This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0112
A19-0118
A19-0124
A20-1271
A20-1380
A20-1385

In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System / State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project St Louis County Hoyt Lakes and Babbitt Minnesota.

Filed January 24, 2022
Affirmed in part, reversed in part, and remanded
Johnson, Judge

Minnesota Pollution Control Agency

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Considered and decided by Johnson, Presiding Judge; Jesson, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

Poly Met Mining, Inc., intends to build and operate a new mine in St. Louis County for the purpose of extracting nickel, copper, and platinum-group elements. Poly Met applied to the Minnesota Pollution Control Agency (PCA) for a permit that would allow it to discharge water from the mine's facilities. The PCA granted the permit, subject to numerous conditions.

In this matter, several non-profit organizations and one tribal band challenge the PCA's decision to issue the permit as well as various decisions related to the permit, such as decisions to not impose more restrictive conditions on Poly Met and to deny a contested-case hearing. We conclude that the PCA erred by not properly considering whether the federal Clean Water Act applies to any future discharges from Poly Met's facility to groundwater. But we conclude that there is no reversible error with respect to all other

issues that have been raised by the parties. Therefore, we affirm in part, reverse in part, and remand to the PCA for a determination as to whether any discharges by Poly Met to groundwater are governed by the Clean Water Act.

FACTS

Poly Met is in the process of planning a new mine known as the NorthMet project. The project includes a mine site, which now is a relatively undisturbed parcel of land approximately six miles south of the city of Babbitt. The project also includes a former taconite-processing plant, where mined ore will be processed, which is approximately six miles north of the city of Hoyt Lakes. And the project includes infrastructure updates to a transportation corridor that will connect the mine site and the plant site.

The NorthMet project is designed such that wastewater from mining and processing operations will be collected and treated by a wastewater-treatment system at the plant site and then routed to a flotation-tailings basin, which will be built on top of a former taconite-tailings basin. Water that seeps from the tailings basin will be captured, treated, and discharged to the headwater wetlands of three creeks: Unnamed Creek, Trimble Creek, and Second Creek. Those three creeks flow to the Embarrass River and the Partridge River, both of which flow to the St. Louis River, which flows into Lake Superior.

Because it will require numerous federal and state permits, the NorthMet project was the subject of environmental review by the federal and state governments. A final environmental-impact statement (FEIS) for the project was jointly prepared by the United States Army Corps of Engineers, the United States Forest Service, and the Minnesota Department of Natural Resources (DNR), with assistance from the PCA. The United States

Environmental Protection Agency (EPA) participated as a cooperating agency and submitted comments on a draft of the FEIS. In March 2016, the DNR determined that the FEIS was adequate. No appeal was taken from that decision. Poly Met thereafter proceeded to seek the permits necessary to complete the NorthMet project.

In July 2016, Poly Met submitted an application to the PCA for a National Pollutant Discharge Elimination System and State Disposal System (NPDES/SDS) permit for the NorthMet project. Poly Met submitted updates to its application in November 2016 and October 2017. In mid-January 2018, the PCA provided a pre-public-notice version of a draft permit to the EPA and to interested Indian tribes. Two weeks later, the PCA provided public notice of a draft permit and allowed members of the public to submit comments until March 16, 2018. During the public-comment period, the PCA received 686 submissions and four petitions for a contested-case hearing. On December 20, 2018, the PCA issued a written decision in which it denied the petitions for a contested-case hearing and authorized issuance of an NPDES/SDS permit for the NorthMet project.

In January 2019, three petitions for writs of certiorari were filed with this court to challenge the PCA's issuance of the NPDES/SDS permit. In case number A19-0112, the petition was jointly filed by the Minnesota Center for Environmental Advocacy, the Center for Biological Diversity, and the Friends of the Boundary Waters Wilderness (whom we shall collectively identify hereinafter as MCEA). In case number A19-0118, the petition was filed by WaterLegacy. And in case number A19-0124, the petition was filed by the Fond du Lac Band of Lake Superior Chippewa. In January 2019, this court consolidated the three certiorari appeals.

In May 2019, WaterLegacy filed a motion in this court for a transfer to district court for an inquiry into certain alleged procedural irregularities. In June 2019, this court granted the motion and transferred the matter, for limited purposes, to the Ramsey County District Court. The district court issued an order in September 2020. All of the relators filed notices of appeal to challenge the district court's order, and the PCA filed a notice of related appeal.

In November 2020, this court consolidated the three direct appeals with the three certiorari appeals. The parties thereafter filed their respective appellate briefs, and the court heard oral arguments in October 2021.

DECISION

We begin by identifying the laws that provide the basic framework of our analysis.

The federal Clean Water Act (CWA) prohibits the discharge of any pollutant without a permit. *See* 33 U.S.C. §§ 1311, 1342 (2018). The discharge of a pollutant occurs if there is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2018). A point source is defined by statute to mean "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id*., § 1362(14). The CWA has long been understood to apply to "virtually all surface waters in the country." *International Paper Co. v. Ouellette*, 479 U.S. 481, 486 (1987). The United States Supreme Court recently clarified that the CWA also applies to discharges of pollutants from a point source to groundwater, if the discharge "is the functional equivalent of a direct discharge" to navigable waters. *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020).

An NPDES permit is one type of permit that may be issued under the CWA. *See* 33 U.S.C. § 1342. The CWA authorizes the issuance of NPDES permits by states with approved NPDES permit programs. 33 U.S.C. § 1342(b). Minnesota is such a state. *See* 39 Fed. Reg. 26061 (July 16, 1974). But the EPA retains an oversight role. *See* 33 U.S.C. § 1342(b). Unless the EPA has waived the requirement, a state must transmit to the EPA copies of all NPDES permit applications and must provide the EPA with notice of actions relating to such applications, including notice of proposed final permits. *Id.*, § 1342(d)(1). The EPA may object to a proposed permit. *Id.*, § 1342(d)(2). If the reasons for the objection are not resolved, the EPA may assume responsibility for issuing the permit. *Id.*, § 1342(d)(4). The EPA also retains authority to enforce state-issued NPDES permits. *Id*., § 1342(i).

The PCA is the state agency charged with administering the state's NPDES permitting program in Minnesota. Minn. Stat. § 115.03, subd. 5 (2020). The PCA's administration of the program is governed by the CWA; the state Water Pollution Control Act, Minn. Stat. §§ 115.01-.09 (2020); applicable federal and state regulations; and a Memorandum of Agreement (MOA) with the EPA. The EPA and the PCA entered into the MOA in 1974, when the EPA approved Minnesota's NPDES permitting program. The MOA has subsequently been amended, most recently in 2000.

