

APPELLATE COURT CASE NO. A06-1371

**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 ALEXANDRIA LAKE AREA
SANITARY DISTRICT'S REPLY BRIEF AND APPENDIX**

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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).

TABLE OF CONTENTS

| | |
|---|----|
| Table of Authorities | ii |
| Introduction | 1 |
| ARGUMENT | 2 |
| I. MCEA’s Interpretation Is Not the Clear and Unambiguous Meaning of the Regulation | 2 |
| A. MCEA ignores the relevant language of 40 C.F.R. § 122.44(d) | 4 |
| B. MCEA misreads 40 C.F.R. § 122.44(d)(1)(vi) | 5 |
| C. MCEA misreads 40 C.F.R. § 122.44(d)(1)(vii) | 8 |
| D. 40 C.F.R. § 122.44(d) is silent on the issue of timing | 9 |
| II. The Contextual Backdrop of the Regulation Also Creates Ambiguity | 10 |
| A. When EPA establishes an NPDES permitting prohibition, it does so expressly | 11 |
| III. EPA Implementation Confirms MCEA’s Rule Interpretation Is Misplaced | 13 |
| A. Several of the documents used to support MCEA’s position pertain to toxics, not nutrients | 13 |
| B. EPA’s varied approaches do not support MCEA’s position | 16 |
| C. EPA has approved MPCA’s interim limit approach in some situations | 18 |
| D. MCEA’s case law is inapplicable to the issue | 19 |
| Conclusion | 20 |

TABLE OF AUTHORITIES

Federal Cases

| | |
|--|----|
| <i>Arkansas v. Oklahoma</i> , 503 U.S. 91, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992) | 7 |
| <i>Chevron USA, Inc v. Natural Resources Defense Council</i> , 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) | 9 |
| <i>Environmental Integrity Project v. EPA</i> , 425 F.3d 992 (D.C. Cir. 2005) | 16 |
| <i>Immigration & Naturalization Service v. Jong Ha Wang</i> , 450 U.S. 139, 101 S.Ct. 1027, 67 L.Ed.2d 123 (1981) | 10 |
| <i>King v. St. Vincent's Hospital</i> , 502 U.S. 215, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991) | 10 |
| <i>National Black Media Coalition v. FCC</i> , 791 F.2d 1016 (2nd Cir. 1986) | 15 |
| <i>Natural Resources Defense Council, Inc. v. EPA</i> , 822 F.2d 104 (D.C. Cir. 1987) | 4 |
| <i>Paralyzed Veterans of America v. D.C. Arena L.P.</i> , 326 U.S. App. D.C. 25, 117 F.3d 579 (D.C. Cir. 1997) | 15 |
| <i>Rollins Environmental Services v. EPA</i> , 937 F.2d 649 (D.C. Cir. 1991) | 19 |

State Cases

| | |
|---|----|
| <i>Chiodo v. Board of Education</i> , 298 Minn. 380, 215 N.W.2d 806 (Minn. 1974) | 10 |
| <i>Communities for a Better Env'm't v. State Water Resources Control Bd.</i> , 109 Cal. App. 4 th 1089 (2003) | 20 |
| <i>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, Minnesota, No. A06-1371, 2007 WL 2421527 (Minn. Ct. App. August 28, 2007) (unpublished)</i> | 11 |
| <i>In the Matter of the Cities of Annandale and Maple Lake</i> , 731 N.W.2d 502 (Minn. 2007) | 11 |

State v. Donaldson, 41 Minn. 74, 42 N.W. 781 (Minn. 1889)..... 10

Agency Cases

In re City of Marlborough, Massachusetts Easterly WWTF,
NPDES Appeal No. 04-13, 2005 WL 1993924 (EPA 2005)..... 20

*In re Government of the District of Columbia Municipal Separate
Storm Sewer System*, NPDES Appeal Nos. 00-14 and 01-09,
2002 WL 257698 (EPA 2002)..... 20

