

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**

**APPELLANT MINNESOTA POLLUTION
CONTROL AGENCY'S REPLY BRIEF**

MINNESOTA CENTER FOR
ENVIRONMENTAL ADVOCACY

JANETTE K. BRIMMER
Atty. Reg. No. 174762
26 East Exchange Street
Suite 206
St. Paul, MN 55101-1667
Tel: (651) 223-5959
Fax: (651) 223-5967

ATTORNEY FOR RESPONDENT
MINNESOTA CENTER FOR
ENVIRONMENTAL ADVOCACY

MIKE HATCH
Attorney General
State of Minnesota

ROBERT B. ROCHE
Assistant Attorney General
Atty. Reg. No. 289589
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
Tel: (651) 215-1506
Fax: (651) 297-4139

ATTORNEYS FOR APPELLANT
MINNESOTA POLLUTION
CONTROL AGENCY

EDWARD J. LAUBACH, JR.
Atty. Reg. No. 61025
GRAY, PLANT, MOOTY, MOOTY,
& BENNETT, P.A.
1010 West St. Germain Street
Suite 600
St. Cloud, MN 56301
ATTORNEY FOR APPELLANTS
CITIES OF ANNANDALE AND
MAPLE LAKE

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I. THE QUESTION WHETHER A TMDL MUST BE COMPLETED BEFORE ANY PERMITS CAN ISSUE WAS RESOLVED BY THE COURT OF APPEALS AND WAS NOT APPEALED, SO THAT QUESTION IS NOT BEFORE THIS COURT.

The bulk of Respondent's brief is devoted to an issue that is not before this Court. Respondent's principal argument is that no permit may be issued under 40 C.F.R. § 122.4(i) until a total maximum daily load ("TMDL") study has been completed. (Resp. Br., pp. 9-15, 17-18, 22-25, 39-40.) This issue is not before this Court.

The Court of Appeals unanimously held that 40 C.F.R. § 122.4(i) does not preclude the issuance of a permit to a new source until a TMDL has been completed. *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for Discharge of Treated Wastewater*, 702 N.W.2d 768, 772-73 (Minn. Ct. App. 2005). None of the parties chose to appeal this portion of the Court of Appeals' decision. As a result, this question is not before this Court. *Anderly v. Minneapolis*, 552 N.W.2d 236, 239-40 (Minn. 1996) (Supreme Court may decline to address issue if it is not raised in either petition for review or conditional petition for review); *Norwest Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche*, 535 N.W.2d 612, 613, n. 1 (Minn. 1995) (Supreme Court declines to address issues not raised in petition for review or conditional petition for review); *Hapka v. Paquin Farms*, 458 N.W.2d 683, 685-686 (Minn. 1990) (Supreme Court would not consider issue raised in brief where petition for review did not identify that issue as required by Minn. R. Civ. App. P. 117.)

If Respondent wanted this Court to address this issue, then Respondent was required to submit its own petition for review or a conditional petition for review asking

this Court to review the issue. Minn. R. Civ. App. P. 117. Respondent chose not to do so. (MCEA Replies to MPCA's and Cities' Pets. for Rev., Sep. 28, 2005.) As a result, the question whether a TMDL must be completed before any permits can issue under 40 C.F.R. § 122.4(i) is not before this Court and the Court should decline to address it.¹

II. MINNESOTA LAW CALLS FOR JUDICIAL DEFERENCE WHEN AN AGENCY INTERPRETS AN AMBIGUOUS REGULATION THAT THE AGENCY ADMINISTERS AND IS WITHIN THE AGENCY'S AREA OF EXPERTISE.

Respondent argues that MPCA is not entitled to deference in this case because MPCA interpreted a federal regulation instead of one of MPCA's own regulations. (Resp. Br., pp. 6-7, 21-22; 35-36.) Respondent suggests that an agency is not entitled to deference unless the agency is interpreting a law that the agency has adopted itself. *Id.* As discussed below, Respondent's arguments on this point are entirely without merit.

A. Persuasive Federal Caselaw Supports Judicial Deference In This Case.

Respondent cites several cases in which federal courts have declined to defer to a state agency's interpretation of various federal laws in support of its arguments that MPCA's legal interpretation was not entitled to deference in this case. (Resp. Br., at pp. 21-22; 35-36.) Respondent's argument on this point is without merit for the following reasons.

¹ Because this issue is not before the Court, MPCA does not provide a substantive response to Respondent's arguments in this Reply Brief. Moreover, given the limited time and space allowed for reply briefs, it is not possible for MPCA to address this question fully in this brief. If the Court decides to consider this issue despite the fact that it was not raised in a petition for review, MPCA respectfully refers the Court to MPCA's briefs filed in the proceedings below.

