STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT
Case Type: Other Civil

United States Steel Corporation,

Plaintiff-Petitioner,

vs.

John Linc Stine, in his official capacity as the Commissioner of the Minnesota Pollution Control Agency, and the Minnesota Pollution Control Agency,

Defendants-Respondents.

Court File No. 62-CV-17-989

ANSWER AND COUNTERCLAIM

Defendants John Linc Stine, in his official capacity as the Commissioner of the Minnesota Pollution Control Agency ("Commissioner Stine") and the Minnesota Pollution Control Agency ("MPCA"), for their Answer to the Verified Complaint and Petition for Writ of Mandamus ("Complaint") of United States Steel Corporation ("U.S. Steel"), deny each and every allegation of the Complaint except as expressly admitted, alleged, or qualified herein:

1. As to paragraph 1, admit.

2. As to paragraph 2, admit.

3. As to paragraph 3, admit.

4. As to paragraph 4, admit that the Tailings Basin is the disposal area for tailings generated during the processing of taconite at the U. S. Steel "Minntac" facility, but deny any inference that the Tailings Basin is exclusively used for the disposal of

tailings generated during U.S. Steel's processing of taconite. Admit that the Tailings Basin also stores water that U.S. Steel uses for industrial purposes which it calls "process water." Admit that certain seepage discharges of wastewater from the Tailings Basin are permitted and regulated pursuant to an NPDES/SDS permit, but deny any inference that all discharges or seepage discharges are so permitted and/or regulated.

5. As to paragraph 5, admit that the NPDES/SDS permit for the Tailings Basin was originally issued in 1987 and expired in 1992. Admit that U.S. Steel applied for reissuance in a timely manner and that Minn. R. 7001.0160 allows a permittee who holds an expired permit to conduct the permitted activity in accordance with the terms and conditions of the expired permit until the agency takes final action on the application unless the commissioner determines that any of the following are true:

A. the permittee is not in substantial compliance with the terms and conditions of the expired permit or with a stipulation agreement or compliance schedule designed to bring the permittee in compliance with the permit;

B. the agency, as a result of an action or failure to act of the permittee, has been unable to take final action on the application on or before the expiration date of the permit; or

C. the permittee has submitted an application with major deficiencies or has failed to properly supplement the application in a timely manner after being informed of deficiencies.

Deny any inference that Commissioner Stine has determined that the conditions established in Minn. R. 7001.0160 are not present currently with regard to the NPDES/SDS permit for U.S. Steel's Tailings Basin.

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6. As to paragraph 6, admit that U.S. Steel may request that the MPCA modify water quality standards and the classifications applicable to water bodies, including bodies of water downstream from the Tailings Basin, but refer the Court to Minn. R. 7050.0405 and Minn. R. 7050.0220, subp. 7 for a description of such authorities.

7. As to paragraph 7, admit that U.S. Steel submitted a Use Attainability Analysis ("UAA") petition to the MPCA on December 19, 2014, which sought reclassification of certain water bodies near the Tailings Basin on the ground that certain uses do not exist. Deny that the MPCA "failed" to take final agency action on U.S. Steel's UAA petition or any inference that such action was required and deny all remaining allegations.

8. As to paragraph 8, admit that on October 30, 2015, U.S. Steel submitted to the MPCA a request for Site-Specific Modification of certain state-established water quality standards ("SSS") applicable to certain waters located downstream from the Tailings Basin. Deny that the MPCA "failed" to take final agency action on U.S. Steel's SSS request or any inference that such action was required and deny all remaining allegations.

9. As to paragraph 9, deny that U.S. Steel submitted its UAA petition and/or SSS request after the MPCA had failed to complete its duties under the federally-required "triennial review" of water quality standards. Admit that, pursuant to 40 C.F.R. § 131.20, the MPCA is required to "once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards . . . and, as appropriate, modify[] and

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adopt[] standards," but deny any inference that the MPCA is required to complete modification of the standards "at least once each three-year period." Admit that the MPCA has identified water quality standards for Class 3 and 4 waters as a priority for review and possible modification, but deny that the MPCA has "failed" to complete such water quality standard modification and any inference that the MPCA was compelled to complete such modification in any particular period of time, and deny all remaining allegations.

10. As to paragraph 10, admit that the MPCA issued a draft NPDES/SDS permit for public comment for U.S. Steel's Tailings Basin in November 2016 ("draft 2016 Permit"), but deny all remaining allegations.

11. As to paragraph 11, admit only that in January 2016 the MPCA announced that it intended to wait to reissue U.S. Steel's expired Minntac Tailings Basin NPDES/SDS permit until as soon as possible after a revised water quality standard protecting wild rice is adopted into rule, but deny that this delay was to "give it time to put in place certain water quality standards" other than a sulfate standard for wild rice waters, and deny all remaining allegations.

12. As to paragraph 12, deny.

13. As to paragraph 13, deny.

14. As to paragraph 14, deny.

15. As to paragraph 15, deny to the extent that the stated basis for this action by U.S. Steel includes factual allegations.

