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NO. A08-1828

State of Minnesota
In Court of Appeals

In the Matter of a Request for Issuance of the
SDS General Permit MNG300000
for Ballast Water Discharges from Vessels
Transiting Minnesota State Waters of Lake Superior

BRIEF OF RELATOR
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STATEMENT OF THE ISSUE

Issue: Did the Minnesota Pollution Control Agency (“MPCA”) err as a matter of law in failing to conduct non-degradation review prior to issuing the general permit for ballast water discharge (“Permit”) to Lake Superior?

MPCA decision: MPCA issued the Permit without conducting a non-degradation review, asserting that discharges from vessels predate 1984 when the non-degradation rule was adopted and that such discharges are, therefore, not covered by non-degradation requirements.

Most apposite cases, statutes or rules: Minn. R. 7050.0180 (2008); *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 696 N.W.2d 95, 105 (Minn. Ct. App. 2005); *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 660 N.W.2d 427 (Minn. Ct. App. 2003); 40 C.F.R. § 131.12 (2008).

STATEMENT OF THE CASE

Because of the threat posed by aquatic invasive species to Lake Superior, its fisheries, and the natural and human environment, MCEA filed suit in Ramsey County District Court against the MPCA alleging that the MPCA’s failure to regulate the discharge of ballast water from commercial vessels to Lake Superior violated the Minnesota Environmental Rights Act, Minn. Stat. § 116B. On April 21, 2008, Ramsey County District Court Chief Judge Kathleen Gearin issued an Order directing the MPCA to, “take action to enforce its anti-degradation rule prohibiting the discharge of pollutants into Lake Superior” and “to begin

regulating ballast water discharges from ships as water pollution starting on or before October 1, 2008.” *State of Minnesota ex rel., Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, File No. 62-CV-07-2224, Order, ¶¶ 2, 3 (State of Minnesota District Court, Ramsey County, Second Judicial District, April 21, 2008). (App. 2.) Pursuant to the Court’s Order and its state permitting authority, the MPCA issued the General Permit (“Permit”) under review here.

The Minnesota Center for Environmental Advocacy (“MCEA”) submitted comments on the Permit on July 30, 2008, and testified at the MPCA Citizens’ Board and Committee Meeting on September 23, 2008. MCEA commented and testified that the MPCA had erred in its interpretation of Minn. R. 7050.0180, failed to conduct the requisite non-degradation review, and issued the permit with terms that violate the non-degradation standard. MPCA concluded that most ballast water discharges to Lake Superior were not new or expanded, and claimed to have conducted non-degradation review, but in fact had not.

The MPCA Board approved the Permit as proposed, and the MPCA Commissioner signed the Findings of Fact, Conclusions of Law, and Order on September 26, 2008. MCEA filed its Petition for Writ of Certiorari, Writ, and Statement of the Case on October 22, 2008, initiating this appeal.

STATEMENT OF FACTS

I. AQUATIC INVASIVE SPECIES – THE THREAT AND HARMS OF PERMANENT INVASION

Aquatic invasive species introduced to Lake Superior arrive mainly through ballast water discharges, have caused economic and ecological harm, and have interfered with recreational activities and the aesthetic appreciation of Lake Superior. (Record at 273; 385-387; 489-492.) As of 2007, over 180 invasive species are reported to have reproducing populations in the Great Lakes Basin. (Record at 1148.) Forty-three invasive species are known to have already arrived in Lake Superior, and 48% of those are thought to have been introduced to Lake Superior through ballast water discharge. (Record at 273; 738 ¶ 7.) Due to natural barriers, currents, distance, and unique water conditions, the remainder of invasive species in the Great Lakes might not arrive in Lake Superior under their own power. (Record at 743-744 ¶ 47.) They can be and in the past have been brought to Lake Superior by human-caused methods. Ballast water discharged by commercial shipping vessels is the primary means of introducing and spreading invasive species throughout the Great Lakes. (Record at 273; 380-387; 475-482.)

The zebra mussel, introduced to the Great Lakes in 1988 and detected in Lake Superior just one year later, provides a concrete example of the potential economic consequences of the arrival of invasive species that are not yet present in Lake Superior. Zebra mussels spread in just 20 years throughout the Great Lakes and surrounding inland waters in both Canada and the U.S., costing the

region hundreds of millions of dollars per year. (Record at 380-387; 908; 911.) Thus far, the cost of removing zebra mussels from piping in power generation plants, public and private drinking water plants, and industrial facilities, and from navigation lock and dam structures and marinas has been estimated at over \$1 billion since 1989, with intermediate estimates of \$3 billion. Some estimates are as high as \$5 billion. (Record at 380-387; 777; 908; 911.)

