

No. A08-1828

STATE OF MINNESOTA

IN COURT OF APPEALS

In the Matter of a Request for Issuance of the SDS General Permit
MNG300000 for Ballast Water Discharges from Vessels Transiting
Minnesota State Waters of Lake Superior.

**RESPONDENT MINNESOTA POLLUTION CONTROL AGENCY'S
BRIEF AND APPENDIX**

MATTHEW J NORTON #292722
Minnesota Center for
Environmental Advocacy
26 East Exchange Street, Suit 206
St. Paul, MN 55101-1667
(651) 223-5969 (Voice)
(651) 223-5967 (Fax)

ATTORNEY FOR RELATOR
MINNESOTA CENTER FOR
ENVIRONMENTAL
ADVOCACY

LORI SWANSON
Attorney General
State of Minnesota

ROBERT B. ROCHE #289589
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 215-1506 (Voice)
(651) 296-1410 (TTY)
(651) 297-4139 (Fax)

ATTORNEYS FOR
RESPONDENT
MINNESOTA POLLUTION
CONTROL AGENCY

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LEGAL ISSUES

- I. Did the Minnesota Pollution Control Agency (“MPCA”) reasonably conclude that ballast water discharges that pre-date the designation of Lake Superior as an outstanding resource value water are not new or expanded discharges under MPCA’s nondegradation rule?

The MPCA Citizens Board concluded that ballast water discharges that pre-date or which have not expanded since before Lake Superior was designated as an outstanding resource value water are not new or expanded discharges under Minnesota’s nondegradation rule.

In re Cities of Annandale & Maple Lake, 731 N.W.2d 501 (Minn. 2007)

Minn. R. 7050.0180 (2007)

- II. Was it reasonable for MPCA to conclude that it satisfied nondegradation requirements by including in its ballast water permit the most stringent treatment standards that have been developed and that will actually be achievable during the term of the permit?

The MPCA Citizens Board concluded that imposition of the most stringent ballast water treatment standards that have been developed that will actually be achievable during the term of this permit satisfied nondegradation requirements.

MCEA v. MPCA & Boise Cascade Corp., 644 N.W.2d 457 (Minn. 2002)

Kells v. City of Rochester, 597 N.W.2d 332 (Minn. Ct. App. 1999)

STATEMENT OF THE CASE

This case involves a challenge to the first permit that has ever been issued to control the discharge of ballast water in Minnesota waters.

Ballast water is water that is taken into the hull of a ship to improve the ship's stability. As cargo is loaded and unloaded or as weather conditions change, vessels take on and discharge ballast water.

Ballast water discharges are currently exempt from regulation under the federal Clean Water Act. In 2006, several plaintiffs, including the State of Minnesota, successfully sued the United States Environmental Protection Agency ("EPA") in federal court challenging the EPA regulation that exempts ballast water discharges from Clean Water Act permitting requirements. The federal court ruled that the regulation was invalid, but held that the regulation would continue in effect until September 30, 2008 in order to give EPA time to develop a regulatory plan for ballast water discharges. *N'West Env'tl. Advoc. v. EPA*, 36 Env'tl. Rep. 20,294 (N.D. Cal. Sep. 18, 2006). The federal court has subsequently extended that deadline twice. The federal regulation exempting ballast water discharges from Clean Water Act permitting requirements will be vacated on February 6, 2009.

In early summer of 2007, MPCA began working to develop a ballast water permit that would regulate the discharge of ballast water in Minnesota waters of Lake Superior. The MPCA began working on the permit for several reasons. First, MPCA is delegated to issue federal Clean Water Act permits in Minnesota and the agency wanted to be ready to meet the federal court September 30, 2008 deadline. Second, MPCA was concerned

that the EPA might not have a draft permit of its own for States to use as a model by the September 30, 2008 deadline. Third, MPCA was concerned that if the EPA did prepare a draft permit, then the EPA permit might not be as stringent as MPCA believed was necessary. As a result, the MPCA decided to have its own permit ready for issuance on September 30, 2008.

Despite the fact that MPCA was already in the process of developing a ballast water permit for issuance by September 30, 2008 in accordance with the federal district court's order, the Minnesota Center for Environmental Advocacy ("MCEA") sued MPCA in Ramsey County District Court demanding that MPCA immediately begin regulating ballast water discharges in Minnesota without following the normal permit issuance procedures. *State of Minn. ex rel., MCEA v. MPCA*, No. 62-CV-07-2224 (2nd Jud. Dist., Apr. 21, 2008). (RA 37.)

The Ramsey County District Court rejected MCEA's request to bypass the permitting process and instead ordered the MPCA to issue a federal Clean Water Act permit for ballast water discharges in Minnesota by September 30, 2008 in accordance with the federal district court's order. *Id.* After the Ramsey County District Court issued its order, the EPA informed MPCA in writing that MPCA's delegation to issue federal Clean Water Act permits did not include the issuance of permits for ballast water discharges. (R. 0225-0228.)¹

¹ References to MPCA's certified administrative record are indicated by the letter "R" followed by the page numbers.

Although it was not required to do so by the Ramsey County District Court's order, MPCA nevertheless decided to continue its permitting efforts under its State law authority. MPCA issued its State law based general permit regulating ballast water discharges on September 23, 2008. (MPCA brought the EPA's notification to the Ramsey County District Court's attention, but the district court took no action in response to the EPA notification.)

MPCA's ballast water permit requires vessels that transit Minnesota waters of Lake Superior to treat their ballast water to eliminate biological organisms from the ballast water. Specifically, the MPCA permit imposes stringent International Maritime Organization ("IMO") biological treatment standards for ballast water discharges in Minnesota waters of Lake Superior.

Many stakeholders argued that MPCA's / IMO's treatment standards were too strict, but MPCA concluded that the standards were achievable, necessary and appropriate to protect Lake Superior. Other stakeholders, including MCEA, argued that MPCA should impose more stringent standards, referencing theoretical standards from the State of California.

MPCA chose the IMO limits because they are the most stringent ballast water limits that have been developed that will actually be technologically achievable during the term of the permit. There is currently no known technology that is capable of meeting the California standards that MCEA advocated. Moreover, MPCA is unaware of any evidence that any technology capable of meeting the California standards is likely to be developed during the life of the permit. MPCA therefore concluded that the IMO

standards would provide greater protection for Lake Superior than the California standards because unlike the California standards, the IMO standards are technologically achievable within the timeframe of the MPCA's permit.

Because vessels have not historically been legally required to treat ballast water prior to discharging it, retrofitting will be necessary for vessels to be able to meet treatment requirements. MPCA therefore included an implementation schedule for existing vessels to go into drydock and have technology installed to meet the IMO standards. In the meantime, all vessels are required to employ proven best management practices to minimize any potential threat from the discharge of ballast water.

As required by State law, MPCA performed a nondegradation analysis before issuing its ballast water permit. Because Lake Superior is an outstanding resource value water ("ORVW"), the MPCA performed its nondegradation analysis under Minn. R. 7050.0180 (2007).

