

State of Minnesota  
**In Court of Appeals**

In the Matter of the Decision on the  
Approval for Submittal of a  
401 Water Quality Certification to the  
U.S. Environmental Protection Agency for the  
Draft 2013 Vessel General Permit and the  
Draft 2013 Small Vessel General Permit

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**BRIEF AND ADDENDUM OF RELATORS  
MINNESOTA CONSERVATION FEDERATION,  
MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY,  
NATIONAL WILDLIFE FEDERATION, AND  
NATURAL RESOURCES DEFENSE COUNCIL**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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**OTHER AUTHORITIES**

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U.S. Environmental Protection Agency, *NPDES Permit Writers' Manual* (EPA-833-K-10-001, 2010) ..... 46, 47

U.S. EPA Office of Wetlands, Oceans, and Watersheds, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (April 2010)..... 23, 38

## STATEMENT OF LEGAL ISSUES

1. Whether the Minnesota Pollution Control Agency's conditional certification of a permit proposed by the U.S. Environmental Protection Agency was affected by an error of law and violated constitutional provisions because the agency did not apply the legal standard for certification required by the Clean Water Act, § 401(d), 33 U.S.C. § 1341(d) (West, Westlaw through 2012), which expressly provides that a certification must set forth conditions necessary to "assure" that dischargers will comply with state water quality standards.

**How The Issue Was Raised:** Relators Minnesota Conservation Federation *et al.*

("Conservation Groups") raised this issue in the comments they submitted to the agency on its draft conditional certification and to the Citizens' Board. (R.<sup>1</sup> 874-75, *Comments*, pp. 12-13; (R. 2321-28, *Comments*, pp. 1-8.)

**Agency Decision:** The agency found that the conditions in the certification "reasonably assure" compliance with state water quality standards.

**Most Apposite Authority:** *Alcoa Power Generating Inc. v. F.E.R.C.*, 643 F.3d 963 (D.C. Cir. 2011); *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006); U.S. Const. art. VI, cl. 2; 33 U.S.C. § 1341(a)(1), (d) (West, Westlaw through 2012); Minn. Stat. § 14.69 (West, Westlaw through 2012); Minn. R. 7001.1450, Subp. 1(A) (West, Westlaw through 2012).

2. Whether the conditional certification was affected by an error of law because the agency failed to incorporate effluent limitations as stringent as necessary to assure that vessels discharging ballast water will comply with state water quality standards, where technology-based effluent limitations alone were not stringent enough to achieve such compliance.

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<sup>1</sup> Citations to the administrative record will be referenced as "R. at [page number]."

**How The Issue Was Raised:** Conservation Groups raised this issue in the comments they submitted to the agency on its draft conditional certification. (R. 882, *Comments*, p. 20.)

**Agency Decision:** The agency decided not to include a numeric water quality-based effluent limitation, because it claimed it could not determine one that would protect water quality, and claimed that a technology-based effluent limitation is an “interim” water quality-based effluent limitation.

**Most Apposite Authority:** *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999); *Ackels v. EPA*, 7 F.3d 862 (9th Cir. 1993); *In re Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738*, 763 N.W.2d 303 (Minn. 2009); 33 U.S.C. §§ 1341(d); Minn. Stat. § 14.69; Minn. R. 7001.1450, Subp. 1(A).

3. Whether the certification was unsupported by substantial evidence or arbitrary or capricious, or both, because uncontradicted evidence established that the certification condition requiring vessels to meet numeric technology-based effluent limitations will not assure or reasonably assure that dischargers will comply with state water quality standards.

**How The Issue Was Raised:** Conservation Groups raised this issue in the comments they submitted to the agency on its draft conditional certification. (R. 882, *Comments*, pp. 15-17, 20.)

**Agency Decision:** The agency found that a certification condition requiring vessels to treat their ballast water to meet numeric technology-based effluent limitations reasonably assures that dischargers will comply with state water quality standards.

**Most Apposite Authority:** *In re Alexandria Lake Area Sanitary Dist. NPDES/SDS*

*Permit No. MN0040738*, 763 N.W.2d 303 (Minn. 2009); 33 U.S.C. § 1341(d); Minn. Stat. § 14.69; Minn. R. 7001.1450, Subp. 1(A).

4. Whether the certification was unsupported by substantial evidence or arbitrary or capricious, or both, because uncontradicted evidence established that a prohibition on ballast water discharges that violate state water quality standards is not one that dischargers have the capability to comply with or is not practically enforceable, or both.

**How The Issue Was Raised:** Conservation Groups raised this issue in the comments they submitted to the agency on its draft conditional certification. (R. 873-74, 879-80, 883, *Comments*, pp. 11-12, 17-18, 21.)

**Agency Decision:** The agency found that a certification condition prohibiting ballast water discharges that violate state water quality standards reasonably assures that dischargers will comply with such standards.

**Most Apposite Authority:** 33 U.S.C. § 1365(a)(1)(A), (f) (West, Westlaw through 2012); 33 U.S.C. § 1341(d); Minn. Stat. § 14.69; Minn. R. 7001.1450, Subp. 1(A).

5. Whether the certification was unsupported by substantial evidence or arbitrary or capricious, or both, because no evidence established that requiring oceangoing vessels to perform ballast water exchange or saltwater flushing will reduce the risk of invasion of Minnesota waters by non-indigenous species, while other evidence established that it will not reduce the risk of invasion.

**How The Issue Was Raised:** Conservation Groups raised this issue in the comments they submitted to the agency on its draft conditional certification. (R. 882, *Comments*, p. 20.)

**Agency Decision:** The agency found that a certification condition requiring oceangoing vessels to perform ballast water exchange or saltwater flushing reasonably assures that dischargers will comply with state water quality standards.

**Most Apposite Authority:** 33 U.S.C. § 1341(d); Minn. Stat. § 14.69; Minn. R. 7001.1450, Subp. 1(A).

6. Whether the certification was unsupported by substantial evidence or arbitrary or capricious, or both, because nothing in the record establishes the level of compliance with water quality standards through the use of ballast water treatment systems to address high-risk ballast water discharges.

**How The Issue Was Raised:** Conservation Groups raised this issue in the comments they submitted to the agency on its draft conditional certification. (R. 882-83, *Comments*, pp. 20-21.)

**Agency Decision:** The agency found that a certification condition establishing emergency provisions for high-risk ballast water discharges reasonably assures that dischargers will comply with state water quality standards.

**Most Apposite Authority:** 33 U.S.C. § 1341(d); Minn. Stat. § 14.69; Minn. R. 7001.1450, Subp. 1(A).

7. Whether the certification was unsupported by substantial evidence or arbitrary or capricious, or both, because no evidence established that best management practices will reduce the risk of aquatic bioinvasions sufficiently to protect state water quality standards, while other evidence established that they will not.

**How The Issue Was Raised:** Conservation Groups raised this issue in the comments they submitted to the agency on its draft conditional certification. (R. 883, *Comments*, p. 21.)

**Agency Decision:** The agency found that a certification condition requiring vessels that operate exclusively in the Great Lakes to employ best management practices reasonably assures that dischargers will comply with state water quality standards.

**Most Apposite Authority:** 33 U.S.C. § 1341(d); Minn. Stat. § 14.69; Minn. R. 7001.1450, Subp. 1(A).

8. Whether the certification was or arbitrary or capricious, because the agency failed to consider its failure to require dischargers to monitor their compliance with a prohibition on ballast water discharges that violate state water quality standards.

**How The Issue Was Raised:** Conservation Groups raised this issue in the comments they submitted to the agency on its draft conditional certification. (R. 883, *Comments*, p. 21.)

**Agency Decision:** The agency concluded found that a certification condition establishing other monitoring requirements reasonably assures that dischargers will comply with state water quality standards.

**Most Apposite Authority:** 33 U.S.C. § 1341(d); Minn. Stat. § 14.69; Minn. R. 7001.1450, Subp. 1(A).

### STATEMENT OF THE CASE

On December 8, 2011, pursuant to the Clean Water Act (“CWA” or “the Act”), § 402, 33 U.S.C. § 1342 (West, Westlaw through 2012), the U.S. Environmental Protection Agency (“EPA”) proposed to issue a Vessel General Permit (“VGP”), which would take effect on December 19, 2013, to regulate discharges incidental to the normal operation of commercial vessels, including discharges of ballast water. 76 Fed. Reg. 76,716 (Dec. 8, 2011).

Pursuant to CWA § 401, 33 U.S.C. § 1341, EPA asked the Minnesota Pollution Control Agency (“MPCA”) to certify the proposed 2013 VGP. (R. 319-20, *Letter from EPA*, pp. 1-2.) On May 7, 2012, MPCA gave public notice of a draft certification and an opportunity to comment by May 28, 2012. (R. 818-20, *Notice*, pp. 1-3.)

On May 26, 2012, Relators Minnesota Conservation Federation *et al.* (“Conservation Groups”) submitted comments, accompanied by forty-two exhibits, on the draft certification to MPCA. (R. 863-85, *Comments*, pp. 1-23.) They commented that the draft certification was insufficient to assure that ballast water discharges will comply with Minnesota water quality standards, because it would not prevent the introduction or spread of new aquatic non-indigenous species or the establishment or spread of new aquatic invasive species. (R. 863, *Comments*, p. 1.) Conservation Groups called on MPCA to revise the draft certification. (*Id.*)

On August 20 and 21, 2012, Conservation Groups submitted a letter and the affidavit of a prominent expert on aquatic bioinvasions, respectively, to the Citizens’ Board of the MPCA. (R. 2321-28, *Comments*, pp. 1-8; R. 2331-87, *Affidavit of Andrew N. Cohen* (“*Cohen Affidavit*”), pp. 1-56.)

On August 29, 2012, Commissioner Stine, Chair of the Citizens’ Board, signed Findings of Fact, Conclusions of Law, and an Order approving MPCA’s certification of the proposed 2013 VGP. (R. 2400, *Findings of Fact, Conclusions of Law, and Order*, p. 11.) On the same day, MPCA gave notice of its decision to Conservation Groups. (R. 2389, *Notice*, p. 1.) On September 7, 2012, MPCA submitted to EPA a conditional certification of the proposed 2013 VGP. (R. 2401, *Certification Letter from MPCA*, pp.

