

No. A12-1661

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

Respondent Minnesota Pollution Control Agency's Brief And Appendix

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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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LEGAL ISSUES

- I. Did the Minnesota Pollution Control Agency (MPCA) apply the correct legal standard when it issued a conditional 401 Certification for permits proposed by the U.S. EPA to control (among other things) the discharge of ballast water from vessels in Minnesota waters?

The MPCA Citizens Board concluded that, under the conditions established in the MPCA's 401 Certification, discharges from vessels authorized under the U.S. EPA permits "will comply" with state and federal water quality standards.

Minn. R. 7001.0140 (2011)

Minn. R. 7001.1450 (2011)

- II. Was the MPCA compelled by state or federal law to include a "numeric" water quality based effluent limitation in a 401 Certification?

The MPCA concluded that it was not compelled by state or federal law to include a "numeric" water quality based effluent limitation when there was no scientific support for how such a limit would be calculated, implemented, or enforced.

Minn. R. 7001.1080 (2011)

Minn. R. 7053.0205, subp. 8 (2011)

In The Matter Of A Request For Issuance Of The SDS General Permit MNG3000000 For Ballast Water Discharges From Vessels Transiting Minnesota State Water Of Lake Superior, 769 N.W.2d 312 (Minn. Ct. App. 2009)

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

- III. Was the MPCA's decision to issue the 401 Certification with conditions needed to ensure that federal permittees will comply with state water quality standards supported by substantial evidence in the record?

Substantial information in the record supports the MPCA's decision to issue the 401 Certification with conditions.

National Audubon Society v. MPCA, 569 N.W.2d 211 (Minn. Ct. App. 1997)

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

In re American Iron and Supply Co., 604 N.W.2d 140 (Minn. Ct. App. 2000)

STATEMENT OF THE CASE

The State of Minnesota, acting through the Minnesota Pollution Control Agency (MPCA) and the Minnesota Department of Natural Resources (MDNR), has been the most aggressive of the Great Lakes states with regard to taking actions to protect its waters from aquatic invasive species (“AIS”) spread through the discharge of ballast water.¹ Rec. 1922, 1960. Minnesota was the first state to issue a permit to require vessels confined to the Great Lakes (“Lakers”) to meet numeric discharge standards for ballast water discharges. This Court affirmed that permit in 2009. *See In The Matter Of A Request For Issuance Of The SDS General Permit MNG3000000 For Ballast Water Discharges From Vessels Transiting Minnesota State Water Of Lake Superior*, 769 N.W.2d 312 (Minn. Ct. App. 2009). At issue in the present case is a “401 Certification” that the MPCA issued in August 2012, indicating conditional approval of two permits proposed by the U.S. EPA that would govern, among other things, discharges of ballast water from vessels (2013 Vessel General Permit and Small Vessel General Permit, hereinafter “2013 VGPs”).² Minnesota’s 401 Certification is the most aggressive of all the Great Lakes states, containing “conditions” requiring “Salties”³ and

¹ Ballast water “means water taken on board a vessel to control trim, list, draft, stability, or stresses of the vessel, including matter suspended in the water, or any water placed into a ballast tank during cleaning, maintenance, or other operations.” Minn. Stat. § 115.1701, subd. 3 (2010).

² Under Clean Water Act Section 401 (33 U.S.C. 1341), agencies of the federal government must seek state “certification” that federal permits will comply with water quality standards established by affected states (“401 Certification”).

³ A “Saltie” is an oceangoing vessel that is not confined to the Great Lakes. Rec. 2391.

“Lakers” to install ballast water treatment systems, meet numeric ballast water discharge standards, conduct biological monitoring of ballast water, maintain “best management practices,” comply with conditions related to discharge of “high risk” ballast water, and other conditions.⁴

Despite the fact that Minnesota’s conditions exceed those of all other Great Lakes states, Relators in this case have filed this appeal, arguing that the MPCA’s 401 Certification is deficient. Relators claim that the Respondent MPCA (Respondent will be referred to as “MPCA” in this brief) applied an incorrect legal standard in approving 401 Certification. Relators also claim that the MPCA’s conclusion that the 401 Certification will result in compliance with state water quality standards was arbitrary and capricious and not supported by substantial evidence on the record.

Relators’ claims are baseless. The MPCA’s rules, and the findings adopted pursuant to those rules, incorporate the correct “will comply” legal standard. Relators’ claim that the 401 Certification is deficient because it did not include a “numeric” water quality based effluent limit (“WQBEL”) and related monitoring provisions is not supported in law or by the record. In contrast, substantial information supports the MPCA’s conclusion that current scientific information is insufficient to support the

⁴ Wisconsin, in contrast, has yet to require Lakers to treat or monitor ballast water discharges. Rec. 810; Tr. 29. Ohio and Michigan also only regulate Salties. Rec. 846 (Ohio); Rec. 837 (Michigan). In its final 401 Certification, New York did not require monitoring for vessels without treatment systems and deferred a numeric WQBEL. See MPCA Mot. to Supp. Record.

development of a numeric WQBEL, and that there is neither the system available to monitor compliance with more stringent standards nor the technology to implement it.

The precedents from this Court are clear: MPCA must act reasonably in its establishment of permit conditions. MPCA should not adopt effluent limits that – in the absence of technology to meet those limits – would “not result in meaningful protection for Minnesota's aquatic environment.” *In re Request for Issuance of SDS General Permit MNG300000*, 769 N.W.2d 312, 324 (Minn. Ct. App. 2009). To impose the numeric WQBEL Relators seek, the MPCA must have some evidence that the WQBEL will be “reasonably achievable.” *Id.* Sadly, such information remains to be developed, as even Relators’ expert, Dr. Andrew Cohen, has acknowledged. As a result, unless Relators propose that the MPCA shut down all shipping into the Minnesota ports (which they have not), the MPCA must exercise its judgment in establishing reasonable conditions that will comply with MPCA’s water quality standards. For this reason, the MPCA’s decision to issue the 401 Certification should be affirmed.

STATEMENT OF FACTS

MPCA Has Acknowledged The Threat Posed By Aquatic Invasive Species And Taken Actions To Control Them.

The MPCA’s findings adopted in support of its decision demonstrate that MPCA appreciates the challenges faced by the State of Minnesota regarding AIS, particularly with regard to the role played by “Lakers,” the vessels that operate within the confines of the Great Lakes system. The MPCA understands that “[a]quatic invasive species compete with native species for food and habitat, alter aquatic ecosystems, and cause

significant economic impact” and that “[d]ischarges of ballast water from commercial vessels have been identified as the leading source of recorded introductions of aquatic invasive organisms into the Great Lakes since the St. Lawrence Seaway was opened in 1959 (National Academy of Sciences Special Report 291, 2008).” Rec. 2390-2391.