First, the federal courts are split on the question of whether a state agency's interpretation of a federal law that the state agency administers is entitled to judicial deference. There is substantial persuasive precedent from the federal courts that indicates that deference should have been extended in this case. Numerous federal courts have held that deference is appropriate when a state agency interprets a federal law that the agency administers. See *Clark v. Alexandria*, 85 F.3d 146, 152 (4th Cir. 1996) (federal court should defer to local housing agency's interpretation of federal housing regulation so long as interpretation not inconsistent with federal provision) citing *Ritter v. Cecil Cty. Off. of Hous. & Comm. Dev.*, 33 F.3d 323, 327-28 (4th Cir. 1994); *Comm. Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 137-38 (2d Cir. 2002) (federal courts owe significant deference to state agency's interpretation of federal Medicaid statute that state agency administers); *Chambers v. Ohio Dep't of Hum. Serv.*, 145 F.3d 793, 803 (6th Cir. 1998) (state agency's interpretation of federal regulation given deference so long as interpretation is reasonable); *U.S. v. Bruno's, Inc.*, 54 F.Supp.2d 1252, 1258 (M.D. Ala. 1999) (absent unambiguous language in federal regulation or federal interpretation court must defer to any reasonable interpretation of federal regulation by state agency); *Perry v. Dowling*, 95 F.3d 231, 236-37 (2d Cir. 1996) (state agency's interpretation of federal Medicaid statute it administers is appropriate because agency was participating in joint federal-state program and state's position was consistent with the federal agency's position). Thus, although there is some caselaw in which federal courts have declined to defer to a state agency's interpretation of a federal law, there is other more persuasive

federal caselaw that indicates that the majority below erred in denying MPCA deference in this case.

As has been established, the Clean Water Act is a joint federal-state program with the primary administrative responsibility vested in the states. S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News, 3668-69 (noting that Congress chose to delegate the primary responsibility for implementing Clean Water Act to the states). MPCA is legally required to administer the regulation in question in this case and the regulation has been incorporated into MPCA's own rules. Minn. Stat. § 115.03, subd. 1(a), (e) (2004); Minn. R. 7050.0210, subp. 6(c) (2005). Moreover, MPCA's interpretation of the regulation in question is based on and entirely consistent with EPA's interpretation. As a result, MPCA's interpretation of the regulation is entitled to deference based on the above-cited persuasive authority.

Second, Respondent points to the need for uniformity in the application of federal regulations as a reason for denying MPCA deference in this case. (Resp. Br., p. 36.) This argument completely ignores the fact that MPCA's interpretation of the federal regulation in this case is entirely consistent with EPA's interpretation. In fact, MPCA maintains that its interpretation of the regulation is reasonable precisely because it is consistent with EPA's interpretation. As a result, MPCA's position promotes uniformity and there is no valid reason to deny deference in this case.

The position of the majority below, however, is contrary to the principle of uniformity. As the Court is aware, EPA allows for the use of offsets under 40 C.F.R.

§ 122.4(i) as its agency practice. EPA Resp. Memo in Supp. of Sched. of Prep. of TMDLS, *Sierra Club v. Clifford*, No. 96-0527 (E.D. La. 1999) (A. 26-92) (explaining that in practice EPA believes a new discharge may be permitted under 40 C.F.R. § 122.4(i) when offsets will result in net reduction in loading of pollutant of concern).² EPA has also published a policy document and ruled in a formal adjudication that the regulation allows for the use of offsets. U.S. EPA Office of Water Final Water Quality Trading Policy (Jan. 13, 2003) (A. 93-103); *In re Carlotta Copper Co.*, No. 00-23 & 02-06, 2004 WL 3214473 (Env'tl. App. Bd. Sep 30. 2004) (A. 104-200). Other states that have been delegated the responsibility to implement the Clean Water Act will naturally look to EPA's practice, policy document, and formal adjudication, all of which say that offsets are permissible, to determine how to properly interpret this regulation. Now, however, these states will have to contend with a published decision from the Minnesota Court of Appeals holding that offsets are prohibited under the regulation. Thus, instead of promoting uniformity in the application of the federal regulation in question, the majority's decision constitutes a departure from EPA's interpretation. Extending judicial deference to MPCA's legal interpretation in this case, which is expressly based on EPA's interpretation, would promote uniformity; not frustrate it.

Third, the federal cases Respondent cites are not on point because they do not address Minnesota law. The question in this case is whether Minnesota law requires a Minnesota court to defer to a Minnesota agency's reasonable interpretation of a federal

² Hereafter "Clifford Brief."

regulation that the agency is legally required to administer and which the agency has incorporated into its own rules. Minnesota law clearly calls for deference in this case.

