

NO. A04-2033

State of Minnesota
In Supreme Court

In the Matter of the Cities of Annandale and Maple Lake
NPDES/SDS Permit Issuance for the Discharge of Treated
Wastewater and Request for Contested Case Hearing

**BRIEF OF AMICUS CURIAE
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I. STATEMENT OF INTEREST¹

The Metropolitan Council is a political subdivision of the State of Minnesota with jurisdiction in the seven-county metropolitan area surrounding Minneapolis and Saint Paul. Minn. Stat. § 473.123, subd. 1 (2004). The Minnesota Legislature has given the Metropolitan Council certain comprehensive planning responsibilities and authorities to help address problems that transcend local government boundaries in the metropolitan area, including problems associated with wastewater treatment, water quality, and pollution. Minn. Stat. § 473.851 (2004).

In addition to its regional planning responsibilities, the Metropolitan Council is also responsible for planning, maintaining, constructing, and operating the Metropolitan Disposal System (“MDS”), which provides wastewater collection and treatment services to 2.5 million people in 103 communities. Minn. Stat. § 473.121, subd. 24; §§ 473.501-.549 (2004); Metropolitan Council, 2030 Water Resources Management Policy Plan (“WRMPP”) (adopted May 25, 2005) at 47.² The MDS includes eight wastewater treatment plants and 600 miles of regional interceptors that connect to 5,000 miles of sewers owned by local communities. Id. The MDS treats up to 300 million gallons of wastewater from homes, industries, and commercial businesses per day. Id. It accepts septage from individual sewage treatment systems (“ISTS”), community or cluster

¹ This brief was authored in whole by counsel for *amicus curiae* Metropolitan Council. No other person or entity made a monetary contribution to the preparation or submission of this brief.

² Available at <http://www.metrocouncil.org/planning/environment/WRMPP/WRMPP2005.htm>.

systems, and, as capacity permits, biosolids from municipal plants located within surrounding counties. Id.

The Metropolitan Council submits this amicus brief out of concern that the Court of Appeals' decision in this case will frustrate efforts to implement area-wide, coordinated, comprehensive solutions to wastewater treatment problems that would alleviate existing pollution.

II. THE COURT OF APPEALS' DECISION

This case involves a NPDES permit issued by the Minnesota Pollution Control Agency ("MPCA") for a new wastewater treatment facility serving the cities of Annandale and Maple Lake. The proposed facility would discharge 3,600 pounds of phosphorus per year into the North Fork of the Crow River ("North Fork") – a 2,200 pound increase from the combined discharges of the cities' existing wastewater treatment facilities.³ The North Fork flows into the Mississippi River and eventually into Lake Pepin. The MPCA has designated Lake Pepin as "impaired" under Section 303(d) of the Clean Water Act for excessive nutrients including phosphorus. In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for Discharge of Treated Wastewater, 702 N.W.2d 768, 770 (Minn. Ct. App. 2005) ("Annandale/Maple Lake").

At issue in this case is an Environmental Protection Agency ("EPA") regulation, implementing the Clean Water Act, which prohibits issuance of a permit to a new source

³ The existing Maple Lake treatment facility currently discharges approximately 1,400 pounds of phosphorus per year. The existing Annandale treatment facility discharges by spray irrigation to the land and has no permitted annual phosphorus discharge to the river. Thus, the combined phosphorus discharge of the two treatment plants consists of the approximately 1,400 pounds per year from the existing Maple Lake treatment facility.

or new discharger “if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.” 40 C.F.R. § 122.4(i).⁴ The MPCA concluded that 40 C.F.R. § 122.4(i) did not prohibit issuance of the permit because the combined *2,200-pound increase* in phosphorus to be discharged by the new Annandale-Maple Lake facility would be more than offset by a *53,500-pound reduction* in the phosphorus discharge already imposed by agency permit on a new Litchfield wastewater treatment plant, which also discharges into the North Fork. Annandale/Maple Lake, 702 N.W.2d at 770-71.

The Minnesota Court of Appeals accepted review of the permit issuance on petition from Relator Minnesota Center for Environmental Advocacy (“MCEA”). In a split decision, the Court of Appeals refused to defer to MPCA’s interpretation of 40 C.F.R. § 122.4(i). The Court of Appeals concluded that:

[a] plain reading of the phrase “cause or contribute to the violation of water quality standards” indicates that, so long as some level of discharge may be causally attributed to the impairment of Section 303(d) waters, a permit shall not be issued. Here, the record demonstrates that notwithstanding the reduction in phosphorus resulting from other sources, the waters at issue remain impaired.