Federal Statutes

33 U.S.C. § 1313(d) (2005) 13, 14

33 U.S.C. § 1314(l) (2005) 13

Federal Rules

40 C.F.R. § 122.4(i) (2005)..... 11, 12

40 C.F.R. § 122.44(d) (2005)..... *passim*

40 C.F.R. § 130.2 (2005) 7

40 C.F.R. § 131.21 (2005) 15

40 C.F.R. § 131.36 (2005) 15

Other Federal Authorities

54 *Federal Register* 23868, 23871-73 (June 2, 1989) 14

64 *Federal Register* 46046 (August 23, 1999) 12

64 *Federal Register* 46068 (August 23, 1999) 12, 13

65 *Federal Register* 43640-43 (July 13, 2000)..... 12

INTRODUCTION

Both Appellants Minnesota Pollution Control Agency (MPCA) and Alexandria Lake Area Sanitary District (ALASD) have argued that the language of 40 C.F.R. § 122.44(d) provides a general framework for developing water quality-based limits that often requires the application of complex scientific principles, extensive field monitoring, and leaves considerable discretion to the permitting authority on when and how to establish such limits. To address the requirements of this rule in this case, MPCA imposed stringent interim phosphorus limitations to prevent water quality degradation and a condition to comply with the effluent limits established in an ongoing Total Maximum Daily Load (TMDL). That TMDL process, consistent with § 122.44(d), is designed to ensure narrative and numeric water quality standards for Lake Winona would be identified and achieved. The MPCA (and EPA Region V) considered this a reasonable approach in light of its ongoing data collection and modeling analyses needed to derive necessary wasteload allocations (WLAs) and water quality-based effluent limitations (WQBELs) for Lake Winona. TMDL completion is expected during the term of the permit.

Respondent MCEA asserts that § 122.44(d) expressly prohibits this approach and requires the immediate calculation and imposition of a final effluent limit that will ensure Lake Winona will meet applicable standards. However, MCEA fails to identify any rule language that specifies a time frame for completing final WQBELs for dischargers to impaired waters (*e.g.*, “at permit issuance”). Nor does MCEA identify any portion of the regulation that precludes permit issuance for existing facilities unless the final calculated WQBEL ensures impaired waters attain standards compliance. MCEA fails to identify

these critical requirements because the MPCA's ability to impose interim requirements and utilize the TMDL process to identify the ultimate solution to remedy the impairment is nowhere proscribed by this rule. Consequently, MCEA's claim that the plain language of the rule dictates a contrary result is simply misplaced.

Given the undisputed scientific complexity of the situations encountered and the need to conduct extensive, watershed analyses under Clean Water Act (CWA) Section 303(d) procedures to solve many impairment situations, deference in applying § 122.44(d) is not simply appropriate, it is a necessity. There are numerous situations where it is impossible, impractical, and/or unreasonable to interpret the regulation in the matter suggested by MCEA. MCEA's response does not seek to refute these positions. Rather, to convince this Court that no discretion is allowable and final WQBELs must be immediately calculated, MCEA parses out subsections of the rule to cobble together its position. As discussed further herein, MCEA has clearly misread the plain meaning of the regulation, presumed a timing requirement that does not exist, and ignored existing administrative practice. Consequently, MCEA's arguments should be rejected and the Court of Appeals' decision should be reversed.

ARGUMENT

I. MCEA's Interpretation Is Not the Clear and Unambiguous Meaning of the Regulation

In its response brief (hereinafter 'Response'), MCEA states that "PCA and ALASD in their primary briefs, however, have failed to identify any specific provision in the regulation that would be considered ambiguous. Indeed, they cannot, because the regulatory language, while "lengthy and complex", is straightforward and clear in its

meaning.” (Response at 15)¹ In support of its argument, MCEA specifically focuses on regulatory language referenced in 40 C.F.R. § 122.44(d)(1)(vi) and (vii) to conclude MPCA’s action is unlawful. MCEA claims that these portions of the regulation clearly and unambiguously require that “PCA must establish an effluent limit using a numeric criterion and must be able to demonstrate that the effluent limit will fully protect Lake Winona so it can be used for swimming and fishing and will protect aquatic life.” (Response at 19 (emphasis supplied)). MCEA claims that MPCA must rigidly apply this mandatory requirement (Response at 20) and immediately calculate a final WQBEL even in situations involving assessment of complex nutrient impacts where necessary data collection is ongoing and a TMDL study is not yet completed (Response at 22, 26).²

ALASD completely disagrees with this reading of the regulation. The regulation is ambiguous and doesn’t require a fully calculated set of final effluent limits at the time of permit issuance as claimed by MCEA. Consequently, MPCA’s interpretation, which provides a phased-in approach to attaining water quality standards based upon the TMDL results, must be affirmed because it is a reasonable and allowable approach.³

¹ References to “App.” refer to the Appendix to this Reply Brief. References to “ALASD App.,” “MPCA App.” and “MCEA App.” refer to the appendices to the parties’ principal briefs, respectively.

² Under this rigid view, even complex situations such as Lake Pepin, which involves hundreds of discharges and significant non-point source loads, would require the immediate calculation of final WLAs and effluent limits.

³ Contrary to MCEA’s arguments, facts about the alleged magnitude of the District’s contribution to Lake Winona have no relevance in interpreting whether the rule requires immediate calculation of final WQBELs at time of permit issuance. (Response at 5, 7-9) MCEA’s appeal was brought strictly on legal grounds, under the theory that any facility that “causes or contributes” to an impairment must receive final WQBEL at permit issuance. As MCEA’s appeal has nothing to do with the degree of alleged impairment caused by the discharge, such arguments cannot be raised at this time.