The PCA also is charged with administering the state disposal system (SDS) permitting program under state law. *See* Minn. Stat. §§ 115.03, subd. 1(e), .07, subd. 1. If a project requires both an NPDES and an SDS permit, the issuance of an NPDES permit satisfies the requirements for both permits. Minn. R. 7001.1010 (2019). But the PCA also

issues combined NPDES/SDS permits if it determines that some but not all of the discharges from a project will be governed by the CWA. *See In re Reissuance of NPDES/SDS Permit to U.S. Steel Corp*., 937 N.W.2d 770, 778 (Minn. App. 2019) (describing PCA's decision to regulate seepage from tailings basin to groundwater under SDS portion of permit) (*U.S. Steel I*), *rev'd in part on other grounds*, 954 N.W.2d 572 (Minn. 2021). The PCA issued a combined NPDES/SDS permit for the NorthMet project.

This court's review of the PCA's issuance of an NPDES/SDS permit is governed by the Minnesota Administrative Procedure Act, Minn. Stat. §§ 14.001-.69 (2020) (MAPA). *See* Minn. Stat. § 115.05, subd. 11. Under MAPA, our review is based on the administrative agency's record, "except that in cases of alleged irregularities in procedure, not shown in the record," this court may transfer the case to a district court with instructions "to take testimony and to hear and determine the alleged irregularities in procedure." Minn. Stat. § 14.68. In conducting our judicial review of an agency decision, we

> may affirm the decision of the agency or remand the case for further proceedings; or [we] may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:
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> (a) in violation of constitutional provisions; or
>
> (b) in excess of the statutory authority or jurisdiction of the agency; or
>
> (c) made upon unlawful procedure; or
>
> (d) affected by other error of law; or
>
> (e) unsupported by substantial evidence in view of the entire record as submitted; or

(f) arbitrary or capricious.

Minn. Stat. § 14.69. We give "substantial deference" to agency decisions, which enjoy a presumption of correctness. *In re Minn. Power's Petition for Approval of EnergyForward Res. Package*, 958 N.W.2d 339, 344 (Minn. 2021) (*EnergyForward*); *see also In re NorthMet Project Permit to Mine Application*, 959 N.W.2d 731, 749 (Minn. 2021) (*NorthMet*). A relator challenging an agency decision bears the burden of demonstrating that the decision violates one or more of the provisions of section 14.69. *EnergyForward*, 958 N.W.2d at 344.

In this case, relators do not argue that the PCA's decision violates a constitutional provision. But relators argue that this court should grant appellate relief under the other five paragraphs of section 14.69. We begin with relators' arguments that the PCA's decision violated paragraph (c).

I. Lawfulness of Procedures

All relators argue that the PCA made its decision to issue the permit based on "unlawful procedure." Minn. Stat. § 14.69(c). Specifically, all relators argue that the PCA followed irregular and unlawful procedures by pursuing and entering into an agreement by which the EPA would not submit written comments during the public-comment period and by failing to preserve documents in violation of the Official Records Act, Minn. Stat. § 15.17 (2020); Minn. R. 7000.0750, subp. 4(D) (2019); the PCA's Records and Data Management Manual; and common-law principles. WaterLegacy and the Band also argue that the PCA followed irregular and unlawful procedures by processing Poly Met's

application after the PCA received the EPA's deficiency letter. WaterLegacy further argues that the PCA followed irregular and unlawful procedures by violating its duty of candor in permit-related documents.

A. Background

Relators' unlawful-procedure argument is based on facts that were determined after certiorari petitions were filed in this court. As stated above, WaterLegacy moved for a transfer to district court for an inquiry into certain alleged procedural irregularities. Specifically, WaterLegacy alleged in its motion that "MPCA's Commissioner and political leaders at the United States Environmental Protection Agency (EPA) developed a plan to keep EPA criticism of the NorthMet permit out of the public record and the record for judicial review." The MCEA supported the motion, and the Band joined in it.

In June 2019, this court granted WaterLegacy's motion and transferred the matter to the Ramsey County District Court "for the limited purpose of an evidentiary hearing and determination of the alleged irregularities in procedure." In January 2020, the district court conducted an evidentiary hearing over seven days. In September 2020, the district court issued a 104-page order with 272 paragraphs of findings of fact and 92 paragraphs of conclusions of law.

The district court's findings of facts may be summarized as follows:

At the PCA's request, the EPA was involved in the development of the NPDES permit for the NorthMet project at an early stage. The PCA and the EPA had frequent telephone conferences, which resulted in significantly more interaction between the

agencies than is typical. The PCA sought the EPA's feedback to avoid later objections by the EPA to the issuance of a permit.

On November 3, 2016, approximately four months after Poly Met first applied for the NPDES permit, the EPA sent the PCA a letter, which advised the PCA of certain deficiencies and stated that the MOA prevented the PCA from processing the application until the EPA sent a letter indicating that the deficiencies had been resolved. The PCA never received such a letter, but the EPA did not thereafter question the PCA's compliance with the MOA as the PCA moved forward with processing the application.

During a March 5, 2018 conference call, Kevin Pierard, chief of the NPDES permitting program for Region 5 of the EPA (which includes Minnesota), told PCA staff that the EPA intended to submit written comments on the NorthMet application during the public-comment period. The PCA's mining-sector manager questioned whether there was any "wiggle room" in that approach and whether it would be "cleaner to raise the issues later in the process." Pierard expressed a preference for a comment letter.

The mining-sector manager informed the PCA's assistant commissioner for water policy that the EPA intended to submit written comments during the public-comment period. The assistant commissioner made a number of telephone calls to EPA staff to "procure an agreement from the EPA to forego sending written comments during the public notice period." The assistant commissioner also discussed the matter with the PCA commissioner, John Linc Stine, who in turn discussed it with EPA Regional Administrator Cathy Stepp and her chief of staff.

During a March 12, 2018 conference call, Commissioner Stine suggested that the EPA not comment in writing until after the PCA had revised the draft permit based on comments received during the public-comment period. Later that day, Commissioner Stine sent an e-mail message to Stepp and her chief of staff to thank them for the prior discussion. Stine copied the assistant commissioner and asked her to follow up with the regional administrator's chief of staff "regarding the Region 5—PCA agreement [Stine] mentioned on [the] call." Stine's e-mail message was not preserved by the PCA or included in the administrative record. WaterLegacy obtained it from the EPA though public-records requests.

On March 13, 2018, the assistant commissioner sent an e-mail message to the regional administrator's chief of staff requesting that EPA not submit written comments during the public-comment period. The assistant commissioner also expressed a willingness to allow EPA a subsequent review period longer than the 15 days allowed by the MOA. The assistant commissioner testified that she deleted this e-mail message, and the e-mail message is not in the administrative record. WaterLegacy obtained it from the EPA through public-records requests.

On March 16, 2018, the regional administrator's chief of staff sent an e-mail message to the assistant commissioner describing an agreement by which the PCA would, after responding to public comments, develop a pre-proposed permit and give the EPA up to 45 days to review it and provide written comments to the PCA while still retaining its right under the MOA to object to a final proposed permit. The e-mail message from the regional administrator's chief of staff is in the administrative record, but it does not reflect

the PCA's underlying request that the EPA not submit written comments during the public-comment period.