Minn. R. 7050.0180 prohibits new or expanded discharges to ORVWs unless there is not a feasible and prudent alternative to the discharge. New or expanded discharges are discharges that come into existence or that expand pollutant loading to a receiving water after the date the water was designated as an ORVW. *Id.* The rule also provides that if a new or expanded discharge to an ORVW is permitted, then the discharge must be regulated to preserve the high quality of the ORVW. *Id.*

MPCA concluded that the vast majority of ballast water discharges in Minnesota waters of Lake Superior are neither new nor expanded discharges because the discharges pre-date the designation of Lake Superior as an ORVW. MPCA further concluded that

even if ballast waters were considered new or expanded, there is no feasible and prudent alternative to such discharge because ships cannot operate without discharging ballast water and stopping shipping on the Great Lakes would be neither feasible nor prudent. Moreover, MPCA concluded that by including the most stringent technologically achievable treatment limits, the controls in the permit satisfy the nondegradation rule requirements.

STATEMENT OF FACTS

Background Of Minnesota's Ballast Water Efforts

Unregulated discharges of ballast water threaten receiving waters because such discharges can introduce invasive species to the receiving waters. (R. 0521-023.) Because of this threat, the State of Minnesota has been actively working for the past several years to ensure the development of an appropriate regulatory system to control the discharge of ballast water.

For example, as noted above, the State of Minnesota was one of the plaintiffs that successfully sued EPA to invalidate the federal regulation that excuses ballast water discharges from federal Clean Water Act permitting requirements. *N'West Env'tl. Advoc. v. EPA*, 36 Env't'l. Rep. 20,294. When the shipping industry sued in federal court to block any state regulation of ballast water discharges at all, Minnesota led a coalition of Great Lakes States in successfully defending the states' rights to regulate ballast water discharges. *Fednav, Ltd. v. Chester*, 547 F.3d 607 (6th Cir. 2008)(holding that neither preemption nor dormant Commerce Clause preclude state regulation of ballast water discharges).

As noted above, MPCA also began working on a ballast water discharge permit in early 2007. (R. 0523.) MPCA intended to be ready to issue a ballast water discharge permit by the original federal court deadline of October 1, 2008. *Id.* MPCA decided to be ready to issue its own ballast water discharge permit by October 1, 2008 in case the federal government either failed to meet the deadline or issued a permit that MPCA decided was not sufficiently protective of Minnesota's waters.² (R. 0553.)

Development Of MPCA's Ballast Water Discharge Permit

Because MPCA's ballast water discharge permit required the creation of an entirely new regulatory system, MPCA utilized an extensive stakeholder process to develop its permit. (R. 0525.) MPCA held four large public stakeholder meetings in different parts of the State to solicit input on issues to be addressed in the permit. *Id.*

These meetings were well attended by a healthy mix of stakeholders. Participants in the meetings included representatives from the shipping industry, numerous environmental and conservation organizations, private citizens, and representatives of different state, federal, local agencies, and the Canadian government. *Id.*

In addition to these early stakeholder meetings, MPCA placed its draft ballast water discharge permit on public notice from June 30, 2008 to July 30, 2008. *Id.* Along with the draft permit, MPCA public noticed a fact sheet that explained the terms and

² As discussed below, the federal government both failed to meet the October 1, 2008 deadline and issued a permit that the MPCA determined was not, by itself, sufficiently protective of Minnesota's waters.

conditions of the permit and the rationale for why MPCA was proposing those terms and conditions. (*MPCA Fact Sheet*, R. 0270-0293 at RA 1 - 24.)³

MPCA's fact sheet explained that "the intent of [the] permit is to protect the water quality of the Minnesota waters of Lake Superior by reducing the threat of [aquatic invasive species] from ballast water, while supporting a viable shipping industry in Minnesota and throughout the Great Lakes." (R. 0273.)

To accomplish these purposes MPCA's permit requires ships operating in Minnesota to comply with seven proven best management practices immediately upon permit issuance. (R. 0276-0277.) Compliance with these proven best management practices is, however, only a first step under the permit. *Id.*

Minnesota's permit also requires ships operating in Minnesota to treat their ballast water prior to discharge so that the discharge meets specific stringent biological treatment standards. (R. 0278-0279.) Because ballast water has not historically been subject to permitting requirements, neither rule nor statute establish specific treatment requirements for such discharges. *Id.* MPCA staff therefore had to develop appropriate discharge standards using their best professional judgment. *Id.*

Although this permit was not developed under federal law, MPCA staff followed guidance laid out at 40 C.F.R. § 125.3 for the development of so-called best professional judgment permit limits. *Id.* Under that guidance, best professional judgment is defined as the "highest quality technical opinion developed after consideration of all reasonably

³ References to Respondent's Appendix are indicated by the abbreviation 'RA' followed by the page numbers.

available and pertinent data or information that forms the basis for the terms and conditions of a permit.” *Id.*

After performing its best professional judgment analysis, MPCA staff established four specific treatment standards for ballast water. *Id.* The standards that MPCA staff selected are based on Section D-2 of the International Maritime Organization (“IMO”) Convention. *Id.* In general terms, the standards that MPCA chose limit the number of biological organisms that a ship may discharge based on the type and size of the organisms at issue. *Id.* MPCA chose not to include one of the IMO standards for a particular type of organism because there are no existing analytical methods to quantify that particular organism. *Id.*

MPCA had several reasons for concluding that the IMO biological treatment standards were appropriate for this permit. (R. 0278-0279.) First, MPCA concluded that the IMO standards would both protect the waters of the State and promote uniformity in discharge standards among different regulatory jurisdictions. *Id.* Second, the IMO standards are generally recognized throughout the international shipping community. Third, treatment technologies are currently being developed that will be capable of meeting the IMO standards. Fourth, those treatment technologies are expected to be commercially available within the term of this permit. *Id.*

In simple terms, MPCA staff’s best professional judgment analysis involved reviewing and selecting the most stringent treatment standards that have been developed that will actually be achievable during the term of the permit. *Id.* Before selecting the IMO standards, MPCA staff conducted a thorough evaluation of the treatment

technologies currently being developed to treat ballast water. (R. 0279.) MPCA staff evaluated the status and available performance data of fifteen separate treatment systems. (R. 0291-0293.) Based on that evaluation, MPCA staff concluded that the IMO standards were the most stringent treatment standards that would actually be technologically achievable during the term of the permit. (R. 0291-0293.)