A. MCEA Ignores the Relevant Language of 40 C.F.R. § 122.44(d)(1).

MCEA's position is in error for several reasons. First and foremost, MCEA has misconstrued the basic structure of § 122.44(d). The first three sections of that rule describe generally that an effluent limit is required if a "cause and contribute" finding is made. The next three sections (iv-vi) indicate how to identify the applicable standards, and the seventh provision sets forth the basic principle that WLAs in a TMDL should be the basis of effluent limits when WLAs are available. By starting its analysis in section (vi), MCEA overlooks the controlling introductory language of § 122.44 which only requires that permits include "*conditions* meeting the following requirements when applicable." (emphasis supplied) MCEA fails to recognize that MPCA included "conditions" in the permit (1) to halt further nutrient impairment of Lake Winona and (2) to meet a final effluent limit based on a TMDL scheduled for completion within the term of the permit. Together, these "conditions" ensure compliance with all aspects of § 122.44(d).⁴ Importantly, the term "condition" has been found to be broader than the terms "effluent limitation." *NRDC v USEPA*, 822 F.2d 104, 124 (D.C. Cir. 1987) ("As we have previously observed, permits may include conditions other than effluent limitations"). As the rule does not define the term "condition," it cannot be stated that MPCA's approach is inconsistent with the rule's "plain language."

⁴ MCEA entirely misconstrues the email from Region V that specifically found MPCA's approach to be consistent with § 122.44(d). The region acknowledged the TMDL was not "completed"; therefore, the final limit was yet unknown. Nonetheless, Region V concluded that the "proposed discharge" limit (interim and final once calculated) would prevent the discharge from "causing or contributing" to "impairment." MCEA improperly assumes that the Region misunderstood that the existing discharge did not "cause or contribute" to impairment. (Response at 45-46) That is a wholly unsupported reading of this confirmation email.

Additionally, MCEA completely ignores the other controlling provisions of (d)(1)(i) and (d)(1)(iii) which only require that “effluent limits” be set where the discharge of a pollutant “causes or contributes” to a standards exceedance. In this case, MPCA did set effluent limitations for phosphorus. Nowhere does 40 C.F.R. § 122.44(d) mandate the kind of rigid “effluent limit” MCEA claims must be established immediately. (Supra at 3) Certainly, if EPA intended the regulation to require an effluent limit which ensures that an individual facility single-handedly attains water quality standards for the entire water body as MCEA repeatedly alleges, EPA would have highlighted that burden very clearly. It did not. So how did MCEA generate this unlikely burden? MCEA’s legal theory mistakenly focuses on the provision in Subparagraph (vi)(A) which requires MPCA to set effluent limits “using” a calculated numeric criterion that has been demonstrated to attain the narrative standard. As described below, the process does *not* specify when a final effluent limit must be calculated and it does not preclude the establishment of the final WQBEL under the TMDL program. This basic error of regulatory interpretation pervades MCEA’s entire Response.

B. MCEA Misreads 40 C.F.R. § 122.44(d)(1)(vi).

In its response, MCEA claims that 40 C.F.R. § 122.44(d)(1)(vi) unambiguously precludes a permitting agency from issuing an interim limit to preclude further impairment and a final limit based on an upcoming TMDL. (Response at 21) MCEA asserts that (d)(1)(vi) requires that the ALASD permit must include a calculated final “effluent limitation” that ensures the water quality standards for Lake Winona are attained. (Response at 18-20) The full text of this particular subsection, relied upon by

MCEA, can be found in MCEA's response. (Response at 17). The key language, which MCEA concludes unambiguously requires an immediate final WQBEL calculation, is the phrase "*which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use.*" MCEA has completely misread this provision, believing this phrase modifies the words "effluent limits." It does not. This phrase modifies the words "*calculated numeric water quality criterion*" which immediately precede it.⁵ Under the proper reading, § 122 44(d) does not require that individual point source effluent limitations assure that standards are attained in the impaired waters as MCEA alleges. It only requires that the effluent limit be based on a calculated numeric criterion which is designed to attain and maintain the designated use.

Moreover, MCEA's position creates an impossible reading when multiple dischargers are contributing to an impairment, a common situation covered by this rule. Under MCEA's reading, MPCA must set an effluent limit for an individual discharger to an already impaired water body that MPCA demonstrates will "ensure that water body attains and maintains narrative water quality criteria." (Response at 18) When multiple facilities and sources, including non-point sources, are contributing to the impairment, as is common in nutrient situations (*e.g.*, Lake Pepin, the Gulf of Mexico, Chesapeake Bay, etc.), individual facility permit limits cannot ensure standards attainment.⁶ MCEA's

⁵ The accuracy of ALASD's reading of this provision is further supported by the subsequent sentence which starts with the phrase "such criterion" that refers back to the preceding sentence which describes how "such criterion" must be generated, not how such "effluent limit" must be generated.