Also on March 16, 2018, Pierard called PCA's mining-sector manager to schedule a conference call to "walk through what the comment letter would have said had it been sent." On April 5, 2018, PCA staff and EPA staff had a conference call during which Pierard read from a draft comment letter that the EPA had prepared but did not send pursuant to the agreement between the regional administrator's chief of staff and the assistant commissioner. A PCA permit writer who had taken notes in previous PCA-EPA conference calls started taking notes during this call but stopped because she was unable to keep up and discarded the notes she had begun taking. A PCA attorney took notes during the call and typed them up after the meeting. No notes of the April 5, 2018 conference call were included in the administrative record. Relators obtained the PCA attorney's notes through a motion to compel discovery during the district court proceedings.

Neither Stine nor other PCA witnesses could recall a previous instance in which the PCA had asked the EPA to not submit written comments during the public-comment period or in which the EPA had read written comments to the PCA over the telephone.

In its conclusions of law, the district court considered ten alleged procedural irregularities and concluded that three are procedural irregularities: (1) the failure to preserve Commissioner Stine's March 12, 2018 e-mail message to EPA officials and the assistant commissioner's March 13, 2018 e-mail message to the regional administrator's chief of staff; (2) the failure to institute a litigation hold at least as early as the filing of the certiorari appeals; and (3) the failure to preserve the permit writer's notes of the April 5,

2018 telephone conference for inclusion in the administrative record. The district court determined that other conduct by the PCA did not constitute procedural irregularities, including the PCA's efforts to persuade the EPA not to submit written comments during the public-comment period, the agreement to provide an additional 45 days for review of the pre-proposed permit in exchange for EPA's refraining from commenting, and the failure to disclose the PCA attorney's notes of the April 5, 2018 telephone conference during which the EPA comments were read.

B. Arguments for Reversal of District Court

Relators and the PCA challenge certain parts of the district court's lengthy order. They do not challenge the district court's findings of historical fact—*i.e.*, findings that describe the interactions between the PCA and the EPA. Rather, they focus their challenges on several of the district court's conclusions of law. Relators contend that the district court erred by concluding that it was not a procedural irregularity for the PCA to seek EPA's agreement not to submit written comments during the public-comment period. The PCA contends that the district court erred by determining that its failures to implement a litigation hold and preserve documents constituted procedural irregularities.

After a transfer pursuant to section 14.68, this court applies a *de novo* standard of review to a district court's legal conclusions. *In re Hutchinson*, 440 N.W.2d 171, 175 (Minn. App. 1989), *rev. denied* (Minn. Aug. 9, 1989). In this case, however, we need not determine whether the district court erred by concluding that some of the EPA's procedures were "irregular" and that others were not. No particular legal consequence necessarily flows from such a characterization. The court of appeals is authorized by statute to grant

appellate relief to relators only for a reason specified in the MAPA. *See* Minn. Stat. § 14.69. Relators' arguments implicate the third statutory basis for appellate relief: "*unlawful* procedure." *Id.*, (c) (emphasis added). We may not reverse on the ground that an EPA decision was made upon an *irregular* procedure that is not unlawful. Consequently, if we were to conclude that the district court erred by mischaracterizing a procedure as irregular or not irregular, any such error would be inconsequential and, thus, a harmless error. *See* Minn. R. Civ. P. 61.

The district court faithfully and ably conducted its proceedings in the manner requested by this court's transfer order and made detailed factual findings that have facilitated our certiorari review. We are grateful to the district court for its diligent development of a factual record, a function that appellate courts do not perform. Therefore, the district court's order is affirmed.

C. Arguments for Reversal of PCA

Based on both the administrative record and the district court's findings of fact, we proceed to address relators' arguments that the PCA made a decision "upon unlawful procedure." *See* Minn. Stat. § 14.69(c). If relators are correct that the PCA made its decision upon an unlawful procedure, they may be entitled to judicial relief, but only if they can demonstrate that their "substantial rights . . . have been prejudiced." *See* Minn. Stat. § 14.69; *see also First Nat'l Bank v. Department of Commerce*, 245 N.W.2d 861, 863-64 (Minn. 1976); *E.N. v. Special Sch. Dist. No. 1*, 603 N.W.2d 344, 349-50 (Minn. App. 1999); *Northern Messenger, Inc. v. Airport Couriers, Inc.*, 359 N.W.2d 302, 305 (Minn. App. 1984).

Relators contend that they were prejudiced by the alleged unlawful procedures because earlier disclosure of the EPA's concerns would have aided relators' efforts to oppose the NorthMet project by, for example, obtaining documents through public-records requests and relying on a complete administrative record for judicial review.

We need not determine whether the challenged procedures are unlawful because relators have not demonstrated that the procedures prejudiced their substantial rights. Assuming without deciding that the challenged procedures are unlawful, those procedures did not impede relators' ability to submit comments on the permit. Indeed, the MCEA, WaterLegacy, and the Band each submitted comments to which the PCA provided responses in connection with issuing the permit. In addition, the record indicates that, even if the EPA had submitted comments during the public-comment period, it would have done so near the end of the period. In that event, relators would not have had access to the EPA's comments when preparing their own comments or their petitions for a contested-case hearing. Furthermore, the EPA actually communicated its comments to the PCA through numerous meetings, conference calls, and written correspondence. The EPA's concerns are reflected in the administrative record and the record created in the district court. Many of the EPA's concerns are reiterated in relators' briefs and are considered in this opinion, but we have concluded that those concerns do not warrant relief on the merits. *See infra* part III. Thus, we conclude that the PCA's allegedly unlawful procedures did not prejudice relators' substantial rights.

We note that the Band asserts a different theory concerning the same underlying facts: that the PCA's decision is arbitrary and capricious. *See* Minn. Stat. § 14.69(f). In

support of this theory, the Band cites *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utilities*, 768 N.W.2d 112, 120 (Minn. 2009) (*2005 Charges*), for the proposition that an agency "must generally conform to its prior norms and decisions or, to the extent that it departs from its prior norms and decisions, the agency must set forth a reasoned analysis for the departure that is not arbitrary and capricious." The supreme court's holding in that case related to an agency's substantive decision, not the procedures by which the agency reached that decision. *See 2005 Charges*, 768 N.W.2d at 119 (discussing whether agency "failed to follow the principles set out in its prior variance cases"). In addition, the Band's arbitrary-and-capricious argument fails for the same reason as the relator's unlawful-procedure arguments: because any departure from norms did not prejudice the Band's substantial rights.

Our conclusion on this issue should not be misconstrued as an endorsement of the challenged procedures. The district court's key finding bears repeating:

> The evidence submitted at the hearing demonstrates that the MPCA did not want the EPA to submit a comment letter during the public comment period. The MPCA knew that it was required to respond to all written EPA comments, its responses would be public, and the public would find out what the EPA's specific concerns about the permit were from the comments and responses. The MPCA had other legitimate reasons for seeking an EPA delay in submitting comments. However, the MPCA's primary motivation was its belief that there would be less negative press about the NorthMet Project if EPA comments were delayed until after public comments and verbally expressed EPA concerns were incorporated into the draft permit.

