No. A12-0950

State of Minnesota
In Court of Appeals

Minnesota Chamber of Commerce,

Appellant,

vs.

Minnesota Pollution Control Agency,

Respondent,

and

WaterLegacy,

Respondent-Intervenor.

BRIEF AND ADDENDUM OF RESPONDENT-INTERVENOR WATERLEGACY

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STATEMENT OF THE ISSUES

1) Whether the district court correctly determined, in granting the motion for summary judgment of Respondent-Intervenor WaterLegacy ("WaterLegacy"), that Minn. R. 7050.0224, Subp. 2 (2012), limiting sulfate discharge in waters used for the production of wild rice, is constitutional.

   Most apposite authority:

   State v. Normandale Properties, 420 N.W. 2d 259 (Minn. Ct. App. 1988) *rev. denied* (Minn., May 4, 1988)

   Minn. Chamber of Commerce v. Minn. Pollution Control Agency, 469 N.W. 2d 100 (Minn. Ct. App. 1991)*, rev. denied* (Minn. July 24, 1991)

   Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. 455 U.S. 489 (1982)

   Grayned v. City of Rockford, 408 U.S. 104 (1972)

   Minn. Stat. § 115.05, Subd. 11 (2011)
   Minn. R. 7000.7000 (2012)
   Minn. R. 7000.1800 (2012)
   Minn. R. 7050.0224, Subp. 2 (2012)

2) Whether the district court correctly determined, in granting WaterLegacy's motion for summary judgment, that the application of Minn. R. 7050.0224, Subp. 2 by Respondent Minnesota Pollution Control Agency ("MPCA") to waters producing natural stands of wild rice is within MPCA's statutory authority.

   Most apposite authority:

   Minn. Chamber of Commerce v. Minn. Pollution Control Agency, 469 N.W. 2d 100 (Minn. Ct. App. 1991)*, rev. denied* (Minn. July 24, 1991)

   Coalition of Greater Minnesota Cities v. Minn. Pollution Control Agency, 765 N.W. 2d 159 (Minn. Ct. App. 2009) *rev. denied* (Minn. Aug. 11, 2009)

   33 U.S.C. §§ 1311(b)(1)(C)(2011)
   33 U.S.C. §§ 1342(c)(2)-(3)(2011)
   40 C.F.R. § 122.44(d)(1)(2012)
   40 C.F.R. §131.5(a)(2) & (4) (2012)
   Minn. Stat. § 115.03, Subd. 1(a)-(c), Subd. 5(2011)

Minn. R. 7050.0140 (2012)
Minn. R. 7050.0224, Subp. 1, Subp. 2(2012)
Minn. R. 7050.0410 (2012)
Minn. R. 7050.0430 (2012)

3) Whether the district court correctly determined, in granting WaterLegacy's motion for summary judgment, that declaratory judgment claims made by Appellant Minnesota Chamber of Commerce ("Chamber") should be denied.

Most apposite authority:

S. Minn. Constr. Co. v. Minn. Dep't of Transp., 637 N.W. 2d 339 (Minn. Ct. App. 2002)

Alliance for Metro. Stability v. Metro. Council, 671 N.W. 2d 905 (Minn. Ct. App. 2003)

In re Alexandria Lake Area Sanitary Dist., 763 N.W.2d 303 (Minn. 2009)

Udall v. Tallman, 380 U.S. 1 (1965)

Minn. Stat. § 14.44 (2011)
Minn. Stat. § 555.02 (2011)
Minn. Stat. § 645.001 (2011)
Minn. R. 7050.0224, Subp. 1 and 2 (2012)

4) Whether the district court correctly determined, in granting WaterLegacy's motion for summary judgment, that the Chamber's claims for injunctive relief should be denied.

Most apposite authority:

ServiceMaster of St. Cloud v. GAB Business Services, Inc., 544 N.W. 2d 302, 305 (Minn. 1996)

Minnesota-Dakotas Retail Hardware Ass'n. v. State, 279 N.W. 2d 360, 363 (Minn. 1979)

40 C.F.R. §131.5 (2012)
Minn. Stat. § 115.03, Subd. 1(b), Subd. 5, Subd. 7 (2011)
Minn. Stat. § 115.05, Subd. 11 (2011).
Minn. Laws 2011, 1 Sp. c.2, art. 4, § 3
Minn. R. 7050.0224, Subp. 2 (2012)

STATEMENT OF THE CASE

Appellant Minnesota Chamber of Commerce ("Chamber") filed this action on December 17, 2010 challenging the construction and application of Minnesota Rule 7050.0224, Subpart 2, a water quality standard enacted in 1973 limiting discharge of sulfates in waters used for the production of wild rice to 10 milligrams per liter ("wild rice sulfate standard" or, in Chamber's claims, "Wild Rice Rule"). On February 8, 2011, on stipulation of the parties, the Chamber amended its Complaint. (A. App. 003).[1]

The Chamber claimed that application by Respondent Minnesota Pollution Control Agency ("MPCA") of the wild rice sulfate standard to several mining companies named in its Complaint denied equal protection to its members. (A. App. 022-025) The Chamber further claimed that the Rule was unconstitutionally vague (A. App. 025-027) and that the MPCA's application of the Rule to control sulfate discharge to waters containing natural stands of wild rice, whether listed or unlisted, was unreasonable and exceeded the MPCA's statutory authority. (A. App. 027-028). The Chamber requested a declaratory judgment construing the Wild Rice Rule to apply only to waters used to irrigate rice grown as an agricultural crop (A. App. 028-030) and sought injunctive relief preventing the MPCA from requiring sulfate dischargers to survey whether natural wild rice was present in waters receiving their sulfate discharge and preventing MPCA from protecting natural stands of wild rice from sulfate pollution. (A. App. 031)

[1] Respondent-Intervenor WaterLegacy's Brief refers to Appellant's Addendum as "A. Add.," refers to its own Addendum as "R-I Add.," refers to the Appellant's Appendix as "A. App.," and refers to its own Appendix containing documents omitted in whole or in part from Appellant's Appendix as "R-I App."

Respondent-Intervenor WaterLegacy ("WaterLegacy"), a non-profit organization formed to protect Minnesota water quality, intervened and moved to dismiss the complaint. Judge Gregg Johnson denied WaterLegacy's motion, noting that the Chamber had alleged constitutional violations, particularly a potential equal protection violation, which WaterLegacy had not shown were *completely* frivolous under *Elzie v. Comm'r of Pub. Safety*, 298 N.W. 2d 29, 33 (Minn. 1980). (A. Add. 022-023).

On February 1, 2012, the MPCA and WaterLegacy both filed motions for summary judgment seeking dismissal of all of the Chamber's claims. The Chamber filed a cross motion requesting judgment as a matter of law on all claims (Counts II, III and IV of the Amended Complaint) other than the potential violation of equal protection (Count I of the Amended Complaint).

In briefing its motion, the Chamber made a new claim that the terms of the 1973 Rule "unambiguously" excludes the application of a sulfate limitation to waters containing natural stands of wild rice under Minn. Stat. § 645.16 (2011)(A. App. 158-159). The Chamber also withdrew its claim (Count I) that the MPCA's application of the Wild Rice Rule violates equal protection. (A. Add 001).

The Chamber does not challenge the trial court's ruling granting summary judgment in favor of the MPCA and WaterLegacy dismissing the Chamber's equal protection claim. (A. Add. 008). Further, the parties are in agreement that there are no material issues of fact in dispute and Counts II, III and IV of the Amended Complaint are appropriately decided as a matter of law.

The Honorable Margaret M. Marrinan, District Court Judge, heard the parties' motions for summary judgment on March 1, 2012 and entered judgment on May 15, 2012 granting MPCA's and WaterLegacy's motions for summary judgment in their entirety, denying the Chamber's motion for summary judgment in its entirety and dismissing the Chamber's Complaint in its entirety with prejudice and on the merits. (A. Add. 001-019).

The trial court ruled that Minn. R. 7050.0224, Subp. 2 does not violate due process, is not void for vagueness and that Chamber had not met its burden to show that the Rule proscribes no comprehensible course of conduct and is not rationally related to its legislative goal of environmental protection. (A. Add. 008-009, 011-012). The court emphasized the civil regulatory nature of the Rule and that due process is provided in the permitting and review process. (A. Add. 013-014).

The court further held that the MPCA's application of the wild rice sulfate rule to protect natural stands of wild rice is consistent with the plain language of the water quality standard as well as the administrative and legislative record. (A. Add. 010-011) The trial court ruled that the fact that the MPCA did not specifically list every water body to which the wild rice sulfate standard applied neither violated constitutional requirements nor exceeded statutory authority (A. Add. 011, 014-015) and that both the wild rice sulfate standard and its application by MPCA were consistent with state and federal law. (A. Add. 010, 015-016).

