

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

WaterLegacy,

Plaintiff,

v.

United States Environmental Protection Agency; United States Environmental Protection Agency Region 5; Robert Perciasepe, in his official capacity as Acting Administrator of the United States Environmental Protection Agency; and Susan Hedman, in her official capacity as Administrator of the United States Environmental Protection Agency Region 5,

Case No. 13-cv-1323

Honorable _____

Defendants.

COMPLAINT

INTRODUCTION

1. This is an action for declaratory and injunctive relief pursuant to the Clean Water Act (“CWA”), and the Administrative Procedures Act (“APA”), 5 U.S.C. §§ 701-706. Under the CWA, 33 U.S.C. § 1313(c), the United States Environmental Protection Agency (“EPA”) must approve or deny approval of variances granted by states with delegated authority, since variances are considered time-limited changes to a water quality standard.

2. The Minnesota Pollution Control Agency (“MPCA”) is the Minnesota state agency charged with administration of the state’s water quality program under the CWA, including proposing changes to water quality standards.

3. On December 27, 2012, EPA Region 5 approved the MPCA’s request for a variance from state water quality standards for Mesabi Nugget Delaware, LLC—Hoyt Lakes,

Minnesota on Permit No. MN0067687 (“EPA Variance Approval” attached as Exhibit A).

4. WaterLegacy argues that the EPA Variance Approval for Mesabi Nugget is arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law and that this approval violated the CWA and implementing federal regulations.

5. WaterLegacy submitted comments to EPA raising all issues presented in this Complaint and appealed the EPA Variance Approval to the EPA Environmental Appeals Board (“EAB”), which determined on March 19, 2013 that it lacked jurisdiction to review the Region 5 Variance Approval (“EAB Jurisdiction Order” attached as Exhibit B).

PARTIES

6. WaterLegacy is a Minnesota non-profit 501(c)(3) corporation formed in 2009 under Minnesota law with a mission to protect Minnesota water resources and the communities that rely on them, particularly from threats posed by mining pollution. WaterLegacy has over 4,300 members, many of whom live in Northeastern Minnesota.

7. WaterLegacy’s individual members canoe, kayak, gather wild rice and fish in receiving waters downstream of the discharge from the Mesabi Nugget iron nugget plant to which the Mesabi Variance would apply, including Second Creek, the Partridge River and the St. Louis River and observe and hunt waterfowl and wildlife that depend on the aquatic ecosystems of these water bodies. The approval of the Mesabi Variance has resulted and would result in direct injury to WaterLegacy’s members in their beneficial use of receiving waters downstream of the Mesabi Nugget plant.

8. In addition to comments submitted by WaterLegacy in proceedings before the MPCA and the EPA, approximately 170 citizen members of WaterLegacy submitted letters or emails opposing the Mesabi Variance.

9. EPA is the agency of the federal government responsible for approving or disapproving state implementation of various provisions of the CWA and applicable regulations, including those pertaining to variances from state water quality standards.

10. Robert Perciasepe, in his official capacity as Acting Administrator of the EPA has authority under 33 U.S.C. § 1313(c) and 40 C.F.R. § 131.5 to approve or disapprove proposed variances from State water quality standards based on a determination whether they are consistent with the CWA and regulations promulgated under the Act, including those pertaining to Great Lakes States.

11. Region 5 of the EPA is responsible for approving or disapproving state implementation of various provisions of the CWA and applicable regulations in Minnesota, including those pertaining to variances from Minnesota water quality standards.

12. Susan Hedman, in her official capacity as Regional Administrator of EPA Region 5, has authority under 40 C.F.R. § 131.21 to approve or disapprove variances from Minnesota water quality standards based on the requirements of the CWA and regulations promulgated under the Act, including those pertaining to Great Lakes States.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 704 and a federal question is presented under 28 U.S.C. § 1331 since WaterLegacy claims arise under federal laws, including the APA and the CWA.

14. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b)(2) and (e)(1)(B) because this is a civil action naming a federal agency and its administrators in their official capacities and a substantial part of the events or omissions giving rise to the claim occurred in Minnesota, including Mesabi Nugget's application for a variance, the MPCA's grant of the

variance, Mesabi Nugget's discharge of polluted wastewater from its iron nugget production facility, and exceedances of Minnesota water quality standards in waters of Minnesota as a result of this discharge, including Second Creek, the Partridge River and the St. Louis River.

15. This petition is timely filed within six years of the issuance of the EPA Variance Approval, as required by 28 U.S.C. § 2401(a).

16. The EPA Variance Approval constitutes final agency action pursuant to 33 U.S.C §1313(c)(3), and no further administrative review is available.

LEGAL STANDARDS

17. The APA provides, 5 U.S.C. § 706(2), that a reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

18. Section 101(a)(2) of the CWA, 33 U.S.C. § 1251(a)(2) states that the objective of the Act is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters, and that it is the national goal wherever attainable to achieve water quality “which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.”

19. The CWA at 33 U.S.C. §§ 1311(a) and 1342(a)(1) prohibits point sources like the Mesabi Nugget iron nugget plant from discharging any pollutant to waters of the United States unless the discharge is authorized by a permit in compliance with water quality standards.

20. Section 303(c)(2)(A) of the CWA, 33 U.S.C. § 1313(c)(2)(A), requires the EPA to review and either approve or disapprove any new or revised state water quality standards before they can become effective:

Such revised or new water quality standards shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such

uses. 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. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

21. Federal regulations at 40 C.F.R, Part 131 require that states adopt water quality standards to “serve the purposes of the Clean Water Act.” As explained in 40 C.F.R. §131.2:

Serve the purposes of the Act’ (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.

22. Variances to state water quality standards for an individual facility are considered by the EPA equivalent to a revision of a state water quality standard under Section 303(c) of the CWA and under 40 C.F.R. Part 131 and, thus, must be approved or disapproved by EPA.

23. Pursuant to 40 C.F.R. § 131.5, state water quality standards or variances cannot be approved by the EPA unless the EPA has determined that the proposed standards are consistent with the CWA, with 40 C.F.R. § 131.6 and, for Great Lakes States, are also consistent with 40 C.F.R. Part 132.

24. Further, 40 C.F.R. § 131.10(b) requires that in designating uses of a water body and the appropriate criteria for those uses, the State “shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.”

25. Under 40 C.F.R. §131.12(a)(1), “Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.”

26. State water quality standards may not be revised or variances granted if such

changes remove an *existing* use of waters, 40 C.F.R. § 131.10(h). Existing uses under 40 C.F.R. § 131.3(e) “are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.”

27. State water quality standards or proposed variances may remove a “designated” use which is *not* an existing use use under limited circumstances. 40 C.F.R. § 131.10(g). Designated uses “are those uses specified in water quality standards for each water body or segment whether or not they are being attained.” 40 C.F.R. § 131.3(f)

28. A State may remove a designated use, which is *not* a use attained in the water body on or after November 25, 1975, only “if the State can demonstrate that attaining the designated use is not feasible” because of reasons specified in 40 C.F.R. § 131.10(g), including

(3) Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place.

29. EPA guidance published in the Federal Register when this regulation was promulgated explained that the exception for “human caused conditions” under 40 C.F.R. §131.10(g)(3) was intended to allow flexibility where small dischargers impacted by ubiquitous pollutants could not prove widespread economic harm, not to permit “bootstrapping” by dischargers whose past or present activities cause non-attainment of water quality standards.

30. Pursuant to 40 C.F.R. 131.10(j)(2), 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 Act, namely a use pertaining to fish, shellfish, wildlife or recreation.

31. Section 118 of the Clean Water Act (CWA) requires the EPA to promulgate Water Quality Guidance for the Great Lakes. 33 U.S.C. § 1268(c)(2). The Guidance must contain "numerical limits on pollutants in ambient Great Lakes waters to protect human health,

aquatic life, and wildlife," as well as "minimum water quality standards, antidegradation policies, and implementation procedures." The EPA published Proposed Water Quality Guidance for the Great Lakes System on April 16, 1993 and Final Water Quality Guidance for the Great Lakes System on March 23, 1995.

