NO. A12-1661

State of Minnesota
In Court of Appeals

In the Matter of the Decision on the
Approval for Submittal of a
401 Water Quality Certification to the
U.S. Environmental Protection Agency for the
Draft 2013 Vessel General Permit and the
Draft 2013 Small Vessel General Permit

REPLY BRIEF OF RELATORS MINNESOTA CONSERVATION FEDERATION, MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, NATIONAL WILDLIFE FEDERATION, AND NATURAL RESOURCES DEFENSE COUNCIL

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INTRODUCTION

Respondent Minnesota Pollution Control Agency ("MPCA") opens its brief by claiming to be the most aggressive Great Lakes state in regulating ballast water discharges; the first state to require vessels confined to the Great Lakes ("lakers") to meet numeric discharge standards; and the Great Lakes state that has placed the most restrictive conditions in a certification of the Vessel General Permit ("VGP") proposed by the U.S. Environmental Protection Agency ("EPA").

Even if everything MPCA says is accurate, being the most aggressive, the first, or the most restrictive does not automatically mean that the agency satisfied the standard for certification under Section 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341. The standard for a conditional certification, the type MPCA issued, requires conditions that "assure" dischargers "will comply" with state water quality standards. 33 U.S.C. § 1341(d) (2006).

MPCA did not apply that standard in certifying the VGP. Nor does substantial evidence establish that the conditions MPCA incorporated in its certification are sufficient, either alone or together, to prevent the introduction or spread of aquatic invasive species ("AIS") in Minnesota waters. The conditions may reduce invasions of non-indigenous species discharged in ballast water, but the record shows that mere reduction will not assure or even reasonably assure compliance with state water quality standards. Consequently, MPCA's certification was contrary to law, not supported by substantial evidence, and arbitrary or capricious.

ARGUMENT

I. SCOPE OF REVIEW

Although MPCA's discussion of the scope of review blurs the distinctions between the review of errors of law and errors of reason, nothing the agency says contradicts Relators' explication of the scope of review in their principal brief, with one exception.

MPCA hints that the court should defer to its interpretation of CWA § 401, because it is an environmental law the agency is required to enforce and administer. However, no deference at all is appropriate because the meaning of § 401 is clear and unambiguous. *See In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 516 (Minn. 2007); *St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 40 (Minn. 1989). Only if the meaning of the words were unclear and susceptible to different interpretations would a court "determine whether the agency's interpretation is reasonable." *Annandale*, 731 N.W.2d at 516. In making that determination, "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." *Id.* (emphasis added).

In this case, the words in CWA § 401 are clear and unambiguous. They specify that any certification shall set forth conditions necessary to "assure" that dischargers will comply with state water quality standards. 33 U.S.C. § 1341(d). Those words are not

unclear or susceptible to different interpretations, so there is no occasion for the court to determine whether MPCA's interpretation is reasonable.

Even if the words were deemed open to interpretation, MPCA has no expertise or special knowledge in legal interpretation. Nothing in the words implicates the agency's technical training, education or experience, and MPCA has not suggested that they do.

Instead, MPCA makes a purely legal argument: that "assure" in subsection (d) does not really mean assure because Congress retained the former "reasonable assurance" language in subsections (a)(3) and (a)(4) of § 401. But this argument ignores the canons of statutory construction that Relators pointed out in their principal brief. These canons compel the conclusion that Congress's amendments removing the words "reasonable assurance" from subsection (a)(1), and adding the word "assure" to subsection (d), means Congress intended those subsections to mean something entirely different from what came before. Relators Br. at 28-30. MPCA has no response to this point, which amounts to a concession of its validity. *See In re Application of Olson for Payment of Servs.*, 648 N.W.2d 226, 228 (Minn. 2002) ("It is axiomatic that issues not argued in the briefs are deemed waived on appeal.").

Because MPCA failed to apply the current, unambiguous standard for conditional certification established by § 401, the court should not defer to the agency. Rather, the court should reject MPCA's reliance on the "reasonable assurance" standard. Despite the agency's protestation to the contrary, the words of the Certification itself conclusively establish that MPCA did not unequivocally certify that ballast water discharges "will

comply" with state water quality standards, only that "there is a reasonable assurance" that they will. (R. 2402, *Certification Letter from MPCA*, p. 2.) ("Minnesota certifies there is a *reasonable assurance* that discharges from vessels covered by the 2013 VGP ... will comply with the applicable provisions of 33 U.S.C. §§ 1311, 1312, 1313, 1316, 1317, and 1341 ... , and that Permittees and their activities will not contravene applicable limitations, standards and other requirements of State law, providing the ... conditions set forth in this Certification are met.") (emphasis added).

