

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

**BRIEF OF INTERVENOR-RESPONDENT
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STATEMENT OF LEGAL ISSUES

1. **Did the Minnesota Pollution Control Agency make a determination that the discharges covered by the Clean Water Act 401 Certification will comply with Minnesota's water quality standards, as required by state and federal law?**

Relators raised this issue in the comments they submitted to the agency on its draft 401 Certification and to the Citizens' Board. (Rel. A. 12-13; Rel. A. 24-31.)

The agency properly determined, as required by the Clean Water Act and state and federal regulations, that the 401 Certification complied with Minnesota's water quality standards.

Most Apposite Authority: 33 U.S.C. § 1341(a)(1), (d) (2006); Minn. Stat. § 14.69 (2011); 40 C.F.R. § 121.2(a)(3) (2012); 40 C.F.R. § 124.53(a), (e) (2012); Minn. R. 7001.1450, subp. 1(A) (2011); Minn. R. 7001.1470, subp. 1(C) (2011).

2. **Was the Minnesota Pollution Control Agency's determination that the 401 Certification conditions will ensure compliance with Minnesota's water quality standards arbitrary, capricious or unsupported by substantial evidence?**

Relators raised this issue in the comments they submitted to the agency on its draft 401 Certification. (Rel. A. 19-22.)

In determining that the technology-based effluent limits, monitoring requirements, best management practices, and other restrictions required by the 401 Certification assured compliance with Minnesota's state water quality standards, the agency relied on substantial evidence and did not act in an arbitrary or capricious manner.

Most Apposite Authority: 33 U.S.C. § 1341(a), (d) (2006); Minn. Stat. § 14.69 (2011); *In re Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738*, 763 N.W.2d 303 (Minn. 2009); *In re Request for Issuance of SDS Gen. Permit MNG300000*, 769 N.W.2d 312 (Minn. App. 2009); *Minn. Ctr. for Env'tl. Advocacy v. MPCA*, 660 N.W.2d 427 (Minn. App. 2003); Minn. R. 7001.1450, subp. 1(A); Minn. R. 7001.1470, subp. 1(C), subp. 2; Minn. R. 7001.1080, subp. 2-9 (2011).

STATEMENT OF THE CASE

On December 8, 2011, the U.S. Environmental Protection Agency (“EPA”) proposed to issue a Vessel General Permit (“VGP”) to regulate discharges incidental to the normal operation of commercial shipping vessels, including discharges of ballast water. *See* Draft Pollutant Discharge Elimination Sys. (NPDES) Gen. Permits for Discharges Incidental to the Normal Operation of a Vessel, 76 Fed. Reg. 76,716 (proposed Dec. 8, 2011). As required by Clean Water Act section 401, 33 U.S.C. § 1341 (2006), EPA asked the Minnesota Pollution Control Agency (“MPCA”) to certify that the proposed VGP complied with Minnesota’s water quality standards (hereinafter the “401 Certification”). (R. at 319, Letter Requesting Certification at 1-2.)

On May 7, 2012, MPCA published a draft 401 Certification and gave public notice of an opportunity to submit comments. (R. at 818, Draft 401 Certification at 1-2.) Intervenor-Respondent Lake Carriers’ Association (“LCA”) timely submitted comments on May 24, 2012, and submitted an additional comment on August 22, 2012. (R. A. at 33-41.) Relators filed three comment letters, on May 26, 2012, August 20, 2012, and August 21, 2012, respectively. (Rel. A. at 1, 24; R. at 2329, Relators’ Third Comment on the 401 Certification at 1-2.) The final comment submitted by Natural Resources Defense Council contained the affidavit of Andrew N. Cohen (“Cohen Affidavit”), which Relators rely on throughout their brief (R. at 2331, Cohen Aff. 1-42.)

On August 29, 2012, Commissioner Stine, Chair of the MPCA Citizens’ Board, signed the Findings of Fact, Conclusions of Law, and Order approving MPCA’s 401

Certification for the proposed VGP. (Rel. Add. 1-12.) On September 7, 2012, MPCA submitted a letter to EPA, which constituted the 401 Certification for the proposed VGP. (R.A. at 43.)

On September 14, 2012, Relators initiated this appeal by filing a petition for writ of certiorari for review of MPCA's decision. *Petition for Writ of Certiorari, In re Decision on the Approval for Submittal of 401 Water Quality Certification to the U.S. EPA for the Draft 2013 Vessel Gen. Permit & the Draft 2013 Small Vessel Gen. Permit*, No. A12-1661 (Minn. App. Sept. 14, 2012). On the same date, this Court issued a writ of certiorari. *Writ of Certiorari, id.*, No. A12-1661 (Minn. App. Sept. 14, 2012). On October 17, 2012, the Court entered an order permitting LCA to intervene in the appeal. *Order Granting Lake Carriers' Ass'n's Motion to Intervene, id.*, No. A12-1661 (Minn. App. Oct. 17, 2012).

STATEMENT OF FACTS

The Lake Carriers' Association ("LCA") represents seventeen American companies that operate fifty-seven U.S.-flag vessels on the Great Lakes. These vessels operate exclusively on the Great Lakes, and are therefore known as "Lakers" (as opposed to "Salties," which are ocean going vessels). (R.A. at 33.) These Lakers carry the raw materials that help drive the nation's economy, including iron ore from Minnesota's Mesabi Range, coal for power generation, limestone and cement for construction, and grain for domestic millers. (R.A. at 33.) The cargos carried by LCA members generate and sustain more than 103,000 jobs in the United States, including 4,309 in Minnesota alone, and have an economic impact of more than \$20 billion on the U.S. economy. (R.A. at 33.)

The other relevant facts in this case relate to the existence of certain species in the Great Lakes, the potential impact of invasive species on the aquatic ecosystem, and the procedural history of the 401 Certification. LCA agrees that protecting the aquatic ecosystem of the Great Lakes from invasive species is important, and LCA and its members have been working for decades to combat the threats posed by invasive species.

(T. 69.) As just one example, LCA and its members developed many of the Best Management Practices that have been subsequently adopted by the U.S. Environmental Protection Agency ("EPA") and other regulators. (T. 70.) Notwithstanding the many measures taken by regulatory agencies and the shipping industry to control invasive species, Relators' characterize the facts to suggest that invasive species represent an

ongoing or imminent violation of water quality standards. This characterization is flawed, unsupported by the record, and more properly addressed in legal argument.

Because the issues raised in this case will require the Court to navigate a complex statutory and regulatory framework, LCA summarize the necessary legal context for these issues. As the following sections explain, this case involves an uncommon circumstance in which the EPA and Minnesota share permitting authority over discharges regulated by the Clean Water Act. Accordingly, each agency has issued permits to authorize and regulate the discharge of ballast water in the state. Minnesota issued a State Discharge System (“SDS”) permit, pursuant to state law, and EPA issued a Vessel General Permit (“VGP”), pursuant to federal law. To implement the VGP, however, EPA was required to seek confirmation from the state (i.e., a “401 Certification”) that the VGP would comply with Minnesota’s water quality standards. It is the issuance of this state confirmation is this subject of this appeal.

LEGAL FRAMEWORK

The Clean Water Act (“CWA”)’s novel approach to the regulation of water pollution was to prohibit all discharges into waters of the United States, except pursuant to a permit. 33 U.S.C. § 1311(a) (2006). Most discharges are permitted under the National Pollution Discharge Elimination System (“NPDES”). *Id.* § 1342. Congress initially authorized EPA to issue NPDES permits, but required EPA to delegate this authority to each state as soon as the state established a sufficient permitting program in compliance with the CWA. *See id.* § 1342(a)-(b). Once a state NPDES program is

approved, EPA must suspend its own program. *Id.* § 1342(c)(1); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007). In some instances, however, EPA retains a limited authority to issue certain NPDES permits instead of the “delegated” state. This case involves one such occurrence.

Water quality standards form the backbone of the NPDES permitting process. Section 303 of the CWA empowers the states to establish and enforce water quality standards for waters within the state. *See* 33 U.S.C. § 1313. These standards serve two primary purposes under the CWA: first, to establish the specific “fishable/swimmable” goals for each waterbody; and second, to provide a basis for permitting decisions. *See* Water Quality Standards Regulation, 48 Fed. Reg. 51,400, 51,403 (Nov. 8, 1983) (codifying EPA’s water quality standards regulation). Congress gave states the primary authority to develop, review and periodically revise these water quality standards, and once approved by EPA, they are considered the “applicable” standards in the state. 33 U.S.C. § 1313; 40 C.F.R. § 131.4 (2012).

In general, there are two types of water quality standards. Numeric standards limit the amount of specified contaminants and are expressed as specific numeric limitations (e.g., “no more than 5 mg/l chlorine”). Narrative standards, by contrast, are a textual standard (e.g., “the ecosystem shall not be degraded:”). Unlike numeric standards, narrative standards are inherently subjective, and require interpretation by the relevant state. *See* 40 C.F.R. § 122.44(d)(1)(vi); Minn. R. 7001.1080, subp. 3-9. A state’s interpretation of its narrative standards trumps any competing federal interpretation, so

long as the state's interpretation is supported by substantial evidence. *Am. Paper Inst., Inc. v. U.S. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993).