Ecological effects have been severe. Invaders have eliminated some native species from their range in the Great Lakes, and driven other species extinct, according to the National Research Council. (Record at 380-381, 386; 570-571.) Aquatic invasive species have put the structure and function of ecological webs in each of the Great Lakes at risk of collapse or diminishment. (Record at 386-7; 489-491.) Many invasive species spread both downstream and occasionally upstream, not only in Lake Superior, but to inland waters of Minnesota, too. Each new arriving invasive species has its own particular effects. Highly diverse, healthy native ecosystems are generally thought to be less susceptible to invasion. As each new invasive species is established and damages the ecology of Lake Superior, the Lake becomes more susceptible to future invasions. (Record at 386; 421.)

Recreation, public health, and safety have also been affected by invasive species: sea lampreys, zebra mussels, ruffe, gobies, and water fleas have damaged sport fisheries by causing desirable sportfish species to decline; spiny water fleas foul fishing gear; and zebra mussels foul boat hulls and motors. (Record at 490-

491.) The biomagnifications of toxins by zebra mussels are also thought to be increasing mercury concentrations in fish, birds, and consequently other species in the food chain. *Id.* On beaches, sharp zebra and quagga mussel shells create hazards for feet; the decomposition of proliferating invasive species, including alewife and zebra mussels, creates a stench that is not pleasing, and contributes to occasional poisoning of waters. Public health and safety has been touched by the effects of invasive species, as well. Zebra mussels have accumulated enough to sink navigational buoys. *Id.*

Aquatic invasive species are live biological pollutants, and as such are unlike any other broad category of pollutants in the environment. Once introduced and established, invasive species can persist forever and are generally impossible to eliminate. They are not diluted over time, but reproduce and proliferate, multiplying, sometimes very quickly, in the absence of their usual predators and competitors. As they multiply, their effects are magnified. Their cost to society is permanent and cumulative. (Record at 386-387.); *see also State of Minnesota ex rel., Minnesota Center for Environmental Advocacy Order at ¶ 21. (App. 6.)*

The reactionary mode of dealing with invasive species, in which appreciation for the need to act comes only after the invader has arrived, has proven to carry large economic costs, and has allowed distressing ecological harm to the Great Lakes. Among the invasive species already established in the other Great Lakes but possibly not yet in Lake Superior is viral hemorrhagic septicemia (“VHS”), the so-called “fish Ebola virus.” As the name and nickname suggest,

VHS causes severe internal and external hemorrhaging, and generally organ failure followed by death, and has been responsible for die-offs in the Great Lakes of more than a dozen fish species, including walleye, muskellunge, smallmouth bass, bluegill, and crappie. *Id.* at ¶¶ 3-4. The Ramsey County District Court found that VHS could be transmitted to Lake Superior through discharge of untreated ballast water infested with VHS. *Id.* at ¶¶ 6, 7. The Court also found that if the VHS virus or an infected fish were to be introduced, the consequences to Lake Superior's fish life will be severe and irreparable. *Id.* at ¶¶ 5, 21. Harm to the activities dependent upon Lake Superior's fish life would also be significant.

A number of factors put Lake Superior at elevated risk of receiving invasive species in ballast water discharged by commercial shipping vessels. Lake Superior receives more ballast water discharged from shipping vessels than any other of the Great Lakes, with the port at Duluth receiving 20,444,988 metric tons (5.4 billion gallons) of ballast water, and Two Harbors receiving 7,118,056 metric tons (1.9 billion gallons) in 2005. (Record at 273; 479; 475-482.) Lake Superior receives roughly 5% of its ballast water from ocean-going vessels ("salties"), with the remaining 95% discharged to Lake Superior from vessels that ply the Great Lakes only ("lakers"). (Record at 475-482.) Salties can carry within their ballast water tanks invasive species, and thus pose the risk of introducing new invasive species to the Great Lakes system. (Record at 739 ¶ 11.) Lakers, because they are the source of the great bulk of ballast water discharged to Lake Superior, are the primary means by which invasive species that have already colonized the other

Great Lakes are picked up elsewhere and deposited in Lake Superior. (Record at 475-482.) Results from recent studies of ballast water in the Great Lakes show that most samples of ballast water tested contained more than 60 living species of organism. Of those vessels whose ballast water was tested, 88% contained living organisms of at least one invasive species. (Record at 380-387; 475-482.)

II. STATUTORY AND REGULATORY BACKGROUND

A. Overview Of Relevant Federal And State Water Pollution Law.

The federal Clean Water Act (“CWA”) has as its purpose “to restore and maintain the chemical, physical and biological integrity of our nation’s waters.” 33 U.S.C. § 1251 (2006). Congress set as a goal in the CWA, the elimination of all discharges to all waters by 1985. *Id.* In the absence of eliminating a discharge altogether, the CWA requires that direct “point source” discharges be permitted through a federal or state permitting program. 33 U.S.C. §§ 1311, 1342 (2006). The limits placed on permitted discharges are of two forms. First, technology-based limits for pollutants in discharged effluent are established and must be incorporated in all permits for a given pollutant discharge. 33 U.S.C. § 1311(b)(1)(A) (2006). These technology-based effluent limits are based on available control technologies. Second, in instances where technology-based limits are not sufficient to protect the water quality of the receiving waters, the law requires water quality-based effluent limits. 33 U.S.C. § 1131(b)(1)(C). Water quality-based effluent limits are limits based not on an evaluation of technology, but rather on what the receiving water can handle and still maintain high quality or

to restore water quality. See *American Paper Institute, Inc., v. EPA, et al.*, 996 F.2d 346, 350 (D.C. Cir. 1993).