1-12.) The conditional certification states, “Minnesota certifies there is a reasonable assurance that discharges from vessels covered by the 2013 VGP ... will comply with the applicable provisions of 33 U.S.C. §§ 1311, 1312, 1313, 1316, 1317, and 1341 ... , and that Permittees and their activities will not contravene applicable limitations, standards and other requirements of State law, providing the ... conditions set forth in this Certification are met.” (R. 2402, *Certification Letter from MPCA*, p. 2.)

On September 14, 2012, Conservation Groups initiated this appeal by filing a Petition for Writ of Certiorari for review of MPCA’s decision. On the same date, this court issued a Writ of Certiorari.

### STATEMENT OF FACTS

#### **I. AQUATIC INVASIVE SPECIES AND BALLAST WATER DISCHARGES POSE DANGERS TO MINNESOTA WATERS.**

Aquatic invasive species (“AIS”) are a persistent and unique problem in coastal and inland waters, costing the United States billions of dollars annually. (R. at 900-02, *Aquatic Nuisance Species Impacts*, pp. 1-3.) Ship-borne AIS are estimated to cost the Great Lakes region alone at least \$200 million dollars every year. (R. at 1353, *Annual Losses to Great Lakes Region by Ship-borne Invasive Species*, p. 1.) When a ship takes on ballast water, organisms found in that water are typically taken in as well and may be released alive when the ship discharges the ballast water. (R. at 2335-36, *Cohen Affidavit*, p. 5 (¶8).) Ballast water released from vessels is the recognized vector for 65% of all invasions recorded in the Great Lakes since the opening of the St. Lawrence Seaway in 1959. (R. at 1344, *Patterns of Invasion in the Laurentian Great Lakes*, p.1.)

Lakers, vessels that operate exclusively within the Great Lakes, may not be responsible for *introducing* invasive species to the Great Lakes region, but their potential for facilitating the *spread* of invasive species cannot be ignored. Domestic ballast water transfers, such as those performed by lakers, “may contribute to non-indigenous species introduction and are likely the most important ballast-mediated pathway of secondary spread within the Great Lakes.” (R. at 1331, *Domestic Ballast Operations on the Great Lakes*, p.1.) As MPCA and the Minnesota Department of Natural Resources pointed out in comments on VGP2, “There are numerous examples of aquatic invasive species (AIS) that are present in Lake Michigan, Huron and Erie that are not yet established in Lake Superior. For these species, the most likely dispersal mechanism is ballast water.” (R. at 1328, *Letter from MPCA et al.*, p. 1.)

AIS pose several dangers to aquatic ecosystems, including: outcompeting native species, threatening endangered species, damaging habitat, changing food webs, and altering the chemical and physical aquatic environment. Invasive species are thought to have been involved in 70% of this century’s extinctions of native aquatic species, and 42% of current endangered species are impacted significantly by invasive species. (R. at 1326, *Invasive Non-Native Species*, p. 1.)

Dr. Andrew Cohen is a widely-recognized expert on assessing the extent and impacts of aquatic bioinvasions; identifying and investigating the mechanisms that transport and release non-native species, including transport in ballast water and other ship-associated transport mechanisms; investigating the science and policy of controlling the transport and release of non-native species, eradicating them after they have been

introduced; and analyzing the factors that affect the success of invasions. (R. at 2331-34, *Cohen Affidavit*, pp. 1-4.) Dr. Cohen has observed that “[n]on-native organisms are unlike chemical pollutants in being able to reproduce and increase over time, potentially to very large populations; to spread in large and increasing numbers over thousands of miles; and to persist and have substantial impacts for thousands of years or longer.” (R. at 2368, *Cohen Affidavit*, 38 (¶70).) “[I]n most cases it will be impossible to control a non-native organism after it has been released into a Great Lakes-sized water body, and even in cases where it is reasonable to attempt control there will be costs, attempts may fail, and there will be some risk of unintended environmental impacts.” (R. at 2368, *Cohen Affidavit*, 38 (¶69).)

The Minnesota Department of Natural Resources has designated a long list of water bodies as infested by AIS. (R. at 1309-25, *Designation of Infested Waters*, pp. 1-17.) The designated water bodies include Lake Superior and the St. Louis River, among many others, and the species causing the designations include the Zebra mussel, Eurasian ruffe, New Zealand mudsnail, round goby, spiny water flea, and white perch, among others. (*Id.*)

**A. Aquatic Invasive Species Harm Designated and Existing Uses and Violate State Water Quality Standards.**

Designated uses of Minnesota waters include the propagation of fish and wildlife, recreation, aesthetic enjoyment, navigation, and the supply of water to the public, agriculture, and industry. Minn. R. 7050.0140 (West, Westlaw through 2012). Existing

uses are those that were in existence before January 1, 1988. Minn. R. 7050.0185, Subp. 2.D (West, Westlaw through 2012).

The Zebra mussel, Eurasian ruffe, New Zealand mudsnail, and spiny waterflea impair designated and existing uses of Minnesota waters and violate water quality standards.

### **1. The Zebra mussel**

The Zebra mussel is found in parts of Lake Superior, in nineteen inland lakes, and in parts of the St. Croix River, Pelican Brook, and the Zumbro River. (R. at 1667, *Invasive Species in Minnesota: 2010*, p. 1.) The zebra mussel was probably introduced into the Great Lakes through the discharge of ballast water. (R. at 1304, *Zebra Mussels Threaten Inland Waters*, p. 2.) These mussels “can create numerous problems, such as clogging intake pipes for industry or killing native mussels.” (R. at 1776, *Invasive Species in Minnesota: 2010*, p. 110; R. 2337-38, *Cohen Affidavit*, p. 7 (¶13).) Zebra mussels may also “interfere in the aquatic food chain” by consuming too much algae and other tiny particles, thereby making these nutrient sources unavailable for other organisms. (R. at 1637, *Invasive Species in Minnesota: 2009*, p. 113; R. 2337, *Cohen Affidavit*, p. 7 (¶13).) They have also been reported on boats and water intake systems. (R. at 1779, *Invasive Species in Minnesota: 2010*, p. 113.) In addition, the shells “can cause cuts and scrapes if they grow large enough on rocks, swim rafts and ladders,” and “[a]nglers may lose tackle as the shells can cut fishing line.” (R. at 1300, *Zebra Mussel*, p. 1.)

These effects violate narrative criteria associated with several applicable Minnesota water quality classifications. Narrative criteria for Class 2 waters, which include Lake Superior, state that there shall be no significant changes in the species composition and that “the propagation ... of the fish and other biota normally present shall not be prevented or hindered by the discharge of ... wastes to the waters.” Minn. R. 7050.0150, Subp. 3 (West, Westlaw through 2012). Zebra mussels impair “species diversity and composition,” “feeding characteristics,” and “species abundance and condition” of aquatic invertebrates. Minn. R. 7050.0150, Subp. 6A-C (West, Westlaw through 2012). Zebra mussels kill native mussels, for example, directly and indirectly, through competition. (R. at 1297, *Major Zebra Mussel Infestation*, p. 1.)

Lake Superior is also designated a Class 5 water body, meaning the water quality “shall be such as ... to avoid any interference with navigation or damaging effects on property.” Minn. R. 7050.0224, Subp. 3 (West, Westlaw through 2012). Zebra mussels violate these criteria by fouling boating equipment and water intake systems, and by severing fishing lines. Injuries from sharp mussel shells violate the applicable Class 2A requirement that water quality be adequate for aquatic recreation. Minn. R. 7050.0222, Subp. 2 (West, Westlaw through 2012).

## **2. The Eurasian ruffe**

Ruffe is a fish species that was introduced to Duluth harbor around 1985 by ballast water discharges, and it has since spread elsewhere in Lake Superior and to other Great Lakes. (R. at 912-17, *Eurasian Ruffe*, pp. 1-6.) The species is aggressive and can harm ecosystems and native commercial and sport fish populations by competing for food and

habitat. (*Id.*) “Populations of yellow perch, emerald shiners, and other forage fish caught in survey trawls *have declined significantly* as numbers of ruffe have increased in the St. Louis River.” (R. at 1295, *Ruffe*, p. 1 (emphasis added).) Trawl samples show that “[b]y 1992, ruffe had become the most numerous fish in [the St. Louis River].” (R. at 1292, *Superior Pursuit*, p. 5.)

Therefore, in at least the St. Louis River (categorized as Classes 2B, 3B, 3C, 4A, 4B, 5, and 6), the ruffe is responsible for significant changes in the species composition and harm to the food web that supports commercial and sport fisheries. Minn. R. 7050.0140, 7050.0470 (West, Westlaw through 2012). These effects are prohibited by general Class 2 narrative standards. Minn. R. 7050.0150, Subp. 3 (West, Westlaw through 2012) (“the normal fishery and lower aquatic biota upon which it is dependent and the use thereof shall not be seriously impaired or endangered [and] the species composition shall not be altered materially”). They are also prohibited by narrative criteria specific to Class 2B. Minn. R. 7050.0222, Subp. 4 (West, Westlaw through 2012) (“The quality of Class 2B surface waters shall be such as to permit the propagation and maintenance of a healthy community of cool or warm water sport or commercial fish and associated aquatic life, and their habitats.”).

### **3. The New Zealand mudsnail**

This invasive species was brought to the Great Lakes in ballast water, and is currently found in and around Duluth Harbor and in the St. Louis River estuary. (R. at 1282, 1284, *New Zealand Mudsnail*, pp. 1, 3) Mudsnails “outcompete species that are important forage for native trout and other fishes and provide little nutrition to fish that

eat them.” (R. at 1282, *New Zealand Mudsail*, p. 1.) They “have adapted so well in Western rivers that they have pushed out almost all of the native insects, snails, and other invertebrates that are important food for fish.” (R. at 1276, *Tiny Snail, Big Trouble*, p. 1.) The mudsnails can take over so quickly because they “breed asexually – essentially cloning themselves. Small populations can quickly explode.” (*Id.*)

Class 2A narrative standards state that the quality of the waters “shall be such to permit the propagation and maintenance of a healthy community of cold water sport or commercial fish and associated aquatic life, and their habitats.” Minn. R. 7050.0222, Subp. 2 (West, Westlaw through 2012). The mudsnail violates this standard because it disrupts the food chain for trout and other fish.

