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STATE OF MINNESOTA
IN SUPREME COURT

In the Matter of the Alexandria Lake Area Sanitary District NPDES/SDS Permit No. MN0040738, Reissuance for the Expanded Discharge of Treated Wastewater, Douglas County, Alexandria, Minnesota

APPELLANT MINNESOTA POLLUTION CONTROL AGENCY'S BRIEF, APPENDIX AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

I. Is 40 C.F.R. § 122.44(d)(1), which requires MPCA to set more stringent effluent limits for an existing discharge to surface waters when MPCA determines that it causes or contributes to violation of water quality standards, ambiguous and subject to MPCA interpretation?

The Minnesota Court of Appeals held that the regulation is not ambiguous.

The court of appeals' holding that 40 C.F.R. § 122.44(d)(1) is not ambiguous is directly contrary to this Court's decision in *In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater,* 731 N.W.2d 502 (Minn. 2007) ("*Annandale/Maple Lake*"). In *Annandale/Maple Lake*, this Court held that 40 C.F.R. § 122.4(i), a parallel regulation to 40 C.F.R. § 122.44(d)(1) under the federal Clean Water Act, was ambiguous and subject to interpretation by MPCA. The holding below is also contrary to the express language of Section 122.44(d)(1), its regulatory history, and applicable case law.

II. Does MPCA's application of 40 C.F.R. § 122.44(d)(1) require MPCA to use its special knowledge and expertise?

The Minnesota Court of Appeals did not address this question when reviewing MPCA's interpretation and application of the regulation.

In *Annandale/Maple Lake,* this Court held that when reviewing the reasonableness of an agency's interpretation of an ambiguous regulation the reviewing court should consider whether the regulation requires the agency to use its special knowledge and expertise.

III. Do the effluent limits set by the MPCA for the ALASD facility constitute a reasonable interpretation and application of 40 C.F.R. § 122.44(d)(1) which is entitled to deference?

The Minnesota Court of Appeals held that the effluent limits set by MPCA conflict with the regulation and gave no deference to MPCA's interpretation.

The court of appeals failed to follow this Court's precedent in *Annandale/Maple Lake* to determine whether MPCA's application of 40 C.F.R. § 122.44(d)(1) was reasonable.

STATEMENT OF THE CASE

This case involves review of the phosphorus effluent limits set by the Minnesota Pollution Control Agency ("MPCA") in a water quality permit for an existing and expanding wastewater treatment facility operated by the Alexandria Lake Area Sanitary District ("ALASD"). The effluent limits set by MPCA were based on the agency's interpretation of 40 C.F.R. § 122.44(d)(1), a regulation adopted by the United States Environmental Protection Agency ("EPA") and administered in Minnesota by the MPCA under the federal Clean Water Act, 33 U.S.C. § 1251 *et. seq.* ("CWA"). On writ of certiorari, the Court of appeals reversed MPCA's decision and remanded the permit to the MPCA.[1] The court of appeals held that the regulation was not ambiguous and that the phosphorus effluent limits which MPCA set in the permit did not comply with 40 C.F.R. § 122.44(d)(1). The court gave no deference to MPCA's interpretation of the regulation.

The *ALASD* case was argued and decided shortly after this Court's decision in *Annandale/Maple Lake,* 731 N.W.2d 502 (Minn. 2007).[2] In *Annandale/Maple Lake,* this Court held that 40 C.F.R. § 122.4(i), a companion regulation to the regulation at issue in

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[1] The unpublished opinion of the court of appeals is reproduced in Appellant MPCA's Addendum, *In the Matter of the Alexandria Lake Area Sanitary District NPDES/SDS Permit No. MN0040738, Reissuance for the Expanded Discharge of Treated Wastewater, Douglas County, Alexandria, Minnesota* (Minn. App. Ct. File No. A06-1371, filed August 28, 2007). References to the Addendum are denoted by "PCA Add." followed by the page number from the slip opinion.

[2] *Annandale/Maple Lake* was decided on May 17, 2007, less than three weeks before oral argument of the *ALASD* case in the court of appeals. MPCA filed a motion on May 22, 2007 requesting leave to file a supplemental brief to explain the implications of the *Annandale/Maple Lake* decision on the *ALASD* case. The court of appeals denied the motion.

this case, was ambiguous and that MPCA's interpretation of it was reasonable and entitled to deference. Despite the many obvious parallels between the regulations at issue, and the technical and policy considerations faced by the MPCA in implementing the regulations in the two cases, the court of appeals in the *ALASD* case failed to apply the analytical framework established by this Court in *Annandale/Maple Lake.* The court of appeals also failed to recognize how the express language of 40 C.F.R. § 122.44(d)(1), the EPA regulatory history and applicable case law support MPCA's interpretation in this case.

Because the court of appeals' decision in *ALASD* is directly opposite to the outcome reached by this Court in *Annandale/Maple Lake*, it has created a conflict in MPCA's administration of two parallel federal water quality regulations. This undermines MPCA's ability to carry out its permitting and effluent-setting responsibilities under the CWA in a fair, consistent and effective manner. Indeed, the impact of the *ALASD* decision is more far-reaching than in *Annandale/Maple Lake* because the regulation at issue in *ALASD* applies to all existing wastewater treatment facilities that cause or contribute, or potentially cause or contribute, to existing violations of water quality standards. The regulation at issue in *Annandale/Maple Lake* applied only to new facilities.

The court of appeals' decision in *ALASD* simply cannot be squared with this Court's decision in *Annandale/Maple Lake.* When MPCA's interpretation of 40 C.F.R. § 122.44(d)(1) in *ALASD* is evaluated under *Annandale/Maple Lake,* the conclusion is inescapable that the regulation is ambiguous, that MPCA's technical expertise and policy

judgment are necessary to interpret the regulation, and that MPCA's interpretation of the regulation was a reasonable exercise of that technical expertise and judgment. MPCA's reasonable interpretation of the regulation is therefore entitled to deference. MPCA respectfully asks this Court to reverse the court of appeals and resolve the conflict created by the *ALASD* decision. Review by this Court is *de novo*. 731 N.W.2d at 515.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

ALASD operates a wastewater treatment facility which serves the City of Alexandria and a number of surrounding townships, including many lakeshore properties. R. 1489 (Map).[3] The facility began operating in 1977. R. 8306. Since 1978 the facility has been subject to a strict phosphorus effluent limit of 1 milligram per liter (mg/L) under the state phosphorus rule, Minn. R. 7050.0211, subp. 1a. PCA App. 19.[4] Since 1988 the facility has also been subject to a mass effluent limit for phosphorus of 11.3 kilograms per day (kg/day). *Id.* This mass limit was retained in subsequent permits even though the facility's maximum design flow was increased to 3.75 million gallons per day (mgd). *Id.* By freezing the mass limit while allowing a larger design flow from the facility, MPCA effectively required ALASD to meet a phosphorus concentration limit of 0.8 mg/L. PCA App. 62.

The facility discharges to Lake Winona, a small, shallow lake located at the head of a chain of lakes which also includes Lakes Agnes and Henry. PCA App. 57. Lake

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[3] All references to the Administrative Record of the ALASD permit reissuance proceeding are denoted by "R." followed by the page number in the record.
[4] References to Appellant MPCA's Appendix are denoted by "PCA App. __."

Winona has a small watershed with only two identified point sources of phosphorus, the ALASD facility and the City of Alexandria stormwater collection system. *Id.* MPCA estimates that the discharge from the ALASD facility accounts for approximately 70 to 80 percent of the external load of phosphorus entering Lake Winona each year. *Id.* In 2002, MPCA identified Lake Winona as impaired due to violation of the agency's narrative standard for nutrients (excess algae), which is related to phosphorus levels in the lake. R. 7501. MPCA commenced work in early 2006 to establish a Total Maximum Daily Load ("TMDL") that will determine the allowable discharge of phosphorus from all point and non-point sources in the Lake Winona watershed needed to achieve the narrative water quality standard in Lake Winona. R. 7930-32. MPCA is scheduled to complete the Lake Winona TMDL in 2009. R. 7932.

ALASD has consistently achieved lower effluent levels for phosphorus than its permit required. PCA App. 64. From 1993 to 2006, average annual phosphorus concentrations from the ALASD facility were generally below 0.5 mg/L. PCA App. 116. ALASD's exemplary performance in controlling its phosphorus discharge has led to dramatic improvement of water quality in the Winona-Agnes-Henry chain of lakes. R. 98-110. Phosphorus levels in Lake Agnes are less than half the concentration observed in the 1980s and early 1990s. PCA App. 69; R. 98. A public swimming beach on Lake Agnes was reopened earlier this decade, and active recreational fishing has returned to both lakes. R. 2104-2105, 8289. However, conditions in Lake Winona continue to exceed MPCA's narrative water quality standard for excess algae.