B. Under Minnesota Law, Judicial Deference To Agency Legal Interpretations Is Not Limited To Only Rules That The Agency Has Promulgated Itself.

Respondent suggests that this Court's precedent calls for judicial deference to an agency interpretation of law only when the agency interprets a rule that the agency itself adopted. (Resp. Br., pp. 6-7; 34.) Respondent also claims that deference is inappropriate in this case because the regulation at issue is not susceptible to more than one reasonable interpretation. *Id.* For the reasons discussed below, these arguments are entirely without merit.

First, this Court's precedent does not hold that judicial deference to agency interpretations of law is limited to only those rules that the agency has promulgated itself. On the contrary, this Court's precedent clearly establishes that judicial deference is required when an agency interprets a law that is in the agency's area of expertise or that the agency administers; regardless of who passed the law in question. In *MCEA v. MPCA & Boise Cascade Corp.*, 644 N.W.2d 457, 464 (Minn. 2002), MCEA similarly argued that MPCA was not entitled to deference because the case turned on the interpretation of laws that were not enacted by MPCA. This Court flatly rejected MCEA's argument and held that MPCA was entitled to deference based on MPCA's expertise in environmental issues. *Id.*, at 465. As in *Boise*, MPCA clearly has expertise in the subject matter of the

law in question in this case. As a result, MPCA's interpretation of the law in question is entitled to deference.

This Court has also consistently held that Minnesota courts must extend deference to an agency's interpretation of laws that the agency administers; even where the laws were not passed by the agency. As this Court has specifically stated, "judicial deference, rooted in the separation of powers doctrine, is extended to an agency decision-maker in the interpretation of statutes that the agency is charged with *administering and enforcing*." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) (emphasis added).³ Here, it is undisputed that MPCA is the agency decision-maker charged with administering and enforcing the law in question. 40 C.F.R. § 123.25(a)(1); Minn. Stat. § 115.03, subd. 1(a), (e) (2004). As a result, the majority below should have deferred to MPCA's interpretation per this Court's ruling in *Blue Cross & Blue Shield*. Respondent's suggestion that judicial deference is required

³ See also *Knopp v. Gutterman*, 302 N.W.2d 689, 695 (Minn. 1960) (when meaning of statute in doubt Minnesota courts give great weight to interpretation by agency charged with administering statute); *Krumm v. R.A. Nadeau Co.*, 276 N.W.2d 641, 644 (Minn. 1979) (same); *Mammenga v. State Dep't of Hum. Serv.*, 442 N.W.2d 786, 792 (Minn. 1989) (same); *Atkinson v. Minn. Dep't of Hum. Serv.*, 564 N.W.2d 209, 213 (Minn. 1997) (same); *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988) (agency interpretation of law it administers entitled to deference and should be upheld if not in conflict with express purpose of act and intent of legislature); *Goodman v. Dep't of Pub. Safety*, 282 N.W.2d 559, 560 (Minn. 1979) (court affords substantial consideration to interpretation of ambiguous statute by administrators working daily with problem sought to be remedied).

only when an agency interprets a law that the agency itself has passed is flatly contradicted by this Court's precedent.⁴

Second, MPCA did adopt the law in question in this case as its own. MPCA's rules expressly include any requirements imposed by the Clean Water Act and its implementing regulations. Minn. R. 7050.0210, subp. 6(c) (2005). As a result, Respondent's argument on this point is based on a false premise and it cannot stand.

Third, the text of the majority's decision in this case refutes Respondent's argument that deference is not due because the regulation is unambiguous. (Resp. Br., pp.7; 10.) The majority below went out of its way to state that it was denying MPCA's legal interpretation deference in this case because the regulation in question is a federal regulation and not a rule that MPCA adopted. *Maple Lake & Annandale*, 702 N.W.2d at 772-73. If, as Respondent argues, deference was not required based solely on the plain language of the regulation, then there would be no reason for the majority to have made this statement. *Id.* By saying that deference was not available because the law in question is a federal regulation and not a rule adopted by MPCA, the majority below

⁴ Published Minnesota precedent on this issue establishes that a state agency's interpretation of a federal law that the agency administers is entitled to the same level of deference as an agency interpretation of a state law that the agency administers. *In re S'Eastern Minn. Cit. Action Counc., Inc.*, 359 N.W.2d 60 (Minn. Ct. App. 1984) (where state agency must directly apply federal rules as its own court shows same deference to agency interpretation of rules as if agency had promulgated them); *Conagra Inc. v. Swanson*, 356 N.W.2d 825, 827 (Minn. Ct. App. 1984) (deferring to state agency interpretation of federal labor regulation); *Ross v. Minn. Dep't of Hum. Serv.*, 469 N.W.2d 739 (Minn. Ct. App. 1991) (deferring to state agency interpretation of federal medical assistance statute).

purported to create a new rule of law in Minnesota. As noted above, the new rule of law that the majority purported to create significantly departs from established precedent from both the Court of Appeals and this Court which indicates that deference should have been extended. As a result, the majority's position should be reversed.

