No. 18-260

In The
Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

HAWAIʻI WILDLIFE FUND, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE BAND RELIES ON THE CLEAN WATER ACT TO PROTECT CRITICAL NATURAL RESOURCES FROM LARGE INDUSTRIAL POLLUTERS 5

A. Production And Consumption Of Traditional Foods, Including Manoomin And Freshwater Fish, Are Important To The Ojibwe 5

1. Manoomin 6

2. Freshwater Fish 8

B. The Band's Freshwater Resources Are Sensitive To Water Pollutants, Particularly Sulfate And Mercury 9

1. Sulfate 10

2. Methylmercury 11

C. Large Industrial Point Sources Are Decimating Manoomin With Discharges To Surface Waters That Migrate Through Groundwater 13

1. Minntac 13

2. PolyMet 20

TABLE OF CONTENTS – Continued

Page

II. THIS COURT SHOULD ADOPT RESPONDENTS' CLEAN WATER ACT INTERPRETATION BECAUSE IT IS CONSISTENT WITH THE PLAIN LANGUAGE AND PROTECTS IMPORTANT TRIBAL RESOURCES 22

A. The Clean Water Act's Plain Language Includes Discharges Fairly Traceable To A Point Source 23

B. The County's Interpretation Would Not Protect The Band's Important Natural Resources 27

1. Dischargers could easily evade the Clean Water Act permit requirement 27

2. Petitioner's assertion that other regulatory requirements sufficiently control groundwater-mediated discharges to surface waters is inaccurate 30

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASE LAW

Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599 (2009).....35

Friends of Santa Fe Cty. v. LAC Minerals, Inc., 892 F. Supp. 1333 (D.N.M. 1995).....14

Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009).....23

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Page

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TABLE OF AUTHORITIES – Continued

Page

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Minn. R. 7060.0200 31

Minn. Stat. §§ 115B.01-115B.53 36

H.R. Rep. No. 1185 (1974) 35

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Page

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TABLE OF AUTHORITIES – Continued

Page

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae Fond du Lac Band of Lake Superior Chippewa (the "Band") is a federally-recognized tribe and a member of the Minnesota Chippewa Tribe ("MCT"), whose members have resided in northern Minnesota for centuries. *See* 84 Fed. Reg. 1200, 1202 (Feb. 1, 2019). The Band has the inherent sovereign authority and duty to protect the natural resources and retained treaty rights upon which its members depend both on and off the Fond du Lac Reservation (the "Reservation"). *See* Treaty of LaPointe, 10 Stat. 1109 (Sept. 30 1854) [hereinafter, "1854 Treaty"]; Treaty with the Chippewa, 7 Stat. 591 (Oct. 4, 1842) [hereinafter, "1842 Treaty"]; Treaty with the Chippewa, 7 Stat. 536 (July 29, 1837) [hereinafter, "1837 Treaty"]. In this capacity, the Band has Treatment-As-A-State ("TAS") status under the Clean Water Act and administers and enforces water-quality standards on the Reservation. *See* 33 U.S.C. § 1341; Water Certification Standards, FDL

[1] Pursuant to Supreme Court Rule 37.2(a), all parties have consented to this brief's filing. Counsel of record for all parties received the requisite notice of the intent of *amicus curiae* to file this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution toward this brief's preparation or submission.

Ordinance No. 01/06;[2] Water Quality Standards, FDL Ordinance No. 12/98.[3]

The Band also holds off-Reservation usufructuary rights in lands ceded to the United States, which extend throughout the entire northeast portion of Minnesota and parts of Wisconsin and upper Michigan ("Ceded Territories").[4] 10 Stat. 1109; 7 Stat. 536; 7 Stat. 591. The Band retains and exercises these usufructuary rights, including the right to hunt, fish, and harvest manoomin (*Zizania palustris*) – known as wild rice in English – guaranteed under the 1837, 1842, and 1854 Treaties. H. James St. Arnold & Sue Erickson, *Ojibwe Treaty Rights Understanding and Impact* 13-17 (2006).[5] The Band co-manages the Ceded Territories with Minnesota and the other MCT Bands who share usufructuary rights in the Ceded Territories. *Id.* at 19-20.

The Band submits this brief based on its interest as a regulator ensuring the Clean Water Act's National

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[2] A copy of FDL Ordinance No. 01/06 is available at http://www.fdlrez.com/government/ords/01-06ord.pdf.

[3] A copy of FDL Ordinance No. 12/98 is available at https://www.epa.gov/sites/production/files/2014-12/documents/chippewa-tribe.pdf. The Band was granted TAS status on May 16, 1996. *Water Quality Standards Regulations: Fond du Lac Band of the Minnesota Chippewa*, Envtl. Protection Agency, https://www.epa.gov/wqs-tech/water-quality-standards-regulations-fond-du-lac-band-minnesota-chippewa (last visited June 18, 2019).

[4] A map of the 1837, 1842, and 1854 Ceded Territories are available at http://www.fdlrez.com/RM/fdlmaps.htm.

[5] The Great Lakes Indian Fish & Wildlife Commission published this report and a copy is available at https://www.glifwc.org/publications/pdf/OTRUI2006.pdf.

Pollutant Discharge Elimination System ("NPDES") permitting scheme prevents all point source discharges that impact Reservation surface waters and interfere with the Band's usufructuary rights in the Ceded Territories.

SUMMARY OF ARGUMENT

The Band depends on the Clean Water Act to protect its natural resources, including manoomin and freshwater fish. Manoomin and fish are central elements of the Ojibwe diet, and also play an important cultural, spiritual, and economic role in the life of Band members. Pollutants regulated under the Clean Water Act, for example, sulfate and mercury, directly threaten the manoomin and freshwater fish Band members consume; Petitioner's proposed limitation on the Clean Water Act's reach would have devastating consequences for the Band's resources.

Upstream from the Fond du Lac Reservation and in the Ceded Territories lie large iron ore and precious metal reserves. Mining companies mine, or propose to mine, those mineral reserves, posing real threats to water quality in Minnesota's water-rich environment.

The Clean Water Act's plain language requires, as the Ninth Circuit concluded, permitting for pollutants discharged from a point source through groundwater to navigable waters. The canons of construction instruct that this Court must derive a statute's meaning from the words used in the statute without supplementation.

Yet, Petitioner asks this Court to do the opposite, seeking to supplement the statutory text to limit its reach to "any *direct* addition of any pollutant to a navigable water from any point source." Congress, however, prohibited any person from making "*any addition*" – direct or indirect, continuous or intermittent, permanent or temporary – of any pollutant to navigable waters from any point source without a permit.

