

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

GRAND PORTAGE BAND OF LAKE  
SUPERIOR CHIPPEWA and FOND DU LAC  
BAND OF LAKE SUPERIOR CHIPPEWA,

Case No. 0:22-cv-01783-JRT-LIB

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY and MICHAEL  
REGAN, Administrator, United States  
Environmental Protection Agency,

Defendant,

**MPCA’S BRIEF ON SUMMARY  
JUDGMENT**

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.

**INTRODUCTION<sup>1</sup>**

After an extensive 10-year process that involved complex scientific analysis, peer review, and tribal and public outreach, MPCA revised its Class 3 Industrial, Class 4A Agricultural - Irrigation, and Class 4B Livestock and Wildlife standards. Through this

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<sup>1</sup> The Minnesota Pollution Control Agency files this brief in opposition to the Grand Portage and Fond Du Lac Bands’ motion for summary judgment and in support of MPCA’s and the Environmental Protection Agency’s motions for summary judgment.

process, MPCA established robust narrative standards, retained or created new numeric criteria where scientifically supportable, removed outdated numeric criteria where not scientifically supportable – all in accordance with the requirements of the Clean Water Act (“CWA”) and federal regulations. EPA correctly approved MPCA’s water quality revisions, and this Court should grant their motions for summary judgment.

### **REGULATORY AND FACTUAL BACKGROUND**

Mindful of the Court’s order that the parties “should strive to avoid duplication in their briefing,” MPCA incorporates by reference the Background Section of EPA’s brief as if fully stated here. (Dkt. No. at 3, n.1.)

### **STANDARD OF REVIEW**

The standard of review under the Administrative Procedures Act of an agency action is limited and deferential. 5 U.S.C. § 706. The standard “presumes agency action to be valid,” and the agency’s decision will be upheld as long as there is any rational basis supporting the agency’s determination. *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1317 (8th Cir. 1981). A court cannot substitute its judgment for that of the agency and may only set aside an agency’s decision if it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *El Dorado Chem. Co. v. EPA*, 763 F.3d 950, 956 (8th Cir. 2014). Moreover, agency determinations involving “very technical areas of expertise are accorded a high degree of deference.” *Story v. Marsh*, 732 F.2d 1375, 1381, (8th Cir. 1984); *Nebraska v. EPA*, 812 F.3d 662, 670 (8th Cir. 2016). EPA’s decision to approve MPCA’s revisions to three water quality standards is rational,

well supported by the record and numerous technical analyses, and this Court should grant EPA's and MPCA's motions for summary judgment.

### ARGUMENT

There is a fundamental mismatch between what the Bands are challenging – MPCA's newly adopted Class 3 4A, and 4B standards for industrial, irrigation, and livestock uses – and the resources the Bands seek to protect – aquatic life and wild rice. Simply put, the Class 3 and other revised standards are not the tool MPCA uses to protect water for aquatic life or wild rice. The Class 3 standards may incidentally protect these resources, in the same way a picnic shelter built to protect park users from the weather might incidentally provide a roosting site for birds. But that's not the purpose of the Class 3 standards.

For protection of aquatic life and wild rice, MPCA adopted separate sets of standards in Class 2 and 4 that are far more protective of these resources than Class 3. It is critical to note that a water body can – and every waterbody in Minnesota does – have multiple protective standards applied by MPCA. MPCA does not protect a river by applying Class 2 *or* Class 3 standards. It protects a river by applying Class 2 *and* Class 3 standards. The Class 2 standards ensure the water is suitable for aquatic life. The Class 3 standards ensure it is *also* suitable for industrial uses.

For example, the St. Louis River is a major watershed that forms part of the exterior boundary of the Fond Du Lac reservation. MPCA protects it with multiple water quality standards:

Reach Name and Description	AUID	Uses	✓	ORVW
St Louis River - Cloquet R to Pine R	04010201-503	2Bg, 3, 4A, 4B, 5, 6	+	
St Louis River - Stoney Bk to Cloquet R	04010201-504	2Bg, 3, 4A, 4B, 5, 6	*	
St Louis River - Artichoke R to Stoney Bk	04010201-505	2Bg, 3, 4A, 4B, 5, 6	*	
St Louis River - East Savanna R to Artichoke R	04010201-506	2Bg, 3, 4A, 4B, 5, 6	+	
St Louis River - Floodwood R to East Savanna R	04010201-507	2Bg, 3, 4A, 4B, 5, 6	*	

The gravamen of the Bands’ argument is that the Class 3 standards are not sufficiently protective of aquatic life – ignoring that all the relevant waterbodies also have protection under Class 2, which is the class designed to protect for aquatic life.

Put another way, the Bands are essentially arguing that MPCA is like a baseball team that allows too many runs to score, and as a solution, they argue MPCA should hire a better hitting coach. The Class 3 standards serve a particular purpose. They work to ensure that water running in the St. Louis River and other watercourses is suitable for industrial uses. As set forth in more detail below, MPCA is not legally required to use its Class 3 and other revised standards to protect for aquatic life when it has another class expressly designed for that exact purpose.

