

APPELLATE COURT CASE NO. A06-1371

**STATE OF MINNESOTA
IN SUPREME COURT**

In the Matter of the Alexandria Lake Area Sanitary District NPDES/SDS
Permit No. MN0040738, Reissuance for the Expanded Discharge of
Treated Wastewater, Douglas County, Alexandria, Minnesota

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STATEMENT OF THE LEGAL ISSUES

I. Issue: Where a state has scheduled the completion of a Total Maximum Daily Load (TMDL) to identify the necessary water quality-based effluent limit (WQBEL) to address an impairment, does 40 C.F.R. §§ 122.44(d)/122.4(d), nonetheless, preclude permit issuance to an existing discharger because a final WQBEL, sufficient to ensure standards compliance, is not yet specified in the permit?

Response: The Court of Appeals erred in holding that the interim and final limits imposed in the Alexandria Lake Area Sanitary District (ALASD) permit violated 40 C.F.R. § 122.44(d)/122.4(d), because the final WQBEL necessary to bring the impaired water into compliance with standards is not known at this time. This is tantamount to a prohibition on permit issuance that is not reflected in the adopted rule and completely ignores provisions of the Clean Water Act (CWA) allowing for complex WQBEL development under the TMDL program.

Most apposite cases, statutes, or rules: 33 U.S.C. § 1313 (2005), 40 C.F.R. § 122.44(d) (2004), *Arkansas v. Oklahoma*, 503 U.S. 91, 109, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992), *In the Matter of the Cities of Annandale and Maple Lake*, 731 N.W.2d. 502 (Minn. 2007).

II. Issue: Should the Court have deferred to MPCA's interpretation of 40 C.F.R. § 122.44(d) requirements?

Response: The Clean Water Act and existing federal rules (as evidenced by EPA's current administrative practices) provide considerable discretion on the development and timing of WQBELs for nutrient-impaired waters. Consequently, state regulatory approaches to permitting discharges to impaired waters are subject to deference.

Most apposite cases, statutes, or rules: *In the Matter of the Cities of Annandale and Maple Lake*, 731 N.W.2d. 502 (Minn. 2007), *Communities for a Better Env't v State Water Resources Control Board*, 109 Cal. App. 9th 1089 (2003).

III. Issue: Did the ALASD permit use a reasonable and appropriate approach to setting interim and final effluent limitations?

Response: MPCA's approach is consistent with the CWA, permitting actions undertaken by other delegated state NPDES authorities and MPCA's published guidelines. The NPDES permit with a limit imposed by the state's phosphorus rule, together with a schedule of compliance/reopener clause to impose any more restrictive TMDL-derived limitation, establishes appropriate conditions to ensure compliance with the Act.

Most apposite cases, statutes, or rules: 40 C.F.R. § 122.44(d) (2004), *Arkansas v Oklahoma*, 503 U.S. 91, 109 (1992), *Communities for a Better Env't v State Water Resources Control Board*, 109 Cal. App. 9th 1089 (2003), *In the Matter of the Cities of Annandale and Maple Lake*, 731 N.W.2d. 502 (Minn. 2007).

STATEMENT OF THE CASE

This case concerns the National Pollutant Discharge Elimination System (NPDES) permit issued to Respondent Alexandria Lake Area Sanitary District (herein "ALASD" or the "District") by the Minnesota Pollution Control Agency (MPCA) for operation of the District's existing wastewater treatment facility, and the applicability of federal Clean Water Act (CWA) regulations to this NPDES permit. The facility has discharged to Lake Winona since 1977. Since then the District has complied with a phosphorus water quality-based

effluent limit (WQBEL) of 1.0 mg/L and, since 1988, a phosphorus mass limit of 11.3 kg/day.

In 2002, the MPCA listed Lake Winona as impaired for aquatic recreational uses due to excess nutrients. This designation required the development of a TMDL due to complex environmental conditions governing algal response to nutrients, as identified in the MPCA's Phosphorus Strategy and EPA nutrient TMDL development guidance. Pending TMDL completion, ALASD proposed to expand and upgrade its facilities to achieve much more restrictive phosphorus limits. In the 2007-reissued permit, the MPCA imposed a more restrictive interim WQBEL of 0.3 mg/L and 5.4 kg/day to ensure the prevention of water quality degradation pending TMDL completion. The permit also contained a condition requiring compliance with the WQBEL generated by the ongoing Lake Winona TMDL action. App. at 6.¹ EPA found this permitting approach acceptable. R. 1881, App. at 11.