#### **4. The spiny waterflea**

The spiny waterflea was also introduced to the Great Lakes through ballast water. It is now found across the Great Lakes, as well as in some inland water bodies in Minnesota. (R. 1121, *Spiny Waterflea*, p. 1; R. at 1784, *Invasive Species in Minnesota: 2010*, p. 118.) The spiny waterflea disrupts aquatic ecosystems by consuming large quantities of zooplankton and can greatly reduce the amount of zooplankton available for native fish to eat, to the point of eliminating types of native zooplankton from water bodies. (R. 1123-25, *Spiny and Fishhook Waterflea*, pp. 1-3; R. at 1784, *Invasive Species in Minnesota: 2010*, p. 118.)

Spiny waterfleas “collect in masses on fishing lines and downrigger cables . . . . These masses can clog the first eyelet of rods, damage a reel's drag system, and prevent fish from being landed.” (R. at 1123-25.) Such incidents violate both Class 2A criteria,

which requires Lake Superior to be “suitable for aquatic recreation of all kinds, including bathing, for which the waters may be usable,” and Class 5 criteria, which require that the quality of Lake Superior is “such as to... avoid any... damaging effects on property.”

Minn. R. 7050.0222, Subp. 2, 7050.0225, Subp. 2 (West, Westlaw through 2012).

**B. New Invasive Species Introduced or Spread by Ballast Water Discharges Could Also Harm Designated and Existing Uses and Violate State Water Quality Standards.**

EPA estimated approximately 58 non-indigenous species currently “pose high or medium risk for becoming established in the Great Lakes and for causing ecological harm.” (R. at 1386, *Predicting Future Introductions of Nonindigenous Species to the Great Lakes*, p. 1.) The impacts of these species may be similar or worse than the impacts caused by the species that have already invaded Minnesota waters.

One species likely to invade the Great Lakes through ballast water discharges is the golden mussel. The golden mussel shares some of the physical characteristics of the zebra mussel, but could potentially invade a broader range of habitats and therefore cause even more damage to Minnesota’s ecosystem. (R. at 1110, *Golden Mussel*, p. 1.) Like the zebra mussel, the golden mussel clogs the intakes, pipes and filters of water treatment facilities, industrial plants, and power stations. (*Id.*) The golden mussel also starves native bivalves. (*Id.*)

Similarly, the monkey goby, a member of the goby fish family, has the potential to be introduced into the region through ballast water discharges and, like the round goby, could out-compete native fish species for food and habitat. (R. at 1108, *Monkey Goby*, p. 1.) Another potential invader is the ‘killer shrimp,’ which preys on native shrimp and

young fish. (R. at 1106, *Killer Shrimp*, p. 1.) It has already invaded and spread throughout Western Europe, causing significant ecological disruption. (*Id.*)

## ARGUMENT

### I. SUMMARY OF THE ARGUMENT

This case arises out of EPA's proposal to issue a National Pollutant Discharge Elimination System general permit to regulate discharges of ballast water: the Vessel General Permit or "VGP." EPA proposed the VGP because when vessels plying the Great Lakes load cargo, they discharge ballast water into the lakes. Past ballast water discharges have introduced and spread aquatic non-indigenous species. Once an aquatic non-indigenous species establishes itself, it is known as an aquatic invasive species or "AIS" and usually becomes a permanent problem. Established AIS have caused enormous harm to the ecosystem and economy of the region, including Minnesota. There is as yet no known number of organisms small enough to prevent the risk of invasion.

Under the federal Clean Water Act and the Minnesota Water Pollution Control Act, MPCA has the responsibility to protect the quality of state waters. In § 401 of the Clean Water Act, 33 U.S.C. § 1341, Congress prohibited discharges into state waters that require a federal permit unless the state gives its approval outright or conditionally. Where a state gives conditional approval, § 401 expressly requires the state to establish conditions that are necessary to "assure" that dischargers will comply with state water quality standards.

In conditionally approving EPA's proposed 2013 VGP, MPCA erred as a matter of law by applying the wrong standard. Instead of establishing conditions based on

whether they “assure” that dischargers will comply with state water quality standards, MPCA erroneously established conditions based on whether they “reasonably” assure such compliance. The “reasonably assure” standard is not a misinterpretation of the statutory standard for approval; it is a different standard altogether, a discarded lax standard. Congress deliberately replaced the “reasonably assure” standard with a new, stringent standard requiring strict compliance with water quality standards more in keeping with its goal to restore and maintain the integrity of the nation’s waters.

MPCA also erred as a matter of law by failing to incorporate in the certification effluent limitations as stringent as necessary to assure that vessels discharging ballast water will comply with state water quality standards. Such effluent limitations should have been imposed as a matter of federal and Minnesota law, because the technology-based effluent limitations that were incorporated in the certification are not stringent enough to assure compliance with state water quality standards.

MPCA’s conditional certification was also unsupported by substantial evidence or arbitrary or capricious, or both, in a number of ways. Chief among these was the agency’s finding that compliance with state water quality standards will be reasonably assured by simply stating that dischargers may not violate state water quality standards, despite evidence that dischargers cannot comply with the prohibition and that the prohibition is not practically enforceable. The agency also found that conditions requiring vessels discharging ballast water to meet various numeric and non-numeric technology-based effluent limitations reasonably assures that dischargers will comply

with state water quality standards. Yet, no evidence supported this finding. Rather, the evidence contradicted it.

For all these reasons and others explained in the body of the argument, the Court should reverse or remand the MPCA's certification of the proposed 2013 VGP.

## **II. SCOPE OF REVIEW**

A challenge to an MPCA certification is brought directly to the Minnesota Court of Appeals as a petition for a writ of certiorari.

Any person aggrieved by a final MPCA decision to certify under Minn. Stat. Chapter 115 may obtain judicial review of the decision pursuant to Minn. Stat. § 14.63 *et seq.* Minn. Stat. § 115.05, Subd. 11 (West, Westlaw through 2012). *See also Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 463-64 (Minn. 2002).

The scope of review is as follows:

[T]he court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

(a) in violation of constitutional provisions; or

...

(d) affected by other error of law; or

(e) unsupported by substantial evidence in view of the entire record as submitted; or

(f) arbitrary or capricious.

Minn. Stat. § 14.69.

#### **A. In Violation of Constitutional Provisions**

MPCA violated the Supremacy Clause of the U.S. Constitution by conditionally certifying the proposed 2013 VGP on the ground that the certification conditions “reasonably” assure that dischargers will comply with state water quality standards.

Whether federal law preempts state law is an issue of statutory construction, which the court reviews de novo. *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 9 (Minn. 2002).

#### **B. Affected by Error of Law**

The court may reverse an agency decision that was affected by an error of law. *N. States Power Co. v. Minn. Pub. Utils. Comm'n* (“*N. States Power Co.*”), 344 N.W.2d 374, 377 (Minn. 1984); Minn. Stat. § 14.69(d).

The court reviews de novo errors of law which arise when an agency decision is based on the meaning of words in a statute. *Greene v. Comm’r of Minn. Dep’t of Human Servs.*, 755 N.W.2d 713, 721 (Minn. 2008) (citing *In re Denial of Eller Media Co.’s Applications for Outdoor Adver. Device Permits*, 664 N.W.2d 1, 7 (Minn. 2003)). The court need not defer to an agency interpretation “if the language . . . is clear and capable of understanding.” *St. Otto’s Home v. Minn. Dep’t of Human Servs.*, 437 N.W.2d 35, 40 (Minn. 1989) (citations omitted). In considering such questions of law, the court also

need not defer to the agency's expertise. *Id.* at 39-40 (citing *State by McClure v. Sports & Health Club*, 370 N.W.2d 844, 854 n.17 (Minn. 1985); *No Power Line, Inc. v. Minn. Envtl. Quality Council*, 262 N.W.2d 312, 320 (Minn. 1977)). If a provision is not ambiguous, the court applies the plain and ordinary meaning of the words used. *Johnson v. Paynesville Farmers Union Co-op. Oil Co.*, 817 N.W.2d 693, 707-08 (Minn. 2012).

If the court concludes that statutory language is susceptible to multiple interpretations, the court must determine whether an agency's interpretation is reasonable. *See In re Cities of Annandale & Maple Lake*, 731 N.W.2d 502, 516 (Minn. 2007). Where a required element of an agency's analysis and decision is absent from the record, "there is nothing to defer to," and the court may remand for further proceedings, reverse, or modify any of the agency's findings, inferences, conclusions, or decisions as being affected by error of law or arbitrary and capricious. *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 696 N.W.2d 95, 108 (Minn. Ct. App. 2005); Minn. Stat. § 14.69(d)-(f).

### **C. Unsupported by Substantial Evidence**

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *In re the Application of the Grand Rapids Pub. Util. Comm'n to Extend its Assigned Serv. Area ("Grand Rapids")*, 731 N.W.2d 866, 871 (Minn. Ct. App. 2007). The court "must take contradictory evidence into account when determining whether the agency's decision is supported by substantial evidence." *In re the Temp. Immediate Suspension of the Family Child Care License of Strecker ("Strecker")*, 777 N.W.2d 41, 46 (Minn. Ct. App. 2010). "When applying the substantial-

evidence test we determine whether the agency adequately explained how it derived its conclusion and whether that conclusion was reasonable.” *Grand Rapids*, 731 N.W.2d at 871.

“An agency’s decision is not supported by substantial evidence if there is a ‘combination of danger signals which suggest the agency has not taken a hard look at the salient problems and the decision lacks articulated standards and reflective findings.’” *In re the Claim for Benefits by Meuleners* (“Meuleners”), 725 N.W.2d 121, 123 (Minn. Ct. App. 2006) (quoting *Cable Communications Bd. v. Nor-West Cable Communications P’ship*, 356 N.W.2d 658, 668-69 (Minn.1984)).