Because Minnesota has long recognized this threat, in September 2008, the MPCA issued a General State Disposal System (“SDS”) permit regulating ballast water (“ballast water permit.”) Rec. 0001. This permit pre-dated the first federal Vessel General Permit and contained more stringent conditions, i.e., numeric discharge limits. Rec. 2391. The ballast water SDS permit prohibited certain discharges, required the permittees to maintain a “Ballast Water and Sediment Management Plan,” and to install treatment systems to meet certain numeric discharge criteria by 2016 (for existing vessels) and prior to operation in Minnesota waters (for vessels constructed after January 1, 2012). Rec. 0005. The treatment system requirements contained “biological performance standards” for organisms of certain sizes as a daily average. Rec. 0008. The standard included in the Minnesota ballast water SDS permit conformed to the standard adopted by the International Maritime Organization, or “IMO D-2 standard,” in February 2004 for its international shipping members. Rec. 2038. The IMO D-2 standard results in a significant decrease (greater than 99% reduction) in the discharge of living organisms from ballast tanks. Rec. 0588-0589.

After it was issued, MPCA’s ballast water SDS permit was challenged on a number of grounds (including an allegation that the MPCA had failed to apply its “nondegradation” rules) by Relator Minnesota Center for Environmental Advocacy. On

July 28, 2009, this Court found that MPCA had acted appropriately in crafting the conditions of its ballast water SDS permit, as will be discussed *infra* at II.A, and this Court affirmed the MPCA's issuance of that permit.

Federal Permitting Efforts And 2009 401 Certification

Shortly after the MPCA issued its ballast water SDS permit, the U.S. EPA proposed a permit to govern discharges from vessels, including ballast water ("2008 VGP"). In November 2008, the MPCA issued a 401 Certification with conditions. As in today's case, Relator National Wildlife Federation sought judicial review of this action. The history of the original 401 Certification matter is set forth in some detail in this Court's decision in *U.S. Environmental Protection Agency (USEPA) Vessel General Permit For Discharges To The Normal Operation Of Commercial Vessels*, No. A08-2196, 2009 WL 2998058 (Minn. Ct. App. Sept. 22, 2009) (unpublished opinion, reproduced in Respondent's Appendix at RA1 - RA4). In that case, this Court found that an appeal of a 401 Certification issued by the MPCA in relation to the 2008 VGP was not timely and was moot, because the U.S. EPA issued the 2008 VGP before the appeal was resolved.

The National Research Council Of The National Academy Of Sciences Report

Since the time the 2008 VGP and MPCA ballast water SDS permits were issued, the MPCA and the MDNR have worked with other Great Lakes states, the U.S. EPA, and other interested persons to improve understanding of the aquatic invasive species issue and to identify technologies that might be employed on existing and new vessels to prevent new invasions. Rec. 0022-0122, Rec. 0262-0267, 0753-0762, 0815-0816; Tr. 9.

Of particular interest to MPCA and other state regulatory agencies is whether it would be possible to establish a numeric water quality based effluent limit (WQBEL) on aquatic invasive species in ballast water that could be applied in a permitting decision.

In 2011, the MPCA received a copy of a report from the “Committee on Assessing Numeric Limits for Living Organisms In Ballast Water,” which was an effort on the part of the National Academy of Sciences to assess the status of research on the “numeric limits question.” Rec. 0127-0257 (“NAS Report”). The conclusions of the study were that, while it was clear that significantly reducing propagule pressure (i.e., numbers of live organisms released to a particular body of water) would reduce the probability of invasions, “any method that attempts to predict invasion outcomes based upon only one factor in the multi-dimensional world of the invasion process is likely to suffer from a high level of uncertainty.” Rec. 138. As a result, the NAS Report did not suggest a particular model or numeric limit for any particular species, but only that further studies and models be developed. Rec. 0258-0261. The “overarching recommendation” of the NAS Report was that the “EPA adopt a risk-based approach to minimize the impact of invasive species in vessel ballast water discharges rather than relying solely on numeric standards for discharges from shipboard [Ballast Water Management Systems].” Rec. 2014. The NAS recommended as a “logical first step” that the IMO D-2 standard be implemented. Rec. 0141. Based in part on the NAS Report, the U.S. EPA concluded that numeric WQBELs are infeasible to calculate at this time. Rec. 0591.

Efforts To Monitor Invasive Species In Ballast Water

In addition to the effort to develop a numeric standard for aquatic invasive species in ballast water, state and federal entities have been trying to develop acceptable methods for monitoring invasive species that might be present in the ballast water of a vessel. Monitoring for AIS is challenging for a number of reasons, in particular the lack of standardized testing protocols. Rec. 2084- 2104.

On November 18, 2011, the Great Ships Initiative published a report titled “A Ballast Discharge Monitoring System For Great Lakes Relevant Ships: A Guidebook For Researchers, Ship Owners, And Agency Officials.” Rec. 0268-0308. The guidebook, funded in part by the Legislative Citizen Commission on Minnesota Resources, contains a proposal for monitoring that “appears to be applicable to most ships which ply the Great Lakes.” Rec. 0295. Even though this method has yet to be sanctioned by a standard setting body, the MPCA has indicated that it is an acceptable protocol, due to MPCA’s perception of the great need to collect representative ballast discharge data from vessels discharging ballast water to Minnesota waters. MPCA has also indicated its willingness to review and approve an independently-developed monitoring plan. Rec. 2411; Tr. 116-123.

Treatment Technology

In addition to the challenge of developing a numeric discharge limit and monitoring protocols for ballast water, there is the challenge of development of an effective treatment system. In July 2011, the U.S. EPA Science Advisory Board (SAB), a public advisory group providing extramural scientific information and advice to EPA,

presented a report titled “Efficacy of Ballast Water Treatment Systems: a Report by the EPA Science Advisory Board” (“SAB Report”). Rec. 2013-2167. To produce the SAB Report, the SAB looked at information for 51 existing or developmental ballast treatment technologies and found detailed performance data on only 15 systems. Rec. 2061. Of these systems, the SAB Report concludes that five types meet IMO D-2 standards, but none would meet more stringent performance criteria such as 100 times or 1,000 times the IMO D-2 standard. Rec. 2055-2066. However, the U.S. Coast Guard has yet to approve *any* ballast water management system for any vessels, including Lakers. Rec. 1893, 1898, 1909-1910, 1924-1925. Even if such systems existed, retrofitting would be required to apply the system to existing vessels. Rec. 1899. In addition, Lakers operate under unique conditions, such as high pumping rates, large volumes, cold water, short duration voyages, and uncoated ballast tanks, that may inhibit the applicability of certain treatment technologies. Rec. 2065.

