

NO. 04-2033

**STATE OF MINNESOTA
IN SUPREME COURT**

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

**BRIEF OF *AMICUS CURIAE* BUILDERS ASSOCIATION
OF THE TWIN CITIES**

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INTEREST OF AMICUS CURIAE

Amicus Curiae Builders Association of the Twin Cities (“BATC”) respectfully submits this brief pursuant to the Court’s order dated October 26, 2005.¹

BATC is a not-for-profit, voluntary trade association established to represent the interests of building contractors, land developers, manufacturers, suppliers, and related business enterprises throughout the Minneapolis-St. Paul metropolitan region. BATC was founded in 1948 by a small group of builders, and has since expanded to include approximately 1,800 member companies representing builders, remodelers, developers, sub-contractors, suppliers, and other professionals who support the building industry.

BATC is dedicated to providing a diverse selection of quality and affordable housing to the Twin Cities area. Its members annually deliver nearly 20,000 housing units to the region. In support of its members, BATC focuses on the land development and infrastructure capacity in the Twin Cities region and educating association members, policy makers and the public about urban development patterns, generally, and housing, specifically; and the public infrastructure and regulatory programs necessary to support residential development and housing affordability. BATC participates in these issues at the local, state, and federal government levels in drafting legislation, commenting on proposed regulations, establishing standards, and otherwise providing input to ensure sound public policy.

¹ BATC’s undersigned counsel certifies pursuant to Rule 129.03 of the Minnesota Rules of Civil Procedure that no counsel for any party authored this brief either in whole or in part, and that no one made a monetary contribution to the preparation or submission of this brief, other than BATC, its members and its counsel. Minn. R. Civ. App. P. 129.03.

ARGUMENT

BATC submits this amicus curiae brief in support of Appellant Minnesota Pollution Control Agency's ("MPCA") exercise of its discretion and authority to issue a permit for the construction of the new wastewater treatment plant proposed by Appellants City of Annandale and City of Maple Lake (collectively, "Cities") which, when viewed overall, will be part of a net improvement of the body of water in question. The MPCA's decision to grant the Cities' permit application pending the State's determination of Total Maximum Daily Loads ("TMDLs") based on an "offset" method is entirely consistent with the plain language and clear objectives of the Clean Water Act and the regulations promulgated thereunder, and is an appropriate exercise of state regulatory authority as contemplated under the Clean Water Act. The MPCA's incremental approach also reflects a practical way of achieving the Clean Water Act's objectives of protecting and improving water resources while allowing for incremental development that will, among other things, sustain the local economy and allow for the construction of affordable housing.

In contrast, the position taken by Respondent Minnesota Center for Environmental Advocacy ("MCEA") and adopted by the Court of Appeals' majority in its decision embraces an unduly rigid approach that unnecessarily and unwisely effectively imposes a moratorium on any new wastewater treatment facilities. In the Matter of Cities of Annandale and Maple Lake, 702 N.W.2d 768, 775 (Minn. Ct. App. 2005) ("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"). Such an approach is neither mandated by the

applicable statutory and regulatory authority nor is it compatible with the United States Supreme Court's interpretation of those authorities. This approach is also an improper restriction of the MPCA's broad authority and discretion to develop long-range, area-wide programs to achieve the objectives of the Clean Water Act to protect and improve water resources.

I. MPCA'S "OFFSET" APPROACH IS REASONABLE AND RESPONSIBLE METHOD TO PROTECT AND IMPROVE WATER RESOURCES WHILE AT THE SAME TIME ALLOWING INCREMENTAL DEVELOPMENT.

The Clean Water Act was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In enacting this law, it was stated "policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution and to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." *Id.* at § 1251(b). Consistent with Congress' purpose and policy, the United States Supreme Court has held that "the Clean Water Act vests in the EPA [i.e., U.S. Environmental Protection Agency] and the States broad authority to develop *long-range, area-wide* programs to alleviate and eliminate existing pollution." Arkansas v. Oklahoma, 503 U.S. 91, 108 (1992) (emphasis added).