Petitioner's proposed loophole in the Clean Water Act would allow dischargers to avoid the Clean Water Act's reach by simply moving an outfall underground or onto a beach, leaving surface waters unprotected and contravening the Clean Water Act's purpose. Contrary to Petitioner's assertions, other regulatory requirements do not provide sufficient protections. For example, Minnesota's surface water quality standard to protect manoomin requires no higher sulfate concentration than 10 mg/L; the groundwater standard allows for a sulfate concentration of 250 mg/L. Petitioner simply errs when it asserts that other regulatory regimes can plug the gaping hole Petitioner's interpretation leaves in the bedrock law intended to restore and maintain the integrity of the Nation's waters.

ARGUMENT

I. THE BAND RELIES ON THE CLEAN WATER ACT TO PROTECT CRITICAL NATURAL RESOURCES FROM LARGE INDUSTRIAL POLLUTERS

The Band relies on the Clean Water Act to protect critical natural resources. Traditionally, Ojibwe people, also known as Anishinaabeg or Chippewa, were hunters, fishers, and gatherers, living on both sides of the Great Lakes in what is now United States and Canada. Arnold & Erickson, *supra*, at 6-7. Ojibwe people continue to consume diets rich in traditional foods, including manoomin and fish. For decades, large industrial point sources in the Ceded Territories have discharged, or plan to discharge, through groundwater into surface waters. These discharges contain contaminants that decimate manoomin stands and expose Band members to toxins in the food they eat.

A. Production And Consumption Of Traditional Foods, Including Manoomin And Freshwater Fish, Are Important To The Ojibwe.

Ojibwe culture is rooted in caring for the earth. *See* Fond du Lac Band of Lake Superior Chippewa, *Expanding the Narrative of Tribal Health: The Effects of Wild Rice Water Quality Rules Changes on Tribal Health*, 15 (2018) [hereinafter, "*Wild Rice Tribal Health Study*"].[6]

[6] A copy of *Wild Rice Trial Health Study* is available at https://www.health.state.mn.us/communities/environment/hia/hiainmn.html.

As such, Ojibwe people, living in an environment dominated by lakes and streams, produce and consume greater quantities of foods cultivated in freshwater. *See id.* at 33; J. A. Foran et al., *Evaluation of Mercury Exposure Reduction through a Fish Consumption Advisory Program for Anishinaabe Tribal Members in Northern Wisconsin, Michigan, and Minnesota*, 2010 J. Envtl. & Pub. Health 1, 1 (2010).[7]

Two resources of particular importance to the Ojibwe are manoomin and freshwater fish; large industrial point sources in the Ceded Territories threaten both resources.

1. Manoomin

Manoomin is an aquatic grass native to North America. Minn. Dep't of Nat. Res., *Natural Wild Rice in Minnesota* 7 (2008) [hereinafter, "*Natural Wild Rice*"].[8] Manoomin is a spiritual, cultural, social, nutritional, and medicinal staple of the Ojibwe. Manoomin's importance is rooted in Ojibwe history and spirituality. According to Ojibwe oral tradition, the Ojibwe originally resided along the Atlantic Coast. *See Wild Rice Tribal Health Study*, *supra*, at 8. Seven prophets came to the Ojibwe during a time of prosperity and left the Ojibwe with seven predictions about the future, known

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[7] A copy of this article is available at https://www.hindawi.com/journals/jeph/2010/802584/ (select "Full-Text PDF").

[8] A copy of this article is available at https://files.dnr.state.mn.us/fish_wildlife/wildlife/shallowlakes/natural-wild-rice-in-minnesota.pdf.

as the Seven Fires Prophesy. *See* April E. Lindala, *Anishinaabe Migration and History on the Marquette Iron Range*, https://lib.nmu.edu/voices/anishinaabe.php (last visited July 16, 2019). The prophets instructed the Ojibwe to travel west until they reached a place where food grew upon the water. *Wild Rice Tribal Health Study*, *supra*, at 8. For over five centuries, the Ojibwe migrated west to the Great Lakes region, stretching across the upper Midwestern United States and central Canadian provinces. Thomas Vennum, *Wild Rice and the Ojibway People* 1 (1988).

Since arrival, the Ojibwe relied on manoomin – the food that grows on water – to sustain them physically, socially, and spiritually. *See Wild Rice Tribal Health Study*, *supra*, at 8, 15-16. The migration and fulfillment of the prophesies are essential elements of the teachings of the Seven Fires Prophesy, which forms the spiritual backbone of Ojibwe people. *See id.*; *see also* Lindala, *supra*.

Ojibwe people use manoomin in their cultural practices, social traditions, nutrition, and medicinal customs. *See Wild Rice Tribal Health Study*, *supra*, at 8, 15-16. Manoomin plays a central role in ceremonies and celebrations, which perpetuate and protect its connection to the survival of the Ojibwe. Vennum, *supra*, at 58-59. Manoomin is also a healthy, traditional food. *Wild Rice Tribal Health Study*, *supra*, at 3. Manoomin has been referred to as a "super food" because it offers a healthy composition of protein, minerals, vitamins, dietary fiber, healthy carbohydrates, and low fat content. *Id.* at 33-37; *see also* U.S. Dep't of Agric., *Basic*

Report 20089, Wild Rice, Cooked (2019) (describing manoomin's nutritional properties).[9]

Finally, the seasonal manoomin harvest offers important economic opportunity for Ojibwe harvesters, their tribes, and their business communities. This economic benefit, while separate from the cultural importance of manoomin, is important to tribal economic development, providing hundreds of jobs, millions of dollars in labor income, and millions more in direct and indirect economic effect, all largely in regions where economic growth is needed. *See Wild Rice Tribal Health Study*, *supra*, at 46-47; *see also* Earth Economics, *The Food That Grows Out of the Water: The Economic Benefits of Wild Rice in Minnesota* 4 (2018).[10]

In sum, manoomin is a social, cultural, spiritual, nutritional, medicinal, and economic resource for the Band.

2. Freshwater Fish

Ojibwe people also have a deep connection to freshwater fish and harvesting. Catherine A. O'Neill, *Environmental Justice in the Tribal Context: A Madness to EPA's Method*, 38 Envtl. L. 495, 510 (2008). Not only do fish act as an important means of subsistence, fish are also culturally, spiritually, and politically important.

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[9] A copy of this report is available at https://ndb.nal.usda.gov/ndb/foods/show/20089.

[10] A copy of this report is available at http://www.fdlrez.com/RM/downloads/WQSWildRiceBenefits.pdf.