32. Under 40 C.F.R. § 132.5(g)(3), to be "consistent with" Great Lakes Water Quality Guidance, a State methodology, policy or procedure must be at least as protective as the Guidance.

33. Procedure 2 of Appendix F to 40 C.F.R. Part 132(B) provides a maximum timeframe for variances from water quality standards in Great Lakes States:

The Great Lakes States or Tribes may adopt water quality standards (WQS) variance procedures and may grant WQS variances for point sources pursuant to such procedures. Variance procedures shall be consistent with (as protective as) the provisions in this procedure. . .

Maximum Timeframe for Variances. A WQS variance shall not exceed five years or the term of the NPDES permit, *whichever is less*. A State or Tribe shall review, and modify as necessary, WQS variances as part of each water quality standards review pursuant to section 303(c) of the CWA.

34. Under 40 C.F.R. § 132.4, Great Lakes States may have discretion not to apply Procedure 2 of Appendix F, 40 C.F.R. Part 132 in establishing controls on the discharge of pollutants specifically listed in Table 5 of Part 132. However, bicarbonates, hardness and specific conductance are not listed in Table 5. Case law and EPA guidance published in the Federal Register further state that discretion to deviate from Appendix F applies only to methodologies and procedures that are not technically appropriate for listed pollutants.

35. Wild rice is both an agricultural and a wildlife use under Minnesota law. Minnesota Rule 7050.0224, subpart 1, states that wild rice is protected for human harvest and wildlife uses under the numeric and narrative water quality standards of the rule:

The numeric and narrative water quality standards in this part prescribe the qualities or properties of the waters of the state that are necessary for the agriculture and wildlife designated public uses and benefits. Wild rice is an aquatic plant resource found in certain waters within the state. The harvest and use of grains from this plant serve as a food source for wildlife and humans. In recognition of the ecological importance of this resource, and in conjunction with Minnesota Indian tribes, selected wild rice waters have been specifically identified [WR] and listed in part 7050.0470, subpart 1. The quality of these waters and the aquatic habitat necessary to support the propagation and maintenance of wild rice plant species must not be materially impaired or degraded. If the standards in this part are exceeded in waters of the state that have the Class 4 designation, it is considered indicative of a polluted condition which is actually or potentially deleterious, harmful, detrimental, or injurious with respect to the designated uses.

36. Minnesota Rule 7050.0224, subpart 2 provides the following water quality standards for variance pollutants in Class 4A waters: total dissolved salts -- 700 milligrams per liter (“mg/L”); bicarbonates (HCO_3) -- 5 milliequivalents per liter (equivalent to 250 mg/L); and specific conductance -- 1,000 micromhos/centimeter (“ $\mu\text{hos/cm}$ ”). Minnesota Rule 7050.0223, subpart 4 provides a water quality standard for hardness of 500 mg/L for Class 3C waters.

37. Minnesota Rule 7050.0140, subp. 3 provides that Class 2 waters for aquatic life and recreation include “all waters of the state that support or may support fish, other aquatic life, bathing, boating, or other recreational purposes and for which quality control is or may be necessary to protect aquatic or terrestrial life or their habitats or the public health, safety, or welfare.”

38. Minnesota Rule 7050.0140, subp. 5 provides that Class 4 waters, agriculture and wildlife, include “all waters of the state that are or may be used for any agricultural purposes, including stock watering and irrigation, or by waterfowl or other wildlife.”

39. Minnesota Rules state that classifications of waters “should not be construed to be in order of priority, nor considered to be exclusive or prohibitory of other beneficial uses,” Minn.

R. 7050.0140, subp. 1. All surface waters are protected for multiple beneficial uses. If water quality standards are exceeded, “it is considered indicative of a polluted condition which is actually or potentially deleterious, harmful, detrimental, or injurious with respect to designated uses or established classes of the waters of the state.” Minnesota Rule 7050.0220, subp. 1.

BACKGROUND FACTS GIVING RISE TO CLAIMS

40. The Mesabi Nugget iron nugget production facility was originally permitted under NPDES/SDS permit MN0067687 issued to Mesabi Nugget, LLC and Steel Dynamics, Inc. on July 29, 2005.