The U.S. EPA proposes the 2013 VGPs.

On December 8, 2011, the U.S. EPA proposed the 2013 VGPs. Rec. 0309-0752. The proposed permits did not set numeric WQBELs. Rec. 591-593. However, the permits now include a numeric effluent limit based on the standards established by the IMO,⁵ which is identical to the standard that Minnesota had included in its ballast water SDS discharge permit, except that the 2013 VGPs extend the date for compliance for

⁵ The IMO standard included in Minnesota’s ballast water permit and now proposed to be included in the 2013 VGPs represents the equivalent of approximately 99.99 percent, or four orders of magnitude reduction, of living organisms within a given volume of ballast water. The MPCA recognizes that this does not eliminate all risk from AIS. Tr. 15.

existing vessels to “first scheduled drydocking after January 1, 2016” for most existing vessels. Rec. 0355; Tr. 14. The Minnesota water ballast SDS permit requires compliance by January 1, 2016, without extension for drydocking. Rec. 0005. The 2013 VGPs continue to exempt certain Lakers from ballast treatment requirements due to their unique operational and design limits. Rec. 356, 577-578; Tr. 14.

On February 21, 2012, the MPCA and the MDNR submitted joint comments on the draft 2013 VGPs. Rec. 0794-0796. In these comments, the state agencies indicated their desire to have the 2013 VGPs “set a clear path for the implementation of numeric discharge limitations, and the collection of data that demonstrates compliance with all permit conditions.” Rec. 0794. However, the agencies recognized why the permits proposed to use the IMO ballast discharge standards as the basis for interim limits, due to the need to have a standard about which there was some consensus. *Id.*

Procedural History Of MPCA’s 401 Certification With Conditions

In May 2012, the MPCA published a proposed 401 Certification with conditions for public comment. Rec. 0840-0856. The MPCA received 16 public comments. Rec. 0861-1976. Many of the comments were from shipping industry interests, and detailed the efforts of the shipping industry to address ballast discharge issues. Relators submitted comments (as a joint comment with other environmental organizations) in which (among other things) Relators argued for the MPCA to include a numeric water quality based effluent limit (“numeric WQBEL”). Rec. 0863-1374.

On May 22, 2012, the MPCA’s citizens’ board (Board) heard testimony concerning the proposed conditional 401 Certification. Rec. 0857-0860.

Following the May Board meeting, the MPCA staff made changes to the proposed 401 Certification based on the comments received. Rec. 2309-2320. On August 28, 2012, the 401 Certification as modified was presented to the Board for final action. Rec. 2175-2320. The Board again heard testimony from witnesses regarding the proposed 401 Certification. Industry representatives again detailed their efforts to address the challenges posed by AIS, in particular, the efforts to get a treatment system approved by the U.S. Coast Guard for use on Lakers. Tr. 82-85. A representative of Minnesota Trout Unlimited, which was part of the group of environmental organizations that submitted comments, testified in support of the MPCA's effort to regulate Lakers. Tr. 98. In response to a question about what the witness wanted changed in the 401 Certification, the representative of Minnesota Trout Unlimited did not identify any changes. Tr. 102. At the Board meeting, in response to comments received from industry representatives, the Board revised the 401 Certification to clarify the standards under which MPCA would determine what constituted a ballast water emergency. Tr. 109-115, 130-131.

MPCA's 401 Certification

At the conclusion of the Board meeting, the Board adopted findings of fact and conclusions supporting the issuance of the 401 Certification. Rec. 2388-2400. In its 401 Certification, the MPCA included the following conditions:

- A. Compliance with Minnesota SDS permit for ballast water;
- B. No additional requirements for a Numeric Water Quality Based Effluent Limitation (WQBEL) Determination for Ballast Water Discharges at this time, though Minnesota remains interested in the

development of data via ongoing monitoring which could be used to inform the process of establishing a water quality standard in the future;

- C. Exchange and flushing for voyages originating beyond the Exclusive Economic Zone (EEZ);
- D. Emergency Control of Ballast Water discharge;
- E. Monitoring and use of BMPs for Vessels that operate exclusively in the Great Lakes;
- F. Monitoring Requirements both for vessels' installation treatment technology, as well as for vessels that are not required to install treatment technology;
- G. Control of Biocide usage;
- H. Compliance with any other applicable state regulations, specifically Minn. Stat. § 115.1703.

The MPCA noted that it was “not requiring a Numeric Water Quality Based Effluent Limitation (WQBEL) Determination for Ballast Water Discharges at this time due to lack of data sufficient to support such a WQBEL, although Minnesota remains interested in the development of data via ongoing monitoring which could be used to inform the process of establishing a water quality standard in the future.” Rec. 2393. The MPCA noted that “[t]he proposed conditions include the requirement for monitoring that will assist in development of a WQBEL in the future.” Rec. 2393.

SCOPE OF REVIEW

This Court reviews a final decision of the MPCA under the Minnesota Administrative Procedures Act, Minn. Stat. §§ 14.63-69 (2010), pursuant to Minn. Stat. § 115.05, subd. 11 (2010). To reverse or modify the agency's decision, this Court must find that the agency's findings and conclusions are affected by an error of law,

unsupported by substantial evidence in view of the entire record as submitted, or arbitrary or capricious. *In the Matter Of A Request For Issuance Of The SDS General Permit MNG 300000*, 769 N.W.2d 312, 317 (Minn. Ct. App. 2009) (hereinafter “Ballast Water Permit Decision”). On appeal, the party challenging the agency’s decision has the burden of proof. *Id.* The courts have indicated that “substantial evidence” exists supporting the agency finding if there is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion” “more than a scintilla of evidence” “more than any evidence” or the finding is supported by “evidence considered in its entirety.” *National Audubon Society v. MPCA*, 569 N.W.2d 211, 215 (Minn. Ct. App. 1997). The Minnesota Supreme Court has firmly established that MPCA’s interpretation of technical environmental laws is entitled to deference from reviewing courts. *In re Cities of Annandale & Maple Lake*, 731 N.W.2d 501 (Minn. 2007) (holding Court of Appeals required to defer to MPCA’s interpretation of technical federal water quality permitting regulation); *MCEA v. MPCA & Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (holding Court of Appeals required to defer to MPCA’s interpretation of state environmental review statute). The Minnesota Supreme Court has stated that agency decisions “enjoy a presumption of correctness, and deference should be shown by courts to the agencies’ expertise and their special knowledge in the field of their technical training, education and experience.” *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977). As characterized by the Court of Appeals in *In The Matter of University of Minnesota and Foster Wheeler Twin Cities, Inc. Application for an Air Emission Facility Permit for the University’s Steam Service Facilities*, 566 N.W.2d 98, 108 (Minn. Ct. App. 1997), the

Supreme Court's holding in *Reserve* means that a "court should not interfere with [an] agency determination based on value judgments and expertise." In cases like the present one, where there are technical disputes or uncertainties, Minnesota courts assume that an administrative agency has exercised its discretion appropriately. *In re Amer. Iron & Supply Co.*, 604 N.W.2d 140, 145 (Minn. Ct. App. 2000). Absent manifest injustice, a reviewing court must accept the inferences that the agency has drawn from the evidence even if it appears that contrary inferences would be better supported. *Urban Council on Mobility v. Minnesota Dep't of Nat. Res.*, 289 N.W.2d 729, 733 (Minn. 1980).