The trial court dismissed the Chamber's claims for declaratory relief, since the Chamber's substantive claims were without merit as a matter of law and any claims based on future MPCA actions were conjectural and unripe. (A. Add. 017) The court denied

injunctive relief, noting that any claims based on future permit proceedings would have adequate remedies at law through the contested case and certiorari appeal process (A. Add. 018) and that the Legislature had already addressed the question of how the wild rice sulfate standard should be applied pending research and rulemaking. (A. Add. 019).

STATEMENT OF FACTS

A. ENACTMENT OF WILD RICE SULFATE STANDARD

The Minnesota rule limiting sulfates in waters used for the production of wild rice to 10 milligrams per liter ("mg/L"), which is currently codified as Minn. R. 7050.0224, Subp. 2 (2012), was adopted by the MPCA in formal rulemaking in 1973 in order to comply with U.S. EPA requirements under the Federal Water Pollution Control Act Amendments of 1972. (R-I App. 3-4).

During the 1973 rulemaking, there was debate about whether the rule should protect natural wild rice, cultivated wild rice, or both. (A. App. 410-411, 443, 446) John McGuire, the MPCA's Chief of the Section of Standards and Surveys, Division of Water Quality, explicitly testified twice that the rule was intended to protect both cultivated and natural wild rice. *(Id.)* The 10 mg/L sulfate limit was also adopted by the MPCA based on recommendations by the Minnesota Department of Natural Resources ("MDNR") "to protect the natural and cultivated growth of wild rice." (R-I App. 5; A. App. 437). From its enactment in 1973, the MPCA has intended that the wild rice sulfate rule protect both natural growing and cultivated wild rice. (A. App. 410-411).

Minnesota Rule 7050.0224, Subp. 2 provides that a 10 mg/L limit on sulfates is

"applicable to water used for production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels."

B. ADOPTION OF STATE POLICIES TO PROTECT WILD RICE

In 1977, the Minnesota Legislature adopted wild rice or "manomin," as the official grain of the State of Minnesota. Minn. Stat. § 1.148, Subd. 1 (2011). The Minnesota Legislative Reference Library explains that the state grain designated under this statute is "a hardy aquatic grass and is known as manomin to the Ojibwe." [2]

In 1997, the MPCA amended its rule protecting wild rice to list certain waters containing natural stands of wild rice and increase public awareness as to the ecological importance of natural stands of wild rice, their value to American Indian Bands, and their importance to preserve the genetic diversity of wild rice through adoption of a narrative. (A. App. 531, 535, 536). The wild rice narrative adopted in the 1997 amendments is codified in Minnesota Rule 7050.0224, Subp. 1(2012):

> 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.

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[2] *Minnesota State Symbols*, compiled by the Minnesota Reference Library, http://www.leg.state.mn.us/leg/symbols.aspx last visited Aug. 1, 2012.

C. APPLYING THE SULFATE STANDARD TO PROTECT NATURAL STANDS OF WILD RICE IN LISTED AND UNLISTED WATERS

The wild rice sulfate limit was applied in 1975 to impose sulfate limits on discharge from the Clay Boswell coal plant. (R-I App. 8-9, 18). The regulated party requested a contested case proceeding and obtained a variance imposing less restrictive sulfate limits based on site-specific factors. (R-I App. 15). The record of the administrative hearing for the Clay Boswell permit reflects that the hearing examiner supported application of a sulfate limit in that permit in order to protect natural stands of wild rice, not agricultural irrigation of cultivated wild rice. (A. App. 412).

Sulfate limits were imposed pursuant to the Wild Rice Rule in three other National Pollutant Discharge Elimination System ("NPDES") permits: a June 17, 2010 permit modification for the U.S. Steel Keetac mining area, (A. App. 041, 051-053) and two October 25, 2011 permits issued for U.S. Steel's Keetac mining area and tailings basin. (R-I App. 24, 30, 33).

The Keetac mine area and tailings basin affect natural stands of wild rice, not agricultural irrigation of cultivated rice. (A. App. 020-021). The waters receiving discharge from the Keetac mine where sulfates were limited by the wild rice sulfate rule included waters specifically listed as wild rice waters in Minn. R. 7050.0470, Subp. 1 (Welcome Creek and O'Brien Creek) and waters that were not so listed (Welcome Lake and O'Brien Reservoir). (R-I App. 23). U.S. Steel had an opportunity to request a contested case hearing on the proposed sulfate limit but did not do so. (A. App. 489).

D. MPCA PERMIT PROCESS FOR THE WILD RICE SULFATE STANDARD

The MPCA has approximately ten years of sulfate data for mining discharges because it has monitored wastewater discharges from mining operations in order to evaluate their overall toxicity. (A. App. 386-387). The MPCA has also developed guidance for monitoring sulfates, evaluating the potential for violations and including sulfate permit limits where appropriate for other industrial and municipal sulfate dischargers. (A. App. 564-572).

In considering a permit application, the MPCA determines on a case-by-case basis whether a receiving water is a water used for production of wild rice. (A. App. 387-388). Where a permit applicant discharges sulfates upstream of waters that have been identified as potentially producing wild rice, the MPCA has requested that the permit applicant conduct a survey of receiving waters to help determine whether the receiving waters are waters used for production of wild rice. (A. App. 015-016, 018). The MPCA obtains all reasonably available information to help determine whether such receiving waters are waters used for production of wild rice, including (i) available wild rice records and databases that the MDNR maintains; (ii) consultation with aquatic plant biologists at the MDNR; and (iii) information received from external stakeholders, including, but not limited to, Native American tribes. (A. App. 040, 555, 556-557, 558-560, 562-563).

The MPCA has informed various industrial dischargers of sulfates, including Cliffs Natural Resources Inc., United Taconite LLC, PolyMet Mining, Inc., Mesabi Mining LLC and U.S. Steel Corp. that the wild rice sulfate standard may be applicable to their wastewater discharge based on the presence of natural stands of wild rice. (A. App.

014, 016-019, 021). The MPCA has also notified dischargers, prior to permitting, of the seasons that technical staff considers to be periods when wild rice may be susceptible to damage by high sulfate levels. (A. App. 017, 019).

E. U.S. EPA INTERPRETATION OF THE WILD RICE SULFATE STANDARD

Federal U.S. EPA environmental review for mining projects in 2009 raised the MPCA's awareness of the potential impacts of high sulfate discharges to cause or contribute to violations of the wild rice sulfate limit. (A. App. 387, 544).

In 2010, the U.S. EPA advised the MPCA in federal environmental impact statement ("EIS") review for the Keetac mine expansion that the wild rice protection rule must be applied to limit sulfate discharge to receiving waters "where wild rice stands are present." (A. App. 548-549) The U.S. EPA's determination that a supplemental draft EIS was required for the PolyMet project also included a request to clarify the application of the 10 mg/L sulfate limit to the Upper Partridge River given "the presence of isolated patches of wild rice." (A. App. 554) The Keetac and PolyMet projects both affect natural stands of wild rice, rather than agricultural irrigation for cultivated rice. (A. App. 019-020).

The receiving waters for Keetac and PolyMet discharge that the U.S. EPA advised were subject to the wild rice sulfate limit included lakes, rivers and creeks that are not specifically listed as wild rice waters in Minn. R. 7050.0470, Subp. 1 -- Swan Lake, Swan River, Hay Creek, Hay Lake and Upper Partridge River. (A. App. 548, 554).

F. CLEAN WATER ACT AND THE 2011 WILD RICE LEGISLATION

In 2011, bills were proposed to the Minnesota Legislature to modify or suspend

enforcement of the 10 mg/L wild rice sulfate standard. In response, the U.S. EPA wrote that Minnesota's 10 mg/L sulfate limit for wild rice waters was a "current, federally-approved water quality standard" (A. App. 628) and advised, "A state with a federally authorized NPDES program is required to issue permits that ensure the protection of federally approved water quality standards." (A. App. 629).

The U.S. EPA advised that State proposals to prevent the MPCA from including sulfate limitations in permits pending amendment of the rule would conflict with the Clean Water Act ("CWA") and stated, "should EPA determine that a state is not administering its federally approved NPDES program in accordance with requirements of the CWA, EPA has the authority to require the state to take corrective action, and if necessary to withdraw authorization of the program, pursuant to 33 U.S.C. §§1342(c)(2)-(3)." (A. App. 629). Failure to apply the wild rice sulfate standard as enacted by the MPCA and approved by the U.S. EPA could jeopardize Minnesota's Clean Water Act delegated NPDES permitting authority.