After selecting the appropriate treatment standard, MPCA had to determine how soon one could reasonably expect ships to have technology capable of meeting that standard installed on board. (R. 0281-0282.) MPCA concluded that existing ships would be required to comply with the IMO treatment standards no later than January 1, 2016. (R.0280.) New ships (constructed after January 1, 2012) will be required to comply prior to operation in Minnesota. *Id.*

MPCA considered a number of factors in determining the appropriate schedule for implementing the IMO treatment standards. (R. 0280-0281.) Time is needed so that technology capable of meeting the standards can be developed. (R. 0281.) As noted above, MPCA concluded that technology capable of meeting the IMO standards is expected to be available during the term of this permit, but that technology is still in the development phase. *Id.* At the time that the permit was issued, there were three technologies that were expecting final IMO approval in 2008, but none had yet received such approval. *Id.* The lack of available proven technology, especially in freshwater conditions, therefore influenced the implementation schedule. *Id.*

Once technology is developed to meet the standards, it will be necessary to verify the effectiveness of that technology in freshwater. The vast majority of ballast water

treatment technologies being developed are designed for saltwater or brackish conditions. (R. 0280.) Additional testing and verification will therefore be required to ensure that those systems can perform effectively in freshwater conditions. (R. 0280-0281).

The need to develop a maintenance system for treatment technology also influenced the implementation schedule. *Id.* As noted above, requiring the treatment of ballast water is a brand new regulatory endeavor. As a result, there is no infrastructure for servicing and maintaining ballast water treatment technologies. *Id.* In order for any treatment regime to be effective, the treatment technology must be maintained in good working order. *Id.* MPCA therefore concluded that time was necessary to allow for the development of a maintenance system for ballast water treatment technology. *Id.*

Finally, the availability of dry dock space influenced the implementation schedule. MPCA determined that ships will need to go into drydock to have ballast water treatment technology installed. *Id.* Although some work can be performed on ships while in wet dock, modifications to ballast water discharge systems must take place in drydock. *Id.* There is limited drydock space available for ships of the size that are covered by this permit. *Id.* Ships operating on the Great Lakes typically go into drydock once every five to six years so that engines can be overhauled and additional necessary maintenance can be performed. *Id.* Oceangoing vessels typically go into drydock once every three years. MPCA therefore concluded that the drydock schedule had to be considered in establishing an appropriate implementation schedule for the biological treatment standards in this permit. *Id.*

Public Comments On Draft Permit

As one would expect with the development of a new regulatory scheme, the public comments on the draft permit were fairly evenly divided between those who believed that the permit should be more stringent and those who believed that the permit is too stringent. (R. 0547-0592.)

Commenters who believed the permit should be more stringent (including MCEA) argued that instead of adopting the IMO standards, the MPCA should adopt the so-called "California standards" or even an absolute standard of zero organisms as its treatment standards. (R. 0567; 0572.) MCEA claimed that treatment systems capable of meeting the California standards was likely to be available soon. (R. 0572.) MCEA did not, however, submit any evidence to support that claim. *Id.*

Evidence from the State of California itself, however, refuted MCEA's claim. (R. 1324-1482). According to the State of California's *Assessment of the Efficacy, Availability, and Environmental Impacts of Ballast Water Treatment Systems For Use In California Waters*:

On a system-by-system basis and across all testing platforms and scales (laboratory, dockside, shipboard), no single technology has yet demonstrated the capability to meet all of California's performance standards. Since the limited available data indicated that no system demonstrates the capability to meet all seven organism size classes of California's standards, none can be clearly deemed 'available' for installation.

(R. 1325.)

Moreover, the California study did not even attempt to evaluate when or whether technology that might theoretically be able to meet the California standards in

California's saltwater environment might be available for freshwater application. (R. 1324-1482.)

MPCA therefore reiterated that it had chosen the IMO standards because they were the best standards available that were expected to be technologically achievable within the term of the permit. (R. 0552; 0652-0653.) MPCA further stated that it would continue to monitor technological developments and would consider amending the performance standards if evidence was presented that showed that technology is capable of meeting more stringent standards was available. *Id.*

Other commenters, including representatives of the Canadian government and the shipping industry, claimed that MPCA's permit is too stringent. These commenters offered four main reasons why they believe that MPCA's permit is too stringent.

First, they believe that the IMO standards are too strict because there is not yet any commercially available technology that can meet those standards. (R. 0564; 0568.) Second, they believe the implementation timeframe under the permit is too short and unrealistic. (R. 0560; 0564.) Third, they believe vessels that operate solely on the Great Lakes ("lakers") should not be required to obtain permit coverage at all. These commenters noted that Michigan, the only other Great Lake State that has a ballast water permitting program, exempts lakers from regulation.⁴ (R. 0547-0559; 0551; 0647.) Finally, they argue that the States, including Minnesota, should not attempt to regulate

⁴ Michigan's ballast water permit also does not include actual treatment standards. Instead, Michigan's permit specifies technology that ships must use to discharge ballast water without establishing an actual standard of purity that must be attained.

ballast water discharges at all given that EPA will be issuing a federal permit in the near future. (R. 0549-0550; 0554-0555; 0558-0559.)

MPCA rejected these arguments. As noted above, MPCA concluded that although aggressive, the IMP standards will be technologically achievable during the permit term. (R. 0564.) MPCA also concluded that the implementation schedule in the permit provides a reasonable time period based on the state of the technology for permittees to meet the IMP standards. *Id.*

Although other Great Lakes States have chosen not to regulate the discharge of ballast water from lakers, MPCA decided to include lakers within the scope of its permit. (R. 0523; 0547-0548.) MPCA found that lakers have the potential to cause or accelerate the redistribution of invasive species between each of the Great Lakes. (R. 0547-0548.) MPCA therefore concluded that lakers should be regulated under Minnesota's permit. *Id.*

MPCA also rejected the assertion that Minnesota should simply leave the regulation of ballast water discharges to the federal government. (R. 0549-0550.) MPCA recognized the desirability of having uniform regulations to address an environmental issue that is both national and international in scope. *Id.* MPCA stated that its preference had long been for a federal solution – as long as the federal solution was adequately protective of Minnesota waters. *Id.* Nevertheless, MPCA concluded that the ballast water discharge permit that the EPA had proposed was not, by itself, sufficiently protective of Minnesota waters because that permit did not impose any treatment standards or other requirements beyond existing practices. *Id.* MPCA therefore

concluded that a State permit with additional requirements (i.e. treatment requirements) was necessary to protect Minnesota's waters. *Id.*

Nondegradation Review

As part of the development of its ballast water permit, MPCA performed a nondegradation review pursuant to Minn. R. 7050.0180. (R.0282-0288; 0573.) Under this rule, a nondegradation analysis is required for discharges that come into existence or expand after a water is designated as an ORVW. *Id.*

MPCA concluded that the vast majority of ballast water discharges are neither new nor expanded because the discharges did not come into existence or expand allowable pollutant loading after November 5, 1984 (the date on which Lake Superior was designated as an ORVW). (R. 0283-0284; 0742.)