With these issues in mind, MPCA addresses the Bands’ arguments. In Section I, MPCA addresses the Bands’ argument that MPCA illegally abandoned numeric standards. This argument fails because the law does not require numeric standards, and in any event, the science does not support the use of numeric standards for industrial uses. In Section II, MPCA addresses the Bands’ argument that MPCA’s revised Class 3, 4A, and 4B standards fail to protect downstream uses. This argument fails because the downstream uses the

Bands focus on are protected by Class 2 and Wild Rice standards, which have not changed. In Section III, MPCA addresses how the revised standards protect the downstream uses they are promulgated to protect, the actual issue before this Court, which is ignored in the Bands' briefing. In Section IV, MPCA addresses the Bands' argument that the translators and past permitting are not adequate to protect aquatic life and wild rice. This argument fails because they are not relevant considerations for whether the water quality standard as revised were properly approved, and MPCA details how its translators will assist in future permitting and addressing site specific issues. In Section V, MPCA addresses the practical effect of granting the Bands' motion, namely that the Class 2 standards will not be revised any sooner and fewer resources will be available to address aquatic life issues.

**I. NEITHER EPA NOR MPCA IGNORED THE CWA OR REGULATIONS REGARDING NUMERIC CRITERIA.**

The Bands argue that EPA could not approve MPCA's revisions to Class 3 and Class 4 water quality standards because the previous numeric criteria were longstanding, and MPCA "did not explain why it chose to *eliminate* rather than *update* the numeric criteria." (Bands Br. at 24.) This argument is legally incorrect and factually not supported by the record. MPCA removed outdated numeric standards where they could not be established based on scientifically defensible methods as required by the CWA. MPCA's revised standards are also consistent with the Bands' own corresponding Class 3 and 4 standards which similarly did not establish numeric criteria for the contaminants they complain of, namely sulfate, specific conductivity, or chloride. (AR 968.) The band's arguments fail for several reasons.

First, neither the CWA nor federal regulations require that a water quality standard be numeric. 33 U.S.C. § 1313(c); 40 CFR §§ 131.6 (“Minimum Requirements”), 1313.11 (“Form of Criteria.”); *see also Natural Res. Defense Council, Inc. v. E.P.A.*, 16F.3d 1395, 1405 (4th Cir. 1993) (“Clearly, the form of a particular state’s water criteria may be either numeric or narrative.”).

Second, the fundamental requirement for promulgating any water standard – narrative or numeric – is that it is based on a sound scientific rationale and protects the designated use. 40 CFR§ 131.11(a); *Cntr. For Regulatory Reasonableness v. EPA & MPCA*, No. 16-1435, 2019 WL 1440303, \*8 (D. DC March 31, 2019) (granting summary judgment on EPA’s approval of MPCA’s eutrophication standards to protect aquatic life). Contrary to the Bands’ claim, the length of time a standard has been in place is not relevant, especially when the scientific basis for its promulgation is lacking, as was the case here.

Third, numeric values can only be established based on Section 304(a) guidance or other scientifically defensible methods. 40 CFR § 131.11(b). The record confirms there is no applicable Section 304(a) guidance. (AR 807) (“There are no EPA-recommended 304(a) ambient water quality criteria.”). EPA confirmed the same and acknowledged that it is in the process of but has not yet completed its study of the contaminants at issue or promulgated applicable 304(a) guidance. (AR 3927, EPA Br. at 46.)<sup>2</sup> The Band does not argue otherwise.

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<sup>2</sup> EPA’s 304(a) guidance is also available at <https://www.epa.gov/wqc/national-recommended-water-quality-criteria-tables>.

Fourth, MPCA documented its analysis methodically and in detail – class by class and contaminant by contaminant – regarding whether a scientifically defensible method existed for establishing a numeric criteria. (AR 803, 830-851, 1010-11, 1019, 1023.) EPA’s approval acknowledged the same. (AR 3920-23.) The record shows the extensive research and review MPCA conducted and which EPA considered related to the lack of any adequate basis in the historical record for originally setting several numeric criteria in the 1960s and the lack of a sufficient scientific basis currently to establish numeric criteria for some contaminants now. (AR 803, 812, 848, 1024, 1033.)

The record fully supports MPCA’s revisions to numeric water quality standards. Where MPCA determined there currently was a scientific basis to retain a numeric standard, such as for pH and boron, MPCA retained it. (AR 1135, 1075, 814-15.) Where there was a scientific basis to establish a new numeric standard, such as for sulfate and nitrates, MPCA established it. (AR 1136, 814-15.) Where MPCA determined there was not a scientific basis for a numeric standard, such as for chloride and hardness, MPCA removed it. (AR 1021-23, 814-15.) MPCA thoroughly documented its reasons for retaining, creating, or removing each standard, and EPA similarly detailed its concurrence with MPCA’s decisions. (AR 790-2959, 3903-48.) Because these technical determinations fall within both agencies’ area of expertise, this Court should give substantial deference to MPCA’s and EPA’s decisions. *El Dorado*, 763 F.3d at 956; *Story*, 732 F.2d at 1381. In short, it is simply not enough for the Bands to disagree and advocate for different standards where the record shows MPCA’s and EPA’s decisions were not only rational but reasonable.