Rather than suspending or modifying the wild rice sulfate standard, the Minnesota Legislature enacted and the Governor signed a Session Law directing the MPCA to conduct scientific research on the impacts of sulfates on wild rice and to propose rulemaking that would: a) address water quality of both natural stands of wild rice and cultivated rice; b) designate the waters to which the sulfate water quality standard applies; c) designate the times of year during which the standard applies. Minn. Laws 2011, 1 Sp. c.2, art. 4, § 32(a) (R-I Add. 1-2). This 2011 Wild Rice Legislation and the

federal Clean Water Act prescribe how the wild rice sulfate standard shall be applied pending any further rulemaking.

STANDARD OF REVIEW

The standard of review applicable to a grant of summary judgment is whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Wallin v. Letourneau,* 534 N.W. 2d 712, 715 (Minn. 1995) (reinstating district court grant of summary judgment). The trial court's judgment will be affirmed "if no genuine issues of material fact exist and if the court below properly applied the law." *Kratzer v. Welsh Cos., LLC*, 771 N.W. 2d 14, 18 (Minn. 2009)(reinstating district court grant of summary judgment); *see also Day Masonry v. Indep. Sch. Dist. 347,* 781 N.W. 2d 321, 326 (Minn. 2010). The parties in this case have concurred that no genuine issues of material fact exist. "Summary judgment [is] a fully appropriate procedural vehicle" for a court to use when applying statutory language to the undisputed facts of a case." *Wallin v. Letourneau, supra*, 534 N.W. 2d at 715.

LEGAL ARGUMENT

I. THE DISTRICT CORRECTLY DETERMINED THAT THE WILD RICE SULFATE STANDARD IS CONSTITUTIONAL.

The Chamber alleged in its Amended Complaint that the wild rice sulfate standard violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I of the Minnesota Constitution. U.S. Const. Amend. XIV § 1;

Minn. Const. art. I ¶ 7; (A. App. 025-027). The district court rejected the Chamber's claims that either the absence of a list of every water to which the standard applies or the alleged imprecision of applying the sulfate limit "when the rice may be susceptible to damage from high sulfate levels" constitute a violation of substantive due process. (A. Add. 012-015). The court correctly applied state and federal precedent to find the wild rice sulfate standard comprehensible, consistent with due process of law and reasonable.

A. The Chamber Failed its Burden of Proof that the Wild Rice Sulfate Standard is Vague in All of its Applications and Prescribes No Comprehensible Form of Conduct.

Courts should exercise "extreme caution" before declaring a statute void for vagueness. *Getter v. Travel Lodge,* 260 N.W. 2d 177, 180 (Minn. 1977). "One who challenges the constitutionality of a statute must overcome every presumption in favor of its constitutionality." *Humenansky* v. *Minn. Bd. of Med. Examiners,* 525 N.W. 2d 559, 564 (Minn. Ct. App. 1994) *rev. denied* (Minn. Feb. 14, 1995).

A statute that does not implicate First Amendment freedoms is facially void only if it is vague in all of its applications and prescribes no comprehensible form of conduct at all:

> Vagueness challenges to statutes that do not involve first amendment freedoms must be examined in light of the facts of the particular case. *United States v. Powell,* 423 U.S. 87, 92, 46 L. Ed. 2d 228, 96 S. Ct. 316 (1975); *State v. Becker,* 351 N.W.2d 923, 925 (Minn. 1984). A person whose conduct is clearly proscribed "cannot complain of the vagueness of the law as applied to others." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982). The person charged must show the statute "lacks specificity as to his own behavior and not as to some hypothetical situation." *State v. Currie,* 400 N.W.2d 361, 365 (Minn. Ct. App.), *pet. for rev. denied* (Minn. April 17, 1987). . . A statute that does not implicate first amendment freedoms is facially void for vagueness only if it is vague in all its applications. *Flipside,* 455

> U.S. at 494-95. Unless the statute proscribes no comprehensible course of conduct at all, it will be upheld against a facial challenge. *See Powell,* 423 U.S. at 92; *Becker,* 351 N.W.2d at 925."

State v. Normandale Properties, 420 N.W. 2d 259, 262 (Minn. Ct. App. 1988) *rev. denied* (Minn., May 4, 1988); *State v. Gerring,* 418 N.W. 2d 517, 520 (Minn. Ct. App. 1988); *State v. McAllister,* 399 N.W. 2d 685, 688 (Minn. Ct. App. 1987); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency,* 469 N.W. 2d 100, 107 (Minn. Ct. App. 1991)*, rev. denied* (Minn. July 24, 1991); *see also State v. Hyland,* 431 N.W.2d 868, 871 (Minn. Ct. App. 1988); *State v. Curie*, 400 N.W. 2d 361, 365 (Minn. Ct. App.), *rev. denied* (Minn. April 17, 1987).

Minnesota courts have consistently rejected vagueness challenges to other environmental rules and statutes. Summary judgment was granted against the Minnesota Chamber of Commerce in a case challenging nonpoint source water quality standards in Minnesota Rules Chapter 7050 as unconstitutionally vague. The Court ruled, "The Chamber failed to meet the heavy burden assumed in bringing a vagueness challenge." *Chamber v. MPCA, supra,* 469 N.W. 2d at 107.

The MPCA's compliance criteria to prevent pollution from septic systems were also upheld in the face of a substantive due process challenge as the Court determined that complaining dischargers had not met the "heavy burden of demonstrating that the rules fail to provide adequate standards for enforcement." *In re Appeal of Rocheleau,* 686 N.W. 2d 882, 894 (Minn. Ct. App. 2004)*, rev. denied* (Minn., Dec. 22, 2004). Challenges to Minnesota's hazardous waste statutes on the grounds of vagueness were also rejected and the statutes ruled constitutional. *Normandale Properties, supra,* 420 N.W. 2d at 262;

Gerring, supra, 418 N.W. 2d at 521; *McAllister, supra,* 399 N.W. 2d at 689.

The wild rice sulfate standard rule has been successfully applied by the MPCA and interpreted by the U.S. EPA. The sulfate standard, along with a site-specific variance, was applied to discharge permits for a Clay Boswell coal generating plant (R-I App. 8-9, 18) and to discharge permits for U.S. Steel's Keetac taconite mine and tailings basin facilities. (A. App. 041, 051-053; R-I App. 24, 30, 33). Both sets of permits involved protected natural stands of wild rice (A. App. 020-021, 412). The Clay Boswell permit was issued prior to the enactment of any rule listing wild rice waters, and the U.S. Steel permits affected waters that are not specifically listed in rule as wild rice waters. (R-I App. 23).

The U.S. EPA, in conducting federal environmental review, has also found the wild rice standard sufficiently definite to advise the MPCA as to its application. The EPA advised that the wild rice sulfate standard should be applied to protect natural wild rice downstream of both the Keetac taconite mining facilities and the proposed PolyMet sulfide mine. (A. App. 548-549, 554). As with other environmental rules and statutes upheld by Minnesota courts, the wild rice sulfate standard is demonstrably comprehensible and is not vague in all of its applications.

B. The Wild Rice Sulfate Standard is Sufficiently Definite and is Related to a Legitimate and Ascertainable Public Purpose

The civil, regulatory nature of the wild rice sulfate standard is subject to a less strict "vagueness test" than criminal statutes. To find a civil statute void for vagueness,

the statute must be “so vague and indefinite as really to be no rule or standard at all." *Boutilier* v. *INS,* 387 U.S. 118, 123 (1987); *c.f. Seniors Civil Liberties Ass'n, Inc.* v. *Kemp,* 965 F.2d 1030, 1036 (l1th Cir. 1992). A challenged civil law is void for vagueness only if it "defines the forbidden or required act in terms so vague that individuals must guess at its meaning." *Humenansky, supra,* 525 N.W. 2d at 564.

Administrative rules, such as water quality standards, should be upheld “unless the terms are so uncertain and indefinite that after exhausting all rules of construction it is impossible to ascertain legislative intent.” *Chamber v. MPCA, supra,* 469 N.W. 2d at 107, *citing In re Charges of Unprofessional Conduct Against NP,* 361 N.W.2d 386, 394 (Minn. 1985); *Rocheleau, supra*, 686 N.W.2d at 894.

The void for vagueness doctrine demands only that laws be drafted with "sufficient definiteness that ordinary people can understand what conduct is prohibited." *State* v. *Romine,* 775 N.W.2d 884, 891 (Minn. Ct. App. 2008). Even if a law speaks in "broad, flexible standards that require persons subject to a statute to exercise judgment," or requires persons to "rely on common sense and intelligence to determine whether their conduct complies with the law [it] does not render the law unconstitutionally vague." *State* v. *Enyeart,* 676 N.W.2d 311, 321 (Minn. Ct. App. 2004).