MPCA's nondegradation analysis noted that expanded discharges of ballast water are unlikely because the size and number of ballast tanks are fixed when ships are constructed. *Id.* The environmental threat posed by ballast water discharges have remained relatively unchanged since the opening of the Saint Lawrence Seaway in 1959. *Id.* Moreover, by restricting for the first time the amount of pollution that vessels can discharge in their ballast water, MPCA's permit decreases rather than expands the allowable pollutant loading from ballast water discharges. *Id.*

Nevertheless, MPCA still did a full nondegradation analysis for ballast water discharges because there will likely be some vessels covered by the permit that did come into existence after November 5, 1984. *Id.* MPCA concluded that there is not a feasible and prudent alternative to ballast water discharges. (R.0573; 0656.) MPCA also

concluded that its ballast water discharge permit will ensure that water quality in Lake Superior is maintained. (R. 0283-0284; 0573; 0742; 0656-0657.) In fact, MPCA's ballast water discharge permit will result in substantially greater protection for water quality in Lake Superior than the former practice of allowing unlimited discharges of untreated ballast water. *Id.*

MPCA Board Hearing

The MPCA Citizens Board held a public hearing on the ballast water discharge permit on September 23, 2008. (MPCA Transcript at R. 0636-0735.) During that hearing the MPCA Board heard arguments on each of the issues discussed above. *Id.* MPCA staff opened the hearing by explaining the extensive process they utilized to gather information in this new regulatory area. (R. 0647-0649.) MPCA staff held bi-weekly meetings with the Minnesota Department of Natural Resources. *Id.* Technical staff consulted with Minnesota Sea Grant, natural resources experts, representatives of the shipping industry, and various environmental groups. *Id.* MPCA staff also coordinated with other authorities with regulatory jurisdiction over ballast water discharges. *Id.* MPCA did this to understand the effectiveness of existing regulations and to ensure that Minnesota's permit is compatible with other U.S., Canadian, and international regulations yet also sufficiently protective. *Id.*

MCEA testified at the MPCA Board hearing on the ballast water permit. MCEA asked MPCA to include stricter discharge standards in the permit and to shorten the timeframe for implementing those standards. (R. 0691.) MCEA did not, however, offer any evidence that more stringent standards would be technologically achievable during

the term of this permit; much less on a faster timeframe than the one MPCA technical staff had proposed. *Id.*

MPCA technical staff reiterated that they had concluded that the IMO standards were the most stringent standards that would be technologically achievable within the permit term. (R. 0653.) Technical staff testified that including more stringent standards in the permit would be “a paper exercise” without any environmental benefit because MPCA is unaware of any technology that is available or that will be available during this permit term that could meet such standards. (R. 0653-0654.)

MPCA technical staff explained that several factors made shortening the implementation schedule unrealistic. (R. 0655-0658.) As noted above these factors include: (i) the need to develop technology to meet the IMO standards; (ii) the need to verify the effectiveness of such technology in freshwater conditions; (iii) the need to develop maintenance system for treatment technology once it is developed; and (iv) the need for ships to go into drydock to have treatment technology installed. *Id.*

MPCA staff also explained that the dates in the implementation schedule are end dates. (R. 0655-0658.) This means that vessels will actually be installing treatment technology as they go into drydock over the next few years; not waiting until 2016 to do so. *Id.*

One MPCA Board Member briefly inquired whether the permit decision could be delayed by a single month to determine if a shorter implementation schedule was viable. (R. 0724-0725.) MPCA counsel advised that any such delay would take longer than one month because changing the implementation schedule would require a new public notice

and comment period. (R. 0725.) The MPCA Commissioner suggested that delaying permit issuance would not be beneficial because MPCA staff had adequately established that the proposed implementation schedule was reasonable. (R. 0725-0726.) The Board Member decided not to request a delay in permit issuance. *Id.*

Instead, the MPCA Board directed staff to monitor ongoing legal and technological developments to determine if new information might make a change to the permit implementation schedule feasible. (R. 0726-0728.) MPCA staff agreed. In fact, MPCA staff had consistently stated that if technological developments made more stringent standards or a more aggressive implementation schedule feasible, then the permit would be amended accordingly. (R. 0552; 0583; 0726-0728.)

At the conclusion of the public hearing, the MPCA Citizens Board voted unanimously to issue the ballast water discharge permit. (R. 0733.) The MPCA Citizens Board also adopted findings of fact, conclusions of law and an order authorizing issuance of the permit. (MPCA Board Findings, RA 25-36.)

STANDARD OF REVIEW

I. UNDER MINNESOTA LAW COURTS APPLY A DEFERENTIAL STANDARD OF REVIEW TO MPCA'S INTERPRETATION OF TECHNICAL ENVIRONMENTAL RULES THAT MPCA ADMINISTERS.

Under Minnesota law, reviewing courts are required to uphold MPCA's interpretation of technical environmental rules and statutes that MPCA administers as long as MPCA's interpretation is reasonable. The Minnesota Supreme Court has firmly established that MPCA's interpretation of technical environmental laws like the nondegradation rule at issue in this case is entitled to deference from reviewing courts. *In*

re Cities of Annandale & Maple Lake, 731 N.W.2d 501 (Minn. 2007)(holding court of appeals required to defer to MPCA’s interpretation of technical federal water quality permitting regulation); *MCEA v. MPCA & Boise Cascade*, 644 N.W.2d 457 (Minn. 2002)(holding court of appeals required to defer to MPCA’s interpretation of state environmental review statute).

Although MCEA has argued that deference is not required in this case, highly analogous case law from the Minnesota Supreme Court clearly establishes that deference is required. In *MCEA v. MPCA & Boise Cascade Corp.*, MCEA challenged MPCA’s determination that a proposed forestry project did not have “the potential for significant environmental effects” as that term is defined in the Minnesota Environmental Policy Act. This Court held that MPCA’s interpretation of the applicable statute was not entitled to deference and the Minnesota Supreme Court reversed. *Id.* at 464. The supreme court held that deference to MPCA’s interpretation of the statute was required based on MPCA’s expertise in environmental issues. *Id.* The supreme court concluded that the evaluation of the environmental effects from the project was primarily factual and necessarily required the application of MPCA’s technical expertise. *Id.* As a result, the supreme court held that “it is appropriate to defer to the agency’s determination of whether the statutory standard is met.” *Id.* Noting that MPCA has technical expertise in the areas of water, air and land pollution, the supreme court went on to affirm MPCA’s decision. *Id.* at 465.

In *Annandale / Maple Lake*, MCEA challenged MPCA’s interpretation of the term “cause or contribute” as used in a federal water permitting regulation. *Annandale /*

Maple Lake, 731 N.W.2d 502. This Court held that MPCA's interpretation of the regulation in question was not entitled to deference and the Minnesota Supreme Court reversed. *Id.* The supreme court in *Annandale / Maple Lake* held that deference was required because the interpretation of the regulation in question required the application of MPCA's technical expertise and training in environmental issues. *Id.* at 514-515. The supreme court also went on to affirm MPCA's original permitting decision. *Id.*

In the *Annandale / Maple Lake* case, the supreme court laid out the factors that govern when a reviewing court must defer to an agency's interpretation and application of the agency's regulations. *Id.* According to the Minnesota Supreme Court, deference is required when the relevant regulatory language is unclear or susceptible to different reasonable interpretations. *Id.* at 516. Deference is also required when interpretation and application of the regulation in question requires the agency to apply its specialized training and expertise. *Id.* at 515 citing *MCEA v. MPCA & Boise Cascade*, 644 N.W.2d at 464 & *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977).