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16. As to paragraph 16, but instead summarizes the relief that U.S. Steel seeks through this lawsuit, and deny that U.S. Steel is entitled to relief on the stated bases and all remaining factual allegations.

17. As to paragraph 17, admit.

18. As to paragraph 18, admit.

19. As to paragraph 19, admit on information and belief.

20. As to paragraph 20, admit insofar as the draft 2016 Permit regulates certain discharges from U.S. Steel's Tailings Basin, but deny any inference that the MPCA and the U.S. Environmental Protection Agency ("EPA") do not regulate discharges from the Tailings Basin under other applicable rules and statutes.

21. As to paragraph 21, admit to the extent that NPDES/SDS Permit MN00057207 regulates and authorizes certain discharges from the Tailings Basin, but deny any inference that the referenced permit regulates all discharges associated with the Tailings Basin, and deny that the referenced permit "regulates and authorizes discharges from the Minntac Tailings Basin Area."

22. As to paragraph 22, admit that U.S. Steel was first issued an NPDES/SDS permit to govern discharges from the Minntac Tailings Basin (not facility) on September 30, 1987. Deny that the NPDES/SDS permit has been "administratively continued by MPCA since it expired on July 31, 1992," but admit that U.S. Steel claims the right to continue to operate under the expired permit pursuant to Minn. Rule 7001.0160.

23. As to paragraph 23, deny.

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24. As to paragraph 24, admit that on November 15, 2016, the MPCA issued for public comment the draft 2016 Permit, but deny the remaining allegations.

25. As to paragraph 25, admit that the MPCA issued a draft NPDES/SDS permit ("draft 2016 Permit") six days after it was served with a lawsuit by the Minnesota Center for Environmental Advocacy and two other organizations ("MCEA"), but deny any inference that its decision to issue the draft 2016 Permit was occasioned by MCEA's lawsuit and deny all remaining allegations.

26. As to paragraph 26, admit only that the stipulation entered into with MCEA contained the quoted language and further state that the document speaks for itself.

27. As to paragraph 27, deny.

28. As to paragraph 28, deny.

29. As to paragraph 29, deny.

30. As to paragraph 30, deny that the Clean Water Act ("CWA") was adopted in 1977, but admit the CWA was adopted in 1972 with the goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. § 1251). Deny that the CWA's goal was stated in conjunction with the phrase "where attainable" or "through water quality standards ("WQS") and all remaining allegations.

31. As to paragraph 31, admit.

32. As to paragraph 32, admit that in Minnesota, the MPCA has established WQS that are numeric and narrative that are intended to protect specified uses in specified water bodies, as set forth in Minn. R. chs. 7050 and 7052.

33. As to paragraph 33, admit.

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34. As to paragraph 34, admit that some WQS are found in Minn. R. ch. 7050 but refer the Court to the full text of the rule with regard to the requirements found therein, and note that Minn. R. ch. 7052 and Minn. R. ch. 7060 also set forth WQS.

35. As to paragraph 35, admit.

36. As to paragraph 36, admit that U.S. Steel submitted to MPCA a "Use Attainability Analysis of the Upper Dark River and Timber Creek" petition for the Minntac facility (the "UAA Petition") on December 19, 2014, but otherwise refer the Court to Exhibit B to the Complaint, and deny all remaining factual allegations.

37. As to paragraph 37, admit that Upper Dark River and Timber Creek are located downstream from the Minntac facility insofar as this references the Tailings Basin, and admit that U.S. Steel requested their reclassification. As to the quoted portion of Minn. R. 7050.0405, subp. 2, deny insofar as the allegation consists of a partial quotation, and the Court is referred to the full text of the material.

38. As to paragraph 38, deny insofar as the allegation consists of a partial quotation, and the Court is referred to the full text of the material.

39. As to paragraph 39, deny insofar as the allegation consists of a partial quotation, and the Court is referred to the full text of the material.

40. As to paragraph 40, deny insofar as the allegation consists of a partial quotation, and the Court is referred to the full text of the material.

41. As to paragraph 41, deny.

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42. As to paragraph 42 and all of its subparts, deny. Affirmatively allege that jurisdiction over whether or not U.S. Steel's UAA petition has any validity is vested solely in the MPCA and not this Court.

43. As to paragraph 43, deny. Affirmatively allege that jurisdiction over whether or not U.S. Steel's UAA petition has any validity is vested solely in the MPCA and not this Court.

44. As to paragraph 44 and all of its subparts, deny. Affirmatively allege that jurisdiction over whether or not U.S. Steel's UAA petition has any validity is vested solely in the MPCA and not this Court.

45. As to paragraph 45, deny. Affirmatively allege that jurisdiction over whether or not U.S. Steel's UAA petition has any validity is vested solely in the MPCA and not this Court.

46. As to paragraph 46 and all of its subparts, deny. Affirmatively allege that jurisdiction over whether or not U.S. Steel's UAA petition has any validity is vested solely in the MPCA and not this Court.

