

State of Minnesota  
In Court of Appeals

**FILED**

March 15, 2024

**OFFICE OF  
APPELLATE COURTS**

United States Steel Corporation,

Petitioner,

vs.

Minnesota Pollution Control Agency,

Respondent.

STATEMENT OF THE CASE OF  
PETITIONER

APPELLATE COURT

CASE NUMBER: \_\_\_\_\_

**1. Court or agency of case origination and name of presiding judge or hearing.**

Minnesota Pollution Control Agency (MPCA)

**2. Jurisdictional Statement**

**(B) Certiorari appeal.**

**Statute, rule or other authority authorizing certiorari appeal:**

Appellant is appealing, pursuant to the provisions of Minn. Stat. §§ 606.01–.06 (2023) and Minn. R. Civ. App. P. 115, or in the alternative, pursuant to the provisions of Minn. Stats. §§ 115.05, subd. 11, and 14.63–.69, and Minn. R. Civ. App. P. 115, Respondent’s denial of Appellant’s application for a sulfate site-specific standard (“sulfate SSS”) for Hay Lake.

**Authority fixing time limit for obtaining certiorari review (cite statutory section and date of event triggering appeal time, e.g., mailing of decision, receipt of decision, or receipt of other notice):**

Minn. Stat. § 606.01 provides that a party must apply for a writ of certiorari within 60 days of receiving the underlying decision.

Minn. Stat. § 14.63 provides that an aggrieved person must file and serve a petition for a writ of certiorari challenging a final agency determination within 30 days of the aggrieved person's receipt of the final determination.

Respondent issued its final decision denying Appellant's sulfate SSS application on February 14, 2024, and Appellant received the decision via email the same day, making Appellant's filing of this petition timely under either statute.

**3. State type of litigation and designate any statutes at issue.**

Appeal of a final agency decision via petition for writ of certiorari. Statutes at issue include Minn. Stat. §§ 606.01–.06 (2023); Minn. Stat. §§ 14.63–.69; and those within Minn. Stat. Ch. 115, including, but not limited to, Minn. Stat. § 115.05, subd. 11 and Minn. Stat. § 115.44.

**4. Brief description of claims, defenses, issues litigated, and result below. For criminal cases, specify whether conviction was for a misdemeanor, gross misdemeanor, or felony offense.**

A. Appellant

Appellant is a Delaware corporation that for many decades has operated a taconite mine and processing facility in Keewatin, Minnesota (hereinafter the "Facility"). In 2011, Respondent reissued National Pollutant Discharge Elimination System (NPDES)/State Disposal System (SDS) Permits No. MN0031879 and No. MN0055948 ("Permits") to Appellant. The Permits authorize discharges of stormwater and wastewater associated with the Facility's mining area and tailings basin to downstream receiving waters, including Hay Lake. In the reissued Permits,

Respondent included new discharge limits based on a Class 4A water quality standard for sulfate.

B. Minnesota's Class 4A Sulfate Standard

Minnesota's Class 4 agriculture and wildlife water quality standards protect agricultural uses of water (crop irrigation and livestock uses), as well as wildlife uses. A subclassification of Class 4—Class 4A—protects the use of water for agricultural irrigation. Among the Class 4A water quality standards is a 10 mg/L sulfates standard, which only applies to “waters used for production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels.” Minn. R. 7050.0224, subp. 2 (the “Sulfate Standard” or “Standard”). Respondent has informally determined—without any rulemaking or process—that Hay Lake is a “water[] used for production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels” and thus subject to the Sulfate Standard, despite having no evidence that the water in Hay Lake is used for agricultural irrigation in the production of wild rice or having been designated as such in rule. Appellant disagrees with Respondent's informal designation of Hay Lake as a wild-rice production water subject to the Sulfate Standard.

The Sulfate Standard was adopted in 1973 based on information gathered in the 1940s and 1950s. In the 2010s, the Minnesota Legislature, recognizing that the Standard was unclear, not based upon sound science or data, and outdated, acted three times to limit Respondent's enforcement of the Sulfate Standard until it was updated. First, in 2011, the legislature passed a law that directed Respondent to

update the Standard and limited enforcement until the undertook rulemaking to revise the Standard. Minn. Laws 2011, 1st Spec. Sess., Ch. 2, Art. 4, Sect. 32(a)-(e). Then, in 2015, a new law strengthened the limitations on Respondent's implementation of the Sulfate Standard and set 2018 as the deadline to complete the rulemaking to update the standard. Minn. Laws 2015, 1st Spec. Sess., Ch. 4, Art. 4, Sect. 136(a)(1)(i), (c). Specifically, that law stated that, until Respondent amended the Sulfate Standard, Respondent "shall not require permittees to expend money for design or implementation of sulfate treatment technologies or other forms of sulfate mitigation." *Id.* at 136(a)(1)(i). In 2016, a new law directly invalidated the discharge limits and compliance schedule in Keetac's Permit that were based upon the Sulfate Standard. Minn. Laws 2016, Chapter 165, Sect. 1(a).

C. Respondent's Abandoned Rulemaking

Based on these directives, Respondent, in 2015, commenced rulemaking to replace the Sulfate Standard with a peer-reviewed formula to produce a protective sulfate discharge limit for individual rivers and lakes based on site-specific conditions (the "Sulfate-Standard Formula"). In its proposed rule, Respondent stated: "Because the cost of treating wastewater to remove sulfate is extremely high, it is reasonable and very important to minimize the possibility of applying a standard that is more stringent than necessary to protect the wild rice beneficial use." MPCA, Statement of Need and Reasonableness: Amendment of the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Waters, p. 75 (July 2017). In 2018, an Administrative Law Judge disapproved of Respondent's

proposed revision to the Sulfate Standard. Minnesota Office of Administrative Hearings, OAH 80-9003-34519, Revisor R-4324, at ¶ 143 (Jan. 9, 2018), aff'd, Minnesota Office of Administrative Hearings, Report of the Chief Administrative Law Judge, OAH 80-9003-34519, Revisor R-4324 (Jan. 11, 2018; Apr. 12, 2018). While the Administrative Law Judge affirmed Respondent's Sulfate-Standard Formula, she concluded the revised standard was too complicated to give regulated parties a reasonable understanding of compliance requirements. Respondent has not taken additional action to revise the Sulfate Standard since that time.