Moreover, the regulation unquestionably is ambiguous. The relevant part of the regulation states that “[n]o permit may be issued . . . [t]o a new source or a new discharger, if the discharge from its operation or construction will cause or contribute to the violation of water quality standards.” 40 C.F.R. § 122.4(i). The key phrase “cause or contribute to the violation of water quality standards” is not defined or explained. As a result, the regulation is ambiguous. The EPA, the Environmental Appeals Board, the MPCA, and the dissenting judge from the decision below all interpret the regulation as allowing for offsets. The majority below interprets the regulation as prohibiting offsets. These disparate and irreconcilable interpretations graphically demonstrate that the regulation is ambiguous. The majority below erred in denying MPCA and EPA deference and Respondent's arguments to the contrary are without merit.

III. MPCA'S INTERPRETATION THAT 40 C.F.R. § 122.4(I) ALLOWS FOR THE USE OF OFFSETS IS REASONABLE AND CONSISTENT WITH EPA'S INTERPRETATION OF THE REGULATION.

It is not clear whether Respondent is arguing that offsets are absolutely prohibited under 40 C.F.R. § 122.4(i) (as the majority below ruled) or if Respondent is limiting its argument to this particular offset. In its written comments on the Annandale - Maple Lake permit, Respondent argued that pre-TMDL offsets are permissible under the

regulation if the offsets are sufficiently formalized. (R. 1073.) In its brief, Respondent appears to argue that offsets are completely prohibited under the regulation, that offsets are allowed but only after a TMDL is completed, and that pre-TMDL offsets are allowed but that this particular offset is invalid. (Resp. Br., pp. 22-27; 28-33.) As discussed below, none of these positions has merit.

A. EPA Has Concluded That 40 C.F.R. § 122.4(i) Allows For The Use Of Offsets.

Despite EPA's repeated and clear statements to the contrary, Respondent insists that EPA does not really interpret 40 C.F.R. § 122.4(i) to allow for the use of offsets. (Resp. Br., pp. 21-27; 29-31.) MCEA's argument on this point is flatly contradicted by EPA's written position on the subject in three separate documents.

As the Court is aware, EPA explained its interpretation of 40 C.F.R. § 122.4(i) to a federal district court in Louisiana. EPA explained that according to its practice, a new discharge does not cause or contribute to a violation of water quality standards when other pollutant reductions will offset the discharge such that there is a net decrease in the loading of the pollutant of concern. Clifford Brief, (A. 87-89).

Respondent asserts that the Clifford Brief is a post hoc rationalization from EPA and therefore entitled to no weight. (Resp. Br., p. 31.) Respondent's argument on this point is refuted by the text of the Clifford Brief itself. In the Clifford Brief, EPA was asserting that permits can be issued on a case-by-case basis while TMDLs are being developed. (A. 85.) Significantly, EPA was not trying to defend any particular permitting decision that it had already made in reliance on offsets in the Clifford Brief.

(A. 26-92.) As a result, EPA was not trying to rationalize the use of offsets to justify some permit that it had already issued. EPA's position in the Clifford Brief is a description of agency practice; not a post hoc rationalization for a permitting decision. As a result, the Clifford Brief is entitled to deference. *Auer v. Robbins*, 117 S. Ct. 905, 912 (1997) (agency legal interpretation in legal brief entitled to deference where interpretation not a post hoc rationalization defending agency action).

Respondent also asserts that the Clifford Brief is entitled to no weight because there is no indication that EPA has adhered to the position set forth in the brief since it was submitted. (Resp. Br., p. 31.) Respondent's argument on this point, however, is belied by the other two documents that EPA has published on the subject.

In its formal Water Quality Trading Policy, which was published approximately four years after the Clifford Brief, EPA expressly supports the use of offsets to achieve a net reduction in pollutant loading to impaired waters. EPA Water Quality Trading Policy, (A. 97).

In the *Carlotta Copper* decision, which was issued approximately five years after the Clifford Brief, the Environmental Appeals Board (EAB) specifically found that a discharge would not cause or contribute to a violation of water quality standards under 40 C.F.R. § 122.4(i) based on an offset. (A. 158.) In fact, the EAB specifically referenced the Clifford Brief in its ruling affirming that 40 C.F.R. § 122.4(i) allows for offsets. *Id.* Respondent's assertion that there is no indication that EPA has adhered to the position set forth in the Clifford Brief is simply not accurate.