⁶ In the ALASD permit situation, there are at least two point source dischargers, ALASD and the City of Alexandria stormwater discharge. Contrary to MCEA's characterizations, even in the District's situation it is entirely plausible that impairment would exist with the

denials aside, this common situation effectively bans issuance of permits for existing dischargers to many impaired waterbodies (50% of the dischargers in Minnesota). Such a prohibition contradicts the principles of the Clean Water Act addressed in *Arkansas v Oklahoma*, 503 U.S. 91, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992).

MCEA's reading would also force the first discharger renewing its permit to disproportionately reduce its contribution as compared to the other dischargers that were fortunate enough not to come up for permit renewal. The TMDL process was designed to effectively and proportionately handle scenarios with multiple sources, point source or non-point. On impaired waters, EPA rules allow states to first implement non-point source controls in lieu of point source load reductions, where an agency determines such measures may ensure water quality standard attainment. 40 C.F.R. § 130.2(i). MCEA's position, however, would preclude this approach.

MCEA's "clear reading" is neither an effective, legally mandated, nor proportionately fair way to handle this complex scenario. MCEA has misinterpreted this provision to imply a requirement that is not stated in the rule, is illogical, and in many circumstances would be impossible to achieve. At a minimum, the regulation is ambiguous on the issue and deference to MPCA's interpretation is reasonable.

complete elimination of its discharge. As stated by MPCA's staff, "In addition to phosphorus, the ALASD WWTP also contributes a significant share of the water that flows into Lake Winona each year. This is due to the fact that the watershed is small. The ALASD WWTP discharge thus has opposing effects on Lake Winona" and "It is possible that addressing the ALASD WWTP discharge alone may not be sufficient to improve water quality in Lake Winona to sufficiently meet designate uses" (MPCA App. at 57-58)

C. MCEA Misreads 40 C.F.R. § 122.44(d)(1)(vii).

MCEA also asserts that MPCA's approach reads out part of the provision (vii) and is, therefore, an unacceptable construction of the rule. The full text of this particular subsection can be found in MCEA's response. (Response at 24). Again, MCEA misreads the section by implying requirements that do not exist on the face of the regulation. MCEA claims this section clearly mandates that final WQBELs must be calculated *immediately* for discharges that "cause or contribute" to water quality violations, regardless of the factual setting. (Response at 24).

Contrary to MCEA's assertion, this subsection does not contain any such express requirement. This subsection merely provides general methodologies to follow when calculating a WQBEL (the section is prefaced with the words "*when developing water quality based limits.*") This subsection does not discuss the timing of "when" WQBEL development must occur or preclude a state from relying on the TMDL program to identify the necessary WQBEL. EPA would not have used the word "when" which implies some future temporal event, as a substitute for the word "immediately" or "at permit issuance." As such, this rule provision does not support MCEA's position that MPCA must immediately calculate the final WQBEL for a discharger on an impaired water body regardless of the factual situation (*e.g.*, where ongoing data collection and analyses are necessary to calculate the WQBEL). Nothing in the regulation precludes a state from phasing in effluent limits in a permit by imposing interim limits to prevent

degradation and calculating a final WQBEL when an ongoing watershed-based TMDL study is completed.⁷

D. 40 C.F.R. § 122.44(d)(1) is Silent on the Issue of Timing.

Usually, the multiple meanings and readings of the written words will make a regulation ambiguous. Sometimes, however, it is what isn't written that makes the regulation ambiguous. As stated by the Supreme Court, "if the statute is *silent or ambiguous* . . . the question . . . is whether the agency's answer is based on a permissible construction of the statute." *Chevron USA Inc. v. NRDC*, 467 U.S. 837, 843 (1984) (emphasis supplied). As previously discussed, nowhere does § 122.44(d)(1) discuss the timing of the calculation of a final WQBEL or by which means the waterbody must attain standards. ALASD's principal brief repeatedly made this point and MCEA completely failed to point this Court to a specific provision that discussed WQBEL timing. Nonetheless, MCEA reads the regulation to mean MPCA cannot renew a permit to a discharger on an impaired waterbody unless the MPCA immediately calculates a final WQBEL for the parameter of concern which ensures that the water body complies with water quality standards. MCEA states that the "regulation 'as a whole' clearly contemplates" this conclusion. (Response at 25) What a rule may "contemplate" obviously requires one to look beyond the plain language of the rule; thus, MCEA itself admits the uncertainty of its rule interpretation. However, when asserting that an agency

⁷ On May 25, 2007, EPA issued a memorandum entitled "Nutrient Pollution and Numeric Water Quality Standards," due to the difficulties encountered by states in developing nutrient standards and appropriate effluent amounts. (App. at 1-8) EPA's memorandum focuses on the need to develop numeric standards and implement them under the TMDL process. Nowhere does this memorandum indicate that states are to immediately impose nutrient reduction under § 122.44(d) as alleged by MCEA. If EPA interpreted § 122.44(d) as MCEA claims, the memorandum would have been unnecessary.