A state's water quality standards are used to determine whether to issue a NPDES permit. The issuing agency must ensure that the permit complies with the Clean Water Act, including the state's water quality standards. 33 U.S.C. § 1342(a); 40 C.F.R. §§ 122.4; 123.25. This requirement is the same whether the issuing agency is the state or EPA. 40 C.F.R. §§ 122.4(d); 123.25(a)(1). To ensure that the permit complies with the water quality standards, the issuing agency assesses the need for applicable conditions, including technology-based effluent limits, water quality-based effluent limits, best management practices, monitoring requirements, and other conditions. *See id.* §§ 122.44, 123.25.

Technology-based effluent limits ("TBELs") represent the greatest pollutant reductions that are economically achievable. If imposed, a NPDES permit will establish permit conditions based on the performance of that best available technology. *See* 40 C.F.R. § 122.44(a)(1); Minn. R. 7001.1080, subd. 2. The second type of effluent limits, water quality-based effluent limits ("WQBELs"), are measures that the permitting agency determines are necessary to ensure compliance with a numeric or narrative water quality standard. *See* 40 C.F.R. § 122.44(d); Minn. R. 7001.1080, subd. 2(B)(3); Nat'l Pollutant Discharge Elimination Sys., 54 Fed. Reg. 23,868, 23,876 (June 2, 1989). Both types of effluent limits may be expressed through numeric limits, or through other means. *See* 40 C.F.R. § 122.44; Minn. R. 7001.1080, subd. 2-3.

An agency may also require best management practices (“BMPs”), monitoring requirements, or other conditions the agency deems necessary to ensure compliance with the CWA and the state’s water quality standards. 40 C.F.R. § 144(i), (k). The state (or EPA, if it is the issuing agency) is prohibited from issuing a NPDES permit if these limits and conditions could not “ensure compliance with the applicable water quality requirements.” 40 C.F.R. § 122.4(d); *see* 33 U.S.C. § 1342(a); 40 C.F.R. § 122.43(a), 123.25.

If EPA is the permitting authority, as in this case, the state still retains the primary authority to determine compliance with its water quality standards. CWA Section 401 requires EPA to obtain a “401 Certification” from the state, determining that the discharges at issue will comply with the state’s water quality standards. 33 U.S.C. § 1341; *U.S. EPA Vessel Gen. Permit for Discharges Incidental to the Normal Operation of Commercial Vessels*, No. A08-2196, 2009 WL 2998058, at *1 (Minn. App. Sept. 22, 2009) (unpublished) (“No federal permit authorizing discharge into navigable waters can be issued without the state certifying that the resulting discharges will comply with applicable water-quality standards.”); 40 C.F.R. §§ 122.4(b), 124.53(a), (e); Minn. R. 7001.1450. Having vested states with the primary authority to develop water quality standards, Congress also vested states with the primary authority to certify whether federal permitting decisions are consistent with those standards. *See* 33 U.S.C. § 1341; *Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 234-35 (S.D. Ala. 1976) (“[C]ertification under Section 401 is set up as an exclusive prerogative of the state”); *see also Lake*

Erie Alliance for the Prot. of the Coastal Corridor v. U.S. Army Corps of Eng'rs, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981), *aff'd*, 707 F.2d 1392 (3d Cir. 1981) (unpublished table decision).

REGULATORY AND PROCEDURAL BACKGROUND

Vessels in Minnesota waters have long been subject to extensive and complex federal and state regulation of ballast water. At the federal level, both the U.S. Coast Guard and EPA regulate ballast water. The Coast Guard requires vessels to implement a ballast water management system, numeric TBELs, BMPs, monitoring and reporting, and exchange and flushing requirements for Salties. 33 C.F.R. §§ 151.1500-1518, 2000-2080. The numeric TBELs imposed by the Coast Guard regulations are derived from the treatment standards developed by the International Maritime Organization (“IMO”). *Id.* § 151.1511. The Coast Guard’s numeric TBEL standards, which apply only to Salties, limit the number of biological organisms that a ship may discharge, based on the type and size of organisms. *Id.*

EPA’s regulations have long excluded ballast water from the CWA requirement to obtain a NPDES permit. *See* 40 C.F.R. § 122.3(a). In 2006, however, the U.S. District Court for the Northern District of California vacated this exclusion. *Nw. Env'tl. Advocates v. U.S. EPA*, No. C 03-05760, 2006 WL 2669042 (N.D. Cal. Sept. 18, 2006), *aff'd*, 537 F.3d 1006 (9th Cir. 2008). Once this ruling went into effect, discharges of ballast water would be prohibited without a NPDES permit. *See* 33 U.S.C. § 1311(a). As a result,

MPCA and EPA each began to develop permits to authorize ballast water discharges. (T. 5-6.)

EPA ultimately concluded that it was the only agency with authority under the CWA to issue a NPDES permit regulating ballast water. (T. 6.) Before EPA acted on this conclusion, however, MPCA proceeded with issuance of a State Disposal System (“SDS”) permit for ballast water based on its independent determination that it had the authority under Minn. Stat. §§ 115.03, subd. 1(e), 115.07 (2008), and Minn. R. 7001.0030 (2007). (T. 6.)

Minnesota’s SDS permit, issued on September, 24 2008, includes numeric TBELs, a narrative WQBEL, BMPs, biocide usage requirements, a Ballast Water and Sediment Management Plan, a Ballast Water Treatment Schedule, and monitoring requirements. (R. at 1, SDS Permit at 2-8.) Like the Coast Guard, MPCA relied on the IMO’s treatment standards as a numeric TBEL after MPCA staff concluded that the IMO standards were the most stringent treatment standards that would be technologically available during the term of the permit. *See In re Request for Issuance of the SDS Gen. Permit MNG300000*, 769 N.W.2d 312 (Minn. App. 2009). Significantly, for the first time in any state or federal regulation, the SDS permit required existing Lakers to comply with the numeric TBELs. (R. at 1, SDS Permit at 2, 5.)

EPA issued a Vessel General Permit (“VGP”) a few months later, which was a NPDES general permit under the CWA, applicable to all discharges incidental to the normal operation of vessels. Draft Nat’l Pollutant Discharge Elimination Sys. (NPDES)

Gen. Permit for Discharges Incidental to the Normal Operation of a Vessel, 73 Fed. Reg. 79,493 (Dec. 29, 2008). Notably, the VGP did not include numeric TBELs. (T. 7.) As a federal permit, this first VGP required, and received, a 401 Certification from MPCA in 2009. 33 U.S.C. § 1341(a). LCA submitted comments, and participated in the regulatory development of the SDS, the VGP, and the 401 Certification.¹ [R. A. _____] As a result of these regulatory actions, both the EPA NPDES permit and the MPCA SDS permit currently govern ballast water discharges in Minnesota.

Consistent with the issuance of the first VGP and the ongoing efforts to improve ballast water management, EPA and the Coast Guard commissioned the Water Science and Technology Board of the National Research Council (which is within the National Academies of Science (“NAS”)) to study and provide technical advice on the possibility of implementing numeric limits to reduce the risk of invasive species. (R. at 123, NAS Study at 7-8.) To complement the NAS study, EPA’s Office of Water requested that EPA’s Science Advisory Board (“SAB”) provide guidance on existing ballast water treatment systems and how they might be improved in the future. (R. at 2013, SAB Study at 1.)

The MPCA’s SDS permit and 401 Certification were both challenged in 2009 in this Court. Relator Minnesota Center for Environmental Advocacy appealed the issuance of the SDS permit, alleging, among other things, that there was not a sufficient

¹ LCA’s Appendix contains all of its comments relating to the VGP and the 401 Certification, some of which were inadvertently omitted from the administrative record.

justification for the TBELs chosen by MPCA. This Court determined that MPCA's decisions were supported by substantial evidence and not arbitrary and capricious, and affirmed the issuance of the SDS permit. *In re Request for Issuance*, 769 N.W.2d at 324-25.

Similarly, after MPCA issued the 401 Certification, Relators National Wildlife Federation and Minnesota Conservation Federal appealed the 401 Certification. This Court dismissed that challenge as moot, because federal regulations prohibited MPCA or the Court from adding conditions to the VGP after the permit had been issued. *U.S. EPA Vessel Gen. Permit*, 2009 WL 2998058, at *3-4.

The first VGP itself was also challenged in federal court, in March 2009. The resulting 2011 settlement required EPA to issue a *new* VGP by November 30, 2012 that incorporated numeric TBELs for ballast water discharges, among other requirements (hereinafter, "2013 VGP"). (R. 459, VGP Fact Sheet at 15.) LCA again submitted comments and participated in the development of the new 2013 VGP. (R.A. at 1.)

