

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

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

Civil No. 22-cv-01783-JRT-LIB

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.

**AMICI CURIAE BRIEF OF BOIS FORTE BAND OF CHIPPEWA,
LOWER SIOUX INDIAN COMMUNITY, LEECH LAKE BAND OF OJIBWE,
MILLE LACS BAND OF OJIBWE, MINNESOTA CHIPPEWA TRIBE,
PRAIRIE ISLAND INDIAN COMMUNITY, RED LAKE NATION,
UPPER SIOUX COMMUNITY, and WHITE EARTH NATION
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

The entirety of Minnesota’s territory was once shared by Indigenous nations. The territory that eventually became the state of Minnesota was ceded to the United States through thirteen separate treaties, ratified between 1805 and 1863, and subsequent to conflict with the Minnesota Dakota tribes. In many of these treaties, Minnesota’s Tribes reserved the rights to continue to live with the land and resources—to hunt, fish, gather, harvest plants, including *Manoomin/Psiη* (wild rice)¹, and sustain traditional lifeways. These tribally reserved treaty rights are rooted in, and dependent upon, the availability of abundant and pristine natural resources. Because clean water is vital to Minnesota’s ecosystems, and essential for the survival of many other treaty resources, Minnesota Tribes’ rights are dependent on the protection of water. This is particularly true for wild rice, which is a delicate and culturally significant resource that depends on stable water levels and other factors to thrive. Because of the plant’s sensitivity, wild rice beds “can be analogized to fishing grounds because wild rice can only be harvested in fixed, discrete locations.”² Accordingly, “the destruction of one wild rice bed may cause a significant reduction in one Tribe’s harvest.”³

¹ See, e.g., Treaty with the Chippewa, art. 5, July 29, 1837, 7 Stat. 536 (specifically reserving right to “gather[] the wild rice”).

² Nathan Frischkorn, *Treaty Rights and Water Habitat: Applying the United States v. Washington Culverts Decision to Anishinaabe Akiing*, ARIZ. J. ENVTL. & POL’Y 34, 68 (2020).

³ *Id.* at 85.

The nine Tribes submitting this amicus curiae brief encourage the Court to require the United States Environmental Protection Agency (“EPA”) to uphold its trust responsibilities to the Minnesota Tribes and faithfully adhere to the requirements of the Clean Water Act (“CWA”).

INTEREST AND EXPERTISE OF AMICI CURIAE

The Minnesota Tribes manage environmental resources on their reservations and in the treaty-ceded territories. This authority is rooted in tribal sovereignty, the treaties with the United States, and the trust relationship between the federal government and tribal nations.⁴ A series of federal court cases have further recognized states’ obligations to uphold tribal treaty rights and co-manage shared resources with Tribal governments.⁵ The Minnesota Tribes serve as co-regulators and co-stewards of the state’s natural resources.

The nine amici curiae—Bois Forte Band of Chippewa, Lower Sioux Indian Community, Leech Lake Band of Ojibwe, Mille Lacs Band of Ojibwe, Minnesota

⁴ See Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RESOURCES J. 1, 10-13 (2008).

⁵ See *U.S. v. Washington*, 694 F.2d 1374 (9th Cir. 1982) (“[W]hen considering projects that may have a significant environmental impact, both the State and the Tribes must take reasonable steps commensurate with the respective resources and abilities of each to preserve and enhance the fishery. Both share in the beneficial use of a fragile resource. Each to the other owes this obligation.”); see also, *Lac Courte Oreilles Band v. Wisconsin*, 668 F.Supp. 1233, 1242 (W.D. Wis. 1987) (requiring cooperation “necessary to the common state and tribal goals of preserving the resource and ensuring public health and safety.”); John Eligon, *‘This Ruling Gives Us Hope’: Supreme Court Sides with Tribe in Salmon Case*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/us/washington-salmon-culverts-supreme-court.html> (describing the “Fish Wars” and the subsequent federal court rulings that affirmed tribal rights to “co-manage fishing resources with the state”).

Chippewa Tribe, Prairie Island Indian Community, Red Lake Nation, Upper Sioux Community, and White Earth Nation—are federally recognized tribes who have lived here for centuries and share a common interest in preserving the land, water, plants, and animals. Their interests are rooted in a cultural relationship with the environment which is foundational to their identities. The nine amici curiae bring a unique perspective and expertise based on their generational relationship with the natural environment.

