

NO. A04-2033

State of Minnesota
In Supreme Court

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

BRIEF OF AMICI CURIAE
TROUT UNLIMITED AND MINNESOTA LAKES ASSOCIATION

Michael D. Madigan (#129586)
 Edward M. Tillman (#322337)
 MADIGAN, DAHL & HARLAN, P.A.
 701 Fourth Avenue South, Suite 1700
 Minneapolis, MN 55415
 Tel: (612) 604-2000
 Fax: (612) 604-2599
*Attorneys for Amici Curiae Trout
 Unlimited and Minnesota Lakes
 Association*

Janette K. Brimmer (#174762)
 MINNESOTA CENTER FOR
 ENVIRONMENTAL ADVOCACY
 26 East Exchange Street, Suite 206
 St. Paul, MN 55101-1667
 Tel: (651) 223-5969
 Fax: (651) 223-5967
*Attorney for Respondent Minnesota
 Center for Environmental Advocacy*

Mike Hatch
 Minnesota Attorney General
 Robert B. Roche (#289589)
 OFFICE OF THE STATE
 ATTORNEY GENERAL
 445 Minnesota Street, Suite 900
 St Paul, MN 55101-2127
 Tel: (651) 296-1506
 Fax: (651) 296-4139
*Attorneys for Appellant Minnesota
 Pollution Control Agency*

Edward J. Laubach, Jr. (#61025)
 Christopher W. Harmoning (#285948)
 Heather I. Olson (#342117)
 GRAY, PLANT, MOOTY, MOOTY
 & BENNETT, P.A.
 1010 West St. Germain Street,
 Suite 600
 St Cloud, MN 56301
 Tel: (320) 252 4414
 Fax: (320) 252-4482
*Attorneys for Appellants City of
 Annandale and City of Maple Lake*

(Additional Counsel Listed on following pages)

Jane Reyer (#296521)
220 Pike Lake Road
Grand Marais, MN 55604
Tel: (218) 387-3377

Albert Ettinger, Senior Attorney
ENVIRONMENTAL LAW & POLICY
CENTER OF THE MIDWEST
35 East Wacker, Suite 1300
Chicago, IL 60601
Tel: (312) 795-3707
Fax: (312) 795- 3730

Nancy Stoner, Senior Attorney
NATURAL RESOURCES DEFENSE
COUNCIL
1200 New York Avenue N.W
Washington, D.C. 20005
Tel: (202) 289-2394

Andrew Hanson
MIDWEST ENVIRONMENTAL
ADVOCATES
702 East Johnson Street
Madison, WI 53703
Tel: (608) 251-5047
Fax: (608) 268-0205

Katherine Baer
Director, River Advocacy
AMERICAN RIVERS
1025 Vermont Avenue N.W., Suite 720
Washington, D.C. 20005
(202) 347-7550, Ext. 3053
*Attorneys for Amici Curiae
Environmental Law and Policy Center
of the Midwest, Natural Resources
Defense Counsel, Midwest
Environmental Advocates, and
American Rivers*

Nils Grossman (#38179)
General Counsel
METROPOLITAN COUNCIL
Mears Park Centre, 7th Floor
St. Paul, MN 55101-1634
Tel: (651) 602-1463
Fax: (651) 602-1640

Charles N. Nauen (#121216)
William A. Gengler (#210626)
David J. Zoll (#330681)
LOCKRIDGE GRINDAL NAUEN
P.L.L.P.
100 Washington Avenue South,
Suite 2200
Minneapolis, MN 55401
Tel: (612) 339-6900
Fax: (612) 339-0981
*Attorneys for Amicus Curiae
Metropolitan Council*

Susan L. Naughton (#259743)
LEAGUE OF MINNESOTA CITIES
145 University Avenue West
St. Paul, MN 55103-2044
(651) 281-1232
*Attorney for Amicus Curiae League of
Minnesota Cities*

Lloyd W. Grooms (#188694)
Thomas H. Boyd (#200517)
WINTHROP & WEINSTINE, P.A.
225 South Sixth Street, Suite 3500
Minneapolis, MN 55402
Tel: (612) 604-6400
Fax: (612) 604-6800
*Attorneys for Amicus Curiae Builders
Association of the Twin Cities*

Alexandra Dapolito Dunn
General Counsel
NATIONAL ASSOCIATION OF
CLEAN WATER AGENCIES
1816 Jefferson Place, N.W.
Washington, D.C. 20036
Tel: (202) 533-1803

Molly McKee (#341885)
LARKIN HOFFMAN DALY &
LINDGREN, LTD
1500 Wells Fargo Plaza
7900 Xerxes Avenue South
Minneapolis, MN 55431-1194
Tel: (952) 835-3800
Fax: (952) 896-3333