In this case, deference is appropriate. Like the laws at issue in the supreme court precedents discussed above, MPCA's nondegradation rule is a technical environmental protection regulation that MPCA is charged to administer. Additionally, like the laws at issue in the cases discussed above, MPCA must apply its special training and expertise to interpret and apply MPCA's nondegradation rule. As a result, this Court is required to defer to MPCA's interpretation of its nondegradation rule and must uphold that interpretation because it is reasonable.

II. MPCA'S TECHNICAL FACTUAL CONCLUSIONS ENJOY A PRESUMPTION OF CORRECTNESS AND DEFERENCE MUST BE SHOWN TO MPCA'S TECHNICAL EXPERTISE ON ENVIRONMENTAL ISSUES.

As the Minnesota Supreme Court has held, "decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education and experience." *Annandale / Maple Lake*, 731 N.W.2d at 513 quoting *Reserve Mining*, 256 N.W.2d at 824. More specifically, the Minnesota Supreme Court has held that MPCA has technical expertise regarding water pollution. *MCEA v. MPCA and Boise Cascade Corp.*, 644 N.W.2d at 465. This Court is therefore required to MPCA's determination as to whether an environmental protection standard has been met. *Id.*

The Minnesota Supreme Court has further held that judicial deference is especially appropriate when, as in this case, an agency is launching a new regulatory program. In the *Annandale / Maple Lake* case, the Minnesota Supreme Court stated that it agreed with the United States Supreme Court's statement that:

Deference to an agency's interpretation of a statute is appropriate, particularly 'when the administrative practice at stake involves a contemporaneous construction of a statute by the [people] charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.'

Annandale / Maple Lake, 731 N.W.2d at 512 (quoting *Udall v. Tallman*, 308 U.S. 1, 16 (1965) (quoting *Power Reactor Dev. Co. v. Int'l. Union of Elec., Radio & Mach. Workers*, 367 U.S. 396, 498 (1961))).

As noted above, ballast water discharges have never been subject to permitting requirements before now. The permit being challenged is the first permit ever to control the discharge of ballast water in Minnesota waters. The standards at issue and technology to meet those standards are either new or still being developed. Under *Annandale / Maple Lake*, judicial deference is therefore particularly appropriate in this case while the machinery of ballast water regulation is untried and new.

As the supreme court has stated, “because of an agency’s expertise, its order is presumptively valid and the reviewing court should show deference to conclusions involving [the agency’s] expertise.” *Minn. Power & Light Co. v. Minn. Pub. Util. Comm’n.*, 342 N.W.2d 324, 329 (Minn. 1983). In cases like the present one, where there are technical disputes or uncertainties, Minnesota courts assume that an administrative agency has exercised its discretion appropriately. *In re Amer. Iron & Supply Co.*, 604 N.W.2d 140, 145 (Minn. Ct. App. 2000). Absent manifest injustice, a reviewing court must accept the inferences that the agency has drawn from the evidence even if it appears that contrary inferences would be better supported. *Urban Council on Mobility v. Minnesota Dep’t of Nat. Res.*, 289 N.W.2d 729, 733 (Minn. 1980).

Under this standard the “the agency’s factual findings must be viewed in the light most favorable to the agency’s decision and shall not be reversed if the evidence reasonably sustains them.” *Kells v. City of Rochester*, 597 N.W.2d 332 (Minn. Ct. App. 1999). *See also McBride v. LeVasseur*, 341 N.W.2d 299, 302 (Minn. Ct. App. 1983) (court required to review agency findings in light most favorable to agency’s decision).

As this court has stated “[i]f there is room for two opinions on a matter, [an] agency’s action is not arbitrary or capricious even though the court may believe that an erroneous conclusion has been reached.” *In re Rochester Ambulance Service*, 500 N.W.2d 495, 499 (Minn. Ct. App. 1993). *See also CUB Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 565 (Minn. Ct. App. 2001) (where evidence leaves room for two opinions agency’s choice of one course of action is not arbitrary and capricious); *In re Petition of Minn. Power*, 545 N.W.2d 49, 51 (Minn. Ct. App. 1996) (where there is room for two opinions on a matter agency action not arbitrary and capricious even though court may believe that erroneous conclusion has been reached).

A court reviewing an administrative agency’s decision in a contested matter is prohibited from re-weighing the evidence or from substituting the court’s judgment for that of the agency. *In re Lakedale Telephone Company*, 561 N.W.2d 550, 554 (Minn. Ct. App. 1997) (agency was free to conclude that only evidence presented in administrative proceeding was unpersuasive and court would not substitute its judgment for agency’s on this finding given requirement of substantial judicial deference to agency’s fact-finding process). As the Minnesota Supreme Court has said “[u]pon review, courts should not attempt to weigh the credibility of conflicting experts, but should instead review the record to ensure that decision was legally sufficient - i.e. had support in the record.” *Billy Graham Evangelical Assoc. v. Minneapolis*, 667 N.W.2d 117, 124 (Minn. 2003).

Thus, under Minnesota law deference to MPCA’s technical conclusions is required in this case. This is especially true in light of the fact that what is being challenged is a brand new and untried regulatory program. As discussed below, this

Court must affirm MPCA's technical conclusions because they are reasonable and supported by substantial evidence in the record.

ARGUMENT

I. MPCA REASONABLY CONCLUDED THAT BALLAST WATER DISCHARGES THAT DID NOT COME INTO EXISTENCE OR EXPAND AFTER LAKE SUPERIOR WAS DESIGNATED AS AN OUTSTANDING RESOURCE VALUE WATER ARE NOT NEW OR EXPANDED DISCHARGES UNDER MPCA'S NONDEGRADATION RULE.

As noted above, reviewing courts are required to defer to MPCA's interpretation of technical environmental rules that MPCA administers. MPCA's interpretation of such rules must be upheld if the agency's interpretation is reasonable. In this case, MPCA's interpretation of the term "expanded discharge" under its nondegradation rule is reasonable because it is consistent with the plain text of the rule. MPCA's interpretation must therefore be upheld.

Minnesota's nondegradation rule requires a review before a permit can be issued that allows a new or expanded loading of pollution to an ORVW. Minn. R. 7050.0180. In this case, MPCA's reasonably concluded that ballast water discharges that pre-date Lake Superior's designation as an ORVW are not new or expanded under the nondegradation rule.⁵ As discussed below, this conclusion is reasonable because it is supported by both the evidence and the text of Minnesota's nondegradation rule.

⁵ As discussed below, MPCA did perform a nondegradation review in this case because at least some of the vessels operating on Lake Superior are "new dischargers" because they began operating and discharging after Lake Superior was designated as an ORVW. However, the majority of the ships on Lake Superior have been operating without expansion since before Lake Superior was designated as an ORVW.

