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' REPLY MEMORANDUM 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 submit this reply in support of their cross-motion for summary judgment, Doc. No. 99.

INTRODUCTION

EPA explained in its prior memorandum, Doc. No. 101, that it properly approved Minnesota's revised water quality criteria to protect industrial and irrigated agriculture uses. States have the primary role in setting water quality standards. EPA's regulations establish the scope of its review. EPA's review met the applicable Clean Water Act ("Act") and regulatory requirements, and its decision provided a reasoned basis for approval of Minnesota's revised water quality criteria for industrial and irrigated agriculture uses.

Plaintiffs Grand Portage Band of Lake Superior Chippewa and Fond Du Lac Band of Lake Superior Chippewa ("Bands") challenge EPA's approval of Minnesota's revised water quality criteria but acknowledge that they "do not directly" challenge EPA's determination that the revised criteria protect the State's industrial and agricultural uses. Doc. 113 at 4, n.2. Yet this is the EPA determination subject to judicial review in this case.

Instead, the Bands argue that the criteria for protecting industrial and irrigated agricultural uses should protect *other* uses, even though those other uses are protected by their own criteria *not* subject to judicial review in this case. In approving Minnesota's revised criteria to protect industrial and irrigated agriculture uses, EPA is not required to demonstrate that these criteria also protect other uses. This well-established proposition rebuts many of the Bands' arguments offered in their response brief.

The Bands' concerns over protection of aquatic life and wild rice do not provide a basis to find EPA's approval of Minnesota's revised water quality standards to be arbitrary or capricious. EPA reasonably relied on Minnesota's and the Bands' distinct, federally approved narrative and numeric water quality criteria specifically intended to protect aquatic life and wild rice to protect those uses. The replacement of outdated and scientifically unsupported numeric criteria with narrative criteria to protect industrial and irrigated agriculture uses should not affect the State's or the Bands' ability to protect aquatic life and wild rice using the numeric and narrative criteria approved to protect those resources.

The Bands identify additional analyses they wish EPA had conducted, primarily addressing aquatic life and wild rice. But neither the Act nor applicable regulations require that EPA conduct the analyses the Bands seek before approving Minnesota's criteria to protect industrial and irrigated agriculture uses.

The Court should grant EPA's cross-motion for summary judgment.

ARGUMENT

I. EPA Conducted a Thorough Review and Analysis of Minnesota's Revised Water Quality Standards and Did Not Base Its Approval on Conclusory Statements.

Prior to EPA issuing its approval decision, EPA comprehensively reviewed Minnesota's rule revision package of over 3,900 pages, which included the State's technical analyses, the scientific studies and surveys it considered, the public comments it received, and the State's responses to those comments. AR0000001-3901. EPA's 44-page substantive decision document provided explanations supported by citations to Minnesota's technical analyses, University of Minnesota survey data, scientific journal articles, and other material compiled by Minnesota and EPA. AR0003903-46. EPA's decision document belies

the Band's allegations that it was "conclusory," EPA's "bare word," and "merely a rubber stamp exercise." Doc. 113 at 1, 8. EPA's thorough technical analysis is entitled to this Court's deference. *See Friends of the Norbeck v. U.S. Forest Serv.*, 661 F.3d 969, 976-77 (8th Cir. 2011).

The Band's specific allegations of conclusory statements relate primarily to EPA's explanations addressing protection of aquatic life and wild rice. EPA responded to the issues presented by the Bands. AR0003925-32; AR0008820-32. The Bands may disagree with EPA's explanations but, as explained below, their disagreement does not provide a basis to find EPA's approval arbitrary or capricious. *See In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618, 628 (8th Cir. 2005) ("If an agency's determination is supportable on any rational basis, [the court] must uphold it.").

A. The Bands' Arguments Challenging the Scope of EPA's Review Fail Because the Bands Seek Analyses that Are Not Required by EPA's Regulations for Review and Approval of State Water Quality Standards.

The Bands' arguments regarding the scope of EPA's review process fail for several reasons. First, the factors for approval of Minnesota's water quality standards are limited to those in EPA's

regulations. A water quality criterion is established to protect a specific designated use; it generally is *not* required to protect "*other* instream and downstream water quality standards." Doc. 113 at 3 (emphasis added). Second, EPA's holistic approach to water quality standards, as discussed in EPA's prior memorandum, Doc. 101 at 41-53, does not require that criteria adopted to protect one use also protect others. Rather, Minnesota's criteria are holistically protective because the criteria for each use protect the use with which those criteria are associated, thereby ensuring that all uses will be protected. Third, EPA's explanations regarding protection of aquatic life and wild rice were not conclusory. The additional analyses the Bands identify as lacking are not required to approve Minnesota's water quality standards.

