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STATE OF MINNESOTA
IN SUPREME COURT

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

BRIEF OF *AMICI CURIAE* MINNESOTA ENVIRONMENTAL SCIENCE AND ECONOMIC REVIEW BOARD and COALITION OF GREATER MINNESOTA CITIES

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STATEMENT OF THE LEGAL ISSUES

I. Does the replacement of an existing wastewater treatment facility with a new facility constitute a "new source" subject to Clean Water Act regulation under 40 C.F.R. § 122.4(i)?

The Court of Appeals erred in applying 40 C.F.R. § 122.4(i) to restrict construction of a new wastewater treatment facility ("WWTF") where existing permitted discharges were replaced by a combined discharge.

In re Town of Seabrook, 4 E.A.D. 806, 816-17 n.20 (EAB 1993).

In re Phelps Dodge Corp. Verde Valley Ranch Dev., NPDES Appeal No. 01-07, 2002 EPA App. LEXIS 8 (May 21, 2002).

Okanogan Highlands Alliance v. Washington, PCHB No. 04-064, 2005 WA Env. LEXIS 17, *12 (Apr. 12, 2005).

II. Assuming Section 122.4(i) applies in this instance, does the definition of "cause or contribute" require a demonstration of a wastewater discharge's measurable impact on impaired conditions in a downstream water before an NPDES permit may be denied?

The Court of Appeals properly determined that for a discharge to "cause or contribute" to a water quality standard violation, that discharge must be shown to have a measurable impact on water quality in the impaired water.

The Court of Appeals erred, however, in holding that the proposed Annandale/Maple Lake discharge would have a measurable impact on a water quality standard violation in Lake Pepin, where no site-specific analysis was produced, and a site-specific analysis on a much larger upstream discharge for identical pollutants found no such impact.

The Court of Appeals erred in interpreting 40 C.F.R. § 122.4(i) to prohibit the Minnesota Pollution Control Agency's use of pollutant offsets from other sources, where such offsets are contemplated by the U.S. Environmental Protection Agency.

Minnesota Ctr for Envtl. Advocacy v. Minnesota Pollution Control Agency and City of St. Cloud, 696 N.W.2d 398 (Minn. Ct. App. 2005).

In re City of Owatonna's NPDES/SDS Proposed Permit Reissuance for the Discharge of Treated Wastewater, 672 N.W.2d 921 (Minn. Ct. App. 2004).

In re Carlota Copper Co., NPDES Appeal Nos. 00-23 & 02-06, 2004 EPA App. LEXIS 35 (Sept. 30, 2004).

STATEMENT OF THE CASE

This case concerns the application of Appellants, City of Annandale and City of Maple Lake (herein the "Cities"), for a joint National Pollutant Discharge Elimination System/State Disposal System ("NPDES/SDS") permit issued by Appellant Minnesota Pollution Control Agency ("MPCA"), for construction and operation of a new combined wastewater treatment facility ("joint WWTF").[1] *In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 702 N.W.2d 768 (Minn. Ct. App. 2005). After opportunity for public comment and a public hearing, the MPCA issued the joint NPDES/SDS permit over the objections of Respondent Minnesota Center for Environmental Advocacy ("MCEA"). *Id.* at 771. MCEA appealed, alleging that 40 C.F.R. § 122.4(i) precludes issuance of an NPDES permit to a "new source" that will "cause or contribute to" a violation of water quality standards. *Id.* at 771. The Court of Appeals (herein the "Court") decision reached four major conclusions:

1. Both the majority and the dissent agreed that 40 C.F.R. § 122.4(i) does not preclude the MPCA from issuing an NPDES permit in the period between 303(d) listing of an impaired water and TMDL completion. *Id.* at 773, 776.

2. The majority declined to defer to MCEA's construction of 40 C.F.R. § 122.4(i) and instead held that the plain language of the regulation allows permit issuance "provided that the new source does not 'cause or contribute to the violation of water quality standards.'" *Id.* at 773.

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[1] Per Minn. R. App. Pro. 129.03, this brief was authored in its entirety by counsel for *amici curiae* Minnesota Environmental Science and Economic Review Board (MESERB) and the Coalition of Greater Minnesota Cities (CGMC) on behalf of their members. No other persons made any monetary contribution to the preparation or submission of this brief.

3. The majority held that "a plain reading of the phrase 'cause or contribute to the violation of water quality standards' indicates that so long as some level of discharge may be causally attributed to the impairment of Section 303(d) waters, a permit shall not be issued." 702 N.W.2d at 775. However, if no "measurable impact" is projected to occur, the permit may be issued. *Arkansas v. Oklahoma,* 503 U.S. 91, 111-12 (1992).

