

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

**REPLY BRIEF OF APPELLANTS
CITY OF ANNANDALE AND
CITY OF MAPLE LAKE**

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ARGUMENT

Pursuant to rule 131, subdivision 3, of the Minnesota Rules of Civil Appellate Procedure, Appellants the City of Annandale and the City of Maple Lake (the “Cities”) submit this reply brief in response to the brief served and filed by Respondent Minnesota Center for Environmental Advocacy (the “MCEA”).

I. MPCA’s Analysis in Issuing Discharge Permit to Cities Was Reasonable

In its brief, the MCEA criticizes the issuance of a discharge permit by Appellant Minnesota Pollution Control Agency (the “MPCA”) for the Cities’ joint wastewater treatment facility (the “WTF”), calling the decision – which was based on an immediate offset by a neighboring discharger’s contemporaneous reduction in phosphorus that is more than 24 times greater than the Cities’ maximum loading into the North Fork of the Crow River – an informal, convenient, ad hoc, and last-minute attempt to avoid application of 40 C.F.R. § 122.4(i). (MCEA’s brief at 19, 21, 31, 33). The MCEA also asserts that the MPCA “cannot show any history of interpreting and applying section 122.4(i).” (MCEA’s brief at 21).

Contrary to the MCEA’s assertions, the record on appeal demonstrates that, as early as February 2004,¹ the MPCA had expressly charged one of its task forces to

[a]ddress net changes of phosphorus loadings, which result after establishing phosphorus limits in NPDES permits upstream of Lake Pepin, based on the MPCA Board approved Phosphorus Strategy.

¹ The Cities submitted to the MPCA a modification of their application for a discharge permit in March 2004. (Record (“R.”) at 341, 1002).

(R. at 952). The written task-force recommendation to implement a system of trading/offsets for phosphorus discharged into the Lake Pepin watershed basin preceded the MPCA's final determination regarding the Cities' permit. (R. at 952-54, 1479-88). In addition, a close inspection of the record reveals that the MPCA followed the approach recommended by its task force in determining whether the discharge from the Cities' proposed WTF would cause or contribute to the violation of water-quality standards.

A. Recommendation for Implementation of Trading/Offsets

On August 30, 2004, the MPCA's Lake Pepin Trading Task Force (the "LPTTF") submitted to the members of the Water Quality Policy Forum (the "WQPF") a memorandum that included recommendations for phosphorus trading/offsets in the Lake Pepin watershed basin. (R. at 952-54). The task force considered four options: (1) point/point trading; (2) point – non-point trading; (3) benchmarking other states; and (4) an aggregate phosphorus bank.² (R. at 953). After considering the various options, the LPTTF recommended that the WQPF "set up an Aggregate Phosphorus Banking System to satisfy the requirements of" section 122.4(i). (R. at 952).

² The banking option "utilizes an accounting method that tracks cumulative credits (phosphorus reductions) that result from the assignment of phosphorus limits of 1 mg/l to point source facilities, and cumulative debits from new or expanded facilities resulting in phosphorus load increases. The approach is outcome-based and allows the [MPCA] to determine whether reductions in point source loadings of phosphorus from assignment of effluent limits are adequate to compensate for additional loadings that result from expansions or new sources." (R. at 953).

In recommending the banking system, the task force reasoned that such an approach is “[r]elatively easy to set up and measure”; “allows determination of compliance status”; and “does not require a formal trading system.” (R. at 953). The LPTTF further described the system as a “bridge” that

is to be used as a temporary measure, not a permanent solution, and will be in place until the TMDL Waste Load Allocations for Lake Pepin are completed.

(R. at 952-53). Therefore, the recommended approach for implementing trading/offsets in the Lake Pepin watershed basin was thoroughly considered and well-reasoned by MPCA personnel and was not “invented” in response to the Cities’ permit application.

B. MPCA Followed Recommendation in Issuing Permit to Cities

On September 3, 2004, Greg Gross (Chair of the LPTTF) sent to Marvin Hora (Champion of the LPTTF) an e-mail message related to the Cities’ application for a discharge permit. (R. at 952, 957). Mr. Gross raised a concern that, with respect to the Cities’ proposed WTF, the MPCA must first show

a net decrease in phosphorus loading to the North Fork of the Crow [River], similar to the net decrease we can show for the whole Lake Pepin watershed,

before issuing the proposed permit. (R. at 957) (emphasis added). Mr. Gross also stated that “[i]f we cannot show *an overall decrease in phosphorus loading* for the watershed, I think we have a problem.” (R. at 957) (emphasis added). The references to a “net” and “overall” decrease in phosphorus loading confirm the MPCA’s position that a trade or offset with another point source in the North Fork of the Crow River would comply with the applicable requirements of section 122.4(i).

