UNITED STATES DISTRICT COURT
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 S. REGAN, Administrator, United States Environmental Protection Agency,

Defendants,

and

COALITION OF GREATER MINNESOTA CITIES, RANGE ASSOCIATION OF MUNICIPALITIES AND SCHOOLS, MINNESOTA CHAMBER OF COMMERCE, CLEVELAND-CLIFFS, INC., and UNITED STATES STEEL CORPORATION,

Intervenor-Defendants.

Civil No. 22-1783 (JRT/LIB)

PLAINTIFFS' COMBINED REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANTS' CROSS MOTIONS FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. EPA ABANDONED ITS OBLIGATIONS UNDER THE CLEAN WATER ACT BY RUBBERSTAMPING MINNESOTA'S REVISED STANDARDS. 2

A. EPA Cannot Base Its Approval of Minnesota's Revised Standards on Bare Assumptions That Other Uses Will Be Protected. 4

B. EPA's Obligation to Ensure the Preservation of Tribal Reserved Rights Requires A Comprehensive Review. 10

C. EPA Cannot Ignore Regulations Requiring Numeric Criteria Be Adopted Whenever Possible. 14

II. OFFICIAL GOVERNMENT MATERIALS ARE PROPERLY CONSIDERED THROUGH JUDICIAL NOTICE. 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Am. Paper Inst., Inc. v. EPA,
996 F.2d 346 (D.C. Cir. 1993) 15

Anacostia Riverkeeper, Inc. v. Jackson,
798 F. Supp. 2d 210 (D.D.C. 2011) 3

Bangor Hydro–Electric Co. v. FERC,
78 F.3d 659 (D.C. Cir. 1996) 8

Chamber of Commerce of U.S. v. SEC,
412 F.3d 133 (D.C. Cir. 2005) 16

El Dorado Chem. Co. v. EPA,
763 F.3d 950 (8th Cir. 2014) ..... *passim*

EPA v. California,
426 U.S. 200 (1976) 2

Fla. Wildlife Fed'n, Inc. v. Jackson,
853 F. Supp. 2d 1138 (N.D. Fla. 2012) 15

Fund for Animals v. Williams,
245 F. Supp. 2d 49 (D.D.C. 2003) 19

Genuine Parts Co. v. EPA,
890 F.3d 304 (D.C. Cir. 2018) 2

Harris v. Cty. of Orange,
682 F.3d 1126 (9th Cir. 2012) 19

Holder v. Holder,
305 F.3d 854 (9th Cir. 2002) 19

Kentucky Waterways Alliance v. Johnson,
540 F.3d 466 (6th Cir. 2008) 9

Lands Council v. Powell,
395 F.3d 1019 (9th Cir. 2005) 18

McDonnell Douglas Corp. v. U.S. Dep't of the Air Force,
375 F.3d 1182 (D.C. Cir. 2004) 8

Miccosukee Tribe of Indians of Fla. v. United States,
2008 WL 296765 (S.D. Fla. July 29, 2008) 12

Natural Resources Defense Council, Inc. v. EPA,
16 F.3d 1395 (4th Cir. 1993) 9, 10

NetCoalition v. S.E.C.,
615 F.3d 525 (D.C. Cir. 2010) 16

Nw. Envtl. Advocates v. EPA,
855 F. Supp. 2d 1199 (D. Or. 2012) 14, 15

Nw. Envtl. Advocates v. EPA,
268 F. Supp. 2d 1255 (D. Or. 2003) 9

Portland Audubon Society v. Endangered Species Comm'n,
984 F.2d. 1534 (9th Cir. 1993) 19