Id. at 509-10. Fishing fosters economic independence among tribal members and provides an important nutritional resource. *Id.* at 510. Traditional ceremonies also include fish as a central element. *Id.* And Ojibwe people transfer important cultural knowledge when they fish together. *Id.*

Fishing and consuming fish also plays an important role in the Band's ability to exercise its treaty rights and "engage in cultural self-determination." *Id.* Because fish are important to the Ojibwe, Ojibwe people consume fish at a higher rate than the general public. *Id.* at 504, 509-11; *see also* Fond du Lac Reservation Office of Water Protection, *Tribal Report Under Section 305(b), Clean Water Act* 1, 4-5 (2004).[11]

B. The Band's Freshwater Resources Are Sensitive To Water Pollutants, Particularly Sulfate And Mercury.

As a community rooted in caring for the earth and people focused on consuming resources that come from freshwater ecosystems, the Band is particularly concerned with point sources discharging pollutants that damage its resources. In particular, manoomin is highly sensitive to sulfate discharges and fish consumption becomes dangerous to human health when fish tissue becomes contaminated with high levels of methylmercury.

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[11] This report is available at http://www.fdlrez.com/RM/downloads/2003%20tribal%20305(b)%20water%20report.pdf.

1. Sulfate

As an aquatic species, manoomin grows exclusively in water. *Wild Rice Tribal Health Study*, *supra*, at 47. Ideal habitat for manoomin include water bodies with some movement, such as rivers, streams, flowages, and lakes with inlets and outlets. *Id.* at 47-48. Water depth must either remain stable or decline gradually over the growing season. *Id.* at 51. Manoomin is most consistently productive when growing in lake bottoms with soft, organic sediment. *Id.* at 47-48.

Historically, manoomin ranged throughout the upper Midwest. Today, however, manoomin's range has dramatically diminished due cumulatively to land use changes, altered hydrology, climate change, invasive species, and pollution. *Id.* at 49. Given manoomin's historical, economic, cultural, spiritual, and ecological importance, the Band has an understandable concern for the future of manoomin. *Id.* at 3. One major concern: sulfate's effect on manoomin when it converts to sulfide.

Sulfide is a toxic compound known to adversely affect manoomin. Minn. Envtl. Quality Bd., *Governor's Task Force on Wild Rice* 6, 32, 34 (2019).[12] Sulfate interacting with bacteria in water creates sulfide. *Id.* at 6. Because manoomin grows exclusively in water, and sulfate in water becomes toxic sulfide, hydrologic

[12] A copy of this report is available at https://www.eqb.state.mn.us/sites/default/files/documents/FINAL%20Governor%27s%20Task%20Force%20on%20Wild%20Rice%20Report%20January%203%202019%20v2.pdf.

sulfate discharges can significantly harm manoomin. *Id.* at 32. When sulfate becomes sulfide it reduces manoomin seedling growth and development. Minn. Tribal Wild Rice Task Force, *2018 Tribal Wild Rice Task Force Report* 23 (2018).[13] Seedling emergence, survival, biomass growth, viable production, and seed mass all decrease as sulfide levels increase. *Id.* While several factors can impact manoomin's growth and health, sulfide in sediment porewater has been determined to be a primary controlling feature of manoomin occurrence. *Id.* at 23-25.

2. Methylmercury

Methylmercury in fish tissue constitutes another contaminant with major implications for Band-member health. Methylmercury occurs when mercury enters water bodies and is methylated by microorganisms present in the water. O'Neill, *supra*, at 500. In this form, methylmercury is highly bioavailable and easily absorbed by fish in affected waters. *Id.* Over time, methylmercury bioaccumulates in fish, which in turn acts as a source of methylmercury contamination for organisms (including humans) consuming those fish. *Id.* at 500-01.

Methylmercury is a neurological toxin that is harmful to humans. *Mercury*, Minn. Pollution Control Agency, https://www.pca.state.mn.us/water/mercury (last visited July 16, 2019). In 2011, a Minnesota Department of

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[13] A copy of this report is available at http://mnchippewatribe.org/pdf/TWRTF.Report.2018.pdf.

Health study found that eight percent of Minnesota babies born in the Lake Superior basin had unhealthy levels of mercury, which can affect brain and nervous system development. Patricia McCann, *Mercury Levels in Blood from Newborns in the Lake Superior Basin* 11 (2011).[14] Fishing peoples, such as the Ojibwe, face greater harm from mercury pollution because certain seasonal or cultural constraints can result in acute doses of methylmercury when tribal consumption is especially high. O'Neill, *supra*, at 511.

Methylmercury is especially concerning in the St. Louis River watershed, the river forming the northern and eastern border of the Reservation. Fond du Lac Band of Lake Superior Chippewa, *2008 Integrated Resource Management Plan* 19-20 (2008).[15] The St. Louis River watershed's unique hydrology, geology, and topology more easily converts mercury into methylmercury – the form capable of accumulating in fish. *Fish Contaminant Study*, Fond du Lac Band of Lake Superior Chippewa, http://www.fdlrez.com/RM/waterfish.htm. Consequently, mercury discharges into the St. Louis River and its watershed create human health concerns for those consuming fish from tribal waters both on the Reservation and in the Ceded Territories.

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[14] A copy of the Minnesota Department of Health's study is available at https://www.health.state.mn.us/communities/environment/fish/docs/glnpo.pdf.

[15] A copy of the Integrated Resource Management Plan is available at http://www.fdlrez.com/RM/downloads/IRMP.pdf.

C. Large Industrial Point Sources Are Decimating Manoomin With Discharges To Surface Waters That Migrate Through Groundwater.

The Ceded Territories intersect two large mineral deposits: the Mesabi Iron Range and Duluth Complex. As a result, numerous industrial mining operations have been proposed or constructed in and around the Ceded Territories. These large industrial point sources threaten, or have damaged, manoomin and human health by adding elevated levels of sulfate to surface waters by discharging additional mercury in the St. Louis River and its watershed.

1. Minntac

One example in the Mesabi Iron Range is the Minntac mine. In the 1960s, prior to the Clean Water Act's enactment, U.S. Steel Corporation ("U.S. Steel") constructed Minntac to mine taconite – a low grade iron ore. Minn. Pollution Control Agency, *Draft Minntac Water Inventory Reduction Environmental Impact Statement* S-1 (2004) [hereinafter, "*Minntac EIS*"].[16] The Minntac facility includes an 8,000-acre tailings basin,[17] used to dispose waste from ore processing. *In*

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[16] A copy of the *Minntac EIS* is available at https://www.pca.state.mn.us/sites/default/files/minntac-deis.pdf.