4. The majority declined to conclude that the U. S. Environmental Protection Agency ("EPA") intended for 40 C.F.R. § 122.4(i) to incorporate a system of offsets, based partially on its conclusion that the regulation is not ambiguous, and based partially on a lack of evidence that such an interpretation was intended by the EPA. 702 N.W.2d at 774.

Based upon these conclusions, the assumption that "new source" requirements were applicable to this permit decision, and the determination that increasing existing phosphorus loads from 1,400 to 3,600 lbs/year would contribute to standards violations in Lake Pepin, the Court ruled that the permit could not be issued. *Id.* Alarmingly, the Court accepted the MCEA's contention that the joint WWTF would constitute a "new source" or "new discharger" for purposes of 40 C.F.R. 122.4(i), an issue the MPCA apparently did not refute. *Id.* at 772. Appropriate analysis of this issue would have been dispositive in the decision below and would have allowed issuance of the permit.

STATEMENT OF THE FACTS

The two cities currently have separate WWTFs and received separate NPDES/SPS from MPCA. These facilities have been permitted for over 40 years. R. 1384. The Annandale WWTF normally does not discharge, but its NPDES permit does include a Surface Discharge Station with effluent limits identified as a "Tile Line To Surface Water SD001 (N side of zone 4)." Final Issuance NPDES/SDS Permit MN 0021229, Annandale

Wastewater Treatment Facility, City of Annandale (May 24, 1999) (App. 7, 10).[2] The Maple Lake WWTF discharges effluent into Mud Lake, thence to the North Fork of the Crow River. *City of Annandale*, 702 N.W.2d at 770; *see also* Reissued NPDES/SDS Permit No. MN 24082, Maple Lake Wastewater Treatment Facility, City of Maple Lake (Sept. 6, 2000) (App. 32 – 33). The Maple Lake facility discharges approximately 1,400 pounds of phosphorus per year in its effluent. 702 N.W.2d at 770.

The joint WWTF would discharge to the North Fork, which is approximately 150 miles upstream of Lake Pepin. *Id.* at 771; *see also* Final Issued NPDES/SDS Permit No. MN 0066966, Annandale/Maple Lake Wastewater Treatment Facility (Sept. 30, 2004) (App. 65). The joint WWTF would discharge approximately 3,600 pounds of phosphorus per year, an increase of 2,200 pounds per year above existing loads. 702 N.W.2d at 771. The MPCA proposed to offset this increase with a phosphorus decrease of approximately 53,500 pounds per year from a new WWTF at Litchfield, an offset the Court of Appeals rejected as unauthorized by 40 C.F.R. § 122.4(i). *Id.*

Both the North Fork and Lake Pepin are identified as "impaired waters" on the MPCA's "303(d) list," required under 33 U.S.C. § 1313(d) (2000). The North Fork is listed as impaired for low dissolved oxygen levels, and Lake Pepin is listed as impaired for excess nutrients. 702 N.W.2d at 770. Neither impaired water has a completed Total Maximum Daily Load ("TMDL"). *Id.* The MPCA predicts TMDLs will be completed for Lake Pepin in 2009, and the North Fork in 2012. *Id.*

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[2] References to "App." herein refer to *amici's* Appendix. Annandale uses a spray irrigation, land application system. R. 1487. However, the NPDES permit does authorize a surface water discharge. Thus the Court's understanding of the existing Annandale permit was clear error. 702 N.W.2d at 770.

The Court of Appeals deferred to the MPCA's finding that the joint WWTF would not affect dissolved oxygen levels in the North Fork. *City of Annandale*, 702 N.W.2d 768 at 773-74. The Court found, however, that the MPCA had "determined" the WWTF's phosphorus discharge to have a "measurable impact on the Section 303(d) impairment factors for the North Fork and the Lake Pepin watershed," though no record citation for this critical factual determination was provided. *Id.* at 776. For this reason, the Court of Appeals held that permit issuance was unauthorized.

Federal and State NPDES/SDS Permitting Authority

The Clean Water Act provides for the NPDES/SDS program to be administered either by the EPA directly, or by state agencies through EPA delegation. 33 U.S.C. § 1342 (2002), 40 C.F.R. § 123.1 *et seq.* (2005). The MPCA is one such delegated NPDES/SDS authority. Minn. Stat. § 115.03, subd. 5 (2004). In addition, the MPCA has broad statutory authority to "adopt, issue, reissue, modify, deny, or revoke, enter into or enforce reasonable orders, permits, variances, standards, rules, schedules of compliance, and stipulation agreements, under such conditions as it may prescribe, in order to prevent, control or abate water pollution, or for installation or operation of disposal systems or parts thereof ..." *Id.* at subd. 1(e).