In other words, the PCA's efforts to discourage the EPA from providing written comments during the public-comment period had the purpose and effect of avoiding or minimizing

public criticism of the proposed permit and, in addition, avoiding the need for the PCA to publicly respond in writing to the EPA's comments. *See* 40 C.F.R. § 124.17 (2021) (requiring agency to respond to public comments); Minn. R. 7001.1070, subp. 3 (2019) (same). The procedures employed by the PCA in this matter are contrary to some of the purposes of MAPA: "to increase public accountability of administrative agencies" and "to increase public access to governmental information." *See* Minn. Stat. § 14.001(2), (4) (2020). But we need not determine whether the challenged procedures are unlawful because it is sufficient to determine that the challenged procedures did not prejudice relators' substantial rights.

II. Groundwater

Relators argue that, for two reasons, the permit issued to Poly Met does not sufficiently protect the groundwater (as opposed to surface waters) surrounding the NorthMet facility.

A. Applicability of Clean Water Act

First, all relators argue that the PCA erred by not regulating discharges to groundwater under the NPDES portion of the permit, which is governed by the CWA.

"The Clean Water Act forbids the 'addition' of any pollutant from a 'point source' to 'navigable waters' without the appropriate permit . . . ." *Maui*, 140 S. Ct. at 1468. The term "navigable waters" is defined within the CWA to mean "the waters of the United States, including the territorial seas," 33 U.S.C. § 1362(7), and is understood to include "navigable streams, rivers, the ocean, or coastal waters," *Maui*, 140 S. Ct. at 1469. When the PCA was considering Poly Met's application, there was uncertainty in the caselaw

concerning "whether the CWA applies to discharges conveyed by groundwater to navigable waters." *U.S. Steel I*, 937 N.W.2d at 778 (citing federal appellate opinions from the Fourth, Sixth, Seventh, and Ninth Circuits). Before 2020, the PCA interpreted the CWA to not apply to such discharges. *See id.* (considering permit issued by PCA in November 2018). It appears that the PCA took the same position with respect to the permit in this case.

In April 2020, the United States Supreme Court held that the CWA applies, and an NPDES permit is required, if "there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*." *Maui*, 140 S. Ct. at 1476. The Court identified a non-exhaustive list of factors that may be relevant to determining whether a discharge to groundwater is the functional equivalent of a discharge directly to navigable waters:

> (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity.

Id. at 1476-77.

In February 2021, the Minnesota Supreme Court issued an opinion in response to an argument that is similar to relators' argument in this case. *In re Reissuance of NPDES/SDS Permit to U.S. Steel Corp.*, 954 N.W.2d 572 (Minn. 2021) (*U.S. Steel II*). The supreme court concluded that, in light of the recent *Maui* opinion, the PCA "erred by

interpreting the CWA as not governing discharges from a point source into groundwater." *Id.* at 574 n.1. As a remedy for that error, the supreme court remanded that case to the PCA with instructions "to complete a functional equivalence analysis under the standards set forth in [*Maui*]." *Id.* at 583.

Relators and the PCA agree that a functional-equivalence analysis under *Maui* is necessary to determine whether discharges from the NorthMet project to groundwater require an NPDES permit. But they disagree concerning the appropriate disposition of this issue on appeal. Relators urge this court to reverse and remand to the PCA with instructions for the PCA to perform a functional-equivalence analysis. In contrast, the PCA urges this court to perform the functional-equivalence analysis in the first instance. The PCA contends that this case is different from the *U.S. Steel II* case on the ground that the record in this case is "sufficient for this court to independently conduct a functional equivalent analysis." We believe that the issue is not so straightforward. The factors identified by the United States Supreme Court inevitably require consideration of technical and scientific concepts, which the PCA is much better equipped to understand and apply, and a functional-equivalence analysis may require policy decisions that are more appropriate for an administrative agency. *See Maui*, 140 S. Ct. at 1476-77. Accordingly, we decline to conduct a functional-equivalence analysis in the first instance.

Poly Met contends that a functional-equivalence analysis is unnecessary on the ground that *Maui* does not apply. Poly Met asserts that there will be no discharges to groundwater because the permit prohibits any such discharge and because its facilities are designed to prevent such discharges. But the agency record indicates that some

underground seepage—even if minimal—is expected. In addition, the permit appears to contemplate discharges to groundwater through seepage because it repeatedly prohibits only "direct discharge" to "surface waters" from plant and mine features. Poly Met contends further that, if underground seepage occurs, it would not be a discharge from a "point source," as that term is defined by the CWA. The term "point source" is broadly defined to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The determination of whether the source of any underground seepage is a "point source" requires an evaluation that depends, to an extent, on the PCA's expertise. Accordingly, we decline to make that type of technical, fact-intensive determination in the first instance.

Thus, the PCA erred by not considering whether any discharges to groundwater from the NorthMet project will be the functional equivalent of a discharge to navigable waters and, thus, whether the CWA applies to those discharges. *See U.S. Steel II*, 954 N.W.2d at 574 n.1. Therefore, we reverse and remand to the PCA with instructions to conduct the functional-equivalence analysis required by *Maui*.

B. Compliance with Minnesota Rules

MCEA argues that the PCA erred by issuing a permit that does not comply with a state rule governing groundwater.

This argument is based on the design of the seepage-capture systems that Poly Met intends to build around one of the waste rock stockpiles (the Category 1 stockpile) and the

flotation-tailings basin. The seepage-capture systems will collect water seeping from these features via surface and shallow groundwater flow and route the collected water to the wastewater-treatment system. The seepage-capture systems will include cut-off walls keyed to bedrock. The systems are designed to lower the water table inside the walls to ensure that seepage is collected and routed.

MCEA argues that this design will result in discharges to groundwater in violation of the following rule:

> Subpart 1. **Prohibition against discharge into saturated zone.** No sewage, industrial waste, or other wastes shall be discharged directly into the zone of saturation *by such means as injection wells or other devices used for the purpose of injecting materials into the zone of saturation*, except that the discharge of cooling water under existing permits of the agency may be continued, subject to review of the permit by the agency for conformance with subpart 3.
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> Subp. 2. **Prohibition against discharge into unsaturated zone.** No sewage, industrial waste, other waste, or other pollutants shall be allowed to be discharged to the unsaturated zone or deposited in such place, manner, or quantity that the effluent or residue therefrom, upon reaching the water table, *may actually or potentially preclude or limit the use of the underground waters as a potable water supply*, nor shall any such discharge or deposit be allowed which may *pollute the underground waters*. All such possible sources of pollutants shall be monitored at the discharger's expense as directed by the agency.

Minn. R. 7060.0600 (2019) (emphasis added).