[17] Federal courts have held that "when mining activities release pollutants from a discernible conveyance, they are subject to NPDES regulation, as are all point sources." *Trs. for Alaska v. Envtl. Protection Agency*, 749 F.2d 549, 558 (9th Cir. 1984) (discussing consistent findings in 10th and 5th Circuits). This includes

re Determination of the Need for an Envtl. Impact Statement for the Minntac Mine Extension Project in Mountain Iron, St. Louis Cty., Minn. ("*In re Minntac Extension*"), No. A13–0837, 2014 WL 274077, *1 (Minn. Ct. App. 2014). During the ore-extraction process, U.S. Steel mixes the waste – known as fine tailings – with water to create a slurry. *Minntac EIS* at S-5. U.S. Steel discharges the slurry into the tailings basin. Findings of Fact, Conclusions of Law, and Order ¶ 3, *In re Reissuance of an NPDES/SDS Permit to U.S. Steel Corp. for Its Minntac Facility* (Minn. Pollution Control Agency Nov. 30, 2018) [hereinafter, "*Minntac Reissuance Order*"].[18] The slurry fills the tailings basin with pollutants, including sulfate. *See In re Minntac Extension*, 2014 WL 274077, at *1.

U.S. Steel installed environmental controls, but designed the tailings basin to release contaminated water into the environment. *Minntac Reissuance Order* ¶¶ 5-7. U.S. Steel surrounded the tailings basin with dikes, but declined to install a liner or other barrier to prevent contaminated water from seeping through the dikes or the bottom of the tailings basin. *Id.* ¶¶ 6-7. As a result, the tailings basin discharges

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tailings basins. *Wash. Wilderness Coal. v. Hecla Min. Co.*, 870 F. Supp. 983, 988 (E.D. Wash. 1994); *see also Trs. for Alaska*, 749 F.2d at 558 (sluice boxes); *Ohio Valley Envtl. Coal., Inc. v. Hernshaw Ptnrs., LLC*, 984 F. Supp. 2d 589, 599, (S.D. W. Va. 2013) (mining valley fill); *Friends of Santa Fe Cty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1355 (D.N.M. 1995) (overburden piles).

[18] A copy of the *Minntac Reissuance Order* is available at https://www.pca.state.mn.us/sites/default/files/wq-wwprm1-28f.pdf.

pollution through groundwater into adjacent surface waters. *Id.*

In 2005, the Minnesota Pollution Control Agency estimated seepage discharges were approximately 3,000 gallons per minute, equaling 1.5 **billion** gallons of wastewater per year. *See* Findings of Fact, Conclusions of Law, and Order ¶ 8, *In re Determination of Adequacy of the Envtl. Impact Statement for the U.S. Steel – Minntac Water Inventory Reduction Project Mountain Iron, Minn.* (Minn. Pollution Control Agency Nov. 22, 2005) [hereinafter, "*Minntac Adequacy Order*"].[19] Since then, U.S. Steel installed a seepage collection and return system, but approximately 1,000 gallons per minute continue to escape. Minn. Pollution Control Agency, *National Pollutant Elimination System (NPDES)/ State Disposal System (SDS) Permit Program Fact Sheet Permit Reissuance* 11-12 (2016) [hereinafter, "*NPDES Fact Sheet*"].[20]

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[19] A copy of the *Minntac Adequacy Order* is available at https://www.pca.state.mn.us/sites/default/files/minntac-sd.pdf.

[20] A copy of the *NPDES Fact Sheet* is available at https://www.pca.state.mn.us/sites/default/files/Fact%20Sheet%20-%20MN0057207%20-%202016_2.pdf

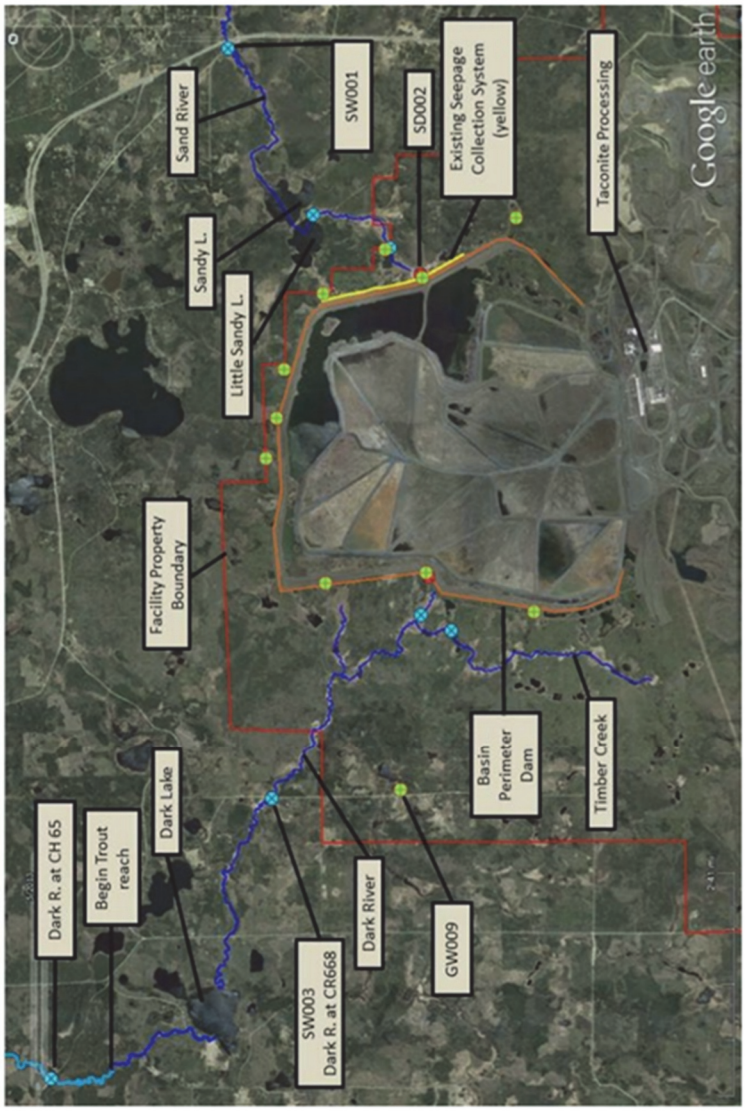

Figure 1. Minntac Tailings Basin.[21]

[21] A copy of this map is available in *NPDES Fact Sheet, supra*, at 14, fig. 2.

The tailings basin's contaminated water discharges into two watersheds: the Sand River and Dark River. The Twin Lakes – also known as Sandy Lake and Little Sandy Lake – lie immediately to the east. Darren J. Vogt, *Sandy Lake and Little Sandy Lake Monitoring (2010-2017)* 2 (2018).[22] The Twin Lakes outlet to the Sand River which merges into the Pike River and, ultimately, Lake Vermillion; all are manoomin-producing lakes and rivers. Kim Lapakko & Ann Jagunich, *Sulfate Release from the USX Tailings Basin and Quantification of Sulfate Sources* 1-2 (1991); *see also MPCA Wild Rice Database,* https://www.pca.state.mn.us/document/wq-s6-43xxlsx (last visited July 16, 2019).