The CWA employs “cooperative federalism,” allowing a significant role for states, including administration and enforcement of the water discharge permitting program. 33 U.S.C. § 1342. The CWA directs states to establish federally-approved water quality standards containing water quality goals for all waters within the state. The purpose of these standards is to ensure that “numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.” *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology (PUD No. 1)*, 511 U.S. 700, 704-5 (1994).

There are three elements to state water quality standards: (1) the designated uses of the navigable waters; (2) the water quality criteria used to evaluate whether lakes and rivers are meeting water quality; and (3) an “anti-degradation” policy. *Id.* The anti-degradation requirement mandates both that state standards be sufficient to protect existing beneficial uses of the waterbody and to prevent water quality degradation. *Id.*

The United States Environmental Protection Agency (“EPA”) has delegated authority over water pollution to the state of Minnesota. The MPCA is the state agency charged with administering and enforcing rules and programs pursuant to the CWA. The CWA specifically provides states with the authority to impose more stringent water pollution regulations and standards than the minimum

required by the federal act. 33 U.S.C. § 1370.

In addition to the federal statutory and regulatory requirements to protect water quality, Minnesota also has a state Water Pollution Control Act. See Minn. Stat. § 115.01, *et seq.* Minnesota's water pollution law provides the authority and obligation to the MPCA to administer and enforce the water pollution law, including taking appropriate measures to "prevent, control or abate water pollution." Minn. Stat. § 115.03, subd. 1(a),(e). The state law, like the CWA, prohibits discharging pollution into Minnesota waters absent a permit. Minn. Stat. § 115.07, subd. 1. The state permitting program established pursuant to this provision is the State Disposal System ("SDS") permit program.

Neither the CWA nor the Minnesota Water Pollution Control Act makes any exception allowing for pollution to be discharged from vessels. While regulations were implemented at both the federal and state level to provide for such an exemption, those regulations have since been challenged and found invalid. EPA regulations that provided for such a federal exemption were struck down in federal court. *Northwest Environmental Advocates v. US EPA*, 2005 WL 756614 (March 30, 2005, N.D. Cal); *affd. by Northwest Environmental Advocates v. United States Environmental Protection Agency*, 537 F.3d 1006, 1021 (9th Cir. 2008). The Minnesota Rule which mirrored this federal exemption was likewise vacated by the Ramsey County District Court in its April 21, 2008 Order. *State of Minnesota ex rel., Minnesota Center for Environmental Order* (App. 9.)

B. “Anti-Degradation” Review Requirement.

The federal anti-degradation requirement establishes a three-tiered system of protecting clean waters. 40 C.F.R. § 131.12. Under this system, a waterbody may receive more or less protection from pollution depending on its classification. The highest protection is afforded to those waters that are deemed to be outstanding national resources. 40 C.F.R. § 131.12(a)(3). The federal rule prohibits any degradation whatsoever of the water quality of waterbodies that have been designated as outstanding resources. *Id.*

The federal regulation requires each state to promulgate its own anti-degradation policy and the means to effectuate the policy. State policies must be at least as protective as the federal template. 40 C.F.R. § 131.12(a). A state may promulgate an anti-degradation policy that is more stringent than required by the federal regulations. *Id.*; 40 C.F.R. § 131.4(a); *Raymond Proffitt Foundation v. Browner*, 930 F.Supp. 1088, 1091 (E.D. Pa., 1996), (citing *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 705, 114 S.Ct. 1900, 1906 (1994)).

Minnesota’s anti-degradation policy is set out in rule at Minn. R. 7050.0180 - .0185. Minnesota uses the term “nondegradation” and that term will be used here. Minnesota’s nondegradation rule provides for different levels of protection depending on the classification of the waterbody. All waters are protected from “significant deterioration” and must be kept clean enough to maintain their existing uses. Minn. R. 7050.0185, subp. 1. Minnesota’s rule provides tiered

levels of protection to waters designated as outstanding. For some outstanding waters, no new or expanded pollutant discharge whatsoever is allowed. Minn. R. 7050.0180, subp. 3. For others, no new or expanded discharge is allowed “unless there is not a prudent and feasible alternative to the discharge.” Minn. R. 7050.0180, subp. 6. In such cases, if a discharge is allowed, the MPCA must “restrict the discharge to the extent necessary to preserve the existing high quality” of the outstanding resource waterbody. *Id.*