is incorrectly interpreting its own regulation by failing to apply an unambiguous mandatory prohibition, the regulation must do more than “contemplate” a result. The plain language must expressly require it. *Chevron, U.S.A., Inc.*, 467 U.S. 837 at 844 (1984), *as cited in INS v Jong Ha Wang*, 450 U.S. 139, 144, 101 S.Ct. 1027, 67 L.Ed.2d 123 (1981) (“Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”)

II. The Contextual Backdrop of the Regulation Also Creates Ambiguity

Both sides agree that the meaning of the regulation must be interpreted within the context of the regulation.⁸ (Response at 22) As stated by the Supreme Court, “[t]he meaning of statutory language, plain or not, depends on context.” *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991); *see also, State v. Donaldson*, 41 Minn. 74, 42 N.W. 781, 782 (1889) (noting that even when “the words are plain,” ambiguity “may be created by the context”). Therefore, this Court must view the words of the regulation “in their setting, not isolated from their context.” *Chiodo v. Board. Of Education*, 298 Minn. 380, 215 N.W.2d 806, 808 (Minn. 1974). In its brief, MCEA claims that “PCA [ALASD] has failed to point to any words or phrases in the regulation... or for that matter, the entire NPDES permitting regulation... that in any way create ambiguity in the meaning of words used in...122.44(d)(1)(vi)(A).” (Response at

⁸ MCEA claims that PCA, and presumably ALASD, are misinterpreting what can appropriately be used as ‘context.’ ALASD is unsure what ‘misuse’ of context MCEA is referencing.

23). ALASD provided this Court a thorough explanation of the regulatory history of the provision as contextual support in favor of MPCA's permitting approach (ALASD Brief at 30-38). However, there are a few additional points that need to be emphasized in light of MCEA's claims.

A. When EPA Establishes an NPDES Permitting Prohibition, It Does So Expressly.

Despite its protestations that 40 C.F.R. § 122.44(d)(1) does not impose a permit ban as the regulation at issue in *Annandale/Maple Lake* did, MCEA's rigid reading of the regulation will have the same effect as an express prohibition on issuing permits to existing dischargers on impaired waterbodies. *Cf.* 731 N.W.2d 502, 517 (Minn. 2007). Indeed, the Court of Appeals in its decision in this case below faulted MPCA for issuing a permit that did not contain all of the conditions the court said were required by its reading of § 122.44(d)(1). In so doing, the Court of Appeals cited a different section of the NPDES rules – 40 C.F.R. § 122.4(d) – and concluded that “[a] state may not reissue a permit ‘[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements.’” *In the Matter of ALASD*, No. A06-1371, 2007 WL 2421527, *6 (Minn. Ct App. August 28, 2007) (unpublished). The Court of Appeals, like MCEA, erroneously interpreted the word “condition” to mean a specific type of effluent limit that had to be immediately calculated and imposed.⁹ Thus, while a

⁹ To reach the result, the Court of Appeals had to read the two regulations in conjunction with one another. However, if EPA wanted this result, it would have included existing dischargers in its prohibition in § 122.4(i). This provision contains almost the same exact prohibition imposed by the Court of Appeals, but for new dischargers. 40 C.F.R. § 122.4(i) (“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

permit ban is not expressly provided in § 122.44(d)(1), a ruling that forces MPCA to set overly rigid permit conditions that cannot be presently derived would have the same effect. This is inconsistent with EPA's understanding of § 122.44(d)(1).

In fact, ten years after the adoption of § 122.44(d), EPA proposed and then withdrew a prohibition to address existing discharges to impaired waters. 64 Fed. Reg. 46068 (August 23, 1999) and 65 Fed. Reg. 43640 (July 13, 2000). EPA sought to set new requirements for existing dischargers to impaired waters pending TMDL development because of concerns that such waters not suffer further impairment. EPA wanted "reasonable further progress" to be achieved pending TMDL development. 64 Fed. Reg. 46046. EPA proposed to modify the prohibition section of the NPDES rules (§ 122.4) so that significant load increases from existing dischargers would not occur and some further reductions could be achieved. EPA specifically concluded that existing non-expanding facilities would simply be left alone, pending TMDL development: "[f]urthermore, it might be very disruptive to existing dischargers if they were required to offset their discharge before a TMDL is established only to possibly receive different permit limits and conditions once wasteload allocations and a margin of safety are

water quality standards.") It is completely illogical to think that EPA intended this circuitous interpretation when it could have easily applied § 122.4(i) to existing dischargers if it so desired. Although MCEA refuses to acknowledge the relevance of § 122.4(i) (Response at 41, n.12), the presence of the § 122.4(i) prohibition proves that if EPA intended to have a similar prohibition apply to existing dischargers, pending TMDL development, it would have not limited § 122.4(i) to new sources. EPA was clearly trying to treat existing dischargers differently from new dischargers and MCEA's protestations to the contrary do not change this fact.