San Luis & Delta-Mendota Water Auth. v. Locke,
776 F.3d 971 (9th Cir. 2014) 18

Sierra Club v. Costle,
657 F.2d 298 (D.C. Cir. 1981) 8

Federal Statutes

33 U.S.C. § 1251(a) 11

33 U.S.C. § 1251(a)(1)–(2) 12

33 U.S.C. § 1313(c)(2)-(3) 10

33 U.S.C. § 1313(c)(2)(A) 2, 11, 17

33 U.S.C. § 1313(c)(3) 2, 5

33 U.S.C. § 1313(c)(3)-(4) 2

33 U.S.C. § 1344 (Clean Water Act Section 404) 13

33 U.S.C. § 1371(a) 10, 11

Rules

Fed. R. Evid. 201(b) 18, 20

Regulations

40 C.F.R. § 122.44(d) 13

40 C.F.R. § 131.5 11

40 C.F.R. § 131.5(a) 3, 5

40 C.F.R. § 131.5(a)(2) 5

40 C.F.R. § 131.5(a)-(b) 2

40 C.F.R. § 131.6 11

40 C.F.R. § 131.6(b)-(c) 3, 5

40 C.F.R. § 131.10 (b) 3, 5, 11

40 C.F.R. § 131.11(a)(1) 3, 5

40 C.F.R. § 131.11(b) 14

40 C.F.R. § 131.11(b)(2) 14

40 CFR 131.11(a)(1) 6

48 Fed. Reg. 51400 (Nov. 8, 1983) 11

87 Fed. Reg. 74361 (Dec. 5, 2022) 11

Minn. R. 7050.0223 2

Minn. R. 7050.0224 2

Minn. R. 7053.0205 Subpart 7(D) 5

Minn. R. 7053.0205 Subpart 7(E) 5

Minn. R. 7053.0260 Subpart 3(D) 5

Minn. R. 7053.0263 Subpart 3(B). 5

Other Authorities

In re 404 Permit MVP-1999-05528-TJH for Polymet/Northmet Mining Project (June 6, 2023) 13, 18

Merriam Webster Dictionary
https://www.merriamwebster.com/dictionary/should 14

INTRODUCTION

The Environmental Protection Agency ("EPA"), the State of Minnesota, and Industry Defendant-Intervenors mischaracterize the Fond du Lac and Grand Portage Bands of Lake Superior Chippewa's (the "Bands") arguments, responding to non-issues in an attempt to sow confusion. To be clear, this case is not about whether Minnesota should maintain its previous, older standards. It is not about whether Minnesota must adopt a single numeric criterion to protect against all identifiable effects to all uses. It is also not an attempt to enforce a proposed rule. Instead, this case is about EPA's failure to analyze the overall impact of Minnesota's adoption of weaker water quality standards for industrial and agricultural uses so the agency can ensure the protection of other sensitive instream and downstream uses—particularly those reserved under the Bands' treaties.

Under the Clean Water Act, Congress directed EPA to be a watchdog over state water programs, requiring EPA to review and approve or disapprove state revisions to water quality standards. EPA's review of water quality standards must be substantive and not merely a rubber stamp exercise, especially when evidence in the record shows that moving to weaker, more challenging-to-enforce narrative standards harms other uses within a state's waters.

While the Bands generally support regular updates to Minnesota's water quality standards, those revisions cannot upset the overall health of the state's waters or come at the expense of other instream and downstream uses—especially the Bands' treaty-reserved rights. The revisions must also be data-driven, scientifically sound, and record-

based. Minn. R. 7050.0223 and Minn. R. 7050.0224 (collectively "Revised Standards") fail to meet this bar.

By approving Minnesota's Revised Standards, EPA acted arbitrarily, capriciously, and contrary to the Clean Water Act. The Bands request that the Court reverse and vacate EPA's approval of Minnesota's Revised Standards.

ARGUMENT

I. EPA ABANDONED ITS OBLIGATIONS UNDER THE CLEAN WATER ACT BY RUBBERSTAMPING MINNESOTA'S REVISED STANDARDS.

EPA cannot hide behind deference to shield its approval of Minnesota's Revised Standards when the agency relied on conclusory assumptions and failed to perform the analysis required by its own regulations. *Genuine Parts Co. v. EPA*, 890 F.3d 304, 346 (D.C. Cir. 2018) ("Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of our review.") (citation omitted). Although the Clean Water Act gives states the first cut at setting water quality standards, the statute directs EPA to be the backstop to ensure that states develop and maintain adequate protective standards. 33 U.S.C. §1313(c)(2)(A). *See EPA v. California*, 426 U.S. 200, 202–09 (1976). EPA's oversight role is active, not passive. The Clean Water Act requires EPA to review and approve or disapprove state revisions to water quality standards to ensure that those standards meet statutory and regulatory requirements. 33 U.S.C. § 1313(c)(3). *See* 40 C.F.R. § 131.5(a)-(b). The statute also directs EPA to develop standards that protect designated uses if the state has failed to do so. 33 U.S.C. § 1313(c)(3)-(4).