In December 2011, EPA issued the draft 2013 VGP, which is the basis of this appeal. (R. 319, Letter Requesting Certification, at 1-2.) The draft 2013 VGP contains many new limitations, including numeric TBELs consistent with IMO standards, BMPs, exchange and flushing requirements for Salties, interim WQBELs, monitoring requirements, and additional requirements for specific types of vessels. (R. at 321, Draft 2013 VGP at 23-40, 54, 59-67.) EPA's proposed 2013 VGP applies to all vessel discharges from all commercial and large recreational vehicles, but excludes Lakers

constructed before January 2009 from compliance with the numeric TBELs for ballast water discharges. (R. at 321, Draft 2013 VGP at 23.)

As with the previous VGP, the new 2013 VGP required the states to issue a 401 Certification, determining that the authorized discharges would comply with the individual states water quality standards. All of the Great Lakes states have issued a 401 Certification. (See R.A. at 808, Wisconsin 401 Certification at 1.) During the development of these 401 Certifications, LCA submitted comments and provided guidance to the relevant state agencies.

On September 7, 2012, MPCA issued its 401 Certification of the 2013 VGP, imposing additional conditions beyond the extensive limitations already incorporated in the 2013 VGP so as to assure compliance with Minnesota's water quality standards. (R.A. at 43-54.) These additional state conditions include compliance with the SDS permit (which has already been upheld by this Court), exchange and flushing requirements for Salties, emergency control of ballast water discharge, specific BMPs for Lakers, monitoring requirements, and state regulations requiring a Ballast Water Management Plan. (R.A. at 44-45.)

Relators petitioned this Court for a writ of certiorari on September 14, 2012, seeking reversal of MPCA's 401 Certification for the 2013 VGP. *Petition for Writ of Certiorari, In re Decision on the Approval for Submittal of a 401 Water Quality Certification to the U.S. EPA for the Draft 2013 Vessel Gen. Permit & the Draft 2013 Small Vessel Gen. Permit*, A12-1661 (Minn. App. Sept. 14, 2012). The Court permitted

LCA to intervene by order of October 17, 2012. Order Granting Lake Carriers' Ass'n's Motion to Intervene, *id.*, No. A12-1661 (Minn. App. Oct. 17, 2012).

ARGUMENT

I. STANDARD OF REVIEW

Final decisions of MPCA are reviewed under the Minnesota Administrative Procedure Act (“MAPA”), Minn. Stat. § 14.63-.69. *See id.* at § 115.05, subd. 11. Section 14.69 of MAPA provides that a reviewing court is limited to determining whether the agency decision is:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; 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.

Id. § 14.69; *Minn. Ctr. for Env. Advocacy v. MPCA*, 660 N.W.2d 427, 433 (Minn. App. 2003).

The Relator has the burden of proof when challenging an agency decision. *Country Liquors, Inc. v. City Council*, 264 N.W.2d 821, 824 (Minn. 1978); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977); *Markwardt v. Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977) (interpreting Minn. Stat. § 15.0425, which is currently codified at § 14.69). “[D]ecisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education,

and experience.” *Reserve Mining*, 256 N.W.2d at 824; see *In re Review of the 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils.*, 768 N.W.2d 112, 119 (Minn. 2009). The agency decision-maker is presumed to have the expertise necessary to decide technical matters within the scope of the agency's authority. *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 515 (Minn. 2007) (“[W]hen determining whether to defer to an agency, we will consider that agency's expertise and special knowledge.”); *In re Special Instruction & Servs. for Pautz*, 295 N.W.2d 635, 637 (Minn. 1980);

An “agency's conclusions are not arbitrary and capricious so long as a rational connection between the facts found and the choice made has been articulated.” *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001) (internal quotation marks omitted). If there is room for two opinions on the matter, the agency's decision to accept one over another is not arbitrary and capricious. *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 565 (Minn. App. 2001).

II. IN COMPLIANCE WITH THE CWA, MPCA DETERMINED THAT THE VGP, AS MODIFIED BY THE 401 CERTIFICATION, WILL COMPLY WITH MINNESOTA’S WATER QUALITY STANDARDS

Section 401 of the Clean Water Act requires Minnesota to certify that any discharges into state waters that are authorized by a federal permit will comply with Minnesota’s water quality standards and applicable effluent limits. Specifically, Section 401(a)(1) provides:

Any applicant for a Federal license or permit to . . . discharge into the navigable waters, shall provide . . . a certification

from the State in which the discharge originates or will originate . . . that any such discharge **will comply** with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. § 1341(a) (emphasis added). EPA's regulations add that "[u]nder CWA section 401(a)(1), EPA may not issue a permit until a certification is granted or waived in accordance with that section." 40 C.F.R. § 124.53(a); *see id.* § 122.4(a), (d).

Section 401 of the CWA and EPA's regulations also require Minnesota to include in the 401 Certification any "[c]onditions which are **necessary to assure compliance** with" Minnesota's water quality standards, any applicable effluent limits, and "appropriate requirements of State law." *Id.* § 124.53(e)(1) (emphasis added). Once added to the 401 Certification, these conditions become a condition of the federal permit at issue; in this case the VGP. 33 U.S.C. § 1341(d).

Minnesota has designated the MPCA as the agency required to evaluate the proposed discharge and issue 401 Certifications. *See* Minn. Stat. § 115.03, subd. 5. Consistent with federal law, MPCA's regulations require MPCA to make a determination that the discharge at issue, as modified by the 401 Certification, will comply with Minnesota's water quality standards and applicable effluent limitations. Specifically, MPCA may only issue a 401 Certification:

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, subp. 1(A) (emphasis added). This “will comply” determination is also required by the section of MPCA’s regulations relied on by Relators. *See* Minn. R. 7001.1470, subp. 1(D), subp. 2 (requiring compliance with Minn. R. 7001.0150 and Minn. R. 7001.1080, each of which require conditions necessary to comply with the state’s water quality standards); (R. at 25, 38.) Accordingly, provisions of the Clean Water Act, federal regulations and Minnesota’s regulations all require MPCA to make a determination that the discharges authorized by the VGP, as modified by the conditions in the 401 Certification, will comply with Minnesota’s water quality standards and applicable effluent limits. *See U.S. EPA Vessel Gen. Permit*, 2009 WL 2998058, at *1 (“No federal permit authorizing discharge into navigable waters can be issued without the state certifying that the resulting discharges will comply with applicable water-quality standards . . .”).

Pursuant to this statutory and regulatory responsibility, MPCA expressly made the required determination. In MPCA’s Findings of Fact, Conclusions of Law, and Order (Aug, 29, 2012), which was the administrative decision approving the issuance of the 401 Certification, MPCA stated:

The MPCA finds 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.

(Rel. Add. 9). (emphasis added).² As a result of this determination, MPCA was authorized to issue the 401 Certification for the VGP, which MPCA did in its letter to EPA on September 7, 2012. (R. A. at 43-44.)

The Certification letter is subject to independent federal and state procedural requirements that guide the form and words used in a 401 Certification. Most relevant to Relators' argument is the requirement, which is nearly identical in both state and federal regulation, that a 401 Certification include:

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.

40 C.F.R. § 121.2(a)(3) (emphasis added); *see* Minn. R. 7001.1470, subp. 1(C). Pursuant to this federal and state requirement, MPCA added the following statement to its Certification letter to EPA: "Minnesota certifies there is a reasonable assurance that discharges from vessels covered by the 2013 VGP . . . will comply with the applicable" water quality standards. (R. A. at 44.)

² During the hearing on the 401 Certification, in which the MPCA board approved the 401 Certification, one board member commented: "all we're doing today is certifying whether or not the EPA's proposed permit complies with current Minnesota law." (T. 25). At the same meeting, the MPCA staff member charged with presenting the 401 Certification, stated that the purpose of the 401 Certification was "to certify to EPA that the permits that they have developed are consistent with Minnesota's laws, statutes, and rules." (T. 26). Counsel for MPCA added: "This agency must find, before it issues a permit, that the permittee will comply with both federal and state law. There is no question about this. That is the standard that this agency must use in approving 401 certifications and other permits, that the permittee will comply with federal and state law." (T. 45).

A. Relators' Wrongly Contend That the 401 Certification Does Not "Assure" Compliance With Minnesota's Water Quality Standards

Relators' contend throughout their opening brief that MPCA only determined that the VGP, as modified by the conditions imposed by 401 Certification, would "reasonably assure" compliance with Minnesota's water quality standards. (Rel. 26, 37, 39, 44, 46, 48-50, 52, 53.) According to Relators, this determination was an error of law because the standard found in the CWA requires MPCA to determine that the VGP, as modified by the Conditions in the 401 Certification, will "assure" such compliance. (Rel. 26-38.)

As explained above, Relators' claim is legally and factually incorrect. Both state and federal law required MPCA to determine that the discharges authorized by the VGP, as modified by the conditions in the 401 Certification, "will comply" with Minnesota's water quality standards and applicable effluent limits. Consistent with these requirements, MPCA indisputably made precisely that finding. (Rel. Add. 9). Relators have not explained how this determination that the discharges "will comply" with Minnesota's water quality standards and effluent limits does not also "assure" such compliance. MPCA did not rely on the supposedly lesser standard of "reasonably assure." Rather, MPCA took the very action Relators' claim to seek in this appeal.