In the case below, Respondent Minnesota Center for Environmental Advocacy (MCEA) argued that the interim WQBEL² established by the MPCA was in violation of federal CWA regulations, specifically 40 C.F.R. § 122.44(d) (*see* App. at 20 – 28), because the interim WQBEL allegedly did not immediately ensure Lake Winona's compliance with the state narrative water quality standard for phosphorus.

¹ References to "App." are to the Appendix to this brief. References to "R." are to the MPCA's Administrative Record Index filed with the Court of Appeals on October 23, 2006, and included in the Appendix to this brief at pages 29 to 87.

² MCEA has agreed to the imposition of interim WQBELs, pending TMDL development, in other cases. *See e.g., In re City of Owatonna*, Nos. A03-331 and A03-333, 672 N.W.2d 921 (Minn. Ct. App. 2004) (dismissed by letter filed with the Administrative Law Judge August 15, 2005, based on settlement requiring cities to comply with 1 mg/L phosphorus effluent limits by December 31, 2011).

The Court of Appeals, finding the rule clear on its face, disagreed with MPCA's historical rule interpretation and ordered the permit reversed and remanded. The Court found that 40 C.F.R. § 122.44(d) in conjunction with 122.4(d) precluded permit issuance to ALASD because MPCA had not "demonstrated [ALASD] 'will attain and maintain' the narrative water-quality criteria and 'fully protect' the water's designated uses." *In the Matter of the Alexandria Lake Area Sanitary District*, No. A06-1371, 2007 WL 2421527 (Minn. Ct. App. August 28, 2007) (unpublished opinion). App. 12 – 19. The Court found that because the interim WQBEL was derived, in part, from current plant performance, not water quality standards, and the final limitation from the pending TMDL was not specified in the permit schedule of compliance, the permit action was insufficient to satisfy the Federal regulation.

The Court of Appeals' decision throws the regulation of existing discharges to impaired waters into complete disarray and will effectively preclude permit issuance statewide, given the lack of available technical information, and number of waters recently identified as "impaired."³ The decision is inconsistent with the U.S. Supreme Court's ruling in *Arkansas v. Oklahoma*, 503 U.S. 91, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992), and this Court's recent decision in *Annandale/Maple Lake*, 731 N.W.2d 502 (Minn. 2007), which stated on a closely related rule that MPCA must "deal with difficult policy issues related to accommodating population growth" for facilities discharging to impaired waters and "these are issues on which the CWA does not provide clear guidance." *Id.* at 523. The Court found such impaired waters permitting decisions and related rule interpretations are "more properly

³ Lake Pepin, which drains approximately 60% of the state, is identified as impaired and the necessary nutrient reduction requirements for point sources in that watershed are not yet known. See MPCA, *2006 Final TMDL List of Impaired Waters*, available at <http://proteus.pca.state.mn.us/publications/wq-iw1-03-2006.pdf>.

left to the MPCA.” *Id.* Neither the CWA nor the implementing regulation mandates that states must impose final WQBELs remedying impaired waters as a precondition to permit issuance for existing facilities. MPCA’s approach is similar to that allowed by EPA in other states and is consistent with the framework of the CWA. Consequently, the Court of Appeals decision must be reversed.

STATEMENT OF THE FACTS

I. History of Lake Winona and the ALASD Discharge

Lake Winona is long and shallow, with a maximum depth of nine feet. R. at 820-23, App. at 51. In response to the sewage needs of a growing population, the ALASD was established in 1971 and constructed a wastewater treatment facility that began operation in 1978. Since 1978, because the facility discharges directly to Lake Winona, the plant has been subject to a phosphorus effluent limit of 1.0 milligrams per liter (mg/L). The District’s phosphorus mass discharge has been frozen at 11.3 kilograms per day (kg/day) since 1988 to prevent water quality degradation. App. at 6, *see also* Minn. R. 7050.0211, subp. 1a (2005). Since the ALASD plant began operations phosphorus reductions in Lakes Winona, Agnes and Henry have been dramatic, as identified in the record and summarized below:

Lake	In-Lake TP 1976-77	In-Lake TP 1991-93	In-Lake TP 2003-05
Winona	550 ug/L	320 ug/L	220 ug/L
Agnes	500 ug/L	300 ug/L	100 ug/L
Henry	490 ug/L	230 ug/L	60 ug/L

R. at 1903-1917, App. at 70. The District's total phosphorus loading has dropped by almost 90% from an average of 22,000 pounds per year in 1976-77 to 4,000 pounds per year in 1991-93, to less than 2,500 pounds per year in 2003-05. *Id.* All of this has occurred while wastewater flows have increased from 0.9 million gallons per day (mgd) in 1976-77 to 2.008 mgd in 1991-93, to 2.643 mgd in 2003-05. The permitted wastewater flow is 3.75 mgd.