Finally, MPCA also developed strong narrative standards with a robust implementation plan because that is what was required and what will protect the Class 3, 4A, and 4B designated uses that were the subject of the rulemaking. (*Id.*) Notably, the Bands’ own corresponding Class 3 and 4A standards are *also* narrative and do not contain *any* numeric standards for the contaminants at issue. This not only supports MPCA’s own use of narrative standards but significantly discredits the Bands’ claims that numeric standards were required to be established. (AR 968.)

State or Tribal Nation <sup>1</sup>	Industrial standards	Irrigation standards	Livestock and/or wildlife standards
Wisconsin <sup>10</sup>	None specific to industry – but all waters protected for use	None specific to irrigation – but all waters protected for use	For wildlife only: DDT and metabolites: 0.011 ng/L Mercury: 1.3 ng/L PCBs: 0.12 ng/L 2,3,7,8-TCDD: 0.003 pg/L
Fond du Lac <sup>11</sup>	“The water quality is adequate for use(s) as commercial water supply for business purposes.”	“The water quality is adequate for uses in irrigation and livestock watering.”	“The water quality is adequate for uses in irrigation and livestock watering.” Wildlife has numeric standards: DDT: 11 pg/L Mercury: 0.0013 µg/L PCBs: 120 pg/L 2,3,7,8-TCDD: 0.0031 pg/L
Grand Portage <sup>12</sup>	“all waters of the Reservation shall be of sufficient quality to be used as a water supply for commercial purposes.”	Irrigation is not a designated use, but forestry application is included as a designated use.	Livestock is not a designated use. Wildlife has numeric standards: DDT: 1.1 x 10 <sup>-5</sup> µg/L Mercury: 1.3 x 10 <sup>-3</sup> µg/L PCBs: 1.2 x 10 <sup>-4</sup> µg/L 2,3,7,8-TCDD: 3.1 x 10 <sup>-9</sup> µg/L

In sum, the record reflects that MPCA’s process for revising the water quality standards for Class 3, 4A, and 4B standards was technically appropriate and legally compliant, and EPA was justified in approving the revisions.



**II. DOWNSTREAM USES ARE PROTECTED. THE CLASS 2 AQUATIC LIFE STANDARDS AND CLASS 4A WILD RICE STANDARDS HAVE NOT BEEN CHANGED AND CONTINUE TO PROTECT THOSE USES.**

The Bands' brief focuses on their claims that revisions to the standards for Class 3 Industrial, Class 4A Irrigation, and Class 4B Livestock and Wildlife do not protect designated uses for other classes, namely Class 2 Aquatic Life and Class 4A Wild Rice. (Bands' Br. at 26-35.) The Bands' argument is contrary to law and not supported by the record.

**A. The CWA Does Not Require One Standard To Protect A Different Standard's Designated Use.**

Under the CWA, one class of standards is not required – and is not intended – to protect the uses covered by a separate distinct class. 33 U.S.C. §§ 1313(c)(2)(a), 1314; 40 CFR §§ 130.3, 131.10; Minn. R. 7050.0140; *NRDC*, 16 F.3d at 1405 (“[W]here multiple uses are designated for a body of water, there may be multiple criteria applicable to it.”). Such an argument runs directly contrary to the whole purpose of establishing different classes in the first place. *NRDC*, 16 F.3d at 1405. MPCA acknowledged the same, noting that “a water quality standard in one class does not protect for a designated use in another class” and that “Minn. R. 7050.0140 and 40 CFR § 131.10 intentionally require distinct designated uses to ensure that tailored water quality protections are developed that are specific only to the designated use.” (AR 851.)

Here, the Bands argue that one set of standards for specific uses (Industrial, Irrigation, and Livestock / Wildlife) cannot be revised without analysis of other unchanged standards that continue to protect completely different uses (Aquatic Life, Wild Rice).