1. Section 401(d) of the Clean Water Act Only Requires *Monitoring* Necessary to "Assure" That the VGP Will Comply With Any Effluent Limitations and Other Limitations

Relator's brief relies almost exclusively on a misreading of the applicable legal requirements and misunderstanding of the factual determinations made by MPCA. The section of the Clean Water Act that Relators cite – 33 U.S.C. § 1341(d) – does not require

that MPCA's 401 Certification will "assure" compliance with Minnesota's water quality standards. (Rel. 21, 26-27). Rather, the section relied on by Relators uses the term "assure" only with respect to the type of monitoring to be included in a 401 Certification.

Section 401(d) of the Clean Water Act, 33 U.S.C. § 1341(d), states, in full:

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and **monitoring requirements necessary to assure that** any applicant for a Federal license or permit **will comply with any applicable effluent limitations and other limitations**, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. § 1341(d) (emphasis added). While this section authorizes MPCA to include in the 401 Certification additional effluent limitations and other conditions pursuant to state water quality standards, it does not require that these additional discretionary elements "assure" anything. 33 U.S.C. 1341(d); *PUD No. 1 of Jefferson Cnty v. Wash. Dep't of Ecology*, 511 U.S. 700, 713 (1994) ("[Section] 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity"). Relators, however, attempt to read more into section 401(d) by claiming that it *requires* effluent limits and other limitations that assure compliance with water quality standards. (Rel. 26-27). This claim is a distortion of the plain language of the statute.

Interpretation of a statute begins with the statute's plain language. *Goodman v. Best Buy, Inc.*, 777 N.W.2d 755, 759 n. 3 (Minn. 2010). As the plain language of the statute establishes, the “assure” requirement is not something the “Certification” or “effluent limits” must do, as alleged by Relators. Instead, the “assure” is specifically and solely tied to the monitoring requirements that might be included in the 401 Certification. In short, section 401(d) calls for effluent limits and other limits, and *monitoring requirements that assure compliance* with those limits. 33 U.S.C. § 1341(d). If Relator’s expanded view of the statute were accurate, section 401(d) would require “effluent limitations and other limitations . . . necessary to assure [compliance with] . . . effluent limitations and other limitations.” This circular interpretation has no meaning, and must therefore be rejected. *Id.*

Moreover, the “assure” in section 401(d) refers to the compliance of the *applicant*, not the compliance of the *discharge* at issue. *Compare id., with id.* § 1341(a). This distinction is important because an effluent limit assures that a discharge complies with water quality standard, but a monitoring requirement assures that the *applicant* complies with the effluent limit. Thus, Congress’s deliberate choice to use the language “assure that any applicant” means that “assure” refers to the type of monitoring requirements.

At various points in their brief, Relators attempt to divert the Court from the issue by selectively quoting from Section 401(d). For example, on page 27 of their brief, Relators explain that:

§ 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 statute [*sic*] law. 33 U.S.C. § 1341(d).

(Rel. 27). This selective quote misrepresents section 401(d) by suggesting that “assure” relates to “any effluent limitations.” (Rel. 26-27). The quote advances this tactic through the use of grammatical imprecision – excluding the commas surrounding the monitoring requirements section, including the use of “assure.” By doing so, Relators make it seem as if the section calls for effluent limitations *and* monitoring requirements that “assure.” When one adds the commas back in, the plain language of the section and the rules of grammar establish that the “assure” refers exclusively to the type of monitoring.

2. Legislative History Provides No Support for Relators’ Interpretation of Section 401(d)

Relators attempt to give significance to the supposed difference between “assure” and “reasonable assurance” by claiming that the “assure” found in section 401(d) replaced the use of “reasonable assurance” in an earlier Congressional enactment. (Rel. 27-30) (“Section 21(b) of the Federal Water Pollution Control Act of 1970 was the predecessor of CWA § 401 [referring to 401(d)]”). Relators later admit, however, that this statement is not true because this section of the CWA was not based on a previous federal law. Specifically, on page 30 of their brief, Relators claim that their interpretation is “bolstered by Congress’s creation of subsection (d) of CWA § 401, **which was wholly new and had no analogue in § 21(b).**” (Rel. 30) (emphasis added). Because 401(d) was wholly new and had no analogue in § 21(b), Relators’ entire statutory history argument is irrelevant.

Relators further acknowledge that the federal regulation that requires a 401 Certification to include a statement with the words “reasonable assurance” was re-designated at least twice by EPA. (Rel. 32-33 (citing Prot. of the Env’t, 37 Fed. Reg. 21,441 (Oct. 9, 1971) and Nat’l Pollutant Discharge Elimination Sys.; Revision of Regulations, 44 Fed. Reg. 32,854, 32,856 (June 7, 1979)).) Relators dismiss these re-designations as irrelevant because they did not “purport” to reinterpret section 401 of the Clean Water Act. The regulatory change in 1979, however, also included changes to the 401 Certification requirement for EPA-issued NPDES permits, and EPA did not use this opportunity to make any changes to the “reasonable assurance” language. This change is therefore highly relevant to this case, in which EPA issued a NPDES permit, and Relators have challenged the resulting 401 Certification.

More specifically, the 1979 federal register notice dedicates two entire columns to explaining how the regulations require a state’s determination that the federal NPDES permit “will comply” with state and federal law, including the state’s water quality standards. *See* Nat’l Pollutant Discharge Elimination Sys.; Revision of Regulations, 44 Fed. Reg. at 32,880 (“A state will now be required to identify those provisions which it finds **necessary to comply** with applicable State or Federal law”; “[C]ertifications have not always clearly stated exactly what conditions are **necessary to comply** with State law”; “The final regulations remedy these problems by requiring States to set forth in all cases the minimum terms and conditions which will be **necessary to comply** with applicable law.”) (emphasis added). As explained above, this standard is the precise one

imposed by both state and federal law. Therefore, EPA appears to have been well aware of the legal requirements for 401 Certifications, notwithstanding EPA's use of "reasonable assurance" in the regulation relied on by Relators.

B. Even If "Reasonable Assurance" Were the Standard Applied by EPA and MPCA, That Interpretation Is Due Deference

Even if the Court were to assume, for the sake of argument, that MPCA only made a finding of "reasonable assurance," Relators' argument would remain unpersuasive because this interpretation is entitled to substantial deference. "[W]hen the relevant language of the regulation is unclear or susceptible to different reasonable interpretations, ... [an appellate court] will give deference to the agency's interpretation and will generally uphold that interpretation if it is reasonable." *In re Request for Issuance*, 769 N.W.2d at 317; *In re Cities of Annandale & Maple Lake*, 731 N.W.2d at 515; *Resident v. Noot*, 305 N.W.2d 311, 312 (Minn. 1981) (citation omitted) (stating that courts generally defer to an agency's interpretation of its own rule "when the language subject to construction is so technical in nature that only a specialized agency has the experience and expertise needed to understand it, when the language is ambiguous or when the agency interpretation is one of long standing.").

The Findings of Fact and Conclusions of Law, and transcript of the MPCA Board Meeting both reveal MPCA's interpretation of its obligations. MPCA Board members, staff and counsel, all believed, based on the record before them, that the conditions imposed in the 401 Certification would ensure that the discharges authorized by the 2013 VGP would comply with the state's water quality standards. (T. 25-26, 45). There is no

equivocation about this position in these documents, and thus it is apparent that MPCA construed their obligation in a manner that resulted in a far stricter determination than mere “reasonable assurance.”

Moreover, this interpretation is also a technical determination that MPCA has the unique expertise to make. MPCA’s confidence regarding the effectiveness of effluent limits and other conditions, MPCA’s determinations regarding what sort of TBEL is required by the available technology, and MPCA findings about scientific understanding of invasive species all contribute to the determination of compliance with the state’s water quality standards. These are highly specialized conclusions about the degree of certainty necessary to comply with water quality standards. MPCA’s interpretation of the regulation in the context of the 401 Certification is therefore due substantial deference.

This interpretation is also due deference because it is longstanding. Relators admit that the regulations containing “reasonable assurance” have been in place for at least the last 40 years, during which time Minnesota has issued thousands of 401 Certifications. (Rel. 30) (describing the 1972 Clean Water Act, in contrast, as a “new national requirement”). Many other states also continue to describe their 401 Certifications as a statement of “reasonable assurance.” *See, e.g.*, Alaska Admin. Code tit. 18, §§ 15.180, 17.990 (2010) (Alaska); 7 Del. Admin. Code 7201-5.20.1 (2010) (Delaware); Haw. Code R. § 11-54-9.1.01(3) (Lexis Nexis 2009) (Hawaii); S.C. Code Ann. Regs. 61-101(a)(4) (2011) (South Carolina); (R. 1977, New York Certification, at 1) (relying on 40 C.F.R. § 121.2(a)(3)). Thus, for the last 40 years, Minnesota and many other states have been

submitting 401 Certifications to EPA, the U.S. Army Corps of Engineers and other federal agencies including this “reasonable assurance” language. And in doing so, these states have always been required by federal law to ensure that the discharges subject to the 401 Certification “will comply” with the state’s water quality standards. Relators argument, favoring style over substance, would effectively declare invalid every 401 Certification issued by any of these states over the course of the last 40 years.