Despite these substantial improvements, the MPCA included Lake Winona on its CWA Section 303(d) impaired waters list in 2002, identifying the lake as impaired for aquatic recreational uses due to excess nutrients. App. at 12. A TMDL study for Lake Winona is under way and is expected to be completed by 2009⁴. R. at 1887-1896, App. at 70. Modeling conducted by MPCA revealed that Lakes Agnes and Henry, both downstream of Lake Winona, will experience no increase in either algal concentrations or turbidity levels so long as ALASD maintains or improves its current performance while the TMDL is being completed. App. at 7.

The permit adopted by the MPCA accounts for an expansion of the plant's wet-weather flow from approximately 3.75 to 4.70 million gallons per day over a twenty-year period. App. at 12. Potential algal growth in lakes has nothing to do with peak wet weather

⁴ Numerous other state waters, such as Lake Pepin on the Mississippi River, have been identified as nutrient impaired. *See* 2006 Final TMDL List of Impaired Waters, *available at* <http://proteus.pca.state.mn.us/publications/wq-iw1-03-2006.pdf>. Since the mid-1990's, MPCA has been conducting complex modeling to determine appropriate standards and TMDL for Lake Pepin. That TMDL action, which will establish new phosphorus limitations for about fifty percent of the wastewater discharges in the state should also be completed in 2009. *See* <http://www.pca.state.mn.us/water/tmdl/tmdl-lakepepin.html>. In the meanwhile, MPCA continues to reissue permits to facilities in that large watershed, without objection by MCEA or EPA.

design flows. It is controlled by the annual average flow and loading⁵. In this case, that flow is projected to increase from 2.7 mgd to 2.9 mgd (less than 8% change) over a five-year period. R. at 1903-1917, App. at 70. Because the plant expansion includes new filtration units to further improve existing phosphorus effluent quality, there is no threat of nutrient increase from this permit. Thus, the actual mass loading is expected to decrease.

After construction is complete, the District will be required to meet a monthly average phosphorus limit of 0.3 mg/L. *Id.* This is equal to the most restrictive phosphorus limit ever established by the MPCA. Further, the permit contains a condition requiring the plant to achieve any more restrictive limitation derived by the ongoing TMDL if determined necessary. Both the necessary water quality objective and effluent limit to achieve that objective will be determined through that process. App. at 9⁶ EPA found that this combination of requirements was consistent with federal NPDES rules. R. 1881, App. at 11.

II. The Clean Water Act 303(d) – WQBEL Derivation Process

A. Clean Water Act Procedures for Impaired Waters

Under the federal Clean Water Act (CWA), every State must establish water quality standards (WQSs) for each body of water within the State's borders. 33 U.S.C. § 1313(a)-

⁵ Much of the Court of Appeals' concern was erroneously focused on the wet weather flows anticipated twenty years in the future and other worst case scenarios (i.e., what happens if the TMDL is never completed or ALASD begins to discharge at maximum permitted limits). App. at 15 – 16. MPCA has considered all of these factors in determining that allowing the plant to upgrade and expand did not pose a significant threat to water quality. The Court of Appeals, rather than focusing on MCEA's worst-case scenarios, should have shown deference to MPCA's technical/policy decisions.

⁶ Given the uncertain existing and attainable uses for Lake Winona, it is not apparent what, if any, more restrictive limitation will be set. The lake is still responding to load reductions as evidenced by the 2006 data. How existing sediment loads will respond to these changes is an open question requiring a detailed technical analysis.