It is worth noting that MPCA's and EPA's position that offsets may be used to determine that a discharge to an impaired water does not cause or contribute to a violation of water quality standards has been endorsed by at least one federal court. *Senville v. Peters*, 327 F.Supp.2d 335, 359-61 (D. Vt. 2004) (conclusion that highway project would not significantly effect sediment-impaired water for which no TMDL had been completed was not arbitrary or capricious where offset plan prohibited net increase in sediment load to impaired water thus ensuring that project would not cause or contribute to violation of water quality standards).

In short, EPA has published three separate documents in which EPA unambiguously states that 40 C.F.R. § 122.4(i) allows for the use of offsets. Respondent's assertion that EPA does not really agree that offsets are allowed under the regulation is without merit. MPCA's interpretation that the regulation allows for the use of offsets is reasonable and consistent with EPA's position and the federal court's position in *Senville*. The conclusion of the majority below that the regulation prohibits offsets is without merit.

B. Neither The *Carlotta Copper* Decision Nor The EPA Water Quality Trading Policy Support Respondent's Argument That Offsets Are Allowed Only After A TMDL Has Been Completed.

Respondent suggests that the *Carlotta Copper* decision does not apply in this case because it involved a discharge to an impaired water for which a TMDL had been completed. (Resp. Br., pp. 27-29.) Respondent further suggests that offsets are only

permissible after a TMDL has been completed. (Resp. Br., pp. 27-29; 31-33.)

Respondent's arguments are invalid for the following reasons.

First, Respondent's argument is based on a mischaracterization of the EAB's decision in *Carlotta Copper*. The EAB did not, as Respondent suggests, rule that offsets are permissible under 40 C.F.R. § 122.4(i) only when a TMDL has been completed for the receiving water. (A. 104-200.) Instead, the EAB evaluated the question whether the discharge in *Carlotta Copper* would cause or contribute to the violation of water quality standards separately from the question whether the discharge would comply with the TMDL.

As the EAB's decision indicates, 40 C.F.R. § 122.4(i) includes two requirements. (A. 157-162.) The first part of the regulation which is at issue in this appeal, prohibits a new discharge to an impaired water if the discharge will cause or contribute to a violation of water quality standards in an impaired water. (A. 157-160.) The second part of the regulation, which is not at issue in this appeal, states that if a TMDL had been completed for an impaired water, then any new discharges to that water must comply with the TMDL. (A. 160-62.)

The EAB evaluated these two parts of the regulation separately in *Carlotta Copper*. The EAB first concluded that the discharge at issue would not cause or contribute to a violation of water quality standards because the new discharge would be more than offset by reductions from another site. (A. 157-60.) Then, the EAB went on to conclude that the discharge would also comply with the TMDL for the receiving water.

(A. 160-62.) The EAB did not say or suggest that the offset in *Carlotta Copper* was permissible only because a TMDL had been completed for the receiving water. Moreover, in concluding that offsets are permissible in *Carlotta Copper*, the EAB expressly relied on EPA's Water Quality Trading Policy. (A. 194, n. 102.) As discussed below, the Water Quality Trading Policy flatly refutes Respondent's assertion that offsets are only permissible after a TMDL has been completed. Offsets are permissible under the regulation both pre-TMDL and post-TMDL.

Second, EPA's Water Quality Trading Policy clearly states that offsets are permissible before a TMDL has been done. EPA's Water Quality Trading Policy expressly states that "EPA supports *pre-TMDL* trading in impaired waters to achieve progress towards or the attainment of water quality standards." (A. 97) (emphasis added). Thus, EPA's Water Quality Trading Policy expressly refutes Respondent's argument that offsets are permissible only after a TMDL has been done.

Third, the majority below did not rule that the offset in this case was invalid because it was pre-TMDL. *Annandale & Maple Lake*, 702 N.W2d at 774-75. The majority below issued a blanket ruling that offsets are prohibited under the regulation. *Id.* Even accepting Respondent's position *arguendo*, the majority below would still need to be reversed because the decision below does not allow for even post-TMDL offsets.

C. The Offset In This Case Is Legal.

Respondent argues that the offset at issue in this case is invalid because it will not result in the complete restoration of Lake Pepin, because MPCA's explanation of the

offset in this case was offered in response to Respondent's formal comment letter on the permit, and because the offset is "too casual." (Resp. Br., pp. 16; 20-21; 31-33.) None of these arguments have merit.

Respondent's assertion that an offset is invalid unless the offset will result in the complete restoration of the receiving water is refuted by both EPA's Water Quality Trading Policy and the *Carlotta Copper* decision.