III. MPCA’S DETERMINATION THAT THE CONDITIONS IN THE 401 CERTIFICATION WOULD ENSURE COMPLIANCE WITH WATER QUALITY STANDARDS WAS NOT ARBITRARY OR CAPRICIOUS AND WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

Deference to a state agency is appropriate when application of the regulation is “primarily factual and necessarily requires application of the agency’s technical knowledge and expertise to the facts presented,” *Minn. Ctr. for Env’tl. Advocacy v. MPCA*, 644 N.W.2d 457, 464 (Minn. 2002). A court will defer to MPCA’s expertise and uphold an agency’s decision “that it [is] not feasible to establish numerical effluent limitations [when] supported by evidence in the record.” *Minn. Ctr. for Env’tl. Advocacy*, 660 N.W.2d at 437. A court should defer to MPCA’s interpretation of the effluent limits needed to meet water quality standards. *In re Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738*, 763 N.W.2d 303, 311-12 (Minn. 2009).

MPCA included several conditions in its 401 Certification. While LCA may not agree with all of the particulars of these conditions, they are undoubtedly comprehensive, rigorous, and supported by substantial evidence in the record. Accordingly, nothing in the law or record supports overturning MPCA’s 401 Certification. MPCA’s choice of limits,

and determinations over their efficacy, are also supported by numerous scientific studies and are consistent with the actions of other state and federal regulators. Therefore, MPCA's determination that these conditions would ensure that discharges of ballast water authorized by the 2013 VGP would comply with Minnesota's water quality standards was not arbitrary or capricious and was supported by substantial evidence.

As discussed in detail below, the MPCA's conditions in the 401 Certification include compliance with, among other things,

- the Minnesota State Disposal System ("SDS") permit,
- exchange and flushing requirements for Salties,
- emergency control of ballast water discharge,
- specific BMPs for vessels operating exclusively within the Great Lakes,
- monitoring requirements, and
- state regulations requiring a Ballast Water Management Plan.

(R. A. 44-54.) The limits imposed by these permits and conditions include a combination of numeric TBELs, narrative WQBELs, BMPs, monitoring requirements and other conditions. As a result, Minnesota's ballast discharge requirements are, when viewed as a whole, the most expansive in the Great Lakes. (R.A. at 34.)

Throughout section V of their Brief, Relators argue that each of these conditions in isolation will not assure compliance with Minnesota's water quality standards and effluent limits. (Rel. 42-53). But they cite to no support for the proposition that each condition must individually assure compliance, and indeed no such support exists. MPCA's obligation was to include in the 401 Certification sufficient conditions to ensure

that, in addition to the requirements of the VGP, the discharges authorized by the VGP would comply with Minnesota's water quality standards. *See, e.g.*, 33 U.S.C. § 1341(a). MPCA has the discretion to include as many conditions as it deems necessary to make this determination. As the following sections explain, these conditions were supported by substantial evidence in the record. MPCA met its obligation as a matter of law.

A. Many of Relators Claims Fail Regardless of the Adequacy of MPCA's Action

For many if not all of the claims advanced by Relators, this Court need not, as a matter of law, examine the voluminous evidence in the record supporting MPCA's determinations. This conclusion is supported because: (1) Relators already challenged MPCA's decision regarding appropriate effluent limits, and (2) Relators' remaining claims rely on Relators' own presumption that invasive species necessarily violate Minnesota's water quality standards.

1. This Court Has Already Upheld MPCA's Determination to Include The IMO Standards and Exclude More Stringent Standards

Several years ago, Relator Minnesota Center for Environmental Advocacy ("MCEA") challenged the issuance of the SDS permit. *In re Request for Issuance*, 769 N.W.2d at 324. A few months later, Relators National Wildlife Federation and Minnesota Conservation Federation appealed the first 401 Certification issued for the first VGP. *U.S. EPA Vessel General Permit*, 2009 WL 2998058, at *3-4. In the meantime, aside from complying with the SDS, VGP and 401 Certification, the discharges of ballast water from vessels on the Great Lakes have not changed significantly. (Rel. Add. at 5.)

And yet, Relators are once again before this Court, this time appealing a 401 Certification for a VGP that together are unambiguously more stringent than the preceding regime.

This Court dismissed the challenge to the first 401 Certification as moot, but reached the merits of the challenge to the SDS permit. This previous determination regarding the SDS permit is important because condition 1 of the 401 Certification that is the subject of this case requires compliance with the SDS permit. That previous challenge therefore has legal implications for this appeal.

In the previous case, Relator MCEA specifically alleged that: “MPCA fail[ed] to identify evidence of a water quality-based rationale for rejecting more stringent performance standards than the IMO standards and for rejecting a shorter implementation timeline.” *In re Request for Issuance*, 769 N.W.2d at 324. The Court found that the record demonstrated substantial evidence for the MPCA’s determinations, and concluded:

In adopting water-treatment standards and a timeline for implementation of those standards, MPCA reasoned that water quality will not be maintained and improved by the adoption of treatment standards and an implementation schedule that are unachievable. MPCA's reasoning is sound. It is not our role to reweigh policy determinations that require an agency's technical knowledge or experience. 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. ***MPCA did not err in its adoption of water-treatment standards and a timeline for implementation of those standards.***

Id. (emphasis added) (citations omitted).

The legal doctrine of *res judicata* “precludes parties from raising subsequent claims in a second action, when the facts, issues, and parties are the same or similar; when the first action resulted in a final judgment on the merits; and when the estopped party had a full and fair opportunity to litigate the matter.” *Brown–Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 732 N.W.2d 209, 220 (Minn. 2007) (internal quotation marks omitted). The elements of collateral estoppel, or issue preclusion, are similar. *Nelson v. Am. Family Ins. Grp.*, 651 N.W.2d 499, 511 (Minn. 2002). The doctrines of *res judicata* and collateral estoppel preclude “subsequent claims in a second action” and inherently require a comparison of the current action to an earlier action in which a resolution has been reached. *See Brown–Wilbert, Inc.*, 732 N.W.2d at 220.

This Court has already made a determination as to the sufficiency of the SDS permit, after Relators had a full and fair opportunity to litigate the matter. Because the 401 Certification simply incorporates these standards, Relators’ claims that relate to the SDS permit are “subsequent claims in a second action.” Thus, these claims are precluded by the doctrines of *res judicata* and collateral estoppel.

2. Relators’ Declarations Regarding the Legal Status of Invasive Species and Minnesota’s Water Quality Standards Are Logically and Factually Untenable

At the outset of their brief, Relators declare that four different types of invasive species found in Minnesota waters violate the state’s narrative water quality standards. (Rel. 5-9). Relators make this claim despite the absence of any numeric water quality standard in Minnesota for invasive species. Instead, Relators can only refer to the

narrative standards, which are interpreted by MPCA in the first instance. Relators do not cite to any finding of MPCA or EPA regarding Relators' claimed water quality standard violations, and in fact cite to no authority whatsoever. Relators simply declare without any legal support that the water quality standards have been violated. Accordingly, to the extent Relators' arguments rely on a finding that the existence of invasive species will necessarily violate water quality standards, those arguments fail.

Relators go one step further in their argument that the 401 Certification condition prohibiting violations of the state's water quality standards is not "practical[ly] enforceab[le]." (Rel. 45-58.) According to Relators, this condition is not practically enforceable because it "presupposes that the vessel operator will know which species are in the ballast water and in what concentrations at the time of discharge." (Rel. 45). This argument is unpersuasive because it relies on circular reasoning.

No water quality standards applicable to individual species exist in Minnesota, and compliance with the 401 Certification conditions has nothing to do with the identity or quantity of an individual species. The biological performance standards apply to individual organisms, but only on the bases of size and quantity. Individual species are not discussed in any of the conditions. Thus, it appears that Relators are, in fact, "presuppos[ing]" that there are water quality standards and 401 Certification conditions applicable to individual species. Because none exist, Relators' attempt to create a new legal requirement must fail.

If Relators wish to establish a numeric water quality criteria designed to protect against invasive species, and believe that this represents the “latest scientific knowledge,” then Relators have three options, none of which can be accomplished through this appeal. First, Relators could persuade MPCA to change its water quality standards through a rulemaking. Second, Relators could urge EPA to evaluate the relevant scientific evidence and prepare a water quality criteria document under CWA Section 304(a), 33 U.S.C. 1314(a). Minnesota, in turn, could consider this document and any value identified therein and adopt, modify or reject it as part of the next scheduled review of its water quality standards. Third, Relators could pursue a change in law the next time Minnesota reviews its water quality standards. *See* 33 U.S.C. § 1313(c). Even if Relators could not convince Minnesota to adopt their proposed standard, they could then urge EPA to make a determination that Minnesota’s proposed water quality standards are deficient without this value. EPA could then issue a determination and propose replacement federal standards. *Id.* § 1313(c)(3)-(4). What Relators may not do is create their own water quality standard and then urge this Court to declare it has been violated.