#### **D. Arbitrary or Capricious**

An agency ruling is arbitrary or capricious if the agency (1) relied on factors not intended by the legislature; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation that runs counter to the evidence; (4) the decision is so implausible that it could not be explained as a difference in view or the result of the agency’s expertise; or (4) if it represents the agency’s will, rather than its judgment. *See Minn. Ctr. for Env’tl. Advocacy v. Minn. Pollution Control Agency*, 632 N.W.2d 230, 235, *rev. granted* (Minn. Ct. App. 2001), *rev’d on other grounds*, 644 N.W.2d 457 (Minn. 2002). In addition, an agency’s conclusions are arbitrary and capricious if it fails to articulate a rational connection between the facts found and the choice made. *See In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.* (“Blue Cross”), 624 N.W.2d 264, 277 (Minn. 2001).

### **III. BOTH FEDERAL AND MINNESOTA LAW REQUIRE A CERTIFICATION THAT ASSURES COMPLIANCE WITH STATE WATER QUALITY STANDARDS.**

#### **A. Federal Law**

Pursuant to CWA § 401(a)(1), applicants for a federal permit for an activity that may result in a discharge into state waters must provide the federal permitting agency with a certification from the state that the discharge “will comply” with applicable effluent limitations, state water quality standards, and standards of performance. 33 U.S.C. § 1341(a)(1). Section 401(d) also requires the certification to set forth limitations and monitoring requirements necessary to “assure” that dischargers “will comply” with state water quality standards. *Id.* at § 1341(d).

In § 401, “the CWA gives states an express role in approving or barring discharges into their navigable waters, and in setting out the conditions under which such discharges may occur.” *Lake Carriers’ Ass’n v. EPA*, 652 F.3d 1, 3 (D.C. Cir. 2011); *accord Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991); *U.S. v. Marathon Dev. Corp.*, 867 F.2d 96, 99-100 (1st Cir. 1989).

In *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (“*PUD No. 1*”), 511 U.S. 700, 712 (1994), the Supreme Court held “ensuring compliance with [CWA] § 303 is a proper function of the § 401 certification.” CWA § 303 requires each state to establish ambient water quality standards for intrastate waters at levels necessary to protect the “public health or welfare, enhance the quality of water and serve the purposes of” the Act. 33 U.S.C. § 1313(c)(2)(A) (2006). “A water quality standard defines the water quality goals for a water body ... [1] by designating the use or uses to be made of

the water, [2] by setting criteria necessary to protect the uses, and [3] by protecting water quality through antidegradation provisions.” (R. 1095, EPA, *Water Quality Standards Handbook*, p. 1 (§ 1.2).) *See also PUD No. 1*, 511 U.S. at 714; 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.3(e) (West, Westlaw through 2012); 40 C.F.R. § 131.6 (West, Westlaw through 2012).

To “assure” that dischargers “will comply” with a water quality standard, a certification must include conditions sufficient to assure compliance with all three components of the standard: designated uses, water quality criteria (numeric or narrative), and the antidegradation (in Minnesota, the “nondegradation”) policy. *PUD No. 1*, 511 U.S. at 714-15, 719. In *PUD No. 1*, the Court upheld a condition in the State of Washington’s certification establishing minimum flow requirements to assure that designated uses would be protected and that any discharges would comply with the state’s antidegradation policy. *Id.* at 715, 719.

To protect a designated use, effluent limitations must assure that the use will be maintained. This follows from the CWA’s mandate that water quality standards “shall ... serve the purposes of this Act,” 33 U.S.C. § 1313(c)(2)(A), which are “to restore and *maintain* the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a) (emphasis added). An impairment of a designated use would run contrary to the mandate of maintaining the integrity of the water. Consequently, a violation of a water quality standard occurs where a designated use continues to a diminished extent. The purposes of the Act would not be served by deeming a designated

use protected, even as its usefulness degrades, by turning a blind eye to the degradation of a designated use until it is completely eliminated.

EPA interprets § 401 to require states to “incorporate those conditions necessary to ensure a resulting federal license or permit will include effluent limitations at least as stringent as the applicable national technology-based guidelines established under the CWA, *and as stringent as needed to attain and maintain water quality standards, including their designated uses and criteria.*” U.S. EPA Office of Wetlands, Oceans, and Watersheds, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (“A Water Quality Protection Tool”)* at 23 (April 2010), *available at* [http://water.epa.gov/lawsregs/guidance/cwa/upload/CWA\\_401\\_Handbook\\_2010\\_Interim.pdf](http://water.epa.gov/lawsregs/guidance/cwa/upload/CWA_401_Handbook_2010_Interim.pdf) (last visited Sep. 27, 2012) (emphasis added). EPA’s interpretation echoes the Senate report on the 1972 amendments to the Clean Water Act, which noted, “The certification provided by a State ... *must* set forth effluent limitations and monitoring requirements necessary to comply with the provisions of this Act or under State law ... .” S. Rep. No. 92-414, at 69 (1972), *reprinted in* 1972 USCCAN 3668, 3735 (emphasis added).

Therefore, if technology-based effluent limitations are insufficient to assure compliance with state water quality standards, a state must include water-quality based effluent limitations (“WQBELs”) in the certification. Just as under CWA § 402(a)(2), 33 U.S.C. § 1342(a)(2) (West, Westlaw through 2012), which like § 401 requires National Pollutant Discharge Elimination System (“NPDES”) permits to “assure compliance” with water quality standards, certification WQBELs must be set without regard to whether the

technology to achieve them is available. *See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999) (under CWA § 402, a permitting authority “is under specific obligation to require that level of effluent control which is needed to implement existing water quality standards *without regard to the limits of practicability*”) (emphasis added) (internal citations omitted). *See, e.g., Ackels v. EPA*, 7 F.3d 862, 865-66 (9th Cir. 1993) (“the Clean Water Act requires ... [CWA § 402] permits to meet ... state water quality standards ... . Accordingly, ... economic and technological restraints are not a valid consideration.”); *NRDC v. EPA*, 859 F.2d 156, 209 (D.C. Cir. 1988) (Under CWA § 402, “Congress did not intend to tie compliance with water quality-based limitations to the capabilities of any given level of technology.”).

#### **B. Minnesota Law**

The legislature enjoined MPCA to establish standards to prevent water pollution, including effluent limitations as stringent as necessary to meet water quality standards. Minn. Stat. § 115.03, Subd. 1(e)(8) (West, Westlaw through 2012). MPCA may only issue a certification upon a determination that a discharge and discharger will comply with all applicable federal and state statutes and rules. Minn. R. 7001.1450, Subp. 1(A) (West, Westlaw through 2012).

The Minnesota rule requires MPCA to find that the discharge “will comply with sections 301, 302, 303, 306, and 307 of the Clean Water Act, United States Code, title 33, sections 1311, 1312, 1313, 1316, and 1317.” *Id.* MPCA has explained this standard as follows: “A Section 401 water quality certification may be granted if the applicant demonstrates that an activity ... *will not violate* Minnesota’s water quality standards or

result in adverse long-term or short-term impacts on water quality.” (R. 1092, *Clean Water Act Section 401 Water Quality Certifications*, p. 2). Under Minnesota rules, then, and consistent with *PUD No. 1*, “compliance” includes compliance with the water quality standards Minnesota adopted pursuant to CWA § 303. *See* 511 U.S. at 712-13.

Minnesota rules also specify that a certification shall include conditions established in the same manner as they are established for NPDES permits, which are authorized by CWA § 402. Minn. R. 7001.1470, Subp. 2 (West, Westlaw through 2012). “MPCA implements the NPDES program in Minnesota by issuing permits that comply with or are more stringent than federal permit conditions.” *In re Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738* (“*Alexandria Lake Area*”), 763 N.W.2d 303, 309 (Minn. 2009).

NPDES permits must contain technology-based effluent limitations and, if necessary to meet water quality standards, more stringent limitations, that is to say, WQBELs. *Id.* (quoting *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993)). *See also* 33 U.S.C. § 1311(b)(1)(A), (C) (West, Westlaw through 2012); 40 C.F.R. § 122.44(a)(1), (d)(1)(i) (West, Westlaw through 2012); Minn. R. 7001.1080, Subp. 2(B)(1), (3) (West, Westlaw through 2012); Minn. R. 7053.0115 (West, Westlaw through 2012); Minn. R. 7053.0205, Subp. 8 (West, Westlaw through 2012). As discussed above, if necessary, WQBELs must be included in an NPDES permit whether or not the technology to achieve them is available. Hence, under the Minnesota rules, if necessary, WQBELs must be included in a certification, too.

**IV. THE MINNESOTA POLLUTION CONTROL AGENCY'S CERTIFICATION WAS AFFECTED BY ERRORS OF LAW AND VIOLATED CONSTITUTIONAL PROVISIONS, BECAUSE THE AGENCY FAILED TO USE THE CONGRESSIONALLY-AUTHORIZED STANDARD FOR CERTIFICATION AND FAILED TO ESTABLISH WATER QUALITY-BASED EFFLUENT LIMITATIONS.**

**A. The Agency Failed to Use the Congressionally-Authorized Standard for Certification.**

CWA § 401 requires a certification containing effluent limitations and monitoring requirements necessary to “assure” that dischargers will comply with state water quality standards. Contrary to § 401, MPCA certified the VGP based upon a finding that the certification conditions will reasonably assure compliance with water quality standards. (R. 2402, *Certification Letter from MPCA*, p. 2.) In basing the certification on a “reasonable assurance” standard, rather than the statutory “assurance” standard, MPCA committed an error of law and violated the Supremacy Clause of the U.S. Constitution. MPCA’s error was not one of misinterpretation, but of applying a different standard than the one required by law.

**1. A conditional certification may be issued only if the conditions will “assure” that dischargers will comply with state water quality standards and other requirements of state law.**

The plain language of § 401 specifies that a certification must “assure” that dischargers will comply with state water quality standards. 33 U.S.C. § 1341(d). Nowhere does § 401(d) authorize a certification based on a determination of “reasonable assurance” that dischargers will comply with water quality standards. Because the language is clear and capable of understanding, the court must give effect to its literal meaning. *In re Cities of Annandale & Maple Lake*, 731 N.W.2d at 516; *St. Otto's Home*

*v. Minn. Dep't of Human Servs.*, 437 N.W.2d at 40; 2A Sutherland Statutory Construction § 46:4 (7th ed. 2011) (“[C]ourts are bound to give effect to the literal meaning [of a statute] without consulting other indicia of intent or meaning when the statutory text itself is ‘plain’ or ‘clear and unambiguous.’”).