The Twin Lakes once hosted vibrant manoomin stands. Lapakko & Jagunich, *supra*, at 1-2. Historically, the Twin Lakes could seasonally produce 200 acres of manoomin. *Id.* at 1. Since the 1980s, however, manoomin production has steadily declined. *See id.* (noting "fair" crops in 1980 and 1981 and "poor" corps in 1982 and 1984-1987); *see also* Vogt, *supra*, at 16. ("Rice production generally declined through the 1970s and 1980s, with little or no rice found in the lakes during a 1987 survey. Rice production has since remained poor."). Scientists and Minnesota agencies attribute the decimation of the Twin Lakes' manoomin stands to the extremely high sulfate levels in the contaminated water seeping from Minntac's tailings basin. *See* Lawrence A. Baker, *Evaluation of Minntac Tailings*

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[22] A copy of this report is available at http://www.1854treatyauthority.org/management/biological-resources/fisheries/reports.html?id=122&task=document.viewdoc.

Basin on Little Sandy and Sandy Lakes 12 (2016); Letter from Melissa Thompson, Wildlife Lake Specialist, Minn. Dep't of Nat. Res, to Erik Smith, Industrial Division, Minn. Pollution Control Agency (Jan. 24, 2018) ("When the Twin Lakes sulfate amounts range from 66.4 mg/L to 589 mg/L in 2017, and other lakes in the area have natural sulfate amounts around 1-3 mg/L, it is difficult to not acknowledge the impact the seepage is having on downstream habitats.") (on file with Counsel of Record). As of 2017, sulfate levels ranged up to 589 mg/L, more than fifty-eight times higher than the state water quality standard with an overall upward trend. Letter from Thompson to Smith, *supra*, at 2; *see also* Minn. R. 7050.0224 (setting a 10mg/L water quality standard for sulfates); Letter from Margaret Watkins, Grand Portage Water Quality Specialist, and Nancy Schuldt, Fond du Lac Water Projects Coordinator, to Erik Smith, Minnesota Pollution Control Agency 3 (Dec. 22, 2016) (illustrating the trend in sulfate levels over time) (on file with Counsel of Record).

Minntac is only one example of the threat manoomin faces from large industrial polluters in the Ceded Territories. Large mining companies own mineral leases, have explored those mineral resources, and proposed future mining projects within the Ceded Territories. Those projects, like Minntac, risk discharging sulfate into manoomin-growing waters in the Ceded Territories with high levels of sulfate. The Reservation, the 1854 Ceded Territory, current mining projects, and the St. Louis River watershed are illustrated in the map below:

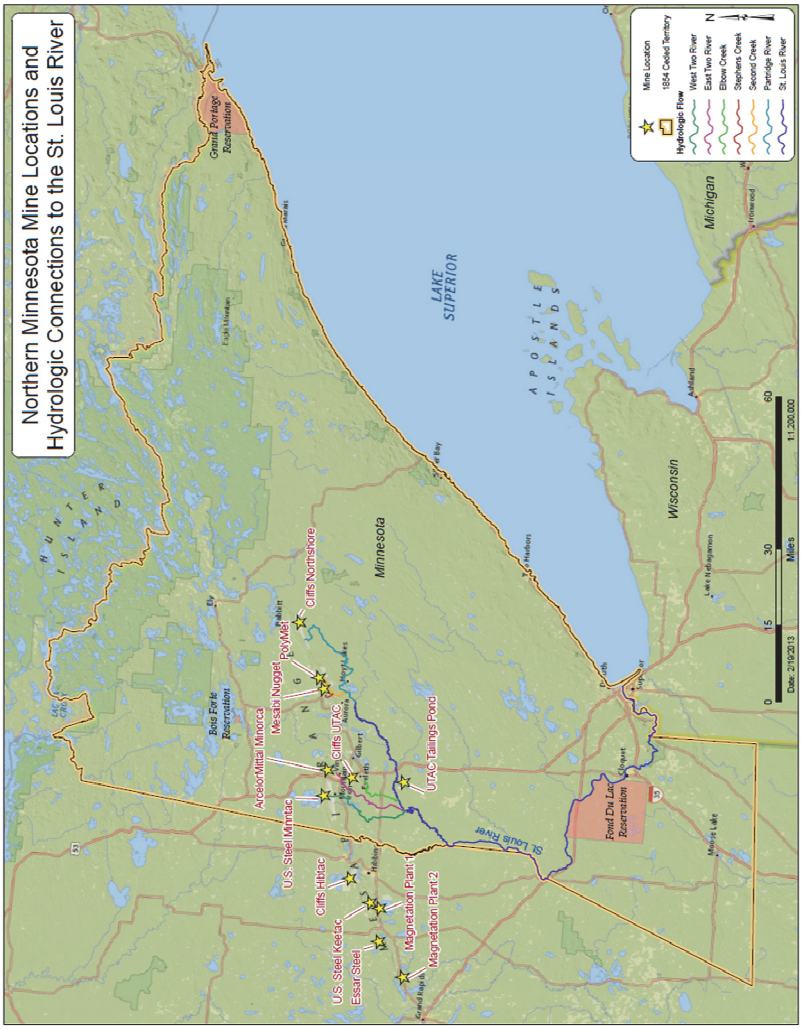

Figure 2. 1854 Ceded Territory with Mine Locations.[23]

[23] Heather Fox, a GIS Specialist for the Grand Portage Reservation, created this map for the Band's use.

2. PolyMet

An example from the Duluth Complex provides an illustration for how industrial point sources discharging to surface water through groundwater could increase mercury concentrations if Petitioner's Clean Water Act interpretation prevails. Poly Met Mining, Inc. ("PolyMet") proposed a copper-nickel mine in the St. Louis River watershed. Minn. Dep't of Nat. Res., *Final Environmental Impact Statement* 1-5 (2015) [hereinafter, "*PolyMet FEIS*"].[24] PolyMet intends to release water contaminated with mercury into the groundwater from two sources.

For a waste rock stockpile, PolyMet proposes to release contaminated water into the groundwater, capture the contaminated groundwater, and subsequently treat the contaminated water prior to discharge at an outfall.[25] Barr Eng'g, NPDES/SDS Permit Application, Vol. II at 42 (2017) [hereinafter, "*NPDES Application*"].[26] PolyMet knows some water will escape the capture system and reach surface waters. PolyMet

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[24] A copy of the *PolyMet FEIS* is available at https://files.dnr.state.mn.us/input/environmentalreview/polymet/feis/NMet_FEIS_Complete.pdf.

[25] The waste rock stockpile is known to be "a major source of sulfate." Don E. Richard, *Summary of Non-Mechanical Treatment Plans for PolyMet* 4 (2016).

[26] A copy of the *NPDES Application* is available at https://www.pca.state.mn.us/regulations/water-quality-permit-northmet (select "NPDES/SDS Permit Application – Vol. II: Mine Site").