1. EPA's Approval Satisfied Applicable Regulatory Requirements, which Do Not Require that a Criterion Adopted to Protect a Particular Designated Use also Protect Other Designated Uses.

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); 40 C.F.R. § 131.5.

The Bands' response, Doc. 113, focuses on one of the factors: the requirement that EPA determine whether the State has adopted criteria that protect the designated water uses and are based on a sound scientific rationale consistent with 40 C.F.R. § 131.11. 40 C.F.R. § 131.5(a)(2).

States adopt water quality criteria to protect an identified designated use, but criteria adopted to protect one use are not required to protect all designated uses. Water quality criteria are "elements of State water quality standards . . . representing a quality of water that supports a *particular* use." 40 C.F.R. § 131.3(b) (emphasis added). When criteria are met, "water quality will generally protect *the designated use*." *Id.* (emphasis added).

EPA fully discussed and supported its determination that the revised criteria for industrial uses support those uses. AR0003908-11, AR0003920-23; *see* Doc. 101 at 33-36. EPA similarly fully discussed and supported its determination that the revised criteria for irrigated agricultural uses support those uses. AR0003911-14; AR0003923-25; *see* Doc. 101 at 36-41. The Bands do not argue otherwise. Doc. 113 at 4 n.2 (the Bands "do not directly challenge whether the Revised

Standards protect industrial and agricultural uses"). EPA provided a rational connection between the facts found—that the criteria would protect the particular designated uses—and its conclusion to approve the standards. *See Minn. Ctr. for Env't Advoc. v. Forest Serv.*, 914 F. Supp. 2d 957, 964 (D. Minn. 2012).

The Bands argue instead that EPA must determine that the revised criteria for protection of industrial and irrigated agriculture uses also protect other uses, such as aquatic life and wild rice. Doc. 113 at 3, 5. Other criteria protect other uses. Minnesota has separate criteria to protect aquatic life uses, comprised of over 70 numeric criteria as well as narrative criteria. Minn. R. 7050.0222 (2023); Minn. R. 7050.0222, Subps. 2, 3, 7(A) (2023). The Bands also have separate criteria to protect aquatic life. *See* Doc. 101 at 48, n. 6. Minnesota has separate criteria to protect wild rice. Minn. R. 7050.0224 (2021). So do the Bands. Doc. 101 at 48, n.6. EPA has approved all these aquatic life and wild rice criteria as supporting a quality of water that protects those particular uses.

The Bands make the curious statement that EPA relied on "unsubstantiated assumptions that standards for other uses would not

be affected" by switching to narrative standards for irrigated agricultural and industrial uses. Doc. 113 at 4. But this is not an assumption, it is a fact. The standards for aquatic life and wild rice are not affected by EPA's approval action. The water quality required by the criteria to protect aquatic life and wild rice that EPA previously approved is unchanged.[1] EPA was not obligated in its approval process to review existing, unchanged water quality standards. *See Mo. Coal. For the Env't Found. v. Jackson*, 853 F. Supp. 2d 903, 908-09 (W.D. Mo. 2012) (EPA needs to act only on new or revised water quality standards submitted during triennial review process).

For these reasons, the Bands miss the mark by asserting that Minnesota and EPA did not explain how they will "analyz[e] (case-by-case) the potential impacts of *narrative* industrial standards on *narrative* aquatic life standards to ensure that aquatic life standards are not harmed." Doc. 113 at 8-9. First, EPA regulations do not require

[1] The Bands incorrectly assert that "EPA predetermined the outcome" and cite an email in which an EPA employee stated that the revisions of the industrial and agricultural water quality standards do not affect the wild rice sulfate standard. Doc. 113 at 3, n.1 (citing AR0014304). The cited statement reflects the simple fact that the revised standards do not affect the 10 mg/L numeric sulfate standard.

that EPA, when reviewing a State's revised water quality standards for a particular use, include a case-by-case analysis of impacts to other uses. *See* 40 C.F.R. § 131.5. Second, such an analysis is unnecessary because the narrative industrial criteria are not adopted to ensure that aquatic life uses are not harmed. Instead, EPA can and does rely on Minnesota's narrative aquatic life standards, which are EPA-approved, enforceable standards, to protect aquatic life uses.[2]

2. EPA's Holistic Approach to Water Quality Standards Is Fully Consistent with EPA's Approval of Minnesota's Revised Criteria to Protect Industrial and Irrigated Agriculture Uses.