This case involves the interpretation and application of 40 C.F.R. § 122.4(i) which was promulgated under the authority of the Clean Water Act and states, in pertinent part, that "[n]o permit may be issued . . . [t]o a new source or a new discharger, if the discharge from its construction or operation will *cause or contribute to the violation of water quality standards.*" 40 C.F.R. § 122.4(i) (2004) (emphasis added). The Court of

Appeals has interpreted Section 122.4(i) as prohibiting the issuance of permits “so long as some level of discharge may be causally attributed to the impairment” of protected waters. In the Matter of Cities of Annandale and Maple Lake, 702 N.W.2d at 775. The Court of Appeals’ majority, however, went on to reach the unwarranted, unprecedented, and potentially detrimental conclusion that Section 122.4(i) requires that determination to be made by focusing on the discharger or source in isolation rather than as part of a long-range, area-wide program that may yield an overall improvement of the water resource.

The United States Supreme Court has rejected the proposition that the Clean Water Act mandates a categorical ban on new discharges of effluent into impaired waters, holding that such a ban could prevent the construction of new wastewater treatment facilities that would actually improve existing conditions. Arkansas, 503 U.S. at 108.

The EPA has adopted the use of offset analyses in its Final Water Quality Trading Policy which encourages water-quality trading by states where such trading “[a]chieves early reductions and progress toward water quality standards pending development of TMDLs [i.e. Total Maximum Daily Loads] for impaired waters” and “[o]ffsets new or increased discharges resulting from growth in order to maintain levels of water quality that supports all designated uses.” *Final Water Quality Trading Policy*, EPA Office of Water (Jan. 13, 2003).²

As noted by the Court of Appeals in both the majority and dissenting opinions, the EPA has previously advocated a flexible approach to the “cause or contribute” language

² The EPA’s *Final Water Quality Trading Policy* has been included in its entirety in the MPCA’s Appendix at App. 93-App. 103.

in Section 122.4(i) in other litigation. In the Matter of Cities of Annandale and Maple Lake, 702 N.W.2d at 774 n.4 & 777-78. In those proceedings, which were captioned Sierra Club v. Clifford, No. 96-0527 (E.D. La.), the EPA confirmed that section 122.4(i) does not impose a per se prohibition on permits, and that, instead, each permit application must be evaluated on a case-by-case basis. EPA Brief at 50-51.³ The EPA went on to confirm that “it is possible for a discharger to be issued a permit where it is demonstrated that other pollutant source reductions . . . will offset the discharge in a manner consistent with water quality standards. The ultimate result of this type of ‘offset’ or ‘trade’ may be a net decrease in the loadings of the pollutant of concern in the [Clean Water Act] § 303(d) listed water, and, therefore, EPA, by practice, has considered a discharge which has been offset in accordance with permit requirements not to ‘cause or contribute to a violation of water quality standards.’” Id. Based on the forgoing, the EPA pointed out that a “blanket prohibition” on new dischargers of the same sort advocated by the MCEA in the instant case “is unnecessary and contrary to law.” Id. at 54. Leaving aside the debate as to the degree of deference courts ought to give to positions taken by an agency in litigation, the interpretation advocated by the EPA in that pending litigation, by definition, reflects what it believes to be a reasonable and good faith interpretation of Section 122.4(i). Fed. R. Civ. P. 11(b)(2).

In rejecting a challenge to the issuance of a permit to a new source that would be discharging into an impaired body of water, the EPA’s Environmental Appeals Board

³ The EPA’s brief in Clifford has been included in its entirety in the MPCA’s Appendix at App. 26-App. 92

pointed out that “[t]he Supreme Court [has] cautioned against interpreting the [Clean Water Act] in a way that would frustrate beneficial development and with it opportunities to improve existing conditions” and has held that, instead, the Clean Water Act should be interpreted recognizing it “has vested the EPA and the states with the authority to develop ‘long-range, area-wide’ programs aimed at alleviating and eliminating existing pollution.” In re Carlota Copper Co., 2004 WL 3214473, at *46 (EPA Environmental Appeals Board Order dated Sept. 30, 2004) (discussing Arkansas v. Oklahoma, 503 U.S. 91 (1992) and upholding offset analysis).⁴