Mining, *NorthMet Project Adaptive Water Management Plan* 20 (2017).[27]

PolyMet also plans to use an existing, Minntac-like tailings basin – known to discharge water contaminated with mercury through groundwater to surface waters – and add more waste to the basin. *NPDES Application*, *supra*, Vol. V, at 13-14; *PolyMet FEIS*, *supra*, at 4-41. PolyMet's proposed method to protect the environment is to allow contaminated water to seep into the groundwater, capture the contaminated groundwater, and either send the water back to the tailings basin or treat the water prior to discharge. *NPDES Application*, *supra*, at 20-22. But again, PolyMet knows the containment system will not collect all pollutants and those that escape will discharge through groundwater to surface waters. Barr Eng'g, *Groundwater Modeling of the NorthMet Flotation Tailings Basin Containment System* 2 (2015); Barr Eng'g, *NorthMet Project Water Modeling Data Package Volume 2* 160-68 (2015).[28]

PolyMet illustrates that industrial polluters will continue production and propose new projects that discharge, or have the potential to discharge, mercury into the St. Louis River watershed. PolyMet also illustrates how designed projects like PolyMet could be easily modified to remove containment systems and allow

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[27] A copy of the *NorthMet Project Adaptive Water Management Plan* is available at https://files.dnr.state.mn.us/lands_minerals/northmet/permit_to_mine/appendix_11_4_dec17.pdf.

[28] A copy of this report is available at https://files.dnr.state.mn.us/lands_minerals/northmet/water-approp/references/plant-site-water-model-data-package-vol2-v11.pdf.

discharges into surface waters through groundwater with no treatment at all. Without the Clean Water Act, protecting the Band from these discharges will be much more difficult.

For the foregoing reasons, the Band asserts the Minntac and PolyMet examples strongly support the Ninth Circuit's and Respondents' Clean Water Act interpretation.

II. THIS COURT SHOULD ADOPT RESPONDENTS' CLEAN WATER ACT INTERPRETATION BECAUSE IT IS CONSISTENT WITH THE PLAIN LANGUAGE AND PROTECTS IMPORTANT TRIBAL RESOURCES

Under existing federal environmental laws, the Clean Water Act's plain language represents the only statutory path to protect the Band's natural resources from point source discharges. Petitioner's and the U.S. Environmental Protection Agency's ("EPA") proffered interpretations undermine these protections and allow large industrial discharges to destroy the Band's natural resources in the Ceded Territories. Therefore, consistent with the Clean Water Act's plain language and purpose, the Band respectfully requests this Court adopt Respondents' Clean Water Act interpretation.

A. The Clean Water Act's Plain Language Includes Discharges Fairly Traceable To A Point Source.

The Clean Water Act's clear prohibition that it is illegal to discharge a pollutant from a point source to a navigable water without a NPDES permit includes circumstances, such as those at issue in this case, where a discharger injects treated sewage through groundwater to a navigable water. Similarly, applying the facts related to the Band's protection of manoomin and freshwater fish, the Clean Water Act's prohibitions include circumstances where pollutants are discharged from a tailings basin through groundwater to navigable waters and damage the Band's natural resources. To conclude otherwise would require this Court to disregard the Clean Water Act's plain language and purpose.

The Clean Water Act defines the discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Further, a "point source" is a "conveyance" (for example a "pipe" or "container") "from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). To interpret this language, the Court must first analyze "the statutory language, 'assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009)). This Court enforces "plain and unambiguous statutory language according to its terms." *Id.* The Court need not travel "beyond the borders of the statute" to find the meaning of these

definitions. *United States v. Great N. Ry.*, 287 U.S. 144, 154 (1932).

As Justice Scalia described in his treatise on the canons of statutory construction, courts are guided by a "supremacy-of-text principle." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). A statute's purpose "must be derived from the text" and that purpose must be "defined precisely" and "described as concretely as possible." *Id.* at 56-57. Importantly, what is *not* included in the text of a statute is equally as significant in divining its meaning and purpose. *See id.* at 57-58 ("[T]he limitations of a text – what a text chooses *not* to do – are as much a part of its 'purpose' as its affirmative dispositions. These exceptions or limitations must be respected, and the only way to accord them their due is to reject the replacement or supplementation of text with purpose.")

Here, the statute means what it says – when pollutants are added to a navigable water from any discrete source, such as a pipe, container, or other "conveyance . . . from which pollutants . . . may be discharged," the discharge requires a permit under the Clean Water Act. In Petitioner's case, no one disputes that the County adds pollutants (treated effluent) to a navigable water (Pacific Ocean) from a point source (injection well). (Pet. Br. 6-7).

Petitioner and its supporting *amici curiae* ignore the definition of a pollutant discharge in the Clean Water Act, and instead impose their own purpose on the Clean Water Act based on a limitation not found in the

text. Petitioner argues that the Clean Water Act's purpose is only to regulate pollutants added *directly* to navigable waters from a point source. (*Id*. at 27-31). In fact, the text prohibits "any addition," not just "any direct addition" of pollutants from a point source to navigable waters. Petitioner engages in the exact practice Justice Scalia condemns and its interpretation should be rejected.

There are three concepts at issue in the relevant definition: (1) addition of pollutants, (2) to a navigable water, (3) from a point source. The Clean Water Act further defines the terms "navigable waters" and "point sources." 33 U.S.C. §§ 1362(7), (14). Applying those definitions, no one disputes that the Pacific Ocean constitutes a navigable water, and the injection well, a point source. The term most relevant to the Court's certified question is the word "addition." What kind of "addition" is intended? Must the "addition" be *direct*, or can it be *indirect*? Is it still an "addition" if the pollutant moves through groundwater to reach a navigable water?

The text answers these questions.

The undefined term "addition" is a general word. "Without some indication to the contrary, general words (like all words, general or not) must be accorded their full and fair scope. They should not be arbitrarily limited." Scalia & Garner, *supra*, at 101. The word "addition" means "the act or process of *adding*; a recipe enhanced by the *addition* of freshly ground pepper." *Addition*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/addition (last visited July 16, 2019).

Far from placing a limitation on the type of addition the Clean Water Act covers, Congress chose to forbid "*any* addition" of pollutants to navigable waters from a point source absent a permit. As this Court previously noted "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (citing Webster's Third New International Dictionary 97 (1976)). In *Gonzales*, the Court construed a mandatory sentencing statute forbidding a sentence that would run concurrently with "any other term of imprisonment" for certain offenses. *Id*. The Court rejected an effort to narrow the statute's application to only federal offenses because "federal" did not appear in the statute. *Id.* "Congress did not add any language limiting the breadth of that word, and so we must read [the statute] as referring to all 'term[s] of imprisonment,' including those imposed by state courts." *Id.*

As in *Gonzales*, here no basis exists to limit the Clean Water Act which, by its plain text, prohibits "any addition" – that is, an addition "of whatever kind" – of pollutants to navigable waters from a point source. By using the term "any," Congress expressly included all kinds of additions – direct or indirect, continuous or intermittent, permanent or temporary, etc.