Phosphorus has received increased public attention in recent years because it may stimulate algal growth that, depending upon its magnitude, may adversely impact receiving water uses. There are no numeric standards for phosphorus. The MPCA has adopted narrative standards for waters of the state as well as assessment factors the agency uses to determine whether these waters are impaired by excess algal growth. Minn. R. 7050.0150, subps. 3 – 5 (2005). The applicable narrative standard requires an evaluation of both

phosphorus levels and how such levels interfere with other water quality indicators (transparency, algal growth, dissolved oxygen). A mere increase in phosphorus does not result in a conclusion that narrative criteria have been violated because other factors may control whether or not excessive algal growth may occur. The MPCA has several regulatory tools at its disposal for addressing point source phosphorus discharges, including the Clean Water Act's provisions for TMDLs and the MPCA's phosphorus effluent regulation. *See* 33 U.S.C. § 1313(d) (2002); Minn. R. 7050.0211, subp. 1a (2005). Because this discharge eventually flows to a "lake or reservoir" (i.e., Lake Pepin) it is reviewable under the MPCA's Phosphorus Strategy.

The Phosphorus Strategy

In March 2000, the MPCA adopted a Phosphorus Strategy based on a 1996 study of phosphorus impacts on water quality systems, and a series of discussions with the public. *Minnesota Ctr. for Envtl. Advocacy v. Minnesota Pollution Control Agency and City of St Cloud*, 696 N.W.2d 398, 401 (Minn. Ct. App. 2005). While not a regulation in and of itself, the Strategy is a policy document describing how the MPCA will evaluate and address phosphorus in NPDES permitting:

> The purpose of the NPDES strategy is to develop a consistent framework for applying phosphorus controls in permits. The decision tree, included with the strategy, outlines the variables to be considered by MPCA staff in making decisions on whether to apply a phosphorus limit or a management plan in individual permits. The decision tree does not identify what a particular phosphorus limit will be, nor was it intended to. Rather the decision tree provides a guiding framework under which those decisions can be made.

"MPCA Phosphorus Strategy," http://www.pca.state.mn.us/water/phosphorus.html (updated Nov. 17, 2005).

The Phosphorus Strategy identifies how the MPCA will address phosphorus discharges in a number of different contexts:

> For water quality segments that are impaired or threatened for phosphorus or phosphorus-related conditions as listed on the 303(d) list, the MPCA shall use its authority to limit point-source discharges, including existing discharges, by including phosphorus limits where appropriate in NPDES permits as part of a TMDL allocation of point and/or nonpoint discharges.

"MPCA Phosphorus (P) Strategy: NPDES Permits," http://www.pca.state.mn.us/water/pubs/phos-npdes.pdf (March 2000) (App. 107). Directly relevant to this case is the MPCA's description regarding how a "measurable impacts" evaluation must occur when the effects of phosphorus to a reservoir such as Lake Pepin are being considered.

Definitions of Key Terms in the Phosphorus Strategy

Phosphorus does not cause direct adverse impacts on aquatic life; it is not a "toxic" substance. It is a nutrient that promotes plant growth under the right conditions. Consequently, the Phosphorus Strategy "defines 'affects' and 'measurable impact' in terms of the detrimental response to phosphorus in a body of water and the individual contribution of the discharge in causing any of certain identified changes..." *City of St. Cloud*, 696 N.W.2d at 401. These "certain identified changes" include indicators of phosphorus impact on algal growth such as "actual or predicted increases in chlorophyll-a concentration, increased frequency of nuisance algae blooms, reduced transparency, reduced dissolved oxygen concentrations (attributable to decaying algae) or related adverse responses to phosphorus." App. 108; *see also In re City of Owatonna's NPDES/SDS Proposed Permit Reissuance for Discharge of Treated Wastewater*, 672 N.W.2d 921, 924 (Minn. Ct. App. 2004). "In addressing whether phosphorus 'affects' a body of water, the [MPCA] determines whether phosphorus creates a 'measurable impact' in the adverse

reactions to phosphorus by the lake or reservoir being considered and whether those adverse effects can be traced to a particular source of phosphorus." *City of St. Cloud*, 696 N.W.2d at 404-05. Thus, it is only where a scientific evaluation determines that a phosphorus load causes a "measurable" impairment that phosphorus limits are imposed before a TMDL is completed. *City of St. Cloud Wastewater Treatment Facility Request to Adopt the Summary Disposition Granted by the Administrative Law Judge,*, 2003 Minn. App. LEXIS 1156 (Sept. 12, 2003) (unpublished opinion), at *4 - *5 (App. 134-35).

The evaluation requires an incremental impacts assessment, which considers not only the relevant physical factors of the waterbody but also the relative importance of the loading compared to other sources. The Strategy also provides an extended discussion of its definition of *de minimus* phosphorus loadings, including the following summary:

> Municipal facilities with a phosphorus load of 1,800 pounds per year or less will ordinarily be considered as *de minimus* facilities for purposes of considering what, if any, phosphorus controls should be required. This is based on MPCA staff's general experience which shows that these small discharges do not have a measurable impact on the environment. However, if under further review of a specific discharge a measurable impact appears likely, appropriate measure[s] will be considered.