Lake Superior is recognized by the law, as it is by Minnesota’s citizens, as one of the state’s most outstanding water resources. Minn. R. 7050.0180, subp. 6. That portion of Lake Superior subject to the ballast water permit is designated as off limits to the discharge of new or expanded pollutants unless there is no prudent or feasible alternative. *Id.* If there are no prudent and feasible alternatives, the discharge must be restricted to the extent necessary to preserve Lake Superior’s high water quality. *Id.*

III. MPCA’S GENERAL PERMIT ALLOWING BALLAST WATER DISCHARGES.

MPCA’s general permit allowing ballast water discharges (“Permit”), on appeal here, applies to vessels greater than 50 meters in length and having a ballast water capacity greater than eight cubic meters. The Permit applies to all such vessels in the Minnesota waters of Lake Superior. (Record at 738-748 ¶¶ 16, 18.)

MPCA has imposed a “biological performance standard” in the Permit. (Record at 740.) The biological performance standard MPCA selected is known

as the International Maritime Organization (“IMO”) standard. The IMO standard sets limits by organism size class on the maximum number of allowable live organisms that may be discharged in a given volume of water. (Record at 738-748 ¶ 25.) Specifically, the permit allows for the discharge of fewer than 10 viable organisms larger than 50 microns in size (this would include fish) per cubic meter (a metric ton, “MT”) of water; fewer than 10 viable organisms 10-50 microns in size per milliliter; fewer than 2,500 colony-forming units of E. coli per liter; and fewer than 1,000 colony-forming units of intestinal interococci per liter. (Record at 383.) Although the MPCA assumes viruses are killed if certain bacteria are killed by a treatment, there is no limit imposed on viable organisms at the size range of viruses, which are smaller than 10 microns. (Record at 659, lines 4-9, 10-23.) The limits for E. coli and intestinal interococci are used by the MPCA as surrogates for viruses. (Record at 659, line 10 – 660, line 4.)

The significance of the Permit’s numeric limits, which are given per volume of water (e.g., per liter, or per cubic meter¹), is rooted in the fact that such large volumes of ballast water are discharged to Lake Superior each year. Correspondingly large numbers of live organisms can be discharged in compliance with the IMO limit placed in the Permit.

In 2005, for example, discharges to Lake Superior totaled over 27.4 million metric tons. (Record at 479.) If those discharges all conformed to the biological

¹ A cubic meter of water is equal to one metric ton, and volumes of water are often expressed in metric tons.

control limits, the permit would still allow the following to be discharged: (1) up to 274 million live organisms greater than 50 microns in size (including fish); (2) up to 27 billion live organisms between 10 and 50 microns in size; and (3) up to 6 billion colony-forming units of E. coli. (Record at 383.)

Due to concern over the large number of live organisms that could be discharged under the proposed Permit limits, MCEA and others requested in comments and testimony that MPCA impose more stringent interim standards, as has been done in California. California's vessel discharge treatment standards prohibit, for example, any discharge of a live organism larger than 50 microns. Cal. Code of Regs., tit. 2, §§ 2291-2296. The California standards also contain specific limitations on bacteria and viruses. *Id.* In addition, MCEA pointed out to the MPCA that federal treatment standards being considered by Congress at the same time the MPCA was developing its Permit would have imposed a limit 100 times more stringent than the IMO standards. (Record at 384.) A comparison of the IMO and California biological performance standards, provided in the table at App. 13, was submitted to the MPCA Board at the Board meeting on September 23, 2008, to illustrate the greater stringency of the California standards. (Record at 689-697.) The MPCA Board approved the Permit with the more lax IMO standards. (Record at 733.)

The implementation timeline incorporated into MPCA's Permit does not impose the IMO biological performance standards on vessels immediately, and in fact the Permit does not impose any performance requirement for existing vessels

until 2016 – seven years after the permit was issued. (Record at 741.) Vessels constructed after January 1, 2012, are required to be compliant when they begin operating. *Id.* MCEA objected to the extended implementation schedule and the fact that the MPCA had not conducted a non-degradation review, at the MPCA Citizen Board meeting. (Record at 689-697.)

MCEA requested in its written comments and at the MPCA Board meeting that the Board include a shorter compliance timetable in the Permit. *Id.* MCEA presented the Board with a second table, provided at App. 14, comparing the proposed timetable with several faster alternatives. (Record at 689-697.) One Board member agreed that shortening the implementation schedule would be “very valuable to the environment” and suggested that the Board delay its decision with direction to staff to “come forward with a proposal for a shorter implementation schedule.” (Record at 724-725.) The proposal was withdrawn, however, after MPCA’s counsel advised, “I don’t think you can delay the decision” because it would require another public notice, and the MPCA Commissioner spoke in opposition. (Record at 725-726.) The Permit was passed with the original seven-year implementation timeline. (Record at 733.)