The Court of Appeals’ majority also missed the point as to the significance of the EPA’s consideration of revisions to Section 122.4(i) that would have included a nationwide system offsets. In the Matter of Cities of Annandale and Maple Lake, 702 N.W.2d at 774-75. As the dissent correctly pointed out, while the EPA eventually decided that such a nationwide requirement imposing a “one size fits all” approach was unwise, the fact that the EPA has considered such proposed revisions reflects the EPA’s interpretation that Section 122.4(i) allows for such an offset approach at the state level. Id. at 778.

The MPCA has adopted a reasoned and flexible long-range, area-wide approach which considers the overall impact of how a proposed discharger or source may “cause or contribute” to the water quality and, in so doing, advanced the statutory objectives to maintain and improve water resources while still allowing for incremental development.

⁴ The EPA Environmental Appeals Board’s order in Carlotta Copper has been included in its entirety in the MPCA’s Appendix at App. 104-App. 200.

The benefit of such an “offset” approach would be illustrated in the instant case where the MPCA “concluded that the 2,200-pound increase in the phosphorus discharge from the Cities’ proposed plant would be offset by a new wastewater-treatment plant in Litchfield that will reduce the phosphorus discharge into the North Fork by approximately 53,500 pounds per year.” *Id.* at 770-71. By applying the offset approach in the decision to issue the permit, the MPCA achieved the objective of the Clean Water Act “restore and maintain” the water resource while, at the same time, allowing for incremental development.⁵

The MPCA’s application of an “offset” approach is not only consistent with the objectives of the Clean Water Act and the language of 40 C.F.R. § 122.4(i), as interpreted by the Supreme Court and EPA, respectively, but it is also consistent with the MPCA’s longstanding approach to managing phosphorus in Minnesota’s waters. Since 1996, the MPCA has been developing a comprehensive strategy for managing phosphorus which includes “basin management as the main policy context for implementing the phosphorus strategy.” *MPCA Phosphorus Strategy* (www.pca.state.mn.us/water/phosphorus.html). The MPCA’s phosphorus strategy is based on the agency’s findings that phosphorus comes from both “point” and “nonpoint” sources. Point sources consist mainly of municipal and industrial waste water discharges. Nonpoint sources include runoff from agricultural fields, feedlots, urban areas, and on-site sewage treatment systems. This

⁵ MCEA has claimed the MPCA’s findings on the dissolved-oxygen levels in the North Fork were not adequately supported by the record. *Id.* at 773 n.3 The merits of any such claim, if any, do not alter the underlying rationale and legitimacy of the offset approach in determining whether to issue these types of permits.

strategy is intended to address the types of challenges presented by the instant case where the Cities, whose permits have now expired and whose 40-year-old facilities are nearing the end of their useful lives, need to construct a new regional, jointly operated wastewater treatment facility in order “to continue to provide safe and reliable wastewater treatment now and in the future.” (R. at 765, 1384, 1480).

As this case demonstrates, the MPCA’s approach allows for the construction of new, more efficient, and more environmentally compatible wastewater treatment facilities. In contrast, a categorical and open-ended ban will unduly delay and increase costs so as to discourage the replacement of aging treatment facilities and will force municipalities whose facilities are at their capacities to impose a moratorium on further growth and development. Duchscher, Kevin & Smith, Mary Lynn, *Sewage Ruling Reins In Cities, Court Ruling Might Slow Growth*, Star Tribune, Aug. 10, 2005; Lien, Dennis, *Wastewater Ruling Might Stall Growth, Towns Restricted By Decision On Water Pollution*, St. Paul Pioneer Press, Aug. 10, 2005; Post, Tim, *Court Says State Officials Violated Clean Water Act*, Minnesota Public Radio, Aug. 10, 2005; Olson, David C., *Clean Water Is Vital To Minnesota Economy*, St. Paul Pioneer Press, Sept. 11, 2005. Such a stagnation of growth and development would have an adverse impact on the economic future of those communities and regions of the State. Given these dramatically different alternative scenarios, the MPCA’s responsible and measured approach which allows for incremental growth and the overall improvement of the affected water resources is clearly preferable to the rigid, stagnant, and short-sighted ban advocated by the MCEA.