EPA cannot validly approve new or revised water quality standards based on conclusory statements or unsupported assumptions. 40 C.F.R. §§ 131.5(a), 131.6(b)-(c), 131.10 (b), 131.11(a)(1). EPA must undertake a holistic and comprehensive review of any new or revised standards to make sure that the overall health of the interconnected water systems is maintained and that the standards are scientifically defensible. *Id*., *El Dorado Chem. Co. v. EPA*, 763 F.3d 950, 959 (the Act endorses a holistic approach to the nation's waterways); EPA Br., 42. This holistic review requires EPA to analyze the potential impacts of new or revised water quality standards on stream systems as a whole and use that analysis to ensure appropriate measures are in place to protect other instream and downstream water quality standards and preserve tribal reserved rights. *Id*.; *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 230 (D.D.C. 2011) (stating that regulations instruct states to consider "all water quality criteria…to ensure that all designated uses are preserved").

Here, EPA abdicated its responsibilities under the Clean Water Act by approving Minnesota's Revised Standards without analyzing the effect that weaker narrative standards would have on waters that support aquatic life, wild rice, and tribal reserved rights.[1] EPA's approval rests on unfounded assumptions that permitted dischargers will not increase their discharge of salty pollutants, an unsupported presumption that existing

[1] It appears that EPA predetermined the outcome of its review before the agency even received Minnesota's final supporting documentation or comments from the public. *See* AR 14304 (email from David Pfeifer, Chief, Watersheds and Wetlands Branch at EPA Region 5, stating that Minnesota's Revised Standards do not affect the wild rice standard on the same day the standards were released for public comment).

criteria will protect other instream and downstream uses, and unenforceable implementation promises from Minnesota. EPA's approval of Minnesota's Revised Standards also flouts its regulations that favor numeric criteria. The very studies EPA, Minnesota, and Industry rely on for removing numeric criteria demonstrate that developing appropriate numeric criteria for industrial and agricultural uses is possible. This house of cards that EPA used to approve Minnesota's Revised Standards cannot stand.[2]

A. EPA Cannot Base Its Approval of Minnesota's Revised Standards on Bare Assumptions That Other Uses Will Be Protected.

It is critical to the overall health of the nation's waters that EPA takes a holistic and comprehensive approach to reviewing changes to water quality standards. Yet, EPA approved Minnesota's Revised Standards without this analysis, opting instead to rely on unsubstantiated assumptions that standards for other uses would not be affected by switching to weaker narrative standards—apparently believing that pollutants in water operate in an independent, compartmentalized fashion contrary to accepted science.

Waterbodies are interconnected, meaning that changing pollutant parameters for one water quality standard can affect the ability for other standards to be met. Fed. Defs. Answering Br., 34–35, *El Dorado Chem. Co. v. EPA*, 763 F.3d 950 (8th Cir. 2014) (No. 13-1936) ("In integrated stream systems, upstream and downstream standards are obviously interrelated…In determining whether state-adopted criteria are sufficiently

[2] As EPA, Minnesota, and Industry have recognized, the Bands do not directly challenge whether the Revised Standards protect industrial and agricultural uses and the Bands do not address those arguments. EPA Br., 4, 35; Minnesota Br., 2, 3-5; Intervenors Br., 2-3.

protective of designated water uses per 40 C.F.R. § 131.5(a)(2), EPA reviews the criteria to ensure all requirements are met"). This interconnectedness is why the Clean Water Act endorses a holistic approach and why the implementing regulations require states and EPA to analyze and ensure that all designated uses—the most sensitive instream and those downstream from a pollution source—are maintained when developing or modifying standards. *Id*. ("Only by considering the impacted stream systems as a whole can EPA ensure that the [Clean Water Act] statutory requirements are met. *See* 33 U.S.C. § 1313(c)(3)."); 40 C.F.R. §§ 131.5(a), 131.6 (b)-(c), 131.10 (b), 131.11(a)(1); AR 17370-5; *El Dorado Chem. Co*., 763 F.3d at 959.

EPA's claim that existing, mostly narrative, criteria will protect the other instream and downstream uses, such as aquatic life and wild rice, fails to holistically consider how the interconnectedness of water can affect interactions between pollutants and the ability for standards to be met or enforced. This claim is especially precarious because Minnesota's Revised Standards require compliance to be measured at the point an industrial or agricultural user withdraws water for use rather than at the point of pollution discharge—meaning that there will be no way to know the overall health of the water for aquatic life and wild rice between the point where pollutants are discharged and the point, if any, where an agricultural or industrial user withdraws water downstream. *See e.g.*, Minn. R. 7053.0205 Subpart 7(D)-(E); 7053.0260 Subpart 3(D); 7053.0263 Subpart 3(B).