47. As to paragraph 47, deny.

48. As to paragraph 48, deny.

49. As to paragraph 49, deny.

50. As to paragraph 50, deny.

51. As to paragraph 51, deny.

52. As to paragraph 52, admit but refer the Court to the document attached to the Complaint as Exhibit C.

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53. As to paragraph 53, admit only to the extent that the statements are consistent with the attached document Exhibit C to the Complaint, and deny the truth of the statements and deny all remaining allegations.

54. As to paragraph 54, deny and refer the Court to the full text of Minn. R. 7050.0220, subp. 7

55. As to paragraph 55, deny insofar as the allegations consist of partial quotations of the referenced rule that omit significant material and additional text not found in the rule and which is inconsistent with the rule, and the Court is referred to the full text thereof, and deny all remaining allegations.

56. As to paragraph 56, deny insofar as the allegations consist of partial quotations of the referenced rule that omit significant material and the Court is referred to the full text thereof.

57. As to paragraph 57, deny insofar as the allegations consist of partial quotations of the referenced rule that omit significant material and the Court is referred to the full text thereof, and deny all remaining factual allegations and any inference that the Site-Specific Standard Request was complete.

58. As to paragraph 58, deny.

59. As to paragraph 59, deny.

60. As to paragraph 60, deny.

61. As to paragraph 61, deny.

62. As to paragraph 62, admit only to the extent that the MPCA is the state agency with the authorities provided in Minn. Stat. § 115.03, subd. 5 with regard to the

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participation by the state of Minnesota in the national pollutant discharge elimination system. Admit that the MPCA is charged with reviewing Minnesota's WQS and, as appropriate, modifying and adopting standards within the meaning of 33 U.S.C. § 1313, and deny all remaining allegations.

63. As to paragraph 63, admit that this is a partial quotation of Section 303(c)(1) of the CWA.

64. As to paragraph 64, admit that the MPCA conducted a review of the WQS beginning in 2008 and concluded that there was a need to re-evaluate and update existing Class 3 and Class 4 WQS. Admit that the MPCA contracted with Departments of Bioproducts and Biosystems Engineering at the University of Minnesota to provide information in support of potential rule amendments, but deny that the purpose of the contract was to "conduct a reexamination of the Class 3 and 4 WQS." Deny all remaining allegations.

65. As to paragraph 65, admit only that the MPCA held public information sessions about the Triennial Standards Review as a whole in November 2010, and that this meeting included the presentation of a summary of the University of Minnesota report and that the meeting included a presentation of MPCA staff's recommendations on potential WQS changes. Deny all remaining allegations.

66. As to paragraph 66, admit that the June 2010 Technical Support Document Summary included the quoted statement but refer the Court to the full text thereof and deny all remaining allegations.

67. As to paragraph 67, admit.

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68. As to paragraph 68, admit.

69. As to paragraph 69, admit that the quoted sections appear on the MPCA's website but refer the Court to the full text of the website.

70. As to paragraph 70, admit that the statement was included in an email from the MPCA to U.S. Steel, but refer the Court to the full text thereof.

71. As to paragraph 71, admit that the quoted statement was included in an email from the MPCA to U.S. Steel, but refer the Court to the full text thereof and deny all remaining allegations.

72. As to paragraph 72, admit that the MPCA made the quoted statement, but refer the Court to the full text thereof and deny all remaining allegations.

73. As to paragraph 73, admit that the MPCA made the statement, but refer the Court to the full text thereof and deny all remaining allegations.

74. As to paragraph 74, admit only that U.S. Steel submitted comments concerning the planned amendment to the Class 3 and Class 4 rules on or about March 29, 2016, and deny all remaining inferences.

75. As to paragraph 75, admit.

76. As to paragraph 76, deny.

77. As to paragraph 77, deny.

78. As to paragraph 78, deny.

79. As to paragraph 79, deny.

80. As to paragraph 80, admit and deny as otherwise qualified or stated above.

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81. As to paragraph 81, deny that U.S. Steel's UAA petition was submitted on December 19, 2015. U.S. Steel's UAA petition was submitted on December 19, 2014.

82. As to paragraph 82, deny insofar as the quoted material consists of partial quotations of Minn. R. 7050.0405, and refer the Court to the full text thereof, and deny all remaining allegations.

83. As to paragraph 83, deny.

84. As to paragraph 84, deny.

85. As to paragraph 85, admit and deny as otherwise qualified or stated above.

86. As to paragraph 86, the paragraph contains only a legal assertion and therefore no response is necessary, and to the extent that a response is necessary, deny.

87. As to paragraph 87, deny insofar as the quoted material consists of partial quotations of Minn. R. 7050.0220, and refer the Court to the full text thereof. Deny any inference that the cited rule requires Commissioner Stine to approve a SSS request unless and until Commissioner Stine has "evaluate[d] all relevant data in support of a modified standard and determine[d] whether a change in the standard for a specific water body or reach is justified," which he has not, and deny all remaining allegations.