App. 109; *see also* App. 111-15. Thus, there are certain phosphorus loadings that are technically presumed to have no measurable effect. The phosphorus loading in this case is 3600 lbs/year, double the presumed *de minimus* level.

Taken together, the Phosphorus Strategy discussion of these key terms highlights several elements: 1) the MPCA analyzes not just phosphorus discharges in a vacuum, but rather algal response factors such as chlorophyll-a and Secchi disk depth (water transparency) to assess effects; 2) these effects must be "measurable," a technical determination within the MPCA's purview; 3) the attribution of "affects" and "measurable

impact" are in relation to the individual phosphorus discharge; and 4) the MPCA has determined, based on its expertise and experience, that some phosphorus discharges may be so small as to be *de minimus* in terms of their impacts on algal growth. Consequently, the MPCA does not consider an impact "measurable" simply because the current phosphorus load has doubled from a *de minimus* level to a higher level. *Cf.* 702 N.W.2d at 770-71. Data or analysis must indicate the degree of impact attributable to an individual wastewater treatment facility's discharge (i.e., change in chlorophyll-a and Secchi disk depth), which necessarily must include consideration of the relative change in water quality that will occur. Without such evidence, "affects" and "measurable impact" are not demonstrated.

A recent Court of Appeals decision illustrates how a measurable impacts analysis is conducted and confirms the Court's ruling is in error. In *City of Owatonna*, the Court found that each of the two municipal phosphorus discharges in question had been individually evaluated to determine their effect on Lake Byllesby, a downstream reservoir on the federal Section 303(d) list. 672 N.W.2d 921. The regulation being evaluated would require a phosphorus effluent limitation of 1 mg/L if a "measurable impact" were predicted to occur. *Id.* at 924 The MPCA's modeling of the City of Owatonna's effluent demonstrated that reducing the city's phosphorus effluent concentration to 1 mg/L would reduce in-lake phosphorus levels by 9% and chlorophyll-a levels by 4%. *Id.* The same modeling applied to the City of Faribault's effluent showed that reducing that city's phosphorus concentration to 1 mg/L would reduce in-lake phosphorus concentrations by 15.86%, and chlorophyll-a levels by 7%. *Id.*

The MPCA found these phosphorus impacts to fall within the margin of error for the water quality model it used, thereby rendering them not "measurable," and as a result

the MPCA declined to apply the state's phosphorus effluent rule to the municipal discharges, citing the eventual development of a TMDL for Lake Byllesby that would evaluate a host of point and nonpoint source contributions to nutrient impairment in Lake Byllesby. *City of Owatonna,* 672 N.W.2d at 925. The Court of Appeals reversed and remanded for a contested case hearing, citing doubts as to whether the MPCA's decision to permit the facilities was supported by substantial evidence. *Id.* at 928. Notwithstanding the outcome given the issue of fact presented, *City of Owatonna* demonstrates the type of highly technical analysis used by the MPCA to evaluate phosphorus discharges.

Total Maximum Daily Loads

The Phosphorus Strategy, like 40 C.F.R. § 122.4(i), addresses phosphorus impacts and reduction requirements for individual facilities. A TMDL, on the other hand, addresses cumulative impacts of phosphorus (or other pollutants) on an impaired water from one or more point or nonpoint pollution sources contributing to the impaired condition. App. 134. TMDLs are provided for directly within the Clean Water Act. 33 U.S.C. § 1313(d) (2000). Unlike the Phosphorus Strategy (or 40 C.F.R. § 122.4(i)), a TMDL does not require a showing of individual, measurable pollutant impacts before requiring one or more sources to reduce pollutants.[3] Thus, in the context of the permit issuance decision prior to TMDL development, individual impacts on algal growth such as those evaluated by 40 C.F.R. §§ 122.4(i) or 122.44(d) are addressed through the Phosphorus Strategy, whereas cumulative impacts from multiple sources are addressed through a TMDL. Allowing an individual permit to increase its loading pending TMDL development does not imply that such

[3] For a detailed description of 303(d) listing and TMDL development, see *San Francisco Baykeeper v. Browner*, 147 F. Supp .2d 991, 995 (N.D. Cal. 2001).

phosphorus loading will avoid regulation; it merely defers the timing of that decision until the relevant scientific studies are completed.[4]

ARGUMENT

At issue in the present case is not whether or how phosphorus reductions should be imposed, but rather whether the MPCA may issue an NPDES permit to a new joint WWTF that is replacing two existing facilities, if the facility is discharging to a Section 303(d)-listed impaired water, where a TMDL has not been completed.[5] On this point the majority and dissent agreed that 40 C.F.R. § 122.4(i) does not preclude the MPCA from issuing an NPDES permit to a "new source" under such circumstances, and on this point the Court of Appeals decision should be affirmed.