As explained in the Band's opening brief, the record is replete with information about how Minnesota's adoption of narrative water quality criteria for industrial and

agricultural uses could allow substantial increases in salty discharge and would further threaten aquatic life and wild rice. Bands Br., 26–35. The record also shows, as EPA points out, that the "alleged impairments and threats to [aquatic life and wild rice] occurred during a period when numeric criteria were in place" for industrial and agricultural use, meaning that further weakening of the standards may worsen those pollution problems. EPA Br., 61. *See* Bands Br., 26–35. EPA cannot dismiss this information simply because "[t]his case does not involve Minnesota's submission of revised aquatic life criteria to EPA for approval" or the wild rice sulfate standard.[3] EPA's own regulations require the agency to analyze and ensure that the most sensitive use is supported in waters with multiple use designations and that downstream uses are maintained. 40 C.F.R. 131.11(a)(1); 131.10(b).

Neither EPA nor Minnesota point to anything in the record that shows they analyzed the impact that removing numerical criteria for industrial and agricultural uses would have on maintaining the water quality necessary to protect aquatic life and wild rice.[4] The record contains:

[3] Contrary to MPCA's assertion (MPCA Br., 11-12, 16), wild rice waters are subject to all the same numeric standards as other waters classified for agricultural use (Class 4A)—which EPA admitted. EPA Answer ¶¶ 29; Bands' Br., 33.

[4] Minnesota acknowledged that as of the date of the Statement of Need and Reasonableness, it had "not assessed any of the narrative or numeric water quality standards that exist for the [industrial and agricultural] beneficial uses." AR 816. *See also* AR 1805 (peer reviewer flagging concerns about the lack of consideration of drought conditions' impact on wetlands, which can increase the concentrations of salts and nitrates.).

(1) no impact analysis on how the revisions will affect aquatic life and wild rice,

(2) no determination of what the most sensitive use within the waters is and analysis to ensure that use is protected,

(3) no data-driven explanation as to why the existing criteria would be protective against substantial increases in salts, and

(4) no reference to anything that backs EPA's assumptions.[5]

Based on EPA's own admission that it is "without knowledge" about whether Minnesota examined downstream impacts on aquatic life and wild rice, the agency clearly did not conduct the required reviews. EPA Answer, ¶¶ 32, 35-36.

It also strains credulity for EPA to rely on the state's contention that it "does not expect permitted dischargers to increase their discharge of ionic (that is, salty) pollutants" when, again, there is no reference to or explanation in the record as to why this might be so. AR 851. Minnesota admitted that "…these changes will likely result in fewer and less restrictive limits in permits[]" and "[i]n most cases…will allow for lesser treatment, possibly reducing the impact of the Class 3 [industrial] and 4 [agricultural] standards." AR 909, 969. Even in the face of that admission, EPA declined to do the required analysis to ensure water quality for aquatic life and wild rice would be protected.

[5] Attempting to demonstrate that Minnesota and EPA considered the impact of the Revised Standards on aquatic life and wild rice, Industry points to the example of how the translator would be implemented. Industry Br., 24-25. But this is a far cry from the analysis required to satisfy Clean Water Act requirements. *See* AR 17581, 17372, 17374; Bands Br., 27–28.

Both EPA and Minnesota ask this Court to take their word and not question their conclusory assertion that the Revised Standards will not interfere with the maintenance of water quality needed to support aquatic life and wild rice. But their bare word is not entitled to the significant deference that EPA seeks—more is required under the law. *See McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (holding that the "Court will not defer to the agency's conclusory or unsupported assertions"); *Sierra Club v. Costle*, 657 F.2d 298, 333 (D.C. Cir. 1981) ("[T]he agency must sufficiently explain the assumptions and methodology used in preparing the model.... The technical complexity of the analysis does not relieve the agency of the burden to consider all relevant factors and to identify the stepping stones to its final decision."); *Bangor Hydro–Electric Co. v. FERC*, 78 F.3d 659, 664 (D.C. Cir. 1996).

EPA attempts to rationalize its approval of Minnesota's Revised Standards by relying on unenforceable commitments the state made to paper over the risks to aquatic life.[6] EPA Br., 47–48. EPA's reliance on Minnesota's guidance, Implementing the Aquatic Life Narrative Standard, is improper because, as EPA admits, it did not review the guidance to ensure aquatic life would be protected. AR 3927-31, 3927 n. 27. Neither Minnesota nor EPA explains how the state will navigate analyzing (case-by-case) the potential impacts of *narrative* industrial standards on *narrative* aquatic life standards

[6] EPA claims that the effectiveness of a state's implementation of its water quality standards is not relevant or a factor that must be considered, EPA Br., 59–61, but EPA's reliance on Minnesota's implementation of guidance to support its approval of the state's Revised Standards renders Minnesota's challenges with implementation very relevant. *See id*., 47–48.

to ensure that aquatic life standards are not harmed. EPA cannot rely on Minnesota's promise to implement the state's narrative aquatic life standards to support its approval of Minnesota's Revised Standards. *See Nw. Envtl. Advocates v. EPA*, 268 F. Supp. 2d 1255, 1268-69 (D. Or. 2003) (vacating EPA approval of water quality standards that was premised on state's unenforceable "commitment" to apply a lower numeric standard to certain species); *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 488-490, 493-494 (6th Cir. 2008).