established in a TMDL. EPA seeks to avoid these disruptions if possible.” 64 Fed. Reg. 46068 (August 23, 1999) (ALASD App. at 146).¹⁰

EPA obviously would not have undertaken such action if § 122.44(d), in conjunction with § 122.4(d), so clearly mandated that states immediately calculate and impose final effluent limitations that would ensure standards attainment as MCEA claims. Nor would EPA have proposed a distinction between existing and expanding discharges as § 122.44(d) contains no such distinction when evaluating the need for effluent limitations. EPA’s decision to withdraw that proposal and, instead, commit to issuing further guidance on the matter (which has yet to be issued) underscores the uncertainty associated with the interpretation and application of the existing rules. (ALASD Brief at 21, n. 16)

III. EPA Implementation Confirms MCEA’s Rule Interpretation is Misplaced

A. Several of the Documents Used to Support MCEA’s Position Pertain to Toxics, Not Nutrients.

MCEA’s selective citation to the 1989 rule preamble to support its position overlooks a basic point that that the central focus of the 1989 EPA rule action was the

¹⁰ The context of the Clean Water Act also comes into play because MCEA’s reading of the regulation would usurp the TMDL process established in CWA Section 303(d) (33 U.S.C. § 1313(d)). The TMDL process was created for these types of situations, and the Grumbles memorandum expressly refers to that process to address nutrient impairment issues. App. at 12. TMDL development, however, is not as simple a process as MCEA would have this Court believe (Response at 8). Consequently, as stated in the District’s original brief, the CWA does not establish deadlines for the development of nutrient TMDLs. (ALASD Brief at 16). Certain TMDLs are more complex than others and EPA has repeatedly recognized that nutrient TMDLs are some of the most complex to develop (ALASD Brief at 17). MCEA’s position would in essence require state agencies, such as MPCA, to develop a TMDL-equivalent effluent limitation for every individual discharger on an impaired basin. The Act does not require such redundant and impossible feats to be achieved.

discharge of toxics to implement Section 304(l) of the Act.¹¹ “Today’s action amends Parts of 122, 123 and 130 of EPA’s regulations. The regulations clarify EPA’s surface water toxics program and incorporate Section 308(a) of the Water Quality Control Act of 1987 [CWA Section 304(l)] into EPA’s toxics control program.” 54 Fed. Reg. 23868 (emphasis supplied). That statutory amendment established mandatory timeframes for imposing effluent limitations for these parameters. 33 U.S.C. §§ 1313(c)(2)(B) & 1314(l). These deadlines were not applicable to non-toxics.

The portion of the rule preamble quoted by MCEA is entitled “Changes to the National Surface Water Toxics Program.” 54 Fed. Reg. 23871 (emphasis supplied). (Response at 26-27). This preamble section recommended that permitting authorities use the “Technical Support Document for Water Quality-based *Toxics Control*” (1985, updated, 1991) to implement the new rule requirements and determine necessary effluent limitations. 54 Fed. Reg. 23873 (emphasis supplied).¹² Thus, EPA’s focus on controlling toxics discharges and meeting related statutory deadlines is the driving force behind the preamble statements cited by MCEA that indicate that effluent limitations should be immediately calculated in the absence of a TMDL or available WLA, (*e.g.* Response at 26-27). Nutrients are nowhere mentioned in the rule or its preamble in this regard because they are not subject to Section 304(l) timeframes for effluent limitation development.

¹¹ EPA also required use of whole effluent toxicity tests to ensure that toxic pollutants not otherwise limited by EPA or the states would nonetheless be regulated. 40 C.F.R. §§ 122.44(d)(1)(iv) & (v).

¹² The TSD sets simplified procedures to calculate toxics limits. These procedures have no relevance whatsoever to proper application or derivation of nutrient limitations.

MCEA also cites to a contemporaneous EPA memorandum in support of its position. (Response at 18) However, MCEA failed to quote the portion of this memo which specifies that “[t]he specific requirements in § 122.44(d) are structured in a way that implements EPA’s Policy for the Development of Water Quality Based Permit Limitations for Toxic Pollutants....Regions will need to look closely at each state’s surface water toxics control program...” (James R. Elder, Director of Water Enforcement August 21, 1989) (emphasis supplied).¹³ Obviously, this document cannot form any basis to conclude the rule sets any hard and fast deadlines for nutrient related requirements. At this time EPA had not even published *any* nutrient criteria or nutrient effluent limitation development documents so it would have been impossible for this rule to apply to that parameter. (App. at 3)

MCEA’s claim that the rule must be interpreted to impose requirements on an entirely different class of pollutants never discussed in the rule violates federal Administrative Procedures Act notice requirements. *Paralyzed Veterans of Am. v. D C Arena L.P* , 326 U.S. App. D.C. 25, 117 F.3d 579 (D.C. Cir. 1997) One cannot propose a rule for one purpose, then turn around several decades later and claim it applies to something completely different.¹⁴ Thus, MCEA’s assertion that EPA intended that §

¹³ Likewise, the letter signed by James Hanlon addresses California’s actions under the California Toxics Rule (CTR), not nutrients. (MCEA App. at 65-67) The CTR was a federal action that imposed dozens of numeric toxics standards on California waters since California failed to comply with CWA § 304(l). (40 C.F.R. § 131.36(d)(10)) CTR standards must be achieved unless and until amended. 40 C.F.R. § 131.21.

