

CASE NO. A04-2033

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*
LEAGUE OF MINNESOTA CITIES and
WRIGHT COUNTY MAYORS ASSOCIATION**

Edward J. Laubach, Jr. (#61025)
Christopher W. Harmoning (#285948)
GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.
1010 West St. Germain, Suite 600
St. Cloud, MN 56301
(320) 252-4414

*Attorneys for Appellants Cities of
Annandale and Maple Lake*

Robert B. Roche (#289589)
OFFICE OF THE MINNESOTA
ATTORNEY GENERAL
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 297-4139

*Attorney for Appellant Minnesota
Pollution Control Agency*

Janette K. Brimmer (#174762)
MINNESOTA CENTER FOR
ENVIRONMENTAL ADVOCACY
26 East Exchange Street, Suite 206
St. Paul, MN 55101-1667
(651) 223-5969

*Attorney for Respondent Minnesota
Center for Environmental Advocacy*

Susan L. Naughton (#259743)
LEAGUE OF MINNESOTA CITIES
145 University Avenue West
St. Paul, Minnesota 55103
(651) 281-1232

*Attorney for Amici Curiae
League of Minnesota Cities and
Wright County Mayors Association*

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LEGAL ISSUE

The Clean Water Act provides that a wastewater permit may not be issued to a new source or a new discharger if the discharge will cause or contribute to the violation of water-quality standards. Should the Minnesota Pollution Control Agency's decision to interpret the "cause or contribute" language to allow a system of offsets be affirmed, where the decision focuses on the net loading of pollutants to a water source and allows a permittee to demonstrate that pollutant reductions by other sources or dischargers will offset the permittee's discharge?

INTRODUCTION

The League of Minnesota Cities has a voluntary membership of 828 out of 853 cities in Minnesota. The League represents the common interests of cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, advocacy, and insurance services. The Wright County Mayors Association (WCMA) is a voluntary association of Mayors of Cities in west central Minnesota, which includes the Mayors of the Cities of Annandale and Maple Lake, as well as the Mayors of the Cities of Albertville, Buffalo, Clearwater, Cokato, Delano, Hanover, Howard Lake, Monticello, Montrose, Otsego, Rockford, St. Michael, South Haven, and Waverly.

The League and the WCMA have a public interest in this case as representatives of cities and their officials.¹ We have a particular interest in clarifying that the Clean Water Act (CWA) gives individual states flexibility to implement a system of offsets that focuses on the net loading of pollutants to a water source when determining whether a new discharge will cause or contribute to a violation of water-quality standards.

The wastewater issues in this appeal are urgent and will continue to recur throughout the state because Minnesota citizens will continue to generate increasing amounts of sewage. This appeal is particularly important to the League and the WCMA because it is primarily cities that must protect the public health by treating and disposing

¹ Pursuant to Minn. R. Civ. App. P. 129.03, the League and the WCMA certify that this brief was not authored in whole or in part by counsel for either party to this appeal, and that no other person or entity made a monetary contribution to its preparation or submission.

of our state's sewage. The Minnesota Pollution Control Agency's (MPCA's) decision should be affirmed because it reasonably interprets the CWA in a way that fulfills its purpose of protecting water quality while also addressing the practical needs of Minnesota citizens.

In this case, the Cities of Annandale and Maple Lake requested a permit for a new joint wastewater-treatment facility that is necessary to replace their aging facilities and to accommodate growth in their communities. The CWA provides that a wastewater permit may not be issued to a new source or a new discharger if the discharge will "cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i). The MPCA issued the permit even though the new facility will discharge pollutant into water with an impaired status under the CWA. The MPCA interpreted the CWA to allow the permit because improvements to the City of Litchfield's wastewater-treatment facility (which discharges into the same water system) will substantially offset the increased pollutant discharge from the joint Annandale and Maple Lake facility.² The court of appeals (in a split decision) held that the MPCA's interpretation of the undefined "cause or contribute" language of the CWA was not entitled to deference and was unreasonable because offsets are not explicitly authorized by the CWA. Judge Schumacher dissented reasoning that the MPCA's decision should have been affirmed because it was entitled to deference and was based on a reasonable interpretation of the CWA that is consistent with its purpose.