EPA also cannot use *Natural Resources Defense Council, Inc. v. EPA*, 16 F.3d 1395, 1404-05 (4th Cir. 1993) ("*NRDC*") to excuse its actions, as the case is inapplicable here. First, contrary to EPA's assertion, the Bands' arguments differ significantly from those that the court rejected in *NRDC*. EPA Br. 42–44. Plaintiffs in *NRDC* argued that states are obligated under the Clean Water Act and implementing regulations to adopt a single numeric criterion to protect against all identifiable effects to all uses. 16 F.3d at 1404. In this case, by contrast, the Bands are asserting that Minnesota and EPA violated the Clean Water Act and implementing regulations because EPA failed to analyze the Revised Standards' impact on aquatic life and wild rice to ensure appropriate measures were in place to protect those uses. EPA's own guidance document outlines several options that states can adopt to ensure the maintenance of the most sensitive instream uses and downstream uses other than a single criterion. AR 17375–78. Second, the court in *NRDC* found that EPA conducted an extensive review of the adequacy of the state's criteria for the pollutant at issue in that case. 16 F.3d at 1405 (4th Cir. 1993). Here, as explained above, EPA performed only a cursory review, relying on unsupported

assumptions rather than data-driven analysis. Because *NRDC* is distinguishable, it has no bearing on the outcome here.

EPA's approval of Minnesota's Revised Standards violated the Clean Water Act and the statute's implementing regulations because the agency failed to do the required due diligence and relied on unsupported assumptions.

B. EPA's Obligation to Ensure the Preservation of Tribal Reserved Rights Requires A Comprehensive Review.

As explained above, EPA cannot discharge its Clean Water Act obligations by conducting a cursory review that assumes that existing water quality standards are protective enough. EPA's perfunctory review of aquatic life and wild rice leaves the agency unable to fulfill its statutory obligation to ensure that new or revised water quality standards do not impinge on tribal reserved rights to aquatic resources—like the Bands' right to fish and harvest wild rice. While EPA cites agency policy in acknowledging that its actions cannot conflict with treaty rights, EPA fails to recognize that the Clean Water Act requires it to do more than merely talk to tribes when reviewing state submissions of new or revised water quality standards. EPA Br., 56. To meet its Clean Water Act obligations, EPA must analyze and consider impacts on tribal reserved resources in deciding whether to approve a state's water quality standards.[7] *See*, 33 U.S.C. §§

[7] As explained in the Bands opening brief, the Bands have standing based on their existential interest in protecting their treaty-reserved rights to hunt, fish, and harvest wild rice in waters that flow throughout the Ceded Territories from the increased pollution caused by EPA's approval of weaker standards for industrial and agricultural uses. *See* Bands Br., 18-19. This interest fits squarely within the zone of the Clean Water Act, which was designed to restore and maintain the chemical, physical, and biological

1313(c)(2)-(3), 1371(a); 40 C.F.R. §§ 131.5, 131.6, 131.10(b); 87 Fed. Reg. 74361 (Dec. 5, 2022). Contrary to EPA's assertion, this is not a "new" or "future" requirement that proposed regulations will be adding, EPA Br., 56-57; rather, the proposed regulations simply memorialize and clarify what has *always been the law* under the Clean Water Act. 87 Fed. Reg. 74361 (Dec. 5, 2022) ("[t]his proposed rulemaking adds regulatory requirements to clarify how EPA and states must ensure protection of reserved rights."). The Clean Water Act explicitly provides that the statute "shall not be construed as . . . affecting or impairing the provisions of any treaty of the United States." 33 U.S.C. § 1371(a). EPA has been clear that "[a]ny specific treaty requirements have the force of law," and therefore, "State water quality standards will have to meet any treaty requirements." 48 Fed. Reg. 51400, 51413 (Nov. 8, 1983). EPA also explained in the proposed regulations that protecting tribal reserved rights to aquatic and aquatic-dependent resources "falls within the ambit" of the Clean Water Act's directives and objectives, including the water quality standards program. 87 Fed. Reg. at 74364.