MCEA first contends that the NorthMet seepage-capture systems will violate subpart 1 by directing pollutants to the saturated zone for collection. In response, the PCA contends that subpart 1 is not implicated because the NorthMet project will not discharge

pollutants using injection wells or similar prohibited devices. Injection wells—which are allowed in some states but not in Minnesota—are used for the purpose of permanently disposing of effluent. *See, e.g., Maui*, 140 S. Ct. at 1469 (describing injection wells used by County of Maui to dispose of sewage from surrounding area). We conclude that the PCA reasonably interpreted its own rule to not apply to the NorthMet seepage-capture systems, which are unlike an injection well. *See In re Cities of Annandale & Maple Lake NPDES/SDS Permit*, 731 N.W.2d 502, 516 (Minn. 2007) (*Annandale*) (explaining that courts should generally defer to agency's reasonable interpretation of ambiguous regulation).

MCEA also contends that the NorthMet seepage-capture systems will violate subpart 2 on the ground that it categorically prohibits discharges into an unsaturated zone. In response, the PCA contends that subpart 2 is not implicated because the operation of the seepage-capture systems will not "preclude or limit the use of groundwater as a potable water supply" or "pollute the underground waters." Again, we conclude that the PCA has reasonably interpreted its own rule. The determination of whether a discharge is prohibited because it will "preclude or limit the use of groundwater as a potable water supply" or "pollute the underground waters" requires the PCA's expertise and is entitled to deference from this court.

Thus, the PCA did not err by issuing a permit in violation of Minn. R. 7060.0600.

III. Challenges to Conditions of Permit

Relators argue that the PCA erred by issuing a permit that, they assert, is not sufficiently protective of state and tribal water-quality standards.

A. Water-Quality-Based Effluent Limits

Relators' primary argument is that the PCA erred by issuing a permit that does not include water-quality-based effluent limits (WQBELs).

All NPDES permits must contain conditions that consist of technology-based effluent limits (TBELs). 40 C.F.R. § 122.44(a)(1) (2021). TBELs "represent the minimum level of control that must be imposed in a permit." 40 C.F.R. § 125.3(a) (2021). TBELs are established by the EPA and apply on a nationwide basis. *See* 33 U.S.C. § 1311(b)(1)(A); *PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994). In addition, an NPDES permit must include more stringent conditions—WQBELs—for any pollutants that the permit issuer determines "are or may be discharged at a level which will cause, have the *reasonable potential* to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1)(i) (emphasis added). Accordingly, to determine whether WQBELs are required, it may be necessary for an administrative agency to perform a reasonable-potential analysis. 40 C.F.R. § 122.44(d)(1)(i)-(ii).

In this case, the PCA performed a reasonable-potential analysis and concluded that the NorthMet project "as designed does not have reasonable potential to cause or contribute to any violations of any applicable water quality standards in waters of the state." The PCA based that determination on Poly Met's plan to treat the wastewater to reduce sulfate

to 10 mg/L, which the PCA determined would preclude any reasonable potential for the discharge to cause or contribute to a violation of the state's wild-rice rule, *see* Minn. R. 7050.0224, supb. 2 (2019), and also would limit the rate of other pollutants as necessary to comply with water-quality standards. The PCA also determined that Poly Met's plans to capture and treat wastewater from the flotation-tailings basin and other mine features actually will improve the condition of receiving and downstream waters as compared to current conditions. Based on its determination that the NorthMet project will not cause or contribute to a violation of water-quality standards, the PCA did not include WQBELs in the permit, which would have set end-of-pipe limits on discharge. *See* 40 C.F.R. § 122.45(a) (2021) (requiring that permit's effluent limits be set at point of outfall or discharge unless infeasible). But the PCA did impose conditions consisting of internal "operating limits" to ensure that Poly Met adheres to certain numerical standards before discharging treated wastewater. Specifically, the internal operating limits require the NorthMet facility to treat wastewater so that, before it is discharged, it meets a limit of 10 mg/L for sulfate as well as limits for copper (9.3 µg/L), arsenic (53 µg/L), cobalt (5.0 µg/L), lead (3.2 µg/L), nickel (52 µg/L), and mercury (1.3 ng/L).

Relators contend—on various grounds—that the PCA was required to include WQBELs in the NorthMet permit. All of the grounds for relators' contentions are premised on 40 C.F.R. § 122.44(d)(1). But relators do not explain why the regulation unambiguously compels the PCA to include WQBELs in the NorthMet permit. Section 122.44(d)(1)(i) is facially clear in its command: WQBELs are required when the PCA determines that discharges have the "reasonable potential" to cause or contribute to an exceedance of

water-quality standards. And section 122.44(d)(1)(ii) identifies certain factors that must be taken into account in determining the existence or non-existence of reasonable potential. But the regulations do not provide further guidance on how an agency should determine whether discharges will cause or contribute to a violation of water quality standards. *See Annandale*, 731 N.W.2d at 517.

In the absence of clear guidance, the supreme court and this court repeatedly have recognized that the federal regulations at issue are ambiguous in their application and that courts must defer to the PCA's reasonable interpretations of the ambiguous regulations. *See In re Alexandria Lake Area Sanitary Dist.*, 763 N.W.2d 303, 312-16 (Minn. 2009) (*Alexandria*); *Annandale*, 731 N.W.2d at 517-524; *Minnesota Ctr. for Env't Advocacy v. City of Winsted*, 890 N.W.2d 153, 158-160 (Minn. App. 2017) (*Winsted*); *In re Decision on the Approval of 401 Water Quality Certification*, 822 N.W.2d 676, 687-88 (Minn. App. 2012) (*401 Water Quality Certification*). In *Annandale*, the supreme court discussed similar "cause or contribute" language in 40 C.F.R. § 122.4(i) (2006) and stated that the meaning of the regulation "is not a clear-cut issue where we can just give effect to an unambiguously expressed intent and therefore substitute our judgment for that of the MPCA." *Id.* at 522. The supreme court recognized that "the broad nature of the phrase 'cause or contribute to the violation of water quality standards' leaves leeway for the MPCA to make a range of policy judgments based on the MPCA's scientific and technical knowledge." *Id.* at 524. Accordingly, the supreme court determined that the PCA reasonably interpreted 40 C.F.R. § 122.4(i) to allow consideration of expected offsets from other existing point sources in determining whether a new source would cause or contribute

to a violation of water quality standards. *Id*. In *Alexandria*, the supreme court applied *Annandale* and deferred to the PCA's interpretation of cause-or-contribute language in 40 C.F.R. § 122.44(d)(1)(vi)(A). 763 N.W.2d at 312-14.