(c). The CWA does not ban the discharge of pollutants into waterways that are in violation of state water quality standards. *Arkansas v. Oklahoma*, 503 U.S. 91, 109 (1992). Instead, the CWA “vests in the EPA and the States broad authority to develop long-range, area wide programs to alleviate and eliminate existing pollution.” *Id.*; 33 U.S.C. § 1288(b)(2). CWA Section 303(d) sets forth a detailed planning process under which States are to identify and evaluate waters that do not achieve applicable standards and to establish limitations necessary to achieve the adopted standards. *Arkansas v. Oklahoma*, 503 U.S. 91 at 101, *Missouri Soybean Ass’n v. Missouri Clean Water Comm’n*, 102 S.W.3d 10, 16 (D. Mo. 2003); 40 C.F.R. § 130.7. These impaired waters are known as “water quality limited segments” (WQLS). States must identify, prioritize, and list those WQLSs for which the technology-based effluent limitations and other required controls are not stringent enough to achieve the applicable water quality standards. 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.0(e) (describing the iterative nature of the 303(d) process).

For each WQLS on the 303(d) list confirmed to be impaired, the State must establish a TMDL so that standards are met and water quality is restored. *Missouri Soybean Ass’n*, 102 S.W.3d at 16; 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1). A TMDL is the “sum of the individual [wasteload allocations (“WLAs”)] for point sources and [load allocations (“LAs”)] for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments.” 40 C.F.R. § 130.2(i). These approved loadings are incorporated into the State’s water quality management (“WQM”) plans and NPDES permits. 40 C.F.R. § 130.7(a). The TMDL may allocate load reduction responsibilities in any manner that will

ensure water quality standards compliance. 40 C.F.R. § 130.2(i). No TMDL has been completed for Lake Winona. App. at 6, 12.

The CWA does not establish deadlines for the development of TMDLs.⁷ *Sierra Club v. Browner*, 843 F. Supp. 1304, 1314 (D. Minn. 1993). However, TMDLs are to be developed “in a matter of years, not decades.” *Friends of Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1184, 1196 (D. Mt. 1999). The EPA has stated that State schedules for TMDL development should extend between 8 to 13 years in length. *Sierra Club v. EPA*, 162 F. Supp. 2d 406, 419 (D. Md. 2001). Complex TMDLs will need enough time to “1) gather the necessary data and perform the necessary analyses to identify the sources of the impairment; 2) estimate what the sources could achieve . . . ; 3) identify practices for implementing the TMDL; and 4) provide adequate public involvement.” *Id.* EPA TMDL guidance notes that there are “basic” and “complex” TMDLs. *Guidance For Water Quality-Based Decisions—The TMDL Process* (EPA April 1991) at 20.

Once a waterbody is selected for action, an analyst must decide if the available data and information about the sources, fate, and transport of the pollutant to be controlled is adequate. The level of effort and scientific knowledge needed to acquire adequate data and perform meaningful predictive analyses is often a function of the pollutant source, pollutant characteristics, and the geographical scale of the pollution problem. As described in Chapter 2, modeling the fate and transport of conventional pollutants (e.g., biochemical oxygen demand) and point source contributions is better developed than modeling for non-traditional pollution problems. For certain non-traditional problems, if there are not adequate data and predictive tools to characterize and analyze the pollution problem with a known level of uncertainty, a phased approach may be necessary.

Due to the complexity associated with developing appropriate standards and assessing the impacts of nutrients, EPA has issued a series of voluminous documents on nutrient

⁷ The 1987 CWA amendments did establish a three-year deadline for the development of WQBELs for a specific category of dischargers causing violation of toxics standards. 33 U.S.C. § 1314(l). No other specific deadlines were established for other pollutants.

TMDLs. *See, e.g., Protocol For Developing Nutrient TMDLs* (First Ed. USEPA 1991); *National Strategy for the Development of Regional Nutrient Criteria*, (USEPA June 1998); *Nutrient Criteria Technical Guidance Manual – Lakes and Reservoirs* (First Ed. USEPA April 2000). Considerable data collection and analysis are required to develop a scientifically defensible nutrient TMDL because nutrient interactions are inherently complex.⁸

B. Review of NPDES Regulation Requiring Water Quality-Based Limits

The CWA's NPDES permit system parallels the 303(d) process and provides a two-step process for the establishing of effluent limitations. First, the permittee must comply with technology-based effluent limitations (TBELs), which are based on the best available or practical technology for the reduction of water pollution. 33 U.S.C. § 1311(b)(1)(A); 40 C.F.R. § 122.44(a); *Communities for a Better Env't v. State Water Resources Control Bd.*, 109 Cal. App. 4th 1089, 1093 (2003). Second, if water quality standards are not being met under the technology-based effluent limitations (or other more restrictive state law requirement), then the permittee must comply with the more stringent WQBELs. *Id.* Such WQBELs are established as "necessary to [a]chieve water quality standards established under Section 303 of the CWA." 40 C.F.R. § 122.44(d)(1). The trigger for initiating a WQBEL analysis is when a permitting authority determines that pollutants "are or may be discharged at a level which will cause, or have the reasonable potential to cause, or