ARGUMENT

I. STANDARD OF REVIEW.

This Court must reverse the MPCA’s decision because the administrative finding, inferences, conclusions or decision are affected by an error of law. Minn. Stat. § 14.69 (2004); *see also Northern States Power Co. v. Minn. Public Util.*

Comm'n, 344 N.W.2d 374, 377 (Minn. 1984); *In the Matter of City of Owatonna's NPDES/SDS Proposed Permit Reissuance for the Discharges of Treated Wastewater*, 672 N.W.2d 921, 926 (Minn. Ct. App. 2004); *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 660 N.W.2d 427, 433 (Minn. Ct. App. 2003).

MCEA submits that the MPCA made a legal error in its interpretation and application of the state nondegradation rule, Minnesota Rules 7050.0180. Review of an agency's interpretation of its own regulations presents a question of law that Minnesota courts review *de novo*. *In the Matter of the Cities of Annandale and Maple Lake*, 731 N.W.2d 502, 516 (Minn. 2007).

When the language of the regulation is clear and capable of understanding, a court will not defer to the agency interpretation, and may interpret the regulation based on its plain meaning. *Id.* ("If a court concludes the meaning of the words in the regulation is clear and unambiguous, it need not defer to the agency's interpretation . . .") The rule at issue here is unambiguous, and therefore this Court need not defer to the MPCA.

Even if this Court concluded the nondegradation rule were susceptible to multiple interpretations, the court must still determine whether the agency's interpretation is reasonable. *Id.* If MPCA's interpretation is not reasonable, this Court must reverse and remand the permit. *Minnesota Center for Environmental Advocacy v. Minnesota Center for Environmental Advocacy (City of St. Cloud)*, 660 N.W.2d 427 (remanding permit to MPCA where inconsistent with federal

law). In addition, where, as here, a required element of the agency's analysis and decision is absent from the record, "there is nothing to defer to..." and the court may remand for further proceedings, reverse, or modify any of the agency's findings, inferences, conclusions, or decisions as being affected by error of law, unsupported by substantial evidence in view of the entire record as submitted, or arbitrary and capricious. *Minnesota Center for Environmental Advocacy v. Minnesota Center for Environmental Advocacy*, 696 N.W.2d at 108 (hereinafter "*City of Princeton*"); Minn. Stat. § 14.69(d)-(f).

II. THIS COURT SHOULD REMAND THE GENERAL PERMIT FOR VESSEL BALLAST WATER DISCHARGES BECAUSE MPCA FAILED TO CONDUCT REQUIRED NON-DEGRADATION REVIEW PRIOR TO ISSUING THE PERMIT.

The Permit must be remanded to the MPCA because the Permit was required to undergo a non-degradation review, which the MPCA failed to do. Non-degradation review applies to "expanded discharges." Because they contain new pollutants not present when Lake Superior was designated an outstanding resource value water, the discharges covered by the Permit are expanded under the definition in Minn. R. 7050.0180, subp. 2C.

As the Fact Sheet, an explanation that accompanied the permit, indicates, MPCA failed to conduct a non-degradation review for the Permit on the basis of an erroneous interpretation of the 7050.0180:

Consistent with this regulation, MPCA staff is required to complete non-degradation reviews for ships discharging ballast water into Minnesota waters of Lake Superior that were not in service and discharging ballast

water to Lake Superior on or before November 5, 1984, and ships that have expanded ballast water discharges since November 5, 1984

...
The MPCA does not believe that expanded discharges of ballast water flow are likely to occur. The size and number of ballast tanks is fixed when a ship is constructed. The only way that an expanded discharge of ballast water from a ship could occur is if more ballast tanks were added to a ship. The environmental threat posed by the pollutants carried in ballast water and addressed in this non-degradation review – aquatic invasive species (AIS), mercury, PCBs, and salinity – have remained relatively unchanged since the opening of the St. Lawrence Seaway in 1959. Therefore, non-degradation review applies exclusively to vessels not in existence on November 5, 1984.

(Record at 282-283.).

As made plain above, MPCA interpreted its non-degradation rule to apply only when there is an expanded volume of discharge. That interpretation, as set out below, is incorrect. Moreover, although MPCA may assert that it conducted non-degradation review, it did not.² Basic and essential pieces of a non-degradation review, without which non-degradation review cannot be completed or properly reviewed, are missing from the Record. Finally, even if some sort of non-degradation review was conducted, it failed to result in permit terms that satisfy the requirements of the non-degradation rule.

A. The General Permit Authorizes “Expanded” Discharges Of Pollutants To Lake Superior And Therefore Triggers Nondegradation.

The general permit for vessel discharges to Lake Superior triggers non-degradation review because it authorizes “expanded” discharges as that term is

² MPCA’s findings and assertions are confusing and contradictory. While it asserts that non-degradation review is not necessary, it also has asserted that it did a non-degradation review. (Record at 742¶¶ 35-36.)

defined in the applicable rule.³ The Rule, by its plain terms, defines the term “expanded” more broadly than simply an expansion of volume. Therefore, even if all of the ballast water discharges allowed under MPCA’s permit were from vessels in existence prior to adoption of the rule, the mere fact that the volume of discharge may not increase with time does not save the permit from non-degradation review.