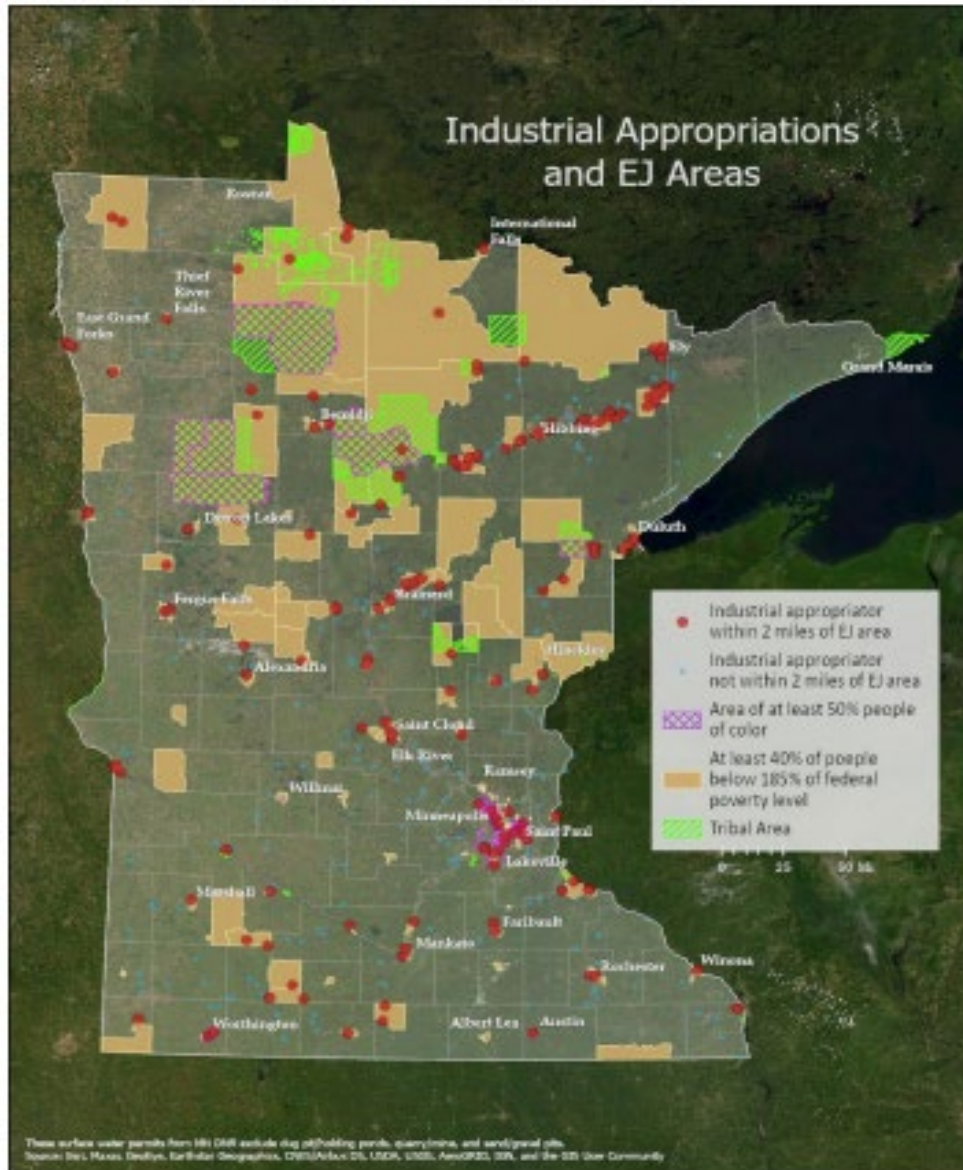
(Bands Br. at 26-35.) Courts have repeatedly rejected the argument the Bands advance because the CWA does not mandate a single standard that protects only the most sensitive use. *NRDC*, 16F.3d at 1405; *MO Coalition for Envir. Foundation v. Wheeler*, Case No. 2:19-cv-04215-NKL, 2021 WL 2211446, \*9 (W.D. MO June 1, 2021) (same); *Cntr. For Regulatory Reasonableness*, 2019 WL 1440303 at \*10 (rejecting a single numeric criteria requirement for multiple classes that protect different uses). Simply put, the standards for industrial users, irrigators, and wildlife under the CWA can and should be different than those standards for aquatic life and wild rice. That alone requires denial of the Bands' motion and is sufficient to grant MPCA's and EPA's motions for summary judgment.

**B. The Class 2 Aquatic Life And Class 4A Wild Rice Standards Were Promulgated To Protect Those Uses And Continue To Do So.**

Although the Bands claim MPCA and EPA ignored impacts to aquatic life, wild rice, and treaty resources, the record shows just the opposite. (Bands Br. at 29-33.) The record reflects MPCA took seriously protections to aquatic life and wild rice throughout Minnesota, and actively engaged with the Bands throughout the revision process to understand and address their concerns. (AR 819, 983-94.) The same concerns the Bands now assert in their brief, they previously raised in public comments. (AR 983-91.) MPCA thoroughly addressed each of these concerns in their response to the Tribes' comments, in meetings with the Tribe, and in MPCA's technical documents. (AR 983-90, 1033-40, 1062-1120, 1136-55.) The record also shows that MPCA identified all the NPDES permit holders upstream of the Fond Du Lac reservation, irrigators downstream of the reservation,

and conducted multiple analyses related to the same and considered the impact of industrial and agricultural appropriations on tribal areas. (AR 982-93.)

Figure 18. Industrial appropriations and areas of environmental justice concern.