In 2004, ALASD commissioned a feasibility study to identify improvements to its treatment facility to meet the needs of a growing population. R. 2154-2498. The feasibility study recommended capital improvements to expand the facility from a maximum design flow of 3.75 to 4.7 mgd. R. 2175. The capital improvements included a new filtration system that will more effectively remove phosphorus and treated solids. R. 2175.

With its permit scheduled to expire in 2006, ALASD applied to MPCA for a reissued permit in 2005. R. 189-239. MPCA issued a draft permit ("proposed permit") for public comment on January 17, 2006. R. 667-747. The proposed permit retained the frozen mass limit for phosphorus of 11.3 kg/day and an effective phosphorus concentration limit of 0.8 mg/L. R. 685-686. Substantial public comment was received on the permit, including from Minnesota Center for Environmental Advocacy ("MCEA"). R. 1513-1514 (list of comment letters received), R. 1123-1167 (MCEA comments). MCEA objected to the phosphorus effluent limits in the proposed permit on the grounds that they did not comply with 40 C.F.R. § 122.44(d)(1), that MPCA should have required ALASD to remove phosphorus from its effluent to the "fullest practicable extent" under the state phosphorus rule, and that MPCA should not reissue the permit until the Lake Winona TMDL was completed. R. 1124-1167. After reviewing the public comments, MPCA proposed a revised permit with substantially more stringent phosphorus concentration limits. R. 1821-1853. The provisions of the revised permit ultimately became the final permit issued by the MPCA. PCA App. 24-56.

Although the final permit included the "frozen" 11.3 kg/day mass limit and effective 0.8 mg/L concentration limit for phosphorus, which applied to the existing facility prior to construction of facility improvements, it also required ALASD to meet a new "intervention limit" of 0.47 mg/L during this time period. PCA App. 18, 21 and 34. An intervention limit is an enforceable limit which requires ALASD to report any exceedance to MPCA and to propose and implement measures to achieve the standard. PCA App. 41. The final permit also imposed a 0.3 mg/L limit effective when construction of the improved facility is complete and full operation attained. PCA App. 21 and 36. In addition, MPCA incorporated these "interim limits" and a TMDL-based effluent limit in a schedule of compliance in the final permit. PCA App. 22 and 40. The schedule of compliance required ALASD to meet the TMDL-based limit upon completion of the Lake Winona TMDL. *Id.*

MPCA based the effluent limits and schedule of compliance in the final permit upon several scientific and policy judgments, including: (1) a determination of the "fullest practicable extent" of phosphorus removal for the ALASD facility under the MPCA's phosphorus rule (PCA App. 20 (Finding 17)); (2) application of the MPCA's pre-TMDL permitting policy to assure that the effluent limits prevented further degradation of Lake Winona while the Lake Winona TMDL is completed (PCA App. 22 (Finding 20)) and; (3) modeling the effect of the effluent limits on algae conditions in Lakes Winona and Agnes. PCA App. 19-22 (Findings 16 and 19). MPCA concluded that the effluent limits in the final permit complied with 40 C.F.R. § 122.44(d)(1). PCA App. 22 and 23 (Findings 20, 22, 24 and 31).

MPCA staff forwarded copies of the original and final drafts of the permit to EPA Region 5 for its review. R. 1879, 2125-2126. On June 26, 2006, EPA Region 5 responded to MPCA, stating that EPA had no objections to the phosphorus effluent limits in the final permit as they pertain to 40 C.F.R. § 122.44(d)(1). PCA App. 75.

On June 27, 2006, the MPCA Board authorized reissuance of the ALASD permit. R. 2150-2151. The Commissioner reissued the permit on June 28, 2006. PCA App. 24-56. R. 1918-1981. MCEA appealed the reissued permit to the court of appeals. In an unpublished opinion, the court of appeals reversed and remanded the ALASD permit to the MPCA, holding that 40 C.F.R. § 122.44(d)(1) is unambiguous and that the phosphorus effluent limits in the permit did not comply with its reading of the regulation. PCA Add. 16. This Court granted review on November 21, 2007. On November 26 and December 17, 2007, the Court granted the requests of the L'Homme Dieu Lake Association and the League of Minnesota Cities, respectively, to file amicus briefs in this case. The Lake Association supports Appellee and the League of Cities supports Appellants.

ARGUMENT

I. THIS COURT'S HOLDING IN *ANNANDALE/MAPLE LAKE* APPLIES TO MPCA'S INTERPRETATION OF 40 C.F.R. § 122.44(d)(1).

In *Annandale/Maple Lake*, this Court thoroughly laid out the analytical framework for determining when a reviewing court should defer to an administrative agency when it interprets and applies its own regulation. *Annandale/Maple Lake* involved review of MPCA's interpretation of a regulation under the CWA that is parallel to the regulation at

issue in this case. The Court began in *Annandale/Maple Lake* by reiterating its longstanding policy in favor of deference announced in *Reserve Mining Co. v. Herbst,* 256 N.W.2d 808 (Minn. 1977). In *Reserve Mining,* this Court said that "decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience." *Id.* at 824. This policy is the starting point for the Court's review of MPCA's decision in the *ALASD* case.

Based on review of its past precedents on the subject of judicial deference, the Court in *Annandale/Maple Lake* identified three factors that a reviewing court should consider when determining when deference is due to an agency that is interpreting its own rule. Those factors are: whether the language of the rule is ambiguous and in need of interpretation; whether the exercise of the agency's expert technical or policy judgment is required to interpret the regulation; and whether the interpretation made by the agency is reasonable. 731 N.W.2d at 516. *Annandale/Maple Lake* holds that when all of these factors are satisfied the reviewing court should defer to the reasoned interpretation of the implementing agency and should not substitute its judgment for the agency's interpretation. *Id.*

The factors that this Court applied in *Annandale/Maple Lake* apply equally or with greater force to MPCA's interpretation of 40 C.F.R. § 122.44(d)(1) in this case, and the application of those factors requires the same conclusions that this Court reached in

Annandale/Maple Lake.[5] That is, MPCA's interpretation and application of 40 C.F.R. § 122.44(d)(1) is reasonable and entitled to deference.

II. 40 C.F.R. § 122.44(d)(1) IS AMBIGUOUS UNDER THE FACTORS APPLIED BY THIS COURT IN *ANNANDALE/MAPLE LAKE.*

The first factor that this Court must consider in this case is whether 40 C.F.R. § 122.44(d)(1) is ambiguous. Under *Annandale/Maple Lake,* the Court's analysis focuses on the language of the regulation as viewed in its overall legal context.[6]

A. The Legal Context Of 40 C.F.R. § 122.44(d)(1) Is The Same As In *Annandale/Maple Lake* And Requires The Same Conclusion: That 40 C.F.R. § 122.44(d)(1) Is Ambiguous.

In *Annandale/Maple Lake,* this Court gave heavy emphasis to the legal and regulatory context of the regulation at issue, stating that "our determination of whether words or phrases are ambiguous does not depend on a reading of those words or phrases in isolation, but relies on the meaning assigned to the words or phrases in accordance with the apparent purpose of the regulation as a whole." 731 N.W.2d at 518. Indeed, the Court stated that even otherwise "plain" language may be rendered ambiguous by its context, noting that "both the Supreme Court and our court have said that 'the meaning of statutory language, plain or not, depends on context.'" 731 N.W.2d at 518 (citation

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[5] It is not necessary for this Court to address the question of whether 40 C.F.R. § 122.44(d)(1) must be treated as MPCA's "own" regulation for purposes of deference analysis. After stating that "it is undisputed that MPCA is legally required to enforce and administer 40 C.F.R. § 122.44(d)(1)," the court of appeals in ALASD concluded that "we treat 40 C.F.R. § 122.44(d)(1) as MPCA's own regulation in determining whether to defer to MPCA's interpretation of the regulation." PCA Add. 6.

[6] The full text of 40 C.F.R. § 122.44, with subsection 122.44(d)(1) shown in bold print, and Paragraph (vi)(A) highlighted, is reproduced in PCA App. 1-13.

omitted). The Court also cited *State v. Donaldson,* 41 Minn. 74, 80, 42 N.W. 781, 782 (1889), for the proposition that "even when 'the words are plain,' ambiguity 'may be created by the context.'" *Id.* More specifically, when reviewing regulations adopted under the CWA, the Court concluded that it was appropriate to take a "whole Act" approach, that considers the policies and purposes underlying the regulations. *Id.*

The regulation at issue in this case is the companion to the regulation which this court concluded was ambiguous in *Annandale/Maple Lake.* Both regulations serve the same purpose in the context of the CWA, by requiring the permitting agency to use the permitting process to address the condition of downstream waters that are already in violation of water quality standards. The regulation at issue in *Annandale/Maple Lake* required MPCA to withhold issuance of a permit to a *new* discharger if the agency determined that it caused or contributed to violation of water quality standards in downstream waters. 40 C.F.R. § 122.4(i). The regulation in this case requires MPCA to set more stringent effluent limits for an *existing* discharger if the agency determines that the discharge causes or contributes, or would have the potential to cause or contribute, to violation of water quality standards in downstream waters. 40 C.F.R. § 122.44(d)(1)(i), PCA App. 3. In both cases, the MPCA had not yet completed a TMDL to provide a watershed-wide plan for restoring the impaired downstream waters (Lakes Pepin and Winona).[7] Thus, MPCA had to craft a regulatory response for a single facility that

[7] A TMDL allocates the permissible loading of phosphorus from all point and non-point sources in the watershed that will assure compliance with water quality standards. *See* Minn. Stat. § 114D.15, subd. 10. A TMDL allows MPCA to set an effluent limit for new
(Footnote Continued on Next Page)

appropriately considered the watershed-wide impact on already impaired waters without the benefit of a TMDL. Clearly, the legal context for MPCA's application of both 40 C.F.R. § 122.4(i) and 40 C.F.R. § 122.44(d)(1) is the same.