ARGUMENT

I. MINNESOTA’S AMENDED WATER QUALITY STANDARDS WEAKEN NUMERIC PROTECTIONS AND UNDERMINE THE INTEGRITY OF MINNESOTA WATERS

The Minnesota Pollution Control Agency’s (“MPCA”) amendments to Minnesota’s water quality standards roll back the numeric criteria which were originally implemented to ensure that Class 3 and 4 waters were protected from rampant discharges and were based on specific, scientifically-sound criteria. For decades, Minnesota had numeric criteria for bicarbonates, pH, specific conductance, total dissolved salts, sodium, and sulfate in its water quality standards; some of these criteria were specifically implemented to protect Minnesota’s wild rice waters. This is consistent with the purposes of the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”⁶ and the state’s attendant obligation to establish criteria that “support the most sensitive use”⁷ for waters with multiple use designations, a category which includes many of Minnesota’s wild rice waters.

⁶ 33 U.S.C. § 1251(a).

⁷ 40 C.F.R. § 131.11(a).

There is no question that numeric criteria can be established—numeric criteria for Class 3 and 4 waters have been on the books for fifty years.⁸ In developing the amended rules, MPCA failed to perform the required structured scientific assessment or Use Attainability Analysis (“UAA”) to determine whether the numeric criteria for Class 3 and 4 waters could be achieved,⁹ and ignored its own analyses regarding the risks of less restrictive water quality standards for vulnerable aquatic ecosystems.¹⁰

The MPCA’s decision to set aside its prior finding that numeric criteria are necessary for protecting Minnesota’s waters is arbitrary and unsupported by sound scientific rationale.¹¹ MPCA’s rule revision failed to meaningfully consider Tribal

⁸ See, e.g., *Nat. Res. Def. Council v. EPA*, 16 F.3d 1395, 1403–1404 (4th Cir. 1993) (“[S]tates should develop either numerical criteria based upon CWA guidance (or other scientific methods), or narrative criteria, *if numerical criteria cannot be established.*” (emphasis added)).

⁹ See 40 C.F.R. 131.10 (g) (listing requirement of a use attainability analysis to either “designate a use, or remove a use that is not an existing use”); see also US EPA, Use Attainability Analysis (UAA), at <https://www.epa.gov/wqs-tech/use-attainability-analysis-uaa> (“A UAA must be conducted for any water body when a state or authorized tribe designates uses that do not include the uses specified in section 101(a)(2) of the Act or when designating subcategories of these uses that require less stringent criteria than previously applicable.”). Pursuant to EPA guidance, a UAA “must be conducted for any water body when a state or authorized tribe designates uses that do not include the uses specified in section 101(a)(2) of the Act or when designating sub-categories of these uses that require less stringent criteria than previously applicable[,]” as is the case here. EPA, UAA, available at <https://www.epa.gov/wqs-tech/use-attainability-analysis-uaa>.

¹⁰ Joint Tribal Comments on Proposed Amendments to Rules Governing Water Quality Standards, Revisor ID No. 4335, OAH Dkt. No. 65-9003-37102 (Feb. 24, 2021); Joint Tribal Rebuttal Comments on Proposed Amendments to Rules Governing Water Quality Standards, Revisor ID No. 4335; OAH Dkt. No. 65-9003-37102 (Mar. 3, 2021); MPCA, St. Louis River Watershed Stressor Identification Rep. at 465 (Dec. 2016), available at <https://www.pca.state.mn.us/sites/default/files/wq-ws5-04010201a.pdf>.

¹¹ 40 C.F.R. §§ 131.5(a)(2); 131.11(a).

impacts, despite the submission of numerous Tribal comments clearly articulating these concerns.¹² Tribes have repeatedly pressed the MPCA to protect and restore wild rice waters using the tools provided for in the Clean Water Act. The MPCA has repeatedly refused to do so and has specifically excluded impaired wild rice waters from its analyses and rulemaking.¹³ The MPCA's revisions will diminish the quality of Minnesota waters, particularly the waters that sustain the state's most sensitive aquatic ecosystems, by replacing sound objective criteria with less protective narrative criteria. The MPCA's action contravenes its obligations under the CWA, and its obligations to Tribes under state law.¹⁴

The Tribes' concerns are particularly relevant here because the pollutants addressed in the revised narrative standards pose direct threats to their water-dependent resources, including *Manoomin/Psiñ*, a sacred species for the Anishinaabe and Dakota. Indeed, MPCA's own data confirms that Minnesota's wetland plants—including wild rice—are vulnerable to salinity stressors like conductivity, chloride, and sulfate.¹⁵ These are the very

¹² Joint Tribal Comments on Proposed Amendments to Rules Governing Water Quality Standards, Revisor ID No. 4335, OAH Dkt. No. 65-9003-37102 (Feb. 24, 2021); Joint Tribal Rebuttal Comments on Proposed Amendments to Rules Governing Water Quality Standards, Revisor ID No. 4335; OAH Dkt. No. 65-9003-37102 (Mar. 3, 2021).