Ironically, the Court of Appeals majority acknowledged “the difficult wastewater-management issues arising from the Cities’ current size and anticipated growth.” In the Matter of Cities of Annandale and Maple Lake, 702 N.W.2d at 776. Indeed, these are complex and challenging issues that require creative and flexible approaches rather than restrictive and rigid mandates. Congress, the EPA, the MPCA, the Cities, and the Court of Appeals’ dissent have all clearly recognized the complex and dynamic character of land use planning requires a holistic approach that can achieve the objectives of protecting and improving all of our environmental resources, while at the same time allowing for development that sustains the local, regional, and State-wide economy.

The MPCA’s holistic approach allows communities and developers more flexibility to accommodate all aspects of the environment, including the soil and air, as well as the State’s water resources. For example, rather than forcing the use of septic systems which would eventually impact the environment, the MPCA has used greater foresight to view how the development of an area will impact the environment overall and utilize offsets to approve waster-water treatment facilities so as to allow for responsible residential planning, as well as industrial and commercial uses, in a comprehensive and coordinated manner.

This holistic approach is compatible with a sound and sensible approach to growth. As the EPA observed in its Final Water Quality Trading Policy, “[p]opulation growth and development place increasing demands on the environment making it more difficult to achieve and maintain water quality standards.” *Final Water Quality Trading*

Policy, EPA Office of Water (Jan. 13, 2003). As a result, “[f]inding solutions to these complex water quality problems requires innovative approaches that are aligned with core water programs. Water quality trading is an approach that offers greater efficiency in achieving water quality goals on a watershed basis. It allows one source to meet its regulatory obligations by using pollutant reductions created by another source that has lower pollution control costs. Trading capitalizes on economics of scale and the central cost differentials among and between sources.” *Id.*

The multiplicity of environmental and economic factors create highly complex and dynamic situations that can be managed most effectively through efficient land and infrastructure use and creation of housing densities high enough to support marketplace and regional housing goals. The National Association of Home Builders⁶ have pointed out that “[e]xcessive regulations and onerous procedures limit the number of homes that can be built, increase the cost of those that are built, and reduce the affordability of all homes.” *Barriers to Affordable Housing*, National Association of Home Builders (www.nahb.org/generic.aspx?sectionID=636&genericContentID=3516&print=true).

Stopping or slowing growth “penalize[s] and put[s] at greatest risk those living at the edge of housing affordability—the young, minorities, immigrants and moderate-income families who are just now taking advantage of today’s economic prosperity and low interest rates and are entering the homeownership market in record numbers.” *Smart*

⁶ Founded in 1942, the National Association of Home Builders is a federation of more than 800 state and local associations, including the BATC.

Growth, National Association of Home Builders

(www.nahb.org/generic.aspx?sectionID=636&genericContentID=3519&print=true).

This flexible approach to environmental regulatory programs allows for:

- Planning for and accommodating anticipated growth in economic activity, population, and housing demand as well as ongoing changes in demographics and lifestyles while protecting the environment.
- Providing for a wide range of housing types to suite the needs, preferences, and income levels of a community's diverse population.
- Adopting balanced and reliable means to finance and pay for the construction and expansion of roads, schools, water and sewer facilities, and other infrastructure required to serve a prosperous community.

Smart Growth, National Association of Home Builders

(www.nahb.org/generic.aspx?sectionID=636&genericContentID=3519&print=true).

