not exist when EPA reviewed Minnesota's revised water quality standards—and does not yet exist—to protect aquatic life,

EPA's approval of the removal of outdated criteria for pollutants is not arbitrary.

Fifth, the Bands appear to presume that aquatic life uses are the most sensitive use. Without more information, EPA determined that it cannot make a general characterization about whether aquatic life, industrial consumption, or irrigated agriculture is the most sensitive use with respect to ions or which use is most sensitive to ions for a specific water body. AR0003928. Regardless, whichever is the most sensitive use, the numeric and narrative criteria for that use will provide the required protection. AR0003928. *See Mo. Coal.*, 2021 WL 2211446, at *9-*11.

Sixth, EPA also considered Minnesota's proposed methods of implementing its narrative and biological criteria to protect aquatic life uses from non-chloride ions. Minnesota submitted its guidance, *Implementing the Aquatic Life Narrative Standard*, which relied on the use of a peer-reviewed EPA manual specifically developed to protect aquatic life from the effects of ions. AR0003928-29; AR0001193-1287. Minnesota described several methods it will use that are from the EPA manual. AR0003928-29; AR0001193-1287; *see also* AR0004765-5040.

EPA reviewed this information and reasonably concluded that "Minnesota's existing narratives protect against the types of harm excess ions may present to aquatic life in waterbodies designated for aquatic life." AR0003929.

Seventh, the Bands focus on other pollutants related to aquatic life that are covered by other standards. The Bands discuss concerns about mercury, Bands' Br. at 7-8, 15, 31, but Minnesota and the Bands have numeric mercury criteria for aquatic life uses that are not affected by Minnesota's revisions and would apply to all waters designated for aquatic life uses. *See, e.g.,* Minn. R. 7050.0222 (water column and fish tissue standards for mercury).[6] The State also addressed the impact of sulfates on mercury levels. *See, e.g.,* AR0000808. The Bands' concerns about eutrophication, Bands' Br. at 15-16, can be addressed by the State's numeric eutrophication standards that apply to protect aquatic

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[6] See also Fond du Lac of Lake Superior Chippewa, *Water Quality Standards of the Fond du Lac Reservation Ordinance #12/98, as amended* 50-51 (July 8, 2020), available at https://www.fdlrez.com/government/ords/12-98WaterQualityStandard2020.07.pdf (last accessed June 20, 2023); Grand Portage Reservation, *Water Quality Standards* 32 (Dec. 7, 2017), available at https://www.epa.gov/sites/default/files/2014-12/documents/grandportageband.pdf (last accessed June 20, 2023).

life and were not affected by this action. *See* Minn. R. 7050.0222, Subp. 2a. Class 2A.

With respect to salt pollutants, Minnesota plans to use an interim method of specific conductance benchmarks to implement the State's aquatic life narrative criteria. AR0000992; AR00001193-1287. The fact that a discharger will not receive a specific conductance effluent limit to protect industrial consumption use (because current industrial consumption use does not require limits on specific conductance) does not exempt dischargers to waters potentially impacted by conductivity from receiving specific conductivity effluent limitations to protect aquatic life uses in their next NPDES permit. Compare Bands' Br. at 29-30 to AR00001200.

The Bands' discussion of studies that they believe would support more stringent aquatic life standards does not show that EPA's approval was arbitrary or capricious. Bands' Br. at 13-14, 30-33. This case does not involve Minnesota's submission of revised aquatic life criteria to EPA for approval. Perhaps some of the scientific studies cited by the Bands regarding concentrations of salt pollutants that would or would not be protective of aquatic life will be relevant in future

efforts to revise aquatic life criteria. *See* Bands' Br. at 13-14. States are required to review their water quality standards no less often than every three years. 33 U.S.C. § 1313(c)(1); 40 C.F.R. § 131.20. Alternatively, the Bands can present this information in the NPDES permitting context to support an argument that effluent limitations for a particular discharger are necessary to meet the narrative criteria for aquatic life uses. Minn. R. 7050.0222, Subps. 2, 3 and 7A; *see* 40 C.F.R. § 122.44(d)(1) (NPDES permits must include effluent limitations "necessary to [a]chieve water quality standards established under section 303 of the [Act], *including State narrative criteria for water quality*.") (emphasis added); § 122.44(d)(1)(vi) (describing methods for establishing limits necessary to attain narrative criteria). However, those studies and any potential need for additional numeric standards to protect aquatic life uses do not demonstrate that EPA's approval of the State's revision of criteria to protect *industrial consumption and irrigated agriculture uses* is arbitrary or capricious.