MPCA's use of the wrong legal standard tainted the entire Certification, making reversal of the agency's decision well-warranted.

II. THE MINNESOTA POLLUTION CONTROL AGENCY'S CERTIFICATION IS AFFECTED BY ERRORS OF LAW AND VIOLATES CONSTITUTIONAL PROVISIONS, BECAUSE THE AGENCY FAILED TO USE THE CONGRESSIONALLY-AUTHORIZED STANDARD FOR CERTIFICATION AND FAILED TO ESTABLISH WATER QUALITY-BASED EFFLUENT LIMITATIONS

A. The Agency Failed to Use the Congressionally-Authorized Standard for Certification

1. Reply to the Agency's Response

As alluded to above, MPCA now claims that its use of the phrase "reasonable assurance" was just so much mumbo-jumbo, and that the agency actually applied the "correct 'will comply' standard." MPCA Br. at 14-15. In other words, MPCA says, "Pay no attention to that man behind the curtain." But just as in the *Wizard of Oz*, the facts belie the illusion.

At the hearing on the Certification, MPCA's counsel advised the Citizens' Board in no uncertain terms: "We have to find that the permittee will comply and beyond that *our determination of that compliance has to meet a reasonable basis or a reasonable assurance standard* which is the language that is in both federal and state law." (Tr. 46 (emphasis added).) Consequently, when the Citizens' Board adopted a finding the next day that ballast water discharges will comply with the Clean Water Act (R. 2398, *Findings of Fact, Conclusions of Law, and Order*, p. 9 (¶39)), it understood this finding to mean there would be a "reasonable assurance" of compliance.

The Citizens' Board then issued the actual Certification, this time articulating its understanding of the governing standard by explicitly qualifying the certification as one based on "reasonable assurance": "Minnesota certifies that there is a *reasonable assurance* that discharges from vessels covered by the 2013 VGP... will comply with the applicable provisions of 33 U.S.C. §§ 1311, 1312, 1313, 1316, 1317, and 1341... , and that Permittees and their activities will not contravene applicable limitations, standards and other requirements of State law, providing the ... conditions set forth in this Certification are met." (R. at 2402, *Certification Letter from MCPA*, p. 2) (emphasis added).)

This record allows only one conclusion: MPCA based its finding on an incorrect standard. MPCA cannot disavow its own counsel's advice or the understanding of the Citizens' Board, plainly expressed in the Certification itself.

MPCA also argues erroneously that there is no meaningful distinction between the "reasonable assurance" and "will comply" standards when it comes to this court's review. MPCA Br. at 16. Specifically, if there is "reasonable assurance" of compliance, the Certification must be upheld just as it must be if MPCA's conclusions are reasonable, that is to say, supported by substantial evidence.

This argument conflates the distinct legal and fact-based reviews that the court conducts. To comply with the requirement that the Certification be lawful, MPCA must establish conditions that satisfy the correct legal standard, which is set forth in CWA § 401(d). Minn. Stat. § 14.69(d) (2011). To comply with the requirement that the Certification be reasonable, MPCA must establish conditions which are supported by substantial evidence and are not arbitrary or capricious. *Id.* at § 14.69(e), (f). Thus, MPCA's conditions can only be deemed lawful if the agency uses the correct standard in formulating them. They cannot be deemed lawful if the agency only comes reasonably close to using the correct standard.

2. Reply to the Lake Carriers' Response

Based on the placement of a comma, LCA erroneously argues that CWA § 401(d) does not require a certification to set forth effluent limitations necessary to assure that dischargers comply with state water quality standards. Rather, according to LCA, § 401(d) only requires monitoring requirements necessary to assure such compliance.

This reading is contrary to the interpretations of the courts and EPA, as well as the Congressional intent behind the provision. The U.S. Supreme Court interpreted § 401(d) as follows:

> In granting certification pursuant to § 401(d), the State "shall set forth any … limitations … necessary to assure that [the applicant] will comply with any … limitations under [§ 303] … and with any other appropriate requirement of State law." A certification requirement that an applicant operate the project consistently with state water quality standards – i.e., consistently with the designated uses of the water body and the water quality criteria – is both a "limitation" to assure "compl[iance] with … limitations" imposed under § 303, and an "appropriate" requirement of state law.

PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology, 511 U.S. 711, 715 (1994); *accord Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 3 (D.C. Cir. 2011) (The state must also set forth in its certification "any effluent limitations and other limitations ... necessary to assure" that the permit holder "will comply" with CWA standards "and with any other appropriate requirement of State law." *Id.* [33 U.S.C.] § 1341(d).").

As Relators showed in their principal brief, EPA interprets § 401(d) just as the courts do. Relators Br. at 23. Indeed, as LCA admits, EPA promulgated a regulation at 40 C.F.R. § 124.53 requiring certifications to include "'[c]onditions which are necessary to assure compliance with' Minnesota's water quality standards." LCA Br. at 16; 40

C.F.R. § 124.53(e)(1). In addition, the legislative history shows that Congress expressly intended to require certifications to incorporate both effluent limitations ***and*** monitoring requirements necessary to comply with state water quality standards. Relators Br. at 23.

LCA's reading of the statute is not only at odds with the authorities', it would produce absurd results. It would require states to incorporate effluent limitations in a certification, but would not restrict the states to limitations necessary to protect water quality. The courts, however, have firmly interpreted § 401(d) to allow only those conditions that relate to water quality. *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) ("Section 401(d), reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another.")

LCA also argues that the legislative history does not show that § 401(d) requires effluent limitations that "assure" compliance with state water quality standards – despite the provision's use of that word, because subsection (d) was added in 1972 when Congress removed the "reasonable assurance" language from subsection (a)(1). This argument makes no sense. It was precisely these changes, in conjunction with the rest of the relevant legislative history, that prove Relators are correct, that Congress intended to discard the weak standard – allowing certification where there is "reasonable assurance" that state water quality standards will not be violated – in favor of the strong standard – requiring conditions that "assurance" that dischargers "will comply" with water quality standards.

LCA's citation of EPA's Federal Register notice only reinforces Relators' case. The notice's repeated references to the states' obligation to incorporate conditions "necessary to comply" with applicable law, which include state water quality standards, show that compliance with water quality standards is of paramount importance. Accordingly, that compliance must be assured, as subsection (d) explicitly says.

Finally, Minnesota's and other states' longstanding practice of certifying based on "reasonable assurance" is no proof of the standard's validity. The exemption of ballast water discharges from the NPDES program was on the books for thirty-two years when it was declared invalid. *Northwest Environmental Advocates v. EPA*, No. C 03-05760 SI, 2005 WL 756614, at *7, *13 (N.D. Cal. Mar. 30, 2005).

For these reasons, LCA's contention that effluent limitations need not assure compliance with state water quality standards is untenable.

B. The Agency Failed to Establish Water Quality-Based Effluent Limitations, As Required by Federal and Minnesota Law

In order to evade the responsibility to incorporate any WQBELs in the Certification, MPCA attempted to cloud the issue by saying it could not determine ***numeric*** WQBELs. (R. 2403, *Certification Letter from MPCA*, p. 3). MPCA takes the same tack in its brief, attempting to make the issue whether it was legally required to incorporate ***numeric*** WQBELs in the Certification. MPCA Br. at 1 (Legal Issue II), 20.

Relators posit that numeric WQBELs are, indeed, required by the Clean Water Act and the courts' interpretation of the law. Even were MPCA not required to incorporate ***numeric*** WQBELs in the Certification, however, the law and its implementing

regulations are crystal clear in expressly requiring practically enforceable WQBELs. MPCA may have flexibility in developing the WQBELs. *Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738*, 763 N.W.2d 303, 311-12 (Minn. 2009) ("*Alexandria Lake Area*"). But certifying the VGP without WQBELs applicable to all types of vessels is simply not an option under CWA § 401.

CWA § 401 expressly requires WQBELs by stating that "[a]ny certification ... shall set forth any effluent limitations ... necessary to assure" that dischargers will comply with state water quality standards. 33 U.S.C. § 1341(d). Both the legislative history and EPA confirm that this is what § 401 requires. See Relators Br. at 41-42. Moreover, MPCA must express the WQBELs as "specific limitations," as Washington did when it established numeric minimum flows to protect designated and existing uses in the absence of numeric water quality criteria. *PUD No. 1*, 511 U.S. at 715, 716, 719; *accord Islander East Pipeline Co. v. McCarthy*, 525 F.3d 141, 145 (2d Cir. 2008).