MCEA incorrectly argues that existing vessels have expanded their ballast water discharges under MPCA's nondegradation rule since the date that Lake Superior was designated as an ORVW. (MCEA Br., pp. 17-20.) For the reasons discussed below, MCEA's argument is factually and legally without merit.

Factually, MCEA's argument improperly calls upon this Court to second guess the MPCA's technical conclusions. *MCEA v. MPCA & Boise Cascade*, 644 N.W.2d at 466 (reversing court of appeals for improperly weighing environmental evidence of trier of fact).

MPCA reviewed the evidence and reasonably concluded that increased pollutant loading from ballast water discharges by ships that pre-date Lake Superior's designation as an ORVW is unlikely to occur for two reasons. First, the size and number of ballast water tanks are fixed when a ship is constructed. Ballast water tanks are not expanded after a ship becomes operational. Second, MPCA applied its technical expertise and concluded that the environmental threats from ballast water discharges have remained relatively unchanged since 1959. MPCA therefore reasonably concluded that the discharge of ballast water from ships that pre-date Lake Superior's designation as an ORVW are not expanded discharges. This Court should decline MCEA's request to re-weigh the evidence as an environmental trier of fact.

Legally, MCEA's argument improperly calls upon this Court to apply the nondegradation rule in a manner that conflicts with text of the rule. MCEA suggests that if any new invasive species have been introduced to Lake Superior since November 5, 1984, then all ballast water discharges must be expanded discharges under MPCA's

nondegradation rule. (MCEA Br., p. 19.) MCEA's argument, however, ignores the plain text of MPCA's nondegradation rule. Under MPCA's nondegradation rule, an expanded discharge is:

a discharge that changes in volume, quality, location, or any other manner after the effective date the outstanding resource value water was designated as [an outstanding resource value water] such that an increased loading of one or more pollutants results. *In determining whether an increased loading of one or more pollutants would result from the proposed change in the discharge, the agency shall compare the loading that would result from the proposed discharge with the loading allowed by the agency as of the effective date of outstanding resource value water designation.*

Minn. R. 7050.0180, subp. 2 (C) (2007) (emphasis added).

In other words, to determine if a discharge is expanded under this rule, MPCA is legally required to compare the amount of pollutant loading that was allowed as of the date of ORVW designation with the amount of pollutant loading allowed after a proposed change. *Id.* If the amount of allowable pollutant loading increases, there is an expanded discharge. *Id.* If the amount of allowable pollutant loading remains constant or decreases, there is not an expanded discharge. *Id.*

In this case, MPCA's ballast water permit significantly decreases the allowable pollutant loading to Lake Superior. Lake Superior was designated as an ORVW on November 5, 1984. At that time, ballast water discharges were unregulated. This means that vessels operating on Lake Superior were allowed to discharge (and did discharge) an unlimited amount of pollution in their ballast water as of the date of Lake Superior's designation as an ORVW. By imposing the most stringent technologically achievable treatment standards in its ballast water discharge permit, MPCA has *decreased* the

amount of allowable pollutant loading from ballast water discharges; not increased it. MPCA therefore reasonably concluded that its permit does not allow ships that have been in operation since before 1984 to expand their discharges under its nondegradation rule.

MPCA's interpretation and application of its nondegradation rule in this case is reasonable because it is entirely consistent with the text of the rule. MPCA's ballast water permit does not expand the allowable pollutant loading from existing vessels. On the contrary, MPCA's permit restricts, for the first time ever, the amount of pollution that vessels on Lake Superior can legally discharge. That restriction applies to all ships; both new and old. MPCA's conclusion that its permit will not result in expanded discharges of pollution from existing vessels is therefore reasonable and it must be affirmed.

II. MPCA REASONABLY CONCLUDED THAT IT SATISFIED NONDEGRADATION REQUIREMENTS BY INCLUDING IN ITS PERMIT THE MOST STRINGENT TREATMENT REQUIREMENTS THAT HAVE BEEN DEVELOPED THAT WILL ACTUALLY BE ACHIEVABLE DURING THE TERM OF THE PERMIT.

Under Minnesota law, this Court is required to presume that MPCA's conclusion that its ballast water permit satisfied nondegradation requirements is correct and to show deference to MPCA's conclusions in its area of expertise. The Minnesota Supreme Court has specifically ruled that the MPCA's judgment on technical environmental questions is entitled to substantial deference from reviewing courts. *MCEA v. MPCA and Boise Cascade*, 644 N.W.2d at 464-65. Under this standard, the Court must review MPCA's factual conclusions in the light most favorable to MPCA's decision and must affirm MPCA's decision if the evidence permits dual inferences to be drawn or leaves room for more than one opinion. *Id.* As discussed above, deference is especially appropriate in

this case because MPCA is launching a new regulatory program that is yet untried and new. *Annandale & Maple Lake*, 731 N.W.2d at 51.

In this case, MPCA's conclusion that the inclusion of the most stringent treatment standards available that will actually be technologically achievable during the term of this permit is reasonable. This Court must therefore uphold that conclusion.

MCEA has erroneously asserted that because MPCA determined that the vast majority of ballast water discharges are not new or expanded, MPCA failed to perform a nondegradation review before issuing its ballast water permit. (MCEA Br., p. 16.) The record refutes this assertion. MPCA acknowledged that nondegradation analysis was required because at least some vessels covered by this permit would be considered new or expanded under the nondegradation rule. MPCA therefore conducted a nondegradation review under Minn. R. 7050.0185 before issuing this permit.⁶ (R. 0573.)

MCEA simply wants this Court to reweigh the technical evidence as an environmental trier of fact and to change the terms and conditions of MPCA's ballast water discharge permit. (MCEA Br., pp. 23-28.) As discussed below, MPCA's conclusion that the terms and conditions of its ballast water discharge permit satisfy nondegradation requirements is supported by substantial evidence in the record. The

⁶ Of course, the fact that the MPCA actually did a nondegradation review renders MCEA's argument over whether existing discharges should have been treated as new or expanded moot. Nondegradation review was already required because some of the discharges are new discharges.

Court should therefore decline MCEA's request to re-write Minnesota's ballast water discharge permit.

A. MPCA Reasonably Concluded That Inclusion Of The IMO Standards In The Ballast Water Discharge Permit Satisfy Nondegradation Requirements By Improving The Existing Protection And Water Quality Of Lake Superior.

MPCA's nondegradation rule prohibits new or expanded discharges to ORVWs unless there is not a feasible and prudent alternative to the discharge.⁷ Minn. R. 7050.0180, subp. 6. If a new or expanded discharge to an ORVW is permitted, then the discharge must be restricted to the extent necessary to maintain the existing high quality of the ORVW. *Id.* Here, MPCA reasonably concluded that the IMO treatment standards satisfy this requirement because they are the most stringent standards that are expected to be technologically achievable during the term of this permit.