There are a total of 3,158 agricultural appropriators and 560 industrial appropriators. There are 1,158 agricultural appropriators and 290 industrial appropriators within two miles of a Tribal area, or an area where at least 40% of the people are below 185% of the federal poverty level, or an area with at least 50% BIPOC. Two miles was used in developing the translator approach as likely the farthest distance that a

MPCA also made clear throughout the record that both the numeric and narrative standards for Class 2 Aquatic Life and Class 4A Wild Rice are not being changed, have in

no way been reduced, and remain protective of those sensitive uses they were promulgated to protect. (AR 806-09, 1018.) In the opening pages of its statement of need, MPCA addressed the narrow scope of these rule revisions and explicitly stated “this rulemaking will not impact the wild rice standard” and that any “revisions to the aquatic life (class 2) water quality standards [will occur] in a separate rulemaking.” (AR 806.) Those Class 2 and Wild Rice standards, therefore, must continue to be met.

By way of example, the St. Louis River borders the Fond Du Lac reservation. That waterbody has multiple use designations including 2, 3, 4A, and 4B. (See graph below.)<sup>3</sup> All 75 of the contaminants with numeric values in the Class 2 Aquatic Life standard<sup>4</sup> – including mercury in edible fish tissue, phosphorous, and the acute and chronic chloride standards – cannot be exceeded regardless of any changes to the Class 3, 4A, and 4B standards in this rulemaking. (AR 806.)

**Beneficial use designations for stream reaches in the St. Louis River Watershed (04010201) (Table originally created August 9, 2016; updated on May 17, 2017; May 18, 2018; June 1, 2020, as per Minn. R. 7050.0470). This is a draft table created to support rule making. Proposed use designations are highlighted in yellow.**

Reach Name and Description	AUID	Uses	v	ORVW
St Louis River - Cloquet R to Pine R	04010201-503	2Bg, 3, 4A, 4B, 5, 6	+	
St Louis River - Stoney Bk to Cloquet R	04010201-504	2Bg, 3, 4A, 4B, 5, 6	*	
St Louis River - Artichoke R to Stoney Bk	04010201-505	2Bg, 3, 4A, 4B, 5, 6	*	
St Louis River - East Savanna R to Artichoke R	04010201-506	2Bg, 3, 4A, 4B, 5, 6	+	
St Louis River - Floodwood R to East Savanna R	04010201-507	2Bg, 3, 4A, 4B, 5, 6	*	
St Louis River - Whiteface R to Floodwood R	04010201-508	2Bg, 3, 4A, 4B, 5, 6	+	
Whiteface River - Paleface R to St Louis R	04010201-509	2Bg, 3, 4A, 4B, 5, 6	+	
St Louis River - West Two R to Swan R	04010201-510	2Bg, 3, 4A, 4B, 5, 6	+	
St Louis River - Embarrass R to East Two R	04010201-511	2Bg, 3, 4A, 4B, 5, 6	+	

<sup>3</sup> <https://www.pca.state.mn.us/sites/default/files/wq-s6-46c.pdf>

<sup>4</sup> The full list of contaminants addressed in Class 2 standard is available at <https://www.revisor.mn.gov/rules/7050.0222/>.

Similarly, wherever a water body has both wild rice and wildlife uses, the more restrictive 10 mg/L sulfate in the Class 4A Wild Rice standard applies, regardless of the fact that there would also be the new 600 mg/L in the Class 4B Wildlife standard.<sup>5</sup> (AR 806.)

The Bands' complaint and brief make clear that they are concerned with the protection of aquatic life and wild rice. The standards promulgated by MPCA and approved by EPA to protect those uses, Class 2 and the Class 4A Wild Rice, remain unchanged and continue to protect those uses. Thus, while those uses are important, they simply have no bearing on the rulemaking at issue related to industrial use, irrigation, livestock and wildlife. This Court should therefore grant summary judgment to MPCA.

### **III. THE REVISED CLASS 3, 4A, AND 4B NARRATIVE AND NUMERIC STANDARDS PROTECT THOSE DESIGNATED USES.**

The new standards acknowledge the diversity of water quality needs for industrial and irrigation use, better reflect the current scientific understanding, and provide clarity around the implementation of the revised water quality standards. (AR 802.)

#### **A. The Revisions To The Class 3 Standards For Industrial Consumption Are Scientifically Sound And Protect Those Designated Uses.**

MPCA reviewed the original record establishing those numeric values and concluded that "MPCA cannot make a reasonable argument for why the current Class 3 parameters with numeric standards (pH, chloride, hardness) were selected, or the reasoning for the specific numeric values selected for those parameters." (AR 830.)

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<sup>5</sup> See Class 4A and 4B standards, available at <https://www.revisor.mn.gov/rules/7050.0224/>.

MPCA also reviewed the current scientific literature, which further supported MPCA decision to move to a narrative standard as did the modern usage of water by industrial consumers which did not support any numeric standard. (AR 830-33, 1024-25.) MPCA noted that industrial water users do not consider the current Class 3 numeric standards to provide any essential protection for their needs and significantly “do not use any of the class 3 numeric criteria as reference values in the design or operation of their water treatment systems.” (AR 1025.) Instead, the record shows that industrial consumers are committed to treating water quality to tailor their own specific needs and rate consistency as their primary water quality concern. (AR 1038.)