Petitioner's interpretation requires this Court to re-write the statute, adding a modifier to the statutory definition so it would read: "any *direct* addition of any pollutant to a navigable water from any point source." This Court's canons of construction do not allow such a re-write. The Court "must enforce plain and

unambiguous statutory language according to its terms." *Hardt*, 560 U.S. at 251. That includes not adding words to a statute. *Id.* (where "prevailing party" does not appear in fee shifting statute, it is error to limit eligibility for fees to prevailing parties). Indeed, Petitioner's argument, which asks the Court to add unincluded terms, seeks to "invent" rather than "interpret" the statute. *Id.*

For these reasons, the Ninth Circuit and Respondents correctly interpret the Clean Water Act, and this Court should reject Petitioner's misconstruction.

B. The County's Interpretation Would Not Protect The Band's Important Natural Resources.

The interpretation Petitioner and supporting *amici* offer, if adopted by this Court, would have severe consequences for water quality and natural resource protection. A narrow construction that exempts any point source pollutant discharge through groundwater to navigable waters from the Clean Water Act threatens the Band's resources both on the Reservation and in the Ceded Territories.

1. Dischargers could easily evade the Clean Water Act permit requirement.

Resources on the Reservation and within the Ceded Territories lie downstream from numerous permitted water pollution discharges regulated under the Clean Water Act. *Watershed Health Assessment*

Framework, Minn. Dep't Nat. Resources, http://bit.ly/2Yhq2Sm (mapping tool that highlights all upstream feedlots, wastewater treatment facilities, and open pit mines). Dischargers include both publicly-owned facilities like wastewater treatment works, as well as private industries like mines, paper mills, and power plants. Many of these discharges flow into the St. Louis River watershed and include pollutants ranging from bacteria and nutrients to heavy metals and other toxics.

As described above, the St. Louis River and its watershed are vitally important to the Band. *See* Part I.B.2. Due to historic, pre-Clean Water Act pollution, the St. Louis River was designated a Great Lakes Area of Concern in 1987. *Sediment Studies: St. Louis River Area of Concern*, Minn. Pollution Control Agency, https://www.pca.state.mn.us/water/sediment-studies-st-louis-river-area-concern (last visited July 16, 2019). Overall, more than $420 million has been invested in the St. Louis River's clean-up and restoration since its designation. Minn. Pollution Control Agency et al., *A Roadmap to Delisting: St. Louis River Area of Concern Remedial Action Plan Update* 2 (2013).[29] Yet mining companies continue to propose new projects – like PolyMet – that without stringent Clean Water Act protections could stymie the progress made to remediate the St. Louis River watershed.

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[29] A copy of the Remedial Action Plan Update is available at https://stlouisriver.org/wp-content/uploads/2015/08/RoadmapSummaryBrochureSLR2013.pdf.

The rigid pipe-into-water interpretation Petitioner seeks to force on the statute contravenes the Clean Water Act's purpose and creates a perverse incentive for dischargers to simply discharge unregulated, nonpoint source pollution. In the National Association of Clean Water Agencies et al.'s *Amicus* Brief, for example, *amici* assert that a "discrete source of pollution cannot be a point source when groundwater or another intervening nonpoint source diffuses pollutants and carries them to navigable waters." (*Amicus Curiae* Nat'l Ass'n of Clean Water Agencies Br., 9). In other words, *amici* suggest that if the pollution from a discrete source – wastewater in a pipe, for instance – is first diffused – sprayed on the ground, for example – it is beyond the reach of the Clean Water Act's permitting program.

Such a rule would eviscerate the Clean Water Act. What would prevent existing or new dischargers from simply removing their outfalls from a surface water and instead placing them into adjacent groundwater, or allowing them to discharge on beaches or fields, or even spraying them as mist into the air? In PolyMet's case, this would require little more than removing the containment systems and simply allowing contaminates to flow into the groundwater untreated.

Petitioner's interpretation threatens decades of achievement to clean the Nation's surface waters, creating an incentive for polluters to design their discharges to travel through a "nonpoint" to avoid the need for a NPDES permit. The giant loophole Petitioner's interpretation would create contravenes Congress's intent to "restore and maintain the chemical,

physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The plain meaning of the statutory text compels the result the Ninth Circuit reached. The Clean Water Act's prohibition applies to *any* addition of pollutants to navigable waters from a point source, not just *direct* discharges.

2. Petitioner's assertion that other regulatory requirements sufficiently control groundwater-mediated discharges to surface waters is inaccurate.

Maintaining Clean Water Act jurisdiction over point sources that contaminate surface waters through groundwater seepage is vital to the protection of manoomin in the Ceded Territories. Petitioner suggests Clean Water Act jurisdiction is unnecessary because other existing laws provide the protections the Clean Water Act affords – particularly state laws governing groundwater and drinking water, and the federal Safe Drinking Water Act ("SDWA"), Coastal Zone Act ("CZA"), Comprehensive Environmental Response, Compensations, and Liability Act ("CERCLA"), and Resource Conservation and Recovery Act ("RCRA"). (Pet. Br. 43-44). But Minntac and its damage to manoomin exemplify why limiting the Clean Water Act would allow unregulated discharges to contaminate surface waters and, thereby, destroy the Band's important resource.

a. State Groundwater Protection

Petitioners contend state groundwater protection laws sufficiently regulate underground discharges from point sources such that Clean Water Act jurisdiction is superfluous. (Pet. Br. 43). But in Minnesota, standards governing groundwater are not equivalent to surface water standards and are often inadequate to protect the natural environment, including the protection of manoomin. Where the Clean Water Act's purpose extends to preserving the biological integrity of the Nation's waters, *see* 33 U.S.C. § 1251(a), Minnesota's groundwater laws focus on groundwater's importance for human consumption, *see* Minn. R. 7050.0140 (designating Class 1 waters for "[d]omestic consumption"); 7050.0221 (underground waters designated Class 1); 7060.0200 (nondegradation policy focused on maintaining a potable water supply for future generations). Consequently, Minnesota sets groundwater standards based on impact to human health, rather than impact on the environment.