**a. In 1972, Congress replaced the old, lax “reasonable assurance” standard for certification with the new, stringent “assure” standard.**

Section 21(b) of the Federal Water Pollution Control Act of 1970 was the predecessor of CWA § 401. *See* H.R. Rep. No. 92-911 (1972), *reprinted in* A Legislative History of the Water Pollution Control Act Amendments of 1972, at Vol. 1, p. 808 (1973).<sup>2</sup> Section 21(b) required a certification “that there is *reasonable assurance* ... that ... [the] activity will be conducted in a manner which will not violate applicable water quality standards.” 84 Stat. 91, 108 (1970) (emphasis added). Enacted in 1972, § 401(d) specifies, “Any certification provided under this section shall set forth any effluent limitations ... and monitoring requirements necessary to *assure* that any applicant for a Federal license or permit will comply with” water quality standards and other requirements of state law. 33 U.S.C. § 1341(d). Unlike § 401(d), then, § 21(b)(1) did not require assurance, merely reasonable assurance.

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<sup>2</sup> The language that became CWA § 401 was mostly drawn from the House bill. S. Conf. Rep. No. 92-1236 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3815, *and in* A Legislative History of the Water Pollution Control Act Amendments of 1972, at Vol. 1, p. 321 (1973).

“It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.” *SEC. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003). *See also Johnson*, 817 N.W.2d at 709 (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62-63 (2006)). Moreover, “Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning.” *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989); *see also Braylock v. Jesson*, 819 N.W.2d 585, 588 (Minn. 2012) (“The Legislature’s amendment of a statute creates a presumption that the Legislature intended to change the law.”) Applying these canons here compels the conclusion that Congress’s use of the word “assure” in § 401(d) means something different than the different words “reasonable assurance” that were in § 21(b)(1) and are in CWA § 401(a)(3) and (4).<sup>3</sup>

Since the statutory language is not defined by the Clean Water Act, the language should be construed according to its common usage as indicated by the dictionary. *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 376 (2006) (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (“[If] it is neither defined in the statute nor a term of art,

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<sup>3</sup> CWA § 401(a)(3), like its predecessor § 21(b)(3), provides that certification of a permit to construct a facility also covers a permit to operate the facility, unless the state notifies the federal permitting agency “that there is no longer reasonable assurance that there will be compliance” with water quality standards. Likewise, § 401(a)(4), like § 21(b)(4), provides that a federal permitting agency may suspend the permit of a facility and that the permit shall remain suspended until the state notifies the federal agency “that there is reasonable assurance that such facility” will not violate water quality standards.

we are left to construe [the word] “in accordance with its ordinary or natural meaning.”); *In re Roman\_Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 432 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1867 (2012) (“The statute does not define ‘scandalous,’ so we turn to its ordinary, dictionary meaning.”); *Am. Auto. Ins. Co. v. Murray*, 658 F.3d 311, 320 (3d Cir. 2011) (“Words of common usage must be ‘construed in their natural, plain, and ordinary sense, with a court free to consult a dictionary to inform its understanding of terms.’” (citation omitted)); *Johnson*, 817 N.W.2d at 707-08.

The word “assure” is defined as “to make sure or certain.” Merriam-Webster Dictionary, *available at* <http://www.merriam-webster.com/dictionary/assure> (last visited Aug. 2, 2012). “Reasonable” is defined as “moderate, fair <a *reasonable* chance>.” Merriam-Webster Dictionary, *available at* <http://www.merriam-webster.com/dictionary/reasonable> (last visited Aug. 2, 2012). In requiring effluent limitations and monitoring requirements that “assure” that dischargers will comply with water quality standards, then, Congress required conditions that make conformance sure or certain. This is more than the mere moderate or fair level of certainty denoted by the words “reasonable assurance.”

CWA § 401(d)’s requirement of certainty reflects Congress’s purpose in enacting § 401: to “assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act.” H.R. Rep. No. 92-911, *reprinted in* A Legislative History of the Water Pollution Control Act Amendments of 1972, *supra*. See *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (“Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute

... .”); *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968) (to properly interpret a statute, “Courts must ... look to the logic of Congress and to the broad national policy which prompted the legislation.”).

One of those new requirements was “to meet water quality standards” to achieve the objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a) (West, Westlaw through 2012) (“The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”); 33 U.S.C. § 1311(b)(1)(C) (West, Westlaw through 2012) (“In order to carry out the objective of this chapter there shall be achieved—... any more stringent [than technology-based] limitation ... necessary to meet water quality standards ... .”). Indeed, achieving water quality standards was one of the Act’s central objectives. *Arkansas v. Oklahoma*, 503 U.S. 91, 106 (1992). In the context of this new national requirement, Congress’s amendment of § 21(b)(1) must be read as an intent to discard the existing, relatively weak test for certification – mere “reasonable assurance” that water quality standards will not be violated – in favor of a new, strong test: assurance that water quality standards will, in fact, be met.

This interpretation is bolstered by Congress’s creation of subsection (d) of CWA § 401, which was wholly new and had no analogue in § 21(b). By adding § 401(d), Congress reinforced its insistence on strict compliance with water quality standards by requiring a certification to include measures to “assure,” not merely “reasonably assure,” such compliance. 33 U.S.C. § 1341(d).

**b. The certainty of compliance with water quality standards required by CWA § 401 is consistent with Congress’s strict requirement that NPDES permits “assure” compliance with water quality standards.**

The certainty required by § 401(d) mirrors the level of certainty required by the similar language of CWA § 402. Indeed, the two sections are intertwined when EPA proposes to issue a nationwide NPDES permit such as the VGP, strongly indicating that they should be interpreted consistently.

Like § 401(d), § 402 directs EPA to “prescribe conditions for [NPDES] permits to *assure compliance with*” water quality standards.” 33 U.S.C. §1342(a)(2) (West, Westlaw through 2012). This language “demands regulation in fact.” *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 498, 499 (2d Cir. 2005) (holding that a rule did nothing “to *ensure*” that permittees have, in fact, developed the necessary effluent limitation) (emphasis in original); *Gov’t of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342-43 (EAB 2002) (remanding permit to EPA “to provide and/or develop support for its conclusion that the permit will ‘*ensure*’ compliance with the District’s water quality standards (emphasis in original). “Simply stated, the [EPA] ‘reasonably capable’ formulation, accepting as it is of the potential that the Permit will not, in fact, attain water quality standards, does not appear to be entirely comparable to the concept of *ensuring* compliance.” *Id.* (emphasis in original)).

In other words, §402 does not authorize permits that leave any room for doubt that the water quality standards will be met. The permit terms must guarantee that the water quality standard will be met.

This is also evident from the strict liability for any violation of those terms. 33 U.S.C. § 1319(d) (West, Westlaw through 2012) (“Any person who violates ... any permit condition or limitation ... *shall* be subject to a civil penalty.”) (emphasis added); *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1978) (The CWA “mak[es] the person responsible for the discharge of any pollutant strictly liable.”). The permit terms establish what a permittee must do to comply with water quality standards. The permittee’s agreement to discharge in accordance with those terms is the *quid pro quo* for receiving the permit. Consequently, if the permittee does not abide strictly by the permit terms, his discharge conclusively establishes a violation of the water quality standards. This violates CWA §402, making the discharge automatically unlawful under CWA §301. 33 U.S.C. § 1311(a) (West, Westlaw through 2012) (“Except as in compliance with this section ... and section[] 1342 ... of this title, the discharge of any pollutant by any person shall be unlawful.”)

Just like CWA §402, §401 only authorizes certifications that assure compliance with water quality standards. Therefore, just as an NPDES permit may leave no room for doubt whether water quality standards will be met, a certification may leave none either. Certifications, like permits, must guarantee compliance with water quality standards.

**c. EPA’s regulatory “reasonable assurance” standard for certification is null and void, because it is based on the old statutory standard and is inconsistent with CWA § 401.**

An EPA regulation, codified at 40 C.F.R. § 121.2(a)(3), directs states to include in a certification “[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.” As the

regulatory history shows, this regulation does not reflect the 1972 amendments. Rather, it is a vestige of § 21(b) in the 1970 Act.

EPA originally promulgated § 121.2(a)(3) in 1971, when it was designated 40 C.F.R. § 115.2(a)(3). 36 Fed. Reg. 22,369, 22,488 (1971). The text of the regulation did not undergo any change as it was re-designated through the following years. *Compare* 40 C.F.R. § 121.2(a)(3) *with* 36 Fed. Reg. 22,369, 22,488 (1971) (setting forth 40 C.F.R. § 115.2(a)(3)). Nor did EPA purport any of the incarnations of the regulation to be an interpretation of § 401. *See* 44 Fed. Reg. 32,854, 32,856 (1979); 37 Fed. Reg. 21,441 (1972). Indeed, upon re-designating the regulation for the final time, EPA expressly noted, “The existing State certification regulations predate the Federal Water Pollution Control Act Amendments of 1972 and have never been updated.” 44 Fed. Reg. at 32,856.

The significance of this history is twofold. First, 40 C.F.R. § 115.2(a)(3), promulgated in 1971, before the 1972 amendments, was a reiteration of § 21(b)(1). Therefore, so is the current regulation at 40 C.F.R. § 121.2(a)(3). Second, § 121.2(a)(3) is not an interpretation of CWA § 401(d). This explains the regulation’s clear inconsistency with the plain language of that provision, which deprives the regulation of any force or effect. A regulation that is inconsistent with the underlying statute is null and void. *U.S. v. Larionoff*, 431 U.S. 864, 873 (1977); *Dixon v. United States*, 381 U.S. 68, 74 (1965); *Manhattan Gen. Equip. Co. v. Comm’r of Internal Revenue*, 297 U.S. 129, 134 (1936) (a regulation inconsistent with its underlying statute is a “mere nullity”); *Legal Envtl. Assistance Found. v. U.S. Envtl. Prot. Agency*, 118 F.3d 1467, 1472 (11th

Cir. 1997) (“[I]f the ... regulations are inconsistent with the statute, ... these regulations are void *ab initio* and cannot be relied upon by EPA ... .”); *City of New Haven v. Civil Aeronautics Bd.*, 618 F.2d 955, 960, 964 (2d Cir. 1980) (“[E]ven if the Board had left these regulations on the books, they could not have overridden the Congressional decision to permit airlines to suspend service on notice.”). The standard for certification is thus assured compliance with water quality standards, just as § 401(d) says it is; the standard is not “reasonable assurance” of compliance.

