TO THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WaterLegacy Petition for Withdrawal of Program Delegation from the State of Minnesota for NPDES Permits Related to Mining Facilities

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INTRODUCTION AND CRITERIA FOR WITHDRAWAL

Minnesota is failing to administer the National Pollutant Discharge Elimination System (NPDES) program in accordance with the Clean Water Act (CWA) and the U.S. Environmental Protection Agency's (EPA's) regulations in connection with mining projects, including discharge from mine pits, mine waste rock piles and mine tailings waste facilities.

As a result, regulated dischargers are routinely contributing pollutants, including sulfate, bicarbonates, dissolved salts, specific conductivity and metals, such as copper, nickel and mercury, to both immediate and downstream receiving waters. The Minnesota Pollution Control Agency (MPCA) and the EPA agreed in 2013 that Minnesota had a significant problem with expired and out-of-date NPDES permits that failed to control pertinent parameters. Despite a formal Metallic Mining Joint Priority Agreement with EPA, MPCA has made virtually no progress in addressing the backlog of out-of-date mining permits that provide inadequate control of pollutants.

Although Minnesota Department of Natural Resources (MDNR) Fisheries Division and MPCA investigations indicate mining discharges have resulted in the impairment of fish and macroinvertebrates, MPCA does not do a reasonable potential analysis to determine whether specific conductance or other mining pollutants have the reasonable potential to cause or contribute to violation of Minnesota's narrative standards that protect aquatic life. In the few NPDES permits MPCA has completed with respect to mining projects, MPCA uses variances and schedules of compliance to avoid or delay effluent control. In connection with the U.S. Steel Minntac tailings facility pre-publication draft permit released in 2014, MPCA revealed the Agency's position that tailings waste seepage would not be controlled under the NPDES program, irrespective of the hydrological connection between tailings seepage and surface

waters. This position, as well as the MPCA's failure to act on mining permit and water quality standard violations, fails to comply with the Clean Water Act.

In addition, Minnesota has recently passed laws that preclude the MPCA's compliance with the Clean Water Act in enforcing Minnesota's wild rice sulfate standard and in listing wild rice waters impaired due to sulfate in excess of Minnesota's water quality standard.

Recent events have demonstrated that mining interests have an undue influence on Minnesota decisions critical to the efficacy of the NPDES program, including the determination whether Minnesota's existing wild rice sulfate standard is needed and reasonable. Mining industry influence over Minnesota officials is pervasive and undermines the ability of the State to act in conformity with Clean Water Act pollution control requirements.

Based on MPCA's failure to issue mining facility permits, MPCA's failure to conduct a reasonable potential analysis to protect Minnesota waters from mining pollutants that cause or contribute to violations of narrative standards, MPCA's improper use of variances and schedules of compliance to avoid mining pollution controls, MPCA's failure to act on violations of permits and the Clean Water Act by mining facilities, MPCA's position rejecting regulation of tailings seepage under the Clean Water Act, and Minnesota's new laws explicitly preventing the MPCA from complying with the Clean Water Act when sulfate pollution is discharged upstream of wild rice waters, WaterLegacy submits this Petition pursuant to 40 C.F.R. §123.64(b)(1) requesting that EPA order the commencement of withdrawal proceedings and fix a time and place for a hearing on the allegations in this petition.

The Clean Water Act (CWA) employs "cooperative federalism," allowing a significant role for states, including administration and enforcement of the water discharge permitting program, where a state demonstrates that its program complies with the Act. 33 U.S.C. §

1342(b)(2015). While states are given leeway to enact more stringent standards or procedures than required by the Act to protect and clean up their waters, state statutes and rules must, at a minimum, satisfy and conform to the Act and EPA regulations. 33 U.S.C. §1311(b)(1)(C) (2015).

The CWA further provides that, where EPA determines that a state is not administering its program in a manner that conforms to the Act, EPA must inform the state, request corrective action, and proceed with withdrawing approval of the state program if corrective action is not taken within 90 days of EPA's request. 33 U.S.C. § 1342(c)(3)(2015) ("Whenever the Administrator determines . . . that a State is not administering a program . . . in accordance with requirements of this section, he *shall* so notify the State and, if appropriate corrective action is not taken . . . the Administrator *shall* withdraw approval of such program.") (emphasis added).

When EPA is made aware of state violations of permit conditions that "are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively," the Administrator shall notify the State and if the failure extends more than 30 days, the Administrator shall give public notice and either issue an order or bring a civil action. 33 U.S.C. § 1319(a)(2)(2015). When EPA learns that state practices do not conform to federal law, it has an obligation to make findings and demand corrective action. *Save the Valley, Inc. v. U.S. Envtl. Protection Agency,* 99 F. Supp. 2d 981, 985 (S.D. Ind. 2000) (*Save the Valley I*). Courts have found that EPA has a non-discretionary duty to act, enforceable under 33 U.S.C. § 1365(a)(2), the CWA's citizen suit provision. *Save the Valley, Inc. v. U.S. Envtl. Protection Agency*, 223 F. Supp. 2d 997, 1007 (S.D. Ind. 2002) (*Save the Valley II*).

EPA's regulations set forth specific criteria for withdrawal of State programs. Minnesota meets these criteria with respect to regulation of metallic mining facilities:

- With respect to mining facilities, Minnesota has failed, "to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits." 40 C.F.R. §123.63(a)(5)(2015).

- The operation of Minnesota's NPDES program for mining facilities fails to comply with EPA regulations due to "Failure to exercise control over activities required to be regulated under this part, including failure to issue permits." 40 C.F.R. §123.63(a)(2)(i)(2015).

- The operation of Minnesota's NPDES program for mining facilities also fails to comply with EPA regulations due to "Repeated issuance of permits which do not conform to the requirements of this part." 40 C.F.R. §123.63(a)(2)(ii)(2015).

- Minnesota's enforcement program for mining facilities fails to comply with EPA regulations due to "Failure to act on violations of permits or other program requirements." 40 C.F.R. §123.63(a)(3)(i)(2015).

- Minnesota's legal authority no longer meets the requirements of EPA regulations as a result of "Action by a State legislature . . striking down or limiting State authorities." 40 C.F.R. §123.63(a)(1)(ii)(2015).

- Undue influence of mining interests in both the regulatory and legislative process and resulting deficiencies compel EPA action to initiate withdrawal proceedings in order to secure any corrective action. 40 C.F.R. §123.64(b)(8)(iii)-(vi)(2015).

EPA has both the authority and the obligation to initiate proceedings to withdraw Minnesota NPDES authority over mining permits. 33 U.S.C. § 1342(c)(2015); 40 C.F.R. § 123.63(2015); *Save the Valley (II), supra*, 223 F. Supp. 2d 997.

DISCUSSION SUPPORTING WITHDRAWAL OF STATE AUTHORITY

I. THE MINNESOTA POLLUTION CONTROL AGENCY (MPCA) HAS FAILED TO PROVIDE AN ADEQUATE REGULATORY PROGRAM FOR METALLIC MINING FACILITIES.

A. The MPCA has Failed to Issue Timely NPDES Permits for Minnesota Mining Facilities Despite a Joint Priority Agreement with the U. S. Environmental Protection Agency (EPA) to Eliminate the MPCA's Mining Permit Backlog.