The Bands do not raise specific concerns with the revised standard as it relates to industrial users or contend that the revised standard would not meet downstream industrial needs, and instead, focused its argument only on the inability of the revised industrial standard to protect aquatic life. (Bands Br. at 29-30.) EPA’s careful review reflects that it considered MPCA’s analysis and implementation strategy and found the revisions adequate to protect Class 3 uses and to meet CWA requirements. (AR 3908-11, 3947.)

**B. The Revisions To The Class 4A Standards For Irrigation Are Scientifically Sound And Protect Those Designated Uses.**

MPCA also reviewed the original record establishing those numeric values and concluded that it did not support the numeric irrigation standards for bicarbonates, specific conductance, total dissolved salts, and sodium. (AR 840.) MPCA noted that there was limited information in the record supporting the existing numeric standards for these salty

parameters and that values appeared to be based on needs in arid, Western states which greatly differ from the irrigation needs in Minnesota. (AR 840.)

Although MPCA considered a single numeric irrigation standard, it concluded such a standard would likely be either under-protective or over-protective given that the variability in irrigation is greater than other standards. (AR 841.) Similarly, the record shows MPCA considered but rejected a multi-factorial numeric standard because it would be too complex and need to have 750 cells to account for the “different crop types, soil types, drainage, [and] irrigation methods.” (AR 841.) Finally, MPCA found supportive the fact that the U.S. Department of Agriculture “did not raise major concerns” and not a single farmer or farm group raised concerns about the new standards or downstream impacts to their land and crops. (AR 842.) The Bands did not raise concerns that the new irrigation standards would not be protective of irrigation uses instream or downstream.<sup>6</sup> EPA properly found MPCA’s Class 4A revisions adequate to protect Class 4A uses and to meet CWA requirements. (AR 3920-33, 3947.)

**C. The Revisions To The Class 4B Standards For Livestock And Wildlife Are Scientifically Sound And Protect Those Designated Uses.**

As with its review of the Class 3 and 4A standards, MPCA found that the rationale for the selection of numeric criteria for total salinity and pH was not well documented during the original 1967 proceedings. (AR. 848.) The record shows MPCA found

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<sup>6</sup> The Bands’ claim that MPCA was concerned with removing numeric criteria for industrial uses because it “could cause problems for aquatic life” is not supported at all by the record. (Bands Br. at 13.) In the very same paragraph referenced by the Bands, MPCA states unequivocally that it does “not expect permitted dischargers to increase their discharge of [salty] ionic pollutants” and the “Class 2 chloride standard is not changed in this rule making.” (AR 851.)

sufficient scientific support to replace the current Class 4B salinity standard with a total dissolved solids standard, retain the current numeric pH standards, add new numeric standards for sulfate and nitrate, include duration and frequency components for the Class 4B numeric standards, and leave in place the current narrative standards. (AR. 849.)

The record also supports there was no water quality monitoring related to total salinity because that parameter is not a standard water quality analysis, and MPCA therefore changed to total dissolved solids because there was monitoring for total dissolved solids and “extensive research has been done on the effects of total dissolved solids to livestock.” (AR 865.) The scientific literature showed possible impacts to livestock growth and development at 3,000 mg/L, and MPCA therefore appropriately set the numeric standard for dissolved solids standard at that amount. (*Id.*)

Prior to these revisions, there was no Class 4B numeric for nitrate + nitrate or sulfate. (AR 865-66.) MPCA surveyed the available data and scientific literature and set the nitrate + nitrate limit at 100 mg/L because nitrate can impact livestock growth and reproduction at amounts above that threshold. (AR 865.) Similarly, MPCA analyzed available data and determined that wildlife could be impacted by sulfate at 600 mg/L and set the standard accordingly. (AR 866.) Rather than address wildlife, the Bands again focused its arguments on wild rice, a different use not intended to be protected by the revised standard. (Bands Br. at 30.)

The Bands also claim MPCA revised these standards to reduce costs for permit holders. (Bands Br. at 25.) Nothing could be further from the truth. MPCA is required by state law to compile the probable costs of compliance, included that mandatory analysis,



and was explicit that costs did not influence its decision because “the CWA and case law prevents consideration of cost from being a factor in establishing a standard.” (AR 907.)

The record shows that MPCA’s actions in retaining, updating, or removing numeric and narrative standards were tailored to each individual designated use, protective of those designated uses, and scientifically supportable. EPA’s approval confirms the same.

#### **IV. WHILE WATER QUALITY STANDARDS APPLY STATEWIDE, MPCA ALSO PROTECTS SPECIFIC SITES THROUGH TRANSLATORS AND LIMITS IN PERMITS.**

The Bands argue that the Class 3 and 4A translators are insufficient because they do not address the Class 2 aquatic life standard. (Bands Br. at 38.) This is nothing more than a re-dressing of their earlier argument that Class 3 and 4A standards must also protect Class 2 uses and fails for the same reason, namely because the CWA imposes no such single criteria requirement.