Unfortunately, both the majority and the dissent labored under the mistaken assumption that 40 C.F.R. § 122.4(i) was applicable to this permit action.[6] Because the

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[4] MPCA's recently issued TMDL for the Minnesota River confirmed that where excess nutrients are present, the addition of further nutrients to a waterbody has no detrimental effect. *Lower Minnesota River Dissolved Oxygen Total Maximum Daily Load Report,* http://www.pca.state.mn.us/publications/reports/tmdl-final-lowermn-doreport.pdf (May 2004), *generally* and at 20. Thus, allowing increased phosphorus loadings pending the completion of the TMDL would not cause additional standard violations.

[5] Pending TMDL completion, the proposed Annandale/Maple Lake WWTF would receive a phosphorus effluent limit of one milligram per liter. R. 1487; *see also* App. 70.

[6] Apparently MCEA raised this contention below and the MPCA did not object. While this issue may be deemed waived, to prevent manifest injustice this Court may, nonetheless, consider this issue *de novo* as a matter of law. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (issue raised for first time on appeal generally disallowed), *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (issues not argued in briefs "deemed waived" on appeal); *but see Frank v Winter*, 528 N.W.2d 910, 913 (Minn. App. 1995) (appellate court "may reach issues not ordinarily considered properly raised"), *Balder v. Haley*, 399 N.W.2d 77, 80 (Minn. 1987) (same), Minn. R. Civ. App. Pro. 103.04 (2005) (appellate courts may "take any other action as the interest of justice may require"). In any event, remand would allow this issue to be raised and briefed, but in the interest of judicial economy it may be more appropriate to resolve the issue in the present forum.

joint WWTF does not fit within the definitions of "new source" or "new discharger" in 40 C.F.R. § 122.4(i), the regulation simply does not address the MPCA's authority to issue an NPDES permit to the Cities in this instance.

Moreover, assuming *arguendo* that the regulation did apply, the majority's *de novo* construction of 40 C.F.R. § 122.4(i) and its conclusory position that a mere doubling of a load means that the joint WWTF will cause impairment and its refusal to defer to the MPCA's application of this regulation to the joint WWTF mandates reversal. The MPCA should not be restricted from issuing a NPDES permit for the joint WWTF because through the combined application of its "measurable impacts" analysis via the MPCA's Phosphorus Strategy, and the application of pollutant offsets as countenanced in EPA guidance and precedent, the MPCA could determine that the joint WWTF would not "cause or contribute" to a violation of water quality standards.[7] These findings are technical in nature, warranting deference to the MPCA's determinations.

I. Standard of Review

Questions of fact are reviewed based on a "clear error" standard of review. *Pierce v. Underwood,* 487 U.S. 552, 558 (1988); *Northern States Power Co. v. Lyon Food Products, Inc.,* 304 Minn. 196, 201, 229 N.W.2d 521, 524 (Minn. 1975). While questions

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[7] The majority asserted that "the PCA determined that the Cities' proposed source has a measurable impact on the Section 303(d) impairment factors for the North Fork and the Lake Pepin watershed." 702 N.W.2d at 776. While the record basis for this position is unknown, it appears the majority made this finding by ignoring the MPCA's argument with regard to offsets from the City of Litchfield, which will reduce its phosphorus discharge by 53,544 pounds per year, dwarfing the proposed Annandale/Maple Lake discharge of 3,600 pounds. *Id.* at 771-72. The Court's decision noted that a "cause or contribute" analysis must be supported by substantial evidence. *Id.* at 774, n. 3, *see also City of Owatonna*, 672 N.W.2d at 928. An offset analysis would be sufficient to evaluate that a load increase could not worsen water quality. But absent the offset, one cannot presume that the phosphorus will cause additional impairment.

of law may be reviewed *de novo*, "decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience." *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977).

Judicial deference is appropriate to "agency decision-makers in the interpretation of statutes that the agency is charged with administering." *In re Max Schwartzman & Sons, Inc.*, 670 N.W.2d 746, 754 (Minn. Ct. App. 2003); *see also In re Excess Surplus Status of Blue Cross & Blue Shield of Minnesota*, 624 N.W.2d 264, 278 (Minn. 2001). The majority's failure to defer to the MPCA's determination in this regard should be reversed.