41. The 2005 permit granted the Mesabi Nugget facility variances from Minnesota water quality standards for total dissolved salts (TDS), bicarbonates, specific conductance and hardness.

42. In the variance granted to Mesabi Nugget in July 2005, the MPCA required a commitment from Mesabi Nugget to remediate existing pollution in Area 1 Pit to return water quality to its natural background levels within three to five years and required that remediation to natural conditions be completed before Mesabi Nugget started iron nugget production.

43. Mesabi Nugget has not remediated Area 1 Pit water, but since 2010 has produced iron nuggets from ore, with a total operating capacity of 600,000 metric tons per year.

44. The Mesabi Nugget facility pumps the effluent that is the subject of this Complaint from the Area 1 Pit through Outfall SD001 to Second Creek.

45. Second Creek has a low flow (7Q10) of zero. For much of the year, “flow in Second Creek consists solely or primarily of the Area 1 pit discharge” (Exhibit A, p. 8), magnifying the effects of effluent on downstream waters.

46. Second Creek is a Class 2B, 3C, 4A, 4B, 5 and 6 water and is classified for the

protection of aquatic life and recreation, industrial use, agriculture and wildlife, aesthetic enjoyment and navigation, and other uses, and is an Outstanding International Resource Water under Minnesota Rule 7052.0010, subp. 34.

47. Second Creek flows into the Partridge River, which is a tributary to the St. Louis River, the largest tributary to Lake Superior. The Partridge River and the St. Louis River are Class 2B, 3C, 4A, 4B, 5 and 6 waters.

48. Second Creek, the Partridge River and the St. Louis Rivers are waters of the State of Minnesota and waters of the United States. These waters are also within the Lake Superior Basin and subject to regulations pertaining to Great Lakes waters.

49. After the 2005 variance expired on June 30, 2010, Mesabi Nugget voluntarily ceased discharging because the MPCA had not extended its water quality variances.

50. In June 2010, Steel Dynamics, Inc. and Mesabi Nugget, LLC jointly applied to the MPCA for a variance, requesting a “continuation of the variances from these water quality standards for the 5-year term of the reissued permit.”

51. On February 24, 2011, the MPCA issued a modification of permit MN0067687 to Mesabi Nugget, LLC and Steel Dynamics, Inc. setting limits for total dissolved salts (“TDS”), bicarbonates, specific conductance and hardness consistent with the water quality standards in Minnesota Rules. The variance granted by the MPCA in October 2012 and approved by EPA in December 2012 replaces these more stringent permit limitations.

52. On January 30, 2012, the MPCA provided public notice of its intent to issue to Mesabi Nugget variances from compliance with Minnesota water quality standards for total dissolved salts (TDS), bicarbonates, specific conductance and hardness. This draft permit proposed indefinite variances with no time limit.

53. Analysis by the MPCA in its November 2011 Variance Issue Statement demonstrated that granting the requested Mesabi Nugget variances would remove existing beneficial uses from Second Creek, the Partridge River and the St. Louis River.

54. In 2009 and 2010, when Mesabi Nugget was discharging pollutants to Second Creek in excess of water quality standards (as allowed under its 2005 variance) the Creek upstream of Mesabi Nugget's discharge met Minnesota standards for total dissolved salts, but downstream of Mesabi Nugget's discharge violated Minnesota's 700 mg/L water quality standard for TDS.

55. MPCA acknowledged in its November 2011 Variance Issues Statement that Mesabi Nugget variances would remove existing uses from the Partridge and St. Louis Rivers under low flow conditions, since these waters would no longer meet water quality standards:

[T]he SD001 discharge when considered alone was projected to result in standards continuing to be exceeded in Second Creek for all four variance parameters and exceedances being extended to Partridge River for TDS and specific conductance. When contributions from the Area 6 Pit were included in the 7Q10 low flow evaluation, exceedance of standards for hardness, TDS and specific conductance could extend into the St. Louis River.