**d. Despite Minnesota’s own “reasonable assurance” standard for certification, it must apply the CWA’s standard when issuing a certification.**

Minnesota has promulgated a rule establishing “reasonable assurance” as the standard for certification. *See* Minn. R. 7001.1470, Subp. 1(C) (West, Westlaw through 2012) (“A section 401 certification issued by the agency shall include the following: ... A statement that there is reasonable assurance that the activity will be conducted in a manner that will not violate applicable water quality standards.”). This regulation must give way before § 401 by virtue of the Supremacy Clause, which provides that federal law “shall be the supreme Law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.” U.S. Const. art. VI, cl. 2.

This may not really be an issue of preemption, because the Minnesota rule was clearly meant to implement § 401. The rule simply failed to implement it properly. Section 401 does not allow Minnesota to apply a standard other than the one the Clean Water Act specifies for certifying a federal permit.

This is apparent from the language of the statute itself, which requires a certification as “required” by § 401. 33 U.S.C. § 1341(a)(1) (“No license or permit shall be granted until the certification *required by this section* has been obtained or has been waived as provided in the preceding sentence.”) (emphasis added). *See City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (holding that FERC was obligated to confirm that the state complied with notice procedures required by § 401); *accord Alcoa Power Generating Inc. v. F.E.R.C.*, 643 F.3d 963, 971 (D.C. Cir. 2011) (“A water quality certification is reviewable in federal court ... at least to the extent Section 401 itself imposes requirements that a State must satisfy in order for a certification to be a ‘certification required by this section,’ 33 U.S.C. § 1341(a)(1).”) (holding that whether a state’s certification was within the 1-year statutory period for acting on a request for certification is a question of federal law properly before the court). Exercising the authority to certify conferred by § 401 in any manner other than the one required by the Act would make a certification ineffective.

Therefore, once Minnesota exercised its authority to certify pursuant to CWA § 401, it had to exercise that authority in the manner dictated by § 401.

- e. The agency’s obligation to make decisions that are reasonable does not change the nature of the decision it must make when issuing a certification: whether a conditional certification assures that dischargers will comply with Minnesota water quality standards.**

A court will reverse or modify an agency decision if it is unsupported by substantial evidence or arbitrary or capricious. Minn. Stat. § 14.69(e), (f). Under Minnesota law, then, an agency’s decisions must be reasonable.

However, the standard of review used in reviewing a decision to certify does not alter the standard for certification. MPCA's decision must not only be reasonable, its decision must also be the decision required by law. The decision required by CWA § 401 is that conditions "assure" that dischargers will comply with water quality standards.

**2. A "reasonable assurance" standard for certification leads to effluent limitations that will not comply with water quality standards.**

If "reasonable assurance" of compliance with water quality standards were all that is necessary for certification, a state would be able to impose an effluent limitation that is not certain to meet water quality standards.<sup>4</sup> For instance, a state might require vessels to treat their ballast water to reduce the number of organisms in it to a set amount, but not to a sufficiently low number to prevent violations of water quality standards. The state might do so if it had a scientifically-defensible basis for determining that, all other things being equal, its chosen number of organisms would reasonably assure no invasions.<sup>5</sup>

But, by definition, the state's numerical technology-based effluent limitations cannot definitely assure there will be no invasions. Because a reproducing population of

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<sup>4</sup> EPA has already conceded that the VGP's numeric technology-based effluent limitations do not reasonably assure compliance with water quality standards. (R. 586, 590, *Proposed 2013 Vessel General Permit Fact Sheet*, pp. 120 (Part 4.4.3.9), 125 (Part 4.4.3.9.3).)

<sup>5</sup> But all other things are not equal. Factors other than the numbers affect invasion, including the identity, sources, and history of the organisms, and their abundance, quality, and frequency of delivery. (R. 138, *Assessing the Relationship between Propagule Pressure and Invasion Risk in Ballast Water*, p. 4.) Further influencing the outcome of organism release is a host of other factors. (*Id.*) Where more of these factors are present, a small number of organisms might establish an invasive species. (R. 191, *Assessing the Relationship between Propagule Pressure and Invasion Risk in Ballast Water*, p. 57.)

non-indigenous organisms can be established by the introduction of just a few individuals, the number of organisms in ballast water would have to be reduced to a level that will achieve complete prevention to assure compliance with water quality standards.<sup>6</sup>

For these reasons, MPCA's use of the "reasonable assurance" standard, rather than the § 401 "assurance" standard, contravened the law and violated the Supremacy Clause. MPCA's use of the incorrect standard was therefore affected by an error of law and violated a constitutional provision, and should be reversed. *N. States Power Co.*, 344 N.W.2d at 377; Minn. Stat. § 14.69(a), (d).

**3. Even the "reasonable assurance" standard requires a conditional certification to contain conditions that will result in compliance with state water quality standards.**

MPCA's use of the reasonable assurance standard in certifying the VGP no doubt derives from the Minnesota rule that provides, "A section 401 certification issued by the agency shall include ... [a] statement that there is reasonable assurance that the activity will be conducted in a manner that will not violate applicable water quality standards." Minn. R. 7001.1470, Subp. 1(C). The plain language of this rule clearly shows that its purpose is meeting state water quality standards. In particular, meeting state water quality standards must be reasonably assured.

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<sup>6</sup> (See R. 984, *Evaluating the Effectiveness of Ballast Water Exchange Policy in the Great Lakes*, p. 1322 ("A low inoculum of animals might be offset by asexual reproduction and exponential growth ... or by social aggregation ... that effectively raises the local concentration of discharged organisms and enhances their reproductive and establishment success.").)

Consequently, conditions must be sufficient to reasonably assure compliance with state water quality standards. Conditions necessary to reasonably assure compliance are required, even if the technology to achieve them is not available.

This interpretation is required by the Minnesota rule mentioned above that requires water quality-based effluent limitations, or WQBELs, in certifications – just as they are required in NPDES permits – if technology-based effluent limitations are not as stringent as necessary to meet water quality standards. Minn. R. 7001.1470, Subp. 2; see Part III.B., above, at 24-25. It is also consistent with EPA’s interpretation of § 401, also mentioned above. *A Water Quality Protection Tool for States and Tribes* at 23; see Part III.A., above, at 21-24.

**B. The Agency Failed to Establish Water Quality-Based Effluent Limitations, As Required by Federal and Minnesota Law.**

As Conservation Groups show below, the evidence is uncontradicted that the numeric technology-based effluent limitations that MPCA made a condition of certification will not assure or, for the sake of argument, reasonably assure that dischargers will comply with state water quality standards. See Part V.A., below, at 43-44. No evidence establishes that the certification condition requiring ballast water exchange or saltwater flushing, in addition to ballast water treatment, will either. See Part V.C., below, at 48-50. Nor does any evidence establish that lakers’ use of best management practices will.

Accordingly, MPCA’s responsibility was to impose WQBELs – effluent limitations as stringent as necessary to assure or, for the sake of argument, reasonably

assure that all vessels discharging ballast water to Minnesota waters will comply with water quality standards. See Part III.A., above, at 21-24; Part III.B., above, at 24-25. By all vessels, Conservation Groups mean oceangoing vessels, vessels operating exclusively within the Great Lakes (“lakers”), vessels travelling short distances, vessels that can carry no more than 8 cubic meters of ballast water, and unmanned barges. MPCA had to certify that “any” discharge will comply with state water quality standards, without exception. 33 U.S.C. § 1341(a)(1). Yet, the agency did not incorporate WQBELs in the certification.

**1. The agency’s reason for failing to establish water quality-based effluent limitations was not valid.**

In Condition #2 of the certification, MPCA stated that it will not require compliance with a numeric WQBEL because the agency “is unable to conclusively determine a numeric standard which would definitively protect water quality and an unaltered species composition of the ecosystem.” (R. 2403, *Certification Letter from MPCA*, p. 3). Even if MPCA were unable to establish a WQBEL, MPCA’s solution – to conditionally certify the VGP *without* a WQBEL – is contrary to the agency’s obligation to conditionally certify only where it establishes conditions that assure or, for the sake of argument, reasonably assure that dischargers will comply with state water quality standards.

MPCA justified its determination that it could not calculate a numeric WQBEL on the ground that the “determination is consistent with the National Academies’ National Research Council 2011 report *Assessing the Relationship Between Propagule Pressure*

and Invasion Risk in Ballast Water.” (R. 2184, *Issue Statement*, p. 8; R. 2292, *Responses to Comments*, p. 11.) However, neither the National Academy of Sciences nor its National Research Council are bound to comply with the law. MPCA is.

In Condition #3 of the certification, MPCA mischaracterized the combination of treatment and ballast water exchange or saltwater flushing as an “interim WQBEL.” (R. 2405, *Certification Letter from MPCA*, p. 5.) This is actually a combination of two different types of technology-based effluent limitations. It is not a WQBEL of any kind.

A WQBEL for ballast water discharges must assure or, for the sake of argument, reasonably assure that dischargers will comply with state water quality standards. In the aquatic invasive species context – where the invasion of even one species, such as the zebra mussel, can cause devastating impacts over all the Great Lakes and is essentially forever – assurance means preventing the introduction and spread of harmful new species, not just reducing the risk of invasion.

MPCA cited no evidence that its proposal to require vessels entering the Great Lakes to combine ballast water exchange or saltwater flushing with treatment will sufficiently reduce the risk of further harmful species invasions and thus assure or even reasonably assure that state water quality standards will be maintained. In fact, no such evidence is available, because “with our current scientific understanding it is impossible to determine if such a threshold limit exists.” (R. 2369; *Cohen Affidavit*, p. 39 (¶72); R. 983, *Evaluating the Effectiveness of Ballast Water Exchange Policy in the Great Lakes*, p. 1321 (“It is currently impossible to identify an acceptable level of risk based on

biological criteria, because the relationship between propagule pressure and invasion success has not been ascertained with respect to ballast water discharges.”.)