As explained in the Bands' opening brief, the record lacks any meaningful analysis of the impact that Minnesota's Revised Standards will have on tribal reserved rights, including fishing and harvesting wild rice.[8] Bands Br. 36–37. There is no analysis of the cumulative impact that Minnesota's Revised Standards will have on

integrity of the nation's waters. 33 U.S.C. § 1251(a). The Act directs states to develop water quality standards to protect public health and welfare, enhance water quality, and prevent pollution in the nation's waters. 33 U.S.C. § 1313(c)(2)(A).

[8] EPA's reference to the Bands' rights as "asserted" is deeply offensive and disrespectful. EPA Br., 6, 56. The Bands' rights under the 1837 and 1854 Treaties are controlling law and the usufructuary rights therein have been recognized by federal courts. Band Br., 3.

waters that are already impaired—a situation that is currently harming the Bands' ability to exercise their reserved rights. There is no analysis of how weakening the standards for industrial and agricultural uses will affect enforcing the standards meant to protect the Bands' rights to fish and harvest wild rice. There is not even a map detailing where the Bands have reserved fishing and harvesting rights and the impact of the Revised Standards on those rights. *See Miccosukee Tribe of Indians of Fla. v. United States*, 2008 WL 296765 at *38 n.70 (S.D. Fla. July 29, 2008).

EPA suggests the agency's failure to examine and ensure that wild rice waters are protected can be remedied through the Clean Water Act 303(d) impaired waters listing process—meaning that wild rice waters will only receive the necessary protections *after they become so polluted that they must be listed*. EPA Br., 61 n. 10. This remedy is antithetical to the purpose of the Clean Water Act, which includes:

(1) *restoring* and *maintaining* the nation's waters' chemical, physical, and biological integrity;

(2) *protecting* fish, shellfish, and wildlife; and

(3) *eliminating* the discharge of pollution in the nation's waters.

33 U.S.C. § 1251(a)(1)–(2).

Congress clearly intended the Clean Water Act to protect the nations' waters *before* they become polluted.

EPA also suggests that the Bands can present their scientific information when individual permitting situations arise. EPA Br., 50. But again, this will not remedy EPA's failure to analyze and ensure measures are in place to protect the Bands' treaty

reserved rights. It also places a significant burden on the party affected by such pollution. Further, while 40 C.F.R. § 122.44(d) requires individual polluter permits to ensure that polluters do not cause or contribute to a violation of water quality standards, Minnesota has struggled to convert narrative standards into permit limits and has accumulated a backlog of permit renewals. AR 984 ("MPCA recognizes that many older narrative standards are not regularly enforced, in that they are not generally incorporated into permit limits"); AR 11328, 12345-12346, 12366-13369, 12382. The State's failure to set appropriate effluent limits was a contributing factor to the U.S. Army Corps' decision to revoke Polymet's Clean Water Act Section 404 permit, which the Bands, EPA, and the Army Corps found would violate Fond du Lac Band's downstream water quality standards. U.S. Army Corp of Engineers, *In re 404 Permit MVP-1999-05528-TJH for Polymet/Nothmet Mining Project* (June 6, 2023). ("[I]n addition to the reasonably foreseeable discharges that are unaccounted for in PolyMet's *state* and federal permits, EPA is unaware of any Clean Water Act Section 404 permit conditions that would ensure compliance with the Band's water quality requirements for mercury for Reservation waters, given current project design and discharges outside the [the Clean Water Act] Section 404 permitted activities.") (emphasis added).[9]

EPA cannot rely on after-the-fact impaired water listings and case-by-case discharge permits to ensure that water quality standards are maintained to protect the

[9] Based on the Army Corps' decision to revoke Polymet's 404 permit, Minnesota and Industry are wrong in asserting that the Polymet NPDES permit assures compliance with Fond du Lac Band's water quality standards. Minnesota Pollution Control Agency ("MPCA") Br., 21; Industry Br., 29.

Bands' reserved rights to aquatic resources. *See, e.g.*, *El Dorado Chemical Co. v. EPA.*, 763 F.3d 950, 959 (8th Cir. 2014) (rejecting an argument that future conditions would compensate for gaps in proposed water quality standards). The only real solution, as dictated by the Clean Water Act and implementing regulations, is for EPA to analyze the impact Minnesota's Revised Standards will have on the Bands' reserved rights and ensure that there are measures in place to prevent the degradation of the water quality needed to support those rights—something EPA failed to do here.