Based on the record materials, EPA concluded that, following the removal of the numeric criteria associated with industrial consumption and irrigated agriculture uses, Minnesota's existing narrative criteria

for aquatic life protect against the types of harm excess ions may present to aquatic life in waterbodies designated for aquatic life uses. AR0003929. There was not previously and is not currently a sound scientific rationale to support a conclusion that the criteria that Minnesota has removed would be protective of aquatic life uses. The Bands have not rebutted EPA's reasonable, technical determination.

B. Wild Rice Is Protected.

In addition to the protective narrative general irrigated agriculture criterion, Minnesota has a numeric criterion of 10 mg/L of sulfates that applies to waters used for the production of wild rice. Minn. R. 7050.0224. It also has a narrative criterion to protect specifically listed waters used for wild. *Id.*

The Bands' argument specific to the protection of wild rice based on the removal of numeric criteria for ions that previously were associated with industrial consumption and irrigated agriculture uses suffers from similar flaws as its argument focused on aquatic life uses: there was not a current sound scientific rationale to support their use to protect wild rice, and the separate narrative criteria and 10 mg/L numeric sulfate criterion protect wild rice.

Although Minnesota concluded that aquatic plants can and should be considered when adopting aquatic life ion criteria, Minnesota considered the current understanding of ion toxicity to aquatic plants and concluded that existing information was inadequate for purposes of deriving statewide numeric criteria specifically to protect aquatic plants. *See* AR0001193. EPA has not published Section 304(a) recommended criteria to protect aquatic plants for ions or for ion mixtures. AR0003930. This is a matter of evolving scientific understanding, and EPA is currently evaluating the issue of ion toxicity to aquatic plants. *Id.* A sound scientific basis does not exist to establish numeric criteria for ions to protect aquatic plants, such as wild rice, based on direct ion toxicity.

Because the numeric sulfate standard for wild rice will likely be the most stringent sulfate criterion in a water body, it will apply in instances when two or more uses have numeric or narrative criteria that would limit sulfate discharges. The Bands' speculations about increased sulfate discharges under the revised narrative criteria for industrial consumption and irrigated agriculture uses, Bands' Br. at 34-35, are unjustified because the State will still need to ensure that

discharges will not cause downstream sulfate levels in waters used for wild rice to exceed the 10 mg/L numeric standard.[7] Accordingly, the Bands' arguments do not show that EPA's action is arbitrary or capricious.[8]

Based on the record materials, EPA concluded that, notwithstanding the removal of numeric criteria associated with industrial consumption and irrigated agriculture uses, Minnesota has narrative and numeric criteria that protect against the types of harm excess ions may present to wild rice. This conclusion is reasonable when there was not previously and is not currently a sound scientific rationale to conclude that the criteria that Minnesota removed would be protective of wild rice.

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[7] If the numeric criterion is not met to protect wild rice in certain waters, Minnesota or EPA can identify the waterbodies as impaired due to sulfate levels and require more stringent effluent limitations to meet that numeric criterion. 33 U.S.C. § 1313(d)(1).

[8] The Bands' argument, Bands' Br. at 35, that compliance will be measured at the point an industrial or agricultural user withdraws water from a waterbody, rather than the discharge point, is irrelevant to the sulfate numeric standard for wild rice because the sulfate standard requires effluent limits for dischargers to meet the 10 mg/L criterion in waters used for the protection of wild rice.

V. EPA Reasonably Determined that Minnesota's Revised Water Quality Standards Will Protect Downstream Uses.

EPA regulations require that Minnesota's water quality standards provide for the attainment and maintenance of downstream designated uses and water quality criteria. 40 C.F.R. § 131.10(b). Minnesota's water quality standards do so by requiring that "all waters must maintain a level of water quality that provides for the attainment and maintenance of the water quality standards of downstream waters, including the waters of another state." Minn. R. 7050.0155 (2017). EPA verified that this provision meets EPA requirements for the protection of downstream waters and is comparable to the narrative provisions EPA suggests that states use for this purpose. AR0003929. This protection for downstream waters requires the protection of the downstream uses related to aquatic life and wild rice of concern to the Bands. See Bands' Br. at 26. EPA addressed this issue in its approval, it reviewed the relevant requirements that assure protection of downstream uses, and its determination was not arbitrary or capricious.