² The additional annual phosphorus discharge of 2,200 pounds from Annandale and Maple Lake's facility would be offset by an annual reduction in phosphorus discharge of approximately 53,500 pounds from Litchfield's new facility. (MPCA's administrative record at 1487.)

STATEMENT OF THE CASE AND FACTS

The League and the WCMA concur with Appellants' Statements of the Case and Facts.

ARGUMENT

I. It is good public policy to interpret the Clean Water Act to allow a system of offsets because it protects our water quality while also addressing the practical needs of Minnesota citizens.

Appellants' briefs demonstrate that the MPCA's interpretation of the CWA was entitled to deference and was legally valid. The League and the WCMA concur with Appellants' arguments, which will not be repeated here. Instead, our brief will focus on why it is good public policy to affirm an interpretation of the CWA that allows for a system of offsets.

It is good public policy to affirm this interpretation because it gives our state flexibility to implement the CWA in a way that protects our water quality while also addressing the practical needs of Minnesota citizens. If the court of appeals' decision is not reversed, it will harm thousands of Minnesota citizens³ because — as recognized by Judge Schumacher's dissent — it will result in a categorical ban on the issuance of permits for new wastewater-treatment facilities prior to the establishment of total

³ At least 15 of the League's member cities have already been notified by the MPCA that they will not be eligible for new facility permits as a result of the court of appeals' decision. This number will continue to grow as additional waters are identified as impaired. The number of affected cities may also grow dramatically because it appears that the court of appeals' decision has caused the MPCA to reevaluate how it will treat permit requests for facility expansions. See Minnesota Pollution Control Agency, *Guidance for Issuing NPDES Permits for Discharge to Impaired Waters: Expanding Facilities*, Oct. 2005, <<http://www.pca.state.mn.us/publications/wq-wwprm1-14.pdf>> (App. at A-1-A-2.)

maximum daily loads (TMDLs). *In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance For Discharge of Treated Wastewater and Request for Contested Case Hearing*, 702 N.W.2d 768, 778 (Minn. Ct. App. 2005). It is bad public policy to authorize this categorical ban because cities must be able to build new wastewater-treatment facilities for two important reasons: to replace aging, obsolete facilities and to accommodate the expanding population of our state.

The court of appeals' decision does not just affect cities dealing with population growth. It will also affect many Minnesota cities without significantly expanding populations that have aging wastewater-treatment facilities. The court of appeals' decision will prevent these cities from replacing their aging (and in some cases failing) facilities with new facilities designed to improve water quality. In fact, some of these cities are in a conundrum where their existing facilities are being cited by the MPCA for lack of compliance, but as a result of the court of appeals' decision, are being told by the MPCA that they will not be eligible for permits for new facilities.

For example, the City of Askov (with a population of 371) has an aging wastewater system that was constructed in the 1960s and that disposes of the city's wastewater in stabilization ponds that discharge on a controlled basis to Bear Creek. Askov's ponds are leaking and the MPCA has required the City to replace its existing pond system within three years because of the discovery of sinkholes within the vicinity of the current ponds. *See* Letter from Minnesota Pollution Control Agency to Hon. Dave Weulander, Mayor of Askov, dated August 29, 2005 (App. at A-3-A-4.); National Pollutant Discharge Elimination System (NPDES) and State Disposal System (SDS)

Permit MN0022616 for City of Askov. (App. at A-5-A-35.) The MPCA has also recently notified Askov, however, that it will not be eligible for a new facility permit because of the court of appeals' decision. *See* Letter from Minnesota Pollution Control Agency to Jennifer McLean dated Nov. 11, 2005. (App. at A-36-A-37.) If Askov cannot build a new pond system, it will be out of compliance with the MPCA and will risk the serious danger that its sewage will fall into a sinkhole and be lost into its groundwater.