II. THE PROPOSED NEW COMBINED ANNANDALE/MAPLE LAKE WWTF IS NEITHER A "NEW SOURCE" NOR A "NEW DISCHARGER"; THEREFORE 40 C.F.R. § 122.4(i) DOES NOT APPLY

A. The Proposed Joint WWTF Replaces Existing Permitted Facilities; Therefore, It Is Not Subject To 40 C.F.R. § 122.4(i)

Throughout its decision, the Court assumed that the combined, relocated Annandale/Maple Lake discharge is a "new source" subject to the prohibition contained in 40 C.F.R. § 122.4(i). *See generally,* 702 N.W.2d 768. No analysis of the regulation was provided to support this assumption. *Id.* at 772-73. For 40 C.F.R. § 122.4(i) to apply to the issuance of the draft permit, the facility must fit the narrow federal definition of either "new source" or "new discharger." It does not. As both Annandale and Maple Lake were previously issued separate NPDES permits, and both plan to discharge at the same "site" (albeit at a combined location), this operation is an "existing source" and 40 C.F.R. § 122.4 (i) is simply inapplicable.

1. Municipal Facilities Cannot Be A "New Source"

Federal regulations narrowly define "new source" as:

> "any building, structure, facility, or installation from which there is or may be a 'discharge of pollutants,' the construction of which commenced: (a) After promulgation of standards of performance under section 306 of CWA which are applicable to such source, or (b) After proposal of standards of performance in accordance with section 306 of CWA which are applicable to such source, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal."

40 C.F.R. § 122.2 (2005).

Under Section 306 of the CWA, only certain industries, and not municipalities, are regulated as source categories subject to new source performance standards ("NSPS"). 33 U.S.C. § 1316 (2005). The EPA has recognized that municipalities are not subject to NSPS and thus, cannot qualify as new sources under 40 C.F.R. § 122.4(i). *In re Town of Seabrook*, 4 E.A.D. 806, 816-17 n.20 (EAB 1993) (proposed municipal wastewater treatment plant is not "new source" because no applicable NSPSs exist for such a facility), *aff'd sub nom.* In a subsequent proposed rulemaking, EPA reiterated this position: "[i]f there are no applicable NSPS for either discharger, then neither would be a new source." 64 Fed. Reg. 46058, 46061 n.3 (Aug. 23, 1999). The EPA Environmental Appeals Board has similarly explained that "in some instances, a 'new source' (in the everyday sense) of water pollution is not a 'new source' (in the CWA sense) due to lack of an NSPS." *In re Phelps Dodge Corp. Verde Valley Ranch Dev.*, NPDES Appeal No. 01-07, 2002 EPA App. LEXIS 8 (May 21, 2002). Since municipalities are not subject to NSPS, their combined discharge cannot fit the definition of "new source." Consequently, the joint WWTF is not a "new source," and the decision below is plainly in error.

2. Both The Cities Of Annandale And Maple Lake Had Existing NPDES/SDS Permits For Their WWTFs; Therefore The Combination Of These Two Existing Permittees Does Not Constitute A "New Discharger" Within The Definition Of 40 C.F.R. § 122.4(i)

Although the Court mischaracterized the combined municipal discharge as a "new

source," the relevant question is whether, under federal law, the new joint WWTF should have been classified as a "new discharger," thereby subject to 40 C.F.R. § 122.4(i). Though the Court never evaluated this question, the answer is no. The two currently permitted municipalities were issued a draft joint NPDES permit for a new WWTF. Since both municipalities were previously permitted, neither can be a "new discharger." Moreover, relocation of an existing outfall does not constitute a "new discharger." Thus, the combination and relocation of an existing permitted discharger is an existing source under federal law.[8]

Under the EPA regulations a "new discharger" is defined as "any building, structure, facility, or installation: (a) [f]rom which there is or may be a 'discharge of pollutants;' (b) [t]hat did not commence the 'discharge of pollutants' at a particular 'site' prior to August 13, 1979; (c) [w]hich is not a 'new source;' and (d) [w]hich has never received a finally effective NDPES permit for discharges at that 'site.'" 40 C.F.R. § 122.2. The joint operation is not a "new discharger" for two basic reasons: (1) both facilities held existing NPDES permits prior to August 13, 1979 (criteria b),[9] and (2) the combined discharge will occur at the same "site" as defined in federal law (criteria d). *See Okanogan Highlands Alliance v. Washington*, PCHB No. 04-064, 2005 WA Env. LEXIS 17, *12 (Apr. 12, 2005).

A "site" is broadly defined as "land or water area where any 'facility or activity' is physically located or conducted, including adjacent land used in connection with the

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[8] The draft permit for the new WWTF contains provisions for abandonment of both the Annandale and Maple Lake facilities and termination of their individual NPDES permits. The Cities will be jointly responsible as owners and operators on the new permit App. 78.