In its Water Quality Trading Policy, EPA expressly supports pre-TMDL trading in impaired waters that "*achieves progress towards or the attainment of water quality standards.*" (A. 97) (emphasis added). Thus, according to EPA it is not necessary that an offset result in the complete restoration of the receiving water. It is sufficient that the offset achieve a net reduction in the amount of the pollutant of concern entering the receiving water, like the offset in this case.

Like Respondent, the petitioners in *Carlotta Copper* asserted that to be permissible, an offset would have to be of such magnitude that it would completely restore the receiving water. (A. 157.) The EAB rejected this argument, ruling that it was at odds with the Clean Water Act and its purpose and the text of 40 C.F.R. § 122.4(i). (A. 158.) The EAB expressly concluded that such an interpretation of the regulation would result in a total ban on new discharges to impaired waters in violation of the U.S. Supreme Court's ruling in *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1057 (1992). *Id.* Respondent's argument that the offset in this case is invalid because it will not result in the complete restoration of Lake Pepin is similarly without merit.

Respondent's argument that the offset at issue in this case is invalid because MPCA explained the offset in response to Respondent's formal comment letter on the permit also lacks merit for several reasons.

First, Respondent MCEA offers no legal authority for its assertion that if an agency's explanation of its position is offered in response to a comment from an interested party, then the agency's explanation is invalid. Under Minnesota law, an argument offered without citation to authority is waived. *Minn. v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (arguments offered without citation to any relevant legal authority deemed waived); *Minn. v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (assertion without citation to legal authority is deemed waived); *Louden v. Louden*, 22 N.W.2d 164, 166 (Minn. 1946) (same).

Second, under Minnesota law, MPCA is expressly required to provide substantive responses to comments received during an official public comment period on a permit. Minn. R. 7001.1070, subp. 3 (2005). Thus, Respondent's assertion that there is something untoward in the fact that MPCA explained the offset in this case in response to Respondent's comment letter is without merit. Indeed, MPCA was required to provide that explanation. *Id.*

Third, a review of the record refutes Respondent's assertion that the offset in this case was a "convenient last minute and ad hoc action." (Resp. Br., pp. 20-21.) On the contrary, the staff memorandum to the board and the board transcript clearly show that MPCA thoroughly debated the issue and made a deliberate decision to use an offset in

this case because that is how EPA interprets the regulation. (R. 1323-30; 1331-1478.)

Respondent's assertion to the contrary is simply not supported by the record.

Respondent's final argument against the offset at issue in this case is that the offset is "too casual." (Resp. Br., 20-21; 31-33.) This argument also lacks merit for several reasons.

First, the record in this case does not support Respondent's description of the offset as "casual." The exact source and amount of the offset at issue are expressly stated in both the board transcript and in the agency's written findings. (R. 1448; 1487.) The record clearly indicates that the 2200 pound increase in annual phosphorus loading from the Annandale - Maple Lake plant will be offset by a 53,500 pound reduction from the City of Litchfield. *Id.* The findings demonstrate that the offset in this case results in a net reduction of total phosphorus loading to Lake Pepin of 51,300 pounds per year. *Id.* Thus, Respondent's assertion that the offset is "too casual" is refuted by the record.

Second, the majority below did not rule that the offset in this case was invalid because it is "too casual." The majority below ruled more broadly that offsets are prohibited under the regulation. *Annandale & Maple Lake*, 702 N.W2d at 774-75. The majority's ruling does not leave room for the type of "more formal" offsets that Respondent appears to endorse. Thus, even assuming *arguendo* that this particular offset is "too casual," the proper remedy would be to reverse the majority below and to remand the permit to MPCA so that MPCA can make the offset more formal.

Third, Respondent's argument that the offset in this case is "too casual" is refuted by EPA's Water Quality Trading Policy. Respondent suggests that the offset in this case is invalid per the Water Quality Trading Policy because the offset is not tied to a specified "cap." (Resp. Br., pp.32-33.)

Respondent's argument on this point is invalid because it is based on only one-half of a sentence from the Water Quality Trading Policy. The relevant sentence reads in its entirety: "EPA believes [pre-TMDL trades in impaired waters] *may be accomplished by individual trades that achieve a net reduction of the pollutant traded* or by watershed-scale trading programs that reduce loadings to a specified cap" (A. 97.)

Respondent's brief references only the second half of this sentence. The first half of the sentence, which clearly supports MPCA's action in this case, is conspicuously omitted. Here, there is an individual trade between the Annandale - Maple Lake facility and the Litchfield facility that results in a 51,300 pound annual net reduction in phosphorus loading (R. 1487.) This trade is clearly consistent with EPA's Water Quality Trading Policy and Respondent's arguments to the contrary are without merit.