Or consider the situation of the City of St. Stephen with a population of 846. St. Stephen's citizens currently use individual septic systems to dispose of their sewage. These septic systems are failing and are out of compliance with the MPCA's requirements. But like Askov, St. Stephen has been informed by the MPCA that it will not be eligible for a new facility permit because of the court of appeals' decision.

In addition to cities' need to replace aging, obsolete wastewater-treatment facilities, cities also need to build new facilities to accommodate the substantially increasing population of our state.⁴ Many cities, like Annandale and Maple Lake, need new facilities for a combination of reasons. Annandale and Maple Lake both have facilities that are over forty years old and are at the end of their design lives. (MPCA's administrative record at 1384.) In addition, both Cities are attempting to deal with significantly expanding populations. Between 1980 and 2000, Annandale's population increased 27 percent and Maple Lake's population increased 44 percent (MPCA's

⁴ The population of Minnesota is projected to increase by 255,400 from 2005 to 2010 and by 241,200 from 2010 to 2015. Minnesota Planning, State Demographic Center, *Minnesota Population Projections 2000-2030*, Oct. 2002, <www.demography.state.mn.us/DownloadFiles/00Proj/PopulationProjections02Intro.pdf> (App. at A-38-A-51.)

administrative record at 498.) And the overall population of Wright County is expected to grow 54 percent between 2000 and 2030. *Id.*

Cities like Annandale and Maple Lake need some realistic way to address these issues. It may be tempting to simplistically say that the answer is to restrict growth. But cities are not authorized to simply close their doors. And restriction of growth is unrealistic and not in the best interests of our state's continuing vitality.

The increasing population of our state will have to be absorbed somewhere, and it will necessarily create increased wastewater-treatment needs. It is unrealistic to believe that new Minnesota citizens will be willing to make decisions about where to live based solely on the existing sewer capacity of different communities. And it is bad public policy to force cities to make "comprehensive" planning decisions based solely on their present sewer capacity, instead of on a reasoned contemplation of a combination of important factors like jobs, housing, transportation, and schools.

In this case, the Cities of Annandale and Maple Lake have tried hard to do the right thing. They have planned ahead and have collaborated to come up with a regional solution to their increasing wastewater-treatment needs. They have agreed to incur great expense to replace their aging systems with a new state-of-the-art facility. Even the court of appeals' majority opinion praised Annandale and Maple Lake's efforts.

We are mindful of the difficult wastewater-management issues arising from the Cities' current size and anticipated growth. The Cities' joint effort to resolve these issues is laudable.

In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance, 702 N.W.2d at 776. The majority went on, however, to adopt an unnecessarily restrictive reading of the

CWA that will prevent the Cities' new wastewater-treatment facility because it would release an additional 2,200 pounds of phosphorous even though there will be an overall net reduction of phosphorus in the watershed of approximately 51,347 pounds per year.

The court of appeals' restrictive reading of the CWA is unnecessary and it frustrates the purpose of the CWA by preventing the construction of new facilities that would reduce the amount of pollution entering our water. In fact, the court of appeals' decision creates an incentive for wastewater dischargers to continue using their aging facilities even though they might be obsolete or built for smaller populations. Indeed, the League and the WCMA sought status as *amici curiae* in large part to inform this Court of the frustration cities feel at being placed in a situation where they are being prevented from addressing an urgent problem that affects the whole state. It is simply bad public policy to interpret the CWA in a way that prevents the construction of new wastewater-treatment facilities that could improve our state's water quality.