⁸ Minnesota rules require the following evaluation: "Assessment of trophic status and the response of a given water body to nutrient enrichment will take into account the trophic status of reference water bodies; and all relevant factors that affect the trophic status of the given water body appropriate for its geographic region, such as the morphometry, hydraulic residence time, mixing status, watershed size, and location. The factors in this subpart apply to lakes and, where scientifically justified, to rivers, streams, and wetlands." Minn. R. 7050.0150, subp. 5 (2005) (emphasis supplied).

contribute to an excursion above any State water quality standard.” 40 C.F.R. §

122.44(d)(1)(i).⁹ Where no numeric standard or criterion exists, as was the case here, a more complex, site-specific evaluation is necessary to determine the appropriate numeric standards. 40 C.F.R. § 122.44(d)(1)(vi), App. at 22 – 23.

The January 13, 1989 preamble to 40 C.F.R. § 122.44(d) explains that the EPA expects WQBELs to be derived from the TMDL process, in certain cases.

EPA intended for the proposed regulations to apply to any point source that is discharging a pollutant at a level that is exceeding or may exceed a waste load allocation for that discharge.... *The process for identifying water quality-limited segments requiring total maximum daily loads (TMDLs) and wasteload allocations (WLAs) is set forth in EPA's regulations at 40 CFR 130.7* This regulation establishes procedures for identifying and controlling multiple discharges to the same receiving water in order to attain and maintain applicable water quality standards. *Under this approach, discharges that contribute to the TMDL for a segment are apportioned a WLA, which serves as the basis for effluent limitations for the pollutant or pollutant of concern.*

54 Fed. Reg. at 23873 (June 2, 1989) (emphasis supplied), App. at 137.

Thus, EPA recognized that the TMDL process could be used for developing WQBELs. EPA was also quite clear that the adopted rule did not mandate a particular approach for WQBEL development and states may adopt appropriate procedures themselves.

Subparagraph (vii) does not prescribe detailed procedures for developing water quality-based effluent limits. Rather, the regulation prescribes minimum requirements for developing water quality-based effluent limits, and at the same time, *gives the permitting authority the flexibility to determine the appropriate procedures for developing water quality-based effluent limits.*

⁹ Somewhat similar “cause and contribute” language contained in 40 C.F.R. § 122.4(i) was the subject of this Court’s review in *Annandale/Maple Lake*.

54 Fed. Reg. at 23879 (emphasis supplied) (App. at 138); *see also Annandale/Maple Lake*, 731 N.W.2d 502 at 520 (under *Arkansas v Oklahoma*, states have flexibility to issue permits and interpret CWA regulations to achieve program objectives – improved treatment levels).

For existing facilities, 40 C.F.R. § 122.44(d) does not limit or discuss the state’s authority to develop interim approaches pending TMDL development. However, for new dischargers and new sources, EPA has established permit prohibition if that facility would add additional pollutant loadings to an impaired water body pending TMDL/WQBEL development. 40 C.F.R. § 122.4(i). Even this “prohibition” is subject to several exceptions. 40 C.F.R. § 122.4(i) states: “No permit may be issued: (i) to a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.” *Annandale/Maple Lake*, 731 N.W.2d 502 at 517. Under these rules, only new discharges to impaired waters have mandatory pre-TMDL requirements.¹⁰ *Id.* This rule is not applicable to ALASD since it is not a new source or new discharger.