At the most basic level, issuance of timely and current NPDES permits is critical to meeting federal regulatory requirements under the Clean Water Act (CWA). The CWA makes it

unlawful to discharge any pollutant from a point source unless a permit has been obtained. 33 U.S.C. § 1311(a)(2015). Discharge permits are not indefinite; the CWA does not authorize state permits for more than five years duration. 33 U.S.C. § 1342(b)(1)(B)(2015). Although this requirement has been interpreted to allow states to provide an administrative extension if the permittee has timely applied for permit renewal, 40 C.F.R. §122.6 (2015), expired permits may not contain all water quality based effluent limits (WQBELs) and other conditions needed to protect water quality in light of current practices and current science. Due to the need to maintain a current regulatory program, in 2004 EPA adopted the Priority Permits Initiative as a key measure of NPDES performance, ensuring that States evaluate environmentally significant "older" expired NPDES permits and act either to reissue or terminate permits.[1]

In January 2013, EPA highlighted several concerns regarding Minnesota regulatory programs. With respect to MPCA's NPDES permit program for mining facilities, a Joint Briefing summarized these concerns:

> Forty-eight NPDES permits for discharges from Minnesota mining operations are expired. Three more will expire in federal fiscal year 2013. Expired permits may not contain all of the effluent limitations and other conditions needed to protect water quality.
> . . .
> Permit development includes a process for determining whether a discharge has "reasonable potential" to cause or contribute to excursions beyond water quality standards in the receiving and downstream waters. The Clean Water Act and Minnesota law require effluent limitations based on the standards where reasonable potential exists. On average across all 48 permits, more than eight years have passed since Minnesota last determined whether the discharges need limits to protect water quality. (Exhibit 1, EPA/MPCA Joint Briefing, Jan. 2013, Exhibit ("Ex.") Page 2)

EPA and MPCA agreed to "jointly work to modernize all expired permits for mining operations over the next 18 months." (*Id.*, Ex. Page 1)

[1] EPA, Priority Permits Initiative, http://water.epa.gov/polwaste/npdes/basics/Priority-Permits-Initiative.cfm.

By April 2013, EPA and MPCA negotiated a Performance Partnership Agreement (PPA) related to the metallic mining sector. The objective of this Metallic Mining Joint Priority PPA was to "Complete timely NPDES permitting actions for metallic mining projects in Minnesota to address outstanding environmental issues, eliminate permit backlog, and issue permit decisions for construction projects." (Exhibit 2, EPA/MPCA Metallic Mining Joint Priority PPA, Apr. 2013, Ex. Page 7). The Mining Joint Priority PPA recognized that, "Water quality permits for the metallic mining sector are critical to the protection of surface waters." (*Id.*) The PPA required that EPA and MPCA jointly determine prioritization and a schedule to achieve 20% backlog reduction per year so that Minnesota's backlog of expired and out-of-date mining permits would be eliminated by July 1, 2018. (*Id.*, Ex. Page 8).

This PPA has been ineffectual to resolve Minnesota's backlog and update expired NPDES mining permits. At the close of 2014, MPCA cited adequate staffing and funding and proposed to "update" the Metallic Mining Permit Priority List to scale back on priorities. (Exhibit 3, MPCA Mining Permit Joint Priority Report FY2014 with EPA Comments, Ex. Page 14). EPA's comments rejected MPCA's excuses for failure to improve NPDES mining program performance:

> The report identifies that the level of effort to date has not been sufficient to meet the joint priority objective and eliminate the permit backlog over a 5 year period nor does it provide significant actions or enhanced strategies intended to improve program performance or meet the joint priority objective going forward. (*Id.*)

EPA stated that NPDES mine permits "should be prioritized to reflect the need to address active discharges, potential environmental impact of those discharges and the duration of which the permit has been expired." (*Id.*)

Despite the Joint Briefing, the Metallic Mining Joint Priority PPA, and the EPA's strong recommendations in comments on the MPCA's FY2014 Joint Priority Report, virtually no

progress has been made in updating mining sector NPDES permits to provide current and appropriate effluent limits and conditions. The single commitment made by MPCA in its FY2014 Report was that the U.S. Steel Minntac permit would be on public notice by the end of 2014. As of the date of this Petition, this commitment has not been kept.

WaterLegacy's spreadsheet in Exhibit 4 reviews the Metallic Mining Permit Priority List, MPCA Mining Reports and other permit documents to summarize MPCA's lack of progress in issuing metallic mining NPDES permits. None of Minnesota's twelve top priority expired mining permits identified by EPA and none of the State's other six expired mining permits have progressed to notice of a draft permit. A new SDS permit was issued to allow the Magnetation LLC Plant 4 to operate, but no NPDES surface water permit. Although the Mesabi Nugget variance was overturned in July 2014, no revision of the variance has been noticed or referenced in either the MPCA Mining Report or any other available document. (Exhibit 4, WaterLegacy, Minnesota Metallic Mining Permit Status, June 2015, Ex. Page 17).

As a result of the MPCA's failure to issue current and timely mining permits, neither the control of pollutants nor the scientific analysis of mining pollution impacts on aquatic life, plants, wildlife and human health are up-to-date or subject to EPA and public scrutiny. MPCA's unresolved mining permit backlog results in a substantial failure to exercise control over mining activities required to be regulated, including failure to issue permits, in violation of 40 C.F.R. §123.63(a)(2)(i)(2015).

B. The MPCA Consistently Fails to Conduct a Reasonable Potential Analysis to Determine whether Mining Pollutants Have the Potential to Cause or Contribute to a Violation of Minnesota's Narrative Water Quality Standards.

EPA regulations at 40 C.F.R. § 122.44(d)(2015) require that each NPDES permit include conditions meeting requirements to protect water quality, including "requirements in addition to

or more stringent than promulgated effluent limitations guidelines or standards . . . necessary to achieve water quality standards . . . including State narrative criteria." The requirement for limitations calculated to "achieve water quality" is triggered whenever a discharge "will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." *Id.* at (1)(i); *see* 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A)(2015).

Water quality-based effluent limits play an important role in the CWA's overall purpose of eliminating water pollution and protecting water quality. The requirement for permit limitations that are based on water quality standards is longstanding and non-controversial. As the D.C. Circuit Court of Appeals put it: "[O]nce a water quality standard has been promulgated, section 301 of the CWA requires all NPDES permits for point sources to incorporate discharge limitations necessary to satisfy that standard." *American Paper Institute, Inc., v. EPA, et al.,* 996 F.2d 346, 350 (D.C. Cir. 1993). Water quality-based limits are required regardless of whether a water quality standard is numeric or narrative. *American Iron and Steel Institute v. EPA,* 115 F.3d 979, 990-91 (D.C. Cir. 1997).

In issuing metallic mining permits, MPCA routinely fails to conduct a reasonable potential analysis to prevent degradation of water quality or toxicity to aquatic life from discharges of sulfates, specific conductance and other mining pollutants. As a result, MPCA has failed to establish water quality-based effluent limitations (WQBELs) in metallic mining permits to protect aquatic life.