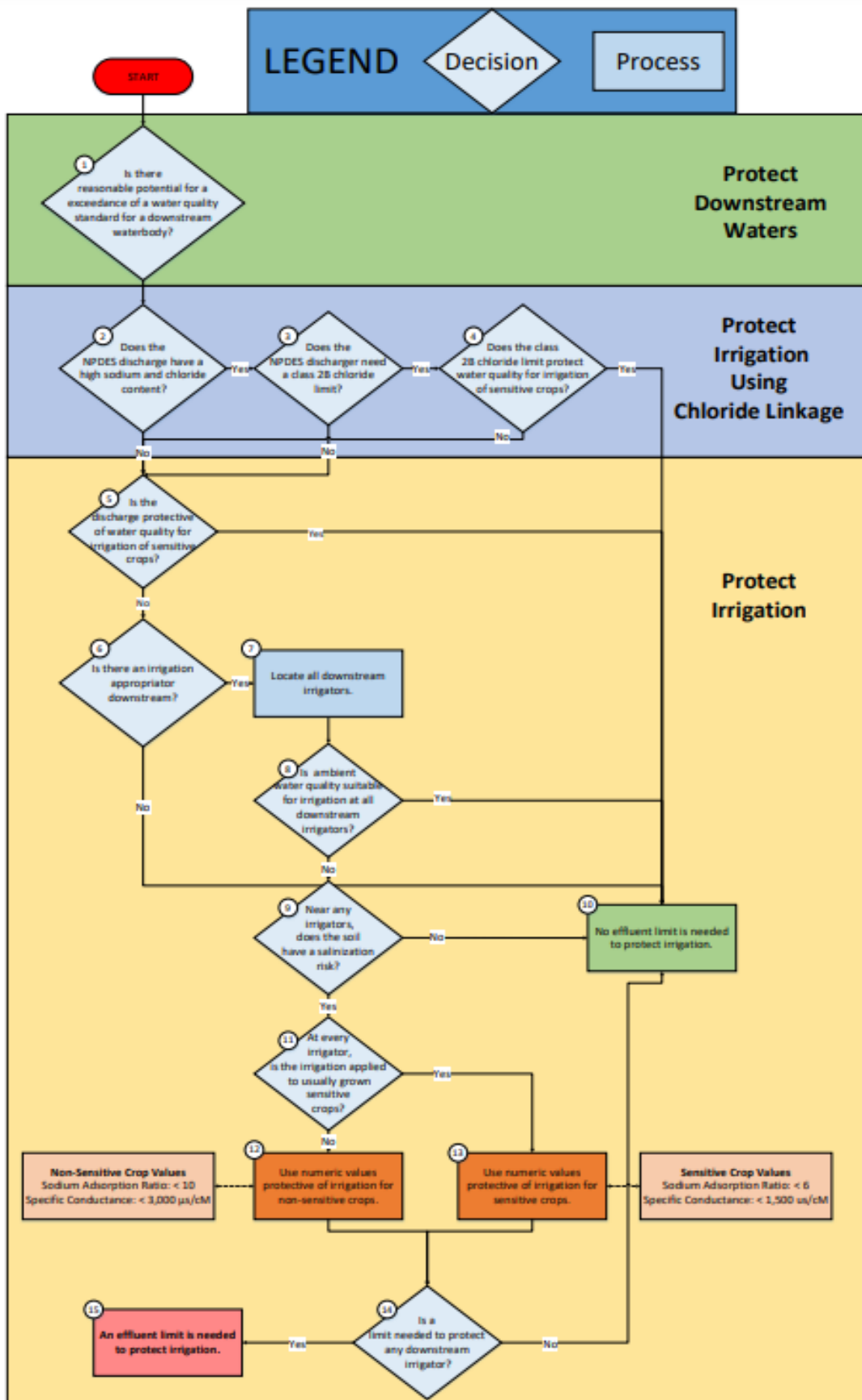
The Bands also claim that MPCA cannot rely on future permit conditions to “plug gaps in its water quality standards.” (Bands Br. at 39.) This too is just a variation on the Bands’ claim that a numeric standard is required and a narrative standard is not sufficient to comply with the CWA. Here, MPCA is not plugging any gaps with the translators. MPCA has promulgated robust, protective narrative standards that are protective and apply throughout the State. The use of translators further increases those protections already in place for downstream uses at specific sites.

Narrative translators are an important tool for states to ensure that narrative water quality standards are attained and protected. (AR 814.) Narrative translators allow state agencies like MPCA to convert the protective goals of narrative standards into enforceable

numeric wastewater effluent limitations that protect the designated use. (*Id.*) While the water quality standards apply throughout the state, translators are a targeted and specific control that allow MPCA to specify in a discharger's NPDES permit the allowable concentration and/or mass (e.g., kilograms per day) of pollutants that can be discharged to a specific receiving water and be protective of the water quality standards based on site specific conditions. (AR 811.)