In *Annandale/Maple Lake,* this Court rejected the rigid "black and white terms" in which the court of appeals held the federal regulation to be unambiguous. 731 N.W.2d at 518. This Court reversed the court of appeals and held that the regulation provides "leeway for the MPCA to make a range of policy judgments based on the MPCA's scientific and technical knowledge." 731 N.W.2d at 524. The Court's conclusion that the regulation in *Annandale/Maple Lake* was ambiguous relied heavily on *Arkansas v. Oklahoma.* 503 U.S. 91, 112 S. Ct. 1046 (1992); discussed at 731 N.W.2d 519-521 and 524-525. In *Arkansas,* a federal appeals court "construed the Clean Water Act to prohibit any discharge of effluent that would reach waters already in violation of existing water quality standards." 503 U.S. at 107. The United States Supreme Court reversed and concluded that the CWA "vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution." 503 U.S. at 108.

Arkansas is equally applicable to this case. By holding that 40 C.F.R. § 122.44(d)(1) is not ambiguous, the court of appeals has prevented MPCA from developing a balanced approach to setting effluent limits to address a specific facility's

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or existing facility that reflects its specific contribution to the overall phosphorus load in the watershed.

discharge to impaired waters while relying on TMDLs as the appropriate long-range, area-wide approach to restoring those waters. Without flexibility to fashion appropriate facility effluent limits, and schedules for their implementation, existing wastewater facilities could be forced to cease operation and facility expansions that improve wastewater treatment will be precluded. This Court must consider the statewide consequences of enforcing such a short-sighted approach, not just the consequences in the *ALASD* case. Particularly in a large watershed such as the Lake Pepin watershed, where many point and non-point sources discharge to an impaired downstream water, the potential for drastic impacts on individual existing facilities is very substantial.

Because the legal context of 40 C.F.R. § 122.4(i) and 40 C.F.R. § 122.44(d)(1) under the CWA is essentially the same, and because the court of appeals' rigid interpretation of 40 C.F.R. § 122.44(d)(1) poses drastic consequences for existing wastewater treatment facilities similar to those which concerned this Court for new facilities in *Annandale/Maple Lake,* this Court must hold that 40 C.F.R. § 122.44(d)(1) is ambiguous and subject to a reasoned interpretation by the MPCA.[8]

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[8] Given this Court's holding in *Annandale/Maple Lake* that the language of 40 C.F.R. § 122.4(i) requiring MPCA to determine whether a new facility "causes or contributes" to the violation of water quality standards is ambiguous, there should be no question that the portions of 40 C.F.R. § 122.44(d)(1) which require MPCA to make a similar determination of "whether a discharge causes, has the reasonable potential to cause, or contributes to" a violation of a water quality standard, are also ambiguous. *See* 40 C.F.R. § 122.44(d)(1)(ii). Treating analogous language in the two regulations under the same standard of ambiguity is not just a matter of logical consistency. Any other result would effectively bar the MPCA from allowing an existing facility to use pollutant trading or offsets in the same way that a new facility could do in order to comply with 40 C.F.R. (Footnote Continued on Next Page)

B. The Language Of 40 C.F.R. § 122.44(d)(1), Its Regulatory History, And Other Legal Authority Further Demonstrate That The Regulation Is Ambiguous.

MPCA does not rely only on the parallels in language and legal context of the regulations in *Annandale/Maple Lake* and *ALASD* to show that 40 C.F.R. § 122.44(d)(1) is ambiguous. The language and regulatory history of 40 C.F.R. § 122.44(d)(1), and federal case law bearing on the regulation, also demonstrate that the regulation is ambiguous and requires agency interpretation.

40 C.F.R. § 122.44(d)(1) is a lengthy, complex and multi-step regulation that is difficult to parse without the understanding that comes from a regulatory agency's expertise and familiarity in implementing the CWA. PCA App. 1-13. The rule combines a number of technical determinations that the agency must make to decide whether a more stringent effluent limit must be set for a particular facility, and establishes specific requirements for how to set such a limit if required. The requirements are couched in general terminology rather than mathematical or formulaic terms, leaving the implementing agency to decide whether the requirements have been met. In this respect, the regulation is similar to the environmental review statute at issue in *Minn. Ctr. for Envtl. Advocacy v. Minnesota Pollution Control Agency* (*MCEA v. MPCA*), 644 N.W.2d 457 (Minn. 2002), which required MPCA to determine whether a project will result in "significant environmental effects." Just as in *MCEA v. MPCA,* the agency's "training

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§ 122.44(d)(1). Such a result would cause inequitable regulation of new and existing facilities by MPCA.

and expertise were necessary to interpret and *apply*" 40 C.F.R. § 122.44(d)(1). *See Annandale/Maple Lake,* 731 N.W.2d at 514 (emphasis in original). Even the court of appeals, while holding 40 C.F.R. § 122.44(d)(1) to be unambiguous, conceded that the regulation is "complex" and that it "allows MPCA some latitude to determine the appropriate procedures for developing water quality-based effluent limits." PCA Add. 16.

To fully appreciate the complexity and ambiguity of 40 C.F.R. § 122.44(d)(1), the Court must consider the specific portion of the regulation that MPCA had to implement in order to set effluent limits in the ALASD permit--Paragraph (vi) of Section 22.44(d)(1). PCA App. 4. Paragraph (vi) expressly provides options which the permitting authority may use to set effluent limits where the State has not adopted a numeric criterion to measure the ambient quality of the receiving water for the particular pollutant involved. Since MPCA had not adopted numeric criteria for ambient phosphorus concentrations in the State's waters, MPCA was required to apply Paragraph (vi) to set phosphorus effluent limits for the ALASD facility.[9] EPA's regulatory

[9] Since reissuance of the ALASD permit, MPCA formally proposed amendments to its water quality rules, Minn. Rule ch. 7050. *See* Notice of Proposed Amendments, 32 S.R. 87-217, July 23, 2007. The amended rules include, for the first time, numeric criteria for phosphorus used in determining whether the agency's narrative standard for nutrients is violated. *See* proposed Minn. R. 7050.0222, subps. 2-4 (setting numeric "eutrophication standards" for different classes of waters). To the extent that these numeric criteria set an "allowable ambient concentration" for phosphorus as that term is used in Paragraph (iii) of 40 C.F.R. § 122.44(d)(1), Paragraph (iii) rather than Paragraph (vi) of the regulation will be used by MPCA in setting effluents for existing facilities in the future. However, this will not eliminate the need for MPCA to exercise technical and policy judgment to determine when effluent limits are required and what effluent limits are sufficient to
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preamble to 40 C.F.R. § 122.44(d)(1) provides that States have *"maximum flexibility"* in implementing Paragraph (vi) of the regulation. 54 Fed. Reg. 23876, PCA App. 108 (emphasis added). Furthermore, federal case law recognizes that a permitting authority must necessarily exercise discretion in implementing this provision. Finally, EPA reviewed the final permit containing the effluent limits set by MPCA for the ALASD facility and expressed its approval of those limits as consistent with 40 C.F.R. § 122.44(d)(1). Each of these points is discussed further below.

1. The language of Paragraph (vi) of 40 C.F.R. § 122.44(d)(1) expressly authorizes MPCA to use several options to set effluent limits.

Paragraph (vi) of 40 C.F.R. § 122.44(d)(1) provides three possible options for the permitting authority to use in setting effluent limits in these circumstances. MPCA selected subparagraph (vi) (A) as the option applicable to the ALASD permit.[10] Subparagraph (vi)(A) of 40 C.F.R. § 122.44(d)(1) reads as follows:

> Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that

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comply with 40 C.F.R. § 122.44(d)(1). The amendments to Minn. Rule ch. 7050 were adopted by the MPCA Citizen's Board on December 18, 2007. *See* Order Adopting Rules, Amendment to Rules Governing Water Quality, dated December 18, 2007, available at http://www.pca.state.mn.us/about/board/bdagenda-archives.html.

[10] MCEA argued in its opening brief below that MPCA should have invoked paragraph (iii) rather than Paragraph (vi)(A) of the regulation in the ALASD permit proceeding. However, in oral argument, MCEA appeared to abandon this position, arguing only that MPCA's interpretation of Paragraph (vi)(A) did not comply with the regulation. There was no argument below that MPCA could or should have invoked subparagraphs (B) or (C) of Paragraph (vi) and those subparagraphs are not discussed here.

> causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits using one or more of the following options:
>
> (A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived *using a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information* which may include: EPA's Water Quality Standards Handbook, October 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents.

40 C.F.R. § 122.44(d)(1)(vi)(A) (emphasis added) ("Option A").

The language of Paragraph (vi)(A) clearly gives MPCA broad discretion to derive more stringent phosphorus effluent limits from at least three sources: "a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion." The language provides no further detail to guide MPCA in selecting an appropriate source from among these choices, or indeed to help MPCA answer such questions as whether a state policy is "explicit" or whether a state regulation is one that "interpret[s] its narrative water quality criterion." The regulation clearly leaves these matters to the MPCA. Thus, considering simply the language of this part of the regulation, it is clear that the regulation left considerable discretion to MPCA to identify and select the sources from which it may derive numeric effluent limits for the ALASD facility.

2. The EPA regulatory preamble supports maximum state flexibility in implementing 40 C.F.R. § 122.44(d)(1)(vi).

EPA adopted 40 C.F.R. § 122.44(d)(1) in its current form in 1989. 54 Fed. Reg. 23868 (June 2, 1989), PCA App. 94. In its regulatory preamble, EPA repeatedly emphasizes that states have significant flexibility in implementing the regulation, especially paragraph (vi)(A), the provision used by MPCA in the *ALASD* proceeding. PCA App. 94-114. According to EPA, "Option A gives the states *maximum flexibility* in developing water quality-based effluent limits for pollutants for which the state has not adopted a water quality criterion." 54 Fed. Reg. 23876, PCA App. 108 (emphasis added). In addition, according to EPA, "there is flexibility in the state's interpretation of its narrative water quality criteria." 54 Fed. Reg. 23875, PCA App. 107. In other words, when MPCA chooses to use Option A, as it did in *ALASD,* the regulation gives MPCA broad authority and flexibility to establish an effluent limit based on the State's interpretation and application of the State's own water quality rules and policies. It is obvious that when the implementing agency is given such an extraordinary degree of flexibility by a regulation, a court reviewing the agency's determinations under that regulation must afford the agency leeway to make a reasonable technical and policy judgment. In other words, the regulation must be considered "ambiguous" and subject to reasonable agency interpretation.

3. Case law further supports agency exercise of judgment in implementing 40 C.F.R. § 122.44(d)(1)(vi).

The federal courts have confirmed the role of agency judgment in applying 40 C.F.R. § 122.44(d)(1). In *American Paper Inst. v. EPA,* 996 F.2d 346 (D.C. Cir. 1993), the Court of Appeals for the District of Columbia Circuit rejected industry's claim that 40 C.F.R. § 122.44(d)(1) diminished the standard-setting authority of the states under the CWA. The court firmly rejected that argument, stating as follows:

> As long as narrative criteria are permissible. . . and must be enforced through limitations in particular permits, *a permit writer will inevitably have some discretion in applying the criteria to a particular case.* The general language of narrative criteria can only take the permit writer so far in her task. Of course, that does not mean that the language of a narrative criterion does not cabin the permit writer's authority at all; rather, *it is an acknowledgement that the writer will have to engage in some kind of interpretation to determine what chemical-specific numeric criteria--and thus what effluent limitations--are most consistent with the state's intent as evinced in its generic standard.* The EPA's new regulation merely requires that permit writers engage in this task to create chemical-specific limitations on discharges of pollutants and gives those writers three tools with which to do this work in a fairly regularized fashion.

996 F.2d at 351 (emphasis added). The *American Paper* case further demonstrates that 40 C.F.R. § 122.44(d)(1) must be considered ambiguous. The court of appeals in *ALASD* never refers to the *American Paper* case, nor does it make more than a cursory reference to the EPA regulatory preamble in its decision below.

4. EPA's approval of the phosphorus effluent limits in the ALASD permit further demonstrates that the regulation is ambiguous and susceptible to different interpretations.

EPA's approval of the effluent limits set by MPCA in the ALASD permit demonstrates that EPA, the agency which promulgated the regulation and supervises its

implementation, recognizes that MPCA had leeway in implementing it. MPCA staff sent copies of the proposed ALASD permit and the final version of the permit to EPA for its review prior to MPCA action on the permit. R. 1879, 2125-2126. At EPA's request, MPCA also provided copies of the 2004 and 2005 MPCA policy on pre-TMDL permitting that MPCA relied on in part to set the effluent limits in the permit. *Id.* In response, EPA Region 5 sent an explicit statement to MPCA supporting the effluent limits set in the final permit. PCA App. 75. The statement was sent by electronic mail and reads as follows:

> Thank you for your FAX correspondence, June 9, regarding a review of the changes to the reissued final NPDES permit for the Alexandria Lake (sic) Area Sanitary District Wastewater Treatment Facility (MN0040738) as they pertain to 40CFR122.44(d)(1) (sic). As we discussed today, we do not object to your proposed interim and final effluent limits for phosphorus at this facility. We understand that this facility is discharging to a lake that does not have a completed TMDL, and that your findings demonstrate that the proposed discharge limit does not cause or contribute to that impairment.

Id. EPA's June 26, 2006 statement indicating its approval of the phosphorus effluent limits in the final ALASD permit "as they pertain to 40CFR122.44(d)(1)" demonstrates that EPA recognized that the regulation gave MPCA leeway to use its technical and policy judgment in setting effluent limits, thus leaving the regulation open to more than one possible interpretation. The EPA statement provides further support for this Court to hold that the regulation is ambiguous.[11]

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[11] In argument below, MCEA questioned whether the EPA statement actually approved the limits in the ALASD permit because MPCA had not made any proposed findings to "demonstrate that the proposed discharge limit does not cause or contribute to that [Lake
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C. Conclusion.

Based upon the clear parallels between the regulations at issue in *ALASD* and *Annandale/Maple Lake,* as well as the administrative flexibility apparent on the face of the regulation applied in *ALASD,* and its regulatory history and applicable case law, the conclusion is inescapable that 40 C.F.R. § 122.44(d)(1) is ambiguous and subject to MPCA interpretation.

III. MPCA'S INTERPRETATION OF 40 C.F.R. § 122.44(d)(1) IN SETTING EFFLUENT LIMITS IN THE ALASD PERMIT WAS REASONABLE AND ENTITLED TO DEFERENCE.

Under *Annandale/Maple Lake,* if this Court concludes that 40 C.F.R. § 122.44(d)(1) is ambiguous, as MPCA has argued in Part II of this Brief, the Court must then determine whether the agency's interpretation is reasonable. 731 N.W.2d at 516. In determining the reasonableness of an agency's interpretation of its own regulation, *Annandale/Maple Lake* holds that the Court should consider whether the agency is required to exercise its expertise and special knowledge in order to interpret or apply the regulation. *Id.* If the Court finds that the MPCA's exercise of its special expertise is necessary to interpret the regulation at issue in this case, it should defer to the reasoned

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Winona's] impairment." However, no such finding is required by 40 C.F.R. § 122.44(d)(1), and nothing in the regulation requires consideration of whether an *effluent limit* causes or contributes to an impairment. The MPCA Board understood EPA's statement to mean that by complying with the proposed limits in the permit, the ALASD facility will not, in the future, cause or contribute to further impairment of Lake Winona. MPCA added a finding to that effect in its Findings and Conclusions. PCA App. 22 (Finding 22).

interpretation of the agency. *Id.* That is, the Court should refrain from substituting its judgment for the agency's interpretation, and instead leave that decision to the reasoned judgment of the administrative agency. 731 N.W.2d at 523 (stating that "Here, we believe that any necessary policy determinations in interpreting the regulation are more properly left to the MPCA, the agency responsible for interpreting its regulation.") (citations omitted). In its final analysis of whether MPCA's regulatory interpretation was reasonable in *Annandale/Maple Lake,* this Court considered two additional factors: first, whether anything in the regulation at issue prohibited MPCA's interpretation; and second, whether MPCA's interpretation was reasonable

> [i]n light of the multitude of variables and possible approaches in determining whether a specific discharge of phosphorus will "cause or contribute to the violation of water quality standards"--not the least of which is whether the MPCA should consider the discharge in isolation or in the context of other reductions in the watershed as a whole.

731 N.W.2d at 524. The same factors that this Court used to review the MPCA's interpretation in *Annandale/Maple Lake* apply to MPCA's interpretation of 40 C.F.R. § 122.44(d)(1) in this case.

A. MPCA's Special Knowledge And Expertise Are Necessary To Interpret And Apply 40 C.F.R. § 122.44(d)(1).

In *Annandale/Maple Lake,* this Court stated that

> When determining whether an agency's interpretation is reasonable, courts may consider the agency's expertise and special knowledge, especially when the construction of the regulation's language is so technical in nature that the agency's field of technical training, education, and experience is necessary to understand the regulation.