Id. at 775.

The Court of Appeals’ decision prohibits consideration of offsets in determining whether the discharge from the operation of a new source or new discharger will cause or contribute to the violation of water quality standards, thereby preventing the MPCA

⁴ After the establishment of a Total Maximum Daily Load (“TMDL”) for a water segment, section 122.4(i) imposes a different standard for new sources or dischargers from the “cause or contribute” standard. MCEA argued below that no new source or discharge could occur until a TMDL was developed for the water segment. The Court of Appeals rejected that extreme position and that issue has not been appealed in this case.

and/or dischargers from taking coordinated action to improve water quality on an area-wide basis. Such a constrained reading of the regulation is contrary to the purpose of the Clean Water Act and cannot stand.

III. ARGUMENT

In Arkansas v. Oklahoma, 503 U.S. 91 (1992), the United States Supreme Court endorsed comprehensive, coordinated, area-wide approaches to pollution problems that transcend local boundaries. It held that “the Clean Water Act vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution[,]” and firmly rejected an interpretation of the Clean Water Act “which might frustrate the construction of new [wastewater treatment] plants that would improve existing conditions” Id. at 108.⁵

The Court of Appeals’ decision in this case is antithetical to the purposes of the Clean Water Act and the principles articulated by the Supreme Court in Arkansas v. Oklahoma. It would prohibit coordinated, area-wide solutions to wastewater treatment problems that would result in a net improvement of existing conditions.

In accordance with this Court’s instruction to avoid redundant briefing, the Metropolitan Council adopts by reference MPCA’s arguments that the Court of Appeals erred in concluding that 40 C.F.R. § 122.4(i) prohibits offsets, see Appellant MPCA’s Brief at 25-37, and further demonstrates the error of the Court of Appeals’ decision by illustrating its practical implications.

⁵ The Clean Water Act is intended to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

A. The Court of Appeals' Decision May Preclude Replacement of Aging Wastewater Treatment Plants.

By prohibiting consideration of offsets in determining whether the discharge from the operation of a new source or new discharger will cause or contribute to the violation of water quality standards, the Court of Appeals' decision may effectively preclude replacement of aging wastewater treatment plants even where the replacement would result in no increase in, or would reduce, the discharge of pollutants. The Metropolitan Council's Hastings Wastewater Treatment Plant is a case-in-point.⁶

Originally constructed in 1955, the Hastings Wastewater Treatment Plant serves approximately 18,000 residents in Hastings and discharges an average of 1.8 million gallons per day ("mgd") into the Mississippi River upstream from Lake Pepin. WRMPP at 49. Although the Hastings Plant has adequate capacity to meet area sewer service needs through 2020, it is approaching the end of its useful life and would require substantial rehabilitation to ensure facility integrity. *Id.* at 49, 53.

Rather than reinvest in the old facility, the Metropolitan Council has committed to construction of a new replacement plant several miles downstream. *Id.* at 49. It is the Council's intention to cap the discharge of pollutants from the new facility during the pre-TMDL period to the levels currently discharged from the existing facility.⁷ In

⁶ Although the Council believes the Hastings Plant situation is distinguishable in significant ways from the situation at issue in this case, the Council is concerned that an upholding of the Court of Appeals' decision could lead to challenges with respect to the Hastings Plant on similar grounds.

⁷ Post-TMDL discharge levels would be established through the load allocations set during the TMDL development and implementation process.

addition, the new plant will be subject to a 1 mg/L total phosphorus effluent limit and include treatments for the removal of phosphorus resulting in significantly lower phosphorus discharges. Minn. Rules 7050.0211 subp. 1a.

There is no question that the planned replacement of the Hastings Plant would benefit the environment. However, the replacement plant would occupy a new site and, thus, might be considered a new discharger to impaired waters. Therefore, even though the discharge from the replacement plant would be offset by eliminating the discharge from the old plant, the Court of Appeals' decision might be interpreted to prohibit the MPCA from issuing or renewing a permit for operation of the replacement plant. This perverse potential consequence of the Court of Appeals' decision aptly illustrates its conflict with the purposes of the Clean Water Act and its inconsistency with the Supreme Court's decision in Arkansas v. Oklahoma, *supra*.

B. The Court of Appeals' Decision May Deprive Planning Agencies of the Flexibility Needed to Protect the Environment While Managing Wastewater Treatment.