56. Mesabi Nugget's studies evaluating water quality in its pits and discharge connected high levels of total dissolved salts, associated conductivity and sulfates to observed intermittent aquatic toxicity to the test endpoint species *C. dubia*. Contrary to EPA guidance, no whole effluent toxicity tests were conducted on any plant species.

57. EPA Region 5 in its February 29, 2012 comments stated that it appeared that the proposed limits on variance pollutants "would not protect existing aquatic life uses" and that "the final variance must ensure protection of existing life uses."

58. No use attainability analysis was performed for Second Creek, the Partridge River or the St. Louis River.

59. Mesabi Nugget's studies concluded that reverse osmosis was a feasible and an established technology with "multiple commercial installations." Its consultants verified that reverse osmosis is "widely commercially available, having a number of large-scale installations which can reliably produce treated water that could meet the water quality standards."

60. Mesabi Nugget's analysis of the water quality treatment concluded that the Mesabi Nugget iron nugget plant is the primary source of solute loads for variance pollutants.

61. On October 23, 2012, the MPCA Citizens' Board approved the MPCA's proposed findings, permit and variance. That variance ("Mesabi Variance") allowed Mesabi Nugget to discharge pollutants from Outfall SD001 at the following levels in excess of Minnesota water quality standards until August 1, 2021: total dissolved salts (TDS) 1228 mg/L monthly maximum and 1160 mg/L monthly average; bicarbonates (HCO_3) - 378 mg/L monthly maximum and 362 mg/L monthly average; specific conductance – 1965 $\mu\text{hos/cm}$ monthly maximum and 1189 $\mu\text{hos/cm}$ monthly average; and hardness 863 mg/L monthly maximum and 831 mg/L monthly average.

62. In its findings granting the variance, MPCA determined that whole effluent toxicity testing of the Area 1 Pit water discharged by Mesabi Nugget demonstrated intermittent chronic toxicity to *C. dubia*, resulting in a reduction in the number of young per bearing female.

63. In other ecoregions impacted by mining, EPA has set limitations on conductivity at 300 $\mu\text{hos/cm}$ to protect aquatic life from salt mixtures that elevate conductivity. EPA has also stated on its website that specific conductance above 500 $\mu\text{hos/cm}$ may have the potential to impair aquatic life.

64. The Partridge River and portions of Second Creek downstream of the Mesabi Nugget discharge were determined by the MPCA staff to be waters used for the production of

wild rice. The MPCA further determined that these downstream waters used for production of wild rice are susceptible to damage from high sulfate levels. The St. Louis River downstream of Mesabi Nugget is also a water body used for the production of wild rice.

65. On December 27, 2012, EPA Region 5 approved the variances for total dissolved salts, bicarbonates, specific conductance and hardness granted by the MPCA for Mesabi Nugget through August 1, 2021.

66. In its Variance Approval, EPA Region 5 claimed -- allegedly relying on papers by John Moyle, a naturalist on whose research Minnesota's wild rice standards are based -- that the Mesabi Nugget variance would not adversely affect wild rice. EPA provided no evidence and no other basis for its conclusion that the Mesabi Variances would not impact wild rice uses in receiving waters. (Exhibit A, p. 5)

67. None of the John Moyle references cited by EPA state that total dissolved salts in excess of 700 mg/L and specific conductance in excess of 1,000 $\mu\text{hos/cm}$ would not harm natural stands of wild rice. In fact, one such reference states, "In Minnesota wild rice is not found in waters high in alkali or sulfate salts."

68. Other writings and testimony by Moyle state that at several parts per million any salts can have damaging osmotic effects on wild rice. Moyle recommended the more stringent limit of 10 mg/L for sulfates enacted in Minnesota Rule 7050.0224, subpart 2 on the grounds that sulfate toxicity at lower concentrations is likely to result from reduction to hydrogen sulfide in anaerobic sediments.

69. In its Variance Approval, EPA Region 5 stated, "As described in detail in section III C below, this variance does not affect aquatic life use protection." (Exhibit A, p. 11). However, EPA's Variance Approval has no section "III C" other than a conclusion to approve

the variance; it provides no basis for the Agency's conclusion that granting the Mesabi Variances would protect existing aquatic life uses.