¹³ *Id.*

¹⁴ Minn. Exec. Order 19-24 (Apr. 4, 2019); Minn. Stat. § 10.65, subd. 3(f).

¹⁵ State. of Need and Reasonableness, In the Matter of Proposed Revisions of Minnesota Rule Chapters 7050 and 7053, Relating to Water Quality Standards — Use Classifications 3 and 4; Revisor ID No. 04335 (Dec. 14, 2020) (“SONAR”) at 191, available at <https://www.pca.state.mn.us/sites/default/files/wq-rule4-17k.pdf>.

pollutants for which the prior protective standards are relaxed in MPCA’s revised rules.¹⁶ The revisions also have the potential to seriously impact fish and other critical species on which Tribal communities disproportionately depend.¹⁷ It is crucial that Minnesota implement water standards that protect wild rice, as the state is one of the last places where this sensitive species continues to grow in the wild.

II. EPA’S APPROVAL OF MINNESOTA’ AMENDED WATER QUALITY STANDARDS IS CONTRARY TO ITS TRUST RESPONSIBILITY TO TRIBES AND ITS OBLIGATIONS UNDER THE CLEAN WATER ACT

EPA has a duty to ensure that a state’s revised Water Quality Standards are scientifically defensible and protect designated uses.¹⁸ It also has a trust responsibility, as a federal agency, to protect treaty-reserved natural resources and “ensure that tribal concerns and interests are considered whenever EPA’s actions and/or decisions may affect Indian country or other tribal interests.”¹⁹ EPA failed on both fronts. EPA declined to conduct the analysis necessary to understand the impacts of the MPCA’s rule revision on

¹⁶ The narrative criteria approved by the MPCA and EPA allow for levels of conductivity and other salinity stressor that far exceed tolerance levels for wild rice and other aquatic life.

¹⁷ MPCA, St. Louis River Watershed Stressor Identification Rep. at 465 (Dec. 2016), available at <https://www.pca.state.mn.us/sites/default/files/wq-ws5-04010201a.pdf>; Great Lakes Water Quality Initiative Technical Support Document for Wildlife Criteria (1995) available at <https://www.epa.gov/gliclearinghouse/great-lakes-initiative-technical-support-documents>.

¹⁸ 33 U.S.C. § 1313(c)(2), (3); 40 C.F.R. § 131.5(a)(2); 131.11(a).

¹⁹ EPA, OAR HANDBOOK FOR INTERACTING WITH TRIBAL GOVERNMENTS 7, 9, 69 (2017), available at https://wwwsw.epa.gov/sites/default/files/201801/documents/oar_handbook_updated_1.24.18_.pdf; Pres. Biden Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, Daily Comp. Pres. Doc 202100091 (Jan. 26, 2021).

wild rice and aquatic life. EPA's reliance on MPCA's unsupported representations and conclusions regarding the rule revision was arbitrary and unreasonable and undermined its responsibility to protect the designated uses of Minnesota's waters.²⁰ By approving MPCA's less protective narrative criteria, EPA has violated its obligations under the CWA, and its failure to meaningfully engage with Minnesota Tribes on this issue of critical importance has contravened its federal trust responsibility.²¹

The consequences of EPA's approval of the narrative water quality standards are not isolated to the territories and resources managed by Plaintiffs. The standards apply to waters which flow through the ceded territories and every reservation in Minnesota and threaten the resources of every tribe, including all nine amici curiae.

CONCLUSION

The nine amici curiae support Plaintiffs' claims and Motion for Summary Judgment. Minnesota Tribes expect the EPA to uphold its trust responsibilities, fulfill its obligation to protect treaty-reserved rights and resources, and faithfully adhere to the requirements of the Clean Water Act. By approving the MPCA's revised water quality standards, without regard for the degradation of water quality, impacts on designated uses and aquatic species, and effects on Tribes, the EPA has disregarded its duties to Tribes and the environment.

²⁰ 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.10(b).

²¹ *Nw. Env'tl. Advocates v. EPA*, 855 F. Supp. 2d 1199, 1217–18 (D. Ore. 2012) (EPA violated the Act by approving new, less protective numeric criteria); *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 402 (D.S.D. 1995) (finding duty to meaningfully consult, pursuant to Agency's own policies and guidelines).

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