ARGUMENT

I. THE MPCA APPLIED THE CORRECT STANDARD WHEN IT ISSUED THE 401 CERTIFICATION.

A. MPCA Found That The 2013 VGP Permittees "Will Comply" With State Water Quality Standards When It Issued The 401 Certification.

When it approved the 401 Certification, the MPCA found that, with the conditions imposed, the vessels permitted under the 2013 VGPs "will comply" with federal and state law. Rec. 2398. Nevertheless, in their brief, Relators argue that the MPCA applied the wrong standard when it approved the 401 Certification. Relators conclude that the MPCA failed to apply the standard established by the Clean Water Act due to the fact that MPCA's 401 Certification included the following text: "[a] statement that there is reasonable assurance that the activity will be conducted in a manner that will not violate applicable water quality standards" as required by 40 CFR 121.2 and Minn. R. 7001.1470. However, as will be shown below, despite this text appearing on the

“face” of the 401 Certification, the *actual standard* that the MPCA applied was the correct “will comply” standard.

The MPCA’s 401 Certification rule requires the MPCA to approve 401 Certifications as follows:

7001.1450 FINAL DETERMINATION.

Subpart 1. Action required. The agency shall make final determinations with respect to section 401 certifications by taking one of the following actions:

A. Issue, reissue, revoke and reissue, or modify a section 401 certification *in accordance with part 7001.0140, subpart 1* and upon making a finding that the discharge which is the subject of the section 401 certification *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.

...

Minn. R. 7001.1450 (emphasis added). This rule, therefore, requires the MPCA to apply the “will comply” standard. In addition, the authority under which the MPCA must approve a 401 Certification – Minn. R. 7001.0140, subp. 1 – includes the “will comply” standard.

Minn. R. 7001.0140 establishes the standard that the MPCA must apply to all permits that it issues, including 401 Certifications. The rule states as follows:

7001.0140 FINAL DETERMINATION.

Subpart 1. Agency action. Except as provided in subpart 2, the agency shall issue, reissue, revoke and reissue, or modify a permit if the agency determines that the proposed permittee or permittees *will*, with respect to the facility or activity to be permitted, *comply* or will undertake a schedule of compliance to achieve compliance with all applicable state and federal pollution control statutes and rules administered by the agency, and conditions of the permit and that all applicable requirements of Minnesota

Statutes, chapter 116D, and the rules adopted under Minnesota Statutes, chapter 116D, have been fulfilled. For solid waste facilities, the requirements of Minnesota Statutes, section 473.823, subdivisions 3 and 6, must also be fulfilled.

Minn. R. 7001.0140 (emphasis added). As a result of this rule, the MPCA found in this case (as it does in all cases where it determines that a permit should be issued) that the proposed permittee (in this case, the permittees under the 2013 VGPs) “will . . . comply or will undertake a schedule of compliance to achieve compliance with all applicable state and federal pollution control statutes and rules administered by the agency, and conditions of the permit.” Rec. 2398.

Because the MPCA applied the correct legal standard, this Court must find that Relators’ argument is simply based on a false premise and affirm the MPCA.

B. Relators Err In Asserting That The Clean Water Act Amendments Changed The Applicable Standard For Approval Of 401 Certifications.

The MPCA finds that there is no meaningful distinction between the standard articulated in the rule (“reasonable assurance”) and the standard articulated in the statute (“will comply”) when viewed in the context of court review of administrative agency decisions under the Administrative Procedures Act, Minn. Stat. ch. 14. Any action taken by the MPCA must be supported by “substantial evidence” given the record in the matter. *See* Minn. Stat. § 14.69 (an agency decision that is “unsupported by substantial evidence in view of the entire record as submitted” may be overturned). As interpreted by the courts, if there is “substantial evidence” supporting an MPCA decision, it must be upheld. *In re American Iron and Supply Co.*, 604 N.W.2d 140, 149 (Minn. Ct. App. 2000).

Similarly, if there is a “reasonable assurance” that the action will result in the given standard being met – as stated in the 401 Certification – MPCA’s action must be upheld.

Although Congress amended 33 U.S.C. § 1341 as Relators point out, Relators have submitted no other proof that Congress intended any radical change to the basis on which states would certify federal actions. The remaining portions of the statute suggest otherwise. Although Congress did modify the first paragraph of 33 U.S.C. § 1341 to remove the “reasonable assurance” language, the “reasonable assurance” language remains in the statute in other places. Paragraph 3, for example, notes that a state, after having received notice of changes to a previously certified facility, can notify the federal agency that “there is no longer *reasonable assurance* that there will be compliance. . . .” See 33 U.S.C. § 1341(a)(3) (emphasis added). Similarly, in paragraph 4, the statute notes that a state can review the manner in which a facility or activity will be operated (if not governed by a federal operating license or permit) to ensure that conditions are being met. See 33 U.S.C. § 1341(a)(4). If the certifying state notifies the Administrator that the operation will violate applicable effluent limitations, and the license or permit is suspended, “it shall remain suspended until notification is received from the certifying State . . . that there is *reasonable assurance* that such facility or activity will not violate the applicable provisions. . . .” 33 U.S.C. § 1341(a)(4) (emphasis added). The fact that Congress left the “reasonable assurance” language intact suggests strongly that Congress did not intend for a dramatically different standard to be applied when it modified the statute in a manner that removed the phrase in the initial sentences.

Relators have failed to establish that Congress intended a significant change in the basis for 401 Certifications, or that it changed the standard of review under the Administrative Procedures Act. As a result, the MPCA finds that its rule (and 40 CFR § 121.2) is adequate and that its 401 certification is not legally deficient.