CWA § 401 places the responsibility to establish WQBELs and other certification conditions squarely on MPCA, not Relators. *PUD No. 1*, 511 U.S. at 707 ("§ 401 of the Act requires *States* to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters.") (emphasis added). Nevertheless, Relators offer Dr. Cohen's expert opinion that water quality should be protected by establishing standards of "less than 0.005 live organisms greater than 50 micrometers in minimum dimensions per cubic meter, less than 0.0003 live organisms between 10 and 50 micrometers in minimum

dimensions per milliliter, less than 1 live bacteria per milliliter, and less than 10 viable viruses per milliliter." (R. at 2370, *Affidavit of Andrew N. Cohen* ("*Cohen Affidavit*") at 40 (¶¶73-74).) These standards are approximately 1000 times more stringent than the IMO standards. "Also, concentration limits should be included for an additional class of organisms, made of protists that are less then [sic] 10 microns in minimum dimension, a group that contains organisms with both environmental and human health impacts." *Id.* at 40-41 (¶74).

Furthermore, WQBELs must be established without regard to the availability of technology or other factors. The cases Relators cited in their principal brief recognized this, despite MPCA's baseless assertions to the contrary. In *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999), citing 33 U.S.C. § 1311(b)(1)(C), the court explained that NPDES permits must contain effluent limitations more stringent than technology-based effluent limitations if necessary to meet water quality standards – that is to say, WQBELs – without regard to practicability. The court only held that practicability may be taken into account in regulating municipal storm-sewer discharges, because another section of the CWA does not require those particular discharges to comply with 33 U.S.C. § 1311(b)(1)(C). *Id.* at 1165. There is no such exemption for ballast water discharges.

In *Ackels v. EPA*, 7 F.3d 862, 865 (9th Cir. 1993), the court did say that technologies were capable of meeting EPA's turbidity limitation. What MPCA fails to acknowledge, however, is that the court then immediately stated, "*Regardless of that fact,*

the limitation is necessary to comply with state water quality standards, and the Clean Water Act requires the permits to meet the state water quality standards," citing 33 U.S.C. § 1311(b)(1)(C). *Id.* "*Accordingly*," the court went on to say next – meaning according to 33 U.S.C. § 1311(b)(1)(C), which requires WQBELs – "the economic and technological restraints are not a valid consideration." *Id.* at 865-66 (emphasis added).

Finally, in *NRDC v. EPA*, 859 F.2d 156, 207 (D.C. Cir. 1988), the court held that the "upset defense" is not available when a plant exceeds effluent limitations based upon water quality standards. The basis for the court's holding was its recognition of the "fundamental differences" between technology-based effluent limitations, required by 33 U.S.C. § 1311(b)(1)(A), and WQBELs, required by 33 U.S.C. § 1311(b)(1)(C). *Id.* at 208. The difference, the court said, was that "Congress did not intend to tie compliance with water quality-based limitations to the capabilities of any given level of technology." *Id.* The premise of a technology-based effluent limitation is that it must take into account "the limits inherent in the technology." *Id.* "By contrast, a water quality-based permit limit begins with the premise that a certain level of water quality will be maintained, *come what may*, and places upon the permittee the responsibility for realizing that goal." *Id.* "While at first blush it seems odd to expect dischargers to go beyond the limits of extant technology, it becomes apparent that Congress had a deep respect for the sanctity of water quality standards and a firm conviction of need for technology-forcing measures." *Id.*

There is nothing to the contrary in MPCA's quotation from *Northwest Environmental Advocates v. EPA*, No. C 03-05760 SI, 2006 WL 2669042, at *12 (N.D. Cal. Sep. 18, 2006). Neither there nor anywhere in the opinion did the court say EPA may ignore 33 U.S.C. § 1311(b)(1)(C) in regulating ballast water discharges. The court even acknowledged that NPDES permits must comply with water quality standards, as well as technology-based requirements, citing 33 U.S.C. § 1311(b)(1)(C). *Id.* at *2 (quoting *City of Arcadia v. EPA*, 411 F.3d 1103, 1105 (9th Cir. 2005)).