Neither 40 C.F.R. § 122.44(d) nor 122.4(d) on its face sets any other specific pre-TMDL permitting requirements such as those imposed by 122.4(i). In 1999, EPA sought to adopt interim permitting requirements pending TMDL/WQBEL completion for a

¹⁰ Under 122.44(d), EPA’s adopted “cause or contribute” test is the trigger for conducting a WQBEL analysis. Under 40 C.F.R. § 122.4(i), it is the standard for setting interim limitations pending TMDL completion. This issue was discussed in a 1999 EPA brief (referenced by this court in *Annandale/Maple Lake* at 521). “Section 122.4(i) precludes only the issuance of a permit to a new source or new discharger whose discharge will cause or contribute to a violation of water quality standards. A permit therefore may be issued, if the discharge would not cause or contribute to the violation of water quality standards. *Further, existing dischargers, as well as increased in existing discharges, are not subject to this regulation.*” Def’s Resp. Mem. In Support of Schedule For Preparation of Total Maximum Daily Loads at 51, n. 3, *Sierra Club v. Clifford*, CV-96-0527 (E.D. La. Feb. 24, 1999); App. at 123 (emphasis added). If existing sources were similarly proscribed under 122.44(d), EPA would not have made this distinction.

subcategory of existing sources – “large new and significantly expanding discharges.” 64 Fed. Reg. 46068 (August 23, 1999) (App. at 147). EPA noted in the proposal, “Furthermore, it might be very disruptive to existing dischargers if they were required to offset their discharge before a TMDL is established only to possibly receive different permit limits and conditions once wasteload allocations and a margin of safety are established in a TMDL. EPA seeks to avoid these disruptions if possible.” App. at 146. EPA withdrew that proposal in 2000 finding it “simply unworkable.” 65 Fed. Reg. 43640 (July 13, 2000) (App. at 150). In that action, EPA opined further that existing rules could be used “to achieve progress toward attainment of water quality standards in impaired waters in the absence of a TMDL” and noted that EPA would provide “further guidance” for developing WQBELs in the absence of a TMDL.” App. at 151, 153. No such guidance has ever been forthcoming and in 2002, EPA rescinded the regulatory requirements that were adopted in the July 13, 2000 rulemaking. 67 Fed. Reg. 79020 – 79028 (December 27, 2002) (App. at 154 – 162).

In the absence of any specific regulatory requirements, EPA regional offices have allowed states to use a variety of approaches to regulate existing discharges to impaired waters pending TMDL development. *See* App. at 88 – 113 (EPA regional offices responses provided under FOIA¹¹). The generally accepted approach regarding nutrients has been either to defer any limitation or to establish a cap based on existing loads or permit limits pending TMDL completion to ensure conditions do not worsen. *Id* One state court has

¹¹ An agency’s interpretation of its own rules is a proper subject for judicial notice. *See O’Brien v. Douglas County Bd. Of Com’rs*, 2005 WL 3291395, *5 (Minn. Ct. App. 2005) (unpublished); *State v Anderson*, 302 Minn. 77, 80, 223 N.W.2d 789, 792 (Minn. 1974); *United States v. St. Paul*, 258 F.3d 750, 753 (8th Cir. 2001). *The Annandale/Maple Lake* decision noted that EPA’s administrative implementation of a rule was evidence of its proper application and could provide a basis to conclude that a rule was subject to several reasonable interpretations. *Annandale/Maple Lake*, 731 N.W.2d at 521.

indicated that an interim limitation, not a WQBEL, is appropriate when a TMDL (and WQBEL) for an impaired water has not been completed, and EPA concurred with that position. *Communities for a Better Env't*, 109 Cal. App. 9th at 1089, 1101 (2003). MPCA's approach to pre-TMDL permitting is similar to other EPA-approved approaches. In October 2005, the MPCA Board adopted an interim permitting strategy for expanding discharges to impaired waters. R. at 1187-1196, App. at 60. That policy notes the Board's interpretation that, pending TMDL/WQBEL completion, the purpose of 40 C.F.R. § 122.44(d) is to prevent further impairment. Expanding facilities were to either 1) avoid load increases or 2) accept an interim phosphorus effluent limitation of 1 mg/L. EPA has never informed MPCA of any objection to this approach.

Minnesota's Approach to Phosphorus Regulation

In March 2000 the MPCA adopted the Phosphorus Strategy, a set of policy documents addressing among other things the application of phosphorus effluent regulations to NPDES permits and the development of more stringent requirements under the TMDL program if the phosphorus rule limitations were insufficient to protect uses.

A key feature of the Phosphorus Strategy is a "decision tree" illustrating how the MPCA would consider factors to decide the appropriate phosphorus controls, if any, to impose in an NPDES permit. This decision tree contains the following note:

For water quality segments that are impaired or threatened for phosphorus or phosphorus-related conditions as listed on the 303(d) list, the MPCA shall use its authority to limit point-source discharges, including existing discharges, by including phosphorus limits where appropriate in NPDES permits *as part of a TMDL allocation of point and/or nonpoint discharges*. This consideration is also included as part of the permitting checklist.