Fredric P. Andes
Erika K. Powers
David T. Ballard
BARNES & THORNBURG, LLP
1 North Wacker Drive, Suite 4400
Chicago, IL 60606-2809
(312) 357-1313
*Attorneys for Amicus Curiae National
Association of Clean Water Agencies*

Timothy P. Flaherty (#0029920)
Christopher M. Hood (#229386)
Steven W. Nyhus (#296193)
Kari J. Thurlow (#303008)
FLAHERTY & HOOD, P.A.
525 Park Street, Suite 470
St. Paul, MN 55103
Tel: (651) 225-8840
*Attorneys for Amici Curiae Minnesota
Environmental Science and Economic
Review Board and Coalition for
Greater Minnesota Cities*

Robert S. Halagan (#136402)
HALAGAN LAW FIRM, LTD.
101 Courthouse Square
15 Second Street N.W.
Buffalo, MN 55313
Tel: (763) 682-8975
*Attorney for Amicus Curiae Wright
County Mayors Association*

Brian J. Wisdorf (#297768)
OLSON & PRICE, LTD.
220 Exchange Building
26 East Exchange Street
St. Paul, MN 55101
Tel: (651) 298-9884
Fax: (651) 298-0056
*Attorney for Amici Curiae Coalition for
Clean Minnesota Rives, New Ulm Area
Sportfishermen, and Friends of the
Minnesota Valley*

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

STATEMENT OF FACTS..... 1

ARGUMENT..... 4

I. Statutory Framework of the Clean Water Act..... 4

 A. Section 303 Requirements..... 5

 B. MPCA’s Failures to Comply with Section 303..... 7

II. 40 C.F.R. § 122.4(i)..... 7

 A. MPCA’s Failure to Complete a TMDL Precludes the Issuance of this Permit..... 9

 B. The Undisputed Fact that the Discharge from this Proposed Plant Will Cause or Contribute to a Violation of Water Quality Standards Precludes the Issuance of this Permit..... 14

III. Prohibiting the Issuance of this Permit Will Enhance Efforts to Remediate Phosphorus Loading in Lake Pepin and Promote Comprehensive, Coordinated, and Area-wide Management of NPDES Discharges..... 16

CONCLUSION..... 19

TABLE OF AUTHORITIES

Federal Cases:

<i>Auer v. Robbins</i> , 519 U.S. 452, 117 S.Ct. 905 (1997).....	10
<i>Friends of the Wild Swan v. United States Environmental Protection Agency</i> , 74 Fed.Appx. 718 (9th Cir. 2003).....	9, 13, 14
<i>Friends of the Wild Swan v. United States Environmental Protection Agency</i> , 130 F.Supp.2d 1184 (D.Mt. 2000).....	9
<i>Friends of the Wild Swan v. United States Environmental Protection Agency</i> , 130 F.Supp.2d 1199 (D.Mt. 2000).....	9
<i>Friends of the Wild Swan v. United States Environmental Protection Agency</i> , 130 F.Supp.2d 1204 (D.Mt. 2000).....	9
<i>San Francisco Baykeeper, Inc. v. Browner</i> , 147 F.Supp.2d 291 (N.D.Cal. 2001)	9, 13
<i>Sierra Club v. Browner</i> , 843 F.Supp. 1304 (D.Minn. 1993).....	7

Minnesota State Cases:

<i>In the Matter of the Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Waste Water</i> , 702 N.W.2d 768 (Minn.App. 2005)	9, 10, 16
--	-----------

Other State Cases:

<i>Crutchfield v. State Water Control Bd.</i> , 45 Va.App. 546, 612 S.E.2d 249 (2005)	14
<i>City of Waco, Texas v. Texas Commission on Environmental Quality</i> , Cause No. GN1-00654, (Dist.Ct., Travis County, TX, 1984).....	9, 14

Federal Statutes:

33 U.S.C. § 1251(a).....	4
--------------------------	---

33 U.S.C. § 1311(a).....	4
33 U.S.C. § 1312.....	4
33 U.S.C. § 1313(a).....	5
33 U.S.C. § 1313(a)(3)(A).....	5
33 U.S.C. § 1313(c)(2)(A).....	5
33 U.S.C. § 1313(d)(1)(A).....	6, 7
33 U.S.C. § 1313(d)(1)(C).....	6, 8
33 U.S.C. § 1383.....	5

Federal Rules:

40 C.F.R. § 122.4(i).....	<i>passim</i>
40 C.F.R. § 130.2(e).....	6
40 C.F.R. § 130.2(f).....	6
40 C.F.R. § 130.2(g).....	6
40 C.F.R. § 130.2(h).....	6

Federal Register:

65 Fed.Reg. 64746, <i>et. seq.</i>	12, 13
65 Fed.Reg. 64756.....	13

Other Resources:

Brief of Appellants City of Annandale and City of Maple Lake.....	16, 17
Brief of Amicus Curiae Metropolitan Counsel.....	17

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STATEMENT OF FACTS

Introduction

Trout Unlimited and the Minnesota Lakes Association¹ submit this Amicus Brief to alert the Court to the ongoing degradation of Lake Pepin and to urge the Court to affirm the Court of Appeals in protecting this irreplaceable resource.