As discussed above, EPA's ballast water permit does not include any treatment standards or other requirements beyond existing practices. MPCA determined that EPA's permit, by itself, is insufficient to protect Minnesota's waters. MPCA's permit therefore includes the most stringent treatment standards that are expected to be technologically achievable within the term of the permit.

MCEA asks this Court to believe that MPCA chose the IMO standards to accommodate the shipping industry, but the record refutes MCEA's assertion. The shipping industry argued that MPCA should leave ballast water regulation to the federal

⁷ MCEA did not challenge MPCA's conclusion that there is no feasible and prudent alternative to ballast water discharges during the permitting process and does not appear to challenge that conclusion now. MPCA therefore offers no argument on this point.

government and refrain from issuing a permit at all. The shipping industry also claimed that if MPCA did issue a permit, it must exempt lakers from permitting requirements. Finally, the shipping industry argued that if MPCA did issue a permit, the IMO standards are too stringent because there is currently no commercially available technology to meet those standards. MCEA's suggestion that MPCA's chose the IMO treatment standards because those standards are amenable to the shipping industry is a red herring.

Contrary to MCEA's suggestion, the record demonstrates that MPCA's technical staff chose the IMO standards after thoroughly studying the question of what treatment standards would best protect the quality of Lake Superior. Although this permit was not developed under federal law, MPCA technical staff followed EPA guidance in developing best professional judgment limits for the permit. In establishing best professional judgment limits for the permit, MPCA staff considered all reasonably available and pertinent data.

After studying the issue for several months, MPCA chose the IMO treatment standards because they are the most stringent standards that have been developed that are expected to be technologically achievable during the term of this permit. Before selecting the IMO treatment standards, MPCA technical staff evaluated the status and available performance data of fifteen separate treatment systems. Based on that evaluation, MPCA technical staff reasonably concluded that the IMO standards are the most protective standards that will actually be technologically achievable during the term of this permit.

MPCA Staff also reasonably concluded that by requiring previously unregulated ballast water discharges to meet the IMO standards, this permit will maintain and improve the quality of Lake Superior. In this case, the existing high quality of Lake Superior is the quality of the water with decades of literally unlimited amounts of pollution from ballast water discharges. By choosing to limit the amount of pollution discharged in ballast water with the most stringent achievable standards, MPCA's permit maintains and improves the existing high quality of Lake Superior.

As noted above, MCEA proposed that MPCA include the theoretically more stringent California treatment standards in its permit. MCEA did not, however, offer any evidence to demonstrate that the California treatment standards would actually be technologically achievable during the term of this permit. The State of California itself has stated that its treatment standards are not currently technologically achievable. Moreover, neither MCEA nor the State of California provided any evidence as to when or whether the California treatment standards would be achievable in Lake Superior's freshwater environment.

MPCA therefore reasonably concluded that including the California standards in the permit would not achieve any greater protection for Lake Superior. In fact, as MPCA technical staff stated, including more stringent standards in the permit at a time when there is no technology to meet those standards would be a paper exercise with no environmental benefit.

The administrative record demonstrates that MPCA reasonably concluded that its ballast water permit satisfied nondegradation requirements by improving the existing

protection and water quality of Lake Superior. In fact, the record demonstrates that MPCA's permit includes the most stringent treatment standards that will be technologically achievable during the permit term.⁸ Because MPCA's conclusion that this permit satisfies nondegradation requirements is reasonable, this Court must affirm that conclusion.

MCEA cites this Court's decision in *MCEA v. MPCA & City of Princeton*, 696 N.W.2d 95 (Minn. Ct. App. 2005), in support of its argument that MPCA's nondegradation rule requires the MPCA to impose more stringent treatment requirements in this case; even if those standards are not technologically achievable. (MCEA Br., pp. 21-27.) MCEA's reliance on the *Princeton* case is misplaced because this case is factually and legally distinguishable from *Princeton* in three critical aspects.

First, in *Princeton*, this Court held that MPCA erred by failing to require the discharger to explain why a particular *available* treatment method was not a feasible and prudent alternative to discharging to an ORVW river. *Princeton*, 696 N.W.2d at 105. In this case, MCEA does not contend that it would be feasible or prudent for ships to operate in the Great Lakes without discharging ballast water. There is also no evidence that there are available treatment technologies that could achieve compliance with more stringent standards. As a result, *Princeton* is not applicable to this case.

⁸ As discussed above, EPA's permit does not include any treatment standards or requirements beyond existing practices. Michigan's permit likewise does not include treatment standards. Michigan's permit also excludes lakers from regulation.

Second, in *Princeton*, this Court held that MPCA was required to define the existing quality of an ORVW river in order to ensure that the river's water quality would not be degraded by a new discharge. *Id.* Significantly, this Court held that this was necessary in *Princeton* because the discharge at issue was to be the first discharge of pollution ever allowed into that river. *Id.* at 108.

In this case, MPCA is not allowing a new discharge into a receiving water that has never received such a discharge before. Instead, MPCA is choosing to regulate for the first time discharges that have existed for scores of years without any controls whatsoever. The evidence in the record and common sense dictate that by restricting currently uncontrolled discharges MPCA will not only maintain the existing high quality of the receiving water, it will enhance water quality. Put simply, however high the existing water quality in Lake Superior is with completely unregulated discharges of ballast water, that water quality will necessarily be maintained and improved through the imposition of the most stringent technologically achievable treatment standards. MPCA did not have to define the water quality in Lake Superior to determine that regulating ballast water discharges for the first time would help maintain and improve water quality.

Third, in *Princeton*, this Court found that MPCA mistakenly believed that it was required to base the terms and conditions of the permit in that case on preserving the scenic aspects of the river instead of focusing on preserving the quality of the receiving water. *Id.* at 107. In this case, there is no indication in the record that MPCA based the terms and conditions of the ballast water permit on preserving the scenic aspects of Lake Superior. On the contrary, the record clearly establishes that MPCA staff selected the

IMO standards in order to protect the quality of Lake Superior from the threat of aquatic invasive species. In fact MPCA staff specifically testified that “a nondegradation review was completed in order to ensure that water quality is being maintained.” (R. 0656.) As a result, the *Princeton* case is not applicable in this case.

MPCA’s ballast water permit includes the most stringent treatment standards that will be technologically achievable during the term of the permit. Lake Superior is currently vulnerable to the threat of aquatic invasive species because ballast water discharges are completely unregulated. MPCA has reasonably chosen to address that threat by imposing the most stringent technologically achievable limits on ballast water discharges. MPCA has reasonably concluded that doing this will maintain and protect the quality of Lake Superior. MPCA’s decision is supported by a thorough technical analysis of available treatment standards and technologies. The record evidence demonstrates that MPCA’s conclusion that its ballast water permit will maintain and improve the quality of Lake Superior is reasonable. This Court must therefore affirm that conclusion.

B The Implementation Schedule In MPCA’s Ballast Water Discharge Permit Is Reasonable.