Minnesota narrative water quality standards require prevention of degradation of water quality, Minn. R. 7050.0185(2015), Minn. R. 7052.0300(2015), as well as protection of aquatic life, including invertebrates, from acute and chronic toxicity. Minn. Stat. §115.01, Subd.

20(2015); Minn. R. 7050.0150, Subp. 1-3(2015); Minn. R. 7052.0240(2015). If there is a numeric standard - such as a limit to protect industrial or agricultural uses – as well as a narrative standard applicable, Minnesota's most restrictive standard applies. Minn. R. 7050.0150, Subp. 2 (2015).

For mining facilities, MPCA limits consideration of pollutant control for sulfates, total dissolved salts, bicarbonates and specific conductance to numeric standards for industrial uses and agricultural irrigation, even when comments on a draft NPDES permit have requested a reasonable potential analysis to prevent degradation and protect aquatic life from toxicity. WaterLegacy has repeatedly commented on permits, requested promulgation of rules to protect aquatic life from salinity pollution and even filed a lawsuit to prod MPCA to action.[2]

In the case of Mesabi Nugget, WaterLegacy commented that granting the proposed variances for specific conductance would impair aquatic life, citing the EPA's *Field-based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams*[3] as well as site-specific study data. (Exhibit 5, WaterLegacy Comment on Mesabi Nugget Draft NPDES Permit and Variance, Feb. 18, 2012, Ex. Pages 28-29). MPCA not only failed to perform a reasonable potential analysis to determine whether Minnesota narrative standards required a more stringent WQBEL for conductivity than the numeric limits adopted to protect agricultural irrigation uses,[4] but approved a variance exceeding even these lax water quality standards, allowing a daily

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[2] See Exhibit 5, WaterLegacy Comment on Mesabi Nugget Draft NPDES Permit and Variance (Feb. 18, 2012), Ex. Pages 18-33; Exhibit 6, WaterLegacy Triennial Review Comment (Jan. 28, 2014), Ex. Pages 34-40; *WaterLegacy et al. v. U.S. Environmental Protection Agency et al.*, Civil No. 13-1323 (JRT/LIB) (U.S. D. Minn., Complaint Filed June 3, 2013).

[3] U.S. Environmental Protection Agency, *A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams,* Office of Research and Development, National Center for Environmental Assessment, Washington, D. C. 2011 EPA/600/R-10/023F.

[4] Minnesota's numeric standard for conductivity is 1,000 micromhos per centimeter at 25°C. Minn. R. 7050.0224, Subp. 2. This is equivalent to 1,000 microSiemens per centimeter (µS/cm), the unit of measure used by EPA for conductivity analysis.

maximum for specific conductivity of 1,965 µS/cm and a monthly average of 1,889 µS/cm. (Exhibit 7, Mesabi Nugget NPDES Permit, approved Oct. 23, 2012, Ex. Page 50).

For the U.S. Steel Minntac tailings waste facility pre-publication draft NPDES permit, MPCA performed a reasonable potential analysis exclusively for *numeric* water quality standards, without considering either aquatic toxicity or nondegradation. (Exhibit 8, MPCA Minntac NPDES Permit "Fact Sheet," Dec. 2014, Ex. Pages 111-112). MPCA's pre-publication draft NPDES permit for Minntac set interim limits for specific conductance of 2,810 µS/cm at SW001 and 3,230 µS/cm at SW003 and final limits of 1,000 µS/cm, and sets a final limit for sulfate of 1,000 mg/L at SD001, SW003, SW006 and SW008, without considering the impact that these high levels of sulfate and specific conductance would have on aquatic life. (Exhibit 9, Minntac Pre-publication Draft NPDES Permit, Dec. 2014, Ex. Pages 142, 144, 148, 149).

Minnesota data from the Regional Copper-Nickel Study, as well as from more recent sources, demonstrates that high levels of sulfates and conductivity have the potential to result in extirpation of benthic invertebrates, degrading uses of surface waters for aquatic life. The Regional Copper-Nickel Study found that several species of benthic invertebrates in the Minnesota ecoregions where copper-nickel mining was contemplated were sensitive to sulfate at levels far below 1,000 mg/L. For example, among Ephemeroptera (mayflies), Leptophlebiidae Choroterpes sp. were intolerant of sulfate between 24.6-25.1 mg/L; P. praepedita were intolerant of sulfate above 26.5 mg/L; and P. volitans were intolerant of sulfate at 3.6 mg/L. In the Baetidae family of mayflies, Pseudocloeon sp. were intolerant to sulfate between 3-235 mg/L, and in the Ephemeridae family, Hexagenia sp. were vulnerable to sulfate between 34.9-45.2 mg/L.[5]

[5] Paul Bartoo, Minnesota Environmental Quality Board, *Environmental Requirements and Pollution Tolerance of Aquatic Insects of the Regional Copper Nickel Study Area*, 1978, Table 1. (Regional Copper-Nickel Study).

The Copper-Nickel Study also identified many benthic invertebrates in Northeastern Minnesota ecoregions for which EPA has analyzed pollution tolerances to determine an aquatic life benchmark for conductivity in Appalachia. Among these invertebrates in common, several were intolerant of specific conductance at levels far below 2,810 µS/cm, including: Ephemeroptera (mayflies), such as Leptophlebiidae Leptophlebia sp. (251 µS/cm) and Paraleptophlebia sp. (463 µS/cm); and Trichoptera (caddisflies), such as Lepidostomatidae Lepidostoma sp. (~121 µS/cm) and Limnephilidae Pycnopsyche sp. (295 µS/cm).[6]

Research performed in the St. Louis River by the Minnesota Department of Natural Resources and tribal agencies demonstrated that specific conductance in the segment of the river above mining impacts averaged 59 µS/cm, while downstream from mile 129 to 72, in the middle reaches impacted by mining discharge, conductivity averaged 260 µS/cm. Comparing invertebrate genera in unimpacted and mining-impacted segments of the St. Louis River, the number of invertebrate genera observed in this impacted segment was reduced by about 18% overall and the number of Ephemeroptera, Plecoptera, and Trichoptera genera observed was reduced by about 23% as compared to the unimpacted reaches further upstream in the St. Louis River. Various specific genera that were present in large populations in the upper St. Louis River, such as the sensitive Ephemeroptera, Leptophlebiidae Leptophlebia sp., were wholly absent in the mining-impacted middle segment.[7]

The MPCA's failure to assess the reasonable potential of mining discharge to impair aquatic life is particularly troubling since a recent draft report by the MPCA identified sulfate and specific conductance from mining pollution in the St. Louis River watershed as stressors

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[6] Tolerance ranges from EPA, *A Field-Based Aquatic Life Benchmark for Conductivity, supra.*

[7] Lindgren, John (Minnesota Department of Natural Resources), Nancy Schuldt (Fond du Lac Resource Management), Brian Borkholder (Fond du Lac Resource Management), Andrew Levar (DNR Grand Rapids), Caryle Olson (1854 Treaty Authority), Jeff Tillma (DNR Grand Rapids Area Fisheries), Darren Vogt (1854 Treaty Authority) *A Study of the St. Louis River*, Minnesota F-29-R(P)-25, Area 220 Study 3 Job 4, August 29, 2006. Available at http://files.dnr.state.mn.us/areas/fisheries/duluth/st_louis_river_study.pdf, last visited June 18, 2015.

resulting in fish and aquatic life impairments. The MPCA determined that the following tributaries were impaired: Embarrass River - fish; Spring Mine Creek - invertebrates, fish; Wyman Creek – fish and attributed these impairments to sulfate and specific conductance from mine facilities:

> Fish results from the upper Embarrass River (the portion upstream of the town of Embarrass) show extremely low fish counts and limited taxa richness. . . Two of the impaired streams in this watershed zone, Spring Mine Creek and the Embarrass River, receive water originating from mine pits. Sampling results from these streams show elevated specific conductance and sulfate concentrations.[8]

Spring Mine Creek and the Embarrass River also receive seepage from mine waste rock and tailings.