The unparalleled beauty and spiritual value of Lake Pepin has long been recognized and treasured by Minnesotans. It inspired the “Legend of Maiden Rock” among our earliest inhabitants (later expressed by Henry Wadsworth Longfellow in the Song of Hiawatha) and led the poet William Cullen Bryant to remark that “Lake Pepin ought to be visited by every poet and painter in the land.” It is host and sustenance to countless fish, waterfowl, birds, shellfish, and other wildlife, many of them threatened.² In the Land of 10,000 lakes, Lake Pepin truly stands out as one of our aquatic jewels.

What is not as well known, however, is the inexorable degradation of this great resource that has been allowed to occur over the course of the last century. The waters of Lake Pepin have been fouled by excessive amounts of phosphorus (the primary pollutant) and sediments. The phosphorus pollution promotes severe algae blooms which rob the lake of oxygen and aggravate turbidity levels, which

¹ Pursuant to Rule 129.03 of the Minnesota Rules of Civil Appellate Procedure, counsel for Amici Curiae Trout Unlimited and Minnesota Lakes Association, by their signature, certify that they have authored this brief in whole, and that no person other than said Amici Curiae, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

² For instance, sturgeon, paddlefish, mussels, and others. Lake Pepin and the Mississippi River also host enormous fall migrations of swans, geese and ducks.

are already unacceptably high due to sediment loading. This degradation led the State to list Lake Pepin on Minnesota's Impaired Water List.

Notwithstanding this impaired status, the Minnesota Pollution Control Agency ("MPCA") recently issued a permit for a proposed wastewater treatment plant which would discharge 3,600 pounds of phosphorous each year in waters which flow into Lake Pepin. This is 2,200 pounds more each year than that already discharged by the existing municipal facilities. This phosphorus discharge would unquestionably further aggravate the existing phosphorus pollution and impairment of Lake Pepin.

Procedural History

The facts underlying this dispute are accurately and comprehensively set forth in the Brief of the Minnesota Center for Environmental Advocacy ("MCEA") and will not be repeated here. Procedurally, Appellants have taken an appeal from a Minnesota Court of Appeals decision which held that the MPCA erred by interpreting 40 C.F.R. § 122.4(i) as authorizing it to issue a National Pollutant Discharge Elimination System ("NPDES") permit to the Cities of Annandale and Maple Lake for the proposed wastewater treatment plant, when the proposed discharge of at least 3,600 pounds of phosphorus from this plant would undeniably contribute to the violation of water quality standards of this already impaired water body. This is an issue of great significance to the water quality of Lake Pepin and all of Minnesota's lakes, rivers, and streams. It is also an issue of great significance to the integrity and efficacy of the Clean Water Act.

Amici Curiae

Trout Unlimited (“TU”) is a 2,300 member, nonprofit organization dedicated to the preservation of cold water ecology and, in particular, to the protection of water quality. The Minnesota Lakes Association³ (“MLA”) is a nonprofit organization comprised of members residing throughout Minnesota, which seeks to protect, preserve, and enhance Minnesota’s lakes as irreplaceable natural assets and, in particular, to protect water quality. Both TU and MLA have a public interest in this case. TU and MLA members’ use and enjoyment of Minnesota’s lakes and streams is diminished if environmental laws are not enforced and if substantial discharges of phosphorus, such as that contemplated by the proposed wastewater treatment plant, are not appropriately regulated and controlled.