At or about the same time, the MPCA was administering a request from the City of Litchfield related to a proposed expansion of its wastewater treatment facility. And in analyzing the Cities' application for a discharge permit, the MPCA specifically considered the following factors with respect to the proposed Litchfield expansion:

- Before expansion of its wastewater treatment facility, Litchfield had no concentration limit for phosphorus (R. at 1109);
- From August 2001, to December 2003, Litchfield's average phosphorus concentration was 10.5 mg/L (R. at 1487);
- After completion of the expansion of Litchfield's wastewater treatment facility, the MPCA assigned a 1 mg/L concentration limit for phosphorus, beginning on September 1, 2004 (R. at 1487);
- The assignment of a 1 mg/L concentration limit was part of the MPCA's application of its Phosphorus Strategy (R. at 952); and
- By assigning such a concentration limit, the aggregate phosphorus loading in the North Fork of the Crow River was reduced by 53,544 pounds per year (R. at 1109, 1487).

The MPCA's consideration of such factors was reasonable and proper in all respects.

It is obvious that the MPCA followed the Aggregate Phosphorus Banking System in reaching its decision to issue the Cities' discharge permit. Under the banking system, the assignment of a 1 mg/L concentration limit to Litchfield's expanded facility resulted in a cumulative credit for phosphorus reductions in the amount of 53,544 pounds per year. Litchfield's credit more than offset the cumulative debit from the Cities' proposed

WTF,³ resulting in a net (or overall) decrease in phosphorus loading for both the North Fork of the Crow River and the Lake Pepin watershed basin.

Because the offset/trade between Litchfield and the Cities was entirely consistent with the approach expressly recommended by the LPTTF, the MPCA's decision was reasonable. See *In re City of Owatonna's NPDES/SDS Proposed Permit Reissuance for the Discharge of Treated Wastewater*, 672 N.W.2d 921, 926 (Minn. Ct. App. 2004) (stating that appellate courts defer to agency decisions and will affirm if reasonable). In addition, the MPCA's application of the banking system addressed all of the concerns raised by Mr. Gross. And the trade/offset in question is precisely the type of temporary system, or bridge, that the LPTTF recommended until the completion of TMDL studies and the determination of waste load allocations for impaired waters.

C. Court of Appeals Erred in Concluding That EPA Has Not Authorized Use of Trading/Offsets Under Section 122.4(i)

The MCEA argues that the trade/offset between Litchfield and the Cities is too informal and that “[a]ny other use of ‘trades’ is abstract, theoretical and will not accomplish water quality goals.” (MCEA’s brief at 32). But the MCEA ignores the fact that the Minnesota Court of Appeals did not hold that the trade/offset was too informal, abstract, or theoretical. Rather, the court of appeals concluded that section 122.4(i) “is not intended to incorporate a system of offsets” and that there is no “indication that a discretionary system of offsets is authorized.” *In re Cities of Annandale and Maple Lake*

³ The Cities’ proposed increase in phosphorus loading, based on the WTF’s maximum capacity and projected average wet weather flows in the year 2024, is only 2,197 pounds per year. (R. at 185, 643, 1109, 1487).

NPDES/SDS Permit Issuance for Discharge of Treated Wastewater and Request for Contested Case Hearing, 702 N.W.2d 768, 775-76 (Minn. Ct. App. 2005). The court's conclusion was clearly in error.

1. EPA Expressly Supports Pre-TMDL Trading/Offsets

The United States Environmental Protection Agency (the "EPA") has expressly stated that it supports implementation of water-quality trading by states where trading:

Achieves early reductions and progress towards water quality standards pending development of TMDLs for impaired waters [and]

Offsets new or increased discharges resulting from growth in order to maintain levels of water quality that support all designated uses.