¹⁴ “While a final rule need not be an exact replica of the rule proposed in the Notice, the final rule must be a ‘logical outgrowth’ of the rule proposed.” *Nat’l Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986). “The test that has been set forth is whether the agency’s notice would fairly apprise interested persons of the subjects and issues” of the rulemaking. *Id.* (citation and internal quotation marks omitted). Agencies

122.44(d) to require *immediate* imposition of all effluent limitations needed to attain narrative nutrient water quality standards is not well founded when 1) prompt attainment of nutrient standards was plainly not the focus of the rule; 2) no EPA guidance on numeric nutrient criteria was available when the regulation was adopted; and 3) different, complex data collection and modeling procedures were required to set proper nutrient limits. This entire line of argument from MCEA is misplaced. None of the rule preamble or related policy statements from the time the rule was adopted provide legal support for MCEA's claim that the rule unambiguously requires the immediate calculation of final effluent limits that will attain narrative water quality standards for nutrients at the time of permit issuance.

B. EPA's Varied Approaches Do Not Support MCEA's Position.

MCEA's bold assertion that EPA has always required the calculation and imposition of final effluent limits for nutrients regardless of whether a TMDL is available is clearly wrong. (Response at 28) MCEA claims that the quotations cited by the District to show EPA's flexible administrative practice somehow misrepresent the situation because MCEA is able to find other sections of those or related letters that indicate that limits must be calculated.¹⁵ (Response at 20, n.6) The fact that there may be certain

accordingly are not permitted "to use the rulemaking process to pull a surprise switcheroo." *Env'tl Integrity Project v EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

¹⁵ MCEA again claims that a comment by ALASD counsel before the MPCA Citizens' Board indicates that the 0.3 mg/L limit was a "negotiated" limit, rather than a limit imposed by operation of law. (Response at 20, n.5) This is a fabrication based on taking this statement out of context, which MCEA also tried to purvey on the Court of Appeals without success. What the District and the MPCA negotiated was the pre-construction effluent intervention limit of 0.47 mg/L. This intervention limit accommodated ALASD's concern about meeting the more stringent effluent limit required by Minn. R. 7050.0211 during construction of the expanded facility and replacement of the filtration

situations which warrant immediate calculation of limitations (usually toxics), does not support MCEA's position that a single, uniform position is applied by EPA for all situations. The very fact that EPA allows flexibility, depending on the circumstances, confirms MCEA's absolute position is in error. For example, Region X expressly stated that effluent limit deferral would be allowable if the TMDL was expected to be issued in the near future. (ALASD App. at 109) Obviously, if the rule were clear on its face and mandated that final water quality based limits be fully calculated at permit issuance on all facilities that cause or contribute to an impairment regardless of TMDL status, EPA's various correspondence would have said so and not discussed situations where such limits are not required for dischargers to impaired waters.¹⁶

system used to filter solids containing phosphorus from facility effluent. The 0.3 mg/L limit in the permit and the schedule of compliance based on the Lake Winona TMDL were never subject to negotiation and were imposed by MPCA to meet the requirements of § 122.44(d), Minn. R. 7050.0211, and MPCA's pre-TMDL permitting policy.

¹⁶ As noted earlier, where toxics are involved, EPA is statutorily constrained to ensure that such limitations are calculated promptly, in compliance with CWA § 304(l). However, it is obvious that the various regional offices allow increased flexibility when addressing nutrients as disclosed by documents from EPA Regions III, VII and X. In rebuttal to MCEA's claim, ALASD provides EPA Region IV's pre-TMDL permitting policy that allows a different permitting approach where nutrients are involved. (App. at 13-17) EPA Region VII's formal FOIA response which mirrors the statements of the Regional coordinator previously provided is also attached. (App. at 18) MCEA's attempts to diminish the information by claiming it was obtained from EPA staff ignores the fact that it was information provided by EPA under FOIA explaining the administrative practices of each delegated state NPDES authority in implementing § 122.44(d). EPA is the NPDES oversight authority in these regions. If the state implementation procedures were not allowable, EPA would have required the delegated state agency to amend these procedures and EPA certainly has not. That some EPA regions would prefer a different approach does not mean that such preference is a legal requirement.