This court twice has applied *Annandale* by deferring to the PCA's interpretation of 40 C.F.R. § 122.44(d)(1)—the regulation at issue in this appeal. In *401 Water Quality Certification*, we considered an argument that numeric WQBELs were required in a general NPDES permit for ballast-water discharge. 822 N.W.2d at 687-88. We acknowledged the requirement of section 122.44(d)(1) for WQBELs "as necessary to meet state water-quality standards," but we explained that nothing in that regulation "requires numeric WQBELs, either in all situations or in the circumstances present in this case." *Id.* at 687. We concluded that "the conflicting positions taken by relators and the MPCA can and should be resolved by judicial deference to the MPCA's decision to not impose numeric WQBELs." *Id.* at 688.

Similarly, in *Winsted*, we addressed an argument that the PCA violated 40 C.F.R. § 122.44(d)(1)(i)-(iii) by not determining whether there was a reasonable potential for discharges from a wastewater-treatment plant to cause or contribute to exceedances of water-quality standards in certain river reaches. 890 N.W.2d at 157-58. We reasoned, "Although the language of the regulations at issue plainly requires the MPCA to conduct a reasonable-potential analysis and include effluent limits under some circumstances, the language does not address the data on which the reasonable-potential analysis must be based." *Id.* at 158. The PCA had interpreted the regulations "as not requiring the agency to assume a water body violates eutrophication water quality standards if insufficient

information is available to make this determination." *Id.* at 159. We concluded that, under the *Annandale* standard, the PCA's interpretation was "reasonable and entitled to deference." *Id.*

In this case, as in previous cases, the applicable federal regulation is ambiguous in its application, and the PCA's interpretation of the regulation is entitled to our deference. The PCA interprets section 122.44(d)(1) to not require WQBELs for the NorthMet project on the ground that Poly Met plans to treat the project's wastewater to meet water-quality standards before it is discharged to surface waters. Relators object to the PCA's use of pre-discharge operating limits, rather than end-of-pipe WQBELs, to ensure Poly Met's adherence to promised water-treatment standards. But relators cite no authority requiring the PCA to adopt WQBELs if it has determined that a facility has no reasonable potential to cause or contribute to an exceedance of water-quality standards. The PCA's reasonable-potential analysis is based on its scientific expertise and policy judgments, which, as in prior cases, are entitled to our deference.

Relators also contend that the PCA erred on the ground that its reasonable-potential analysis violates the requirements of the Great Lakes Initiative (GLI), which are set forth in Minn. R. 7052.0005-.0380 (2019),[1] in two ways. The GLI rules apply in this case

[1] The EPA began the GLI "in cooperation with the Great Lakes States to establish a consistent level of environmental protection for the Great Lakes ecosystem, particularly in the area of State water quality standards and the [NPDES] programs." 60 Fed. Reg. 15366, 15368 (Mar. 23, 1995). In March 1995, the EPA published its Final Water Quality Guidance for the Great Lakes System in response to Congressional direction to "publish proposed and final water quality guidance on minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System." *Id.* at 15366. That guidance is now contained in 40 C.F.R. Part 132 (2021) and requires Great

because the receiving waters of the proposed NorthMet project discharges are within the Lake Superior Basin. *See* Minn. R. 7052.0005 (defining scope of rules).

Relators first contend that the PCA erred by not using GLI procedures in conducting its reasonable-potential analysis under Minn. R. 7052.0220, subp. 1. That analysis applies if "facility-specific effluent monitoring data are available." Minn. R. 7052.0220, subp. 1; *see also* 40 C.F.R. Part 132 Appx. F., Procedure 5 (including same language). The PCA did not apply the GLI-specific reasonable-potential analysis because the NorthMet project is not yet built, so no monitoring data is yet available. The PCA did not err in this regard.

Relators MCEA and WaterLegacy also contend that the PCA erred by not imposing a WQBEL for mercury to ensure compliance with Minn. R. 7052.0220, supb. 7. If a GLI pollutant standard (such as the mercury standard) is exceeded in a body of water, the PCA must include a WQBEL for that pollutant in the permit of "each facility that discharges detectable levels of such GLI pollutant *to that water*." Minn. R. 7052.0220, supb. 7 (emphasis added). The PCA did not include a mercury WQBEL in the permit because the mercury standard is not exceeded in any of the waters to which discharges will be made: the headwater wetlands of Unnamed Creek, Trimble Creek, and Second Creek. The PCA also did not err in this regard.

Lakes states to adopt requirements for waters of the Great Lakes System that are consistent with its provisions. *See* 40 C.F.R. § 132.4. Minnesota adopted regulations to comply with the guidance in 1998. 22 Minn. Reg. 1461, 1466 (Mar. 2, 1998). Also, in connection with the GLI, Minnesota and Region 5 of the EPA amended the MOA to ensure that chapter 7052 would be implemented in a manner consistent with the federal guidance.

MCEA contends further that, even if WQBELs are not required by federal law, they are required by state law. MCEA bases this argument on a statutory provision that broadly defines the PCA's "power and duties." *See* Minn. Stat. § 115.03, subd. 1. That provision either authorizes or requires the PCA to impose "more stringent limitations . . . whenever the agency determines that discharges of pollutants from such point source or sources, with the application of effluent limitations required to comply with any standard of best available technology, would interfere with the attainment or maintenance of the water quality classification in a specific portion of the waters of the state." *Id.*, subd. 1(e)(8). MCEA interprets this provision to mean that, "if TBELs alone are insufficient to attain or maintain water-quality standards, Minnesota law requires the Permit to include WQBELs necessary to protect the standard, without further analysis." We discern no such mandate. Assuming without deciding that the MCEA has correctly interpreted the statute, the statute has not been violated because the NorthMet permit includes "more stringent limitations" than the federal TBELs in the form of internal operating limits. Relators assert that the operating limits are unenforceable under federal law, but they have not explained why the internal operating limits cannot satisfy this provision of state law.

Thus, the PCA did not err by issuing a permit that does not include water-quality-based effluent limits.

B. Construction-Related Impacts

The Band argues that the PCA erred by issuing a permit that violates 40 C.F.R. § 122.4(i) (2021), which provides that "[n]o permit may be issued" to a new facility "if the

discharge from its construction or operation will cause or contribute to the violation of water quality standards."

The Band relies on the EPA's draft comment letter, which cited section 122.4(i) in questioning the PCA's intention to regulate construction stormwater under one of the state's general NPDES permits. But the EPA did not suggest that an NPDES permit for operation of the NorthMet project was prohibited by section 122.4(i); rather, the EPA suggested that construction stormwater discharges should be governed by a separate permit rather than the state's general stormwater permit, if there would be reasonable potential for those discharges to cause or contribute to an exceedance of water-quality standards. The PCA maintained its plan to permit construction stormwater discharges under the general permit and explained that the general permit "requires best management practices that will have the effect of reducing mercury in stormwater." The PCA explained further that "the discharge will not cause or contribute to a violation of water quality standards" and that "the prohibition in 40 C.F.R. § 122.4(i) does not apply." The PCA's analysis in this regard was based on its expertise, to which we defer.

Thus, the PCA did not err by granting the NPDES permit for operation of the NorthMet project without issuing a separate construction stormwater permit for the project.