United States Environmental Protection Agency, Office of Water, *Final Water Quality Trading Policy*, at 3 (Jan. 13, 2003) <<http://www.epa.gov.owow/watershed/trading/-finalpolicy2003.html>> (Appellants' Appendix ("A.A.") at 142). In addition, the EPA supports pre-TMDL trading

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 supported by baseline information on pollutant sources and loadings.

Id. at 4 (A.A. at 143). Here, the record demonstrates that the pre-TMDL, individual trade/offset at issue accomplishes the EPA's stated goals by achieving early, net reductions in phosphorus and by achieving progress towards water-quality standards.⁴

⁴ The MCEA maintains that trading/offsets, when allowed, must occur using a "cap and trade." (MCEA's brief at 32). But the EPA's trading policy expressly permits "individual trades that achieve a net reduction" in phosphorus. (A.A. at 142).

2. EPA Has Endorsed Individual Trading/Offsets

The EPA, in *Sierra Club v. Clifford*, No. Civ.A. 96-0527, 1999 WL 33494861 (E.D. La. Oct. 1, 1999), asserted that section 122.4(i) allows the issuance of discharge permits “where it is demonstrated that other pollutant source reductions * * * will offset the discharge in a manner consistent with water quality standards.” Brief for Defendant EPA at 53, *Sierra Club*, 1999 WL 33494861 (stating that, where trade/offset results in net decrease in pollutant loadings, discharge will not cause or contribute to violation of water-quality standards) (A.A. at 132). The EPA’s Environmental Appeals Board (the “EAB”) later cited with full approval the brief filed in *Sierra Club*, stating that the use of offsets “is consistent with prior Agency interpretation” of section 122.4(i). *In re Carlota Copper Co.*, 2004 WL 3214473 (Envtl. App. Bd. Sept. 30, 2004) (examining prohibition against issuing permits to new sources and new dischargers that cause or contribute to violation of water-quality standards) (A.A. at 81-83).⁵

Because the EPA has expressly authorized and endorsed the use of trading/offsets by state agencies in determining whether the discharge of effluent from a new source or new discharger will cause or contribute to the violation of water-quality standards, the decision of the Minnesota Court of Appeals must be reversed.

⁵ The MCEA argues that the *Carlota* decision is inapplicable because a TMDL study had been completed for the impaired water. (MCEA’s brief at 27). But in *Carlota*, the EAB rejected the argument that a TMDL study must be implemented before a permit may be issued. 2004 WL 3214473 (A.A. at 80). And the EAB, in examining the requirements of section 122.4(i), analyzed the cause-or-contribute standard separately from any additional standards relating to remaining pollutant load allocations, which standards arise only in the event that a TMDL study has been completed. *Id.* (A.A. at 81-85).

II. Decision by Court of Appeals Is Contrary to Sound Public Policy

In its decision, the Minnesota Court of Appeals stated 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.” *In re Cities of Annandale and Maple Lake*, 702 N.W.2d at 775. Judge Schumacher, in his dissenting opinion, reasoned that such an approach,

will effectively preclude issuance of a permit prior to completion of a TMDL, [which] frustrates the purposes of the CWA and prevents the [MPCA] from exercising its authority to take necessary action to ameliorate water quality in the meantime.

Id. at 778-79 (Schumacher, J., dissenting); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 107-08, 112 S. Ct. 1046, 1057-58 (1992) (rejecting argument that CWA mandates categorical ban on new dischargers of effluent into impaired waters).

The court of appeals’ decision has already resulted, and will continue to result, in unnecessary delays in the permitting process and in the construction of newer, more efficient, and more environmentally friendly wastewater treatment facilities. In addition, the delays and extra costs associated with such delays will inevitably discourage the replacement of aging treatment facilities. The uncertainty created by the decision will ultimately force municipalities, whose facilities may be at or near their respective capacities, to halt all further growth and development, which would have significant and wide-ranging effects on towns, cities, and counties throughout the State of Minnesota.⁶

⁶ For an in-depth discussion of such effects, see briefs filed on behalf of the following groups, who have been granted status as amici curiae in this matter: the Builders Association of the Twin Cities; the Coalition for Greater Minnesota Cities; the League of Minnesota Cities; the Metropolitan Council; the Minnesota Environmental Science and

Further, the decision places the burden of improving water quality on new sources and new dischargers, ignoring the effluent and pollutants now discharged by existing facilities that do not treat to the stringent levels otherwise required by the MPCA.