C. **EPA Has Approved MPCA's Interim Limit Approach in Some Situations.**

MCEA's brief attempts to classify the interim 0.3 mg/L phosphorus limit imposed on the District as a "final" water quality-based limit and discount the language of the permit that calls for imposition of a more restrictive final WQBEL when the TMDL is completed (Response at 9). MCEA claims this approach is not allowed under the NPDES rules. First, the rules nowhere state that interim limits are not allowed. Second, this is precisely the type of permit action EPA Region VIII informed the State of Montana was acceptable for the City of Bozeman. (App. at 10).¹⁷ EPA itself recommended referring to the limits imposed pending TMDL completion as "Interim Limits" and that the permit be reopened to include more restrictive nutrient limits once the TMDL/WQBEL was completed:

...[T]he East Gallatin River and downstream waters are experiencing water quality problems associated with pollutants that are currently discharged from the Bozeman Wastewater Treatment Plant, particularly nutrients and sediment. Although the TMDL process has not yet begun in the East Gallitan or immediate downstream waters, it is likely that load reductions for nutrients and sediments will be sought when the TMDLs are completed in the future. Given the fact that nutrient and sediment problems already exist and load reductions likely will be required in the future, it is recommended that water quality-based limits for nutrients (nitrogen and phosphorus) and sediments (TSS) are planned to be added to the 2011 renewal permit for the City of Bozeman.

It is apparent from the referenced EPA documents, obtained under FOIA, that the EPA regional offices recognize that deferral of calculation of final water quality-based

¹⁷ This document also received from EPA under FOIA was not previously provided to this Court since MCEA had never raised a claim regarding the nature of the interim limit set by MPCA in the case below. As MCEA's brief raises the issue for the first time, the District submits this letter to confirm the approach is considered acceptable by EPA.

limits is acceptable depending on the circumstances, particularly for nutrients.¹⁸ As the EPA correspondence acknowledges that site specific circumstances may be considered, it would be unreasonable to conclude that the rule plainly contains a mandatory requirement for immediate calculation of effluent limits that will ensure standards are achieved as asserted by MCEA. *Rollins Envtl. Svcs. v USEPA*, 937 F.2d 649, 653 (D.C. Cir. 1991) (Arbitrary and capricious to conclude rule language is plain when multiple interpretations by EPA are held)

D. MCEA Case Law Inapplicable to Issue.

MCEA's citations to cases where final water quality-based effluent limits were challenged as insufficient to ensure standards compliance do not address the issue at hand. (Response at 31, 32) When a final water quality-based limit is determined, the rules are clear that it must be part of an overall pollution control strategy that ensures the standard will be attained. 40 C.F.R § 122.44(d)(vii)(A). However, that issue is not in dispute. Here, MPCA is still in the process of developing the information necessary to calculate the final limit that implements a narrative standard. (Supra at 1; ALASD Brief at 7, n.6 and 10, n.8) MCEA has tried to claim that MPCA is not allowed to issue a permit with interim requirements pending TMDL completion, and a condition to adhere

¹⁸ Whether EPA Region I determined that it had sufficient information to impose limitations on Keene, NH does not demonstrate that MCEA's interpretation of § 122.44(d) is correct. EPA is the permit issuance authority in New Hampshire and can make a judgment call of when it believes it has sufficient information to issue a permit limitation. EPA explained its rationale for proceeding as follows: "uncertainty (heightened by numerous past delays) regarding the date for completion and final approval of the TMDL is another factor on the decision to proceed with water quality-based limits at this time." (MCEA App. at 15) Contrary to MCEA, EPA Region I believes there are factors to consider (such as the timing of the TMDL) regarding whether to immediately calculate a WQBEL.

to the TMDL limits once derived. The cases cited by MCEA do not hold that such a permitting approach is impermissible.¹⁹ The only case to address that situation concluded it was a permissible action. *Communities for a Better Env't v State Water Resources Control Bd.*, 109 Cal. App. 4th 1089 (2003). MCEA has cited no authority to the contrary directly on point.

CONCLUSION

For the foregoing reasons, the District respectfully again requests that this Court reverse the Court of Appeals decision and uphold MPCA's legal interpretation and issuance of the NPDES permit for the ALASD facility.

Respectfully submitted,

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02/13/08

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¹⁹ The case law provided by MCEA (Response at 32) are both situations where the the calculated WQBEL was challenged as insufficient to ensure compliance. *In re City of Marlborough, Mass. Easterly WWTF*, NPDES Appeal No. 04-13, (E.P.A. 2005) the agency used a 'may be possible' standard and this was not enough to 'ensure' compliance. *Id.* at 3-4. Similarly, in *In re Government of the Dist. Of Columbia Municipal Separate Storm Sewer System*, NPDES Appeal Nos. 00-14 and 01-09 (EPA 2002), the permitting agency used a 'reasonably capable' standard instead of the proper 'must ensure' standard. *Id.* at *3. Neither case involved whether an agency could determine the final WQBEL as part of an ongoing TMDL.