Nor may Minnesota ignore the requirement to include WQBELs in certifications. MPCA must issue NPDES permits that comply with federal requirements, including the requirement to establish WQBELs. *Alexandria Lake Area*, 763 N.W.2d at 309 ("Section 301 of the CWA mandates that every permit contain: (1) 'effluent limitations' that reflect the practicable pollution reduction a state can achieve; and (2) any more stringent limitations required for a body of water to meet 'water quality standards.'"). Since Minnesota rules specify that a certification shall include conditions established in the same manner as they are established for NPDES permits, a certification must include WQBELs where technology-based effluent limitations are not stringent enough to meet state water quality standards. Minn. R. 7001.1470, Subp. 2.

To justify its failure to incorporate a practically enforceable WQBEL in the Certification, MPCA cites *Alexandria Lake Area* for the proposition that the Clean Water Act does not require unrealistic limits. MPCA Br. at 34. However, the court in that case acknowledged MPCA's responsibility to establish WQBELs. The court only rejected as

unrealistic a demand for WQBELs that would fully restore Lake Winona within five years, and it upheld MPCA's WQBELs, in part, because the phosphorus that they would allow to enter the lake would have no measurable impact on algal conditions. 763 N.W.2d at 314-15.

For these reasons, even if MPCA does not have to establish ***numeric*** WQBELs in the Certification, it has to establish WQBELs, and they have to be practically enforceable. If MPCA does not establish such WQBELs, it cannot certify the VGP.

III. THE MINNESOTA POLLUTION CONTROL AGENCY'S CERTIFICATION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE OR ARBITRARY OR CAPRICIOUS, OR BOTH, BECAUSE THE CERTIFICATION CONDITIONS DO NOT ASSURE OR REASONABLY ASSURE THAT DISCHARGERS WILL COMPLY WITH STATE WATER QUALITY STANDARDS

In their principal brief, Relators stated that the conditions MPCA incorporated in the Certification will neither assure nor reasonably assure compliance with state water quality standards, "either individually or in combination," and that "MPCA's finding to the contrary is unsupported by substantial evidence or arbitrary or capricious, or both." Relators Br. at 42. That remains the case. Neither MPCA nor LCA has identified any substantial evidence or rational basis for the agency's conclusion that the conditions, either on their own or collectively, warrant certification.

Despite the plain language of CWA § 401(d), MPCA argues that the law does not require any guarantee of compliance with state water quality standards, because science can provide no guarantee. That is a *non sequitur*. Science may not be able to provide a

guarantee,[1] but that does not mean that Congress did not require it. Even if Congress did not require a guarantee, it did not condone conditions that had no basis in evidence or rationality, or are known to have a reasonable potential to cause or contribute to a violation of water quality standards.

MPCA's conditions suffer from these defects. At best, they reduce the number of organisms discharged in ballast water. But absolutely nothing in the record establishes in all cases what the level of reduction is. Moreover, MPCA does not dispute that the record is devoid of any evidence establishing whether any level of reduction – whether achieved through a single condition or the combination of conditions – will be sufficient to prevent the introduction or spread of new AIS, and hence the violation of state water quality standards. Nor does MPCA dispute the evidence that no such level is known.

A. The Court's Judgment that the Agency's State Ballast Water Permit Complies with the Minnesota Nondegradation Rule Does Not Constitute Substantial Evidence that the Permit Complies with the Clean Water Act's Certification Provision

MPCA erroneously contends that *Request for Issuance of SDS General Permit MNG300000*, 769 N.W.2d 312 (Minn. Ct. App. 2009) ("*Ballast Water Permit*"), constitutes a precedent that controls the outcome of this case. LCA's contention that the case constitutes *res judicata* or collateral estoppel is no more defensible.

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[1] Relators acknowledge that MPCA may use its "best professional judgment" ("BPJ") where EPA has not promulgated effluent limitations guidelines for a particular pollutant, but only to establish technology-based effluent limitations. 40 C.F.R. § 125.3(c). Technology-based effluent limitations established with BPJ are subject to judicial review, however, and must be supported by substantial evidence, must not be arbitrary or capricious, and are no substitute for WQBELs.

The 2009 case concerned the interpretation and application of the state nondegradation rule at Minn. R. 7050.0180 to MPCA's regulation of ballast water discharges through a state permit. In contrast, this case concerns the interpretation and application of the federal statute at CWA § 401 authorizing MPCA to certify a federal permit. Thus, the claim in the case concerning the state ballast water permit is different than the claim here, and neither Minnesota Center for Environmental Advocacy nor any other Relator had a full and fair opportunity to litigate the adequacy of the Certification under CWA § 401 in that case. That includes whether the terms of the state ballast water permit, now incorporated as a condition in the Certification, satisfy MPCA's obligations under § 401.