Minnesota Pollution Control Agency, “MPCA Phosphorus Strategy: NPDES Permits,” <http://www.pca.state.mn.us/water/pubs/phos-npdes.pdf> (March 2000) (emphasis supplied).

The MPCA explains the purpose of the decision tree as follows:

The purpose of the NPDES strategy is to develop a consistent framework for applying phosphorus controls in permits. The decision tree, included in the strategy, outlines the variables to be considered by MPCA staff in making decisions on whether to apply a phosphorus limit or a management plan in individual permits. The decision tree does not identify what a particular phosphorus limit should be, nor was it intended to. Rather the decision tree provides a guiding framework under which those decisions can be made.

“MPCA Phosphorus Strategy,” <http://www.pca.state.mn.us/water/phosphorus.html> (October 2006). With regard to the regulation of phosphorus discharges, MPCA utilizes an approach that evaluates the impacts of algal growth on water bodies of concern in determining the proper phosphorus effluent limits to impose in NPDES permits. The ALASD permit followed that approach and incorporated stringent nutrient limitations consistent with MPCA’s adopted interim permitting strategy.

Court of Appeals Decision

In the appeal below, Respondent MCEA alleged that the plain language of 40 C.F.R. § 122.44(d)(1) requires the MPCA “to calculate and impose effluent limits for phosphorus necessary to achieve water-quality standards.” App. at 13. The appeal further alleged that the phosphorus limits in the permit at issue were not “water quality-based” and that the MPCA had elected to simply wait for the completion of the Lake Winona TMDL to impose more stringent effluent limits. *Id.*

The Court of Appeals ruled that MPCA may not issue a permit to an existing facility discharging to an impaired waterway unless the permit ensures standards are attained. App. at 16 – 17. The Court cited 40 C.F.R. §§ 122.4(d) and 122.44(d) as mandating this result. *Id.*

The Court of Appeals referenced the *Annandale/Maple Lake* standard of review for giving deference to MPCA's interpretation of NPDES rules; however, the Court determined that the complex regulation, 40 C.F.R. § 122.44(d) was clear on its face and therefore MPCA's rule interpretation was not entitled to deference. App. at 16.

The Court of Appeals decision contains critical errors that must be rectified in order to harmonize it with the Clean Water Act, *Arkansas v Oklahoma*, and *Annandale/Maple Lake* on the issue of allowable discharges to impaired waters. Contrary to the Court's decision, the MPCA properly exercised its expertise in reissuing the permit with more stringent phosphorus effluent and mass limits pending the completion of the TMDL.

ARGUMENT

Standard of Review

The ALASD appeals the decision of the Court of Appeals, which reversed the decision of the MPCA to issue an NPDES permit for existing discharge. The MPCA's interpretation of 40 C.F.R. § 122.44(d) is an issue of law. *St. Otto's Home v Minnesota Dep't of Human Services*, 437 N.W. 2d 35, 40 (Minn. 1989). While questions of law may be reviewed *de novo*, "decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience." *Reserve Mining Co. v Herbst*, 256 N.W.2d 808, 824 (Minn. 1977); *see also Annandale/Maple Lake*, 731 N.W.2d at 513. *De novo* review is appropriate where, as here, the decision turns on the meaning of words within 40 C.F.R. § 122.44(d), which the MPCA enforces as its own regulation. *Annandale/Maple Lake*, 731 N.W.2d at 515 – 516. If that language is clear and

capable of understanding, no deference is necessary; if the language is unclear or ambiguous, the Court will defer to the MPCA's interpretation so long as it is reasonable. *Id.* However, it is important to note that "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); *see also, State v. Donaldson*, 41 Minn. 74, 42 N.W. 781, 782 (1889) (noting that even when "the words are plain," ambiguity "may be created by the context"). Therefore, this Court must view the words of the regulation "in their setting, not isolated from their context." *Chiodo v. Board of Education*, 298 Minn. 380, 215 N.W.2d 806, 808 (Minn. 1974).