The MPCA has provided no justification for failure to conduct a reasonable potential analysis to set appropriate water quality based effluent limitations to protect aquatic life from mining pollutants, including sulfate and specific conductance. MPCA's refusal to evaluate whether a mining discharge has potential to cause or contribute to a violation of Minnesota's narrative water quality standards violates the Clean Water Act and its implementing EPA regulations.

In the few cases where MPCA has issued or even proposed to issue an NPDES mining discharge permit, the MPCA has failed to comply with EPA regulation 40 C.F.R. § 122.44(d)(1)(2015) and governing Minnesota law by flatly disregarding the reasonable potential of mining pollutants to degrade and impair aquatic life. Minnesota's authority over the NPDES program for mining facilities should be withdrawn due to MPCA's failure to apply narrative standards to mining pollutants and consequent failure to develop WQBEL's in compliance with the CWA and the requirements of EPA regulations. 40 C.F.R. §123.63(a)(2)(ii)(2015).

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[8] Minnesota Pollution Control Agency, *St Louis Watershed Identification Stressor Report,* October 2013 Draft. Report obtained by WaterLegacy through Minnesota Data Practices Act, available on request.

C. The MPCA Uses Variances and Compliance Schedules to Issue Mining Facility Permits that Do Not Comply with the Clean Water Act.

In the few cases in recent years where MPCA has issued NPDES mining permits, MPCA has used variances and schedules of compliance to avoid control of pollutants. Variances are considered to be equivalent to a revision of water quality standards, and must conform to Clean Water Act, 33 U.S.C. § 1313(c)(2)(A)(2015), which requires that revised or new water quality standards set water quality criteria based on the "designated uses of the navigable waters involved," and that "Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. . taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes. . ." *See also* 40 C.F.R. § 131.2(2015).

State variances may not remove an *existing* use of navigable waters, including a use for wild rice or aquatic life that was attained in the water body on or after November 28, 1975. 40 C.F.R. § 131.10(h)(1)(2015); 40 C.F.R. § 131.3(e)(2015). Even where a designated use of waters is *not* an existing use, as defined in federal regulations, a variance may be granted only "if the State can demonstrate that attaining the designated use is not feasible." 40 C.F.R. § 131.10(g)(2015). A state must conduct a use attainability analysis if the state wishes to remove a designated use that is specified in section 101(a)(2) of the Clean Water Act, namely a use pertaining to fish, shellfish, wildlife or recreation. 40 C.F.R. § 131.10(j)(2)(2015).

Minnesota variances routinely exempt mining facilities from compliance with water quality standards. For none of these mining discharge variances, even those involving designated uses pertaining to aquatic life, has the MPCA conducted a use attainability analysis. As with the MPCA's NPDES permits for mining facilities, Minnesota's variances are expired and/or inconsistent with applicable governing law.

Across the State, Minnesota only reports five active variances from water quality standards.[9] Three out of these five, or 60% of Minnesota's active variances from water quality standards, allow mining company facilities to exceed pollution standards. For the Dunka Mine, the last permit issued by the MPCA was on August 3, 2000. It expired on June 30, 2005, more than 8 years ago. That permit (NPDES/SDS permit MN0042579) contains a variance for discharges that are acutely toxic to aquatic life. The permit provides that MPCA can require that a long-closed water treatment plant resume operation if discharge exceeded the variance limits, but such authority has never been exercised. Discharge monitoring reports at Dunka show violations of even the mine's variance conditions, which do not consider chronic toxicity from metals, improperly allow dilution, do not limit specific conductance and do not evaluate toxicity to conductivity intolerant species. WaterLegacy appealed to MPCA in 2009 and 2011 to review the Dunka Mine variance.[10] As shown in Exhibit 4 (Ex. Page 17), although this is an EPA top priority expired permit, no permit or variance revision has been noticed by MPCA.

The United Taconite (UTAC) Thunderbird Mine variance (NPDES/SDS permit MNMN0044946) allows the facility to discharge at pH levels up to 9.3, which exceeds the pH standards in two receiving waters.[11] The variance was apparently last reviewed in 1999. Discharge monitoring reports at the existing UTAC tailings basin show repeated exceedances of Minnesota's water quality standards for specific conductance and total dissolved salts.[12] Seepage from the UTAC tailings basin discharging as much as 20,000 gallons per day (SD001) has consistently exceeded 300 mg/L in sulfate concentration, potentially impacting nearby wild rice

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[9] MPCA, Water Quality Variance, http://www.pca.state.mn.us/index.php/water/water-permits-and-rules/water-rulemaking/water-quality-variance.html, last visited June 18, 2015.
[10] See Exhibit 10, WaterLegacy Letters on Dunka Mine Variance (2009 and 2011)(Ex. Pages 187-201).
[11] Request For Issuance Of A Variance From Agency Rules Regarding pH Water Quality Standards Applicable To Outfalls SD007 And SD009 For NPDES Permit MN044946 Issued to EVTAC Mining For The Thunderbird Mine, MPCA, June 1999.
[12] DMRS, 2000 to 2012, MN0052116 United Taconite Fairlane/Tailings Basin received from MPCA.

lakes identified by the Minnesota Department of Natural Resources.[13] Although the UTAC permit is also an EPA top priority expired permit, no permit or variance revision has been noticed by MPCA. (Exhibit 4, Ex. Page 17).

EPA is familiar with the variance for Mesabi Nugget, which WaterLegacy, the Fond du Lac and Grand Portage Bands of the Lake Superior Chippewa and the Minnesota Center for Environmental Advocacy litigated in Minnesota federal district court, arguing that the variance violated the Clean Water Act and EPA regulations. In response to this litigation, EPA made a motion for remand, and on July 2, 2014, disapproved the Mesabi Nugget variance on the grounds that the variance was not "consistent with applicable requirements of the CWA." EPA requested that the MPCA provide to EPA "methods used, analyses conducted, scientific rationale, and other information demonstrating the appropriateness under all applicable aspects of 40 C.F.R. Part 131 of any variance granted for Mesabi." (Exhibit 11, EPA Disapproval of Mesabi Nugget Variance, July 2, 2014, Ex. Page 202). Although the variance supporting Mesabi Nugget's NPDES permit has been disapproved by EPA for over a year, to date MPCA has neither noticed a new permit nor a variance revision to ensure that Mesabi Nugget operates under conditions that meet CWA and federal regulatory requirements. (Exhibit 4, Ex. Page 17).