D. Appellant's Sulfate SSS Application

On August 17, 2022, Appellant—while continuing to dispute the applicability of the Sulfate Standard to Hay Lake—out of an abundance of caution submitted an update to a 2014 application to Respondent for a site-specific standard for sulfate (“sulfate SSS”) in Hay Lake. The 2022 updated application utilized Respondent's most recent Sulfate-Standard Formula and updated science and data available at the time of application submission. The application itself exceeded twenty pages and was accompanied by over 1,500 pages of appendices containing maps, data, studies, calculations, and analyses. Minnesota rules provide that state water quality standards may be modified as to a specific surface water body, reach, or segment upon the showing that a site-specific modification is “more appropriate than the statewide or ecoregion standard for a particular water body, reach, or segment.” Minn. R. 7050.0220, subp. 7(A). In addition, federal law requires that site-specific standards, like all state water quality standards, must be “based on

sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.” 40 C.F.R. § 131.11(a). Appellant’s application sought to modify the statewide 10 mg/L Sulfate Standard to a site-specific standard of 79 mg/L for Hay Lake. Appellant’s application provided significant scientific support to demonstrate how the proposed sulfate SSS, which was directly based upon Respondent’s Sulfate-Standard Formula, would protect the underlying agricultural wild-rice beneficial use in Hay Lake and was more appropriate for Hay Lake than the statewide Sulfate Standard.

E. Respondent’s Sulfate SSS Framework and Denial of Appellant’s Application

Following Appellant’s submission of its thorough and complete 2022 sulfate SSS application, Respondent published a policy document titled *Framework for Developing and Evaluating Site-specific Sulfate Standards for the Protection of Wild Rice* (December 2023) (“Framework”). The Framework sets forth the standards and processes Respondent will utilize when evaluating SSS applications in waters subject to the Sulfate Standard. For example, Respondent indicates in the Framework that it interprets the key phrase “production of wild rice” in the Sulfate Standard as referring not only to the intentional cultivation of wild rice in agricultural paddies, but also to wild rice in naturally occurring stands. The Framework also indicates that Respondent will be taking “an expansive approach” to identifying waters that are “used for production of wild rice” and thus subject to the sulfate standard; documentation as simple as “current or historical wild rice presence—recorded observations, harvest histories, measurements of population

extent or other wild rice growth metrics, or other reliable evidence—is sufficient to consider a waterbody to be a water used for the production of wild rice” even in waters containing only “minimal stands or sparse rice.” In addition, the Framework provides that in most cases, sulfate SSS applications must be supported by 10 years of water-quality monitoring data, and that Respondent no longer supports use of the Sulfate-Standard Formula from the 2017 rulemaking “as a primary means to derive” a sulfate SSS. Notwithstanding these far-reaching policy pronouncements set forth in the Framework, Respondent did not promulgate the Framework as a rule, despite Respondent’s intent to apply the Framework standards to all future sulfate SSS applications, and despite the requests of Appellant and other regulated parties to do so. On February 14, 2024, less than two months after publishing the Framework and in a conclusory decision of less than four full pages, Respondent denied Appellant’s 2022 sulfate SSS application based upon the standards set forth in the Framework.

**5. List specific issues proposed to be raised on appeal.**

The issues Appellant intends to appeal include, but are not limited to, the following:

Whether Respondent’s denial of Appellant’s sulfate SSS application should be reversed because in denying the application, Respondent acted upon unlawful procedures, in excess of statutory authority, without substantial evidence in the record, and arbitrarily and capriciously by implementing the Framework standards as unpromulgated rules.

Key standards articulated in the Framework that were critical to Respondent’s determination to deny Appellant’s sulfate SSS application include but are not limited to:

- 1) Respondent's position that the Sulfate Standard applies to waters such as Hay Lake that simply contain naturally occurring wild rice but are not used to irrigate intentionally cultivated wild rice.
  - 2) Respondent's expansive interpretation that the scope of the beneficial use protected by the Sulfate Standard—and which must be protected by Appellant's sulfate SSS application—is the natural growth of wild rice in any Minnesota water.
  - 3) Respondent's position that the Sulfate-Standard Formula from Respondent's 2017 proposed rule is categorically insufficient as a scientific basis for a sulfate SSS.
- Appellant reserves its right to modify and expand its list of issues in its formal brief to be filed under Minn. R. App. P. 128.02.

**6. Related appeals.**

**List all prior or pending appeals arising from the same action as this appeal. If none, so state.**

There are no prior or pending appeals arising from the same action as this appeal.

**List any known pending appeals in separate actions raising similar issues to this appeal. If none are known, so state.**

There are no known pending appeals in separate actions raising issues similar to this appeal.

**7. Contents of record.**

**Is a transcript necessary to review the issues on appeal? Yes ( ) No (X)**

**8. Is oral argument requested? Yes (X) No ( )**



**If so, is argument requested at a location other than that provided in Rule 134.09, subd. 2? Yes ( ) No (X)**

**9. Identify the type of brief to be filed.**

Formal brief under Rule 128.02.

**10. Names, addresses, and telephone numbers of attorney for appellant and respondent.**

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By: /s/ *Jeremy Greenhouse*

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