It is also bad public policy to strip the MPCA of its authority to find flexible solutions to protect our waters. The CWA provides that it is 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." 33 U.S.C. § 1251(b). And the U.S. Supreme Court has expressly recognized that the CWA grants states broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution. *Arkansas v. Oklahoma*, 503 U.S. 91, 108, 112 S. Ct. 1046, 1058 (citing 33 U.S.C. § 1288(b)(2)). Indeed, the U.S. Supreme Court has already rejected a similar categorical ban on the issuance of wastewater permits

because it would interfere with the ability of individual states to find the best solutions to protect their waters. *Id.*

Likewise, this Court should affirm that our state has flexibility to decide how best to implement the CWA in Minnesota. It is good public policy to ensure that the MPCA has this flexibility because the MPCA works daily with the wastewater issues involved in this appeal and is best suited to make decisions about whether individual wastewater permits should be issued. The MPCA has been delegated authority to implement the CWA. 40 C.F.R. § 123.25(a)(1); Minn. Stat. § 115.03, subs. 1 and 5. And it has the technical expertise to make this type of decision. *See* Minn. Stat. §116.01; *Minn. Ctr. for Envtl. Advoc. v. MPCA & Boise Cascade Corp.*, 644 N.W.2d 457, 465 (Minn. 2002).

II. The establishment of TMDLs will not solve the problems created by the court of appeals' decision because it will be a long, expensive process that cannot respond to the urgency of the issues involved in this appeal.

It is also important to the League and the WCMA to clarify that the establishment of TMDLs will not solve the serious problems created by the court of appeals' decision. The establishment of TMDLs will be a long, expensive process that cannot respond to the urgency of the issues involved in this appeal.

The MPCA estimates, for example, that the TMDL for Lake Pepin will not be completed until 2009. (MPCA's administrative record at 420.) And even after the Lake Pepin TMDL is established, it must be submitted to the EPA for review. 33 U.S.C. § 1313(d)(2). Once approved, the MPCA must incorporate the TMDL into its continuing planning process. *Id.* Only then can a TMDL be implemented through the National Pollutant Discharge Elimination System (NPDES) process.

Until this entire process is completed, any new discharge of *any* level of phosphorus into the water system at issue in this case, which includes the entire Minnesota River basin above Lake Pepin and the St. Croix River basin, would be restricted. *In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance*, 702 N.W.2d at 775 (stating 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”). And as a result of the court of appeals’ categorical ban on phosphorus discharge, there will also effectively be a categorical ban on permits for new wastewater-treatment facilities in about 50 percent of the land area of Minnesota.

In addition, the same lengthy TMDL process will also need to be completed for the many other impaired waters throughout the state. And the number of impaired waters will continue to grow. So far Minnesota has only assessed the quality of about 14 percent of its lakes and 8 percent of its rivers and streams, and of those tested, about 40 percent have been found to be impaired. See Minnesota Pollution Control Agency, *Why impaired waters are a priority for Minnesota*, Feb. 6, 2004, <<http://www.pca.state.mn.us/publications/leg-04sy2-02.pdf>> (App. at A-52-A-53.)

In short, it is clear that the establishment of TMDLs will be a lengthy, uncertain process due to the magnitude of the project and to the serious shortage of its funding. See Minnesota Pollution Control Agency, *Minnesota’s Impaired Waters, Report to the Legislature*, March 2003, <<http://www.pca.state.mn.us/publications/reports/lrwq-slsy03.pdf>> (App. at A-54-A-73.) In the meantime, however, it is imperative that cities

have a realistic way to protect the public health by treating and disposing of the increasing amounts of sewage that Minnesota citizens will continue to generate.

CONCLUSION

In this case, the MPCA (using its expertise as the agency delegated authority to administer the CWA) reasonably interpreted the CWA to allow a system of offsets, which focuses on the net loading of pollutants to a water source when determining whether a new discharge will cause or contribute to a violation of water-quality standards. This interpretation should be affirmed because it protects our water quality while addressing the practical needs of Minnesota citizens.

For all of these reasons, League of Minnesota Cities and the WCMA respectfully request that this Court reverse the court of appeals' decision and reinstate the MPCA's decision.

Dated December 5, 2005

Respectfully submitted,

League of Minnesota Cities
Wright County Mayors Association

By: 
Susan L. Naughton (#259743)
145 University Avenue West
St. Paul, Minnesota 55103-2044

Attorney for Amici Curiae

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).