MPCA's expired and disapproved mining variances are not sufficient to protect either existing or designated uses, including uses for fish and macroinvertebrate aquatic life and use for the production of natural wild rice, which is a wildlife use pursuant to Minn. R. 7050.0224, Subp. 1. MPCA's mining variances violate the Clean Water Act, 33 U.S.C. § 1313(c)(2)(A) (2015) and federal regulations, including 40 C.F.R. §§ 131.2; 131.10(g), (h) and (j) (2015).

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[13] *Id.* and MDNR, *Natural Wild Rice in Minnesota - A Wild Rice Study document submitted to the Minnesota Legislature by the Minnesota Department of Natural Resources,* February 15, 2008, pp. 79, 81(Perch, Stone, East Stone and Anchor Lake). Available at http://files.dnr.state.mn.us/fish_wildlife/wildlife/shallowlakes/natural-wild-rice-in-minnesota.pdf

In addition, since 1975, despite extensive documentation in discharge monitoring reports of sulfate discharge from mining facilities, MPCA has issued only two NPDES permits purporting to regulate sulfate discharge to wild rice waters. These two permits, issued for the Keetac Mine (NPDES/SDS permit MN0031879) and the Keetac Tailings Basin (NPDES/SDS permit MN0055948) in 2011,[14] contain schedules of compliance for Minnesota's wild rice sulfate standard that do not meet the requirements of the Clean Water Act and its implementing regulations. 40 C.F.R. § 122.47 (2015).

As summarized in a 2007 memorandum from James Hanlon, the Director of the EPA Office of Wastewater Management, after July 1, 1977 NPDES permits may not contain schedules of compliance for effluent limitations implementing water quality standards adopted before July 1, 1977. Even for water quality standards adopted after 1977, compliance schedules must be an "enforceable sequence of actions" that will lead to compliance with the effluent limitation by the end of the compliance schedule. 40 C.F.R.§§122.2; 122.44(d)(1)(vii)(A)(2015). (Exhibit 12, James Hanlon, Director, EPA Office of Wastewater Management, Compliance Schedules for Water-Quality Based Effluent Limitations in NPDES Permits, May 10, 2007, Ex. Pages 204-206)

The Keetac schedules of compliance meet none of the requirements summarized by EPA. Minnesota's wild rice sulfate standard, Minn. R. 7050.0224, Subp. 2 (2015), was promulgated in rule and approved by the EPA in 1973, long before the July 1, 1977 cut-off date. Under EPA's interpretation of governing law, schedules of compliance for Keetac were impermissible. In addition, the Keetac permits do not require compliance with any wild rice sulfate standard WQBEL until August 17, 2018 for non-tailings discharges and August 17, 2019 for tailings

[14] These Keetac NPDES/SDS permits are available in the MPCA Board Packet Oct. 14, 2011 at http://www.pca.state.mn.us/index.php/view-document.html?gid=17044, last visited June 30, 2015.

discharge. (Keetac NPDES permit MN0031879, p. 15). The actions required in the Keetac compliance schedule consist of reports, with no requirement to design, build or operate any controls that would lead to reduction of sulfate effluent by these dates. (*Id.*, pp. 15-17).

MPCA has used variances and compliance schedules at odds with the Clean Water Act and implementing regulations to avoid imposing required effluent limits on mining discharges that cause and contribute to violations of Minnesota's numeric and narrative water quality standards. MPCA's mining facility variances and schedules of compliance provide further evidence that MPCA issues permits that do not conform to the requirements of EPA regulations. 40 C.F.R. §123.63(a)(2)(ii)(2015).

D. The MPCA has Failed to Act on Violations of Permits and Clean Water Act Violations by Mining Facilities.

MPCA has failed to act on violations of NPDES permits and violations of the Clean Water Act by mining facilities even in the most egregious situations. MPCA's unwillingness to control mining pollution in compliance with water quality standards is demonstrated clearly in the history of inaction to control sulfate and hardness pollution from U.S. Steel's Minntac tailings basin.

MPCA has acknowledged unresolved water quality noncompliance issues related to sulfates at the Minntac tailings basin since at least 1987. (Exhibit 13, WaterLegacy Comments Opposing MPCA Section 401 Certification of Minntac Expansion, Jan. 2, 2014, Ex. Pages 212-213, and MPCA Letter to David Johnson, USX, Feb. 16, 2000, attached with Comment, Ex. Page 217). In 2010, an internal MPCA compliance report documented U.S. Steel's repeated violations of hardness and sulfate standards, despite various schedules of compliance. (MPCA, Minntac Tailings Basin Compliance Report, 2010, attached with Comment, Ex. Pages 302-303)

The MPCA report documented more than 281,000 excess pounds of sulfate from 2006 through 2010 and more than 1,365,000 excess pounds of hardness in excess of permitted limits. (*Id.*)

In October 2012, responding to one of the incremental expansion requests at the Minntac tailings basin that required a CWA Section 404 wetlands dredge and fill permit, the EPA wrote, "The NPDES permit for the tailings basin has not been reissued for approximately 25 years. Based on water quality monitoring data collected by U.S. Steel and others, it appears that WQS are being exceeded in receiving waters impacted by the tailings basin." EPA recommended that MPCA complete a NPDES Section 402 permit, a process that "has not been undertaken for discharges from the Minntac tailings basin operation for approximately 25 years," before the U.S. Army Corps of Engineers approve any further expansion. (EPA Letter to Tamera Cameron, USACE, Oct. 22, 2012, attached with Comment, Ex. Page 221).

Despite Minntac's repeated violations of Minnesota water quality standards, MPCA has not only failed to notice and issue a NPDES Section 402 permit to control Minntac tailings discharge, but in 2014 granted U.S. Steel a Section 401 certification for an additional "extension" of the Minntac mine into wetlands, in violation of the Clean Water Act. Under the Act, Section 401 certifications must ensure compliance with effluent limitations, water quality limitations and other appropriate requirements of state law, 33 U.S.C. §1341(d)(2015). Certification must confirm that "that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 C.F.R. §121.2(a)(3)(2015). Minnesota rules also preclude Section 401 certification if a facility does not comply with federal or state pollution control rules or has unresolved compliance issues. Minn. R. 7001.1450, Subp. 1(B); Minn. R. 7001.0140, Subp. 2 (2015).

The Minntac mine expansion did not meet these requirements. The Environmental Assessment Worksheet and U.S. Steel correspondence acknowledged that Minntac's extension would increase the sulfate load to the Sand River Watershed. U.S. Steel also acknowledged that discharges from the mine exceeded Minnesota water quality standards for mercury, hardness and specific conductance and that tailings discharge exceeded Minnesota water quality standards for hardness, sulfates, specific conductance and total dissolved solids. (Exhibit 13, *supra*, WaterLegacy Comments Opposing Minntac Section 401, Ex. Pages 207-213; MDNR, EAW for Minntac Mine Extension, Aug. 1, 2012 attached with Comments, Ex. Pages 250, 266; U.S. Steel Letter to USACE, July 9, 2013 attached with Comments, Ex. Pages 277, 281, 287, 288).