EPA undertakes a holistic review of water quality standards to make sure downstream and most sensitive uses are protected. While the Bands assert that EPA should undertake a "holistic and comprehensive review of any new or revised standards," Doc. 113 at 3, to protect downstream and most sensitive uses, 40 C.F.R. §§ 131.10(b),

[2] States, like Minnesota here, establish different criteria to protect different uses. The criteria exist side-by-side, and all criteria to protect each designated use must be considered independently when states make water quality-based regulatory decisions under the Act, such as when establishing effluent limitations in discharge permits. *See* 40 C.F.R. § 122.44(d)(1).

131.11(a)(1), the Bands incorrectly assert that this holistic approach requires EPA to evaluate whether the criteria adopted to protect one use also protect other distinct designated uses. But EPA's consideration of whether the State's criteria are protective under this holistic review does not require EPA to determine that criteria designed to protect one particular use also protect another designated use. As EPA explained in its decision document, AR0003925-26, Minnesota's criteria are holistically protective because the criteria for each use, including the most sensitive use, protect the use with which those criteria are associated, thereby ensuring that all uses will be protected.

The cases the parties cite affirm this point. In *Natural Resources Defense Council, Inc. v. EPA*, 16 F.3d 1395, 1405 (4th Cir. 1993) ("NRDC"), the court held that EPA was not required to show that criteria for dioxin to protect human health would also protect aquatic life uses. Rather, distinct criteria for dioxin adopted to protect aquatic life uses serve to protect aquatic life. *Id.* at 1405. Those distinct criteria could require more stringent controls than would be required to meet the human health criteria alone if the aquatic life use is more sensitive. *Id.*

Similarly, in *Missouri Coalition For Environment Foundation v. Wheeler*, No. 2:19-cv-04215-NKL, 2021 WL 2211446, at *10 (D. Mo. June 1, 2021), the court observed that numeric criteria to protect Missouri's aquatic life uses may result in water quality that has adverse effects on human drinking water uses but that Missouri's general narrative criteria for human health uses would protect the drinking water supply use. EPA, when approving aquatic life criteria in *Missouri Coalition*, did not have to establish that the aquatic life criteria would also protect human drinking water uses.

The Bands argue that EPA's holistic approach does not allow it to rely on Minnesota's narrative aquatic life standards to support its approval of Minnesota's revised water quality criteria. Doc. 113 at 3. Yet the courts in *NRDC* and *Missouri Coalition* addressed this exact point and held that EPA can rely on narrative criteria adopted to protect a different use.

The Bands' misconception of EPA's holistic approach is highlighted by their criticism of Minnesota's practice of measuring compliance with criteria to protect industrial and irrigated agricultural uses at the point an industrial or agricultural user withdraws water.

Doc. 113 at 5. Criteria apply to all waters that support the designated use. The location where water is withdrawn from a waterbody is an appropriate *measurement* point for evaluating compliance with criteria to protect industrial and irrigated agricultural uses because those uses occur at the point the industrial or agricultural user withdraws its water. The "overall health" of the water, Doc. 113 at 5, between a discharge point and a withdrawal point is not relevant to protecting industrial or agricultural users because they do not make instream uses of the waters. In contrast, the measurement of water quality required to protect aquatic life and wild rice can occur in any portion of the waters where those resources are present to determine whether criteria are being met.