70. In its Variance Approval, EPA Region 5 reached a legal conclusion not previously discussed in the record that compliance with procedures in 40 C.F.R. §132, including the 5-year time limit for variances, is discretionary with Great Lakes States for pollutants listed in Table 5 of Part 132. (Exhibit A, p. 20). EPA did not address the fact that three of the four Mesabi Nugget variance pollutants are not listed in Table 5 of 40 C.F.R. Part 132 or discuss the requirements of Part 132 that state procedures be consistent with federal regulations.

71. In its Variance Approval, EPA Region 5 advanced a rationale for approval of the Mesabi Nugget variance not previously reflected in the record, suggesting that MPCA's arguments for granting a variance from water quality standards due to problems with Mesabi Nuggets compliance with air quality standards "are consistent with" 40 C.F.R. §131.10(g)(3), which allows a variance where "human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied." (Exhibit A, p. 18)

72. In its Variance Approval, EPA Region 5 cited MPCA's findings that "technological uncertainty" remains for the Mesabi Nugget discharge, particularly with respect to pretreatment requirements, selection of an effective membrane(s) for variable influent quality, and general design/scale-up considerations. However, EPA acknowledged that reverse osmosis water quality treatment was "potentially technically capable of reducing the levels of the variance parameters to meet water quality standards." (Exhibit A, p. 9)

**COUNT ONE – ADMINISTRATIVE PROCEDURES ACT
ARBITRARY, CAPRICIOUS, UNLAWFUL CONCLUSION THAT VARIANCES
WOULD NOT REMOVE EXISTING AQUATIC USES**

73. WaterLegacy restates and realleges paragraphs 1 through 72.

74. Under the CWA and implementing regulations, including 33 U.S.C §1313(c)(2)(A) and 40 C.F.R. §§ 131.5(a); 131.10(b) and 131.10(h), whether or not Minnesota's water quality standards for total dissolved salts (TDS), bicarbonates, specific conductance and hardness were specifically adopted to protect aquatic life, the EPA cannot legally approve variances for such pollutants that impair, degrade or remove existing aquatic life uses of downstream waters.

75. EPA approved the Mesabi Variance arbitrarily, capriciously and otherwise not in accordance with law despite uncontested evidence that discharge under the Mesabi Variance would result in exceedances of water quality standards in Second Creek, the Partridge River and the St. Louis River.

76. EPA arbitrarily, capriciously and otherwise not in accordance with law approved the Mesabi Variance despite its own prior comments regarding aquatic toxicity and uncontested evidence that Area 1 Pit waters that would be discharged without treatment under the Mesabi Variance demonstrated toxicity to *C. dubia* in whole effluent toxicity testing.

77. EPA arbitrarily, capriciously and otherwise not in accordance with law approved the Mesabi Variance without requiring whole effluent testing with any plant species, without requiring a use attainability analysis and without providing any explanation of its conclusion that approval of the variance would protect existing aquatic life uses of downstream receiving waters.

78. EPA arbitrarily, capriciously and otherwise not in accordance with law approved the Mesabi Variance allowing conductivity at levels of 1965 µhos/cm monthly maximum and 1189 µhos/cm monthly average despite its own research and guidance reflecting aquatic toxicity at far lower levels of conductivity.

79. EPA arbitrarily, capriciously and otherwise not in accordance with law approved

the Mesabi Variance although granting this variance would impair, degrade or remove existing uses of Class 2B waters to support aquatic life.

COUNT TWO – ADMINISTRATIVE PROCEDURES ACT
ARBITRARY, CAPRICIOUS, UNLAWFUL CONCLUSION VARIANCES WOULD
NOT REMOVE EXISTING WILD RICE USES

80. WaterLegacy restates and realleges paragraphs 1 through 79.

81. Under the CWA and implementing regulations, including 33 U.S.C §1313(c)(2)(A) and 40 C.F.R. §§ 131.5(a); 131.10(b) and 131.10(h), whether or not Minnesota’s water quality standards for total dissolved salts (TDS), bicarbonates, specific conductance and hardness were specifically adopted to protect natural stands of wild rice, the EPA cannot legally approve variances for such pollutants that impair, degrade or remove use of downstream waters for the production of wild rice, which is both an agriculture and a wildlife life use under Minnesota law.