Specifically, where environmental standards are concerned, the fact that “a more specific statutory definition” of terms might have been provided doesn’t render that standard unconstitutionally vague. *Gerring, supra,* 418 N.W. 2d at 522. The relation to the public purpose of environmental protection supports a finding that water quality standards are constitutional. “The standards promulgated in chapter 7050 bear a rational

relation to the accomplishment of the legitimate public purpose of maintaining water quality." *Chamber v. MPCA, supra,* 469 N.W. 2d 107, *see also Manufactured Housing Inst. v. Pettersen,* 347 N.W. 2d 238, 243 (Minn. 1984).

Precedent cited by the Chamber supports the constitutionality of the wild rice sulfate standard on substantive due process grounds. The few cases where courts have determined that a statute was impermissibly vague involved First Amendment freedoms and are explicitly distinguishable under *State v. Normandale Properties, supra,* 420 N.W. 2d at 262 and *United States v. Powell, supra*, 423 U.S. at 92. *See Smith v. Goguen*, 415 U.S. 566 (1974) (flag misuse); *Kolender v. Lawson*, 461 U.S. 352 (1983) (criminal statute requiring people who are loitering to provide identification); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (oath as condition of state employment).

Even where First Amendment constraints were implicated, Supreme Court cases cited by the Chamber (App. Brief 47-48) rejected claims that statutes were unconstitutionally vague. *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971); *United States Civil Serv. Comm'n v. Nat'l Assn. of Letter Carriers*, 413 U.S. 548, 580-581 (1973). In *Grayned v. City of Rockford* 408 U.S. 104 (1972), despite the potential impact of an antinoise ordinance on expression, the Court found no unconstitutional vagueness, stating, "Condemned to the use of words, we can never expect mathematical certainty from our language." *Id*. at 110. The Court explained that "meticulous specificity" was not required to make clear what the ordinance as a whole prohibited, and noted as to the claim of vagueness, "It will always be true that the fertile

legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question.'" *Id*. at 110, fn 15.

Hard Times Café, Inc. v. City of Minneapolis, 625 N.W. 2d 165 (Minn. Ct. App. 2001), another case cited by the Chamber, held that a "good cause" standard for license revocation does not violate due process because ordinary persons do not have to guess at the meaning of the standard, the charter read in its entirety indicates the type of behavior that is prohibited and "[t]he use of general language in a statute does not make it vague." *Id*., at 171-172, *citing State v. Christie,* 506 N.W. 2d 293, 301 (Minn. 1993).

Cases cited by the Chamber for the principle that statutes and rules are void if their vagueness encourages arbitrary enforcement (App. Brief pp. 47-48) held otherwise. *Hill v. Colorado*, 530 U.S. 703, 732 (2000) upheld a statute restricting picketing around health care facilities, despite its First Amendment implications. *In re Charges Against NP, supra,* 361 N.W.2d at 394, upheld rules of professional conduct in the face of a vagueness challenge, explaining, "difficulty in construction is not in itself sufficient to set aside a rule, and the rule "should be upheld unless the terms are so uncertain and indefinite that after exhausting all rules of construction it is impossible to ascertain legislative intent*," citing Getter v. Travel Lodge*, 260 N.W. 2d 177, 180 (Minn. 1977).

The terms of the wild rice standard are not so uncertain and indefinite that it is impossible to ascertain legislative intent. The intent of the wild rice rule to protect wild rice -- Minnesota's state grain -- from sulfate pollution in waters where it is present at the times when it is most vulnerable is quite possible to discern from the rule's language, history and policy. The district court found that the term "when the wild rice may be

susceptible to damage by high sulfate levels" is "straightforward and can be understood using plain language." (A. Add 014).

The rule's use of general common sense language rather than meticulous specificity does not render it vague or unconstitutional. Similarly, noting that the goal of the law is "to protect production of wild rice in Minnesota," the district court found the application of the standard "at a point in the wild rice life cycle when the sulfate is found to damage the plant" to be reasonable in relation to that goal. (A. Add. 014).

Failure to specifically list every body to which the wild rice sulfate standard applies also does not render the rule unconstitutionally vague. The district court explained that Chamber's members "are not left guessing as to whether the wild rice sulfate standard applies to a particular water or as to what is required of them under the standard because the proposed permit details exactly what is required." (A. Add. 015).

C. The Administrative Permitting Process Assures that the Wild Rice Sulfate Standard Provides Substantive and Procedural Due Process.

Civil laws regulating business are less likely to be void for vagueness than criminal laws "because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Village of Hoffman Estates v. Flipside*, *supra*, 455 U.S. at 498. When a party is given actual notice of the conduct required and can avoid the violation through compliance, a standard will not be found

unconstitutionally vague. *State v. Larson Transfer & Storage, Inc*., 246 N.W. 2d 176, 180 (Minn. 1976).

Businesses required to comply with the wild rice sulfate standard are given extensive *actual notice* of the conduct that is required through the NPDES permit process as well as an opportunity to challenge or comply with proposed permit limitations. Minnesota Rule 7050.0224, Subp. 2, the wild rice sulfate rule, like other water quality standards, is an ambient water quality standard that describes the desired condition of certain waters, rather than a discharge standard prohibiting conduct. The only way that the MPCA can require or prohibit action based on the wild rice sulfate standard is by setting limits or conditions in a permit to comply with the standard. *See* 40 C.F.R. § 122.44(d)(1)(2012) (requiring discharge limits in permits where discharge has reasonable potential to cause or contribute to a violation of a water quality standard in a receiving water); Minn. R. 7001.0150, Subp. 2 (2012) (requiring MPCA permits to include terms necessary to achieve compliance with applicable state and federal law).

Before the MPCA issues a permit limiting a regulated party's sulfate discharge, the MPCA is legally required to publish a draft of the permit for public review and comment. Minn. R. 7001.0100 (2012). A regulated party that disagrees with the terms of a proposed MPCA permit may seek a variance, Minn. R. 7000.7000 (2012) and has the right to request a contested case hearing before an administrative law judge. Minn. R. 7000.1800 (2012). A regulated party that is aggrieved by the MPCA's denial of a contested case or final permit decision also has a right to judicial review. Minn. Stat. § 115.05, Subd. 11 (2011). Procedural due process is provided to dischargers of pollutants

as a result of these contested case process and variance procedures. *Minn. Chamber of Commerce v. MPCA, supra,* 469 N.W. 2d at 107.

The New York case cited by the Chamber to argue that vagueness results in arbitrary application, *Cunney v. Village of Grand View Bd. Of Trustees*, 660 F. 3d 612 (2d Cir. 2011) markedly contrasts with the MPCA's conduct in providing actual notice to mining companies of how the wild rice sulfate standard applies to their conduct. In *Cunney*, the local zoning board refused to interpret the ordinance to a home builder even as they denied his variance, *Id*. at 616, and then approved his plan, only to deny a certificate of occupancy for the same home months later. *Id*. at 617.

In contrast, rather than declining to provide mining companies with guidance on how the wild rice sulfate standard will be applied to their discharge, MPCA staff has provided specific notice as to when, where and how the Agency plans to enforce the 10 mg/L sulfate limit in waters containing natural stands of wild rice. The MPCA has taken pains to advise companies that receiving waters for their sulfate pollution may be waters used for the production of wild rice (A. App. 014, 016-019, 021) and to ensure that appropriate research and surveys are done to confirm the presence of wild rice. (A. App. 015-016, 018, 040, 555, 556-557, 558-560, 562-563). The MPCA has also provided regulated parties with specific actual notice of the time periods to which the wild rice sulfate standard will apply in future permits. (A. App. 017, 019). There is no evidence in this record that any discharger has ever been sanctioned for sulfate discharge to wild rice waters without knowing the specific conduct proscribed and the behavior required to comply with the wild rice standard.

Although the Chamber asserts that the wild rice sulfate standard has been "arbitrarily" applied to named companies, (App. Brief 52), its allegations of disparate treatment were withdrawn and are not properly before this Court on appeal. (A. Add. 001). There is no evidence that any company has appealed any permit alleging arbitrary application of the wild rice standard to its sulfate discharge.

The conduct proscribed by the wild rice sulfate standard is not unconstitutionally vague, the intent of the rule is reasonable and ascertainably serves a legitimate public purpose, and the permitting process provides actual notice of prohibited conduct and an opportunity for procedural due process before any penalty could attach. The district court correctly ruled that the wild rice sulfate standard is constitutional.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE MPCA'S APPLICATION OF THE WILD RICE SULFATE STANDARD IS WITHIN THE SCOPE OF THE AGENCY'S AUTHORITY.