MPCA has also failed to resolve violations at Cliffs mining facilities. On January 25, 2010, the Center for Biological Diversity, Save Lake Superior Association and the Indigenous Environmental Network served notice of their intent to litigate violations of Minnesota water quality standards and the Clean Water Act by Cliffs corporate entities in connection with three separate locations described in NPDES permits MN0042536 (Hoyt Lakes Mine Area), MN0042579 (Dunka Mine), and MN0054089 (Hoyt Lakes/LTVSMC Tailings Facility). (Exhibit 14, Notice of Intent to Sue for Cliffs Violations, Complaint and Consent Decree, Ex. Pages 304-391). MPCA entered into a Consent Decree, foreclosing further pursuit of CWA Section 505 litigation. More than five years have passed, but no monetary penalties have been issued for the noticed violations and, as summarized in Exhibit 4 (Ex. Page 17), none of the three Cliffs permits subject to the MPCA Consent Decree have been placed on public notice, let alone reissued to require conformity with Minnesota water quality standards and the CWA.

MPCA has failed to control Minntac pollution for decades, has certified expansions into wetlands under Section 401 when violations of Minnesota water quality standards and the

applicable permits were undisputed, and has failed to control mining facility violations of water quality standards despite the trigger of Section 505 CWA litigation. MPCA has consistently failed to act on violations of permits by mining facilities, in violation of 40 C.F.R. §123.63(a)(3)(i)(2013).

E. The MPCA has Said it Will Not Regulate Tailings Seepage under the Clean Water Act even where there is a Hydrologic Connection to Surface Waters.

MPCA has not only delayed in issuance of a permit for the Minntac tailings facility (NPDES permit MN0057207), but has indicated in its pre-publication draft permit and the "fact sheet" for this draft permit that the Agency does not intend to regulate seepage from tailings as discharge under the Clean Water Act. (Exhibit 8, MPCA Minntac NPDES "Fact Sheet," Ex. Pages 93-95).

The CWA requires control of groundwater pollution under the Section 402 NPDES program where there is a hydrological connection between groundwater and surface waters. *Hawaii Wildlife Fund v. County of Maui*, 24 F. Supp. 980 (D. Haw. 2014). The connection between the Minntac tailings seepage and surface waters is unequivocal. The Minnesota Department of Natural Resources (MDNR) Minntac sulfate isotopes report found:

> Sulfate concentration at many of the downgradient locations were higher than expected based on the applied dilution effect . . .We calculate that up to 600 mg/L of "extra" sulfate is present in waters surrounding the basin, demonstrating that the oxidation of sulfide minerals in tailings does impact the sulfate concentration of seepage into both the Sand and Dark River watersheds. . .
>
> Most of the water stored in the Cell 1 and Cell 2 pools is cycled back to the plant for use in processing. A portion, however, seeps from the bottom of the basin and through the perimeter dike into the surrounding watersheds, namely the Sand River watershed to the east of the basin and the Dark River watershed to the west. The concentration of dissolved sulfate is elevated in the Tailings Basin pool waters, and thus the seepage water that discharges into the Sand and Dark River watersheds is elevated as well.[15]

[15] M. Kelly, M. Berndt, and T, Bavin, *Use of sulfate and water isotopes to improve water and chemical balance estimates for water seeping from tailings basins* (focus on US Steel's Minntac Basin), August 28, 2014, p. 3 and p. 9, available at http://files.dnr.state.mn.us/lands_minerals/reclamation/kelly_et_al_2014.pdf.

EPA has already expressed concern that the MPCA's proposed Minntac tailings NPDES permit would not comply with Clean Water Act NPDES program requirements to regulate tailings discharges at the point where they daylight to surface water. EPA Region 5 NPDES Programs Branch Chief commented on the Minntac pre-publication draft permit:

> We are concerned that this draft permit as written does not address, under MPCA's approved National Pollutant Discharge Elimination System (NPDES) program and in accordance with the Clean Water Act (CWA), all discharges to surface waters from this tailings basin. MPCA acknowledges in the fact sheet that discharges from this 8,000 acre tailings basin are causing exceedances of surface water quality standards. Based on this and facts supporting this conclusion, the CWA requires an NPDES permit for all such discharges to surface waters from the tailings basin. The original NPDES permit, which was issued in 1987, did not contemplate the full extent of the discharges to surface water from this facility. In the years between expiration of that permit and today the discharges to surface waters have continued and are better understood. (Exhibit 15, K. Pierard, EPA Region 5 NPDES Programs Branch Chief, Comment on Minntac Pre-publication Draft Permit, Dec. 19, 2014, Ex. Page 392).

Regulation of tailings seepage connected to surface waters is an indispensable requirement of the Clean Water Act NPDES program. MPCA's unwillingness to comply with this NPDES program requirement provides yet another justification for withdrawal of delegated authority for mining permits, pursuant to 40 C.F.R. §123.63(a)(3)(i)(2015).

II. THE MINNESOTA LEGISLATURE HAS DEPRIVED THE MPCA OF LEGAL AUTHORITY NEEDED TO IMPLEMENT THE CLEAN WATER ACT.

The Legislature Recently Prohibited MPCA from Enforcing Minnesota's Wild Rice Sulfate Standard or Listing Wild Rice Impaired Waters.

This session, despite knowledge that the EPA considered such legislation to conflict with the Clean Water Act and implementing regulations, the Minnesota Legislature enacted laws precluding MPCA from enforcing the wild rice sulfate standard. Previously, in 2011, the Minnesota Legislature, at the urging of the Minnesota Chamber of Commerce and its mining

industry members, considered bills that would weaken Minnesota's existing water quality standard that sets a limit of 10 milligrams per liter (mg/L) of sulfate in waters used for the production of wild rice or suspend operation of this standard pending rulemaking proceedings to change the standard.

EPA Region 5 was asked by legislative authors to comment on these bills and responded with a letter stating that proposals to prevent MPCA from including sulfate limitations in permits until a new standard is developed would conflict with the Clean Water Act and federal regulations, as would a state permit that "either fails to apply, or to ensure compliance with, any applicable requirement, including WQBELs." (Exhibit 16, T. Hyde, EPA Region 5, Water Division Director, Sulfate Standard Letter, May 13, 2011, Ex. Pages 394-395).

In 2011, the Minnesota Legislature then reconsidered and passed a law beginning the process of research to determine whether a change in the sulfate standard that protects wild rice was warranted. Four years ago, although the Legislature sought to minimize costs for sulfate treatment, the law it enacted respected the requirements of federal law, providing "to the extent allowable under the federal Clean Water Act or other federal laws, the Pollution Control Agency shall exercise its authority under federal and state laws and regulations to ensure, to the fullest extent possible, that no permittee is required to expend funds for design and implementation of sulfate treatment technologies." (Exhibit 17, 2011 Minn. Laws 1st Spec. Sess. ch. 2, art. 4, § 32(e), Ex. Page 396, emphasis added).

In 2015, in a climate of increasing mining industry influence, the Minnesota Legislature again considered laws to suspend the operation of the wild rice sulfate standard. Although testifiers reminded legislators of the EPA's May 2011 comment that state laws must conform to

the CWA and federal regulations,[16] this time the Legislature proceeded to preclude the MPCA from requiring any sulfate mitigation that would impose costs on permittees, irrespective of what may be required under federal law. As adopted, the new Minnesota law states that, until the MPCA amends its wild rice sulfate standard, Minn. R. 7050.0224, Subp. 2, unless the permittee itself requests conditions, "the agency shall not require permittees to expend money for design or implementation of sulfate treatment technologies or other forms of sulfate mitigation." There is no qualifier requiring compliance with the Clean Water Act. (Exhibit 18, 2015 Minn. Laws 1st Spec. Sess. ch.4, art 4, § 136(a)(1)(i), Ex. Page 398).