82. EPA arbitrarily, capriciously and otherwise not in accordance with law approved the Mesabi Variance despite uncontested evidence that discharge under the Mesabi Variance would result in exceedances of water quality standards in Second Creek, the Partridge River and the St. Louis River.

83. EPA arbitrarily, capriciously and otherwise not in accordance with law approved the Mesabi Variance allegedly relying on John Moyle’s research to conclude that Mesabi Nugget’s exceedances of water quality standards would not impair wild rice, despite the fact that Moyle’s writings are in conflict with the claims made by the EPA and state that salts and other pollutants in the concentrations allowed under the Mesabi Variance are damaging to wild rice.

84. EPA arbitrarily, capriciously and otherwise not in accordance with law approved the Mesabi Variance with no scientific evidence demonstrating that the elevated levels of total

dissolved salts and conductivity authorized by the variance would protect existing agricultural and wildlife uses in downstream waters used for the production of wild rice.

85. EPA arbitrarily, capriciously and otherwise not in accordance with law approved the Mesabi Variance although granting this variance would impair, degrade or remove existing agriculture and wildlife uses of Class 4A waters used for the production of wild rice.

COUNT THREE – CLEAN WATER ACT
VIOLATION OF OBLIGATION TO DENY VARIANCE TO PROTECT
DOWNSTREAM USES FOR FISH, AGRICULTURE AND WILDLIFE

86. WaterLegacy restates and realleges paragraphs 1 through 85.

87. The CWA 33 U.S.C §1313(c)(2)(A) requires that water quality standards, wherever attainable, should provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation. Implementing regulations, including 40 C.F.R. §§ 131.5(a); 131.10(b) and 131.10(h) preclude approval of variances that would impair, degrade or remove existing uses or fail to assure attainment and maintenance of downstream water quality.

88. EPA's approval of the Mesabi Variance violated the CWA and implementing regulations and would impair, degrade or remove existing aquatic life, agriculture and wildlife uses and fail to assure attainment and maintenance of downstream water quality standards for the following reasons, each of which independently justifies relief:

- a. Discharge under the Mesabi Variance will result in violations of water quality standards that would otherwise be met, thus removing existing uses from receiving waters, namely Second Creek, the Partridge River and the St. Louis River;
- b. Even with the limited testing performed by Mesabi Nugget, the record demonstrates that discharge under the Mesabi Variance will result in aquatic toxicity and impairment, degradation or removal of aquatic life uses of receiving waters;
- c. The EPA's approval of the Mesabi Variance for conductivity is inconsistent with the Agency's own guidance and research regarding aquatic toxicity;

- d. The EPA required neither whole effluent testing on a plant species nor a use attainment analysis before approving a variance that would remove existing aquatic life, agricultural and wildlife uses from receiving waters for Mesabi Nugget discharge;
- e. The expert on which EPA relied for its statement that the Mesabi Variance would protect wild rice uses, in fact, opined that the concentrations of pollutants such as those permitted under the Variance would damage natural stands of wild rice;
- f. The EPA provided no scientific evidence that violations of water quality standards resulting from the Mesabi Variance would not impair, degrade or remove agricultural and wildlife uses of downstream waters for the production of wild rice.

**COUNT FOUR – CLEAN WATER ACT, GREAT LAKES INITIATIVE
VIOLATION OF CLEAN WATER ACT AND REGULATIONS FOR GREAT LAKES
STATES SETTING FIVE-YEAR LIMIT ON VARIANCES**

89. WaterLegacy restates and realleges paragraphs 1 through 88.

90. EPA's Variance Approval fails to satisfy the requirements of the CWA and enacting regulations, including 33 U.S.C §1313(c)(2)(A), 33 U.S.C. §1268(c)(2) and 40 C.F.R. §131.5(a)(5), because it authorizes a variance in excess of five years, which is inconsistent with 40 C.F.R. § 132.5(g)(3), which requires that State regulations be at least as protective as Great Lakes Water Quality Guidance and with 40 C.F.R. Part 132, Procedure 2 of Appendix F, which provides a five-year maximum timeframe for variances.