Together, TU and MLA represent a broad cross-section of Minnesotans who share an interest in clean lakes and streams, abundant fishing, hunting, bird watching and other outdoor recreational activities, and the vitality of the tourism sector of the state’s economy. These public interest organizations also share a strong interest in ensuring that federal and state environmental laws are appropriately interpreted and enforced. TU and MLA are deeply concerned that these interests will be severely impaired if the permit at issue is granted. They are also concerned that a reversal of the decision of the Court of Appeals would

³ As of January 1, 2006, the Minnesota Lakes Association merged with the Rivers Council of Minnesota to become Minnesota Waters.

further undermine the goals of the Clean Water Act to restore “the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a)

ARGUMENT

I. Statutory Framework of the Clean Water Act

Congress enacted the Clean Water Act, in its present form, for the expressly stated purpose of restoring “the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Various sections of the Clean Water Act seek to reach this goal by different yet complementary approaches. One such approach is a system of uniform effluent limitations imposed on discharges of pollutants from discrete points, such as factory outlets or wastewater treatment plants. Under this system, no entity is allowed to discharge any pollutant into a water body from any point source except in compliance with certain requirements, including the requirement to obtain a permit, commonly known as a NPDES Permit. 33 U.S.C. § 1311(a). These permits serve the congressional goal of restoring the integrity of the nation’s waters by offering a means to limit the number of point source dischargers and by including conditions, such as numeric effluent imitations, placing restrictions on the permit holders’ activities.

Congress knew, however, that uniform NPDES permit restrictions alone would not achieve the goals of the Clean Water Act. Thus, Congress provided other mechanisms to control water pollution, such as imposition of extraordinary, site-specific discharge limitations which exceed standard restrictions, see e.g., 33 U.S.C. § 1312, and control of non-point source pollution to a water body, such as

runoff of agricultural chemicals, see e.g., 33 U.S.C. § 1383 (providing for federal assistance to state-run non-point source management programs).

But extraordinary permit restrictions cannot be knowledgeably imposed, and programs for addressing non-point source pollution cannot be developed, unless the agencies imposing such restrictions and developing such programs have first identified the waters where such restrictions and programs are necessary, and have identified the nature and extent of the response required. That is the very purpose of the provisions of Section 303 of the Clean Water Act.

A. Section 303 Requirements

Section 303(a) of the Clean Water Act requires each state to establish minimum water quality standards for all surface waters within its boundaries. 33 U.S.C. § 1313(a). Such water quality standards must serve to protect the public health or welfare, enhance water quality, and serve the purposes of water pollution prevention and control. 33 U.S.C. § 1313(c)(2)(A). This step was to have been taken no later than 180 days after October 18, 1972. 33 U.S.C. § 1313(a)(3)(A).

Once these water quality standards are established, each state is then required to identify the waters within its boundaries that standard point source pollution controls will not bring within the water quality standards:

Each State shall identify those waters within its boundaries for which the effluent limitations required by [other sections] of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

33 U.S.C. § 1313(d)(1)(A). Such waters are commonly referred to as water quality limited segments (“WQLSs”).

Once a state has identified and prioritized WQLSs it must then establish total maximum daily loads (“TMDLs”) for such waters:

Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

33 U.S.C. § 1313(d)(1)(C). Thus, a TMDL is the maximum daily amount of discharge of a pollutant at which the applicable water quality standard will be achieved, allowing for a margin of safety. *Id.* As a part of establishing TMDLs, and with regard to each separate WQLS, every state, including the State of Minnesota, must designate both wasteload allocations for point sources of pollution such as wastewater treatment plants, and load allocations for non-point sources of pollution such as agricultural and urban runoff.⁴

⁴ A wasteload allocation is the portion of a receiving water’s loading capacity that is attributed to one of its existing or future point sources of pollution. 40 C.F.R. § 130.2(h). A load allocation is the portion of the water’s receiving capacity that is attributed to an existing or future nonpoint source or to natural background sources. 40 C.F.R. § 130.2(g). The loading capacity for any water is the greatest amount of matter or thermal energy that a water body can receive without violating water quality standards. 40 C.F.R. §§ 130.2(e) and (f). Wasteload allocation plus load allocation, plus a margin of safety, combine to comprise a TMDL.

B. MPCA's Failures to Comply with Section 303

Like every other State, the State of Minnesota was to have submitted its first Section 303(d) list to the Administrator by June 26, 1979. The Minnesota Pollution Control Agency ("MPCA") not only failed to meet that deadline, but also failed to submit any document even purporting to qualify as a Section 303(d) List until 13 years later. Indeed, it was not until 1992 that the MPCA finally made a submission purporting to constitute its Section 303(d) List of prioritized water quality limited segments. See *Sierra Club v. Browner*, 843 F.Supp. 1304 (D.Minn. 1993).

The MPCA's effort was not only tardy by 13 years, but it was also woefully inadequate. The MPCA has only assessed a small fraction of Minnesota's waters. Today, more than 25 years after the passage of the Clean Water Act, only 14% of Minnesota's lakes and only 8% of Minnesota's streams have even been assessed. Of those that have been assessed, 40% are polluted with contaminants such as mercury, fertilizers, algae (due to phosphorous), and human and animal waste. See Minnesota Pollution Control Agency website at www.pca.state.mn.us/water/tmdl.