Minntac's sulfate discharges illustrate why Minnesota's groundwater laws would not sufficiently protect the biological integrity of surface waters, particularly those with manoomin. Sulfate occurs naturally in much of Minnesota's groundwater. *See Sulfate in Well Water*, Minn. Dep't of Health, https://www.health.state.mn.us/communities/environment/water/wells/waterquality/sulfate.html, (last visited July 16, 2019). While humans unaccustomed to drinking water with elevated sulfate may experience diarrhea, most adjust after a few days. *Id.* The Minnesota Department of Health's

only precautions for human sulfate consumption are that water exceeding 250 mg/L may have a "bitter" or "medical taste" and that water with sulfate levels exceeding 500 mg/L should not be used to prepare infant formula. *Id.* Correlated with these human health determinations, Minnesota's groundwater water quality standard for sulfate is 250 mg/L. *See* Minn. R. 7050.0220, subpts. 3a(30), 4a(30) (Class 1B and 1C waters 250 mg/L); 7050.0221, subpts. 1-2 (Class 1A waters apply EPA standards); 40 C.F.R. § 143.3 (secondary maximum contaminant level for sulfate 250 mg/L).

In contrast, as set forth above, manoomin is very susceptible to sulfate levels. *See* Part I.B.1. In 1973, the Minnesota Pollution Control Agency adopted Minn. R. 7050.0224, subpt. 2 "to protect and support the growth of manoomin in Minnesota, and to comply with Clean Water Act requirements set by the U.S. Environmental Protection Agency." *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, No. A12-0950, 2012 WL 6554544, at *1 (Minn. Ct. App. Dec. 17, 2012). Minnesota set the surface water quality standard for sulfate at 10 mg/L, *see* Minn. R. 7050.0224, subpt. 2, based, in part, on the Minnesota Department of Natural Resource's recommendations that "sulfate concentrations above that level are a 'serious detriment to the natural and cultivated growth of wild rice.'" *Minn. Chamber of Commerce*, 2012 WL 6554544, at *1.

Plainly, without the surface water 10 mg/L standard, protecting, for example, the Twin Lakes from contamination via underground seepage from Minntac's tailings basin would be almost impossible. Seeps from

under the tailings basin could discharge with sulfate levels twenty-five times higher than the surface water standard, in compliance with Minnesota groundwater law, and continue to deplete the manoomin in the Twin Lakes. Consequently, eliminating Clean Water Act jurisdiction over discharges from point sources to surface water through groundwater would undermine the ability of the Band to protect this natural resource now and into the future.

b. CZA, RCRA, SDWA, CERCLA, and Related State Laws

Petitioners also assert the CZA, RCRA, SDWA, CERCLA, and related state laws adequately regulate groundwater and surface water pollution such that Clean Water Act jurisdiction is unnecessary. (Pet. Br. 43-44). Minntac, however, exemplifies exactly why these statutory schemes do not target the point source discharges Congress intended the Clean Water Act to regulate.

First, Petitioners point to the CZA as evidence that sufficient environmental protection exists outside the Clean Water Act. (*Id*. at 44). But the CZA only protects coastal zones, not inland waters like those on the Mesabi Iron Range. *See* 16 U.S.C. § 1455b(a)(1). Thus, for obvious reasons, the CZA would not protect manoomin from the Minntac discharges.

Second, Petitioners assert RCRA and its accompanying regulations allow EPA to "control[] and remediate[] groundwater contamination." (Pet. Br. 44).

"RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). Congress intended RCRA "to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Id.* (quoting 42 U.S.C. § 6902(b)). But RCRA does not apply to all solid waste; in fact, Congress specifically exempted "[s]pent materials . . . generated within the primary mineral processing industry from which minerals, acids, cyanide, water, or other values are recovered by mineral processing or by beneficiation." 40 C.F.R. § 261.4(a)(17); *see also* Minn. R. 7045.0120 (Minnesota's exemption that mine waste is not hazardous waste). RCRA, thus, does not apply to the waste discharged into the environment from Minntac's tailings basin.

The SDWA similarly would not protect manoomin from Minntac's discharges. In particular, Petitioners point to the SDWA Part C, governing underground injection control wells, as protective of groundwater. (Pet. Br. 43). Congress intended Part C "to assure that underground sources of drinking water will not be endangered by any underground injection." *Nat. Res. Def. Council, Inc. v. Envtl. Protection Agency*, 824 F.2d 1258, 1268 (1st Cir. 1987). But Part C specifically applies to "well[s]," meaning "[a] bored, drilled, or driven shaft whose depth is greater than the largest surface dimension; or, a dug hole whose depth is greater than the

largest surface dimension; or, an improved sinkhole; or, a subsurface fluid distribution system." 40 C.F.R. § 146.3. The seeps underneath Minntac's tailings basin do not meet this definition; the seepage occurs because the basin is not lined and designed to leak. *Minntac Reissuance Order* ¶¶ 5-7.

More generally, however, Congress intended the SDWA "to assure that the water supply systems serving the public meet minimum national standards *for protection of public health*." H.R. Rep. No. 1185, at 1 (1974) (emphasis added). As such, while the Minnesota Department of Health lists sulfate in its "List of Contaminants in Water," as discussed above, the Minnesota Department of Health has few concerns regarding sulfate, as it naturally occurs in wells throughout the state. *Sulfate in Well Water*, *supra*. Consequently, the SDWA and state regulations do not protect manoomin from sulfate contamination where sulfate levels too high for manoomin are considered safe for human consumption.

Finally, Petitioner avers that CERCLA protects groundwater from "hazardous substances" such that regulating point source discharges under the Clean Water Act is unnecessary. (Pet. Br. 44). But Congress fundamentally intended CERCLA to serve a very different purpose than the Clean Water Act: promoting clean-up efforts for sites already contaminated with hazardous waste. *See Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). This contrasts with the Clean Water Act's broader purpose to not only "restore" the Nation's waters, but also to

"maintain" the waters by preventing future pollution. *See* 33 U.S.C. § 1251(a). Further, sulfate arguably does not meet the "hazardous substance" definition under CERCLA. *See* 42 U.S.C. § 9601(14); *Rhodes v. Cty. of Darlington, S.C.*, 833 F. Supp. 1163, 1178 (D.S.C. 1992); 40 C.F.R. § 302.4; *see also* Minn. Stat. §§ 115B.01-115B.53. Thus, the sulfate discharges from Minntac would not qualify the facility for CERCLA remediation.

For these reasons, Petitioner's interpretation not only undermines the Clean Water Act, it leaves valuable environmental resources unprotected by any federal or state scheme. The Band asks this Court to apply the Clean Water Act's plain language, interpret the statute consistent with the Clean Water Act's purpose, and apply the Clean Water Act in a way that protects the Band's important natural resources.

CONCLUSION

Because the Ninth Circuit's and Respondents' Clean Water Act interpretation is consistent with the Clean Water Act's plain language and such an interpretation is necessary to protect the Band's important

resources, *amicus curiae* urges the Court to affirm the Ninth Circuit's decision.

Respectfully submitted,

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JULY 19, 2019