In addition, in 2015, the Minnesota Legislature prohibited the MPCA from listing waters impaired for wild rice as a result of violation of Minnesota's wild rice sulfate standard. As WaterLegacy learned through Minnesota Data Practices Act requests, in response to EPA and public comments on the 2012 section 303(d) list, in 2013 MPCA began identifying wild rice waters impaired due to elevated sulfate. By August 2013, MPCA had a preliminary list, which mining interests, including U.S. Steel, lobbied to forestall until new wild rice rules were promulgated. (Exhibit 19, MPCA Wild Rice Impaired Waters Documents, Aug. – Nov. 2013, Ex. Pages 399-414). Despite a 2014 timeline promised by MPCA, no Minnesota wild rice impaired waters list has been released to date.

Now, the mining industry lobbying position has become law. Along with prohibiting sulfate treatment or mitigation costs to comply with the sulfate water quality standard, Minnesota's 2015 laws also prohibit the MPCA from complying with section 303(d) of the Clean Water Act, 33 U.S.C. §1313(d), stating, "the agency shall not list waters containing natural beds

[16] WaterLegacy's testimony reminding the Legislature of EPA's 2011 advice on Clean Water Act requirements is available at http://www.waterlegacy.org/sites/default/files/docsWL/WaterLegacyTestimony,MaterialsHF1000_2-24-15.pdf and https://www.youtube.com/watch?v=fnlcWzly4-k.

of wild rice as impaired for sulfate" until rulemaking to change the wild rice water quality standard is completed. (Exhibit 18, 2015 Minn. Laws 1st Spec. Sess. ch.4, art 4, § 136(a)(2), Ex. Page 398).

Minnesota law now protects the mining industry by striking down and limiting the MPCA's ability to require permittees to comply with Minnesota's existing EPA-approved sulfate standard or to list waters impaired for wild rice due to sulfate discharge. As a result, Minnesota's legal authority no longer meets the requirements of EPA regulations. 40 C.F.R. §123.63(a)(1)(ii)(2015).

III. MINING INTERESTS UNDULY INFLUENCE MINNESOTA IN SETTING AND ENFORCING WATER QUALITY STANDARDS.

The influence of mining interests on Minnesota's ability to impose regulatory requirements that protect Minnesota waters from mining pollution is widespread and pervasive. This influence has affected the MPCA's interpretation of the research funded by the State of Minnesota since 2011 to evaluate the existing wild rice sulfate standard. In February 2014, the MPCA had prepared a summary of its findings and recommendations based on this recent wild rice sulfate standard research. MPCA's summary concluded that sulfide, not sulfate, was directly toxic to wild rice. MPCA further concluded that Minnesota's existing wild rice sulfate standard was needed, reasonable and should be enforced, stating: "The 10 mg/L sulfate standard is needed and reasonable to protect wild rice production from sulfate-driven sulfide toxicity. . .The 10 mg/L wild rice sulfate standard should continue to apply to both lakes and streams." (Exhibit 20, Wild Rice Sulfate Standard – Summary of Findings and Preliminary Recommendations Legislative Briefing Document, Feb. 2014, Ex. Page 415).

MPCA's February 2014 Wild Rice Standard Summary was never released to the public; WaterLegacy obtained this and other documents through a Minnesota Data Practices Act request. Internal documents reveal that MPCA first presented its findings and recommendations to a small group of Iron Range legislators. A February 26, 2014 email from the Governor's staff reported that the "meeting with range legislators went poorly" and the issue "became a big deal" that was "blowing up" as a result. A phone conference was set with the Governor, the MPCA Commissioner and a cabinet member representing Iron Range economic development interests.[17] Later that evening, the MPCA communicated to others, including legislators, the wild rice researchers and the MPCA's Wild Rice Advisory Committee that the MPCA "thought we would be ready to release preliminary findings on the wild rice sulfate standard on Thursday, but we are not." (Exhibit 21, Governor Staff and MPCA Wild Rice Standard Emails, Feb. 26, 2014, Ex. Pages 420-427). Since February 26, 2014, none of MPCA's proposals or analyses have stated that Minnesota's existing 10 mg/L wild rice sulfate standard is needed, reasonable or should be applied to lakes and streams.

In 2015, as the iron and steel industries experienced falling prices and lay-offs, the pressure from mining interests increased. In an interview with Minnesota Public Radio posted on line, Governor Mark Dayton explained that MPCA would soon present an alternative to preserving and enforcing the 10 mg/L wild rice sulfate standard. (Exhibit 22, Transcript of MPR Interview with Gov. Dayton Mar. 29, 2015 and Affidavit of Transcription, Ex. Pages 428-431). In this interview, the Governor said, with no apparent irony, that U.S. Steel had made it clear they would not agree to a permit applying the existing wild rice sulfate standard:

> U.S. Steel has made it very clear they're not going to — and they closed down the Keewatin plant, they're still operating the Minntac plant — but they made it very clear they're not going to agree to a permit that has the standard of 10 [10 milligrams per liter]

[17] Tony Sertich, Iron Range Resources and Rehabilitation Board, an official with no scientific or regulatory role.

> which was set in, by science — was posted in 1940, and established in the 1960s and 70s as the standard, which is not applied to most other projects in Minnesota or anywhere else in the country. (*Id.*, Ex. Page 428)

When a state's governor suggests that a regulated party may reject compliance with an applicable water quality standard, that state cannot provide effective CWA regulatory authority.

The political pressure on MPCA preventing Minnesota from operating a regulatory program in compliance with the Clean Water Act cannot be overstated. In addition to the specific laws prohibiting enforcement of the wild rice sulfate standard and listing of wild rice waters, as described above, the 2015 Minnesota Legislature enacted several other provisions protecting mining interests and demonstrating the risks to any executive officials who might question mining projects. The Legislature exempted copper-nickel mining projects, like the PolyMet NorthMet project, from permitting under Minnesota solid waste rules. (Exhibit 23, 2015 Minn. Laws 1st Spec. Sess. ch.4, art 4, § 119, Ex. Page 431)[18] Prior to this exemption, it is likely that Minnesota law would have required the PolyMet hydrometallurgical residue facility to obtain an industrial solid waste permit under Minnesota Rules, Chapter 7035, even if hydrometallurgical waste were not classified as hazardous. MPCA's permit rules preclude siting a solid waste facility on top of wetlands, among other requirements. Minn. R. 7045.0460, Subp. 2; Minn. R. 7035.1600 (2015).