The *Ballast Water Permit* case decided three issues. First, the court decided that the definition of the term "expanded discharge" in the state nondegradation rule is clear, and the court thus gave MPCA's interpretation of the term no deference, although it held that the agency had interpreted the term properly. *Ballast Water Permit*, 769 N.W.2d at 320. This holding has no bearing on whether MPCA's Certification is supported by substantial evidence or is arbitrary or capricious.

Next, the court decided that the rule is "ambiguous regarding the procedure, form, and content of a nondegradation review." *Id.* at 321. That ambiguity, in conjunction with the novelty of regulating ballast water discharges and MPCA's special, technical knowledge, led the court to defer to MPCA's determination of the appropriate procedure, form, and content of its nondegradation review. *Id.* at 321, 323-24. This holding is not

controlling in this case, either, because the issue is not whether MPCA may determine how to implement the ambiguous nondegradation rule, but whether the agency's determination that its conditions satisfy an unambiguous standard for certification is supported by substantial evidence and is not arbitrary or capricious.

Last, the court decided that MPCA did not contravene the nondegradation rule's requirement that the agency "restrict the discharge to the extent necessary to preserve the existing high quality" of Lake Superior. *Id.* at 324. The court found, "MPCA reasonably concluded that adopting more stringent standards, in the absence of technology to meet those standards, would 'not result in meaningful protection for Minnesota's aquatic environment.'" *Id.* The court thus implicitly determined that MPCA has discretion to choose restrictions based on technology. The court did not identify any statutory or regulatory language supporting this interpretation.

This last holding is no more controlling here than the previous two, because CWA § 401 does not allow a state to issue a certification unless discharges will comply with state water quality standards, which include designated uses and water quality criteria, as well as the existing uses protected by the nondegradation policy. Moreover, § 401 requires a certification to include effluent limitations necessary to assure such compliance, whether or not the technology to meet those effluent limitations is available. The whole point of this technology-forcing feature is to make achievable treatment that is not currently achievable in order to provide meaningful protection for Minnesota waters.

Section 401 does not make any exceptions and it does not give MPCA any discretion to provide less than full protection of water quality, and MPCA cannot re-write the law to grant itself such discretion. Quite apart from the agency's total lack of authority to override a federal law, technological considerations are antithetical to the whole purpose of requiring effluent limitations as stringent as necessary to meet water quality standards. That purpose, as Relators have explained, is to force the development of technology. Technology will never be forced if effluent limitations need only be as stringent as the current technology permits.

B. The Certification Condition Requiring Vessels to Meet Numeric Technology-Based Effluent Limitations Is Not Supported by Substantial Evidence or Is Arbitrary or Capricious, or Both, Because No Evidence Establishes That These Effluent Limitations Will Reduce the Risk of Invasion Sufficiently to Assure or Reasonably Assure That Dischargers Will Comply with State Water Quality Standards

LCA did not offer a scintilla of evidence establishing that the reductions that might be achieved by meeting the IMO standards will prevent the introduction or spread of AIS. EPA has concluded they will not.

To protect water quality standards, EPA concluded that effluent limitations must be "sufficient to '*safeguard against the establishment of new aquatic nonindigenous species* and … protect and preserve existing indigenous populations of fish, shellfish, and wildlife and other beneficial uses of the nation's waters.'" (R. 591, *Proposed 2013 Vessel General Permit Fact Sheet*, p. 125 n.36 (Part 4.4.3.9.3) (emphasis added).) Thus, reducing invasions is not sufficient to comply with water quality standards. Only preventing them is.

Accordingly, because evidence establishes that discharges subject to the IMO standards may only reduce invasions, not prevent them, EPA concluded that ballast water discharges subject to the IMO standards have the reasonable potential to cause or contribute to a violation of water quality standards. (R. 586, 590, 591, *Proposed 2013 Vessel General Permit Fact Sheet*, pp. 120 (Part 4.4.3.9), 124 (Part 4.4.3.9.2), 125 (Part 4.4.3.9.3).) EPA made this concession even while citing studies quantifying reductions in discharge concentration exceeding ninety-nine percent. (R. 588-89, *Proposed 2013 Vessel General Permit Fact Sheet*, pp. 122-23 (Part 4.4.3.9.2).)