The Chamber claims the following actions or omissions pertaining to the wild rice sulfate standard exceed MPCA's statutory authority: Applying the wild rice sulfate standard to protect natural stands of wild rice as well as rice grown as an agricultural crop. (App. Brief 38); failing to list all of the specific bodies of water to which the wild rice sulfate standard applies (App. Brief 39); and failing to more precisely define the periods when wild rice may be susceptible to damage by high sulfate levels. (App. Brief 45). The district court found each of these claims wholly without merit.

A. The MPCA has a Duty as well as the Authority to Apply the Wild Rice Sulfate Standard to Protect Natural Stands of Wild Rice

Federal and state laws provide the MPCA with the authority and the duty to apply Minn. R. 7050.0224, Subp. 2 to protect natural stands of wild rice. The Clean Water Act (CWA) provides that water quality standards shall protect uses, "taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes." 33 U.S.C. §1313(c)(2)(A)(2011). Federal regulations implementing the CWA require the MPCA to protect all in-stream uses from degradation, not just agricultural uses, 40 C.F.R. §131.12 (2012) and require states to set water quality criteria "sufficient to protect the designated uses." 40 C.F.R. §131.6(c) (2012).

The wild rice sulfate standard was promulgated in 1973 to fulfill requirements under the Federal Water Pollution Control Act Amendments of 1972 (R-I App. 3-4) and the limit of 10 mg/L was set in order to protect natural growth of wild rice as well as cultivated rice. (A. App. 410-411, 437, 443, 446; R-I App. 5). In both the Keetac and PolyMet environmental review proceedings, the EPA directed the MPCA to apply the wild rice sulfate limit in waters containing natural stands of wild rice, not waters used for irrigation of cultivated rice. (A. App. 548-549, 554).

U.S. EPA also advised Minnesota officials in 2011 that MPCA enforcement of the wild rice standard is required under the Clean Water Act. The U.S. EPA cautioned Minnesota legislators in May 2011 that State action to prevent MPCA from implementing the wild rice sulfate standard would violate the Clean Water Act and its implementing

regulations, citing 33 U.S.C. §1311(b)(1)(C)(2011) and 40 C.F.R. §§ 123.25(a)(1), 122.4; 122.44(d)(1)(2012). The EPA advised that it had the authority to review and object to permits that did not apply the standard, and if permits were issued despite federal objections, to withdraw Minnesota's Clean Water Act delegated permitting authority pursuant to pursuant to 33 U.S.C. §§ 1342(c)(2)-(3)(2011). (A. App. 629).

The district court correctly concluded that the MPCA's application of the wild rice sulfate rule to protect waters with natural stands of wild rice is "consistent with a number of established legislative policies and statutory duties, among them the duty to ensure that the State of Minnesota maintains responsibility to administer the federal Clean Water Act in Minnesota." (A. Add. 010)

State law also authorizes protection of natural stands of wild rice from harm resulting from water pollution. The aquatic grass known to the Ojibwe as "manomin" is designated as Minnesota's official state grain. Minn. Stat. § 1.148, Subd. 1 (2011).

Minnesota environmental statutes give the MPCA broad authority "to administer and enforce all laws relating to the pollution of any of the waters of the state," Minn. Stat. § 115.03, Subd. 1(a)(2011), and "to establish and alter such reasonable pollution standards for any waters of the state in relation to the public use to which they are or may be put as it shall deem necessary" for the purposes of this chapter and for the purposes of discharge permits under chapter 116. Minn. Stat. § 115.03, Subd. 1(c)(2011). In the scope of this authority, pollution of water is expansively defined to include the contamination of any waters of the state "so as to be actually or potentially harmful or detrimental or injurious to public health, safety or welfare, to domestic, agricultural, commercial,

industrial, recreational or other legitimate uses, or to livestock, animals, birds, fish or other aquatic life." Minn. Stat. § 115.01, Subd. 13 (2011).

The MPCA's authority under the federal delegated NPDES permit program is also broadly defined to ensure protection of water quality.

> [T]he agency shall have the authority to perform any and all acts minimally necessary including, but not limited to, the establishment and application of standards, procedures, rules, orders, variances, stipulation agreements, schedules of compliance, and permit conditions, consistent with and, therefore not less stringent than the provisions of the Federal Water Pollution Control Act, as amended, applicable to the participation by the state of Minnesota in the national pollutant discharge elimination system (NPDES); provided that this provision shall not be construed as a limitation on any powers or duties otherwise residing with the agency pursuant to any provision of law.

Minn. Stat. § 115.03, Subd. 5 (2011).

Precedent confirms that the statutory enforcement scheme under Minnesota chapter 115 "unambiguously accords the state discretion in selecting the means of enforcement it deems most suitable in a given case" and "requires that those entrusted with the enforcement of our pollution control laws be provided a broad range of remedies from which they are free to select those they deem most appropriate." *State v. U.S. Steel Corp*., 240 N.W. 2d 316, 319 (Minn. 1976).

In upholding phosphorous water quality standards in the face of polluters' claims that the rule exceeded statutory authority, the Court explained, the "law and rules concerning water-quality standards and effluent limits are for the general health and welfare of the public," and questions of application to protect public health or welfare should be left to the "reasonable discretion of administrative officers." *Coalition of Greater Minnesota Cities v. Minn. Pollution Control Agency*, 765 N.W. 2d 159, 166-67

(Minn. Ct. App. 2009) *rev. denied* (Minn. Aug. 11, 2009). Where standards are needed to protect water quality, "the MPCA has broad and discretionary powers," and the courts have declined to "second-guess the agency's judgment." *Id.*, at 167-168.

The MPCA has not exceeded any federal or statutory authority in applying Minn. R. 7050.0224, Subp. 2 to protect natural stands of wild rice. In fact, such enforcement of the wild rice sulfate standard fulfills federal and state obligations under the Clean Water Act, federal regulations implementing the CWA and state statutes enacted to protect Minnesota's water resources, health and public welfare.

B. The MPCA has a Duty as well as the Authority to Apply the Wild Rice Sulfate Standard to Unlisted as Well as Listed Wild Rice Waters

The district court correctly determined that "no Minnesota or federal statutes require a state to list expressly every surface water to which a water quality standard applies. Such a requirement would be particularly absurd in a state such as Minnesota." (A. Add. 014).[3]

The Clean Water Act and federal regulations implementing the CWA are based on designating *uses* of water that must be protected, not naming each water body in rule before it can be protected from pollution. State water quality standards protect those uses "by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 C.F.R.§131.2 (2012).

Minnesota statutes authorize the MPCA "to make such classification of the waters

[3] A footnote to the district court opinion cites the *Minnesota Legislative Manual (*2011-2012) that "there are 11,842 lakes of more than 10 acres, 3 major river systems, and 6,564 (69,200 miles) rivers and streams." (A. Add. 014).

of the state as it may deem advisable." Minn. Stat. §115.03, Subd. 1(b)(2011). The MPCA has not exceeded this authority by protecting waters used for the production of natural stands of wild rice that are not specifically listed in rule.

In general, Minnesota rules do not require Class 4A or Class 4B waters to be individually listed before they can be protected from pollution. All waters of the state used for agricultural purposes, waterfowl, wildlife or habitat are Class 4 waters, Minn. R. 7050.0140, Subp. 5 (2012). Waters that are specifically listed in rule 7050.0470 to have some classification are, in addition to that classification, also classified as Class 3C, 4A, 4B, 5 and 6 waters. Minn. R. 7050.0410 (2012). Similarly, waters that are *not* listed in part 7050.0470 are classified as Class 2B, 3C, 4A, 4B, 5, and 6 waters. Minn. R. 7050.0430 (2012).

Whether or not they are specifically listed for that use, Minnesota's legal framework for water quality standards, approved by the EPA under the Clean Water Act provides, "All surface waters are protected for multiple beneficial uses." Minn. R. 7050.0220, Subp. 1 (2012). Whether or not they are specifically named, waters with a beneficial use of wild rice production must be protected from high sulfate discharge.

The fact that some "selected" wild rice waters have been listed pursuant to Minnesota Rule 7050.0224, Subp. 1 does not suggest that *all* wild rice waters must be so listed. The 1997 hearing record explains that the Subpart 1 narrative and this listing should be viewed as "initial steps in a broader process" to provide public awareness of the ecological importance of wild rice and to affirm the MPCA's commitment to work with Indian Bands on environmental issues. (A. App. 531). In the future, MPCA staff

would continue to work with MDNR and Indian Bands to identify additional wild rice waters and standards or criteria needed for the protection of wild rice. (A. App. 533).