Minnesota Rule 7050.0180, subp. 2, defines an “expanded discharge” as one, “that changes in volume, *quality*, location, or *any other manner after the effective date the outstanding resource value water was designated* . . . such that an increased loading of one or more pollutants results.” (Emphasis supplied). The rule explicitly directs MPCA on how to measure whether increased pollutant loading could occur: “... the agency shall compare the loading that would result from the proposed discharge with the loading allowed by the agency as of the effective date of outstanding resource value water designation.” *Id.*

Invasive species are pollutants under state law and the federal CWA, pursuant to which Minn. R. 7050.0180 was promulgated. State law defines “pollutant” to include any waste discharged to waters of the state. Minn. Stat. §115.01, Subd. 12. State law also defines “pollution of water,” “water pollutant” or “pollute the water” broadly to include not only discharge of any pollutants, but also, “the alteration made or induced by human activity of the chemical, physical,

³ This Court has already concluded that the MPCA’s non-degradation rule applies equally to general permits as to individual permits. *City of St. Cloud*, 660 N.W.2d at 435-436.

biological, or radiological integrity of waters of the state” *Id.* at Subd. 13; *see also Northwest Environmental Advocates v. United States Environmental Protection Agency*, 537 F.3d 1006, 1021 (9th Cir. 2008)(citing *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988)); *see also State of Minnesota ex rel., Minnesota Center for Environmental Advocacy*, Order. (App. 19.)

Whether an increased loading of one or more pollutants would result from the proposed change in discharge is determined by comparing future pollutant loads expected from the proposed discharge, with the historic pollutant loads as of the effective date of the receiving water’s outstanding resource value water designation. Minn. R. 7050.0180, subp. 2(C). In the case of Lake Superior, it is a simple before-and-after comparison, with “before” set at the date of Lake Superior’s designation, on November 5, 1984.

Many of the invasive species currently in Lake Superior have been newly introduced since November 5, 1984, when Lake Superior was designated. (Record at 386; 397; 778; 896.) There were no zebra mussels, Eurasian ruffe, VHS, or many other aquatic invasive species yet in the Great Lakes. *Id.*; *see also See State of Minnesota ex rel., Minnesota Center for Environmental Order* at ¶¶ 3-5. (App. 2.)

New pollutants for the purposes of Minn. R. 7050.0180, subp. 2(C) include all distinct invasive species introduced to Lake Superior since 1984, and all invasive species that make their way into ballast water tanks in the future. The

fact that new pollutants are, and will be, present in the future discharges from existing vessels is a “change in . . . quality” of the discharge, which means it is “expanded” for purposes of non-degradation. Minn. R. 7050.0180, subp. 2. The addition of new pollutants, likewise, represents a manner of change in the discharge that results in increased pollutant loading. *Id.* When these new invasive species make their way into ballast water, the quality and other aspects of the discharge change markedly, including the risk posed to Lake Superior, and the economic and social units that depend on the Lake Superior ecosystem. *Id.* Each pollutant previously not present in ballast water discharges in 1984, by definition, is a new pollutant causing an increase in pollutant loading to the lake. *Id.*;

Northwest Environmental Advocates v. United States Environmental Protection Agency, 537 F.3d 1006, 1021 (9th Cir. 2008), citing *Nat'l Wildlife Fed'n v.*

Consumers Power Co., 862 F.2d 580, 583 (6th Cir. 1988); also see *State of Minnesota ex rel., Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, File No. 62-CV-07-2224, Order (State of Minnesota District Court, Ramsey County, Second Judicial District, April 21, 2008). (App.

1.)

B. Though MPCA Was Required To Do Non-Degradation Review, No Such Review Was Completed.

MPCA did not complete the required non-degradation review. To the extent that the MPCA asserts that it conducted non-degradation review in accordance with the requirements of Minn. R. 7050.0180, it did not. Had MPCA

conducted the required non-degradation review, the Record would contain significant components of a non-degradation review analysis which are lacking, including a definition of existing water quality; an assessment of the risk and manner of water quality degradation from the invasive species believed most likely to invade Lake Superior; and based on those, an analysis and determination that the biological performance standards in the Permit will in fact preserve Lake Superior's existing high water quality.

1. There is no water quality assessment and characterization.

If the MPCA had performed a proper non-degradation review, then the Record would contain a full water quality characterization for Lake Superior. That characterization would establish the existing high quality in Lake Superior, as required in the rule. *City of Princeton*, 696 N.W.2d at 108-109.