C. Compliance with Tribal Water-Quality Standards

The Band also argues that, for two reasons, the PCA erred by issuing a permit that violates 40 C.F.R. § 122.4(d), which prohibits the issuance of a permit if "the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." The Band is recognized as a state for purposes of the CWA and has

adopted its own water-quality standards. *See* 33 U.S.C. § 1377(e) (2018); 40 C.F.R. § 122.2 (2021).

The Band first contends that the PCA did not make a required finding that the permit would ensure compliance with the Band's water-quality standards. We discern no requirement in section 122.4(d) that a permit-issuing agency must make a finding that a permit will ensure compliance with water-quality standards. Instead, the requirement is that the permit not issue if water-quality standards cannot be met. Nonetheless, the record includes the PCA's determination that "the Project as designed does not have reasonable potential to cause or contribute to *any violations* of *any applicable water quality standards* in waters of the state." (Emphasis added.) The PCA's reference to "any applicable water quality standards" must be understood to include the Band's water-quality standards. *See* 33 U.S.C. § 1377(e); 40 C.F.R. § 122.2. We note that the absence of a more specific statement in the record may be attributable to the absence of a comment on this issue by the Band during the public-comment period. We also note the Band's reliance on its own study, which was submitted during earlier environmental-review proceedings, for its assertion that "[s]ulfate concentrations from Poly Met's discharges would not drop below 10 mg/L until at least 105 miles downstream of the nearest upstream discharge." But that assertion is obsolete; Poly Met later committed to treating discharged water to sulfate levels of 10 mg/L. Although Minnesota's wild-rice rule applies only seasonally, the operating limit in the NPDES permit for the NorthMet project imposes a 10-mg/L limit on a year-round basis. Thus, there is no basis for a conclusion that Poly Met's discharges will violate the Band's sulfate water-quality standard, and the record reflects that the Band's numeric

water-quality standards for other pollutants generally are consistent with the state's standard.

The Band also contends, more specifically, that the permit will not ensure compliance with the Band's water-quality standard for mercury, which is 0.77 ng/L. But the record reflects an express determination in the FEIS that the NorthMet permit will comply with the Band's water-quality standards because discharges from the project will not alter the quality of waters within the Band's reservation boundaries. The FEIS specifically "analyzes compliance with [the Band's] mercury standard" and concludes:

> Overall, the NorthMet Project Proposed Action is predicted to increase mercury loadings in the Embarrass River. Mercury loadings in the Partridge River would decrease. The net effect of these changes would be an overall reduction in mercury loadings to the downstream St. Louis River upstream of the Fond du Lac Reservation boundary. Therefore, the NorthMet Project Proposed Action would not add to any potential exceedance of the Fond du Lac mercury water quality standard of 0.77 ng/L within the Reservation.

The FEIS is consistent with an anti-degradation analysis prepared by Poly Met's consultant, which was approved by the PCA.

The Band contends further, in its reply brief, that 40 C.F.R. § 122.4(d) requires something more than what the anti-degradation analysis supplies: a determination that the mercury level in surface waters within its reservation will be less than the Band's 0.77 ng/L water-quality standard for mercury when the discharge from the NorthMet project reaches tribal waters. In effect, the Band contends that, if a downstream water already is impaired with a particular pollutant, no amount of that pollutant may be added upstream. The United States Supreme Court has rejected that theory. In *Arkansas v. Oklahoma*, 503 U.S. 91

(1992), the State of Oklahoma argued that discharges permitted under an EPA-issued permit for a point source in Arkansas would cause degradation of Oklahoma waters in violation of its water-quality standards. *Id.* at 95. The United States Court of Appeals for the Tenth Circuit had held that "where a proposed source would discharge effluents that would contribute to conditions currently constituting a violation of applicable water quality standards, such [a] proposed source may not be permitted." *Id.* at 98 (alteration in original). The Supreme Court reversed, holding that nothing in the CWA supported the Tenth Circuit's view that the CWA "prohibit[s] any discharge of effluent that would reach waters already in violation of existing water quality standards." *Id.* at 107. The Court approved of the EPA's determination that Oklahoma's no-degradation rule would be violated only if "the discharge effected an 'actually detectable or measurable' change in water quality." *Id.* at 110-11. In *Annandale*, our supreme court relied on *Arkansas* in holding that 40 C.F.R. § 122.4(i) may not be applied to "in essence impose[] a complete ban on new facilities." 731 N.W.2d at 519. In this case, the analysis provided by the FEIS and Poly Met's consultant tracks the approach that was approved in *Arkansas* and *Annandale*, which provides that downstream water-quality standards are not violated if there will be no adverse change to the quality of downstream waters with respect to the particular pollutant.

Thus, the PCA did not err by issuing a permit that does not ensure compliance with the Band's water-quality standards.

IV. Contested-Case Hearing

The MCEA argues that the PCA erred by denying its petition for a contested-case hearing.

The commissioner of the PCA must hold a contested-case hearing if three requirements are satisfied:

> A. there is a material issue of fact in dispute concerning the matter pending before the . . . commissioner;
>
> B. the . . . commissioner has the jurisdiction to make a determination on the disputed material issue of fact; and
>
> C. there is a reasonable basis underlying the disputed material issue of fact or facts such that the holding of a contested case hearing would allow the introduction of information that would aid the . . . commissioner in resolving the disputed facts in making a final decision on the matter.

Minn. R. 7000.1900 (2019). The petitioner bears the burden of demonstrating that all three requirements are satisfied. *NorthMet*, 959 N.W.2d at 745. This court reviews a decision to deny a contested-case hearing according to the criteria in section 14.69. *Id.* at 749.

In *NorthMet*, the supreme court addressed the DNR's denial of a contested-case hearing in relation to the permit to mine for the NorthMet project. *Id.* at 743. The supreme court did so pursuant to Minn. Stat. § 94.483 (2020), which is nearly identical to the PCA's standard in Minn. R. 7000.1900. *Id.* at 745. The supreme court explained: "We will defer to the legislative judgment to allow the commissioner to decide, based on the commissioner's findings, whether to hold a contested case hearing." *Id.* at 747. The supreme court concluded that substantial evidence supported the DNR's decision to deny a contested-case hearing on all but one issue: whether the proposed bentonite amendment to the NorthMet tailings basin will be a practical and workable reclamation technique under Minn. Stat. § 93.481, subd. 2 (2020). *Id.* at 750-56. On that issue, the supreme court

concluded that the record lacked evidence to support the DNR's "conclusory statements" about bentonite's effectiveness and that the contested-case petitions "presented a bevy of evidence, including statements made by the DNR's own experts and external consultants that contradicted the DNR's findings on effectiveness." *Id*. at 753.

The MCEA first contends that the supreme court's *NorthMet* opinion compels a determination that the PCA must hold a contested-case hearing on the same issue for purposes of the NPDES/SDS permit in this case. In response, the PCA contends that the issues regarding the effectiveness of bentonite "have no relevance to [the] NPDES permit."