The U.S. EPA, in its environmental review comments on the Keetac and PolyMet projects not only approved but directed that the MPCA apply the wild rice sulfate standard to non-listed lakes, streams and rivers where wild rice stands are present as well as to listed wild rice waters. (A. App. 548-549, 554)

The MPCA's protection of natural wild rice in both listed and unlisted wild rice waters is within the Agency's authority and duty under federal and state statutes.

C. The MPCA has a Duty as well as the Authority to Apply the Wild Rice Sulfate Standard when Rice may be Susceptible to Damage by High Sulfate Levels.

The Chamber did not allege in its Amended Complaint that the MPCA exceeded its authority by failing to amend the wild rice sulfate standard to more precisely define the periods during which it applies. (*See* A. App. 027-028). For this new claim, the Chamber cites no federal or state statutes that require any particular level of specificity in narrative, but merely asserts its opinion that the indefinite nature of the time period is unreasonable. (App. Brief 45)

The wild rice sulfate standard, including the condition applying the 10 mg/L sulfate limit "during periods when the rice may be susceptible to damage by high sulfate levels" was enacted in formal rulemaking and became a federally-approved water quality standard in 1973. The MPCA is not only authorized, but it is obligated to apply this water quality standard pending amendment of the rule.

Moreover, regulations promulgated under the Clean Water Act limit a State's ability to alter water quality standards once they have been federally approved. Amendments to water quality standards require U.S. EPA approval and a finding that the amendments are based on appropriate scientific and technical data and analysis and are sufficient to protect designated water uses, such as the production of wild rice. 40 C.F.R. §§ 131.5(a)(2) and (a)(4), § 131.6(c) (2012).

Pending appropriate scientific and technical analysis, such as that prescribed in the 2011 Wild Rice Legislation, Minn. Laws 2011, 1 Sp. c.2, art. 4, § 32(a), (c) and (d), the MPCA is not only authorized but obligated under state and federal law to apply the wild rice sulfate standard as enacted and approved.

III. THE DISTRICT COURT CORRECTLY DENIED THE CHAMBER'S CLAIMS FOR DECLARATORY JUDGMENT

The Chamber claims it is entitled to a declaratory judgment that the wild rice sulfate standard does not apply to natural stands of wild rice and that Minn. Stat § 645.16 (2011) requires this construction. (App. Brief 15). The district court correctly determined that there is no jurisdiction for the Chamber's declaratory judgment claim (A. Add 017) and that, under chapter 645, the MPCA's application of the wild rice rule to waters with natural stands of wild rice "is legally valid because it is consistent with the administrative history and intention of the regulation." (A. Add. 010)

A. There is No Jurisdiction for a Declaratory Judgment Action and Denial of Constitutional and Statutory Claims on the Merits has Resolved all Rights of the Parties.

It is uncertain whether promulgated rules may be reviewed under the Declaratory Judgment Act. The Act specifies that a person may obtain a declaration of "rights, status, or other legal relations" affected by or arising under a "statute, municipal ordinance, contract, or franchise," Minn. Stat. § 555.02 (2011), but does not provide for a similar remedy for a promulgated rule. Other declaratory judgment challenges to rules -- *see e.g. Chamber v. MPCA, supra; Manufactured Housing Inst. v. Pettersen, supra* -- have been prosecuted under Minnesota Statutes §14.44 (2011), which provides that the validity of a rule may be determined upon a petition for a declaratory judgment "when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner."

At least one Minnesota case found it significant that the chapter 14 language providing for declaratory judgment when "threatened application" of a rule interferes with a petitioner's rights was "conspicuously absent" from Minnesota Statutes 555.02. *S. Minn. Constr. Co. v. Minn. Dep't of Transp*., 637 N.W. 2d 339, 344, fn. 3 (Minn. Ct. App. 2002). The Court explained that chapter 555 "does not provide for declaratory judgment of rights before the agency has made its determinations." *Id*. at 344.

Even if the Declaratory Judgment Act might provide for declaration of rights pertaining to some other rule, there is no jurisdiction in this case since the Chamber's underlying constitutional and statutory claims are without merit. The Declaratory Judgments Act is not an express independent source of jurisdiction. "A party seeking a declaratory judgment must have an independent, underlying cause of action based on a common-law or statutory right . . . the Uniform Declaratory Judgments Act cannot create

a cause of action that does not otherwise exist." *Alliance for Metro. Stability v. Metro. Council*, 671 N.W. 2d 905, 915 (Minn. Ct. App. 2003). In *Vrieze v. New Century Homes, Inc.,* 542 N.W.2d 62, 67 (Minn. Ct. App. 1996) the Court criticized Appellants' position "that they can demand declaratory judgment without asserting any underlying legal theory of recovery." The Court insisted, "some recovery theory must underlie a declaratory judgment demand" and ruled that dismissal of appellants' substantive tort claims precluded a declaratory judgment claim. *Id*.

The lack of jurisdiction in this case is clear since the court's dismissal of the Chamber's constitutional and statutory claims has effectively resolved any controversy as to the legal rights of the parties. Unlike *Hempel v. Creek House Trust*, 743 N.W.2d 305, 314 (Minn. 2007), where a decision on statute of limitations grounds failed to address a claim of right based in contract, the district court's decision to dismiss the Chamber's claims was made on the merits.

The Chamber cites *Onvoy, Inc. v. Allete, Inc*. 736 N.W. 2d 611 (Minn. 2007) to support its claims. However, in *Onvoy*, the Minnesota Supreme Court reversed declaratory judgment on the grounds that any findings on claims at law that are common to those for declaratory relief are binding on the court when deciding claims for equitable relief. Similarly, *Ketterer v. Ind. School Dist. No. 1,* 79 N.W. 2d 428, 440 (Minn. 1956) held that the dismissal on the merits served to declare the rights of the parties so that additional declaratory judgment under chapter 555 was not necessary. *See also Brown v. State,* 617 N.W.2d 421, 425 (Minn. Ct. App. 2000), *rev. denied* (Minn. Nov. 21, 2000),

cert. denied, 532 U.S. 995 (2001) (findings, conclusions and order dismissing complaint effectively declare rights of the parties).

In this proceeding, there are no rights to determine once the wild rice sulfate standard has been found constitutional and within the MPCA's statutory authority. The fact that members of the Chamber may disagree with the rule's provisions does not create a justiciable controversy as to their legal rights.

B. The Wild Rice Sulfate Standard Protects Natural Stands of Wild Rice.

The Chamber's request for relief pursuant to Minn. Stat. § 645.16 (2011) is not properly before this Court. No claim under chapter 645 was pleaded in its Amended Complaint, and the chapter only governs rules becoming effective after June 30, 1981, Minn. Stat. § 645.001 (2011), whereas the wild rice sulfate standard was adopted in 1973.

Were this Court to entertain the Chamber's claim on its merits, it would fail. Minnesota Statutes 645.16 (2011) states "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." The clear intent of the wild rice standard, as reflected in its text, rulemaking record, history, and the interpretation of both state and federal agencies charged with its application, is to protect natural stands of wild rice along with cultivated rice.

The Chamber argues that the plain language of wild rice rule "unambiguously" applies only to cultivated crops (App. Brief 23), citing selected dictionary definitions of words and phrases in isolation to allege that "production" of wild rice exclusively refers to agriculture. (App. Brief 26-27). This is sophistry. Other dictionaries define

"production" to include "the harvesting or refinement of something natural,"[4] "the natural process of making a substance,"[5] and "the process of making something naturally."[6] Minnesota statutes also use the term "production" to refer to natural growth resulting from habitat conditions. The law pertaining to migratory waterfowl stamps, for example, requires that funds must be used for development of lakes and wetlands for "maximum migratory waterfowl *production*." Minn. Stat. 97A.075, Subd. 2 (2011)(emphasis added).

More importantly, Minnesota Rule 7050.0224, Subp. 1, provides that the numeric standards of 7050.0224, Subp. 2 as well as the narrative standards of Subp. 1 apply to natural stands of wild rice. The rule states that the "numeric" and as well as the "narrative" standards of part 7050.0224 prescribe qualities of waters needed for "wildlife designated public uses and benefits" as well as agriculture. The rule then defines the resource sought to be protected as "an aquatic resource found in certain waters within the state" and states that the "harvest and use of grains from this plant serve as a food source for wildlife and humans." The rule further explains that both 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." Minn. R. 7050.0224, Subp. 1.

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[4] Google Dictionary, http://www.google.com/#hl=en&safe=off&q=production&tbs=dfn:1&tbo=u&sa=X&ei=2jH4T9XDCMenrQGLkeGLCQ&ved=0CFgQkQ4&bav=on.2,or.r_gc.r_pw.r_cp.r_qf.,cf.osb&fp=7a705a4deaff6978&biw=1521&bih=914 last visited Aug. 1, 2012.