In *City of Princeton*, the MPCA was challenged as having violated Minn. R. 7050.0180 for permitting a discharge to an outstanding resource value water without imposing stringent controls to preserve the high water quality; for failing to address alternatives; and for failing to define the existing water quality to be preserved as Minn. R. 7050.0180 dictates. The MPCA claimed deference was due its decision, because "existing high water quality" as used in 7050.0180 was ambiguous and subject only to the agency's expert interpretation. This Court ruled that the MPCA's failure to impose restrictions designed to maintain the high water quality was an error of law. This Court also explained that it was impossible

to evaluate whether the permit conditions in fact preserved existing water quality, because the MPCA had failed at the outset to define at the outset the existing water quality in the record. *City of Princeton*, 696 N.W.2d at 108-109. In remanding the permit, the Court ordered the MPCA to consider the proposed alternative, to define the existing high water quality, and to impose standards stringent enough to preserve the existing quality. *Id.* at 106-109.

In the case at hand, as in *City of Princeton*, there is no definition in the record of existing high water quality for Lake Superior. Because such a definition is required in order to assess whether the controls selected by the MPCA are in compliance with Minn. R. 7050.0180, the Permit must be remanded. *City of Princeton*, 696 N.W.2d at 108-9.

2. **There is no assessment of how Lake Superior water quality would be degraded, in what aspects, and to what degree, by the arrival of expected and foreseeable invasive species, were they to be introduced and become established.**

Just as nothing in the record defines the existing high water quality of Lake Superior, the record is also missing a characterization of the harmful capabilities and the potential of invasion posed by the various invasive species thought by MPCA to pose the greatest likelihood of being discharged to Lake Superior. The class of pollutants in the case at hand is markedly different from the standard pollutants under agency review: invasive species are not diluted over time but reproduce on their own, are almost impossible to eradicate, and have irreparable consequences on the species and water. *See State of Minnesota ex rel., Minnesota*

Center for Environmental Advocacy, Order. (App. 1.) In such a context, the potential of each species to become established, to reproduce quickly, to out-compete native species, and generally to damage the water quality of Lake Superior, must all be determined. Those features can determine how successfully, rapidly, and disruptively a given invasive species might be, and therefore the MPCA must know that information to determine how stringently that invasive species must be controlled in ballast water, to keep the species from invading Lake Superior.

There is no such assessment by the MPCA in the Record. Without discussing these factors in the context of a non-degradation review, it is not possible to provide a reasonable basis for the next, and most important step of non-degradation review.

3. **There is no analysis upon which to base a reasoned determination that the chosen controls will preserve Lake Superior's existing high quality and special characteristics.**

The record does not contain a meaningful assessment equating the Biological Performance Standards selected by the MPCA and the effects of discharges compliant with those standards, on the existing high water quality of Lake Superior. The Permit is required to contain stringent controls sufficient to ensure that Lake Superior water quality will be preserved and maintained. Minn. R. 7050.0180; *City of Princeton*, 696 N.W.2d at 108-9. Some comparison of the Lake Superior's water quality now and after the discharge of billions of gallons

and hundreds of millions-to-billions of organisms, is required in the record. The focus of that comparison must be on whether there could be any loss of water quality in the lake as a result of discharges compliant with the Permit. There is no such review in the record.

Without such a review, and a satisfactory conclusion that the Permit's controls will preserve Lake Superior's existing water, the Permit fails to conform to the requirements of Minn. R. 7050.0180 and Minnesota law and must be remanded. *City of Princeton*, 696 N.W.2d at 108-9.

C. The Substantive Limitations Imposed In The Permit Are Not Consistent With State Or Federal Nondegradation Requirements.

Because the MPCA failed to conduct any nondegradation review prior to issuing the general permit for vessel discharges, the substantive limitations it imposed in the permit are insufficient. Even if this Court determined, as the MPCA's confusing findings suggest (Record at 742 ¶¶ 35, 36.), that the Agency *did* a nondegradation review, the limitations imposed in the permit do not comply with the plain requirements of the nondegradation rule. Neither the performance based standards nor the long time horizon for implementation of the standards satisfy the rule's mandate to "strictly control" these discharges "to the extent necessary to preserve the exiting high quality" of Lake Superior. *See* Minn. R. 7050.0180, subp 1 (agency must prohibit or strictly control new or expanded discharges); subp. 6 (agency must restrict discharge to extent necessary to preserve high quality).

As this Court found in MCEA's challenge to the Princeton wastewater discharge permit, MPCA's nondegradation policy means what it says: the Agency must restrict permitted discharges to special waters like Lake Superior "to the extent necessary to preserve the existing high quality" of the Lake. *City of Princeton*, at 105. Here, as there, the Agency failed to impose limitations that satisfy that mandate. Rather than developing permit terms based on what is required to make sure Lake Superior's high water quality is preserved, MPCA appears content to have imposed limits that may minimally protect the Lake from new invasive species seven years from now, and which it argued should be amenable to the shipping industry. See Findings of Fact, Conclusions of Law, and Order at ¶ 49. (Record at 281; 744 ¶ 49.)