C. The Certification Condition Prohibiting Vessels from Violating State Water Quality Standards Is Not Supported by Substantial Evidence or Is Arbitrary and Capricious, or Both, Because No Evidence Establishes That It Will Assure or Reasonably Assure That Dischargers Will Comply Those Standards

LCA seems to argue that the Certification's prohibition of discharges of ballast water that violate state water quality standards is meaningless because Minnesota has no water quality standards applicable to AIS. LCA Br. at 31. Relators stand by their identification of narrative criteria that are applicable to AIS and the evidence that they have been violated by AIS currently infesting Minnesota waters. Relators Br. at 10-14. Criteria, especially narrative criteria, do not have to be associated with an individual species, and MPCA does not have to make a finding that narrative criteria have been violated before a violation can be established.

Under LCA's theory, neither the Certification nor the state's ballast water permit would be necessary, because no water quality criteria now exist that would be applicable

to individual non-indigenous species that have yet to invade Minnesota waters as a result of ballast water discharges. Relators fault MPCA for failing to comply with CWA § 401, but at least the agency is more cognizant of the threat to the water quality criteria applicable to the state's waters and more forward thinking than that. Water quality criteria are not even a prerequisite to certification conditions necessary to protect designated and existing uses. *PUD No. 1*, 511 U.S. at 717.

Relators also dispute that MPCA's incorporation of the prohibition was a meaningless act. Relators only fault the agency for creating a prohibition that cannot possibly be met or enforced, because the means for assuring compliance with it do not exist. Relators Br. at 45-48. (The so-called narrative WQBEL in the VGP suffers from the same defects.) Contrary to LCA's claim, the monitoring requirements in the state ballast water permit and the Certification will not enable vessel operators, MPCA, or anyone else to know or predict at the time of discharge whether a non-indigenous species will become an AIS that will violate state water quality standards. Neither MPCA nor LCA have identified any evidence or rationale to the contrary.

D. The Certification Condition Requiring Oceangoing Vessels to Perform Ballast Water Exchange or Saltwater Flushing Is Not Supported by Substantial Evidence or Is Arbitrary or Capricious, or Both, Because No Evidence Establishes That These Practices Will Reduce the Risk of Invasion Sufficiently to Assure or Reasonably Assure Compliance with State Water Quality Standards

Citing the record at 2404-05, MPCA claims "there is evidence that ballast water exchange has *reduced* invasions." MPCA Br. at 27. MPCA is alluding to the same portion of the record that Relators discussed in their principal brief. Relators Br. at 48.

But evidence that the practice ***reduces*** invasions is not evidence that it ***prevents*** invasions. So long as there is no evidence that ballast water exchange or saltwater flushing – alone or in combination with treatment – will ***prevent*** invasions, there can be no assurance that invasions will not occur and violate state water quality standards. Consequently, MPCA's finding that this condition will assure compliance with state water quality standards was not supported by substantial evidence and was arbitrary or capricious.

MPCA's inflammatory claim that Relators "distorted" Dr. Cohen's expert evidence is without foundation. MPCA did not quote the passage from Dr. Cohen's affidavit that Relators are alleged to have distorted; that passage stated as follows:

> [B]allast water exchange alone will not meet the IMO concentration limits for organisms in ballast discharges, nor will it in combination with treatment help to meet IMO or more stringent limits on organism concentrations, and may in various circumstances actually increase the concentrations of organisms in discharges."

(R. 2353, *Cohen Affidavit*, p. 23 (¶42).) Relators abridged this quote as follows:

> Dr. Cohen's expert opinion is that ballast water exchange "in combination with treatment will [not] help to meet IMO or more stringent limits on organism concentrations, and may in various circumstances actually increase the concentrations of organisms in discharges."

Relators Br. at 49. Thus, Relators distorted nothing; they only inserted the word "not" to make clear the meaning of Dr. Cohen's position, which is that the combination of treatment and ballast water exchange will *not* meet IMO or more stringent limits on organism concentrations. Dr. Cohen reached this conclusion after discussing the issue over four pages of his affidavit. Relators urge the court to read the whole section to understand his opinion in full. It underscores the unreasonableness of MPCA's decision.