91. EPA had no authority to approve Minnesota's deviation from 40 C.F.R. Part 132, Appendix F procedures providing a five-year time limit on variances since Mesabi Nugget's variance pollutants are not specifically listed in Table 5 of Part 132

92. EPA had no authority to approve Minnesota's deviation from 40 C.F.R. Part 132, Appendix F procedures providing a five-year time limit on variances since extending a variance is not a deviation needed to ensure that technically appropriate methodologies and procedures are used for listed pollutants.

COUNT FIVE – ADMINISTRATIVE PROCEDURES ACT
ARBITRARY, CAPRICIOUS, UNLAWFUL CONCLUSION THAT COMPLIANCE
WITH WATER QUALITY STANDARDS IS NOT FEASIBLE

93. WaterLegacy restates and realleges paragraphs 1 through 92.

94. EPA’s Variance Approval is arbitrary, capricious, otherwise not in accordance with law and a violation of the CWA and implementing regulations, including 33 U.S.C §1313(c)(2)(A) and 40 C.F.R. §131.5(a) in that the State did not demonstrate that attaining compliance with water quality standards is not feasible as required by 40 C.F.R. §131.10(g)(3).

95. EPA’s Variance Approval is arbitrary, capricious and otherwise not in accordance with law, including the CWA and implementing regulations since an uncontested record demonstrated that reverse osmosis water quality treatment is an established and feasible technology capable of treating Mesabi Nugget discharge and producing treated water that would meet Minnesota water quality standards for each of the variance pollutants -- total dissolved salts (TDS) bicarbonates, specific conductance and hardness.

COUNT SIX – CLEAN WATER ACT IMPLEMENTING REGULATIONS
VIOLATION OF REGULATIONS INTENDED TO PREVENT POLLUTERS FROM
USING THEIR POLLUTION TO JUSTIFY WATER QUALITY VARIANCES

96. WaterLegacy restates and realleges paragraphs 1 through 95.

97. EPA’s Variance Approval fails to satisfy the requirements of the CWA and implementing regulations, including 33 U.S.C §1313(c)(2)(A) and 40 C.F.R. § 131.5(a)(5) because its “human caused conditions” analysis does not meet the requirements of 40 C.F. R. § 131.10(g)(3) under its own promulgated guidance.

98. EPA’s legal conclusion that Mesabi Nugget’s water pollution, which results primarily from a solute load caused by the facility’s own operations, along with on-site water pollution for which Mesabi Nugget has legal responsibility, represents “human caused

conditions” justifying a water quality variance is arbitrary, capricious and otherwise unlawful under the CWA, its implementing regulations and the EPA’s own guidance.

PRAYER FOR RELIEF

WHEREFORE, WaterLegacy prays that this Court issue grant the following relief:

1. A declaratory judgment that EPA’s Variance Approval was arbitrary, capricious, and otherwise not in accordance with law;
2. A declaratory judgment that EPA’s Variance Approval violated the Clean Water Act, implementing federal regulations and federal regulations specific to Great Lakes States;
3. An order granting temporary and permanent injunctive relief by setting aside the EPA’s Variance Approval and remanding this matter to the EPA with instructions that the EPA must reconsider approval of the Mesabi Nugget Variance in compliance with the requirements of the CWA, implementing federal regulations and federal regulations specific to Great Lakes States and the instructions of this court;
4. An award and judgment to WaterLegacy for all of its costs, disbursements, and reasonable attorney’s fees incurred herein as authorized by the Equal Access to Justice Act, 28 U.S.C. §§ 2412 and 2202; and
5. Such other and further relief as the court deems just and equitable

DATED: June 3, 2013

JUST CHANGE LAW OFFICES



Paula Goodman Maccabee (#129550)
1961 Selby Avenue
St. Paul, MN 55104
Telephone: (651) 646-8890
Facsimile: (651) 646-5754
Mobile: (651) 775-7128

Attorney for Plaintiff
WATERLEGACY