B. MPCA’s Decision to Include Certain Effluent Limits and Not Others Was Not Arbitrary or Capricious and Was Supported by Substantial Evidence in the Record

In determining which effluent limits would ensure compliance with Minnesota’s water quality standards, MPCA followed its regulations and relied on substantial evidence in the record, scientific findings, and technical expertise. MPCA’s determinations were

not arbitrary or capricious, and were in fact supported by numerous scientific bodies and regulatory agencies.

When determining what terms and conditions to include in a 401 Certification, MPCA is guided by Minn. R. 7001.1080, subp. 2-9. *See* Minn. R. 7001.1470, subp. 2. These regulatory provisions direct MPCA to “consider . . . (1) technology-based effluent limitations [TBEL], standards, or prohibitions and effluent limitation guidelines that apply to the permittee; (2) effluent standards or limitations applicable to the permittee; promulgated by the Environmental Protection Agency . . . [and] (3) the applicable water quality standards.” *Id.* 7001.1080, subp. 2(B). The sole exception to this requirement is found in subpart 3, which provides that if MPCA “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.” *Id.* 7001.1080, subp. 3.

1. MPCA’s Determination That WQBELS Should Not Be Imposed Was Not Arbitrary Or Capricious And Was Supported By Substantial Evidence

While Relators’ Brief does not explain what conditions or effluent limits MPCA should have added to its 401 Certification, in their May 26, 2012 comments,³ Relators requested that MPCA add a numeric water quality-based effluent limit (“WQBEL”) for aquatic invasive species that will prevent the establishment or spread of new invasive

³ Relators were joined on the comments by Alliance for the Great Lakes, Clean Water Action – Minnesota, Great Lakes Committee of the Izaak Walton League of

species.⁴ (Rel. A. 4.) MPCA's determination that no such WQBEL was required was supported by substantial evidence.

As is explained further below, MPCA properly determined that it was appropriate to impose a numeric TBEL. (R. A. at 44-45.) MPCA declined to impose a numeric WQBEL, however, because it was "unable to conclusively determine a numeric standard which would definitively protect water quality." (R. 2401; 401 Certification, P. 3.) In the determination approving the 401 Certification, MPCA stated:

[A]fter careful review of the available data and studies completed to further define the threshold at which point the introduction of nonnative species impacts the quality of Waters of the State, MPCA and the DNR staff are unable to conclusively determine a numeric standard which would definitively protect water quality and an unaltered species composition of the ecosystem. This determination is consistent with the National Academies' National Research Council 2011 report Assessing the Relationship Between Propagule Pressure and Invasion Risk in Ballast Water. Therefore, a numeric WQBEL is not included in the final 401 certification.

(Rel. Add. 9). This decision was supported by substantial evidence, including the VGP report, and the National Academies of Science ("NAS") report; (R. at 459, VGP Fact Sheet at 129); (R at 123, NAS Study at 15). *See Minn. Ctr. for Env'tl. Advocacy*, 660

America, Minnesota Division – Izaak Walton League of America, and Minnesota Trout Unlimited. (Rel. A. 1.)

⁴ Relators actually provided five recommendations. One was the WQBEL requirement, one was the change to the Certification language that is discussed in Section II, *supra*, and the other three related to the application, timeline, and enforcement of the recommended WQBEL requirement. (Rel. A. 3-4.)

N.W.2d at 437 (upholding MPCA's determination that numerical effluent limitations were not feasible where MPCA relied on a statement by EPA).

Relators acknowledge that “the level of reduction in organism numbers necessary to assure compliance with water quality standards is not known to science.” (*E.g.*, Rel. 49.) If that is true, no known effluent limit would “prevent the introduction or spread of new aquatic non-indigenous species and the establishment or spread of new AIS.” (Rel. A. 4.) Accordingly, even if Relators were correct in their view of the state’s water quality standards, they have conceded that there is no scientific basis on which to rest a numeric WQBEL for invasive species.

MPCA concluded that additional conditions were necessary to meet applicable water quality standards, so it imposed BMPs to complement the TBEL. (R. A. at 44-54.) MPCA therefore followed Minn. R. 7001.1080 exactly. Upon a finding that it was not possible to establish a numeric WQBEL, it instead imposed BMPs to protect water quality. As explained further below, MPCA also required compliance with additional conditions, all of which were supported by substantial evidence.

Importantly, WQBELs are also not currently technologically possible. At the Federal level, both agencies which have jurisdiction over ballast water discharges – the EPA and the Coast Guard – have determined that there are presently no ballast water management systems (“BWMS”) available which can be installed and operate satisfactorily on Lakers. (R. A. at 36.) The states of Wisconsin, Ohio, New York, Indiana, Pennsylvania and Michigan have all reached the same conclusion as EPA and

MPCA. (R.A. at 36.) Both the Coast Guard and EPA have positively stated that when ballast water treatment systems become available for use on Lakers, the Federal agencies will draft regulations to require their use. (R. A. at 37.)

LCA's comments and testimony to MPCA during the regulatory process provides additional record evidence to support this conclusion. As LCA has explained, neither the current BWMS nor those under development would be effective for Lakers because of physical and logistical challenges unique to Laker vessels, including significantly higher flow rates, inadequate space for installation, short transit times, fresh water, and colder water temperature. (R. A. at 35-37.) First, almost all of the ballast water treatment systems that are undergoing development require a salt-water environment, not freshwater. (R.A. at 36.) Second, systems under development that require time for biocides or chemical processes to be effective will not work on short trips. Unlike ocean voyages, most Great Lakes voyages are less than three days and some are as short as six hours. Third, even the smallest Lakers typically have flow rates which are several times higher than their oceangoing counterparts. (R.A. at 36.) In the case of the "thousand footers," they have flow rates approaching 80,000 gallons per minute. (R.A. at 36.) There are simply no existing BWMS or any in development that have the capability to treat these extremely high flow rates on existing Lakers. (R.A. at 36-37.) And even if existing treatment systems could accommodate these flow rates, due to their layout, most existing Lakers cannot accommodate the physical footprint required. (R. A. at 36.)

Moreover, the BWMS under production will not work on Lakers for a variety of reasons. (R.A. at 36.)

2. The Biological/Numeric TBELs Included In the 401 Certification Are Supported By Substantial Evidence

The 401 Certification requires Salties and Lakers to comply with the following biological performance standards for ballast water treatment technology:

Biological Performance Standards for Ballast Water Treatment Technology			
<u>Parameter</u>	<u>Limit</u>	<u>Limit Type</u>	<u>Sample Type</u>
Organisms > 50 µm in minimum dimension	< 10 viable / m3	Daily average	Composite
Organisms 10-50 µm in minimum dimension	< 10 viable / ml	Daily average	Composite
Escherichia coliform	< 250 cfu / 100 ml	Daily average	Composite
Intestinal enterococci	< 100 cfu / 100 ml	Daily average	Composite

(R.A. at 44-45.)

These biological performance standards are identical to those required in the SDS Permit⁵, the VGP, and the Coast Guard Rule, and have been adopted from the International Maritime Organization D-2 ballast water discharge limits (“IMO D-2”). Moreover, Canada, Illinois, and Pennsylvania have also adopted these standards. (R. at

⁵ Although not at issue in this appeal, LCA notes here—as it did in the agency proceeding below—that it does not agree that all of the elements of the SDS permit are necessary, including MPCA’s determination that Lakers must be able to comply with these numeric TBELs by 2016. (R.A. at 43-54.) The SDS permit on which this 2016 deadline is based expires in 2013, and LCA intends to participate with MPCA and other stakeholders in the regulatory process to renew or otherwise adjust the SDS permit so that a workable solution addressing all pertinent considerations can be achieved,

68, Report from Great Lakes Meeting at 8.) The VGP regulates how vessels may meet these standards by providing four ballast water management measures that vessels may use, including a ballast water treatment system, onshore treatment, use of public water supply water, and no discharge. (R. at 321, Draft 2013 VGP at 26-35.)

These TBELs have been widely implemented because they are an effective way to ensure compliance with water quality standards. According to the record, MPCA adopted these standards because uniform limitations “will result in the soonest possible significant risk reduction of new invasive species introductions in Minnesota waters.” (R. at 794; MPCA’s Comments on Draft 2013 VGP at 1.) EPA included these TBELs in the VGP to “achieve significant reductions” in the number of AIS discharged via ballast water. (R. at 459, VGP Fact Sheet at 79). EPA found that these treatment technologies have “been shown to be safe, reliable and effective at reducing” invasive species, in addition to being commercially available and economically achievable. (R. 459, VGP Fact Sheet at 85.) The NAS report found that these TBELs will significantly reduce propagule pressure, which reduces the probability of AIS invasions. (R. at 123, NAS Study at 115). Further, the SAB report found that these numeric limitations are the most stringent standards ballcast water management systems can currently meet. (R. at 2013, SAB Report at 49-51.)