The Eighth Circuit's decision in *El Dorado Chemical Company v. EPA*, 763 F.3d 950 (8th Cir. 2014), does not support the Bands' argument that criteria for one use must also meet the water quality requirements for other uses, Doc. 113 at 4-5. *El Dorado* and EPA's brief filed in that case are fully consistent with EPA's holistic approach here. In *El Dorado*, as here, EPA recognized that revised water quality standards must meet all regulatory requirements, which include the

protection of downstream uses. *See* 40 C.F.R. § 131.10(b); AR0003929, AR0003932. Significantly, the dispute in *El Dorado Chemical* involved a single designated use. EPA determined that Arkansas had not demonstrated that its revised criteria to protect aquatic life uses in *El Dorado* would protect *aquatic life* in downstream waters. *El Dorado*, 763 F.3d at 959-60. The Bands do not argue that Minnesota's revised criteria to protect industrial and irrigated agriculture uses will not protect those uses in downstream waters. Here, EPA confirmed when approving the revised criteria that downstream uses related to aquatic life and wild rice of concern to the Bands will be protected under State requirements and the criteria to protect those uses. AR0003928-29; AR0003931-32. EPA's determination was not arbitrary or capricious.

3. EPA's Explanations Regarding Impacts to Aquatic Life and Wild Rice Were Not Conclusory.

EPA reasonably and thoroughly addressed the Bands' assertions regarding whether, following the revisions to the criteria for industrial and irrigated agricultural uses, Minnesota's water quality standards would protect other uses, including downstream and most sensitive uses. EPA did so in six pages of the decision document and in several pages of its response to the Band's comments. *See* AR0003927-35;

AR0008821-23. EPA summarized in its prior memorandum the record materials that provided seven reasons why aquatic life uses are protected and additional reasons why wild rice is protected under the State's water quality standards. Doc. 101 at 44-53.

For example, EPA observed that the primary interest of the commenters concerned about aquatic life was ionic pollutants (salts). EPA discussed Minnesota's determination that existing information was inadequate to derive numeric ion criteria to protect aquatic life. AR0003927. EPA discussed its own evaluation of the current science of ion toxicity and what would be the appropriate form of ion criteria. *Id.* It cited three scientific journal articles reflecting current science that indicated the complexity of ion toxicity. AR0003927, n.25. EPA discussed Minnesota's EPA-approved narrative and biological criteria to protect aquatic life, which must be considered in all water quality management actions that require compliance with the States' water quality standards. AR0003928. EPA provided a similar explanation for protection of wild rice. AR0003929-32. EPA's lengthy explanations were not conclusory.

The Bands argue that EPA's decision-making process did not include four analyses or explanations that the Bands desired, Doc. 113 at 6-7, but three of those four are not required to support EPA's approval.[3] First, the Bands argue that the record does not contain an "impact analysis on how the revisions will affect aquatic life and wild rice." Doc. 113 at 7. Again, only the revised criteria for industrial and irrigated agricultural uses were part of EPA's approval, and EPA's regulations do not require an analysis of other uses.

Second, the Bands seek a determination of "what the most sensitive use within the waters is and analysis to ensure that use is protected." Doc. 113 at 7. The Bands appear to presume that aquatic life uses are the most sensitive. Yet again, the criteria for industrial and irrigated agriculture uses are not adopted to protect aquatic life uses, even if they are the most sensitive. Regardless of which use is the most sensitive, the numeric and narrative criteria for that use will

[3] The Bands' fourth desired explanation sought references "to anything that backs EPA's assumptions." Doc. 113 at 7. As EPA explains here and in its prior memorandum, the record fully supports EPA's decision, including what the Bands characterize as assumptions.

provide the required protection. AR0003928; *see Mo. Coal.*, 2021 WL 2211446, at *9-*11.

Third, the Bands seek a "data driven explanation as to why the existing criteria would be protective against substantial increases in salts." Doc. 113 at 7. Water quality criteria protect uses. EPA explained why the industrial and irrigated agricultural uses would not be impaired by salts under the revised criteria. AR0003909-11. EPA also explained that the narrative and numeric criteria that Minnesota and the Bands adopted to protect aquatic life and wild rice are intended to protect those resources from salt pollutants.[4] AR0003912-14.

Fundamentally, the Bands incorrectly argue that EPA was required to do an analysis of the revised criteria "to ensure water quality for aquatic life and wild rice would be protected." Doc. 113 at 7. Neither the Act nor EPA's regulations require that EPA determine that

[4] The Bands erroneously claim that EPA relied on the State's contention that "it does not expect permitted dischargers to increase their discharge of ionic (that is, salty) pollutants." Doc. 113 at 7. EPA did not rely on this statement to support its decision because whether salts might increase (considering only the application of the revised criteria) is not relevant if the revised criteria are protective of the industrial and irrigated agriculture uses and the criteria are based on a sound scientific rationale. 40 C.F.R. § 131.5(a)(2).

water quality criteria adopted to protect one use will protect other uses. *See* 40 C.F.R. § 131.5. EPA considered the relevant factors, and its approval is not a "clear error of judgment." *See Minn. Ctr. For Env't Advoc.,* 914 F. Supp. 2d at 964.