II. REASONABLE EVIDENCE SUPPORTS THE MPCA'S DECISION TO ISSUE A CONDITIONAL 401 CERTIFICATION.

A. Deference Is Appropriate When An Agency Is Beginning To Implement A Regulatory Program.

As this record reflects in many places, shipping has been an important and essential part of the Great Lakes economy for literally hundreds of years. Rec. 1792-1889, 1890, 1895, 1920, 1921-1922, 1961-1962, 1969-1971. However, the U.S. EPA's and the MPCA's ballast water regulatory program is still in its infancy. Prior to 2008, when states (including the State of Minnesota and other interested parties) sued to protect the environment from such discharges – largely due to AIS – the federal government believed discharges from ships were exempt from regulation under the Clean Water Act. *Nw. Envtl. Advocates v. EPA*, No. C 03-05760 SI, 2005 WL 756614, at *8-9 (N.D. Cal. Mar. 30, 2005) (unpublished opinion, reproduced in Respondent's Appendix at RA5 - RA15), *aff'd*, 537 F.3d 1006 (9th Cir. 2008). Further litigation was required to establish that states had the right to regulate in this area. *Fednav, Ltd. v. Chester*, 505 F. Supp. 2d 381 (E.D. Mich. 2007), *aff'd*, 547 F.3d 607 (6th Cir. 2008) (Michigan ballast statute). Minnesota's statute calling for plans to address ballast water was enacted in 2008, and is currently codified as Minn. Stat. § 115.1701-.1707 (2010). The MPCA's first permit to regulate ballast water discharges was issued a mere four years ago.

This case involves considerations very similar to those posed to this Court in the case brought by Relator MCEA in response to MPCA's ballast water permit, and thus, that case should be viewed here as a controlling precedent, due to the substantial similarity of the permitting decisions at issue. *Ballast Water Permit Decision*, 769 N.W.2d 312 (Minn. Ct. App. 2009). In the *Ballast Water Permit Decision*, this Court recognized that deference is appropriate when the MPCA is addressing a subject – ballast-water discharge – that was not previously subject to regulation in Minnesota. *Id.* at 321. This Court also found reasonable MPCA's conclusion “that adopting more stringent standards, in the absence of technology to meet those standards, would ‘not result in meaningful protection for Minnesota's aquatic environment.’” *Id.* at 324. This Court was mindful of the factors – also present in this matter – that MPCA considered in arriving at its regulatory decision, including: “(1) the need to develop technology to meet the IMO standards; (2) the need to verify the effectiveness of such technology in freshwater conditions; (3) the need to develop a maintenance system for treatment technology; and (4) the need for existing vessels to go into dry dock for installation of treatment technology.” *Id.* The Court found reasonable MPCA's conclusion that “implementation will be an ongoing process,” which is certainly true of the present case. *Id.* Finally, the Court recognized in the *Ballast Water Permit Case* what must certainly be true for this case as well: “water quality will not be maintained and improved by the adoption of treatment standards and an implementation schedule that are unachievable.” *Id.*

This Court should follow its holding in the *Ballast Water Permit Case*. This Court should not “reweigh policy determinations that require an agency's technical knowledge or experience.” *Id.* at 324 (citing *Annandale*, 731 N.W.2d at 523). This Court should agree that it is not its role “to decide among policy choices or to second-guess the reasonableness of an agency's decision, given the broad authority afforded MPCA in its development of water-quality programs.” *Id.*

B. Nothing In Law Requires The MPCA To Include A Numeric “WQBEL” In Conditions In Its 401 Certification.

In its 401 Certification, MPCA included conditions necessary to meet its water quality standards. In this appeal, Relators argue that the MPCA was legally required to include a numeric “water quality-based effluent limit” or WQBEL in the 401 Certification, citing Minn. R. 7053.0205, subp. 8 and cases decided under federal law. Rel. Br. at 25.

Relators err in their interpretation of state and federal law. Neither Minn. R. 7053.0205, subp. 8 nor other state or federal law requires the MPCA to include a particular type of limit in a permit. Instead, MPCA includes the limit that, based on the record, will best achieve compliance given the individual circumstances of the permit.

The MPCA’s general authority to impose permit conditions is found at Minn. R. 7001.1080, subp. 2. This rule directs the commissioner to “establish effluent limitations, standards, or prohibitions for each pollutant to be discharged from each outfall or discharge point of the permitted facility.” In determining the appropriate effluent limitations, standards, or prohibitions, the rule provides the commissioner with

many options. In particular, the rule directs the commissioner to consider “technology-based effluent limitations, standards, or prohibitions and effluent limitation guidelines that apply to the permittee” and “effluent standards or limitations applicable to the permittee promulgated by the Environmental Protection Agency.” Minn. R. 7001.1080, subp. 2. The rule also provides the following:

Subp. 3. Best management practices. If the commissioner finds that it is not feasible to establish an effluent limitation, standard, or prohibition using a numerical value, the commissioner shall establish permit conditions requiring the implementation by the permittee of best management practices. The commissioner may also require implementation of best management practices if the commissioner finds that this requirement is necessary to achieve compliance with an effluent limitation, standard, or prohibition or to comply with Minnesota or federal statutes or rules, including requirements for the control of toxic pollutants and hazardous substances from ancillary activities.

Minn. R. 7001.1080, subp. 3. Federal law is not to the contrary. See 40 CFR 122.44(k)(3) (best management practices authorized when numeric effluent limitations are infeasible). These provisions make clear that the commissioner is not required to impose a numeric water quality based effluent limitation. The state rule cited by Relators – Minn. R. 7053.0205 – is not to the contrary. Minn. R. 7053.0205, subp. 8 provides:

Notwithstanding parts 7053.0235 and 7053.0245, the agency *may require* a specific discharger to meet effluent limits for specific pollutants or whole effluent toxicity that are necessary to maintain the water quality of the receiving water at the standards established in chapters 7050 and 7052, including the nondegradation requirements contained in those chapters. Any effluent limit *determined to be necessary* under this subpart and part 7053.0235 may only be required of a discharger after the discharger has been given notice of the specific effluent limits and an opportunity for public hearing, provided that compliance with the requirements of chapter 7001 regarding notice of national pollutant discharge elimination system

and state disposal system permits satisfies the notice and opportunity for hearing requirements of this subpart.

Minn. R. 7053.0205, subp. 8 (2011) (emphasis added). As the italicized language makes clear, the MPCA is not “required” to include a numeric water quality based effluent limit in any permit. The MPCA includes such a limit only when one has been “determined to be necessary.”