88. As to paragraph 88, admit only that on October 30, 2015, U.S. Steel requested that Commissioner Stine consider certain information in support of a SSS request for certain WQS, but deny that the MPCA "failed to act on said requests" or that any such requests from U.S. Steel were pending. Affirmatively state that U.S. Steel waived its SSS request after failing to respond to the MPCA's December 2, 2015 request for more information in support of U.S. Steel's requests. Deny that the MPCA has any

"clear legal duty to take action on the Site-Specific Standard Modification Request" and deny that the MPCA's alleged "failure" constituted a "public wrong specifically injurious to U.S. Steel" or, if so, that U.S. Steel lacks an adequate remedy in the ordinary course of law. Deny all remaining allegations.

89. As to paragraph 89, deny.

90. As to paragraph 90, admit and deny or as otherwise qualified as stated above.

91. As to paragraph 91, the paragraph contains only a legal assertion and therefore no response is necessary, and to the extent a response is necessary, deny.

92. As to paragraph 92, admit only to the extent that the MPCA is the state agency with the authorities provided in Minn. Stat. § 115.03, subd. 5 with regard to the participation by the state of Minnesota in the national pollutant discharge elimination system. Admit that the MPCA is charged with reviewing Minnesota's WQS and, as appropriate, modifying and adopting standards within the meaning of 33 U.S.C. § 1313. Admit that, pursuant to 40 C.F.R. § 131.20, the MPCA is required to "once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards . . . and, as appropriate, modify[] and adopt[] standards," but deny any inference that the MPCA is required to modify the standards "at least once each three-year period" and all remaining allegations.

93. As to paragraph 93, admit that the MPCA has identified WQS applicable to Class 3 and 4 uses as a priority for modification for some time, but deny that the modification has not proceeded and all remaining allegations.

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94. As to paragraph 94, admit that the MPCA has reviewed the Class 3 and Class 4 standards and determined modifications are appropriate and has not modified the standards by completing rulemaking, but deny that the MPCA has violated any duty imposed on it by Section 303(c) of the CWA to modify such standards within a certain period of time or that U.S. Steel is a party that can enforce any such duty, if it existed. Deny all remaining allegations.

95. As to paragraph 95, deny.

96. As to paragraph 96, admit and deny as otherwise qualified or stated above.

97. As to paragraph 97, the paragraph contains only a legal assertion and therefore no response is required and to the extent that a response is required, deny.

98. As to paragraph 98, deny insofar as the allegation consists of a partial quotation, and the Court is referred to the full text of the material, and deny any inference that the rule creates duties that are not contingent on Commissioner Stine's finding "that the evidence submitted supports a review of the designated uses" which is a determination that is fully committed to the discretion of Commissioner Stine. Deny all remaining allegations.

99. As to paragraph 99, deny

100. As to paragraph 100, deny.

101. As to paragraph 101, deny.

102. As to paragraph 102, admit and deny as stated above.

103. As to paragraph 103, the paragraph contains only a legal assertion and therefore is neither admitted nor denied.

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104. As to paragraph 104, deny.

105. As to paragraph 105, deny.

106. As to paragraph 106, deny.

107. As to paragraph 107, admit and deny as stated above.

108. As to paragraph 108, the paragraph contains only a legal assertion and therefore is neither admitted nor denied.

109. As to paragraph 109, admit only to the extent that the MPCA is the state agency with the authorities provided in Minn. Stat. § 115.03, subd. 5 with regard to the participation by the state of Minnesota in the national pollutant discharge elimination system. Admit that the MPCA is charged with reviewing Minnesota's WQS and, as appropriate, modifying and adopting standards within the meaning of 33 U.S.C. § 1313. Admit that, pursuant to 40 C.F.R. § 131.20, the MPCA is required to "once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards . . . and, as appropriate, modifying and adopting standards," but deny any inference that the MPCA is required to complete rulemaking to modify the standards "at least once each three-year period" and deny all remaining allegations.

110. As to paragraph 110, deny.

111. As to paragraph 111, deny.

112. As to paragraph 112, admit and deny as otherwise qualified or stated above.

113. As to paragraph 113, deny.

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114. As to paragraph 114, admit that the MPCA initiated the permit reissuance process by issuing for public comment the draft 2016 Permit for the Minntac Tailings Basin, but deny all remaining allegations.

115. As to paragraph 115, deny. Affirmatively allege that the district court has no authority to enjoin the MPCA to undertake rulemaking processes because such an effort is committed to the discretion of the MPCA.

116. As to paragraph 116, deny.

117. As to paragraph 117, admit and deny as stated above.

118. As to paragraph 118, deny.

119. As to paragraph 119, deny, and with respect to the remaining unnumbered paragraphs of the Complaint, to the extent that response is required, deny that U.S. Steel is entitled to the relief that it seeks through this action.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.

2. U.S. Steel's claims are barred by the doctrine of "unclean hands."

3. U.S. Steel's damages, if any, were caused by its own conduct.

4. U.S. Steel's claims are barred by its failure to mitigate its purported damages.

5. U.S. Steel's claims are barred because it has a remedy at law.

6. U.S. Steel's claims are barred because it has failed to exhaust its administrative remedies.

7. U.S. Steel's claims are barred by waiver and laches.

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8. The relief requested exceeds the jurisdiction of the Court.