As the Supreme Court has noted, EPA has the authority to prevent the issuance of any NPDES permit that EPA determines violates Clean Water Act requirements. *Arkansas v. Oklahoma*, 112 S. Ct. at 1056 *citing* 33 U.S.C. § 1342(d)(2). In its Trading Policy, EPA expressly states that "when questions or concerns [regarding trading] arise, EPA will use its oversight authorities to ensure that trades and trading programs are fully consistent with the CWA and its implementing regulations." (A. 103.) In this case, EPA

has not used its oversight authorities to prevent the issuance of or require modifications to the permit at issue. The offset in this case is legal and should be reinstated.

IV. THE MAJORITY'S RULING PRECLUDES THE CONSTRUCTION OF NEW FACILITIES THAT MAY BE NEEDED TO RESTORE WATER QUALITY IN IMPAIRED WATERS.

In ruling that 40 C.F.R. § 122.4(i) prohibits the use of offsets or trading, the majority below held 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. Contrary to MCEA's assertions regarding the breadth of the decision below, this ruling effectively prohibits the construction of new wastewater treatment facilities that may be needed to help improve water quality. As a result, the majority's ruling violates the U.S. Supreme Court's ruling in *Arkansas v. Oklahoma*, 112 S. Ct. at 1057 (Clean Water Act should not be interpreted in manner that frustrates construction of new wastewater plants that would improve existing conditions). The majority's position should therefore be reversed.

Because phosphorus is a basic element of plant and animal life, phosphorus is present in all wastewater. Moreover, phosphorus is a conservative element that tends to persist once it enters a watershed. *Annandale & Maple Lake*, 702 N.W.2d at 774. As a result, any new facility whose discharge would eventually reach a phosphorus impaired water is prohibited under the majority's ruling; even if there is a substantial reduction in

the amount of phosphorus entering the impaired water.⁵ *Id.* The majority's ruling thus prevents rather than promotes environmental protection.

For example, with the offset that MPCA proposed in this case, the proposed Annandale - Maple Lake facility would replace two aging facilities with a single modern facility while achieving a net reduction in phosphorus loading to Lake Pepin of 51,300 pounds per year. (R. 1487.) MPCA's technical staff testified to the MPCA Board that because the two existing plants are nearing the end of their design lives, it is better to act now and replace the plants before they fail to meet their discharge limits. (R. 1453.) Even Respondent admitted to the MPCA Board that there is both a need for and environmental efficiency in building new up-to-date wastewater treatment facilities. (R. 1401.) The majority's ruling, however, prohibits a proactive approach that would allow communities to build new wastewater treatment facilities and avoid problems before they occur.

Even worse, the majority's ruling prohibits the construction of new facilities that are necessary to replace systems that are already failing and harming the environment. For example, new treatment facilities may be necessary to treat the wastewater in communities where failing or noncompliant septic systems are harming the environment. (R. 1467-68.) The majority's ruling indicates that even if such a facility would

⁵ Given the size of the Lake Pepin watershed, such a restriction would apply to new facilities throughout most of the State.

substantially reduce the amount of an impairing pollutant that enters the water, a permit cannot be issued. *Annandale & Maple Lake*, 702 N.W.2d at 774.

Respondent's assertion that this decision does not violate the Supreme Court's ruling in *Arkansas v. Oklahoma* is flatly refuted by the *Carlotta Copper* decision. (Resp. Br., pp.38-39.) As the EAB expressly concluded in *Carlotta Copper*, prohibiting the construction of new facilities where there are offsets in place that result in a net reduction in the amount of pollution entering an impaired water "perpetrates the very outcome that the U.S. Supreme Court sought to avoid in *Arkansas v. Oklahoma*." *In re Carlotta Copper Co.*, (A. 107.) Thus, the majority's ruling in this case violates the U.S. Supreme Court's ruling in *Arkansas v. Oklahoma. Id.*

Respondent suggests that the majority's ruling does not actually block the construction of new plants. (Resp. Br., pp. 38-42.) As discussed below, Respondent's attempts to minimize the impact of the majority's ruling are without merit.

First, the text of the majority's ruling expressly refutes Respondent's arguments. As noted, the majority ruled that even where there is a substantial net reduction in the discharge of pollution to an impaired water no new facilities may be built "so long as *some level of discharge may be causally attributed* to the impairment of Section 303(d) waters." *Annandale & Maple Lake*, 702 N.W.2d at 775 (emphasis added). This language clearly refutes Respondent's argument that the majority's ruling will not block the construction of needed new wastewater treatment facilities.