II. 40 C.F.R. § 122.4(i)

As mentioned earlier, the Clean Water Act requires states to identify water bodies within their boundaries that do not meet water quality standards and to establish a priority for ranking those polluted water bodies based on the severity of the pollution and the type of use of the waterway. 33 U.S.C. § 1313(d)(1)(A).

The Clean Water Act also requires each state to identify the maximum amount of each type of pollutant that a water body can handle—the TMDL of that pollutant—and still meet water quality standards. 33 U.S.C. § 1313(d)(1)(C).

The corresponding Clean Water Act regulation at issue here, 40 C.F.R. § 122.4(i) provides, in pertinent part, as follows:

No permit may be issued: . . . [t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards even after the application of the effluent limitations required by [Section 301(b)] of [the] CWA and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that

- (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
- (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

As appropriately argued by MCEA, 40 C.F.R. § 122.4(i) (“§ 122.4(i)” or “the Rule”) prohibits the issuance of a permit for the wastewater treatment facility in question for two reasons. First, a permit should not be granted until the MPCA completes a TMDL for Lake Pepin and the proposed permittee demonstrates that its proposed discharge is in compliance with the TMDL. Second, a permit should not be granted because the proposed permittee has failed to demonstrate that its proposed discharge will not contribute to or cause the violation of water quality

standards. See *In the Matter of the Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Waste Water*, 702 N.W.2d 768 (Minn.App. 2005); *Friends of the Wild Swan v. United States Environmental Protection Agency*, 74 Fed.Appx. 718 (9th Cir. 2003), and consolidated cases decided on appeal therein, *Friends of the Wild Swan v. United States Environmental Protection Agency*, 130 F.Supp.2d 1184 (D.Mt. 2000), *Friends of the Wild Swan v. United States Environmental Protection Agency*, 130 F.Supp.2d 1199 (D.Mt. 2000), and *Friends of the Wild Swan v. United States Environmental Protection Agency*, 130 F.Supp.2d 1204 (D.Mt. 2000).

A. **MPCA's Failure to Complete a TMDL Precludes the Issuance of this Permit**

On its face, the plain language of § 122.4(i) precludes the issuance of this permit prior to the completion of a TMDL for the applicable water bodies. See e.g., *Friends of the Wild Swan*, 74 Fed.Appx. 718, and consolidated cases decided on appeal therein, 130 F.Supp.2d 1184, 130 F.Supp.2d 1199, and 130 F.Supp.2d 1204; *San Francisco Baykeeper, Inc. v. Browner*, 147 F.Supp.2d 291 (N.D.Cal. 2001); and *City of Waco, Texas v. Texas Commission on Environmental Quality*, Cause No. GN1-00654, (Dist.Ct., Travis County, TX, 1984).

Even if the language of § 122.4(i) is considered to be ambiguous, however, the same result is mandated. When considering an ambiguous regulation, the primary consideration is “the intent of the promulgating agency, which controls unless such intent is plainly inconsistent with the language of the regulation.”

Annandale and Maple Lake, 702 N.W.2d at 772 (citing *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 911 (1997)).

The EPA's most recently published statements on § 122.4(i) indicate that a new source or discharge that will contribute to a violation of water quality standards may not be issued a permit until a TMDL wasteload (point source) allocation is completed that allows for the new source or discharge, and where the other existing dischargers are subject to schedules of compliance. The EPA has published a guidance document for NPDES stormwater permits entitled "National Pollutant Discharge Elimination System (NPDES) Storm Water Program Questions and Answers – Volume III" ("Guidance"). The Guidance is dated January 21, 2004, and as having been amended on December 17, 2004. See http://www.epa.gov/npdes/pubs/sw_quanda_intro.pdf. The Guidance is largely set forth in a question-and-answer format. Section E of the Guidance, at pages 9-12, covers the topics of "Impaired Waters and Total Maximum Daily Loads (TMDLs)". Some of the questions and answers in Section E indicate that the EPA's position is that under § 122.4(i) a TMDL must be done before a permit is issued.

The question and answer at E5 are as follows:

E5. How can a prospective permittee find out if a water body is impaired or has an approved Total Maximum Daily Load (TMDL)?

This information must be obtained from your State TMDL authority. In states that are permitting authority, generally the same State environmental agency also develops State 303(d) lists and TMDLs.

Many of these States have websites with lists of impaired water bodies and TMDLs, or with information on who to contact. Your permitting authority can also provide this contact information. For States where EPA is the permitting authority, EPA has developed a website with contact information for the State TMDL authority, <http://cfpub.epa.gov/npdes/stormwater/tmdl.cfm>.