COUNTERCLAIM

For its counterclaim, State of Minnesota, acting by and through the MPCA, alleges the following:

1. The MPCA is charged with regulating sources of water pollution to protect water quality standards ("WQS") adopted to ensure that the waters of the state, which include groundwaters, are protected from pollution.

2. Acting under its authorities in Minn. Stat. ch. 115, the Water Pollution Control Act, the MPCA adopted Minn. R. ch. 7060 to establish policies and standards governing groundwater. Minnesota Rule 7060.0100 states that the purpose of the chapter is "to preserve and protect the underground waters of the state by preventing any new pollution and abating existing pollution."

3. Minnesota Rule 7060.0200 states that "[i]t is the policy of the agency to consider the actual or potential use of the underground waters for potable water supply as constituting the highest priority use and as such to provide maximum protection to all underground waters. The ready availability nearly statewide of underground water constitutes a natural resource of immeasurable value which must be protected as nearly as possible in its natural condition. For the conservation of underground water supplies for present and future generations and prevention of possible health hazards, it is necessary and proper that the agency employ a nondegradation policy to prevent pollution of the underground waters of the state."

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4. Minnesota Rule 7060.0200 also provides that "Parts 7050.0100 to 7050.0220 also apply to underground waters. Where differences exist between parts 7050.0100 to 7050.0220 and this chapter, the more stringent of the conditions shall be construed to apply."

5. Consistent with these policies, Minn. R. 7060.0400 classifies underground waters of suitable natural quality to protect their use now or in the future as a source of drinking, culinary, or food processing water. Minnesota Rule 7060.0400 further states that "all underground waters are best classified for use as potable water supply in order to preserve high quality waters by minimizing spreading of pollutants, by prohibiting further discharges of wastes thereto, and to maximize the possibility of rehabilitating degraded waters for their priority use."

6. Consistent with these policies, Minn. R. 7060.0600, subpart 2, prohibits the discharge of sewage, industrial waste or other wastes into the unsaturated zone "in such place, manner, or quantity that the effluent or residue therefrom, upon reaching the water table, may actually or potentially preclude or limit the use of the underground waters as a potable water supply, nor shall any such discharge or deposit be allowed which may pollute the underground waters."

7. Minnesota Rule 7060.0600, subpart 3, provides that "[t]reatment, safeguards, or other control measures shall be provided by the person responsible for any sewage, industrial waste, other waste, or other pollutants which are to be or have been discharged to the unsaturated zone or deposited there, or which have been discharged to the zone of saturation, to the extent necessary to ensure that the same will not constitute

or continue to be a source of pollution of the underground waters or impair the natural quality thereof."

8. Since 1967, U.S. Steel has disposed of the taconite tailings and certain other waste generated by its Minntac ore processing operation in a land disposal facility called a tailings basin ("Tailings Basin"). The Tailings Basin today covers approximately 8,700 acres (13.6 square miles). An average of 21 million long tons of dry fine tailings and 14 million long tons of dry coarse tailings are disposed of each year in the Tailings Basin. U.S. Steel also disposes of "agglomerator process water," sewage plant wastewater, laboratory wastewater, and plant non-process water and surface runoff from the plant area in the Tailings Basin.

9. In 1987, the MPCA issued U.S. Steel an NPDES/SDS permit ("1987 Permit") that authorized U.S. Steel to discharge pollutants from "seepage outfalls 020 and 030," subject to certain conditions established in the 1987 Permit.

10. The 1987 Permit contained a schedule of compliance to address impact of the Tailings Basin on the groundwater.

11. Although the 1987 Permit has been modified, including a 2010 modification to allow U.S. Steel to construct a system to recapture and return seepage entering the Sand River, it has never been reissued and remains the document that governs water quality impacts related to the Tailings Basin.

12. When the MPCA issued U.S. Steel the 1987 Permit, the MPCA was concerned about sulfate (SO4) impacts from the Tailings Basin and included in the 1987

Permit a condition requiring U.S. Steel to develop a plan to study the sources of sulfate in the Tailings Basin and to determine a total sulfur balance for the Minntac plant area.

13. Sulfate has laxative effects and imparts an unpleasant taste to water. People unaccustomed to drinking water with elevated levels of sulfate can experience diarrhea and dehydration. Infants are often more sensitive to sulfate than adults. Animals are also sensitive to high levels of sulfate. In young animals, high levels may be associated with severe, chronic diarrhea, and in few instances, death.

14. Minnesota has established drinking water standard for sulfate of 250 mg/L by adopting federal standards in 40 C.F.R. Part 143 as amended through July 1, 2006 as part of the state standard for Class 1 waters in Minn. R. 7050.0220, subp. 2, item A.

15. The Minnesota Department of Health also recommends against using water with sulfate concentrations greater that 500 mg/L in infant formula.