E. The Certification Condition Establishing Emergency Provisions for High-Risk Ballast Water Discharges Is Not Supported by Substantial Evidence or Is Arbitrary or Capricious, or Both, Because No Evidence Establishes That These Provisions Will Reduce the Risk of Invasion Sufficiently to Assure or Reasonably Assure Compliance with State Water Quality Standards

In defending this condition, MPCA once again equates reducing the number of propagules with assurance, even though the agency cites no evidence (and none exists) establishing what level of reduction would be achieved or that the number of propagules would be reduced sufficiently to safeguard against the invasion of aquatic non-indigenous species.

F. The Certification Condition Establishing Best Management Practices for Lakers Is Not Supported by Substantial Evidence or Is Arbitrary or Capricious, or Both, Because No Evidence Establishes That These Practices Will Reduce the Risk of Invasion Sufficiently to Assure or Reasonably Assure Compliance with State Water Quality Standards

MPCA offers as substantial evidence the self-interested opinion of a single industry representative that because one of the many AIS infesting Minnesota waters has not spread "significantly," the best management practices are effective. The most MPCA

could say about this "evidence" is that it "does not disagree" with it. MPCA Br. at 31. This is hardly a ringing endorsement.

More importantly, this "evidence," about a single species is not "such ... as a reasonable mind might accept as adequate to support a conclusion." *Application of the Grand Rapids Pub. Util. Comm'n to Extend its Assigned Serv. Area*, 731 N.W.2d 866, 871 (Minn. Ct. App. 2007). Not only does the record lack any indication of the industry representative's scientific credentials, but he neither cited nor introduced into the record any scientific study either linking the claimed lack of significant spread to best management practices or extrapolating it to other AIS.

This one bit of testimony is especially inadequate in view of Dr. Cohen's expert, contradictory evidence that best management practices are unlikely to reduce organism concentrations even to the IMO standards. (R. 2350, *Cohen Affidavit*, p. 20 (¶37).)

LCA makes a completely unfounded claim that EPA deems best management practices a good alternative to numeric WQBELs and effective pollution controls to assure compliance with water quality standards. LCA cites pages fifty-four and fifty-five of the *VGP Fact Sheet* in support of this claim. LCA Br. at 45-46. Nothing on those pages says anything whatsoever about best management practices. (See R. 520-21, *Proposed 2013 Vessel General Permit Fact Sheet*, pp. 54-55.) Relators are not aware of any EPA statement anywhere in the record describing best management practices as "a good alternative to numeric WQBELs."

For these reasons and those in Relators' principal brief, MCPA's requirement that lakers conduct best management practices was not supported by substantial evidence and was arbitrary or capricious.

G. The Certification Condition Establishing Monitoring Requirements Is Arbitrary or Capricious, Because No Evidence Establishes That They Will Assure or Reasonably Assure Compliance with State Water Quality Standards

Relators argued that MPCA failed to require monitoring of the Certification condition prohibiting discharges of ballast water that violate state water quality standards. Relators Br. at 53. MPCA failed entirely to respond to this argument, just as it failed entirely to consider this important gap in the enforceability of the prohibition. This was because MPCA somehow misconstrued Relators' argument as one that the agency failed to require monitoring of a numeric WQBEL. Relators did not make such an argument, as is apparent from Relators' principal brief.

CONCLUSION

For the foregoing reasons, and the reasons given in Relators' principal brief, the court should reverse or remand MPCA's certification of the proposed 2013 VGP.

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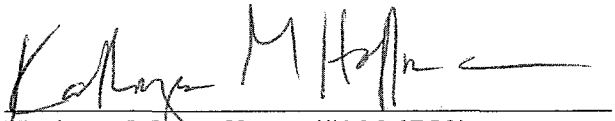

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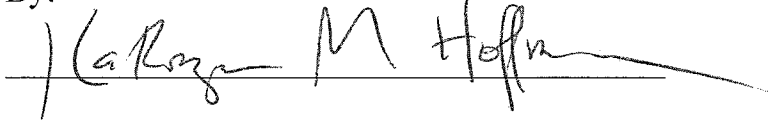
October 23, 2012

CERTIFICATE OF LENGTH PURSUANT TO RCAP 132.01

I hereby certify that this brief conforms to the requirements of *Minn. R. Civ. App. P. 132.01*, subds. 1 and 3, for a brief produced with a proportionate font. The length of this brief is 6,076 words. This brief was prepared using Microsoft Word 07.

Dated: October 23, 2012

By:



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