The Bands argue that the scientific record shows that the removal of numeric criteria "will affect instream and downstream waters."

Bands' Br. at 18. But water quality standards revisions that "affect" are not unlawful unless the water quality standards as revised will not "provide for the attainment and maintenance of the water quality standards of downstream waters." 40 C.F.R. § 131.10(b). EPA examined this during its review and determined that the requirement was met.[9] AR0003929; AR0003932.

Minnesota's water quality standards explicitly provide for protection of downstream waters, which encompass downstream uses relevant to aquatic life and wild rice and the associated separate criteria. Minn. R. 7050.0155. NPDES permitting regulations require such protection as well. *See* 40 C.F.R. § 122.4(d) ("No permit may be issued . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States."); § 122.2 ("State" means an Indian Tribe as defined in EPA's regulations). The Bands mention the interaction between point sources and nonpoint sources of pollutants, differences in upstream and downstream effects,

[9] The Bands note that EPA's answer admitted that it is without knowledge about whether Minnesota examined downstream impacts on wild rice and aquatic life. Bands' Br. at 18. Of relevance to this case is whether EPA examined the issue and provided a reasonable explanation for its approval, which it did. AR0003927-29.

and the mapped locations of the uses. Bands' Br. at 28. But the standards must be met regardless of these factors. Wherever water bodies are identified as having uses relevant to aquatic life and wild rice, they are required to be protected under the aquatic life and wild rice criteria. Based on EPA's reasonable explanations addressing downstream effects, EPA's determination was not arbitrary or capricious.

VI. EPA's Approval Appropriately Addressed the Bands' Asserted Tribal Reserved Rights.

The Bands assert that they possess tribal reserved rights to fish and gather wild rice in certain waters across Minnesota. EPA has a longstanding policy to honor and respect tribal rights and resources reserved by treaties and EPA's actions must not conflict with tribal treaty rights. *See* U.S. EPA, Memorandum, *Commemorating the 30th Anniversary of the EPA Indian Policy* (December 1, 2014), available https://www.epa.gov/sites/production/files/2015-05/documents/indianpolicytreatyrightsmemo2014.pdf. EPA's actions here present no conflict. The State's criteria associated with wild rice and aquatic life are unchanged and, thus, protections for the Bands' treaty resources remain in place. In addition, the Band's reliance on a

proposed regulation that may in the future add certain requirements for EPA and states in establishing water quality standards that implicate reserved rights provides no legal or factual support for the Band's arguments. Bands' Br. at 36-37.

EPA ensured that its approval action did not conflict with the Bands' asserted tribal treaty rights relevant to Minnesota's uses related to the protection of aquatic life and wild rice. Contrary to the Bands' argument, Bands' Br. at 36-37, EPA addressed in its approval the tribal comments that asserted that removing the industrial consumption and irrigated agriculture numeric criteria would impair tribal reserved rights. AR0003925, n.21. EPA also separately responded to the tribes' concerns. AR0008820-29. EPA explained that because Minnesota's water quality standards for aquatic life and wild rice would protect those resources, any tribal reserved rights related to aquatic life and wild rice would not be impaired. *See* AR0003925-32; AR0008820-29. For this reason, EPA's lengthy discussion evaluating the impact of the removal of industrial consumption and irrigated agriculture numeric criteria on aquatic life and wild rice "applies to the comments related to tribal reserved rights." AR0003925, n.21

In addition, treaty-reserved rights are not designated uses under Minnesota's water quality standards. *See* Minn. R. 7050.0140. Further, the tribal treaties do not alter EPA's other obligations under the Act to ensure that water quality criteria are based on a sound scientific rationale.