16. Sulfate also affects the ability of certain water bodies to support wild rice. The MPCA has a WQS applicable to waters used for production of wild rice that applies in waters to which the protective classification applies as shown in Minn. R. 7050.0220, subps. 3a, item A (31); 4a, item A (31); 5a, item A (19); and 6a, item A (14) and wetlands as provided in Minn. R. 7050.0186. Pursuant to a 2011 legislative directive (Minn. Laws 2011, 1st Spec. Sess., Chapter 2, Article 4, Section 32), the MPCA is currently revising the sulfate WQS applicable to waters used for the production of wild rice.

17. Sulfate is added to the Tailings Basin from the oxidation of sulfur-bearing minerals in the taconite tailings deposited in the basin, and from a wastewater stream

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from the "wet scrubber" air pollution control equipment that U.S. Steel operates to control air emissions from fuel combustion.

18. The 1987 Permit also required U.S. Steel to submit a hydrogeologic report on the Tailings Basin, which was to include "an analysis of potential impacts on ground water quality, surface water quality and water users by leachate movement from the facility." The report was also to include "an evaluation of the existing water quality monitoring system" required by the permit.

19. Since the Tailings Basin was permitted, concentrations of sulfate and other dissolved elements have increased in the groundwater around the Tailings Basin.

20. Groundwater under and near the Tailings Basin now exceeds drinking water standards for sulfate and total dissolved solids.

21. The groundwater affected by the Tailings Basin enters surface waters, causing pollution of the surface waters.

22. Certain surface waters, including the Dark River, Sand River, Sandy Lake and Little Sandy Lake, now exceed certain applicable WQS, including standards for sulfate, bicarbonate, hardness, specific conductance, and total dissolved solids, because polluted groundwater from the Tailings Basin is entering those surface waters. Many other surface waters, including Timber Creek, Admiral Lake, and numerous wetlands likely exceed the same standards but have not been sampled.

23. In light of these circumstances, beginning in 2001, the MPCA entered into a series of agreements containing a "Schedule of Compliance" ("SOC agreements") with

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U.S. Steel in an effort to get U.S. Steel to identify methods of reducing the concentration of pollutants in the leachate or seepage leaving the Tailings Basin.

24. In 2001, the MPCA and U.S. Steel entered into an SOC agreement under which U.S. Steel agreed to undertake a focused feasibility study with the goal of identifying the means by which U.S. Steel would control the level of pollutants, particularly sulfate, entering waters of the state from the Tailings Basin, and to determine whether there were alternatives that could be implemented in lieu of allowing the violation of standards under a variance.

25. In 2003, the MPCA and U.S. Steel entered into an amended SOC agreement under which U.S. Steel would focus its feasibility study on a Sulfate-Reducing Packed-bed Bioreactor system ("SPB system").

26. In 2006, the MPCA and U.S. Steel entered into a third SOC agreement, which required U.S. Steel to submit a permit application and a variance application, by August 15, 2006. Although this application was submitted, U.S. Steel indicated in its comments that there may be more appropriate technologies than the SPB system and that seep collection on the Sandy River side of the basin may be feasible, and that studies to establish site specific standards regarding wild rice and sulfate may be desirable.

27. In 2007, the MPCA and U.S. Steel entered into another SOC agreement that included requirements for U.S. Steel to evaluate the potential for collecting and returning seepage affecting the Sand River and to evaluate new treatment options to reduce the level of pollutants in the Tailings Basin water.

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28. In 2009, U.S. Steel submitted a revised permit application in which it proposed to install a Process Water Treatment System ("PWTS") to remove pollutants from the process water. According to information provided by U.S. Steel, within 5 years of initiation of operation of the proposed PWTS, the concentration of sulfate and other pollutants in the Tailings Basin would have been reduced by as much as 50 percent.

29. However, shortly after submitting the 2009 application, U.S. Steel requested that the MPCA not issue a permit based on the application while U.S. Steel investigated refinements to the treatment system. U.S. Steel did install a system to collect and return surface seepage to the Tailings Basin that otherwise would have impacted the Sand River. However, this collection and return system, while designed to reduce pollution in the Sand River, would not improve water quality in the Tailings Basin itself.

30. In 2010, U.S. Steel proposed a new approach to reduce pollutants in the Tailings Basin by replacing the existing wet air emissions control devices on each of the four largest taconite production lines with a series of dry air emissions control devices, specifically a baghouse, a gas suspension absorber, and mercury emissions controls ("Dry Controls").

31. By replacing the wet scrubbers with Dry Controls, U.S. Steel argued it would achieve a significant reduction in the mass of pollutants transferred to the process water and into the Tailings Basin.

32. In addition to improving the water quality in the Tailings Basin, the Dry Controls were expected to achieve air emissions reductions for total particulate matter

(PM), particulate matter less than 10 microns in diameter (PM 10), particulate matter less than 2.5 microns in diameter (PM 2.5), Sulfur dioxide (S02), and Mercury (Hg).

33. In support of this proposal, U.S. Steel submitted a document to the MPCA in which it asserted that implementation of the Dry Controls, along with switching to a processing facility water source lower in sulfate, would reduce the concentration of sulfate in the Tailings Basin water to 476 mg/L in 20 years. The current concentration of sulfate in the Tailings Basin water ranges from 850 to 1100 mg/L.