Once you have determined that your receiving water is impaired and/or has an approved TMDL, you may still need clarification from the TMDL authority on how that status affects your discharge, i.e. whether there are additional requirements you must meet. If so, these additional requirements (e.g. wasteload allocation, monitoring) must be incorporated into your Storm Water Pollution Prevention Plan (“SWPPP”) or your Storm Water Management Plan (“SWMP”), and implemented accordingly.

(Emboldened typeset in original.) The very language of the question at E5 indicates that the EPA’s position is that a TMDL must be performed before a permit is issued. It indicates that a “prospective permittee” would need to find out if a water body has an approved TMDL before a permit may be issued. Also, the second paragraph of the answer to question E5 indicates that once a “prospective permittee” has determined that the water body has an approved TMDL, it may still need clarification regarding possible “additional” requirements. Thus, the first requirement is a TMDL, and there may even be “additional” requirements after that.

Even more illustrative of the fact that § 122.4(i) dictates that a permit may not be issued without a TMDL having been done first are the question and answer set forth in the Guidance at E8:

E8. If a new discharger wants to discharge to an impaired water for which a Total Maximum Daily Load (TMDL) has not yet been developed, can the discharge be covered by a general permit?

However, if the discharge does contain the pollutant for which the water body is impaired, 40 CFR 122.4(i) expressly prohibits the issuance of a permit to a new source or a new discharger, if its discharge will cause or contribute to the violation of water quality standards, unless the operator of the proposed discharge can demonstrate that there are sufficient pollutant load allocations to allow for the discharge, and that other discharges to the water body are under compliance schedules to bring the water body into compliance with water quality standards.

Permitting authorities have developed different policies for dealing with the situation when these conditions are not attainable. Please check with your permitting authority for additional guidance on this issue.

(Emboldened typeset in original; underlined emphasis added.) This language makes it absolutely clear that the EPA's position on the matter is exactly the same as that put forward by MCEA, TU and MLA. Here, the EPA, in interpreting its own Rule, uses the word "unless" to indicate that a permit may not be issued unless a TMDL has first been done.

Additionally, certain of the EPA's statements regarding § 122.4(i) in the Federal Register further make it clear that a TMDL must be done before a permit may be issued. On October 30, 2000 the EPA published its "Final Reissuance of National Pollutant Discharge Elimination System (NPDES) Storm Water Multi-Sector General Permit for Industrial Activities" (the "Reissuance"). See 65 Fed.Reg. 64746, *et. seq.* The Reissuance provides, in pertinent part, as follows:

NPDES regulations at 40 CFR 122.4(i) prohibit discharges unless it can be shown that

- (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
- (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segments into compliance with applicable water quality standards.

65 Fed.Reg. 64756 (emphasis added). As does the Guidance, the language of the Reissuance also makes it absolutely clear that the intent of the EPA in promulgating § 122.4(i) was that a permit for a new discharge would not be issued unless a TMDL has first been done.

While the applicable caselaw is sparse, a number of courts that have examined § 122.4(i) have interpreted it in the same manner as that proposed by MCEA. In *San Francisco Baykeeper, Inc. v. Browner*, 147 F.Supp.2d 291 (N.D.Cal. 2001) the Court noted that under the Rule there can be no new source or new discharger unless the state has first completed a TMDL for the water body at issue. *Id.*, 147 F.Supp.2d at 295. While the word “unless” does not appear in the language of the Rule, the *San Francisco Baykeeper* court still uses the word (as does the EPA itself, as noted above), indicating its recognition that the requirement that the state perform a TMDL is an integral part of the Rule. Also, in *Friends of the Wild Swan v. United States Environmental Protection Agency*, 74 Fed.Appx. 718 (9th Cir. 2003), the Ninth Circuit Court of Appeals upheld the district court’s stay of NPDES permits for new sources or discharges to impaired waters until

TMDLs were first completed. *Id.*, 74 Fed.Appx. at 723-724. By doing so, the Ninth Circuit upheld the district court's ruling that every new discharge permit should have been preceded by a TMDL. *Id.* But see *Crutchfield v. State Water Control Bd.*, 45 Va.App. 546, 612 S.E.2d 249 (2005). Finally, in *City of Waco, Texas v. Texas Commission on Environmental Quality*, Cause No. GN1-00654, (Dist.Ct., Travis County, TX, 1984) the court ordered that the state of Texas could not issue NPDES permits to new dischargers of pollutants to impaired waters unless the state first performed the required TMDL pollutant load allocations, so that it could be determined whether there was sufficient room in the pollutant allocations for the new discharges. Each of these rulings requiring a TMDL to be done before issuance of a permit is directly in line with the purposes of the Clean Water Act and § 122.4(i) to clean up the nation's waters.