C. EPA Cannot Ignore Regulations Requiring Numeric Criteria Be Adopted Whenever Possible.

EPA's reading of the regulations concerning narrative and numeric criteria is wrong. EPA Br., 29-33. The regulations presumptively favor numeric criteria, requiring states to justify adopting narrative standards by demonstrating that numeric criteria cannot be established. 40 C.F.R. § 131.11(b). EPA's regulations use the word "should" in directing states to "establish narrative criteria…where numerical criteria cannot be established or to supplement numerical criteria." *Id.* Should is defined as being used to express obligation, propriety, or expediency. Synonyms of should include have to, must, need, and shall. *See* https://www.merriamwebster.com/dictionary/should. The regulations' plain language makes clear that narrative criteria are only to be adopted when numeric criteria cannot be established based on 304(a) guidance or other scientifically defensible methods.[10]

[10] Contrary to EPA's argument (EPA Br., 31-23), *Northwest Environmental Advocates v. EPA*, 855 F. Supp. 2d 1199, 1217-18 (D. Or. 2012) is applicable here. Based on 40

There is good reason for the regulations to presumptively favor numeric criteria: narrative criteria are inherently vague and difficult to enforce. *See e.g., Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993) (discussing failure of narrative standards to protect waterways from toxins). *See also Fla. Wildlife Fed'n*, *Inc. v. Jackson*, 853 F. Supp. 2d 1138, 1145–46 (N.D. Fla. 2012) (describing the widespread failure of narrative standards to prevent impairment of waterways by nutrients). The regulations require the adoption of narrative criteria to be justified by demonstrating that numeric criteria cannot be established. EPA and Minnesota fail to provide the necessary justifications for moving from numeric to narrative criteria.[11] Both agencies assume the lack of scientific support for the *previous* numeric criteria for industrial uses that applied statewide means new numeric criteria cannot be adopted. EPA Br., 33–41; Minnesota Br., 13–17. But the alleged lack of scientific support for prior standards does not equate to a demonstration that Minnesota is unable to establish numeric criteria, especially when the University of Minnesota study that the state and EPA rely on for the adoption of narrative standards

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C.F.R. § 131.11(b)(2), the *Northwest Environmental Advocates* court found that the agency's approval of the narrative criteria that allowed a numeric translation that was less protective than the prior numeric criteria violated the Clean Water Act because it did not supplement numerical criteria and there was evidence that scientifically sound numeric criteria could be established. *Id*. Here, EPA approved Minnesota's adoption of narrative criteria even though the standards did not supplement numeric criteria and the state had failed to demonstrate that numeric criteria could not be established—despite the record reflecting that they could. AR 1405–06.

[11] MPCA claims that the Bands have no numeric criteria for sulfate and specific conductivity. MPCA Br., 5, 8. That is incorrect. Bands' Br., 4-5 (citing the Bands' numeric criteria for sulfate, specific conductivity (Fond du Lac), and other criteria).

provides options that the state could have implemented—one of which recommends an eco-region approach and cites Colorado's industrial criteria. AR 1405–06.

Moreover, a peer reviewer of Minnesota's Technical Support Document for the Revised Standards ("TSD") flagged that "the TSD does not explain why other water quality parameters are less important and not used numerically" when answering whether the rationale for the narrative translator supports the use of sodium absorption ratio and specific conductance values to characterize the quality of water for irrigation use. AR 1796.

EPA thoughtlessly accepted Minnesota's claim that "the diversity of water quality needs for industrial and irrigation use means that identifying protective numeric values for each potential pollutant necessary to protect various wide-ranging industrial and irrigation uses is unreasonable to complete on a statewide basis" in other words, establishing numeric criteria might be complexed and hard work. AR 802. *See* EPA Br., 33–34. Beyond such conclusory statements, neither EPA nor Minnesota point to anything in the record demonstrating that this task is undoable or unreasonable. AR 831. Both agencies' rationales fall far short of reasoned and scientifically sound. Moreover, "an agency may not shirk a statutory responsibility simply because it may be difficult." *NetCoalition v. S.E.C.*, 615 F.3d 525, 539 (D.C. Cir. 2010) (superseded by statute). *See Chamber of Commerce of U.S. v. SEC,* 412 F.3d 133, 143-144 (D.C. Cir. 2005). Here, the responsibility is for Minnesota to develop and EPA to approve water quality standards that are protective and scientifically sound. Both agencies failed to meet their Clean Water Act obligations.