Second, the text of the majority's decision refutes Respondent's suggestion that new facilities can be permitted if MPCA will just impose stricter effluent limits. (Resp. Br., pp. 40-41.) Phosphorus is present in all wastewater discharges and it is not possible to completely eliminate it. Thus, per the majority's ruling, there is no effluent limit that would be strict enough to permit a new plant to be built. There will always be some phosphorus in the discharge which means that "some level of discharge may be causally attributed" to a phosphorus impairment; effectively precluding the construction of any new facilities. *Annandale & Maple Lake*, 702 N.W.2d at 775.

Finally, Respondent asserts that MPCA could issue permits for new plants by simply increasing the pace of TMDL development. (Resp. Br., pp. 39-41.) Respondent's argument on this point is without merit for the following reasons.

First, Respondent's argument is contradicted by the text of the majority's ruling. As noted, according to the majority below, so long as there may be a causal connection between a new plant and an existing impairment the new plant cannot be built; even if there is a substantial reduction in the amount of the impairing pollutant entering the water. *Annandale & Maple Lake*, 702 N.W.2d at 775. The majority's decision does not include an exception for new facilities built after a TMDL is completed. *Id.* In fact, there is nothing in the majority's decision to suggest that the result would be different if a TMDL was completed first. *Id.* Thus, the majority's decision does not appear to allow new plants to be built even post-TMDL as Respondent suggests.

Second, EPA has clearly stated in its Water Quality Trading Policy that “EPA supports *pre-TMDL trading in impaired waters*” that results in a net reduction of the impairing pollutant. (A. 97) (emphasis added). Pre-TMDL trading is clearly permissible.

Third, the adequacy of MPCA’s progress in completing TMDLs is not before this Court. The federal courts have jurisdiction over claims that a state has not made adequate progress in developing TMDLs. *Sierra Club v. Browner*, 843 F.Supp. 1304 (D. Minn. 1993). In fact, the United States District Court for Minnesota has addressed this issue, and held that MPCA’s progress in developing TMDLs was adequate. *Id.* Thus, Respondent’s argument on this point is legally without merit.

Respondent’s argument on this point is also factually inaccurate in several respects. Respondent mischaracterizes MPCA’s position as a request for this Court to excuse MPCA from complying with the requirement to develop a TMDL for Lake Pepin. (Resp. Br., p. 41.) The record clearly shows that MPCA has worked on and continues to work on a TMDL for Lake Pepin.⁶ (R. 420.) There is nothing in the record or in MPCA’s briefs to support Respondent’s claim that MPCA has asked this Court to excuse MPCA from developing a TMDL for Lake Pepin. MPCA makes no such request.

Respondent’s assertion that MPCA has “only three other completed TMDLs under its belt” since the Clean Water Act was passed is also inaccurate. (Resp. Br., p. 42.) In

⁶ MCEA’s assertion that the Lake Pepin TMDL must be completed in months is similarly without merit. (See Resp. Br., pp. 40-42.) According to EPA, development of a proper nutrient TMDL can take several years; especially when dealing with a large, complex watershed like Lake Pepin. U.S. EPA *Protocol for Developing Nutrient TMDLs* (Nov. 1999) p. 2-6. (Available at www.epa.gov/owow/tmdl/nutrient/pdf/nutrient.pdf.)

fact, this assertion is quite simply false. According to EPA's letters approving MPCA's various TMDL projects, MPCA actually has completed forty-one TMDLs.⁷ Thus, Respondent's criticism of MPCA for inadequate TMDL development is not only a legal red herring, it is based on inaccurate assertions of fact. Respondent's assertion that MPCA should "just do the TMDL" does not alter the conclusion that the majority below erred.

The simple fact is that the majority's decision precludes the construction of new plants that discharge to impaired waters, even where there is a net reduction in the amount of pollution entering the impaired waters. *Annandale & Maple Lake*, 702 N.W.2d at 775. As the EAB concluded, the majority's position violates the U.S. Supreme Court's ruling in *Arkansas v. Oklahoma*. *In re Carlotta Copper*, (A. 107).

CONCLUSION

For the reasons stated above, MPCA respectfully requests that this Court reverse the decision of the majority below.

⁷ Available at www.pca.state.mn.us/water/tmdl/index.html#tmdl. This includes 20 TMDLs that were approved and which remain in effect while being revised per a court order.

Dated:

1/12/06

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota



ROBERT B. ROCHE
Assistant Attorney General
Atty. Reg. No. 289589

445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 215-1506 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR APPELLANT
MINNESOTA POLLUTION CONTROL
AGENCY

AG: #1538574-v1

CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 6,482 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2002, the word processing system used to prepare this Brief.

A handwritten signature in black ink, appearing to read "Robert B. Roche", written over a horizontal line.

Robert B. Roche