[9] Both facilities are over forty years old. (R. 1384).

facility or activity." 40 C.F.R. § 122.2. "Facility or activity" is defined as not merely the location of the physical discharge point, but also where any other "activity...that is subject to regulation under the NPDES program" occurs. Thus, "the site" would also include the area where the pollutants are generated at the cities of Annandale and Maple Lake. 40 C.F.R. § 122.2. Since these "sites" remain unchanged (the Cities are still located in the same place) the joint WWTF is not a "new discharger."

Finally, the relocation of wastewater outfalls, a common occurrence often triggered by water quality compliance concerns, does not convert an existing facility to a "new discharger." In a proposed 1999 rule amendment EPA sought to broaden the reach of 40 C.F.R. § 122.4(i) to classify certain relocated discharges as "new discharges." Even under the broadened rule proposal, EPA clarified that dischargers who have undergone an expansion of their facilities and proposed to relocate their discharge within the same watershed, are not new dischargers but "existing dischargers." 64 Fed. Reg. at 46061. EPA stated that "[d]ischargers who move an outfall(s) within the same body of water would remain existing dischargers." *Id.* The instant facts show the relocated discharge remains within the North Fork watershed. Moreover, the waterbody of concern for phosphorus, Lake Pepin, remains the same. Thus, had the expanded rule been adopted, relocation of this outfall does not trigger "new discharger" status.

The draft permit authorizes the discharge from existing "the sites" into North Fork of the Crow River. North Fork is within the same "body of water" impacted by the current, individual facilities as well as the joint WWTF. Since the draft NPDES permit authorizes dischargers to the same waterbody, from the same "site," the Annandale and Maple Lake operations do not meet the definition of "new discharger" in their individual capacity.

Since Annandale and Maple Lake individually qualify as existing dischargers, 40 C.F.R. § 122.4(i) is inapplicable to the issuance of their joint permit.

III. THE "CAUSE OR CONTRIBUTE" LANGUAGE IN 40 C.F.R. § 122.4(i) DOES NOT RESTRICT POINT SOURCE PERMITTING PRIOR TO TMDL COMPLETION, ABSENT A DEMONSTRATION THAT THE POINT SOURCE'S DISCHARGE WOULD MEASURABLY IMPACT A DOWNSTREAM IMPAIRED WATER

The Court's decision is internally inconsistent and misstates how 40 C.F.R. § 122.4(i) applies, assuming it is applicable at all. The Court erroneously concluded that "so long as some level of discharge may be causally attributed to the impairment of Section 303(d) waters, a permit shall not be issued." *Annandale/Maple Lake*, 702 N.W.2d at 775. However, nowhere does 40 C.F.R. § 122.4(i) state that the mere addition of an increased pollutant load means that the facility is "causing or contributing to" a water quality standard violation. Such evaluation is left to the discretion of the permitting authority. *Id.* The Court, realizing its position was overstated, determined that the "cause or contribute" test is equivalent to a "measurable impacts" evaluation. *Id.* at 775-76. By its very nature, such an evaluation is only concerned with the relative impacts of the individual facility.[10] The TMDL, however, will determine whether or not further regulation is necessary to account for the cumulative impacts of all discharges in a basin. Failure to make this distinction between the timing of an individual versus cumulative impacts analysis discharge would be to adopt MCEA's argument, rejected by the Court of Appeals, that no

[10] EPA's discussion regarding the type of information needed from the discharger to make a "cause or contribute" evaluation is only the "information that is normally and properly submitted during the permit application process for the imposition of water quality-based effluent limitation...." 65 Fed. Reg. 30887 (May 15, 2000). The more detailed information needed to perform a TMDL is the responsibility of the state and federal government. 33 U.S.C. § 1313(d).

discharges potentially affecting impaired waters could be permitted until the TMDL is completed. *Id.*

A. The Court Erred As A Matter Of Law In Focusing Solely On The Change In Phosphorus Loading

As previously discussed, the MPCA has a longstanding practice of identifying and regulating "measurable impacts" on algal growth from a point source phosphorus discharge to waters such as Lake Pepin. *Supra* 5 to 10; *see also* App. 108-09 and *City of St Cloud*, 696 N.W.2d at 403. As borne out by the Court of Appeals in the decision below, the same evaluation applies to the question of whether a new source would "cause or contribute to" or "measurably impact" a water quality standard violation. *Annandale/Maple Lake*, 702 N.W.2d at 772-73. The applicable water quality standard plainly does not allow one to conclude a standard violation has occurred simply by considering a phosphorus load change. *Supra* at 6.