B. EPA Reasonably Addressed the Bands' Concerns About Potential Impacts to Treaty Resources.

The Bands' argument regarding protection of tribal reserved rights also seeks a "comprehensive review" and similarly incorrectly ties protection of aquatic resources to EPA's approval of revised criteria for protection of industrial and irrigated agriculture uses. Doc. 113 at 10. The Bands argue that EPA cannot discharge its statutory obligations by a review that "assumes that existing water quality standards are protective enough." Doc. 113 at 10. The Bands misapprehend the nature of EPA's action here. Whether Minnesota's and the Bands' previously approved water quality standards adopted to protect aquatic life uses are "protective enough" of tribal reserved rights is outside the scope of EPA's approval being reviewed in this case. In approving revised criteria for protection of industrial and irrigated agriculture uses, neither the Act nor EPA's regulations require EPA to analyze

whether the State's and the Band's water quality standards for aquatic life uses protect the Bands' rights to fish and harvest wild rice.

The Bands' argument regarding protection of treaty rights also requests analyses that EPA is not required to perform to approve a water quality standards submission. EPA regulations, 40 C.F.R. § 131.5, do not require that EPA conduct an "analysis of the cumulative impact that Minnesota's Revised Standards will have on waters that are already impaired." Doc. 113 at 11-12.

The Bands also desire an analysis of how revised standards will affect enforcing other standards, including the Bands' water quality standards, meant to protect the Bands' rights to fish and harvest wild rice. Doc. 113 at 12. The means by which Minnesota and the Bands elect to enforce their respective standards is an element of water quality standard implementation that is not relevant to the approval of water quality standards. *See* Doc. 101 at 59-61.

Implicit in the Bands' arguments is dissatisfaction with Minnesota's aquatic life criteria. Doc. 113 at 10. If, as the Bands argue, there should be new or revised measures in place to prevent the degradation of the water quality needed to support the Bands' reserved

rights to aquatic resources, Doc. 113 at 14, such measures should address the relevant uses, not industrial and irrigated agricultural uses.[5]

C. The Bands' Arguments Addressing Implementation Do Not Show EPA's Approval Was Arbitrary or Capricious.

Several of the Bands' arguments continue to focus on implementation issues, which are not relevant to EPA's approval of the revised water quality standards. *See, e.g,* Doc. 113 at 9 ("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.") (emphasis added); *id.* at 13-14 (EPA cannot rely on impaired water listings and permits to ensure protection of the Bands' reserved rights to aquatic resources). The critical point is that water quality standards are not self-implementing. The standards are employed by Minnesota when setting discharge limits in permits or identifying impaired waters that do not meet water quality standards. No mechanism in the approval process for water quality standards ensures that the approved

[5] EPA did not intend any offense by referring to "asserted" rights. *See* Doc. 113 at 11 n.8. EPA used the term "asserted" to mean affirmatively declaring or raising the right for consideration.

criteria will, in practice, achieve the desired water quality. Instead, separate regulations govern implementation. This argument does not provide a basis to find EPA's approval action arbitrary or capricious.

The Bands mischaracterize EPA's reliance on the State's *Implementing the Aquatic Life Narrative Standard* guidance document in concluding that Minnesota's existing narrative criteria provide a way to ensure protection of aquatic life from the harmful effects of ionic pollutants. Doc. 113 at 8-9. EPA explained that Minnesota adopted narrative and biological criteria for aquatic life uses that were approved by EPA and therefore required to be considered and implemented in all water quality management actions that require compliance with water quality standards. AR0003929. EPA could have stopped its discussion there, as those criteria on their face are protective of aquatic life and must be implemented for all the Act's purposes. EPA discussed Minnesota's guidance document simply to confirm that the narrative and biological criteria would indeed be implemented, not because the guidance document was somehow necessary to shore up those protective criteria.

II. EPA Reasonably Approved Minnesota's Determination to Adopt Narrative, Rather than Numeric, Criteria for Industrial and Irrigated Agriculture Uses.