The MPCA is entirely within its discretion and judgment to adopt the sort of flexible and creative approach necessary to achieve these objectives. This is precisely why Congress and the EPA look to state agencies to exercise discretion and oversee and regulate the issuance of permits at the local level. As the EPA observed in the Clifford litigation, each permit application must be judged on a "case-by-case" basis, and that judgment must be informed by the manner in which a given area is being, and will be, developed overall so as to maintain and protect all aspects of the environment and, where possible, do so in ways that are economically attractive. Coordinated and long-range planning makes it possible for there to be a net improvement of an area overall that might not be achieved if rigid and absolute bans on certain types of facilities are imposed. This

is entirely consistent with Congress' expectation that the responsible state agencies will make decisions based on long-range, area-wide views.

II. MPCA IS ENTITLED TO DEFERENCE IN ITS EXERCISE OF DISCRETION AS TO THE INTERPRETATION AND APPLICATION OF 40 C.F.R. § 122.4(i).

The Clean Water Act vests the states with broad authority to develop programs to achieve its purposes. 33 U.S.C. § 1288(b)(2). The MPCA is charged with responsibility for administering and enforcing all pollution laws relating to the waters of the State of Minnesota, including the issuance of permits for the prevention, control, and/or abatement of water pollution and for the installation or operation of disposal systems. Minn. Stat. § 115.03, subd. 1(a) & (e). In this regard, the MPCA has the authority to take the necessary actions to establish conditions for discharge permits. Minn. Stat. § 115.03, subd. 5; Minn. R. 7001.0140, subpt. 1. Federal law requires the MPCA to have legal authority to implement the applicable federal regulations, including section 122.4. 40 C.F.R. § 123.25(a)(1).

Utilizing its extensive technical knowledge and expertise, the MPCA must be permitted to exercise its discretion with respect to the implementation and application of 40 C.F.R. § 122.4 in determining whether it is permissible to offset the level of discharge to an impaired water by the reduction in loading from other sources and by considering whether there is a net overall reduction of the total amount of pollution entering the impaired water. The Court of Appeals' decision conflicts with the level of discretion contemplated in the Clean Water Act to be exercised by the states in the implementation of these types of programs; represents a disturbing departure from well-settled law; and

drastically interferes with the responsible development of communities throughout the State of Minnesota by holding that there shall be no deference given to a State agency's interpretation of a technical federal regulation that the state agency is legally required to administer is seriously flawed.

As a matter of constitutional law, judicial deference of this sort is derived from the separation of powers doctrine. Krumm v. R.A. Nadeau Co., 276 N.W.2d 641, 644 (Minn. 1979). It has also been recognized that such deference is justified from a practical standpoint because agency decision makers possess unique knowledge and technical expertise enabling them to make more informed interpretations of statutes and regulations that apply to their field. Indep. Sch. Dist. No. 277 v. Pautz, 295 N.W.2d 635, 637 (Minn. 1980); Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 824 (Minn. 1977). Accordingly, Minnesota Supreme Court precedent provides for great deference to agency's interpretation of statutes and regulations for which that agency is charged with administering and enforcing. George A. Hormel & Co. v. Asper, 428 N.W.2d 47, 50 (Minn. 1988); Reserve Mining Co., 256 N.W.2d at 824.

“When reviewing agency decisions, [courts] presume that the decision is correct and defer to the agency's expertise and its special knowledge in the field of its technical training, education, and experience.” Hy-Vee Food Stores, Inc. v. Minn. Dep't of Health, 2004 WL 2340189, at *1 (Minn. Ct. App. 2004), aff'd, 705 N.W.2d 181 (Minn. 2005) (citing Matter of the Excess Surplus Status of Blue Cross & Blue Shield of Minn., 624 N.W.2d 264, 278 (Minn. 2001)). In particular, this Court has applied a highly “deferential standard of review” to the MPCA's actions which “only requires that there

be more than a scintilla of evidence in support of the MPCA's decision." Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency, 644 N.W.2d 457, 469 & 471 (Minn. 2002) (Anderson, J. Paul H., concurring).