731 N.W.2d at 516. MPCA's argument in Part II of this Brief establishes the highly technical nature of 40 C.F.R. § 122.44(d)(1), as well as the need for MPCA to make important policy judgments under the CWA in order to implement the regulation. The conclusion must follow that MPCA is required to use its technical expertise and policy judgment in order to interpret and apply 40 C.F.R. § 122.44(d)(1).

This Court established in *Annandale/Maple Lake* that when waters downstream from a proposed new discharge are impaired and no TMDL has yet been established for those waters, *Arkansas v. Oklahoma* allows the permitting agency to strike a balance between rigid regulation of the individual discharger (by denying the permit) and implementation of an area-wide approach to address the downstream impairment. This Court's conclusion with respect to new discharges under 40 C.F.R. § 122.4(i) in *Annandale/Maple Lake,* is equally correct for existing discharges under 40 C.F.R. § 122.44(d)(1) in *ALASD.* Just as in *Annandale/Maple Lake,* because implementation of the regulation at issue in this case "requires a careful balancing of competing policies and interests across the state, the agency must necessarily draw on its expertise and special knowledge." 731 N.W.2d at 523 (citing *Arkansas v. Oklahoma*).

Furthermore, MPCA has a greater need to exercise its special technical expertise under 40 C.F.R. § 122.44(d)(1) because of the nature of the decision required by the regulation. In addition to having to determine whether an existing discharge causes or contributes to a downstream impairment, (a similar determination as required by the regulation at issue in *Annandale/Maple Lake*), 40 C.F.R. § 122.44(d)(1) requires MPCA to set more stringent effluent limits for such existing discharges, and to determine

whether the effluent limits will achieve water quality standards in the affected downstream waters. Setting effluent limits and determining whether they will produce the desired water quality result in the receiving waters is a quintessential example of a duty that requires MPCA to exercise its special technical expertise. The importance of MPCA's technical expertise is heightened still further in *ALASD* because in this case the agency was required to derive numeric effluent limits from a non-numeric, narrative water quality standard that prohibits excess algae conditions in the receiving waters.[12]

In addition, the language of the regulation itself authorized the MPCA to identify and select the sources from which it would derive effluent limits for the ALASD permit, allowing MPCA to choose from a proposed numeric criterion for the pollutant, or an explicit agency policy or rule interpreting its narrative water quality standard. *See* 40 C.F.R. § 122.44(d)(1)(vi)(A). Finally, EPA's regulatory preamble and the *American Paper* case further amplify the reasoning for why the agency needs to exercise judgment in interpreting and applying 40 C.F.R. § 122.44(d)(1) in the circumstances of the *ALASD* proceeding.

For all of the foregoing reasons, this Court must conclude that MPCA is required to exercise its special expertise, knowledge and judgment when implementing 40 C.F.R. § 122.44(d)(1). Because the regulation is ambiguous, both on its face and in its legal and

[12] It should go without saying that if the MPCA was required to use its special expertise to determine whether a new facility "causes or contributes" to an existing impairment in downstream waters under the regulation at issue in *Annandale/Maple Lake,* then it must be required to exercise the same expertise to make the same or similar determination under 40 C.F.R. § 122.44(d)(1).

regulatory context under the CWA, and because MPCA is required to exercise its technical and policy judgment to interpret the regulation, MPCA's interpretation and application of the regulation in the reissued ALASD permit are entitled to deference by this Court.

All that remains is to examine the specific effluent limits set by the MPCA in the permit, and the expert technical and policy judgments of the agency on which those limits are based. If this Court concludes that the effluent limits in the permit are based on a reasoned interpretation of the regulation, then the Court should affirm MPCA's interpretation.

B. MPCA's Decision To Set Interim Effluent Limits For Phosphorus In The ALASD Permit And To Incorporate A Schedule Of Compliance That Required ALASD To Meet The Interim Limits And A TMDL-Based Effluent Limit Was A Reasonable Interpretation Of 40 C.F.R. § 122.44(d)(1).

40 C.F.R. § 122.44(d)(1) requires MPCA to set more stringent effluent limits than would ordinarily be applied to an existing discharge if the discharge causes or contributes to a violation of water quality standards in downstream waters. 40 C.F.R. § 122.44(d)(1)(i). More specifically, the regulation requires that such effluent limits "must control all pollutants . . . which the [permitting agency] 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)(ii). Because Lake Winona is listed as impaired for nutrients and the ALASD facility is concededly a major contributor of phosphorus to the lake, MPCA acknowledged that the ALASD facility

causes or contributes to the violation (excursion) of the MPCA's narrative standard under the regulation. *See* PCA App. 64. MPCA therefore proceeded to set more stringent effluent limits in the reissued ALASD permit in order to further "control" ALASD's discharge of phosphorus as required by 40 C.F.R. § 122.44(d)(1).

1. The effluent limits set by MPCA in the ALASD permit are consistent with Paragraph (vi) of 40 C.F.R. § 122.44(d)(1).

MPCA used Paragraph (vi) of 40 C.F.R. § 122.44(d)(1) to set more stringent effluent limits for the ALASD facility. As explained in Part II.C. of this Brief, Paragraph (vi) applies "[w]here a State has not established a water quality criterion for a specific chemical pollutant." 40 C.F.R. § 122.44(d)(1)(vi). Paragraph (vi) provides three options for setting effluent limits when the permitting authority has not established numeric criteria for the pollutant. MPCA chose the option in subparagraph (vi)(A) ("Option A") which states that the permitting agency shall:

> Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, October 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents.

Following Option A, MPCA established interim effluent limits in the reissued ALASD permit that require ALASD to impose more stringent control of its phosphorus discharge than ordinarily required for a municipal wastewater treatment facility. These interim limits were based *both* on an "explicit State . . . regulation" and on "explicit

State policy" that interpret MPCA's narrative water quality standard for excess algae. The explicit state regulation is the MPCA's phosphorus rule which requires a discharger to go beyond ordinary effluent controls and to achieve the "fullest practicable extent" ("FPE") of phosphorus removal from its discharge "wherever sources of nutrients are considered to be actually or potentially detrimental to preservation or enhancement of the designated water uses." Minn. R. 7050.0211, subp. 1a. MPCA determined that the discharge from the ALASD facility met the MPCA's standard for requiring an FPE. PCA App. 57-58.

Having concluded that an FPE was required, MPCA determined that the FPE for the ALASD facility, once new construction was completed and the facility was fully operational, was 0.3 mg/L. PCA App. 61-62. This is almost three times more stringent than the 0.8 mg/L limit in ALASD's previous permit. The 0.3 mg/L limit is the most stringent phosphorus effluent limit that MPCA had ever imposed on municipal wastewater treatment facilities in the state and had been applied previously at only two facilities--Bemidji and Ely. PCA App. 61. For the existing ALASD facility, prior to construction, MPCA modified the FPE slightly, setting an interim "intervention limit" at 0.47 mg/L to take into account the less efficient filtration process used by the existing facility and the potential for operational disruption during construction. PCA App. 62.

But MPCA did not simply impose an FPE-based effluent limit on ALASD, it also conducted scientific lake modeling to evaluate the effect of the more stringent effluent limits on the excess algae conditions in Lake Winona. To determine whether the interim limits were adequate to control the effects of phosphorus in Lake Winona in the interim

period, MPCA applied an "explicit State policy," the agency's pre-TMDL permitting policy, to ensure that waters already violating narrative water quality standards are not further degraded while TMDLs are being developed. PCA App. 83-93. MPCA's lake modeling showed that the interim effluent limits were adequate to meet the goal of preventing deterioration of water quality as provided in the MPCA's policy. PCA App. 64-70.

As a final measure to assure that the more stringent effluent limits "will attain and maintain applicable narrative water quality criteria and will fully protect the designated use" of the affected water as required by 40 C.F.R. § 122.44(d)(1)(vi)(A), MPCA incorporated a TMDL-based effluent limit in the ALASD permit. PCA App. 22 (Finding 21). This requires ALASD to meet an effluent limit consistent with its permissible loading of phosphorus under the Lake Winona TMDL as soon as that TMDL is completed. PCA App. 40. The Lake Winona TMDL was already underway when MPCA issued the ALASD permit, and is scheduled to be completed in 2009, before the end of the five-year ALASD permit reissued in June 2006. R. 7930-7932. The interim effluent limits and the TMDL-based effluent limit constitute a step by step process to more strictly control ALASD's discharge of phosphorus, in a manner that will meet the "attain and maintain" requirement of 40 C.F.R. § 122.44(d)(1)(vi)(A) when fully implemented by ALASD. To assure appropriate implementation and enforcement of these steps, MPCA incorporated the interim limits and the TMDL-based limit in a schedule of compliance in the ALASD permit. PCA App. 40. MPCA determined that

these effluent limits fully complied with 40 C.F.R. § 122.44(d)(1). PCA App. 22-23 (Findings 19, 21, 24 and 31).