In 2015, the Minnesota Legislature also abolished the Agency Board of the MPCA, where opponents of an NPDES permit, including mining permits, would have had a right to a public

[18] Although the session law is opaque, the referenced provisions that previously only applied to *ferrous* mining are: first, Minn. R. 7001.3050, Subp. 3(2015), stating, "The owner or operator of a facility described in items A to H is deemed to have obtained a solid waste management facility permit without making application for it," where item G defines waste "from the exploration, mining, milling, smelting, and refining of ores and minerals." Second, Minn. R. 7035.2525, Subp. 2(2015) provides: "Exceptions. Parts 7035.2525 to 7035.2915 do not apply to the following solid waste management facilities or persons." Item G of this subpart also refers to mining wastes.

hearing and an independent review of staff decisions.[19] (Exhibit 24, 2015 Minn. Laws 1st Spec. Sess. ch.4, art 4, §§ 114-117, 149-150, Ex. Pages 432-433). The Legislature also allowed counties to circumvent the State Auditor in obtaining audits, effectively defunding this Minnesota constitutional office, the elected leader of which was the sole vote in Minnesota's Executive Council against approval of non-ferrous mineral leases. (Exhibit 25, 2015 Minn. Sess. Laws ch. 77, art. 2, § 3, Ex. Pages 434-435).

Commentators across Minnesota's political spectrum share the perception that Iron Range and mining industry influence dominated Minnesota's legislative session this year. (Exhibit 26, Minnesota Media Commentary, June 2015, Ex. Pages 436-445). Pro-mining news media celebrated that "results for the Range were huge," including eliminating the citizens' board that "would have had the authority to delay the PolyMet project." (*Id.*, Bill Hanna, "Range wins big by not losing," *Mesabi Daily News,* Ex. Page 438). An environmental leader concluded that, like poorly run governments in Africa and South America, Minnesota's government had "proven itself helpless" to resist mining industry demands. (*Id.*, Don Arnosti, "Environmental View: Minnesota officials bowing to demands of mining companies," *Duluth News Tribune,* Ex. Page 442). Former State Auditor and Governor, Republican Arne Carlson, called the defunding of the Auditor's office "an effort to intimidate an elected official" who had expressed opposition to copper-nickel leases and "instantly became a political target for the Iron Range legislators." (*Id.*, Arne Carlson, "Raw Politics and the Office of State Auditor," *Blogspot,* Ex. Pages 443-444). The *Star Tribune* editorial board expressed concern that legislators had "sent an alarming warning to anyone in years to come who challenges powerful interests such as agriculture and mining: Those who ask hard questions should expect political payback." (*Id.*, "Legislature 2015:

[19] It is unclear to WaterLegacy whether or how MPCA will comply with 40 C.F.R. §§ 124.11, 124.12 and 124.13 (2015) public hearing requirements under the CWA now that the Agency Board has been abolished.

Special interests win, environment loses with ag bill," *Star Tribune,* Ex. Page 445). Former assistant commissioner of the MPCA, Ron Way, summarized, "What really happened this year was that Iron Range legislators saw an opportunity to send yet another pointed message to everyone in government that there's a political price for saying or doing anything that even hints of opposition to long-planned copper-nickel mining in northern Minnesota." (*Id.*, Ron Way, "Iron Range legislators: Cross us at your own risk," *Star Tribune,* Ex. Page 436).

The MPCA's failures to provide an adequate regulatory program for mining facilities in conformity with the Clean Water Act are an expression of Minnesota's broader failure to preserve the authority to regulate mining facilities in compliance with the CWA. In a state where mining special interests can dictate whether they will comply with water quality standards, what standards will apply, and even whether administrative entities will remain standing if they dare to question mining projects, the EPA must step in and withdraw water quality permitting authority to protect beneficial uses of waters of the United States from mining pollution.

CONCLUSION

The Clean Water Act requires state programs to comply with requirements to set water quality standards, control pollution through water quality-based effluent limits in NPDES permits that ensure compliance with both numeric and narrative standards, enforce permits to require control of pollutants, and regulate pollutants in compliance with the Clean Water Act. 33 U.S.C. §1342(b)(2015).

Minnesota fails to meet the requirements of the CWA in regulating mining facility pollution. The MPCA has consistently failed to issue timely and current NPDES permits for mining facilities, failed to conduct a reasonable potential analysis to determine whether mining pollutants violate narrative standards, improperly used variances and schedules of compliance

that do not conform the CWA, failed to act on permit and CWA violations by mining companies, and has taken the position that it will not regulate mine tailings seepage, in violation of the CWA.

Further, in the 2015 legislative session, Minnesota enacted laws preventing the MPCA from enforcing the wild rice sulfate standard and preventing the MPCA from listing wild rice waters impaired due to sulfate. Mining industry undue influence over setting and enforcement of water quality standards and even over the existence of administrative authority itself, infects Minnesota's will and capacity to administer an NPDES program for mining facilities in accordance with the Clean Water Act. Withdrawal of Minnesota's NPDES permit program for mining facilities is clearly justified according to the criteria set forth in EPA regulations. 40 C.F.R. §123.63(a)(1)(ii), (a)(2)(i), (a) (2)(ii), (a) (3)(i) and (a)(5)(2015).

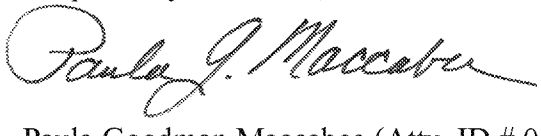
The Clean Water Act states that where EPA determines that a state is not administering its program in a manner that conforms to the Act, EPA must inform the state, request corrective action, and proceed with withdrawing approval of the state program if corrective action is not taken within 90 days of EPA's request. 33 U.S.C. § 1342(c)(3) ("Whenever the Administrator determines . . . that a State is not administering a program . . . in accordance with requirements of this section, he *shall* so notify the State and, if appropriate corrective action is not taken . . . the Administrator *shall* withdraw approval of such program.") (emphasis added). When state violations of permit conditions "are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively," the Administrator must notify the state and the public and require corrective action or withdraw delegated authority. *See* 33 U.S.C. § 1319(a)(2)(2015). *Save the Valley II*, *supra*, 223 F. Supp. 2d at 1000-1001.

Unlike cases challenging a state's allegedly improper issuance of a specific permit -- see e.g. *Del. County Safe Drinking Water Coalition v. McGinty*, 2007 U.S. Dist. LEXIS 88021(E.D. Pa., Nov. 27, 2007) -- Minnesota's failures to regulate mining pollutants under the CWA cannot be addressed in an administrative appeal from a disputed decision. Since MPCA has consistently failed to issue NPDES permits for mining facilities despite its written agreement with EPA, in most Minnesota cases there are no regulatory actions from which an appeal could be taken. In addition, Minnesota's failures to regulate mining pollution in conformity with the Clean Water Act and federal regulations are not singular decisions, but pervasive deficiencies reflected throughout its state government.

Because MPCA's NPDES program for mining facilities does not comply with federal requirements and because Minnesota laws, practices and politics prevent the MPCA from properly implementing its federal delegated authority, WaterLegacy respectfully requests that the EPA initiate proceedings under 40 C.F.R. § 123.64(2015) to investigate, conduct hearings and identify the deficiencies in Minnesota's program to control mining facility water pollution. Unless Minnesota remedies its many deficiencies within 90 days, WaterLegacy further requests that the EPA withdraw all Minnesota authority to implement water quality programs for mining facilities under the Clean Water Act.

Date: July 2, 2015

Respectfully submitted,



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