The Bands continue to assert that EPA's regulations required the adoption of numeric criteria for industrial and irrigated agriculture uses. Doc. 113 at 14-16. Because the Bands state that they are not directly challenging whether the revised standards protect industrial and agriculture uses, the Court need not address whether the relevant regulatory language provides for discretion. If the Court chooses to reach the question, neither the Act nor EPA regulations provide that the sole circumstance in which a state may establish narrative criteria is "when numeric criteria cannot be established based on 304(a) guidance or other scientifically defensible methods." Doc. 113 at 14. In any event, the record demonstrates that numeric criteria for industrial and irrigated agricultural uses could not be established based on Section 304(a) guidance or other scientifically defensible methods.

The regulatory language governing the establishment of water quality criteria uses the word "should," which is not mandatory language in the context of 40 C.F.R. § 131.11(b). 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), such guidance modified to reflect site-specific conditions, 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).

The Bands incorrectly equate "should" with "shall" or "must" in the context of Section 131.11(b). Doc. 113 at 14. Depending on the context of the statute or regulation, "should" implies no mandatory intent. *Hedge v. Lyng*, 689 F. Supp. 898, 907-08 (D. Minn. 1988) (when a regulation that uses "should" is viewed in conjunction with accompanying provisions that use "shall," "should" implies no mandatory intent); *see Bombardier Recreational Prods., Inc. v. Arctic Cat Inc.*, 331 F. Supp. 3d 902, 917-19 (D. Minn. 2018) ("should" is more often permissive in the context of statutes and contracts). In the context of Section 131.11, Section 131.11(a) uses "shall" and must" repeatedly to establish an obligation. The other two regulatory sections in Subpart B (Establishment of Water Quality Standards) also repeatedly use "shall" and "must." 40 C.F.R. §§ 131.10, 131.12. In contrast, 40 C.F.R. § 131.11(b) uses "should." When compared to the

prevalent use of "shall" and "must" in adjacent regulatory sections, in this regulatory context "should" implies discretion. Such discretion would, of course, be bounded by the requirements of 40 C.F.R. § 131.11(a)(1) that criterion "must be based" on a sound scientific rationale and protect the designated use.

In any event, the record supports Minnesota's determination that numeric criteria for industrial and irrigated agricultural uses could not be established using scientifically defensible methods. EPA thoroughly discussed the state of scientific knowledge in its prior brief. Doc. 101 at 33-41. The Court should defer to EPA's detailed assessment of scientific knowledge. *Nebraska v. EPA*, 812 F.3d 662, 670 (8th Cir. 2016).

Further, the Bands do not offer a sound scientific basis to establish numeric criteria to protect *industrial* and *irrigated agricultural* uses. They do not argue that the State should maintain the prior, outdated standards. Doc. 113 at 1. They do not offer, for example, any analysis that would support a sound scientific basis for different numeric criteria to protect *industrial* or *irrigated agriculture* uses. Instead, they cite to scientific studies that discuss harm to aquatic life and wild rice. EPA's determination that the scientific

research and data did not support the State's outdated numeric criteria for industrial and irrigated agriculture uses and were insufficient to derive new statewide numeric criteria to replace them was neither arbitrary nor capricious. AR0003922-23, AR0003924-25.

III. The Court Should Not Take Judicial Notice of the Six Documents Proffered by the Bands.

Judicial notice is an evidentiary doctrine that allows courts to accept facts not subject to reasonable dispute without using the conventional method of taking evidence to establish those facts. *See* Fed. R. Evid. 201. Because the Court is not taking evidence to establish facts in this action for judicial review under the Administrative Procedure Act ("APA"), the Bands' request to take judicial notice is improper.

Judicial notice "is typically an inadequate mechanism for a court to consider extra-record evidence when reviewing an agency action" under the APA. *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 32, n.14 (D.D.C. 2013). This general rule rests on the premise that parties should not be able to exploit the standard for judicial notice to circumvent the standards for supplementing the administrative record.

Level the Playing Field v. Fed. Election Comm'n, 381 F. Supp. 3d 78, 92 (D.D.C. 2019).

The documents the Bands identify for judicial notice are documents that EPA did not consider in making its decision. If the Court finds these documents relevant, then EPA does not oppose the Court considering the facts for which they are cited by the Bands in their briefs.

CONCLUSION

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

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September 1, 2023

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2023, I electronically filed the foregoing Defendants' Reply Memorandum 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 D. Greenberg