MPCA's application of 40 C.F.R. § 122.44(d)(1) is reasonable and is entitled to deference by this Court because it comports with the language of Subparagraph (vi)(A) of 40 C.F.R. § 122.44(d)(1), and is consistent with the purpose and intent of the regulation viewed in the context of the CWA. As discussed more fully below, MPCA's interpretation is reasonable for the following reasons. First, the interim effluent limits are based on "an explicit State . . . regulation" in accordance with the express language of Option A. Second, the MPCA's determination that the interim limits provide adequate interim control of ALASD's phosphorus discharge prior to TMDL completion was based upon an "explicit State policy" as provided in Option A, and on MPCA's expert scientific judgment using lake modeling techniques. MPCA's determinations that this regulation and policy interpret MPCA's "narrative water criterion" as provided in Option A are also reasonable. Third, MPCA's use of a schedule of compliance containing the interim limits and a TMDL-based effluent requirement to assure that ALASD "will attain and maintain applicable narrative water quality criteria and will fully protect the designated use" as required by Option A is reasonable.

2. The interim phosphorus effluent limits set in the ALASD permit are a reasonable application of 40 C.F.R. § 122.44(d)(1)(vi)(A) because they are derived from an explicit State regulation interpreting MPCA's narrative standard for excess algae.

The interim phosphorus effluent limits in the ALASD permit comply with 40 C.F.R. § 122.44(d)(1)(vi)(A) because they are derived from "an explicit State policy

[and] regulation interpreting [the State's] narrative water quality criterion" as required by the language of the regulation. The explicit State regulation from which MPCA initially derived the interim limits is Minn. R. 7050.0211, subp. 1a, (the "state phosphorus rule"). PCA App. 82. Under this rule, all discharges directly to or affecting a lake or reservoir must meet a numeric effluent limit of 1 mg/L. *Id.* The ALASD facility has been subject to this 1 mg/L limit since 1978. R. The rule directs MPCA to set more stringent effluent limits "wherever sources of nutrients are considered to be actually or potentially detrimental to preservation or enhancement of the designated water uses."[13] PCA App. 82. When MPCA makes such a determination, the discharger must achieve removal of phosphorus to the "fullest practicable extent" ("FPE"). *Id.* MPCA made this determination for the ALASD discharge. PCA App. 57-58. MPCA initially derived the 0.47 and 0.3 mg/L interim effluent limits for the reissued ALASD permit by determining the FPE for removal of phosphorus by the existing and expanded/improved ALASD facility.

The court of appeals in this case concluded that the effluent limits derived from the FPE provision of the state phosphorus rule did not comply with 40 C.F.R. § 122.44(d)(1). The Court cited several reasons for this conclusion, including that the interim effluent limits were "not 'derived from' MPCA's narrative water quality standard *as required by subparagraph (vii)(A)*" of the regulation, and were "not 'water

[13] In requiring MPCA to set more stringent effluent limits for a discharge when MPCA determines that the discharge is impeding attainment of designated uses of the receiving water, the FPE requirement parallels the requirements of 40 C.F.R. § 122.44(d)(1).

quality-based effluent limits:"[14] PCA Add. 11. Curiously, the court of appeals decision fails to analyze the reasonableness of MPCA's interpretation under Subparagraph (vi)(A) of the regulation but instead invokes Subparagraph (vii)(A), a more general provision which is also the first and only provision in 40 C.F.R. § 122.44(d)(1) to use the term "water quality based effluent limits." While the entire regulation must of course be read together to give effect to all of its provisions, Subparagraph (vi)(A) clearly provides more specific direction to MPCA in selecting effluent limits for the ALASD facility, and should take precedence over a more general requirement with which it is consistent.

Under Subparagraph (vi)(A), effluent limits may be derived from "an explicit State policy or regulation *interpreting its narrative water quality criterion*." 40 C.F.R. § 122.44(d)(1)(vi)(A) (emphasis added). MPCA's use of the state phosphorus rule as its explicit State regulation interpreting its narrative water quality standard for excess algae was reasonable.[15] Indeed, it was expressly allowed under the regulation. The FPE

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[14] The court of appeals' rejection of the effluent limits set by MPCA in the ALASD permit was also driven by the Court's misinterpretation of crucial facts in the record. Most egregiously, the Court concluded contrary to the record that the reissued permit would have allowed the existing ALASD facility to continue to discharge phosphorus at the rate of 11.3 kg/day and 0.8 mg/L, and that this would "result in a more-than-doubling of the in-lake phosphorus concentration of Lake Winona, [thus] confirming that the 0.8 mg/liter concentration does not comply with the narrative water quality standard." PCA Add. 12. This ignores the 0.47 mg/L intervention limit for phosphorus that applied to the existing facility prior to any new construction. The 0.47 mg/L limit is essentially the same as the 0.3 mg/L for the expanded facility but allowed for a margin of error to account for the less efficient filtration system used by the existing facility. PCA App. 62-63.

[15] MPCA in this brief uses the term "narrative water quality standard" rather than "narrative water criterion" used in 40 C.F.R. § 122.44(d)(1). This is consistent with MPCA's usage of this term in its water quality rules to describe water quality standards
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provision of the state phosphorus rule is inextricably linked to MPCA's narrative standard for nutrients (excess algae). The FPE provision only applies if "sources of nutrients are considered to be actually or potentially detrimental to preservation or enhancement of the designated water uses," language which mirrors the federal regulation's concern with impairment of a water's designated use. Furthermore, the description of the state phosphorus rule in the MPCA's Phosphorus Strategy refers to the FPE portion of the rule as the "narrative portion" of the rule.[16] Thus, MPCA's interpretation that the FPE portion of the state phosphorus rule is an explicit regulation interpreting its narrative standard for excess algae was reasonable.

MPCA's derivation of interim effluent limits by using the state phosphorus rule complies with the requirement of Paragraph (vi)(A) to derive limits that meet MPCA's narrative water quality standard. By complying with Paragraph (vi)(A), the interim limits

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such as the excess algae standard of Minn R. 7050.0150, subp. 3. PCA App. 76. Narrative water quality standards "prescribe the qualities or properties of surface waters that are necessary for the protection of designated public uses and benefits." Minn. R. 7050.0150, subp. 1. *Id.* A narrative water quality standard is distinct from a numeric water quality criterion or standard which sets a particular mass or concentration for a pollutant allowed in ambient surface water. 40 C.F.R. § 122.44(d)(1)(vi)(A) uses a longer term: "narrative water quality criterion within an applicable State water quality standard." MPCA considers this longer term to be equivalent to the term "narrative water quality standard."

[16] *See* "MPCA Phosphorus Strategy NPDES Permits," available at http://www/pca.state.mn.us/water/phosphorus.html, at 11 (stating that "The first portion of this rule was intended to be applied strictly to lakes and reservoirs while the latter, narrative portion could potentially be applied to all waters where it has been demonstrated that nutrients are impairing a designated use.").

also comply with the provision cited by the court of appeals--Paragraph (vii)(A)--which merely reiterates the requirement to meet the narrative standard in more general terms.[17]

The court of appeals also faulted the interim effluent limits on the grounds that they were not "water quality-based effluent limits." PCA Add. 11. More specifically, the Court concluded that the interim effluent limits were "not conditions that will ensure compliance with water-quality standards, as required by federal law" because they were "based on what the proposed facility is designed to achieve, rather than what is required for the lakes to attain and maintain water quality." PCA Add. 13. Contrary to the court of appeals' conclusion, the interim effluent limits set in this case are water quality-based effluent limits. This is demonstrated by the confirmatory modeling that MPCA performed to assure that those limits met MPCA's pre-TMDL permitting policy, which required a discharger to control further exceedance of water quality standards while a TMDL is being completed.[18] To do this modeling, MPCA used the so-called "BATHTUB" Model, a recognized scientific model that predicts changes in water quality when there is a change in the discharge of a pollutant from a particular facility. PCA App. 64-70. Using the BATHTUB Model MPCA staff determined that if the ALASD facility met the 0.3 mg/L effluent limit there would be a small increase in phosphorus discharged by the ALASD facility but no measurable change in nutrient conditions in

[17] In addition, as more fully discussed in Part III.B.4 below, MPCA does not rely solely on the interim limits to attain the narrative standard, but also required ALASD to meet a TMDL-based standard under a schedule of compliance in the permit.
[18] The pre-TMDL permitting policy is discussed further in the next section of this Brief.

Lake Winona, even if the proposed expanded facility operated up to its maximum design flow. PCA App. 69-70.