B. The Undisputed Fact that the Discharge from this Proposed Plant Will Cause or Contribute to a Violation of Water Quality Standards Precludes the Issuance of this Permit

As noted above, § 122.4(i) provides in pertinent part that “[n]o permit may be issued . . . [t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.” Even by MPCA's own admission, the annual phosphorus discharge from this proposed plant is substantially greater than the existing facilities and will “cause or contribute” to excessive nutrient impairment of Lake Pepin. As such, it is undisputed that this discharge would “cause or contribute” to a violation of water quality standards.

In a tortured and illogical construction of § 122.4(i), MPCA, not even knowing the total phosphorus loading in the watershed due to its failure to complete a TMDL, argued to the Court of Appeals that the issuance of a permit was proper because the admitted increase in the phosphorus discharged from the proposed plant was offset by reductions in the phosphorus discharged into the watershed by another new plant. As pointed out by the Court of Appeals, however, not only is this argument contrary to a plain reading of the Rule's phrase "cause or contribute to the violation of water quality standards," but it is also inconsistent with the regulatory structure and goals of the Clean Water Act. See Annandale and Maple Lake, 702 N.W.2d at 774-775. The Clean Water Act contemplated setting realistic, achievable goals regarding the reduction of pollutants into impaired water bodies, as well as fully understanding how each new incremental discharge will impact those goals. If new discharges are assessed and permitted without fully understanding and regulating the watershed-wide impacts on the impaired water body, the goals of the Clean Water Act will never be achieved, and Minnesota's polluted lakes and streams will remain polluted. Furthermore, the regulatory system will never be able to fairly, proactively, and appropriately allocate the discharge of pollutants among competing dischargers within a watershed.

If the Court were to embrace the argument put forth by the MPCA, the NPDES permitting system would not be principally managed toward the achievement of watershed-wide goals and the reduction of specified pollutants to

acceptable levels in impaired water bodies. As noted by the Court of Appeals, the concept of “offsets” was specifically rejected by the EPA when it considered revisions to § 122.4(i). See Annandale and Maple Lake, 702 N.W.2d at 775. Rather, NPDES permitting would become more ad hoc and arbitrary, rewarding those who propose their discharges after the construction of “clean” plants, without due consideration of other more important values. Each new proposed permittee whose discharge, as here, would further aggravate an impaired water body, would seek to benefit from and justify its pollution by pointing to the remedial effort and investment of other more environmentally responsible dischargers. This would certainly cause those “clean” plants to question why they alone invested in cleaner technology, would create a chilling effect on investment in such technology, and would cause further impairment of Minnesota’s waters. Thus, the MPCA’s focus on “offsets” is anathema to the purposes and regulatory scheme of the Clean Water Act, and overlooks the forest for the trees.

III. Prohibiting the Issuance of this Permit Will Enhance Efforts to Remediate Phosphorus Loading in Lake Pepin and Promote Comprehensive, Coordinated, and Area-wide Management of NPDES Discharges

In acknowledgment that this proposed wastewater treatment plant would cause or contribute to the violation of water quality standards applicable to Lake Pepin, Appellants and their amici offer the age-worn arguments against environmental regulation. Specifically, they argue that vigorous environmental regulation will restrain growth, circumscribe flexibility, and deter replacement of

aging wastewater treatment plants. See, e.g., Brief of Appellants City of Annandale and City of Maple Lake and Brief of Amicus Curiae Metropolitan Council. In light of their record, the arguments of the Metropolitan Council and MPCA are particularly ironic.⁵

⁵ Between 1982 and 1997 the population of the Twin Cities grew by 25.1% but the amount of land subject to urbanization grew by 61.1%. See William Fulton, et al., "Who Sprawls Most? How Growth Patterns Differ Across the U.S." Brookings Institution, Center on Urban & Metropolitan Policy, July 2001, p. 10, available at <http://www.brook.edu/es/urban/publications/fulton.pdf>. A particular example which highlights poor planning and sprawl is the fact that the daily vehicle miles traveled per person in the Twin Cities is higher than many metropolitan areas more commonly identified with sprawl such as Los Angeles or Atlanta. See U.S. Department of Transportation, Federal Highway Administration, "Highway Statistics 2003," Table HM-72, available at <http://www.fhwa.dot.gov/policy/ohim/hs03/htm/hm72.htm>. The MPCA has estimated that the Twin Cities may well go into non-attainment with national air quality standards in as little as five years due to the escalating amount of driving required by the region's sprawling settlement patterns. See "Air Quality in Minnesota: Problems and Solutions," Appendix I, Mobile Sources Emissions and Trends, January 2001, available at <http://www.pca.state.mn.us/hot/legislature/reports/2001/aq-report.pdf>. The Minnesota Chamber of Commerce has estimated that a non-attainment designation for air pollution could cost Minnesota citizens and businesses from \$189 million to \$266 million each year. See <http://www.mn-ei.org/air/index.html#MinnesotaNeedsYourHelp>. The additional cost to public health in the region for non-attainment has not been quantified, but the median annual cost to the region's public health for air pollution has been estimated at \$725 million. See David Anderson and Gerard McCullough, The Full Cost of Transportation in the Twin Cities Region, Center for Transportational Studies, University of Minnesota, August 2000, p. 133, available at <http://www.cts.umn.edu/trg/publications/pdfreport/TRGrpt5.pdf>.