This deference to state agencies' interpretations of such regulations has previously been adhered to by the Minnesota Court of Appeals. See, e.g., In re Max Schwartzman & Sons, Inc., 670 N.W.2d 746, 754 (Minn. Ct. App. 2003); In re Univ. of Minn. Application for Air Emission Facility, 566 N.W.2d 98, 103-04 (Minn. Ct. App. 1997). This same deference has been held to apply to instances where Minnesota state and local agencies are called upon to interpret and apply federal rules and regulations in the operation and implementation of federal programs. See, e.g., Hy-Vee Food Stores, Inc. v. Minn. Dep't of Health, 2004 WL 2340189 (Minn. Ct. App. 2004) (Minnesota Department of Health afforded deference in interpreting federal regulations relating to disqualification of vendor under federal food stamp program); In the Matter of Southeastern Minn. Citizens' Action Council, Inc., 359 N.W.2d 60, 61-63 (Minn. Ct. App. 1984) (Minnesota county health departments charged with interpreting federal rules with respect to implementing federal "Women, Infants and Children" program).

The Minnesota Court of Appeals' decision in Hy-Vee Food Stores, Inc. v. Minnesota Department of Health, 2004 WL 2340189 (Minn. Ct. App. 2004), provides a particularly apt illustration of the broad deference state agencies are entitled to receive in their interpretation of federal regulations as part of that agency's administration of a federally mandated program. In that case, the Minnesota Department of Health had interpreted the applicable federal regulations and related regulatory history to disqualify a

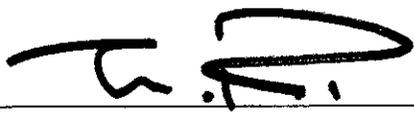
vendor from participating in a food stamp program that was funded by the federal government and administered by the State. Id. at * 2-3. The Court of Appeals properly presumed the agency's decision was correct, deferred to the agency's expertise and its special knowledge in the field of its technical training, education, and experience, and, most importantly, "defer[red] to the agency's interpretation of statutes the agency is charged with administering and enforcing." Id. at * 1.

The MPCA is entitled to the very same presumption and deference in its interpretation and application of 40 C.F.R. § 122.4(i). The MPCA was delegated such authority by Congress under the Clean Water Act, and the MPCA certainly has the requisite knowledge, expertise, and experience to exercise such discretion and be entitled to such deference.

CONCLUSION

For the above-stated reasons, BATC respectfully requests the Court to reverse the Court of Appeals' decision and reinstate the MPCA's decision to issue the permit to the Cities.

Dated: December 5, 2005

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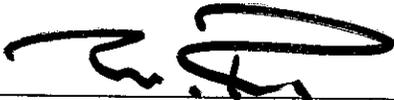
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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(c), for a Brief produced with a proportional 13-point font. The length of this Brief is 3,958 words. Amicus Curiae Builders Association of the Twin Cities' Brief was prepared using Microsoft Word 2000.

Dated: December 5, 2005

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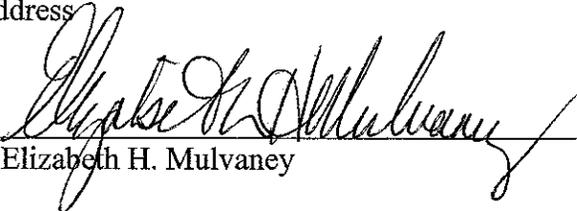
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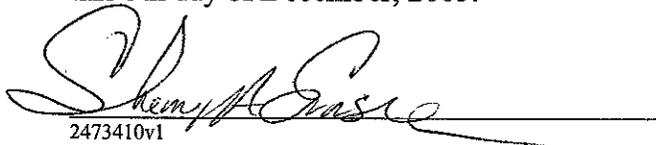
Elizabeth H. Mulvaney, of the City of Grasston, County of Pine, State of Minnesota, being duly sworn, says that on the day of 5th day of December, 2005, she served two copies of a Brief of *Amicus Curiae* Builders Association of the Twin Cities upon:

ALL COUNSEL ON THE ATTACHED SERVICE LIST

These documents have been served by mailing to said persons a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Minneapolis, Minnesota directed to said person at the stated address


Elizabeth H. Mulvaney

Subscribed and sworn to before me
this 5th day of December, 2005.


2473410v1

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