3. The Narrative WQBEL Included In the 401 Certification is Supported by Substantial Evidence

The 2013 VGP includes a narrative WQBEL applicable to all vessel discharges from Salties and Lakers regardless as to whether it is currently subject to a TBEL. (R. at

321, Draft 2013 VGP at 54). This WQBEL does not provide a specific limitation or metric; rather it simply requires that discharges be “controlled as necessary to meet applicable water quality standards.” (R. at 321, Draft 2013 VGP at 54). Although EPA expects the other limitations in the permit to assure compliance with water quality standards, EPA included this supplemental requirement to address situations where a reasonable potential of harm exists after application of those limitations or where other limitations do not apply. (R. at 459, VGP Fact Sheet at 135). EPA found this approach reasonable because it has found that calculating numeric WQBEL is infeasible at this time. (R. at 459, VGP Fact Sheet at 135.)

Relators’ argue in their brief that these standards alone are not enough to assure compliance with water quality standards, stating that even EPA admitted that “reasonable potential to cause or contribute to an exceedance of water quality standards exists.” (Rel. 43.) Relators take this comment out of context. This statement was not an admission that EPA’s standards were not stringent enough, as Relators’ suggest, but instead only an explanation as to why it imposed additional requirements in the 2013 VGP. (R. at 459, VGP Fact Sheet at 129). In other words, EPA recognized that further requirements were necessary to meet water quality standards, and so it imposed further requirements. (Rel. 43-44). This analysis is exactly the same point made by Relators’ expert, Dr. Cohen. (Rel. 43-44.) For the same reason, MPCA, like EPA, imposed more limitations in the SDS permit and in its 401 Certification.

Relators also cite Dr. Cohen for his belief that the standards derived from the IMO are insufficient because they do not limit the discharge of protists less than 10 micrometers. (Rel. 44.) As already explained, EPA recognized that the IMO standards were not enough to meet water quality standards, and so it imposed further requirements. Likewise, MPCA deemed it necessary to impose more limitations in the SDS permit and in its 401 Certification.

Finally, Relators cite Dr. Cohen's statement that the bacteria indicator in the IMO standards is not an indicator of total bacteria concentrations as evidence that the IMO standards will not meet water quality standards. (Rel. 44.) He states that the indicator bacteria has no relationship to the concentration of total bacteria. (R. at 2331, Cohen Affidavit at 41). Dr. Cohen does not cite any specific studies and provides no other support or explanation for this assertion. In the absence of evidence supporting this assertion, Relators' argument has no force. Even if Dr. Cohen's statement were true, the IMO standards are not the only standards incorporated. Rather, EPA and MPCA recognized that further standards were necessary, and so they implemented further standards.

C. **MPCA's Decision To Include Monitoring Requirements Was Not Arbitrary or Capricious And Was Supported by Substantial Evidence In The Record**

Minnesota's 401 Certification sets out different monitoring and reporting requirements to determine whether a vessel is complying with the IMO-D2 standards. According to the 401 Certification, vessels required to install treatment technology must

monitor ballast discharges using specific protocol to ensure compliance with IMO D-2 standards, and submit the results to the EPA and the MPCA annually. (R. A. at 52-53, Certification at 10). Vessels not required to install treatment technology must have the capacity to collect organism samples from ballast water discharges or complete a ballast discharge biological study using actual discharge data to submit to the EPA or MPCA upon request. (R. A. at 52.) New York required similar monitoring requirements in its 401 Certification. (R. 1977, New York Certification at 6).

Relators wrongly claim that the 401 Certification does not require monitoring of compliance with the SDS permit. (Rel. 53). They specifically argue the Certification does not have a monitoring requirement for compliance with the SDS permit's prohibition on discharges that violate state water quality standards. (Rel. 53). This argument is false. The 401 Certification requires compliance with the SDS permit, which in turn contains extensive monitoring requirements.

The SDS permit, which is incorporated into the VGP, contains extensive monitoring and reporting requirements to assure compliance with water quality standards. First, the SDS permit requires Salties and Lakers to have a Ballast Water and Sediment Management Plan, "updated to reflect current shipboard ballast water management practices that are designed to minimize the discharge of aquatic invasive species," including operation and maintenance procedures, actions to implement ballast water management requirements, ballast system fouling maintenance and sediment removal practices, disposal method for sediment solids, and reporting requirements for ports the

vessel may visit. (R. at 1, SDS Permit at 4). For vessels that must meet the IMO D-2 standards, it requires vessels to submit to the MPCA a Ballast Water Treatment Plan explaining how the vessel will meet the IMO D-2 standards and implementation schedule, including the treatment technology implemented, design summary for equipment, drawings of the location, documentation showing that the treatment technologies will meet standards and schedule, operating procedures, system specifications, sample port location and design, and the proposed schedule for implementation. (R. at 1, SDS Permit, at 5.) Additionally, all Salties and Lakers must maintain a ballast water log book that is available for inspection at MPCA's request, recording each ballast water or sediment discharge. (R. at 1, SDS Permit at 6.)

Additionally, the 401 Certification specifies additional monitoring requirements. As explained, these include requiring vessels required to comply with the IMO D-2 standards to monitor ballast discharges using specific protocol to ensure compliance with the IMO-D2 standards, and requiring vessels not yet required to comply with the IMO D-2 standards to have the capacity to collect organism samples from ballast water discharges or complete a ballast discharge biological study. (R. A. at 52-53.)

These extensive monitoring requirements provide MPCA with metrics to gauge whether vessels are complying with limits and other requirements. MPCA has stated that "monitoring requirements are needed to prevent impairment of waters." (R. A. at 53.) By using the data submitted from the monitoring requirements, MPCA can determine

whether vessels are complying with the state law prohibiting discharges of ballast water that violate state water quality standards.

The VGP contains additional monitoring and reporting requirements for vessels required to comply with the IMO D-2 standards. Vessel operators must monitor equipment performance, selected biological indicators, and ballast water discharge for biocides and residuals, and submit the records annually. (R. at 321, Draft 2013 VGP at 27-35.) EPA has explained that “[m]onitoring data on the efficacy of ballast water treatment technologies will help EPA and others understand whether the number of living organisms in discharges has been reduced [and] is needed to evaluate the long-term effectiveness of requirements for treatment of ballast water and other measures to reduce introduction of invasive species.” (R. at 459, VGP Fact Sheet at 91.) The VGP also requires all vessels to maintain a Ballast Water Management Plans. (R. at 321, Draft 2013 VGP at 25-26.) EPA requires these plans as “‘conditions to assure compliance’ with effluent limitations in the CWA.” (R. at 459, VGP Fact Sheet at 81.)

In addition, the Coast Guard Rule requires monitoring and reporting for Salties. Monitoring requirements include total ballast water information, Ballast Water Management Plan, information on ballast water tanks to be discharged, information regarding discharge of sediment. 33 C.F.R. § 151.1516, 2070. Vessel operators must report this information before arrival at port. *Id.* § 151.2060.

The IMO Convention requires a Ballast Water Management Plan as a monitoring mechanism. IMO, Int’l Convention for the Control and & Mgmt of Ships’ Ballast Water

& Sediments (BWM) (2004). The plan must contain detailed description of actions to implement Ballast Water Management requirements and practices, detailed procedures for disposal of sediments, and procedures for coordinating discharges with states into whose waters discharges will take place. IMO, BWM 2004. It also requires each vessel maintain a ballast water record book, in which the operator must record details of each ballast water discharge. IMO, BWM.

D. MPCA's Decision To Include Best Management Practices Was Not Arbitrary or Capricious And Was Supported by Substantial Evidence In The Record

1. The Best Management Practices ("BMPs") Included In The 401 Certification Are Supported By Substantial Evidence

The 401 Certification requires Lakers to follow specific BMPs. These BMPs include annual inspection and replacement if necessary of ballast sea chest screens, lightening the ship as much as practical during cargo operations to raise water intake before ballasting, taking aboard the minimum amount of ballast water necessary for safety, and taking aboard ballast water exclusively via the pumps. (R. A. at 50-52.) MPCA implemented these BMPs as an added measure to reduce the risk of new invasive species introductions. (R. 2177, Issue Statement at 9.) MPCA believed it was appropriate to include them in the 401 Certification because they reduce the risk of invasion and are immediately feasible and implementable. (R. at 2177, Issue Statement at 9.)

EPA requires Salties and Lakers to follow additional BMPs. The VGP permit requires Lakers and Salties to maintain a Ballast Water Management Plan. (R. 321, Draft 2013 VGP at 24.) The plan must outline the procedures for training the person in charge

of vessels with ballast water tanks who take part in the discharge on application of ballast water and treatment procedures, implementing practices to minimize or avoid the discharge or uptake in ballast waters in certain areas, cleaning ballast tanks, keeping discharge of sediments from cleaning tanks out of the waters, using certain suction when discharging ballast water in port, minimizing discharge, and maintaining a ballast management practice plan. (R. at 321, Draft 2013 VGP at 24-25.) The VGP also requires additional BMPs for Lakers, including annual inspections to assess sediment accumulations, minimizing the ballast water taken dockside, and annually inspecting vessel sea chest screens. (R. at 321, Draft 2013 VGP at 25-26.)