**2. The agency was required to establish water quality-based effluent limitations to give effect to the Congressional policy to force the development of technology to protect water quality.**

In enacting CWA § 401(d), Congress extended to certifications its policy decision that NPDES permits must include WQBELs, if necessary, to force industry to develop technology where existing technology is insufficient to meet water quality standards. *See NRDC v. U.S. EPA*, 859 F.2d 156, 209 (D.C. Cir. 1988) (“Congress had a deep respect for the sanctity of water quality standards and a firm conviction of need for technology-forcing measures.”).

The genius of this legislative policy decision is that industry is the most likely sector to find a way to comply with WQBELs and verify that they do, because industry has a financial incentive to do so. Indeed, technology-forcing statutes and rules have consistently generated technology when necessary, often despite industry claims of impossibility or predictions of dire economic consequences. Perhaps the most well-known example is the Clean Air Act’s requirement of reductions in carbon monoxide, hydrocarbon, and nitrogen oxide emissions from automobiles. 42 U.S.C. § 1857f-1(b)(1)(A) (West, Westlaw through 2012). The industry claimed that meeting the emission limits within five years “could prevent continued production of automobiles’ and ‘do irreparable damage to the American economy.’” Alan S. Miller, *Environmental Regulation, Technological Innovation and Technology Forcing*, Natural Res. & Env’t,

Fall 1995, at 65. Of course, those predictions did not come to pass, and the catalytic converter is now standard equipment on all automobiles.

Having chosen to conditionally certify the proposed 2013 VGP, nothing in the Clean Water Act, the Minnesota Water Pollution Control Act, or Minnesota rules relieved MPCA of its obligation to require all vessels to comply with practically enforceable WQBELs, because the technology-based effluent limitations are not as stringent as necessary to comply with state water quality standards. MPCA's failure to fulfill that obligation was an error of law, and should be reversed. *N. States Power Co.*, 344 N.W.2d at 377; Minn. Stat. § 14.69(d).

**V. THE MPCA'S CERTIFICATION WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE OR ARBITRARY OR CAPRICIOUS, OR BOTH, BECAUSE THE CERTIFICATION CONDITIONS DO NOT ASSURE OR REASONABLY ASSURE THAT DISCHARGERS WILL COMPLY WITH STATE WATER QUALITY STANDARDS.**

MPCA certified the VGP based upon a finding that the certification conditions will reasonably assure compliance with state water quality standards. (R. 2402, *Certification Letter from MPCA*, p. 2). Assuming for the sake of argument that this is the correct standard, the certification conditions in this case will not reasonably assure such compliance, either individually or in combination. They certainly will not assure it. MPCA's finding to the contrary is unsupported by substantial evidence or arbitrary or capricious, or both.

**A. The Certification Condition Requiring Vessels to Meet Numeric Technology-Based Effluent Limitations Will Not Assure or Reasonably Assure That Dischargers Will Comply with State Water Quality Standards.**

Condition #1 requires vessels to obtain and comply with the Minnesota ballast water general state disposal system (“SDS”) permit, MN G300000. (R. 2402, *Certification Letter from MPCA*, p. 2). The SDS permit requires vessels to meet certain “biological performance standards.” (*Id.* (Table A).) These standards are identical to the VGP’s numeric technology-based effluent limitations, which in turn are the same as the standards established by the International Maritime Organization (“IMO”). (R. 346, *Proposed 2013 Vessel General Permit*, p. 26 (Part 2.2.3.5); R. 542, *Proposed 2013 Vessel General Permit Fact Sheet*, p. 76 (Part 4.4.3.5.1).)

EPA admitted that, even after compliance with the IMO standards, “reasonable potential to cause or contribute to an exceedance of water quality standards exists.” (R. 586, 590, *Proposed 2013 Vessel General Permit Fact Sheet*, pp. 120 (Part 4.4.3.9), 125 (Part 4.4.3.9.3).) Where there is reasonable potential for violations of water quality standards, there can be no reasonable assurance of compliance with those standards. That is why the law requires water quality-based effluent limitations or WQBELs where reasonable potential exists. *Alexandria Lake Area*, 763 N.W.2d at 309.

EPA’s admission is consistent with Dr. Cohen’s expert opinion, which is that reductions in the concentration of living organisms to meet the IMO standards “are insufficient to reduce the very high rates of ballast water invasions that we have seen in the Great Lakes and elsewhere to a level that is even minimally protective.” (R. 2372,

*Cohen Affidavit*, p. 42 (¶75).) In addition, Dr. Cohen deems the IMO standards insufficient because they “set no limit at all on the discharge of protists that are less than 10 micrometers in minimum dimension, total bacteria or viruses.” (R. 2371, *Cohen Affidavit*, p. 41 (¶75).) “[A]ll three of these organism groups include many dangerous animal pathogens such as the virus that causes Viral Hemorrhagic Septicemia (VHS), which ... since its initial collection ... [in the Great Lakes] in 2003, has caused large kills of several fish species including muskellunge, freshwater drum, yellow perch, smallmouth bass, bluegill and crappie.” (*Id.*) Finally, the bacteria “referred to as indicator bacteria in the IMO standards do not serve as indicators of total bacterial concentrations.” (*Id.*)

No evidence in the record contradicts EPA or Dr. Cohen. Nor did MPCA contest or even respond to Conservation Groups’ comment that compliance with the IMO standards will not meet water quality standards. (R. 878, *Comments*, p. 16.)

Therefore, MPCA’s conclusion that the biological performance standards required by Condition #1 reasonably assure compliance with water quality standards is wholly unsupported by relevant evidence. Indeed, it is contrary to the evidence. In light of this evidentiary record, the agency could not and did not adequately explain how it derived its conclusion. The agency’s determination represented its will, rather than its judgment. Accordingly, the certification should be reversed. *Grand Rapids*, 731 N.W.2d at 871; *Meuleners*, 725 N.W.2d at 123; *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 632 N.W.2d at 235; *Blue Cross*, 624 N.W.2d at 277; Minn. Stat. § 14.69(e), (f).

**B. The Certification Condition Prohibiting Vessels from Violating State Water Quality Standards Will Not Assure or Reasonably Assure That Dischargers Will Comply Those Standards.**

In addition to requiring compliance with biological performance standards, Condition #1 requires vessels to comply with Part 1.2.b of the Minnesota ballast water general SDS permit, MN G300000. (R. 2402, *Certification Letter from MPCA*, p. 2). That provision prohibits discharges of ballast water that violate water quality standards. (R. 2, *SDS Ballast Water Discharge General Permit*, p. 2 (Part 1.2.b).)

Compliance with this prohibition presupposes that the vessel operator will know which species are in the ballast water and in what concentrations at the time of discharge. However, the certification does not require vessel operators to conduct sampling that would provide such knowledge. Even if the certification contained such a requirement, “[t]o conduct such comprehensive sampling on all arriving vessels or discharges in the Great Lakes would be an enormous and almost certainly impossible undertaking.” (R. 2344, *Cohen Affidavit*, p. 14 (¶27).)

Furthermore, even if the operator had the capability to thoroughly examine the vessel’s ballast water to determine whether it contains any non-indigenous species, the operator could not reliably predict at the time of discharge whether any such species will establish a reproducing population that will violate water quality standards. (R. 2341, *Cohen Affidavit*, p. 11 (¶21).) The identification of “invasive” species might take years, as it did in the case of the zebra mussel. (R. 968, 970, *Lag times and exotic species*, pp. 316, 318.) Nor can the source of an invasion later be traced back to a particular vessel with reasonable certainty except under the rarest of circumstances, which have never yet

occurred. (R. 2343-49, *Cohen Affidavit*, pp. 13-19 (¶¶ 23-34).) No evidence in the record contradicts any of this.

Consequently, the prohibition is not practically enforceable. To “assure” or even “reasonably assure” compliance with water quality standards, certification conditions must be enforceable as a practical matter. This follows from the meaning given to similar language in CWA § 402, which requires NPDES permits to “assure compliance” with water quality standards. 33 U.S.C. § 1342(a)(2) (“The Administrator shall prescribe conditions for such permits to *assure compliance* with the requirements of paragraph (1) of this subsection.”) (emphasis added).<sup>7</sup>

EPA has recognized that this means “[e]ach permit must be written clearly and unambiguously so that compliance can be tracked effectively and the permit can be enforced if violations occur.” U.S. Environmental Protection Agency, *NPDES Permit Writers’ Manual* at 11-21 (§ 11.5) (EPA-833-K-10-001, 2010), *available at* [http://www.epa.gov/npdes/pubs/pwm\\_chapt\\_11.pdf](http://www.epa.gov/npdes/pubs/pwm_chapt_11.pdf) (last visited Oct. 11, 2012). In the same vein, EPA instructed that “[m]onitoring is performed to determine compliance with effluent limitations established in NPDES permits [and] establish a basis for enforcement

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<sup>7</sup> EPA’s regulations reinforce the necessity that NPDES permits assure compliance with water quality standards. 40 C.F.R. § 122.4(d) (prohibits the issuance of an NPDES permit “when imposition of conditions cannot *ensure compliance* with the applicable water quality requirements of all affected states”) (emphasis added); 40 C.F.R. § 122.44(d)(1)(vii)(A) (requires permitting authorities to “*ensure*” that WQBELs are developed to achieve a level of water quality that “complies with all applicable water quality standards”) (emphasis added).

actions ... .” *Id.* at 8-2 (§ 8.1.1), *available at*

[http://www.epa.gov/npdes/pubs/pwm\\_chapt\\_08.pdf](http://www.epa.gov/npdes/pubs/pwm_chapt_08.pdf) (last visited Oct. 11, 2012).

EPA’s guidance echoes Congress’s intent that the CWA establish clear requirements that provide precise benchmarks for performance and a basis for enforcement under the citizen suit provision. S. Rep. No. 92-414, at 81 (1971) (“The citizen suit provision [Section 505] is consistent with principles underlying . . . the Act, [which are] the development of clear and identifiable requirements. Such requirements should provide manageable and precise benchmarks for performance.”). CWA § 505 empowers citizens to sue for violations both of NPDES permits and certifications. 33 U.S.C. § 1365(a)(1)(A) (West, Westlaw through 2012) (authorizing citizen suits for violations of “an effluent standard or limitation”), (f) (defining the term “effluent standard or limitation” to mean a “certification under section 1341”); *Stillwater of Crown Point Homeowner's Ass'n, Inc. v. Kovich*, No. 2:09–CV–157–PRC, 2011 WL 4818511, at \*12 (N.D. In., Oct. 11, 2011).