In *City of Princeton*, this Court remanded a wastewater discharge permit, in part, because MPCA's findings did not show that the limits in the permit would protect the high water quality of the Rum River, a waterbody with the same special designation as Lake Superior. There, the MPCA stated that its permit limitations included special conditions that were the "most stringent allowed by current rule and policy." *Princeton*, at 106. But the MPCA failed to show that such limits would protect the high quality of the Rum River. The Court correctly stated that the Agency "ignored the clear mandate of the CWA and nondegradation rules to restrict any discharge into an ORVW 'to the extent necessary to preserve the existing high quality.'" *Id.* at 107. The same is true here.

MPCA's findings state that, "[t]he Permit . . . *is much more protective than the former practice* of allowing untreated ballast water discharges to Lake Superior." (Record at 742, ¶ 36 [emphasis added].) MPCA further finds that, "the permit will result in a *decrease in the potential for discharge of invasive species*, will prohibit expanded discharges of *untreated ballast water*, and will impose controls on previously unregulated existing discharges." (Record at 742 ¶ 36 [emphasis added].) There is no finding, however, nor could there be, that the permit terms "stringently control" vessel discharges "to the extent necessary" to ensure that the existing high water quality of Lake Superior is preserved. Indeed, the permit does nothing over the next seven years to prevent the discharge of any number of new invasive species-pollutants to Lake Superior. Even after full implementation, there is no scientific basis to conclude that the IMO standards will preserve Lake Superior's water quality.

Likewise, here, as in *City of Princeton*, public statements made by the MPCA at the MPCA Board meeting make plain that the permit terms, including the IMO standards and the seven-year-long implementation schedule, were not selected to preserve the high quality of Lake Superior, but rather to accommodate the wishes of the regulated party, the very source of the threat to Lake Superior's high water quality. The MPCA has offered no rationale *based on the preservation of Lake Superior's high water quality* for why it rejected stricter standards or a shorter implementation timeline. When one Board member asked staff to consider a shorter implementation period, she was told by counsel it would not be possible

because of the added time that would be necessary to satisfy procedural requirements for a new meeting in which to discuss a shorter implementation period. (Record at 724-725.) The MPCA Commissioner offered another reason, essentially stating that the permit terms reflected the position staff had reached after much stakeholder involvement. (Record at 724-725.) On the basis of those responses the Board member withdrew her suggestion, and no more was said about it. *Id.*

The MPCA staff in *City of Princeton* also made erroneous assertion about the grounds upon which restrictions could be placed on discharges to an outstanding resource value water. 696 N.W.2d at 106. There, the Board was told by staff that the extent of MPCA's obligation was to protect the receiving water's scenic and recreational value, and that the obligation did not extend to existing high water quality. *Id.* Likewise in error, staff informed the Board that it could only impose technology-based controls that were already established in the CWA, and could not impose higher technology standards without the agreement of the regulated part. *Id.* The misplaced focus during permit development, and misdirection from staff in the MPCA Board meeting, here as in *City of Princeton*, contributed to the Board selecting insufficient restrictions without a rational basis in the record, and imposing those insufficient restrictions for reasons other than to preserve existing water quality.

While MPCA staff may have accomplished commendable work finding what they perceived to be a middle ground between competing interests, that is not

the mandate of the law. The nondegradation rule does not call for a process by which stakeholders provide input and staff recommends a compromise position. The rule requires that MPCA “strictly control” vessel discharges “to the extent necessary” to preserve the high quality of Lake Superior, one of the State’s most precious natural resources. Minn. R. 7050.0180. The Permit under review here fails to meet that standard.

CONCLUSION

Because an invasive species is a pollutant and the Great Lakes including Lake Superior contain new invasive species not present when the lake was designated an outstanding resource value water, the Permit in this case covers expanded discharges under the terms of Minn. R. 7050.0180, subp. 2(C), and thus is subject to non-degradation review. Because the MPCA erroneously concluded it was not required to conduct non-degradation review, and in any case failed to

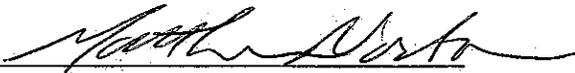
conduct essential elements of a non-degradation review, the agency issuance of the Permit is a decision affected by error of law and MCEA asks that it be remanded to the MPCA to perform a thorough non-degradation review resulting in strict permit controls necessary to preserve Lake Superior's high water quality.

Date:

12/23/08

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STATE OF MINNESOTA
IN COURT OF APPEALS

In the Matter of a Request for Issuance
of the SDS General Permit MNG300000
for Ballast Water Discharges from Vessels
Transiting Minnesota State Waters of
Lake Superior
Court of Appeals No. A08-1828

CERTIFICATION OF
BRIEF LENGTH

I hereby certify that this brief confirms to the requirements of Minn. R. Civ. App.
P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of
this brief is 7,026 words. This brief was prepared using Microsoft Word.

Date: 12/23/2008

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