[5] MacMillan Dictionary http://www.macmillandictionary.com/dictionary/british/production last visited Aug. 1, 2012.

[6] Merriam Webster Learner's Dictionary at http://www.learnersdictionary.com/search/production last visited Aug. 1, 2012.

The interpretation of any rule "does not depend on a reading of those words or phrases in isolation, but relies on the meaning assigned to the words or phrases in accordance with the apparent purpose of the regulation as a whole." *In re Alexandria Lake Area Sanitary Dist*, 763 N.W.2d 303, 310-311 (Minn. 2009), *citing In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater,* 731 N.W. 2d 502, 517 (Minn. 2007). The object of judicial interpretation is to effectuate legislative intent and avoid an absurd result. *Cannon* v. *Minneapolis Police Dep't,* 783 N.W.2d 182, 194 (Minn. Ct. App. 2010). Read in its entirety, the purpose of the Minnesota Rule 7050.0224 manifestly includes protection of natural stands of wild rice. Interpreting the wild rice standard to exclude this purpose would be an absurd result.

In addition, both the MPCA and the U.S. EPA have interpreted the wild rice standard to protect natural stands of wild rice. "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). In construing a regulation, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.*, at 16-17; *Bowles v. Seminole Rock & Sand*, 325 U.S. 410, 413-414 (1945).

In *Ehlert v. United States*, 402 U.S. 99, 105 (1971), the Supreme Court similarly ruled, "we are obligated to regard as controlling a reasonable, consistently applied administrative interpretation if the Government's be such," *citing Immigration Service v. Stanisic,* 395 U.S. 62, 72 (1969); *Thorpe v. Housing Authority,* 393 U.S. 268, 276 (1969);

Udall v. Tallman, supra, 380 U.S. at 16-17; *Bowles v. Seminole Rock & Sand Co., supra,* 325 U.S. at 413-414.

Deference to MPCA and U.S. EPA interpretations of a sulfate discharge rule is appropriate. Controlling wastewater discharge "involves a subject matter uniquely within the agency's expertise and special knowledge" and the courts "will defer to the agency's expertise and special knowledge when the agency's interpretation of an unclear regulation is reasonable." *Alexandria Lake, supra*, 763 N.W. 2d at 313; *Annandale & Maple Lake NPDES/SDS Permit, supra*, 731 N.W. 2d at 515.

The text of Minnesota Rule 7050.0224, the 1973 rulemaking record, the history of the rule's application to protect natural stands of wild rice and consistent interpretations of both the MPCA and the U.S. EPA concur that the wild rice sulfate standard must be interpreted to protect natural stands of wild rice as well as irrigation of a cultivated crop. By every standard of logic, history and precedent, the agencies' construction of Minn. R. 7050.0224, Subp. 2 to protect natural stands of wild rice is reasonable, appropriate and controlling.

IV. THE DISTRICT COURT CORRECTLY DENIED THE CHAMBER'S REQUESTS FOR INJUNCTIVE RELIEF.

The Chamber appears to seek injunctive relief so that MPCA will no longer require regulated parties to conduct wild rice surveys, monitor their sulfate discharge, and evaluate means to comply with the wild rice sulfate standard. (App. Brief 57). The Chamber explicitly requests that this court prevent the MPCA from applying the wild rice sulfate standard to protect natural stands of wild rice and compel the MPCA to amend the

wild rice standard to list every water to which it applies and to more precisely define the periods during which the rule applies. (App. Brief 59). The district court correctly denied the Chamber's requests for injunction as baseless, determined that there were adequate remedies at law precluding equitable relief and declined to interfere in a rulemaking process already directed by the Legislature. (A. Add. 017-019)

A. Barring Monitoring, Surveys or Evaluation of Means to Comply with the Wild Rice Sulfate Standard would be Contrary to Law.

MPCA statutory powers and duties specifically include "to investigate the extent, character, and effect of the pollution of the waters of this state and to gather data and information necessary or desirable in the administration or enforcement of pollution laws." Minn. Stat. § 115.03, Subd. 1(b)(2011). MPCA also authorized to require the owner or operator of any discharge point source to maintain records, sample effluents, conduct monitoring "including where appropriate biological monitoring" and provide "such other information as the agency may reasonably require." Minn. Stat. § 115.03, Subd. 7 (2011). The MPCA also has broad discretion in the NPDES process "to perform any and all acts minimally necessary" to discharge NPDES authority. Minn. Stat. §115.03, Subd. 5(2011).

MPCA guidance requires sulfate monitoring and wild rice surveys from *any* discharger with the potential to violate applicable water quality standards, including the wild rice sulfate rule. (A. App. 564-572). The Chamber previously conceded with respect to requiring permit applicants to submit wild rice surveys, "MPCA has the authority to request information from Plaintiff's members." (A. App. 642).

There is no legal basis for the Chamber's objection to MPCA requirements that mining companies monitor their discharge, conduct wild rice surveys and evaluate their ability to treat sulfate discharge to comply with the wild rice standard. (App. Brief 20-21, 56-57). Surveys, monitoring and evaluating means of treating pollution discharge are necessary to protect wild rice and water quality in compliance with state and federal law.

B. Enjoining Application of the Wild Rice Sulfate Standard to Future Permits is Baseless and Premature, and there is an Adequate Remedy at Law for such an As-Applied Challenge.

There is no substantive basis for injunction on constitutional or statutory grounds. On its face, the wild rice sulfate standard is constitutional, MPCA's application of the rule is within the Agency's statutory authority, and the interpretation of the rule by the MPCA, as advised by the U.S. EPA, is consistent with its language, intent, history and underlying purpose to protect Minnesota's official State grain.

However the Chamber may try to characterize this claim to avoid limits on the court's jurisdiction, a request for injunctive relief to prevent the MPCA from "*interpretation* of and *actions* regarding the Wild Rice Rule" that are "arbitrary and capricious" (App. Brief 35, emphasis in original) is an "as-applied" challenge. The Chamber's request that the court enjoin the MPCA's potentially unreasonable future application of the Wild Rice Rule to unspecified companies discharging sulfates to unspecified waters at unspecified times is a premature and unripe pre-enforcement challenge based on hypothetical facts.

Minnesota case law bars an equitable remedy where there is an adequate remedy at law available. *ServiceMaster of St. Cloud v. GAB Business Services, Inc.* 544 N.W. 2d 302, 305 (Minn. 1996). Minnesota's permitting process provides an adequate remedy at law by requiring publication of the draft permit, Minn. R. 7001.0100(2012), providing the opportunity to seek a variance, Minn. R. 7000.7000 (2012), and a contested case, Minn. R. 7000.1800 (2012) and providing judicial review of an administrative decision to deny a contested case as well as a final permit decision. Minn. Stat. § 115.05, Subd. 11 (2011).

A long line of precedent holds that interpretation or application of rules prior to exhaustion of the administrative process is a premature exercise of judicial authority:

> Broad and far-reaching scrutiny of a rule or regulation, based upon hypothetical facts, is a premature exercise by the judiciary when the actual application or enforcement of the rule remains subject to prosecutorial discretion or formal or informal variance or waiver procedures.

Minnesota-Dakotas Retail Hardware Ass'n. v. State, 279 N.W. 2d 360, 363 (Minn. 1979).

Whether or not a rule exceeds statutory authority as applied must be adjudicated at such time as a controversy arises over its enforcement within a specific fact situation. *Id*., at 365. A pre-enforcement challenge is restricted to the validity of the rule on its face based on the administrative rulemaking record. *Minn. Chamber of Commerce v. MPCA, supra,* 469 N.W. 2d at 103; *Manufactured Housing Inst. v. Pettersen, supra,* 347 N.W. 2d at 241. The wild rice standard is clearly valid on its face.

The reasonableness of a rule *as applied* is appropriately considered in a contested case proceeding, not a pre-enforcement challenge. *Minn. Ass'n of Homes for the Aging v. Dep't of Human Services,* 385 N.W. 2d 65, 68 (Minn. Ct. App. 1986)(emphasis in

original); *Christian Nursing Center v. Dep't of Human Services*, 419 N.W. 2d 86, 92 (Minn. Ct. App. 1988). A challenge to an agency's proposed *interpretation* of a rule must also be made "in a contested case hearing when the agency seeks to enforce the rule." *Minn. Educ. Ass'n v. Minn. Bd. of Educ.,* 499 N.W. 2d 846, 849-850 (Minn. Ct. App. 1993), *citing Minn. Ass'n of Homes for the Aging v. Dep't of Human Services, supra,* 385 N.W. 2d at 68.