Here, the Cities sought a NPDES/SDS permit for the proposed WTF in the face of now-expired permits for their two separate, aging facilities. The MPCA – relying on the expertise and special knowledge of its decision-makers’ technical training, education, and experience – concluded that the requirements for issuance of the Cities’ discharge permit had been met. The conclusion should not be second-guessed by courts. *See Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977) (stating that presumption of correctness and deference should be shown by courts to agencies’ expertise and special knowledge in field of technical training, education, and experience).

The MPCA has an ongoing obligation to ensure that the proposed WTF remains in compliance with all state and federal pollution-control standards. The MPCA will also continue implementing new discharge limits for existing treatment facilities, creating a long-range and area-wide program to alleviate and eliminate pollution. Such agency discretion is consistent with the intent of the CWA, section 122.4(i), and EPA commentary. Furthermore, the MPCA’s approach reflects sound public policy by recognizing the Cities’ needs regarding growth and development while also addressing the State of Minnesota’s environmental concerns through the replacement of two aging systems with a single, more efficient wastewater treatment facility.

Economic Review Board; the National Association of Clean Water Agencies; and the Wright County Mayors Association.

III. MCEA's Argument Regarding Necessity of TMDL Study and Pollutants Load Allocation Is Not Properly Before Supreme Court

A significant portion of the MCEA's brief is devoted to the argument that 40 C.F.R. § 122.4(i) prohibits the issuance of a discharge permit to the Cities unless the MPCA has completed a TMDL study and performed a pollutants load allocation for any affected water segment that does not meet applicable water-quality standards.⁷ But the Minnesota Court of Appeals specifically addressed the argument, concluding that,

in the absence of a TMDL, a permit may issue to a new source that does not otherwise cause or contribute to an impairment of waters with impaired status.

In re Cities of Annandale and Maple Lake, 702 N.W.2d at 772-73 (rejecting MCEA's argument that TMDL study and pollutants load allocation are prerequisites to issuance of discharge permit).

Rule 117 of the Minnesota Rules of Civil Appellate Procedure provides that, in response to a petition for review, a party may "conditionally seek review of additional issues not raised by the petition." Minn. R. Civ. App. P. 117, subd. 4. The MCEA responded in opposition to Appellants' separate petitions for review. But the MCEA did not conditionally seek review of the above-referenced issue, which the Minnesota Court of Appeals decided adversely to the MCEA. And neither the Cities nor the MPCA

⁷ The MCEA's argument includes, but is not limited to a discussion of the following cases: *Friends of the Wild Swan v. United States Environmental Protection Agency* and *City of Waco v. Texas Natural Resource Conservation Commission*. For the reasons discussed herein, the cases are not relevant to the issues raised in this appeal.

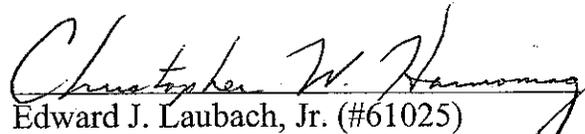
sought review of the issue.⁸ As a result, the issue is not properly before the Minnesota Supreme Court. *See Anderly v. City of Minneapolis*, 552 N.W.2d 236, 239-40 (Minn. 1996) (stating that supreme court may decline to decide issue not raised in petition for review or conditional petition); *Northwest Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche*, 535 N.W.2d 612, 613 n.3 (Minn. 1995) (declining to address issues not raised in petition for review or conditional petition); *Hapka v. Paquin Farms*, 458 N.W.2d 683, 686 (Minn. 1990) (refusing to consider issue omitted from petition for review).

CONCLUSION

For all of the above-stated reasons, and for all of the reasons stated in their principal brief, Appellants the City of Annandale and the City of Maple Lake respectfully request that the Minnesota Supreme Court reverse the decision by the Minnesota Court of Appeals and reinstate the decision by Appellant Minnesota Pollution Control Agency, which authorized the issuance of a NPDES/SDS permit to the Cities for the discharge of treated effluent from the proposed WTF into the North Fork of the Crow River.

⁸ The Cities did not discuss the alleged requirement regarding completion of a TMDL study and performance of a pollutants load allocation in their principal brief and will not attempt to do so within their reply brief. If relevant, the Cities adopt by reference the arguments presented in their responsive brief to the Minnesota Court of Appeals.

Dated this 18th day of January, 2006.



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