With respect to water pollution, the costs have not been quantified but the negative impact on Minnesota tourism is undeniable. The Minnesota tourism industry generates \$9 billion annually for the state economy, is expected to grow in the coming years, and provides over 130,000 jobs. See Minnesota Department of Employment and Economic Development website at <http://www.departmentresults.state.mn.us/deed/DeptDetail.htm>.

While the Metropolitan Council touts its regional planning and growth management responsibilities in support of its arguments, a review of its record belies its assertions. Of the nation's 25 largest metropolitan areas, the Twin Cities has been the most sprawling in the past 20 years, with the exception of only Atlanta.⁶ Our region is beginning to experience worsening traffic congestion, deteriorating air and water quality, falling affordability of housing for low and moderate income households, and the loss of farms, forest and wetlands.⁷ This is largely due to a failure in regional planning and management.

Contrary to the assertion of Appellants, this experience highlights the wisdom of the regulatory scheme contemplated by the Clean Water Act and the need for a NPDES permit system which comprehensively and rigorously regulates pollutant discharges into impaired water bodies. The MPCA had over 25 years to develop WQLSs and TMDLs. But during that time, MPCA has assessed only 14% of Minnesota's lakes and only 8% of its streams. Even when measured by the most conservative yardstick, that has to be considered an abject failure.

The plain language of § 122.4(i) mandates that a proposed discharger demonstrate that its discharge will not "cause or contribute to the violation of water quality standards." While such a demonstration cannot and has not been made on the record applicable to the currently proposed plant, the fact of the matter is that Appellants could obtain a permit if MPCA simply completes a

⁶ See Fulton, et al., note 7 *supra*, at p. 5.

⁷ See generally Fulton, et al., note 7 *supra*.

TMDL and the proposed permit is in compliance with that TMDL, or the proposed facility utilizes available technology to reduce phosphorus discharges.

Such a requirement embodied in current law in no way deters growth. It simply mandates that new facilities do not further pollute an already impaired, highly valued water body. Similarly, this requirement does not limit flexibility. MPCA, the Cities, and the Metropolitan Council are free and unfettered in their ability to achieve this environmental standard. The only inflexible part of the regulation is the adherence to the principle that valued waters will not be further polluted without due consideration to the impact on Lake Pepin, especially in light of all other discharges in the watershed. Finally, it is not a net loss to the environment to adhere to the plain language of the Clean Water Act and continue treatment of wastewater by the existing facilities, as the current discharge of phosphorus into Lake Pepin is still less than that proposed with the new facility.

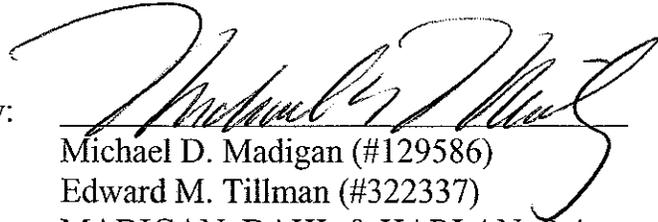
CONCLUSION

Appellants and their amici would have the Court ignore the plain language of the Clean Water Act and the regulations promulgated thereunder, as well as the EPA's interpretation of its own Rule (which specifically rejected a system of "offsets"), and would permit the further phosphorus related degradation of Lake Pepin. TU and MLA urge the Court to see through the arguments of Appellants and their amici, to preserve the integrity of the regulatory structure of the Clean Water Act, to protect Lake Pepin as one of Minnesota's preeminent natural resources, and thus to affirm the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED,

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By:



Michael D. Madigan (#129586)
Edward M. Tillman (#322337)
MADIGAN, DAHL & HARLAN, P.A.
701 Fourth Avenue South, Suite 1700
Minneapolis, MN 55415
Tel: (612) 604-2000
Fax: (612) 604-2599

*Attorneys for Amici Curiae Trout
Unlimited and Minnesota Lakes
Association*