34. In 2011, the MPCA and U.S. Steel entered into a new SOC agreement that required U.S. Steel to submit an application to replace the wet scrubbers with Dry Controls.

35. The 2011 SOC agreement also required U.S. Steel to install a seepage collection and return system ("SCRS") on the west or Dark River side of the Tailings Basin, and to obtain water to use in its plant from a source that contained less sulfate than the source then being used.

36. In various submittals to the MPCA, U.S. Steel has identified that installation of this SCRS system is feasible.

37. In 2013, the 2011 SOC agreement was amended because groundwater monitoring demonstrated that seepage from the Tailings Basin had caused exceedances of the sulfate and total dissolved solids drinking water standards in a groundwater monitoring well that U.S. Steel had been required to install under the terms of the 2011 SOC agreement.

38. Under the 2013 amendment, U.S. Steel submitted a groundwater sulfate reduction plan that involved installing a "permeable reactive barrier" to reduce the existing groundwater contamination in the area where it was detected.

39. After U.S. Steel entered into the 2011 SOC agreement, U.S. Steel sought a 483-acre extension of its mining permit from the Minnesota Department of Natural Resources ("DNR").

40. Before the DNR could issue this permit, the DNR was required by Minn. R. 4410.1000 to publish an Environmental Assessment Worksheet and then decide whether further study in the form of an Environmental Impact Statement ("EIS") was required.

41. Under Minn. R. 4410.1700, subp. 1, "[a]n EIS shall be ordered for projects that have the potential for significant environmental effects."

42. Under Minn. R. 4400.1700, subp. 7, a responsible governmental unit ("RGU") must consider, among other factors, "the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority." Under Minnesota Rule 4410.1700, subp. 7, "[t]he RGU may rely only on mitigation measures that are specific and that can be reasonably expected to effectively mitigate the identified environmental impacts of the project."

43. On April 11, 2013, the DNR adopted findings that an EIS was not required. In part, the DNR relied on the activities that U.S. Steel had agreed to undertake to address the pollution from its Tailings Basin, and in particular the commitments to install Dry Controls and the SCRS for the Dark River under the 2011 SOC agreement with the MPCA, as "mitigation by ongoing public regulatory authority."

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44. In 2013, the Minnesota Center for Environmental Advocacy challenged the DNR's decision, in part because it did not believe that the DNR could rely on the NPDES/SDS permit and the MPCA SOC agreement as "mitigation by ongoing public regulatory authority" of the environmental impacts from the Tailings Basin within the meaning of Minn. R. 4410.1700, subp. 7, item C.

45. In January 2014, the Court of Appeals affirmed the DNR's decisions, relying in part on the fact that U.S. Steel would reduce impacts of pollutants from its tailings basin through its Dry Controls project and Dark River SCRS. *In re Minntac Mine Extension Project in Mountain Iron, St. Louis Cty.*, No. A13-0837, 2014 WL 274077 (Minn. Ct. App. Jan. 27, 2014).

46. Despite having relied on its commitments in the 2011 SOC agreement with the MPCA to obtain its permit to mine, U.S. Steel did not comply with the requirement in the SOC agreement to replace the wet scrubbers with Dry Controls.

47. On January 20, 2015, the MPCA sent U.S. Steel a letter in which it demanded that U.S. Steel comply with the 2011 SOC agreement by submitting an application to install Dry Controls.

48. On February 19, 2015, U.S. Steel responded to the MPCA's January 20, 2015 letter. In its letter, U.S. Steel declined to comply with the Dry Controls requirement, and instead sought to renegotiate the 2011 SOC agreement.

49. Despite having had more than five years to do so, U.S. Steel has also failed to install the SCRS to improve the water quality in the Dark River.

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COUNT I

FAILURE TO COMPLY WITH SCHEDULE OF COMPLIANCE

50. Based on the allegations in paragraphs 1-49 above, in 2011 U.S. Steel entered into an SOC agreement with the MPCA that required it to install Dry Controls and to implement a SCRS system to improve water quality in the Dark River by reducing the flow of polluted water from the Tailings Basin.

51. Despite having had more than five years to do so, U.S. Steel did not submit an accurate or complete permit application to install Dry Controls or install any Dry Controls.

52. Despite having had more than five years to do so, U.S. Steel has not installed the SCRS to reduce pollutants from the Tailings Basin that are impacting the Dark River watershed.

53. Despite the DNR and the Minnesota Court of Appeals acting in reliance on the fact that U.S. Steel would comply with the 2011 SOC agreement and install Dry Controls and an SCRS for the Dark River watershed, U.S. Steel has neither installed Dry Controls nor the SCRS for the Dark River watershed.

54. Minnesota Statutes section 115.071, subd. 4, provides in part that that "any violation of the provisions, rules, standards, orders, stipulation agreements, variances, schedules of compliance, or permits specified in this chapter and chapters 114C and 116 shall constitute a public nuisance and may be enjoined as provided by law in an action, in the name of the state, brought by the attorney general."