Limiting the scope of a pre-enforcement challenge to application and interpretation of rules promotes judicial efficiency as well as administrative autonomy:

> Courts require exhaustion of administrative remedies to protect the autonomy of administrative agencies and to promote judicial efficiency. The record produced during the administrative process facilitates judicial review and may also reduce the need to resort to judicial review.

Northwest Airlines, Inc. v. Metropolitan Airports Comm'n, 672 N.W. 2d 379, 381-382 (Minn. Ct. App. 2003) *rev. denied* (Minn. Feb. 25, 2004)*, citing Zaluckyj v. Rice Creek Watershed Dist.,* 639 N.W.2d 70, 75 (Minn. Ct. App. 2002) *rev. denied* (Minn. Apr. 16, 2002).

The history of the MPCA's application of the wild rice sulfate standard shows the wisdom of limiting judicial access to a pre-enforcement remedy. The dispute regarding wild rice sulfate limits for Minnesota Power's Clay Boswell plant was resolved by granting a site-specific variance through the administrative contested case process. (R-I App. 15). Any concerns of U.S. Steel regarding application of the wild rice standard to sulfate discharge at its Keetac mine and tailings basin in 2010 and 2011 (A. App. 041, 051-053; R-I App. 24, 30, 33) must have been addressed in the permits themselves. U.S. Steel did not

request a contested case although it had the opportunity to do so. (A. App. 489) Should the MPCA attempt to apply the wild rice sulfate standard unreasonably in some future permitting case, the regulated party would have an adequate legal remedy through the contested case process and recourse to judicial review on a fully-developed record. As it has in the past, the MPCA's administrative permitting process would often obviate the need for regulated parties to resort to judicial review.

C. An Injunction to Compel MPCA Rulemaking would Conflict with Federal Law and State Legislative Authority.

The Chamber's request for an injunction to compel the MPCA to amend the wild rice sulfate standard asks this Court to pre-empt the rulemaking process now underway pursuant to the 2011 Wild Rice Legislation requiring the MPCA to conduct a scientific investigation and to more specifically designate wild rice waters and periods to which the standard applies. Minn. Laws 2011 1 Sp. c.2, art. 4, § 32 (a)(c) and (d). The Chamber acknowledges that this Legislation directs the MPCA to amend the rule, but complains, that it will take "months or years to complete the research required by statute" (A. App. 662-663) and that, under the Minnesota Session Law, "MPCA may not even begin the administrative procedure to amend the rule until the agency completes extensive scientific research." (App. Brief 57).

The Chamber has not claimed that the MPCA is in violation of the 2011 Wild Rice Legislation prescribing the process for rulemaking. There is no pending cause of action, let alone the balance of equities and harms that would support a request for the extraordinary remedy of injunctive relief. *Dahlberg Bros., Inc.* v. *Ford Motor Co.,* 137

N.W.2d 314, 321-322 (1965).

Further, federal law enacted pursuant to the Clean Water Act requires the U.S. EPA to review any changes to water quality standards and to determine that any changes "protect the designated water uses" and are "based upon appropriate technical and scientific data and analyses" 40 C.F.R. §§ 131.5 (a)(2) and (4). Amending the wild rice sulfate standard prior to collection of data through the process established in the 2011 Wild Rice Legislation could result in rejection of the amendments under federal law.

Compelling an amendment of rules would also improperly intrude on both executive and legislative powers. This Court recently denied pollution dischargers' request for a limiting amendment to reduce the scope of phosphorus water quality rules. The Court emphasized in denying this relief that discretion of MPCA administrative officers was necessary "in order to facilitate the administration of laws as the complexity of economic and governmental conditions increase." *Coalition of Greater Minnesota Cities v. MPCA*, *supra*, 765 N.W. 2d at 165. Minnesota courts have also been cautious in construing statutes to give them effective operation and "will not allow judicial interpretation to usurp the place of legislative enactment." *State ex rel Hughes v. Reusswig*, 126 N.W. 279, 280 (1910).

Consistent with federal regulations implementing the Clean Water Act and the U.S. EPA's advice as to how these regulations apply to the wild rice sulfate standard, the Minnesota Legislature has established a rulemaking process that includes scientific research. Any amendments proposed in this rulemaking process will be subject to judicial review as well as U.S. EPA oversight. Judicial involvement to speed up this rulemaking

process at the behest of industrial polluters would inappropriately substitute the court's judgment for that of the administrative agency and usurp the place of legislative enactment. The district court correctly denied such relief.

CONCLUSION

For the above reasons and on all the files, records and proceedings herein, WaterLegacy requests that this Court affirm the district court judgment in all respects, thereby ordering: 1) that the motions for summary judgment of MPCA and WaterLegacy are granted in their entirety; 2) that the Chamber's motions for declaratory and injunctive relief are denied in their entirety; 3) that the Chamber's motion for partial summary judgment is denied in its entirety; and 4) that the Chamber's Complaint is dismissed in its entirety with prejudice and on the merits.

DATED: August 6, 2012

JUST CHANGE LAW OFFICES

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ADDENDUM

MINNESOTA SLIP LAWS
ENACTED AT THE 2011 FIRST SPECIAL SESSION (2011-2012)

2011 MINNESOTA CHAPTER LAW 2

2011 MINNESOTA SENATE FILE NUMBER 3

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

. . .

ARTICLE 4

. . .

Section 32. WILD RICE RULEMAKING AND RESEARCH.

(a) Upon completion of the research referenced in paragraph (d), the commissioner of the Pollution Control Agency shall initiate a process to amend Minnesota Rules, chapter 7050. The amended rule shall:

(1) address water quality standards for waters containing natural beds of wild rice, as well as for irrigation waters used for the production of wild rice;

(2) designate each body of water, or specific portion thereof, to which wild rice water quality standards apply; and

(3) designate the specific times of year during which the standard applies.

Nothing in this paragraph shall prevent the Pollution Control Agency from applying the narrative standard for all class 2 waters established in Minnesota Rules, part 7050.0150, subpart 3.

(b) "Waters containing natural beds of wild rice" means waters where wild rice occurs naturally. Before designating waters containing natural beds of wild rice as waters subject to a standard, the commissioner of the Pollution Control Agency shall establish criteria for the waters after consultation with the Department of Natural Resources, Minnesota Indian tribes, and other interested parties and after public notice and comment. The criteria shall include, but not be limited to, history of wild rice harvests, minimum acreage, and wild rice density.

(c) Within 30 days of the effective date of this section, the commissioner of the Pollution Control Agency must create an advisory group to provide input to the commissioner on a protocol for scientific research to assess the impacts of sulfates and other substances on the growth of wild rice, review research results, and provide other advice on the development of future rule amendments to protect wild rice. The group must include representatives of tribal governments, municipal wastewater treatment facilities, industrial dischargers, wild rice harvesters, wild rice research experts, and citizen organizations.

(d) After receiving the advice of the advisory group under paragraph (c), consultation with the commissioner of natural resources, and review of all reasonably available and applicable scientific research on water quality and other environmental impacts on the growth of wild rice, the commissioner of the Pollution Control Agency shall adopt and implement a wild rice research plan using the money appropriated to contract with appropriate scientific experts. The commissioner shall periodically review the results of the research with the commissioner of natural resources and the advisory group.

(e) From the date of enactment until the rule amendment under paragraph (a) is finally adopted, 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. Nothing shall prevent the Pollution Control Agency from including in a schedule of compliance a requirement to monitor sulfate concentrations in discharges and, if appropriate, based on site-specific conditions, a requirement to implement a sulfate minimization plan to avoid or minimize sulfate concentrations during periods when wild rice may be susceptible to damage.

(f) If the commissioner of the Pollution Control Agency determines that amendments to Minnesota Rules are necessary to ensure that no permittee is required to expend funds for design and implementation of sulfate treatment technologies until after the rule amendment described in paragraph (a) is complete, the commissioner may use the good cause exemption under Minnesota Statutes, section 14.388, subdivision 1, clause (3), to adopt rules necessary to implement this section, and Minnesota Statutes, section 14.386, does not apply, except as provided in Minnesota Statutes, section 14.388.

(g) Upon completion of the rule amendment described in paragraph (a), the Pollution Control Agency shall, if necessary, modify the discharge limits in the affected wastewater discharge permits to reflect the new standards in accordance with state and federal regulations and shall exercise its powers to enter into schedules of compliance in the permits.

(h) By December 15, 2011, the commissioner of the Pollution Control Agency shall submit a report to the chairs and ranking minority members of the environment and natural resources committees of the house of representatives and senate on the status of implementation of this section. The report must include an estimated timeline for completion of the wild rice research plan and initiation and completion of the formal rulemaking process under Minnesota Statutes, chapter 14.