Minnesota turns its Clean Water Act obligations on their head by claiming that "industrial appropriators are more capable of treating their water than ever before, they do not need the specific chloride, hardness, and pH water quality standards currently in rule." AR 1040. The state concluded that "[i]ndustries are still generally willing to accept water that is generally suitable for treatment." AR 1024–25 and that "[i]ndustry recognizes that treatment is the responsibility of the water appropriator." *Id*. Minnesota is now placing the burden on downstream users (including municipalities) by forcing them to implement technology to clean the water polluted by upstream dischargers—a position that is antithetical to the purpose of water quality standards that encompasses enhancing the quality of water and preventing pollution in the nation's waters. 33 U.S.C. § 1313(c)(2)(A).

II. OFFICIAL GOVERNMENT MATERIALS ARE PROPERLY CONSIDERED THROUGH JUDICIAL NOTICE.

It is appropriate for the Court to take judicial notice of the following documents attached to Ashley Bennett's Affidavit:

(1) McCann, *Mercury Levels in Blood from Newborns in the Lake Superior Basin Final Report* [Minnesota Mercury Report] Nov. 30, 2011. Ex. A.

(2) MPCA, *St. Louis River Watershed Stressor Identification Report,* [St. Louis River Stressor Report] (Dec. 2016), Ex. B.

(3) MPCA, *10 Smart Salting Tips that Protect Minnesota Water* [Salting Tips Press Release] (Dec. 12, 2016), Ex. C.

(4) EPA, EPA Transmits Addition of 32 Waters to Minnesota's 2020 Impaired Waters List [Impaired Waters Press Release] (Nov. 9, 2021), Ex. D.

(5) Answering Brief of Federal Defendants, El Dorado Chem. Co., 763 F.3d 950 (8th Cir. 2014) (No. 13-1936) [El Dorado Brief], Ex. E.

(6) U.S. Army Corps of Engineers, *In re 404 Permit MVP-1999-05528-TJH for Polymet/Northmet Mining Project* (June 6, 2023) [Polymet Permit Decision], Ex. F.

Facts subject to judicial notice include those that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Although Administrative Procedure Act ("APA") review is generally limited to the record, the listed documents fall squarely within an exception to this rule for evidence necessary to determine "whether the agency has considered all relevant factors and has explained its decision...." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). Documents can be introduced under the exception "to identify and plug holes in the administrative record," *id*. at 1030, "to develop a background against which [the court] can evaluate the integrity of the agency's analysis," *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014), and "to help the court understand whether the agency complied with the APA's requirement that the agency's decision is neither arbitrary nor capricious." *Id*. Because an agency's action is arbitrary or capricious if it offers an explanation contrary to the evidence, documents cited in the record highlighting contrary evidence can assist the court's inquiry.

Each document listed above provides the court with important context about the impact of EPA's decision to approve Minnesota's Revised Standards without performing the required analysis to ensure other instream and downstream uses are protected. The Minnesota Mercury Report, St. Louis River Stressor Report, and Salting Tips Press Release describe the health and risks that the pollutants at issue in this case pose to Minnesota's waters. Minnesota State agencies authored or co-authored these documents, which are repeatedly referenced in comments in the record. *See,* AR 44 at n. 3, 177, 1903, 14268, 15535-36, 15810. EPA and Minnesota had access to and knowledge of all these documents. *See, Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 55 (D.D.C. 2003) (noting that a record necessarily includes documents that were "before" the agency), and generally *Portland Audubon Society v. Endangered Species Comm'n*, 984 F.2d. 1534, 1548 (9th Cir. 1993). EPA's Impaired Waters Press Release contains information that EPA made publicly available on its website and provides helpful background for the court to evaluate the integrity of EPA's decision to approve Minnesota's Revised Standards. The press release includes information compiled by EPA and known to Minnesota. The Polymet Permit Decision was drafted by the US Army Corps and publicly available on its website. This document provides insight into Minnesota's permitting decisions and their impact on the Bands. Courts regularly take judicial notice of "undisputed matters of public record, including documents on file in federal or state courts." *Harris v. Cty. of Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012) (internal citations omitted). *See also Holder v. Holder*, 305 F.3d 854, 866 (9th Cir.

2002). The El Dorado Brief is also a public document on file in federal court that provides useful context on EPA's implementation of Clean Water Act regulations.

All the above-listed documents fall within the exception to the APA rule and are appropriate to judicially notice.

CONCLUSION

For these stated reasons, the Bands respectfully request that the Court vacate EPA's approval of Minnesota's Revised Standards.

Respectfully submitted this 2nd day of August, 2023.

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