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55. Minnesota Statutes section 115.071, subd. 3, provides in part that "[a]ny person who violates any provision of this chapter or chapter 114C or 116 . . . or (5) any rules, stipulation agreements, variances, schedules of compliance, or orders issued by the agency, shall forfeit and pay to the state a penalty, in an amount to be determined by the court, of not more than $10,000 per day of violation except that if the violation relates to hazardous waste the person shall forfeit and pay to the state a penalty, in an amount to be determined by the court, of not more than $25,000 per day of violation."

56. Minnesota Statutes section 115.071, subd. 3, provides in part that a person who violates "any provision of this chapter or chapter 114C or 116 . . . or (5) any rules, stipulation agreements, variances, schedules of compliance, or orders issued by the agency," may, in addition to civil penalties, be made to "forfeit and pay to the state an additional sum to constitute just compensation for any loss or destruction to wildlife, fish or other aquatic life and for other actual damages to the state caused by an unauthorized discharge of pollutants."

57. Under Minn. Stat. § 115.072, the Court may impose, in addition to the other penalties provided in Minn. Stat. ch. 115, an amount determined by the Court to be the reasonable value of all or a part of the litigation expenses incurred by the state, if a violation is proven to be willful.

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COUNT II

PUBLIC NUISANCE

58. Based on the allegations in paragraphs 120-168 above, pollutants from the Tailings Basin are entering the groundwater, which is a water of the state, at levels causing an exceedance of WQS, including drinking water standards for sulfate and specific conductance.

59. Based on the allegations in paragraphs 120-168, U.S. Steel is causing exceedances of surface water standards in surface waters, including sulfate, bicarbonate, hardness, specific conductance, and total dissolved solids, as the result of its operation of the Tailings Basin.

60. Based on the allegations in paragraphs 120-168, U.S. Steel has failed to comply with an SOC agreement it signed in 2011.

61. Minnesota Statutes section 115.071, subd. 4, provides that "any violation of the provisions, rules, standards, orders, stipulation agreements, variances, schedules of compliance, or permits specified in this chapter and chapters 114C and 116 shall constitute a public nuisance and may be enjoined . . . ."

COUNT III

MINNESOTA ENVIRONMENTAL RIGHTS ACT

62. Minnesota Statutes section 116B.03 provides that "[a]ny person residing within the state; the attorney general; any political subdivision of the state; any instrumentality or agency of the state or of a political subdivision thereof. . . may maintain a civil action in the district court for declaratory or equitable relief in the name

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of the state of Minnesota against any person, for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction. . ." unless "allowable under. . . any environmental quality standard, limitation, rule, order, license, stipulation agreement or permit issued by the Pollution Control Agency. . . ."

63. Based on the allegations in paragraphs 120-168, the releases of pollutants from U.S. Steel's Tailings Basin are causing "pollution, impairment or destruction" of the waters of the state, including both surface waters and groundwater.

64. U.S. Steel is not allowed to operate its Tailings Basin in a manner resulting in exceedances of WQS.

65. U.S. Steel's pollution materially adversely affects the environment.

66. U.S. Steel's pollution is not allowed under a stipulation agreement with the MPCA and are in violation of the 2011 SOC agreement.

67. Under Minn. Stat. § 116B.07, this Court may grant "declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are necessary or appropriate to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction."

68. The MPCA shall submit a notice of its intent to make a claim under the Minnesota Environmental Rights Act in this action in the Pioneer Press Dispatch, a legal newspaper in Ramsey County, including all information required by Minn. Stat. § 116B.03, subd. 3, for publication within 21 days of filing of this Counterclaim with the Court.

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RELIEF

WHEREFORE, Plaintiff prays that the Court issue its Order and Judgment in accordance with Minnesota statutes and rules, including without limitation, Minn. Stat. chs. 115 and 116B, as follows:

I. Dismissing U.S. Steel's Complaint and other claims.

II. Declaring that U.S. Steel is discharging pollutants to the groundwater and surface water causing nuisance conditions and pollution, impairment and destruction of natural resources of the state, and that U.S. Steel has failed to comply with the 2011 SOC agreement, and providing injunctive relief as follows:

A. Ordering U.S. Steel to obtain all necessary permits and install and begin to operate a Dark River watershed SCRS acceptable to the MPCA within 2 years; and

B. Ordering U.S. Steel to take all actions necessary to reduce the concentration of sulfate in the Tailings Basin to 800 mg/L (calendar month average) or below within five years and thereafter reduce sulfate to a limit established by a site investigation and modeling acceptable to the MPCA that ensures that the groundwater meets applicable standards. U.S. Steel shall report to the Court on an annual basis with regard to its progress in meeting this requirement.

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III. Subject to the discretion of the Court, relief under Minn. Stat. § 115.071 and 115.072.

IV. Granting such further and other relief as the Court deems just and proper.

Dated: March 16, 2017

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

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ATTORNEY FOR MINNESOTA
POLLUTION CONTROL AGENCY

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The party or parties on whose behalf the attached document is served acknowledge through their undersigned counsel that sanctions may be imposed pursuant to Minn. Stat. § 549.211 (2016).

Dated: March 14, 2017

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