Thus, to determine whether permitting is restricted under 40 C.F.R. § 122.4(i), the MPCA as the designated state NPDES authority must make a scientific determination. In the context of phosphorus, the MPCA uses its Phosphorus Strategy to guide this process. The Phosphorus Strategy clearly indicates that, pending TMDL development, the MPCA determines "measurable impacts" in terms of algal growth response factors attributable to a particular phosphorus discharge. App. 108. Absent such a showing, a point source cannot be said to "cause or contribute to" a standard violation. Therefore, the Court's conclusion that a doubling of the phosphorus loading justified a conclusion that measurable impacts had occurred, was plain error. Such analysis standing alone, as a matter of law, is insufficient to conclude "measurable impacts" have occurred.

B. There Is No Substantial Evidence Of "Measurable Impacts" And The Court's Contrary Determination Is Flatly Contradicted By The *St. Cloud* Decision

The Court of Appeals presumed that measurable impacts were demonstrated. 702 N.W.2d at 774. Contrary to *City of Owatonna*, however, the record below nowhere presents substantial evidence supporting a finding that the joint WWTF will "measurably impact" Lake Pepin. *Supra* note 6, *Cf City of Owatonna*, 672 N.W.2d at 924-25. Moreover, the Court inferred that such a finding must be supported by "substantial evidence." 702 N.W.2d at 774 n. 3. The Court has clearly overstepped is authority assuming that a doubling of load means "measurable impacts" have occurred in a waterbody 150 miles away. The Court's failure to require a demonstration of impacts with substantial evidence was clear error.

In a similar case, a comprehensive analysis was utilized by the MPCA to determine that the City of St. Cloud's existing phosphorus load did not measurably impact Lake Pepin, deferring more restrictive limits for that city until TMDL completion. *City of St. Cloud*, 696 N.W.2d 398 at 405-06. The St. Cloud phosphorus load is over 30,000 lbs/year or 10 times the load from the joint WWTF.[11] It would be absurd for MPCA to conclude that the St. Cloud loading does not cause a measurable impact while the joint WWTF does. The Court's finding to the contrary is inexplicable and was contrary to the *St. Cloud* decision. Moreover, the St. Cloud ALJ decision (rejecting a similar challenge by MCEA) noted that the MPCA's Lake Pepin report had concluded that presently "phosphorus is not

[11] The City's annual average flow is 9.9 million gallons per day with an average phosphorus effluent concentration of 1.013 mg/L. *In re City of St. Cloud Wastewater Treatment Facility NPDES Permit*, No. 7-2200-14439-2, 2004 Minn. ENV LEXIS 8 (May 27, 2004) (App. 139). This translates into just over 30,000 lbs/year of TP to Lake Pepin.

limiting algal growth." App. 151. Thus, the further addition of phosphorus by Annandale/ Maple Lake, even if a new load, could not further increase algal growth. In light of these prior detailed technical findings by MPCA, it is improbable, to say the least, that MPCA "concedes that this phosphorus will affect the Lake Pepin watershed." *Annandale/Maple Lake*, 702 N.W.2d 768 at 774. The Court's conclusion to the contrary should be reversed.

C. Offsets May Be Considered In "Cause and Contribute" Evaluations

Finally, the Court's finding that 40 C.F.R. § 122.4(i) precludes the consideration of "offsets" as a part of a "cause or contribute" analysis was in error. 702 N.W.2d at 774. First, on its face the rule contains no such restriction. Second, contrary to the Court's understanding, EPA has expressly adopted the position that offsets may be included in implementing this rule. *In Re Carlota Copper Co.*, Nos. 00-23 & 02-06, 2004 WL 3214473 (EAB Sept. 30, 2004). As EPA is the author of this provision, a state is bound by that interpretation and the Court's ruling must be reversed. 702 N.W.2d at 771-72.

CONCLUSION

In the decision below, the Court of Appeals correctly held that in order for a point source to be found to "cause or contribute" to a water quality standard violation in a downstream surface water, and therefore be denied an NPDES/SDS permit, there must be some showing that the point source would measurably affect the impaired water. In the case of phosphorus, this demonstration of measurable effects has been longstanding MPCA policy. This portion of the Court of Appeals' decision should be affirmed.

However, the Court of Appeals erred in applying 40 C.F.R. § 122.4(i) to the Annandale/Maple Lake WWTF when the joint facility is plainly neither a "new source" nor a "new discharger" within the definitions contemplated in that regulation. Further, the

Court of Appeals erred in neglecting to defer to the MPCA's expert findings and instead held that the Annandale/Maple Lake WWTF would "cause or contribute to" nutrient impairment in Lake Pepin, while misinterpreting EPA rules to hold that the MPCA could not offset the increased input of phosphorus with reductions from other point sources. MESERB and the CGMC respectfully request that these portions of the Court of Appeals decision be reversed.

Respectfully submitted,

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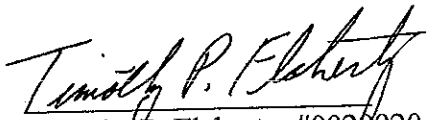

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).