In addition to asking this Court to re-write the treatment standards in MPCA’s ballast water discharge permit, MCEA tacitly asks this Court to re-write the implementation schedule in the permit. (MCEA Br., pp. 24; 26.) This Court must decline MCEA’s request to re-write the implementation schedule because the evidence in the record demonstrates that the implementation schedule is reasonable.

MCEA claims that MPCA's implementation schedule was developed to accommodate the regulated industry, but the record flatly this assertion. *Id.* The record shows that a number of practical factors influenced MPCA's implementation schedule. As noted above, these factors include: (i) the need to develop technology to meet the IMO standards; (ii) the need to verify the effectiveness of such technology in freshwater conditions; (iii) the need to develop maintenance system for treatment technology once it is developed; and (iv) the need for ships to go into drydock to have treatment technology installed.

The fact is the shipping industry objected to MPCA's implementation schedule as too aggressive. The shipping industry claimed that the implementation schedule needed to be lengthened because at the time the permit was issued there was no commercially available technology capable of achieving compliance with the IMO treatment standards. MPCA rejected the shipping industry's request to lengthen the timeframe because MPCA concluded that technology capable of meeting the IMO standards would be commercially available within the term of the permit. MCEA's suggestion that the permit implementation schedule was established to accommodate the shipping industry is yet another red herring.

MCEA has mischaracterized the administrative record in its attempt to persuade this Court to re-write the ballast water permit implementation schedule. (MCEA Br., pp. 26-27.) MCEA suggests that the MPCA Board wanted a shorter implementation schedule but were mistakenly told that they could not order one. *Id.* This is not accurate.

One MPCA Board Member briefly inquired whether the permit decision could be delayed by a single month to determine if a shorter implementation schedule was viable. MPCA counsel advised that any such delay would take longer than a single month because changing the implementation schedule would require a new public notice and comment period.⁹ The MPCA Commissioner then suggested that delaying permit issuance by several months would not be beneficial because MPCA staff had adequately established that a shorter implementation schedule would not be viable. The Board Member was satisfied and therefore decided not to request a delay in permit issuance.

Instead, the MPCA Board directed staff to monitor ongoing legal and technological developments to determine if new information might make a change to the permit implementation schedule feasible. MPCA staff agreed. In fact, MPCA staff had consistently stated that if technological developments made more stringent standards or a more aggressive implementation schedule feasible, then the permit would be amended accordingly.

MCEA also mischaracterizes the administrative record by suggesting that the ballast water permit implementation schedule means that nothing will happen for seven years. This is inaccurate. As the record demonstrates, the dates in the implementation schedule are end dates. This means that vessels will actually be installing treatment technology as they go into drydock over the next few years; not waiting until 2016 to do so as MCEA suggests.

⁹ Although MCEA appears to criticize this advice, MCEA does not suggest that the advice was in any way legally inaccurate. (MCEA Br., pp. 26-27.)

Ballast water treatment is a new technological field. Technology to meet treatment standards was being developed for the first time as MPCA issued its permit. MPCA therefore thoroughly researched how quickly treatment technology can be realistically installed on vessels operating in Lake Superior. Based on that research, MPCA made a reasoned decision to establish an implementation schedule that factors in: (i) the availability of technology; (ii) the need to verify the effectiveness of that technology in fresh water; (iii) the need to develop maintenance infrastructure for the technology; and (iv) the availability of drydock space to install the technology. The evidence in the record demonstrates that MPCA's implementation schedule is reasonable. This Court must therefore uphold MPCA's implementation schedule.

MCEA asks this Court to order new ballast water treatment standards and a new implementation schedule. Put simply, MCEA asks this Court to review the technical evidence on the first permit ever issued to regulate ballast water discharges in Minnesota and urges the Court to simply second guess MPCA's professional judgment. This is improper. In fact, in one of its most recent case reviewing a decision of MPCA, the Minnesota Supreme Court reversed this Court for doing what MCEA asks this Court to do in this case. In *MCEA v. MPCA & Boise Cascade Corp.*, 644 N.W.2d at 466, the Minnesota Supreme Court concluded that this court had improperly "weighed the evidence as a trier of fact instead of analyzing the issue properly under the supported by substantial evidence standard of review." As a result, the supreme court reversed this Court and affirmed MPCA's initial decision. Thus, in this case, the Court should not re-weigh the evidence or substitute the court's judgment for MPCA's as MCEA asks it to.

The Court should instead review the record to determine if there is evidence that supports MPCA's conclusions. Because there is evidence to support MPCA's conclusions, the court must affirm.

As noted above, this Court must review the agency's factual findings in the light most favorable to the agency's decision and must uphold the agency's decision if the evidence reasonably sustains those findings. *Kells*, 597 N.W.2d 332. As this Court has stated, if the evidence leaves room for two opinions on a matter then the agency's decision must be upheld even if the Court would not have necessarily reached the same conclusion if it were the decision-maker. *Rochester Amb. Serv.*, 500 N.W.2d at 499. Deference is especially required in this case because the agency is launching a new and highly technical regulatory program. *Annandale & Maple Lake*, 731 N.W.2d at 512.

In this case, the evidence in the record demonstrates that MPCA's conclusions are reasonable. Specifically, the evidence demonstrates that MPCA thoroughly researched the available technical data and reasonably concluded that that the IMO standards are the most stringent standards that will be technologically achievable during the term of this permit. The evidence further demonstrates that MPCA reasonably concluded that by imposing the most stringent technologically achievable standards, this permit will maintain and improve the quality of Lake Superior. Finally, the evidence demonstrates that MPCA thoroughly researched the relevant factors and established a reasonable implementation schedule for the permit. This Court must therefore uphold MPCA's decision to include the IMO standards in the permit and the implementation schedule.

CONCLUSION

As noted above, the Minnesota Supreme Court's recent case law firmly establishes that MPCA's judgment on technical environmental issues is entitled to judicial deference. Reviewing courts do not re-weigh technical evidence and second guess MPCA's evaluation of such evidence as MCEA asks this Court to do in this case. Deference is appropriate in this case because this case involves the launching of a brand new and highly technical regulatory program.

The record shows that MPCA's decision to regulate ballast water discharges in Minnesota with the most stringent treatment standards that are technologically achievable is reasonable. The record further shows that MPCA's permit implementation schedule is reasonable. MPCA therefore respectfully request that this Court affirm MPCA's decision to issue its ballast water discharge permit.

Dated: 1/26/09

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota

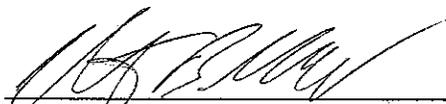


ROBERT B. ROCHE
Assistant Attorney General
Atty. Reg. No. 289589
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 215-1506 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR RESPONDENT
MINNESOTA POLLUTION CONTROL
AGENCY

CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 9,733 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 2003, the word processing system used to prepare this Brief.



Robert B. Roche

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