By prohibiting consideration of offsets in determining whether the discharge from the operation of a new source or new discharger will cause or contribute to the violation of water quality standards, the Court of Appeals' decision also may deprive planning agencies of the flexibility needed to protect the environment while managing wastewater treatment. The Metropolitan Council's plans to improve water quality in the Vermillion River illustrate the point.

The Vermillion River flows into the Mississippi River near Hastings and, ultimately, into Lake Pepin. By the late 1950's, the Vermillion River -- which once was

regarded as one of the premier brook trout streams in the upper Midwest – had become so polluted that it was considered unfit for any game fish or human uses. Through improvements in agricultural practices, wastewater treatment, and storm water management, the Vermillion has made a comeback as a cold water fishery and is now one of the few streams in the metropolitan area healthy enough to support trout. See Friends of the Mississippi River, [The Vermillion River – Resource at a Crossroads](#).⁸

Despite its dramatic improvement, however, the Vermillion River continues to be impacted by stormwater and wastewater discharges from development in surrounding communities, including the effluent from the Metropolitan Council's Empire Wastewater Treatment Plant serving Apple Valley, Lakeville, Farmington, and portions of Empire township and Rosemount. In an effort to protect and improve water quality in the Vermillion River, the Metropolitan Council is constructing a 13-mile pipeline to convey treated wastewater away from this outstanding natural resource to a new outfall directly to the Mississippi River at Rosemount. WRMPP at 49. The project will improve the water quality of the Vermillion River while having no net effect on Lake Pepin's impaired status because the discharge from the new outfall is completely offset by elimination of the existing outfall.

The Court of Appeals' decision will have no effect on this project because it is already permitted. However, it represents the type of project and creative approach to the management of water quality and wastewater treatment that may be foreclosed in the

⁸ Available at http://www.fmr.org/eos_vermillion_river.

future if the Court of Appeals' decision is affirmed.⁹ This potential consequence of the Court of Appeals' decision is contrary to the purposes of the Clean Water Act and constrains the flexibility planning agencies such as the Metropolitan Council need to manage discharges on an area-wide basis.

C. The Court of Appeals' Decision Constrains the Metropolitan Council's Ability to Address Projected Regional Growth.

The population of the Minneapolis–Saint Paul metropolitan area is expected to increase from 2.6 million, currently, to 3.5 million people by 2030. WRMPP at 5. Pursuant to a legislative mandate, the Metropolitan Council has developed a Water Resources Management Policy Plan which integrates water resource management and protection with planning for regional growth. Minn. Stat. § 473.145 (2004).

Accommodating the projected growth while protecting the region's water resources will require substantial investment in the MDS and non-MDS wastewater treatment infrastructure. The Council's wastewater system plan includes extension of MDS service through new regional interceptors, potential acquisition of non-MDS wastewater treatment plants, expansion and improvement of existing plants, and construction of new plants. WRMPP at 54-58. Over the next 25 years, the Metropolitan Council plans to invest \$3.8 billion in the maintenance, improvement, and expansion of the MDS. *Id.* at 58.

⁹Although the Council believes the new outfall for the Empire Plant would not be considered a "new source" or "new discharger" and therefore would not be subject to 40 C.F.R. § 122.4(i) in any event, the Council is concerned that if the Court of Appeals' decision stands it could lead to challenges of similar projects in the future.

To successfully manage regional growth and improve water quality, the Council needs flexibility to develop wastewater infrastructure to accommodate expected growth and protect the region's outstanding natural resources. By prohibiting consideration of offsets in determining whether the discharge from the operation of a new source or new discharger will cause or contribute to the violation of water quality standards, the Court of Appeals' decision could deprive the Council of an important mechanism in planning and providing for growth while protecting water quality on an area-wide basis. As a consequence, regional growth may be forced to occur around the existing MDS infrastructure or leapfrog beyond communities that provide centralized wastewater treatment. Such haphazard development would further tax the region's transportation infrastructure, threaten valuable natural and agricultural areas, and could result in the degradation of water quality by encouraging excess reliance on onsite septic systems.

IV. CONCLUSION

The Court of Appeals' decision conflicts with the purposes of the Clean Water Act and is inconsistent with the Supreme Court's endorsement of the exercise of broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution. For all of the foregoing reasons, the Metropolitan Council respectfully requests that this Court reverse the Court of Appeals' decision that a NPDES permit may not be issued for a new source or new discharger discharging into an impaired water prior to the development of a TMDL even though the discharge is offset by reductions from other sources.

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