EPA added more BMPs to the 2013 VGP when the findings in the SAB report were released. In its report, SAB recommended EPA “adopt a risk-based approach . . . rather than relying solely on numeric standards.” (R. at 2013, SAB Report at 15.) It also recommended EPA give more attention to “integrated sets of practices and technologies” to improve ballast water management.” (R. at 2013, SAB Report at 2.) EPA chose to add additional BMPs that are “widely followed practices by the regulated community,” so they would be relatively easy to implement and economically achievable. (R. at 459, VGP Fact Sheet at 82.)

EPA explained that until more information is available, BMPs are a good alternative to numeric WQBELs, to assure water quality standards are met. (R. at 459, VGP Fact Sheet at 54.) For many of these BMPs, EPA uses the term “minimize,” meaning “to reduce and/or eliminate to the extent achievable using control measures . . .

that are technologically available and economically practicable and achievable in light of best marine practice.” (R. at 459, VGP Fact Sheet at 55.) EPA recognizes that using the term “minimize” provides a “reasonable approach” to determine appropriate control measures for vessels with varying needs for non-numeric controls. .” (R. 459; VGP Fact Sheet, 55). These controls are “effective pollution prevention controls.” .” (R. 459; VGP Fact Sheet, 55). In addition to being an effective means to meet water quality standards, EPA found the BMPs are desirable because they are technologically available, economically achievable, and they have acceptable environmental impacts unrelated to water quality. (R. 459; VGP Fact Sheet, 60).

Similarly, the Coast Guard Rule includes BMPs for Salties and Lakers. These BMPs include avoiding the discharge or uptake of ballast water in very sensitive marine areas, minimizing or avoiding uptake in specific areas that are likely to contain AIS, cleaning ballast tanks regularly to remove sediment mid-ocean or in port or at dry dock, discharging only the minimal amount of ballast water necessary, rinsing anchors and anchor chains, regularly removing fouling organisms from hull, piping, and tanks, maintaining a ballast water management plan developed specifically for the vessel, and training the operator on the application of ballast water and sediment management and treatment. 33 C.F.R. § 151.2050.

While Petitioners argue that NIS could be spread by Laker ballast water, there currently is no peer reviewed, scientific study or other evidence demonstrating that the

BMPs have not been effective. In the absence of any such evidence and in light of the substantial evidence in the record, this Court should defer to MPCA's judgment.

2. The 401 Certification's Requirement For Exchange And Flushing For Voyages Originating Beyond the Exclusive Economic Zone ("EEZ") Is Supported by Substantial Evidence

The 401 Certification prohibits Salties on voyages originating outside the EEZ from discharging ballast water in Minnesota waters unless "the vessel has conducted ballast water exchange or flushing beyond the EEZ, at least 200 nautical miles from any shore, and in water at least 2,000 meters in depth, while in ocean waters, resulting in a salinity level of at least 30 parts per trillion." (R.A. at 46-49.) Salties must comply with this requirement regardless of whether they are equipped with a ballast water treatment system. (R. A. at 46.)

MPCA added this condition "to provide reduction in organisms beyond the IMO D-2 standard." (R. A. at 47.) Thus, this requirement is "needed to prevent impairment of waters and to preserve such waters for their best usage." (R. A. at 4.) Canada also imposes this requirement. (R. at 1375, NCEA Report at 18.)

MPCA views this condition as an "interim WQBEL" because it requires operation of a treatment system that meets IMO D-2 standards in conjunction with exchange or flushing. (R. A. at 47.) This concept comes from the VGP, which calls for "[i]nterim requirements for vessels not meeting the ballast water management measures." (R. at 321, Draft 2013 VGP at 36.) The VGP Fact Sheet, 4.4.3.6 states that "EPA has found the following interim management measures for vessels not meeting the requirements of Part

2.2.3.5 of the VGP to be available, practicable and economically achievement.” (R. at 459; VGP Fact Sheet at 123.) Until a numeric WQBEL is implemented, this condition ensures compliance with state water quality standards. MPCA imposed this condition in part based on the established effectiveness of exchange and flushing alone, and in part based on research by Canada’s Department of Fisheries and Oceans on the combination of exchange and flushing and treatment. (R. A. at 47) (citing Canadian research). The study has not yet been published, but early results “are consistent with the goal of reducing propagule pressure . . . in order to achieve an invasion risk lower than would be achieved using ballast water treatment alone.” (R. A. at 47.) New York included this condition in its 401 Certification, citing this Canadian study as persuasive evidence of its effectiveness. (R. at 1984, New York Fact Sheet at 9-10.) The SAB report also cited this study for its potential reduction of risk. (R. at 2013, SAB Report at 104.)

EPA included in the VGP permit an exchange and flushing requirement for Salties. (VGP, R. 356.) EPA’s requirement is less restrictive than MPCA’s because this requirement only applies to Salties that must meet the IMO D-2 standards. (R. 321; Draft 2013 VGP, at 36). The Coast Guard Rule also requires exchange and flushing for Salties. 33 C.F.R. § 151.1510(a)(1). The IMO Convention contains the same requirement. IMO BWM.

Relators argue that the exchange and flushing requirements for Salties will not assure compliance with water quality standards. (Rel. 48). First, they assert that a Canadian study cited by MPCA as basis for this condition has no support in the record.

(Rel. 48). That is not true. The study was also discussed in New York's 401 Certification and the SAB report related to the effectiveness of exchange and flushing as a method to meet water quality standards. Further, this requirement is widely accepted—both the EPA and the Coast Guard, major national regulatory authorities, have required this practice—which supports its inclusion as one limitation among many in an overall plan to meet water quality standards.

Relators cite Dr. Cohen for the assertion that exchange and flushing combined with treatment will not help address organism concentrations. (Rel. 49). This conclusory statement by Dr. Cohen is not supported by the data he cites. In his affidavit, he discusses research showing that exchange does not always remove all organisms. (R. at 2331, Cohen Aff. 22). He does not cite any studies showing that the combination of flushing and treatment will, like he asserts, not help address organism concentrations.

Relators also cite as evidence statements by the SAB and MPCA that the evidence is not definitive whether exchange and flushing will assure compliance with water quality standards. (Rel. 49). Again, Relators misunderstand the purpose of the Certification. Each limitation alone does not need to assure compliance; all the limitations imposed together must assure compliance. Further, the Court must afford MPCA deference. MPCA's reliance on these studies is reasonable given the support for this practice by the EPA, the Coast Guard, SAB, and other states.

3. The 401 Certification Has A Condition For Emergency Control Of Ballast Water Discharge

MPCA conditioned 401 Certification on its ability, in coordination with the Minnesota Department of Natural Resources, “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. A. at 49-50.)⁶ The condition provides that in the future, MPCA may authorize use of a Ballast Water Treatment System instead of discharging high risk ballast water. (R. A. at 50).

In the absence of onboard treatment technologies, MPCA found this condition necessary to prevent introduction of invasive species. (R. 2177; Issue Statement, P. 9). MPCA has the authority to exercise emergency powers under Minn. R. 7000.5000 and Minn. Stat. § 116.11.

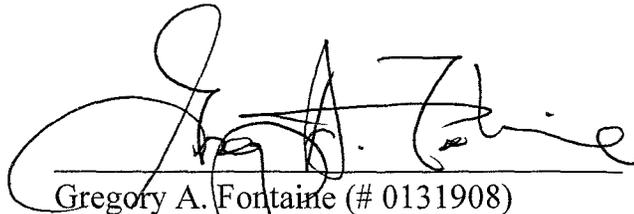
CONCLUSION

In light of the deference afforded to MPCA decisions of this type, and because MPCA relied on substantial evidence in making its determination that the 401 Certification “will comply” with Minnesota’s water quality standards and effluent limits, this Court should affirm MPCA’s decision to issue a 401 Certification for the VGP.

⁶ LCA has expressed concern to MPCA regarding the potentially expansive application of this language. (R. A. at 41.) MPCA acknowledged LCA’s concern, and addressed it in the 401 Certification. (T. 40-41.)

Respectfully Submitted,

Dated: October 19, 2012



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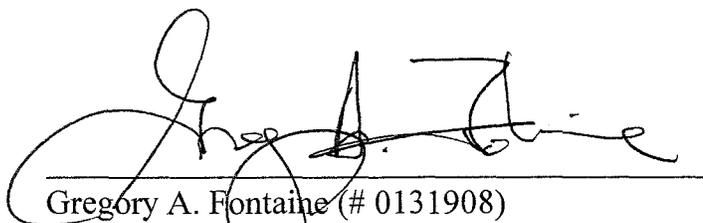
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a 13-point font. The length of this brief is 12,873 Words. This brief was prepared using Microsoft Word 2010.

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