The Bands repeatedly cite a proposed rule that EPA published in December 2022 to revise water quality standards regulations to protect tribal reserved rights. Bands' Br. at 10, 11, 22, 36 (citing 87 Fed. Reg. 74361 (Dec. 5, 2022)). But the Bands cannot rely on EPA's proposed rule for at least two reasons. First, the text from the *proposed* rule that the Bands cite has not yet been promulgated as a regulation. It has no current legal effect and was proposed over a year after the EPA approval decision here. Second, if this proposed rule culminates in promulgation of a regulation at some future date, it will not establish legal requirements that govern EPA's approval of the revised water quality standards in October 2021. The proposed tribal reserved rights rule is not legal authority on which EPA's approval action can be evaluated.

VII. The Bands' Characterization of the State's Translators Is Not Relevant to this Approval Action Because They Were Not Adopted to Protect Aquatic Life and Wild Rice.

The Bands misunderstand the role of Translators in EPA's approval. Bands' Br. at 38. Minnesota adopted binding Translators for its industrial consumption and irrigated agriculture narrative criteria to facilitate implementing the industrial consumption and irrigated agriculture standards in NPDES permits. See AR0000804. EPA based its approval of the revisions of industrial consumption and irrigated agriculture criteria in part on the Translators. AR0003910, AR0003912-13. EPA did not state that aquatic life or wild rice are protected by the Translators used in implementing the industrial consumption and irrigated agriculture narrative criteria. Aquatic life uses are protected by the aquatic life criteria. And EPA did not approve any revision to the aquatic life standard or any Translator for that standard.

VIII. The Bands' Characterization of Minnesota's Implementation of Water Quality Standards is Irrelevant to this Approval Action.

The Bands discuss Minnesota's implementation of its water quality standards, which the Bands view as inadequate. Bands' Br. at

39-41. The argument does not provide a basis to find EPA's approval action arbitrary or capricious.

The Act and EPA's regulations identify the specific factors EPA must consider when deciding whether to approve a state's submitted water quality standards. 33 U.S.C. § 1313(c)(2)(A), (C); 40 C.F.R. § 131.5. The effectiveness of a state's implementation of its water quality standards is not one of them. Rather, EPA is charged with making sure that the water quality standards themselves, whether the criteria are narrative or numeric, meet regulatory requirements. How the State may subsequently implement the standards is not a relevant consideration in the first instance. *See Mont. Env't Info. Ctr. v. Thomas*, 902 F.3d 971, 978-79 (9th Cir. 2018) (finding that concerns regarding a state's implementation of a state's program under an analogous EPA approval process under the Clean Air Act is generally not an appropriate challenge to EPA's approval).

Any alleged "political" pressure supporting a change in criteria is similarly not a relevant consideration. *See* Bands' Br. at 12 (referring to pressure by industrial interests). Such pressures are not the issue before the Court, which is required to determine whether any rational

basis supports EPA's decision to approve the challenged standards. *Mo. Coal.*, 2021 WL 2211446, at *9.

The Band's implementation arguments appear to overlook the fact that the alleged impairments and threats to designated uses referenced by the Bands occurred during a period when numeric criteria (now removed by the revisions) were in place. Thus, the issue here is not numeric as opposed to narrative criteria. Minnesota has stated that it intends to implement narrative criteria to protect aquatic life. AR0001193-1287. The Bands are premature in making assumptions regarding how Minnesota will implement its revised criteria to protect designated uses. Both narrative criteria and existing numeric criteria for protection of aquatic life and wild rice are in place and can and must be implemented.[10]

[10] As the Bands observed, Bands' Br. at 6, EPA added 32 Minnesota waterbodies to the State's list of impaired waters under Section 303(d) of the Act based on a failure to meet the wild rice criterion of 10 mg/L of sulfate. That criterion is not changed by the water quality standards revisions approved by EPA. Unless water quality improves, the listings will lead to additional requirements for Minnesota to incorporate more stringent regulatory controls on discharges and other sources of pollutants necessary to attain the wild rice criterion, which will occur regardless of the removal of the numeric criteria for the industrial consumption and irrigated agriculture uses.

CONCLUSION

For all these reasons, the Court should deny the Bands' motion for summary judgment and grant EPA's motion for summary judgment.

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June 21, 2023

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2023, I electronically filed the foregoing Defendants' Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment with the Clerk of the Court by using the CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

s/ Alan Greenberg