The court of appeals erroneously concluded that the small projected increase in phosphorus levels in Lake Winona from the expanded facility when complying with the new interim phosphorus limits confirms "that the effluent limits do not meet 'water quality standards' as required by 40 C.F.R. § 122.44(d)(1)." PCA Add. 12. This conclusion is extremely troublesome for the MPCA for two reasons. First, this Court rejected a similar conclusion by the court of appeals in *Annandale/Maple Lake* when it reversed that court's holding that the addition of any amount of phosphorus by the proposed Annandale/Maple Lake facility would necessarily cause or contribute to the impairment of Lake Pepin. 731 N.W.2d at 518-519. As this Court pointed out in *Annandale/Maple Lake,* such a conclusion was in conflict with United States Supreme Court precedent in *Arkansas v. Oklahoma.* 731 N.W.2d at 519. The court of appeals' conclusion in this case is also troublesome because it ignores Minn. Rule 7050.0150, subp. 5, which provides that phosphorus concentration is just one of three factors used to determine whether the water quality standard for excess algae is violated. PCA App. 78-79. There must be a corresponding increase in chlorophyll-a levels or decrease in light transparency to produce a violation of the narrative standard for nutrients. *Id.*

MPCA modeling determined that the slight increase in phosphorus that MPCA projected was too small to cause any change in the algae conditions of the lake. PCA App. 69.[19]

Because MPCA confirmed that interim effluent limits will meet the agency's required level of water quality protection (the level required by its pre-TMDL permitting policy), the interim limits must be considered water quality-based limits. This also distinguishes the interim effluent limits from technology-based effluent limits as that term is understood under the CWA. *See Weyerhauser Co. v. Costle,* 590 F.2d 1011, 1041-44 (D.C. Cir. 1978) (holding that technology-based effluent limits under the CWA are set and enforced without considering the impact of the discharger on the quality of the receiving waters). The role of MPCA's pre-TMDL permitting policy in deriving the interim limits is explained in more detail in the following section.

3. The interim phosphorus effluent limits set in the ALASD permit are based on a reasonable application of 40 C.F.R. § 122.44(d)(1)(vi)(A) because they are derived from MPCA's explicit policy for applying 40 C.F.R. § 122.44(d)(1) to protect impaired waters prior to completion of TMDLs.

In addition to applying the fullest practicable extent of phosphorus removal under the state phosphorus rule to initially derive interim effluent limits, MPCA used an

[19] The record also shows that MPCA's projection of the effects of ALASD's future phosphorus discharge on Lake Winona was a "worst-case" scenario that could only occur if the facility always discharged up to the interim effluent limit and constantly operated at its average wet weather flow. PCA App. 71-74. MPCA's technical expert testified on the record that a facility must generally operate below its permitted effluent limit in order to meet that limit on an average basis, and that it is not a realistic scenario to expect a facility to operate constantly at its average wet weather flow. *Id.* According to the MPCA's technical expert, under realistic operating conditions the interim effluent limits would likely result in a net reduction of phosphorus to Lake Winona. *Id.*

"explicit state policy" as provided in 40 C.F.R. § 122.44(d)(1)(vi)(A) to establish those limits. The explicit state policy is MPCA's pre-TMDL permitting policy, which was formulated in an MPCA staff memo to the MPCA Citizens' Board in September 2004. PCA App. 83-91. The essence of the 2004 policy was condensed into a guidance document issued in 2005. PCA App. 92-93. The pre-TMDL permitting policy was developed after the Court of appeals decided the *Annandale/Maple Lake* case and before it was reversed by this Court. The policy addressed MPCA's concern about how to comply with 40 C.F.R. §§ 122.4(i) and 122.44(d)(1) when issuing permits for wastewater facilities (new or existing) that proposed to discharge into impaired waters for which no TMDL had yet been established. The central principle of MPCA's pre-TMDL permitting policy is that the

> MPCA should take a reasonable approach in interpreting the federal regulations during NPDES permitting to ensure that water quality does not worsen before a TMDL is completed. The tool for restoring impaired waters are [sic] completed and approved TMDLs, which identifies the point and non-point sources of the pollutant causing the impairment and the reductions needed from all sources to restore the water body.

PCA App. 91. In the 2005 condensed version, MPCA reiterated that its pre-TMDL permitting policy for existing and expanding discharges under 40 C.F.R. § 122.44(d)(1) is "ensuring that impaired waters are not further degraded before a TMDL is complete." PCA App. 92.

In setting interim effluent limits for the ALASD facility under 40 C.F.R. § 122.44(d)(1)(vi)(A), MPCA applied its pre-TMDL permitting policy to assure that the limits were stringent enough to protect the already impaired water of Lake Winona from

any further exceedance of the excess algae narrative standard until an effluent limit based on the Lake Winona TMDL is imposed on the facility. MPCA's pre-TMDL permitting policy, announced almost two years before the ALASD permitting decision, strikes a reasonable balance between setting overly stringent limits on individual facilities affecting impaired waters, and implementation of a long-range, watershed-based approach to restoring those waters using the TMDL process. Under this Court's reading of *Arkansas v. Oklahoma,* this is exactly the kind of policy leeway that the MPCA must have under the CWA in order to formulate an effective and equitable response to the policy and technical challenges posed by pre-TMDL permitting of existing facilities. The policy complements MPCA's pollution trading policy for permitting new facilities which this Court held to be reasonable under *Annandale/Maple Lake.*

MPCA used its pre-TMDL permitting policy, along with confirmatory modeling of the effects of the proposed effluent limits, to determine that the interim effluent limits in the ALASD permit provides adequate interim control of phosphorus in the Lake Winona watershed while the Lake Winona TMDL is being completed. Based on that determination, MPCA concluded that the interim effluent limits are a reasonable component of the effluent limits needed to comply with 40 C.F.R. § 122.44(d)(1) in the ALASD permit. PCA App. 22 (Finding 20). The final component is a TMDL-based effluent limit which is discussed in the final section of this Brief.

The court of appeals rejected MPCA's use of its pre-TMDL permitting policy to measure the adequacy of the interim effluent limits saying that the policy "conflicts with the language of the regulation" requiring MPCA to set limits necessary to achieve water

quality standards. PCA Add. 13. The Court of appeals went on to say that "[n]owhere in the CWA or the regulation itself is it stated or suggested that the goal should be to avoid further degradation of impaired waters; merely holding the line on existing pollution levels is not enough." *Id.* However, under *Annandale/Maple Lake* the reasonableness of MPCA's pre-TMDL permitting policy cannot be judged solely by whether it is expressly authorized by the regulation. In *Annandale/Maple Lake,* this Court upheld MPCA's application of its pollution trading policy despite the objection that it was not expressly authorized by the regulation at issue, and even though MPCA had not adopted a specific, written policy on pollution offsets before it issued the *Annandale/Maple Lake* permit. 731 N.W.2d at 524. Rather than requiring express authorization for the MPCA policy in the regulation, this Court gave weight to the fact that "nothing in the language of the regulation or the structure of the CWA prohibits the MPCA from considering offsets in this situation." *Id.*

More importantly, however, the court of appeals' objection to MPCA's pre-TMDL permitting policy in this case misses the essential point of the policy. The essential point is that the MPCA policy is an *interim* policy to deal with the period when a TMDL has not yet been completed. Likewise, the challenged effluent limits which are consistent with this policy are *interim* limits. MPCA has never claimed that the interim limits are sufficient *by themselves* to constitute full compliance with 40 C.F.R. § 122.44(d)(1); rather the interim limits are reasonable components of a package of limits, along with a TMDL-based effluent limit, which *together* fully comply with the regulation. The final

section of this Brief addresses the schedule of compliance in the ALASD permit that incorporated the interim limits and the TMDL-based limit.

4. The interim effluent limits together with the TMDL-based effluent limit incorporated in a schedule of compliance in the ALASD permit constitute a reasonable application of 40 C.F.R. § 122.44(d)(1).

The final component of the effluent limits that MPCA determined were needed to comply with 40 C.F.R. § 122.44(d)(1) in the ALASD permit is an effluent limit based on the Lake Winona TMDL. MPCA included a schedule of compliance in the permit that requires ALASD to comply with the TMDL-based limit as soon as the Lake Winona TMDL is completed. As set forth in the record of the ALASD proceeding, MPCA had already begun the Lake Winona TMDL in early 2006, and had scheduled the completion of the TMDL for 2009. R. 7930-7932. Thus, according to the record, MPCA reasonably expected ALASD to comply with a TMDL-based limit during the five year term of the permit that the agency reissued in June 2006. MPCA's incorporation of the interim limits and the TMDL-based limit in a schedule of compliance in the permit was a reasonable interpretation and application of 40 C.F.R. § 122.44(d)(1) for several reasons.

First, it complies with the purpose of 40 C.F.R. § 122.44(d)(1), which is to impose greater control over ALASD's discharge of phosphorus in a way that "will attain and maintain" the narrative water quality standard for excess algae in Lake Winona. Contrary to the court of appeals' conclusion in this case, the schedule of compliance is not a means to delay more stringent phosphorus control. The interim effluent limits in the schedule of compliance are substantially more stringent than in ALASD's previous permit: 0.47 and

0.3 mg/l phosphorus concentration limits versus the current 0.8 mg/L effective phosphorus limit. The 0.47 intervention limit applies immediately, and an even more stringent 0.3 limit applies when the expanded facility is constructed and fully operational. Under the schedule for completion of the Lake Winona TMDL, a TMDL-based effluent limit will be imposed on ALASD within the five year term of the permit.