The cases cited by Relators do not support their arguments. In fact, *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999) notes only the contradictions in authority with regard to whether a permit for municipal storm water discharges must take into account practicability, and does not hold that practicability has no place. *Id.* In fact, for the purposes of the authority governing municipal storm water, the 9th Circuit held that practicability was to be considered. *Id.* at 1166. *Ackels v. U.S. E.P.A.*, 7 F.3d 862 (9th Cir. 1993), also does not provide much help for the Relators’ point. In that case, the court stated (without citation) that economic and technological restraints were not a “valid consideration” due to the requirements of *state law*, but also determined that EPA “correctly established a direct effluent limitation for turbidity” and that “there were technologies capable of meeting the turbidity limitation.” *Id.* at 865. Finally, *NRDC, Inc. v. U.S. E.P.A.*, 859 F.2d 156 (D.C. Ct. of Appeals 1988) only determined, in the face of a broad challenge to the power of the U.S. EPA to exercise oversight over state permitting determinations, that the U.S. EPA had the authority to disapprove permits based on a state judgment as to whether a “particular permit meets the technology based standards.” *Id.* at 210. The case does not hold, as Relators assert, that either the U.S. EPA or a state

cannot issue a permit based on a determination about the availability of technologies. In fact, the court notes that the U.S. EPA Administrator can approve permits on “best professional judgment.” *Id.*

A case that is more on point is the case that mandated the U.S. EPA to begin regulation of ballast water discharges, *Northwest Environmental Advocates v. U.S. E.P.A.*, No. C 03-05760 SI, 2006 WL 2669042 (N.D. Cal., Sept. 18, 2006) (unpublished opinion, reproduced in Respondent’s Appendix at RA16 - RA27). In that case, the Court determined:

In addition, the CWA adopts a flexible approach to controlling water pollution, allowing EPA to adjust its regulations as new technologies appear and existing technologies are improved. Indeed, the CWA requires that EPA base its pollution limitations on the “best available technology economically achievable.” 33 U.S.C. § 1311(b)(2)(A). Moreover, the requirement that NPDES permits last only five years serves to ensure that permits evolve to reflect advances in technology. See 33 U.S.C. § 1342(b)(1)(B) (NPDES permits “are for fixed terms not exceeding five years”); 33 U.S.C. § 1342(b)(1)(A) (NPDES permits must apply the “best available technology” requirement of 33 U.S.C. § 1311). Thus, the Court believes that EPA has the tools at its disposal to comply with the September 30, 2008, deadline.

Id., *aff’d* by *Northwest Environmental Advocates v. U.S. E.P.A.*, 537 F.2d. 1006 (9th Cir. 2008). Given the profound difference between AIS and conventional pollutants, it is not surprising that a flexible approach would be required. See *Citizens Coal Council v. U.S. E.P.A.*, 447 F.3d 879, 895 (6th Cir. 2006) (the Clean Water Act does not require the EPA to set numeric limits where such limits are infeasible).

Here, the MPCA reasonably determined that, given the lack of scientific information regarding what concentration of organisms (or a particular species of

organism) would protect the quality of the water from an invasion, it would not be reasonable to include a numeric WQBEL as a condition of its 401 Certification, but that other limits could be included. Rec. 2393. Substantial evidence on the record supports this determination. See Rec. 0123-0257. In fact, although Relators call for a numeric WQBEL, *they do not propose one nor did they submit any evidence into the record that would provide the scientific basis for such a limit.* In fact, the Relators appear to admit that such a limit is not feasible at this time, given all the factors that affect invasions. Rel. Br. at 36.

It makes no sense for the MPCA to impose a numeric WQBEL that can neither be scientifically defended, met nor enforced. State and federal law give the MPCA flexibility to incorporate limits in a permit that will attain water quality standards. *In the Matter of the Alexandria Lakes Area Sanitary District NPDES/SDS Permit No. MN0040738*, 763 N.W.2d 303, 311-12 (Minn. 2009) (citing *Am. Paper Inst., Inc. v. U.S. EPA*, 996 F.2d 346, 351 (D.C. Cir. 1993) for the proposition that an agency has flexibility to develop effluent limits in a permit). The Court should therefore affirm the MPCA's decision not to include such a numeric WQBEL limit at this time. The Court should find reasonable MPCA's decision to require compliance with the IMO D-2 standard and other conditions that will ensure discharges comply with Minnesota's water quality standards.

C. The MPCA's Decision That The Conditions In The 401 Certification, Taken Together, Will Result In Compliance With State Water Quality Standards Is Supported By Substantial Evidence In The Record And Should Be Affirmed.

The MPCA required federal permittees to comply with numerous separate conditions as part of its 401 Certification. These conditions included the treatment requirement and other requirements in the ballast water permit, “exchange and flushing” for Salties originating beyond the Exclusive Economic Zone, compliance with emergency orders relative for “high risk” ballast waters, monitoring requirements (including the option to design a study) and “best management practices” for Lakers, control of biocides, and compliance with state regulations, in particular Minn. Stat. § 115.1703, which requires Lakers to have an MPCA-approved ballast water management plan designed to minimize the discharge of invasive species. *See* Minn. Stat. § 115.1703.

In their brief, Relators complain that certain conditions that the MPCA included in the 401 Certification are inadequate to prevent a new AIS from becoming established and therefore that the 401 certification is defective because no condition is 100 percent guaranteed to be effective. Relators err for two reasons. Relators err because the record supports the MPCA's conclusion that the conditions – taken together – will result in compliance with state water quality standards. Relators also err because they assume that the law requires that measures taken to ensure compliance with state water quality conditions be “100 percent” guaranteed. No such guarantee is required by law because no such guarantee can be provided by science. All water quality effluent limits are based on scientific understanding of water conditions and how the particular parameters of the

discharge will affect those conditions. The U.S. EPA and the MPCA are specifically allowed to apply “best professional judgment” in determining what effluent limits will be effective in achieving the desired result. *See* 40 CFR 125.3(c)(2) (to the extent that EPA-promulgated effluent limitations are inapplicable). As a result, Relators’ argument that the 401 Certification is deficient because it does not “guarantee” compliance with state water quality rules fails. So long as substantial evidence on the record supports MPCA’s conclusion that, taken together, the measures will assure compliance, the 401 Certification must be affirmed.

- 1. Because this Court has previously affirmed the MPCA’s ballast water permit, reasonable evidence supports the MPCA’s decision to issue the 401 Certification with a condition requiring compliance with the ballast water permit.**

In 2009, this Court affirmed a decision of the MPCA to issue a ballast water SDS permit to govern the discharge of ballast water in Minnesota waters against a challenge by Relator Minnesota Center for Environmental Advocacy (MCEA). *See Ballast Water Permit Case*, 769 N.W.2d 312 (Minn. Ct. App. 2009). The MPCA’s ballast water SDS permit required compliance with the IMO D-2 standard based on MPCA’s conclusion that the treatment system technology necessary to meet the IMO limits would be available according to the schedule established in the permit.⁶ The MPCA ballast water SDS permit applied this treatment system requirement to both “Salties” and “Lakers” and

⁶ Many commentators on the 401 Certification, including authoritative commentators familiar with the status of the treatment systems, have since testified to the MPCA that the schedule may be problematic due to the time it will take the treatment systems to pass the rigorous Coast Guard “type approval” process. Tr. 81-83 (testimony of Gary Croot, former Chief of the Environmental Standards Division at Coast Guard headquarters).

in addition required adherence to “best management practices” and other terms and conditions. Rec. 1- 20.