The supreme court explained in *NorthMet* that the bentonite amendment is a critical element of Poly Met's plan to ultimately close the tailings basin in compliance with the DNR's reactive mine-waste rule. *Id.* at 754. The relators in *NorthMet* argued that, after closure, the bentonite amendment would not prevent water and oxygen from infiltrating the tailings basin and reacting with the tailings, as required by the DNR's reactive mine-waste rule. *Id.*; *see also* Minn. R. 6132.2200 (2019). Bentonite does not play the same critical role in relation to the NPDES permit. The bentonite amendment is not a condition of the NPDES/SDS permit and receives only passing reference in the permit. The permit to mine will govern the entire life of the NorthMet project, including closure and reclamation. *See NorthMet*, 959 N.W.2d at 757 (citing Minn. Stat. § 93.481, subd. 3(a) (2020)). In contrast, the NPDES permit is only a five-year permit, and Poly Met will not seek to close the NorthMet project within that five-year period. 33 U.S.C. § 1342(b)(1)(B). Thus, the supreme court's *NorthMet* opinion does not require the PCA to hold a contested-case hearing on the bentonite amendment for purposes of the NPDES permit.

The MCEA also contends that the PCA erred by relying on the FEIS when it denied its petition for a contested-case hearing. The MCEA correctly asserts that environmental review is a process distinct from (and a predicate to) the permitting process. But it does not necessarily follow that an agency may not rely on information and opinions developed during the environmental-review process during the permitting process. Indeed, the purpose of an EIS is to inform agency decision-making: "To ensure its use in the decision-making process, the environmental impact statement must be prepared as early as practical in the formulation of an action." Minn. Stat. § 116D.04, subd. 2a (2020). As the supreme court explained in *NorthMet*, "The environmental review process precedes the permit application process because it is intended to inform the subsequent permitting and approval processes and, thus, the DNR uses that process and the FEIS as 'guides' during the permitting process." 959 N.W.2d at 742 (quoting Minn. R. 4410.0300, subp. 3 (2019)). Our review of the PCA's decision to deny a contested-case hearing in this case appropriately focuses on the question whether the information on which the PCA relied—information in the FEIS or elsewhere in the record—provides substantial evidence for its determination that there is not "a substantial basis underlying" a fact dispute such that a contested-case hearing would aid the commissioner in reaching a decision. *See NorthMet*, 959 N.W.2d at 749.

The MCEA has identified three factual issues on which it asserts a contested-case hearing was warranted: the accuracy of the characterization of waste rock to be removed from mine pits and the modeling of impacts to groundwater from that waste rock; the accuracy of projections of wastewater quantity and quality to be discharged from the

project; and the efficacy of a liner to be used under a stockpile for certain waste rock (the Category 2/3 stockpile liner). Each of these issues received significant study during environmental review and is addressed in the FEIS. The MCEA submitted reports during environmental review from experts it had retained to challenge the modeling and analysis. The DNR reviewed and ultimately rejected the opinions of MCEA's experts. The PCA then relied on the modeling and analysis completed during environmental review in drafting the NPDES permit for the NorthMet project. In commenting on the draft NPDES permit, the MCEA submitted new reports from its experts, again challenging the modeling and analysis. The PCA reviewed the new reports and concluded that they contained no information that had not been addressed during environmental review. The PCA noted that it had worked with the DNR on the issues and agreed with the DNR's conclusions. Because the issues had already been evaluated, the PCA determined that there was not a reasonable basis underlying these factual disputes and that a contested-case hearing would not aid the commissioner in reaching a decision.

The PCA's decision to deny a contested-case hearing on the three issues identified by the MCEA is supported by substantial evidence and is not arbitrary or capricious. With respect to each of the three issues, the PCA has explained why it relied on the analysis and modeling developed during environmental review over that of the MCEA's experts, and those explanations are reasonable in light of the agency record. Specifically, the PCA explains that it concurred with the extensive waste-rock characterization completed during environmental review, that the groundwater modeling conducted by MCEA's expert relied on assumptions that the DNR concluded (and the PCA concurred) were not justified by

available data, and that permit conditions adequately address concerns regarding the efficacy of the Category 2/3 liner. These explanations are supported by record evidence, including the FEIS.

The MCEA nonetheless contends that a contested-case hearing is required on the ground that the earlier reports of its experts are not in the administrative record for purposes of the NPDES permit because, although they were submitted to the DNR in connection with comments on the draft EIS, they were not submitted to the PCA in connection with comments on the draft NPDES permit. *See* Minn. R. Civ. App. P. 110.01, 115.04. The MCEA asserts that, without those reports, the record lacks substantial evidence to support the PCA's determination that the new expert reports contained no new information. In support of this assertion, the MCEA cites *NorthMet*'s discussion of the DNR's bentonite findings. *See NorthMet*, 959 N.W.2d at 753-54. But in *NorthMet*, the record included documents from the DNR's own staff and consultants questioning the effectiveness of bentonite as a reclamation technique, the DNR's findings regarding the effectiveness of bentonite were based on conclusory statements in the FEIS, and "the single study on which nearly all of the DNR's findings of effectiveness rely [was] not in the record." *Id*. In this case, however, the PCA relies on professionally developed modeling and analysis that is in the record. Furthermore, the MCEA does not explain what, if any, information was presented in its new expert reports that had not been addressed during environmental review. Accordingly, the MCEA has not demonstrated that the absence in the agency record of its experts' earlier reports necessitates a contested-case hearing.

Although there were factual issues regarding the NPDES permit, the supreme court made clear in *NorthMet* that the "mere existence of factual disputes" is insufficient to require a contested-case hearing. *Id.* at 746. Rather, an administrative agency has discretion to determine whether, with respect to particular factual issues, a contested-case hearing would aid in the agency's decision-making. *Id.* at 747. That determination must be affirmed if it is supported by substantial evidence, *i.e.*, if the agency has explained the reason for its decision and the explanation is reasonable in light of the agency record. *Id.* at 749. That standard has been satisfied here.

Thus, the PCA did not err by denying the MCEA's petition for a contested-case hearing.

In sum: We affirm the district court's order. The PCA's decision to issue the NPDES/SDS permit for the NorthMet project was not made upon an unlawful procedure that prejudiced the relators' substantial rights. The permit complies with Minn. R. 7060.0600. The PCA did not err by issuing a permit that does not include WQBELs or without issuing a separate construction stormwater permit. The permit ensures compliance with the Band's water-quality standards. And the PCA did not err by denying the MCEA's petition for a contested-case hearing. But the PCA erred by not considering whether any discharges to groundwater will be the functional equivalent of a discharge to navigable waters and, thus, whether the CWA applies to those discharges. Therefore, we reverse and remand to the PCA with instructions to conduct the functional-equivalence analysis required by *Maui*.

Affirmed in part, reversed in part, and remanded.