Moreover, nothing in 40 C.F.R. § 122.44(d)(1) requires that the narrative water quality standard be attained immediately or by a particular date. Where substantial time and costs may be required for an existing facility to meet the narrative water quality standard, the MPCA must be able to apply a reasonableness standard for determining when that standard will be attained. The record shows that restoration of Lake Winona is going to be a long and difficult task, and that it may not be achievable solely by controlling or even eliminating the phosphorus discharge from the ALASD facility.[20] By requiring ALASD to make an immediate start on more stringent phosphorus control and reasonably prompt compliance with a TMDL-based limit that provides for long-term water quality restoration, the schedule of compliance provides a reasonable set of effluent limits which "will attain" water quality standards.

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[20] The record includes a report by MCEA's consultant Andrea Plevan citing a lake improvement study which says that even "a complete removal of the ALASD will not result in Lake Winona attaining water quality standards." R. 1140 (Plevan, "Impact of ALASD Discharge on the Water Quality of Lakes Winona, Agnes and Henry"). According to the Plevan report, an effluent limit reducing the ALASD phosphorus load would only be "a necessary first step" in order to "urge Lake Winona over into the clear-water phase." *Id.*

Second, the schedule of compliance in the ALASD permit strikes a reasonable balance between the immediate imposition of rigid phosphorus controls on a single facility and appropriate reliance on the TMDL process to provide watershed-wide, long-range restoration of Lake Winona. This complies with this Court's holding in *Annandale/Maple Lake,* which recognized that administrative leeway is available to agencies implementing the CWA under *Arkansas v. Oklahoma.* MPCA must have flexibility to formulate schedules for implementing more stringent effluent limits for existing facilities under 40 C.F.R. § 122.44(d)(1) in order to assure that those facilities can continue to provide wastewater treatment services while planning and implementing necessary improvements to meet new limits. The use of the schedule of compliance in the ALASD permit provides the kind of balance that this Court approved when it affirmed MPCA's interpretation of a parallel CWA rule in *Annandale/Maple Lake.* MPCA's application of 40 C.F.R. § 122.44(d)(1) in this case is reasonable

> [i]n light of the multitude of variables and possible approaches . . . not the least of which is whether the MPCA should consider the discharge in isolation or in the context of other reductions in the watershed as a whole.

731 N.W.2d at 524.

Third, MPCA's policy decision to incorporate a TMDL-based limit in the schedule of compliance to meet the requirements of 40 C.F.R. § 122.44(d)(1) is reasonable because it carries out the purpose and intent of the recently enacted Clean Water Legacy Act. Minn. Stat. ch. 114D (Supp. 2007) (the "CWLA"). The CWLA demonstrates the importance that the Minnesota Legislature attaches to the TMDL process as the appropriate means to achieve restoration of Minnesota's impaired waters through

comprehensive measures to reduce and control *all* point and non-point sources contributing to an impairment.[21] Wastewater treatment facility improvements are just one part of this comprehensive approach. Minn. Stat. § 114D.45, subd. 3(3). MPCA is committed to the prompt completion of the Lake Winona TMDL which will result in the imposition of a TMDL-based effluent limit on the ALASD facility before the end of ALASD's current permit.

Fourth, and contrary to the court of appeals' conclusion in this case, the schedule of compliance in the ALASD permit is reasonable because it fulfills the definitions of a schedule of compliance under the CWA and state law. The CWA defines "schedule of compliance" as

> a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

33 U.S.C. § 1362(11) and (17).[22] The court of appeals objected to MPCA's schedule of compliance because, according to the court, it did not contain an "enforceable sequence of actions . . . leading to compliance with water quality based effluent limits" and "no

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[21] The CWLA sets specific goals and priorities for the TMDL program and enlists other state agencies such as the Departments of Agriculture and Natural Resources, the Public Facilities Finance Authority and the Board of Water and Soil Resources, as well as local governments in a coordinated effort to develop and implement TMDLs. Minn. Stat. § 114D.20 and 114D.30. *See also* Minn. Laws 2007, ch. 57, art. 1, sec. 3, subd. 2 (appropriating just over $31 million to MPCA for FY 2008 "to implement the requirements of Minnesota Statutes, Chapter 114D," and requiring MPCA to complete ten percent of outstanding TMDLs each year of the biennium).

[22] *See also* Minn. Stat. § 115.01, subd. 16 (defining a schedule of compliance as "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard").

mandated dates by which MPCA must complete the [TMDL] process or develop effluent limits based on the [TMDL]." PCA Add. 15. The interim effluent limits in the ALASD schedule of compliance are enforceable by MPCA, either as intervention limits or standard pollution discharge limits. The schedule of compliance clearly includes an enforceable sequence of events tied to the effluent limits, namely commencement of operation of the improved ALASD facility and the completion by MPCA of the TMDL. Contrary to the conclusion of the court of appeals, nothing in the regulatory definitions of a schedule of compliance requires that the sequence of events be tied to specific dates.

The court of appeals also questioned whether the interim effluent limits in the ALASD permit were "remedial measures" as required by the CWA definition of a schedule of compliance. PCA Add. 15. It is clear that the ALASD effluent limits are "remedial" because they address the existing violation of the narrative standard for excess algae in Lake Winona and are intended to ameliorate the condition of the lake and attain the narrative standard as required by 40 C.F.R. § 122.44(d)(1). MPCA's schedule of compliance in the ALASD permit met the relevant general requirements of the CWA.

Finally, the use of a schedule of compliance that includes an effluent limit based on a not yet established TMDL was a reasonable way to comply with 40 C.F.R. § 122.44(d)(1) because it is supported by persuasive judicial authority in the only reported court case that has considered this question. In *Communities for a Better Environment ("CBE") v. State Water Resources Bd,* the California Court of Appeals held that such effluent limits in a schedule of compliance in a water quality permit issued by

California met the requirements of 40 C.F.R. § 122.44(d)(1). 1 Cal. Rptr. 3d 76 (Cal. App. 1st Dist. 2003).

The California case involved discharge of dioxin by an oil refinery into a bay which EPA had listed as impaired for dioxin. 1 Cal. Rptr. 3d at 81-82. At the time of permit reissuance, no TMDL for dioxin had been established for the bay, and adoption of a TMDL was expected to take up to 13 years from when EPA identified the bay as impaired in 1999. 1 Cal. Rptr. 3d at 84. California issued a permit to the refinery that included interim effluent limits for dioxin and a schedule of compliance that gave the refinery ten years to meet a TMDL-based effluent limit. 1 Cal. Rptr. 3d at 86. Alternatively, if there was still no TMDL established after ten years, the permit required a zero discharge of dioxin. 1 Cal. Rptr. 3d at 84. On appeal, the California court concluded that an "effluent limit" as the term is used in federal water quality regulations does not always require that effluent limits be stated as a number. 1 Cal. Rptr. 3d at 87-88. The court also found that the use of a schedule of compliance in the permit, incorporating on effluent limit based on a not yet established TMDL was consistent with the definitions of "effluent limitation" and "schedule of compliance" in the CWA. 1 Cal. Rptr. 3d at 89 (citing 33 U.S.C. § 1362(11) and (17)). Most importantly, the California court agreed with the California agency that a schedule of compliance incorporating a not yet calculated TMDL was a valid means of imposing a water quality based effluent limit under 40 C.F.R. § 122.44(d)(1). *Id.* The California case provides persuasive and uncontradicted judicial authority that a schedule of compliance incorporating an effluent limit based on a not yet completed TMDL is a legitimate means to comply with the

effluent-setting requirements of 40 C.F.R. § 122.44(d)(1). The court of appeals below failed to even discuss this case in its decision.

For all of the reasons discussed in the foregoing Part III.B of this Brief, the effluent limits set by MPCA in the ALASD permit, and their incorporation in a schedule of compliance in the permit, constitute a reasonable interpretation and application of 40 C.F.R. § 122.44(d)(1).

CONCLUSION

Based on all of the foregoing reasons and arguments presented in this Brief, the MPCA respectfully asks this Court to reverse the court of appeals and hold that:

(1) 40 C.F.R. § 122.44(d)(1), which requires MPCA to set more stringent effluent limits for an existing discharge to surface waters when MPCA determines that the discharge causes or contributes to violation of water quality standards is ambiguous and subject to MPCA interpretation;

(2) application of 40 C.F.R. § 122.44(d)(1) requires MPCA to use its special knowledge and expertise; and

(3) the effluent limits set by MPCA and incorporated in a schedule of compliance in the reissued ALASD permit constitute a reasonable interpretation and application of 40 C.F.R. § 122.44(d)(1).

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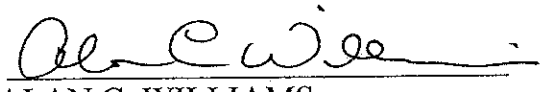
CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 12,818 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.



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