In its 401 Certification, the MPCA had the opportunity to include conditions as necessary to ensure compliance with state water quality standards. First and foremost of the conditions, the MPCA included compliance with the ballast water SDS permit. Relators now complain that this condition is not adequate to protect state water quality. However, because the MPCA’s ballast water SDS permit has already been affirmed and found adequate by this Court in the *Ballast Water Permit Case*, this Court should find that reasonable evidence supports the MPCA’s decision to issue the 401 Certification on that basis. *See Ballast Water Permit Case*, 769 N.W.2d 312 (Minn. Ct. App. 2009).

2. The condition requiring ballast water exchange, in combination with the other conditions included in the 401 Certification, will ensure compliance with Minnesota’s water quality standards.

MPCA’s 401 Certification included conditions requiring “exchange and flushing”⁷ for voyages originating beyond the Exclusive Economic Zone (EEZ). Rec. 2404. Information in the record supports the conclusion that this requirement has been effective in reducing the number of AIS that have become established in the Great Lakes. Rec. 2404-2405. While the MPCA noted that the scientific evidence has yet to be “numerically defined,” there is evidence that the ballast water exchange has reduced invasions. Tr. 48.

⁷ Vessels must exchange ballast water collected in port (where organisms are more likely to be found) with ballast water collected more than 200 nautical miles from shore, where organisms are less likely to be found, in order to reduce the number of organisms that would be present in ballast water when that ballast water is discharged. Rec. 2404.

Relators assert that the ballast water exchange “is not enough” to reasonably assure compliance with water quality standards. In support of this claim, Relators distort what their expert, Dr. Cohen, has stated. Relators claim that Dr. Cohen has stated that “ballast water exchange. . . will [not] help meet IMO or more stringent limits. . .”. Relators make this claim by adding, in brackets, a “not” to his statement. Rel. Br. at. 49. What Dr. Cohen actually states – without Relators’ addition – is the contrary. Dr. Cohen acknowledges that a ballast water exchange, “when properly done, may be expected to reduce the concentration of the *original* organisms in the water column by perhaps 80-90%,” although he goes on to note that this reduction would not necessarily meet the IMO standard in all cases. Rec. 2352 ¶ 40. Dr. Cohen’s concern is that the *new* ballast water taken up in the exchange may itself contain new organisms, depending on the concentration of organisms in the exchange water and other factors. Rec. 2353; Cohen Aff. ¶ 41.

Relators cannot win this case by distorting the record. The evidence in the record supports the fact that mid-oceanic ballast water exchange, if done correctly in an area where reduced numbers of organisms would be expected to be present, will help to reduce the population of potential AIS in ballast water. Rec. 2113-2114. As a result, the MPCA’s decision to include this condition in the 401 Certification is supported by the record and should not be overturned by this Court.

3. The condition providing for management of high-risk ballast water is reasonable, and, in combination with other conditions included in the 401 Certification, will ensure compliance with Minnesota's water quality standards.

When a vessel enters Minnesota waters, it is required by the Minnesota ballast water permit to provide a "Ballast Water Report" to the MPCA at least 24 hours prior to arrival at a port within Minnesota State waters of Lake Superior. Rec. 0007; Tr. 67. By law, the vessel is required to maintain a "ballast water record book in which each operation of the vessel involving ballast water or sediment discharge is recorded." Minn. Stat. § 115.1705 (2010). Based on the information in the report, the MPCA may conclude that the vessel has picked up ballast water in an area where there is an "outbreak" of a known AIS, and is therefore "high risk" for spreading that AIS to a Minnesota port. Tr. 41. As a result, the MPCA included, as a condition in its 401 Certification, the authority to require the vessel discharge "to occur in a particular area, or require emergency treatment" of any "high risk" ballast water. Rec. 2407-2408.

In their brief, Relators complain that "nothing in this condition even purports to reasonably assure compliance with Minnesota water quality standards." Rel. Br. at 50. Relators are in error. As the record reflects, scientific evidence supports a conclusion that a higher level of "propagules" in ballast water may, in general, increase the risk of a population of an AIS becoming established. Rec. 0138. Relators' own expert, Dr. Andrew Cohen, does not disagree. Rec. 2340 ¶ 19 ("in general, propagule pressure appears to dominate over other characteristics in determining whether an invasion will become established"). Thus, it is hard to determine how Relators came to the conclusion

that requiring treatment or a different discharge location for a “high risk” ballast discharge will *not* (in combination with the other requirements established by the 401 Certification) assure the preservation of Minnesota’s water quality. Because substantial information in the record supports MPCA’s decision to require emergency treatment or alternative discharge locations, this Court should affirm MPCA’s decision to issue the 401 Certification.

4. **The conditions providing for best management practices for Lakers, in combination with other conditions included in the 401 Certification, will ensure compliance with Minnesota’s water quality standards.**

As discussed above at II.B, the MPCA has the authority to use “best management practices” as a method of regulation. Minn. R. 7001.1080, subp. 3 (2011). The ballast water statute, Minn. Stat. § 115.1703, requires each vessel to “conduct all ballast water management operations according to a ballast water management plan that is designed to minimize the discharge of invasive species.” Minn. Stat. § 115.1703, subd. 1 (2010). The MPCA’s 401 Certification requires that Lakers follow the following “best management practices:”

- a. Annually inspect and replace, as necessary, ballast sea chest screens. Replace screens with the smallest opening allowed by good engineering practice. Inspections must be documented by log entry, diver’s report, video report, dry-docking report, marine inspection note, or surveyor’s report.

- b. During cargo operations (while accounting for boom list, hull stress, and bending moments), lighten the ship as much as practical to elevate water intakes before ballasting to minimize sediment uptake and increase water flow.

c. Ballast water taken aboard shall be the minimum needed to ensure the safety of the crew and vessel. Additional ballast water can be taken aboard, once deeper water is reached.

d. Ballast water shall always be taken aboard or discharge via the pumps and never “gravity fed or drained.” This ensures an organism that somehow makes it past the screen is pulverized by the high speed, high pressure, and tight tolerance pump.

The record supports that the MPCA reasonably concluded that these measures, in combination with the other 401 Certification conditions, will protect the water quality of the State. Rec. 2409. The MPCA heard testimony that, since Lakers began to use these practices, one species, the “Eurasian Ruffe,” has not spread significantly from the point of infestation in Lake Superior. In the view of one industry representative, this shows that the “best management practices” are effective. Tr. 70. The MPCA does not disagree, and this Court should not second-guess the MPCA’s conclusion. Rec. 2391, Finding 10.