Thus, the Act, its legislative history, and EPA regulations and guidance all create a “practical enforceability” requirement for effluent limitations and monitoring requirements imposed pursuant to § 401, just as they do for such limitations and requirements imposed pursuant to § 402. MPCA did not contest or even respond to Conservation Groups’ comment that compliance with the prohibition is not practically enforceable. (R. 883, *Comments*, p. 21.)

Either because this certification condition is one that dischargers cannot comply with – which MPCA did not consider, or because the certification condition is not

practically enforceable, or for both reasons, MPCA's conclusion that it reasonably assures compliance with water quality standards is wholly unsupported by relevant evidence. In fact, it is contrary to the evidence. In light of this evidentiary record, the agency could not and did not adequately explain how it derived its conclusion, and failed entirely to consider an important aspect of the problem. The agency's determination represented its will, rather than its judgment. Therefore, the certification should be reversed. *Grand Rapids*, 731 N.W.2d at 871; *Meuleners*, 725 N.W.2d at 123; *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 632 N.W.2d at 235; *Blue Cross*, 624 N.W.2d at 277; Minn. Stat. § 14.69(e), (f).

**C. The Certification Condition Requiring Oceangoing Vessels to Perform Ballast Water Exchange or Saltwater Flushing Will Not Assure or Reasonably Assure That Dischargers Will Comply with State Water Quality Standards.**

Condition #3 requires oceangoing vessels to perform open-ocean ballast water exchange or saltwater flushing before discharging ballast water. (R. 2403-04, *Certification Letter from MPCA*, pp. 3-4.) MPCA incorporated this condition in the certification because "early" research results "are consistent with the goal of *reducing* propagule pressure, at least for fresh and brackish receiving waters, in order to achieve an invasion risk lower than would be achieved using ballast water alone." (R. 2405, *Certification Letter from MPCA*, p. 5 (emphasis added).)

No evidence in the record documents these research results, and no evidence in the record establishes that combining treatment and ballast water exchange or saltwater

flushing will reduce the invasion risk low enough to reasonably assure compliance with water quality standards. Actually, the evidence is to the contrary.

First, as explained above, the level of reduction in organism numbers necessary to assure compliance with water quality standards is not known to science. Moreover, even MPCA admitted that the evidence is “unclear” whether the combination of technology and physical treatment reduces the concentration of organisms even below the level set by the IMO standards. (R. 2184, *Issue Statement*, p. 8.) This is consistent with the conclusion of EPA’s Science Advisory Board (“SAB”). The SAB said that reducing the risk of invasions through the combination only “*may be possible.*” (R. 2116, *Efficacy of Ballast Water Treatment Systems*, p. 91 (emphasis added).) The SAB referred to a study that only “*suggests that conducting a mid-ocean exchange combined with BWMS [that is to say, ballast water management systems] for Great Lakes bound carriers may result in at least a 10x reduction in density of high risk taxa.*” (*Id.* (emphasis added).) The SAB did not say 10x what, but Dr. Cohen called for standards approximately 1000 times more stringent than the IMO standards to protect the beneficial uses of receiving waters. (R. 2370, *Cohen Affidavit*, pp. 39-40 (¶¶73-74).)

Dr. Cohen’s expert opinion is that ballast water exchange “in combination with treatment will [not] help to meet IMO or more stringent limits on organism concentrations, and may in various circumstances actually increase the concentrations of organisms in discharges.” (R. 2353, *Cohen Affidavit*, p. 23 (¶42); R. 2350-53, *Cohen Affidavit*, p. 20-23 (¶¶37-41).) Dr. Cohen would “expect a similar pattern of results from

combining saltwater flushing of residual water in NOBOB [“no ballast on board”] vessels with treatment.” (R. 2353-54, *Cohen Affidavit*, pp. 23-24 (¶43).)

For these reasons, MPCA’s conclusion that this certification condition reasonably assures compliance with state water quality standards is not only unsupported by relevant evidence, but contrary to the evidence. In light of this evidentiary record, the agency could not and did not adequately explain how it derived its conclusion. The agency’s determination represented its will, rather than its judgment. Therefore, the certification should be reversed. *Grand Rapids*, 731 N.W.2d at 871; *Meuleners*, 725 N.W.2d at 123; *Minn. Ctr. for Env’tl. Advocacy v. Minn. Pollution Control Agency*, 632 N.W.2d at 235; *Blue Cross*, 624 N.W.2d at 277; Minn. Stat. § 14.69(e), (f).

**D. The Certification’s “Emergency” Provisions for High-Risk Ballast Water Discharges Will Not Assure or Reasonably Assure That Dischargers Will Comply with State Water Quality Standards.**

Condition #4 allows MPCA to “prohibit discharge, require a discharge to occur in a particular area, or require emergency treatment of any ‘high risk’ ballast water proposed to be discharged in Minnesota waters.” (R. 2407, *Certification Letter from MPCA*, p. 7 (Condition #4(a).) Although MPCA’s goal to manage high-risk discharges is commendable, nothing in this condition even purports to reasonably assure compliance with Minnesota water quality standards, except to the extent that the agency exercises discretion, without any apparent provision for public review, to prohibit the discharge altogether. It allows MPCA to “authorize the use of BWTS [ballast water treatment systems] identified as promising technology” by EPA, the U.S. Coast Guard, neighboring states, or a U.S. ballast water testing facility. *Id.* at 8 (Condition #5(e)). (R. 2408,

*Certification Letter from MPCA*, p. 8 (Condition #4(e).) But nothing in the record establishes the level of protection such ballast water treatment systems will provide to water quality standards.

As a result, MPCA's conclusion that this certification condition reasonably assures compliance with Minnesota water quality standards is unsupported by relevant evidence and not adequately explained. The agency's determination represented its will, rather than its judgment. Consequently, the certification should be reversed. *Grand Rapids*, 731 N.W.2d at 871; *Meuleners*, 725 N.W.2d at 123; *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 632 N.W.2d at 235; *Blue Cross*, 624 N.W.2d at 277; Minn. Stat. § 14.69(e), (f).

**E. The Certification's Best Management Practices for Lakers Will Not Assure or Reasonably Assure That Dischargers Will Comply with State Water Quality Standards.**

Condition #5, which requires lakers to follow certain best management practices ("BMPs") and recommends that they follow others, is salutary to the extent it reduces the number of organisms discharged with ballast water. (R. 2408, *Certification Letter from MPCA*, p. 8.) And that is all of substance MPCA can say in favor of them. (R. 2185, *Issue Statement*, p. 9 ("The BMPs reduce risk of invasion.")) However, as explained above, simply reducing the risk of invasion is no guarantee that aquatic non-indigenous and invasive species new to the area of discharge will not be discharged or establish themselves there as AIS.

No evidence in the record establishes that the best management practices required by Condition #5 will reduce the invasion risk low enough to reasonably assure compliance with water quality standards. Once again, the evidence is to the contrary.

To repeat, even if the use of BMPs were to reduce the risk of invasion, no evidence in the record establishes that the reduction is great enough to assure compliance with water quality standards is not known to science. Furthermore, Dr. Cohen reports that “there appear to be no data on levels of compliance and no studies on the effectiveness of any of these [management] measures in reducing the uptake of organisms.” (R. 2350, *Cohen Affidavit*, p. 20 (¶37).) His expert opinion is that “it seems unlikely that these measures, even if fully employed, could reduce the usual organism concentrations in ballast discharges to the IMO limits or more stringent limits; rather they might help to avoid exceptionally high concentrations (don’t ballast during algal blooms) or certain types of undesirable organisms.” (*Id.*) He goes on to say, “Management measures dealing with sediment or the maintenance of sea chest screens might be useful, but would not reduce the organism concentrations in ballast discharges to the IMO limits or more stringent limits.” (*Id.*)

Therefore, MPCA’s conclusion that this certification condition reasonably assures compliance with Minnesota water quality standards is unsupported by relevant evidence, contrary to the evidence that is in the record, and was not and cannot be adequately explained. The agency’s determination represented its will, rather than its judgment. The certification should therefore be reversed. *Grand Rapids*, 731 N.W.2d at 871; *Meuleners*,

725 N.W.2d at 123; *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 632 N.W.2d at 235; *Blue Cross*, 624 N.W.2d at 277; Minn. Stat. § 14.69(e), (f).

**F. The Certification's Monitoring Requirements Will Not Assure or Reasonably Assure That Dischargers Will Comply with State Water Quality Standards.**

The certification does not require dischargers to monitor whether they comply with the conditions in the Minnesota ballast water general SDS permit, MN G300000, incorporated by reference in Condition #1. (R. 2402, *Certification Letter from MPCA*, p. 2). In particular, MPCA did not establish any requirement to monitor compliance with the general SDS permit's prohibition of discharges of ballast water that violate state water quality standards. (See (R. 2, *SDS Ballast Water Discharge General Permit*, p. 2 (Part 1.2.b.).)

As Conservation Groups noted in the comments they submitted to MPCA on the draft certification, in the absence of such a monitoring requirement, neither MPCA nor citizens can track compliance with the prohibition or enforce violations of the prohibition pursuant to CWA § 505, as is their right. (R. 883, *Comments*, p. 21.) MPCA did not respond to this comment, nor does the record establish that the agency gave any consideration to this deficiency in its monitoring requirements in Condition #6.

MPCA thus failed entirely to consider an important aspect of the problem. Therefore, the certification should be reversed. *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 632 N.W.2d at 235; Minn. Stat. § 14.69(f).

**CONCLUSION**

For the foregoing reasons, the Court should reverse or remand MPCA's certification of the proposed 2013 VGP.

Dated: October 12, 2012

Respectfully submitted,

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**CERTIFICATE OF LENGTH PURSUANT TO RCAP 132.01**

I hereby certify that this brief conforms to the requirements of *Minn. R. Civ. App. P. 132.01*, subs. 1 and 3, for a brief produced with a proportionate font. The length of this brief is 13,996 words. This brief was prepared using Microsoft Word 07.

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By: 

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