In this rulemaking, MPCA incorporated two translators to convert the Class 3 Industrial and Class 4A Irrigation narrative standards into numeric effluent limits. (AR 874, 883.) It was important for Minnesota to move away from the one-size-fits-all numeric standard and adopt a targeted translator for irrigators given the great variability state-wide in crop, soil composition, and irrigation practices. (AR 1070-110.) Moreover, MPCA incorporated both translators because “almost all who commented expressed strong support for developing the Class 3 and 4A translator methods as part of the rulemaking so that municipalities, environmental organizations, businesses and individuals could comment on the translators when the rule amendments are proposed.” (AR 822.)

The record reflects that following public comments and a peer review, MPCA further refined the translators and clarified that “all downstream *tribal*, state or provincial water quality standards will be considered first, to ensure protection of downstream water quality standards.” (AR 821.) (Emphasis added.) The matrix below shows the step-by-step process of how the translator is used to convert location specific conditions in permits including related to chloride content, soil composition, and crop type to ensure the narrative standard is met and downstream users are protected. (AR 8725.)



In short, MPCA's translators add additional protection to Class 3 and 4A standards and ensure that all downstream uses are protected, which further supports EPA's approval.

The Bands also contend that MPCA's past permitting precludes approval of the revised water quality standards for future use, which is a particularly weak argument both legally and factually. (Bands Br. at 40.) First, past permitting is not a factor relevant for EPA's approval of water quality standards. That alone dooms this argument. Code of Federal Regulation Title 40, Part 131 lays out the eight factors on which EPA must base its approval decision and makes that clear that if EPA finds the "standards are consistent with the factors listed in paragraphs (a)(1)-(8) of this section, EPA approves the standards." 40 C.F.R. § 131.5. EPA considered the relevant factors and properly approved MPCA's revised 3, 4A, and 4B standards, as required.

Second, the Bands cite no authority that supports their novel theory. The two federal cases the Bands cite do not mention EPA's authority at all, much less address EPA's approval of water quality standards; they involve different federal agencies and completely different issues. (Bands Br. at 39.) The single state case cited, *U.S. Steel*, also does not involve EPA approval of water quality standards and, in fact, supports granting MPCA's and EPA's motions because it shows that the Bands are not without a remedy if they later disagree with MPCA's future implementation of the revised water quality standards and subsequent permitting decisions. (Bands Br. at 40.)

Finally, the Bands reference two mining permits to suggest that MPCA's entire permitting program is not sufficient, but even those permits show just the opposite is true. (Bands Br. at 40.) The Keetac permit contains the 10mg/L sulfate limit to protect wild rice,

and the Polymet permit incorporates even greater protections, which the Minnesota Court of Appeals highlighted when evaluating it: “although Minnesota’s wild rice rule applies only seasonally, the operating limit in the NPDES permit for the Northmet project imposes a 10-mg/L limit on a year round basis.” *In re Denial of Contested Case Hearing Requests & Issuance of NPDES/SDS Permit*, Case Nos. A19-0112 *et al*, 2022 WL 200338, \* 13 (Minn. Ct. App. Jan. 24, 2022) (finding “[t]here is no basis for a conclusion that Poly Met’s discharges will violate the Band’s sulfate water-quality standard”). Contrary to the Bands’ assertions in their brief, the record confirms MPCA is committed to protecting wild rice and aquatic life.

In summary, the record shows MPCA’s water quality standards are protective, EPA met the legal requirements for approval, and MPCA has additional tools to protect downstream uses at individual sites through the use of the Class 3 and 4 translators to impose appropriate limits in permits in the future. EPA, therefore, properly approved MPCA’s revisions to the Class 3, 4A, and 4B standards.

**V. VACATING EPA’S APPROVAL OF THE CLASS 3 AND 4 STANDARDS WILL NOT PROVIDE GREATER PROTECTION TO AQUATIC LIFE AND WILD RICE.**

When boiled down, the Bands’ claims are really a collateral attack on Minnesota’s Class 2 standards for aquatic life and an argument that the Class 2 standards should be revised to establish new criteria. Although the state of the science does not support such a revision at this time, the record is clear that EPA, state regulators, and bands are aware of and analyzing the evolving scientific literature on those issues. (AR 3927, 822.) Regardless, vacating EPA’s approval of these Class 3, 4A, and 4B standards will not

change those Class 2 standards. That's the fundamental problem with the Bands' lawsuit. Moreover, if MPCA has to go back and revise the Class 3, 4A, and 4B standards, those resources will not be available to address Class 2 and Wild Rice issues, and the extensive new protections related to nitrates, sulfates, as well as the targeted monitoring which is not developed in rule but occurs post approval will not be realized. (AR 817.)

These Class 3 and 4 standards were more than a decade in the making and are the result of extensive research, analysis, and outreach. They represent the best scientific understanding of how water quality affects stakeholders' ability to use water for industrial, irrigation, and agricultural purposes. This Court should grant summary judgment in favor of MPCA and EPA.

### CONCLUSION

MPCA respectfully requests that the Court grant MPCA's and EPA's motions for summary judgment.

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Respectfully submitted,

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