In their brief, Relators complain that MPCA’s conclusion that the “best management practices” condition will reduce the risk of the spread of AIS is “unsupported by relevant evidence.” Rel. Br. at 52. However, in view of the evidence in the record cited above, it is Relators’ viewpoint that is unsupported. As a result, the Court should affirm the MPCA’s determination that this condition, in conjunction with the other conditions required, will maintain the quality of Minnesota’s water.

5. The condition requiring monitoring, in combination with other conditions included in the 401 Certification, will ensure compliance with Minnesota's water quality standards.

The 2013 VGPs only require biological monitoring for certain “indicator” bacteria. Rec. 0348. This requirement is applicable only to vessels required to install treatment under the 2013 VGPs. In contrast, the MPCA required all vessels – including Lakers – to sample and conduct biological analyses of the ballast water discharge for virtually all classes of species defined in the IMO D-2 standard at least once a year, using whatever method is most advanced and available. Rec. 2410-2411. In response to a question from an MPCA Board member, the MPCA staff noted that collecting a representative sample from a ballast tank is a “pretty complicated process” and that vessels will need to get retrofitted with sampling equipment. Tr. 119-120. Nevertheless, the MPCA imposed the requirement because, in the words of a staff witness, “[i]f there’s one thing that’s really, really lacking right now is really any good solid scientific data around the threat and how far we need to go to control the spread of invasive species.” Tr. 120.

In their brief, Relators mysteriously characterize the monitoring requirements as “an absence of monitoring requirements,” citing to their own comments. Rel. Br. at 53. While it is true that the monitoring requirements do not require the permittees to determine compliance with a numeric WQBEL that Relators desired (but did not specify), this makes sense because the MPCA has determined it lacks the data to establish such a limit. Instead, the MPCA has sensibly required the federal permittees subject to

the 401 Certification to collect the data upon which a future standard could be based. The MPCA's approach is reasonable, and should be affirmed.

D. Reasonable Evidence In The Record Supports The MPCA's Decision Not To Include The Conditions That Relators Sought.

Relators here have argued that the MPCA should include a numeric water quality based effluent limit, and monitoring requirements based on that limit. Relators argument is deficient, however, because Relators do not suggest what that limit should be.⁸ As discussed above, the record reflects that the scientific information and technology to implement that limit has yet to be invented. *See* Statement of Facts, pp. 5-6 above. As a result, the MPCA reasonably concluded that any decision to require such a limit at this time would not likely survive an industry challenge.

Testimony submitted by Appellant's expert, Dr. Andrew Cohen, is not to the contrary. Rec. 2329 -2373. In his Affidavit, Dr. Cohen admits the following:

1. Efforts to predict the occurrence of effects of biological invasions have not achieved great success. Rec. 2339.
2. Even supposing there were a ballast water sampling program that identified the species in a ship's discharge, and even gave us complete and perfect knowledge of which species and how many individuals of each species were in a discharge (which is more than any sampling program can produce), we would still not be able to reliably predict whether any of the species will become established. Rec. 2341.
3. To conduct such comprehensive sampling on all arriving vessels or discharges in the Great Lakes would be an enormous and almost certainly impossible undertaking. Rec. 2344.

⁸ Had Relator's sought a contested case hearing under Minn. R. 7001.0190, the MPCA would have had grounds to dismiss that request for failure to identify what limit should be imposed. *See* Minn. R. 7000.1800, subp. 2, item A(2).

4. [I]n some invasions in the Great Lakes where ballast water is considered a possible vector, it will not be possible to show that it is the sole possible vector. Even where that can be shown, we will not be able to determine the source ship for an invasion based on sampling of biota in ballast tanks or ballast discharges, because sampling would have to be so comprehensive that it could show with adequate certainty that all other candidate ships were not carrying the organism, which is well beyond any monitoring required by the EPA's Proposed Vessel General Permit and probably beyond our capabilities. Rec. 2344.

5. [T]hat it would be unlikely or impossible, even with reasonable and feasible modifications, for these [shipboard treatment systems] to meet more stringent standards with concentration limits that are one hundredth of the limits in the IMO standard (EPA Science Advisory Board 2011). Rec. 2355.

Dr. Cohen concludes by noting that “with current scientific knowledge the only way we can be sure of preventing additional harmful invasions from ballast water is to prevent the release of any non-native organisms in ballast water.” Rec. 2353 ¶ 42. However, as Dr. Cohen previously noted, there are no treatment systems that can achieve that at this time. Rec. 2355.

To adopt Relators' proposed conditions would be an exercise in futility. As discussed above at II.B, the Clean Water Act does not compel futility. The MPCA must act reasonably in its establishment of permit conditions, and is allowed to make “scientific and policy judgments” in determining an appropriate effluent limit. *In The Matter Of The Alexandria Lake Area Sanitary District NPDES/SDS Permit No. MN0040738*, 763 N.W.2d 303, 314 (Minn. 2009). Unrealistic limits are not required by the Clean Water Act regulatory scheme. *Id.* As this Court noted in its decision on the MPCA's ballast water permit in 2009, “MPCA reasonably concluded that adopting more stringent standards, in the absence of technology to meet those standards, would “not

result in meaningful protection for Minnesota's aquatic environment.” *Ballast Water Permit Case*, 769 N.W.2d 312, 324 (Minn. Ct. App. 2009). The MPCA must have some evidence that the treatment standard will be reasonably achievable in order to impose it in a permit. *Id.* As this Court has previously noted:

It is not our role to reweigh policy determinations that require an agency's technical knowledge or experience. *See Annandale*, 731 N.W.2d at 523. It is likewise not our role to decide among policy choices or to second-guess the reasonableness of an agency's decision, given the broad authority afforded MPCA in its development of water-quality programs. *Id.* at 524. MPCA did not err in its adoption of water-treatment standards and a timeline for implementation of those standards.

Id. at 325. Boiled down, the Relators ask this Court to overturn the MPCA's technical and scientific judgment about what is effective. Under the applicable standard of review, this Court should summarily dismiss Relators' contentions.

CONCLUSION

Substantial evidence supports the MPCA's determination to issue a conditional 401 Certification with regard to the proposed 2013 VGPs. The MPCA's determination is supported by the state of the science and the technology related to control of AIS in ballast water. Relators have failed to meet the burden of showing that the MPCA has acted arbitrarily or that the applicable law requires a different result. Although they claim a different standard is compelled by law and this record, Relators fail even to identify that standard for the Court.

Dated: October 19, 2012

Respectfully submitted,

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