Because the MPCA is the agency charged with the implementation and enforcement of 40 C.F.R. § 122.44(d) and 122.4(d), courts treat the regulation as the MPCA's own. *Annandale/Maple Lake*, 731 N.W.2d at 512 – 513, *See also* App. at 14. Judicial deference is appropriate to "agency decision-makers in the interpretation of statutes that the agency is charged with administering." *In re Max Schwartzman & Sons, Inc.*, 670 N.W.2d 746, 754 (Minn. Ct. App. 2003); *see also In re Excess Surplus Status of Blue Cross & Blue Shield of Minnesota*, 624 N.W.2d 264, 278 (Minn. 2001). Under state and federal law, MPCA is the agency charged with administering the federal CWA and its attendant regulations. 40 C.F.R. § 123.25(a)(1); Minn. Stat. § 115.03, subs. 1 and 5 (2006).

In situations where the plain language of a regulation is unclear or unknowable, like cases dealing with 40 C.F.R. § 122.44(d), courts will give the agency's interpretation of an ambiguous regulation *considerable deference* if it is reasonable. *St. Otto's Home*, 437 N.W. 2d at 40. Furthermore, the Minnesota Court of Appeals has held that when an agency has reasonably interpreted a regulation or statute that it administers "it is the role of the legislature or the supreme court, and not the role of this court, to overrule that interpretation."

In re University of Minn., 566 N.W.2d 98, 103 (Minn. Ct. App. 1997) (citations omitted).

Additionally, this Court has held that, “an agency's interpretation of the statutes it administers is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature.” *George A. Hormel & Co. v Asper*, 428 N.W.2d 47, 50 (Minn. 1988).

Since MPCA is legally required to administer the regulation at issue in this case, 40 C.F.R. § 122.44(d)(1), as its own, this Court should extend judicial deference to MPCA's reasonable interpretation of the ambiguous and technically complex provisions in 40 C.F.R. § 122.44(d)(1). Moreover, MPCA's technical findings regarding the impact of the interim effluent limitations on Lake Winona, pending TMDL development are subject to substantial deference. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minnesota*, 624 N.W.2d at 278.

Summary of Argument

The effect of the Court of Appeals decision is to confuse the state of the law with regard to NPDES permits issued by the MPCA to existing discharges into impaired waters where a TMDL has not yet been completed. In *Annandale/Maple Lake*, this Court firmly established that, in accordance with *Arkansas v. Oklahoma*, the MPCA has flexibility under 40 C.F.R. § 122.4(i) to issue permits to new discharges, even if the final effluent limitations necessary to fully protect the waters is not yet known. This Court in *Annandale/Maple Lake* ruled that a prohibition preventing construction of improved treatment facilities would frustrate the intent of the Clean Water Act.

In reaching this decision, this Court found “MPCA must also deal with difficult policy issues relating to accommodating population growth in a state with significant surface waters, many of which are considered impaired. As previously noted, these are issues on which the CWA does not provide clear guidance.” See *Annandale/Maple Lake*, 731 N.W.2d 502 at 520, 524. Contrary to the *Annandale/Maple Lake* decision, the Court of Appeals’ decision effectively prohibits MPCA’s issuance of NPDES permits to all existing discharges until a final WQBEL is calculated that would bring the receiving water into compliance with standards. In this instance (and many others throughout the state) that effluent limitation is not yet known and cannot be known until the CWA Section 303(d) TMDL process is completed. Given the number of waters still waiting on TMDLs, the practical effect of Court of Appeals’ decision will be to prohibit the reissuance of permits to existing dischargers. *Supra* at 6, n. 4. This rule interpretation, as with the *Annandale/Maple Lake* appellate decision, frustrates the purpose of the CWA and unlawfully proscribes MPCA’s discretionary authority to implement the 303(d) NPDES program while accommodating local growth

The Court of Appeals arrives at this result through a tortured reading of 40 C.F.R. § 122.44(d)(1)(vi) – itself not a model of clarity – and a refusal to defer to the MPCA’s technical and site-specific analysis in the matter. This reading imposes a time limitation on the calculation of a final WQBEL that is not found in the CWA, the regulation at issue or court precedent (i.e., immediate calculation of the WQBEL). The federal rule in question (40 C.F.R. § 122.44(d)) is sufficiently ambiguous that a court should defer to the MPCA’s interpretation and enforcement of the regulation, in light of the MPCA’s scientific and technical expertise needed to render decisions under that rule. The MPCA’s determination that a more stringent phosphorus limit should be imposed to protect Lake Winona water

quality, pending TMDL completion, and the permit would be modified once ongoing TMDL activities were completed was consistent with the CWA and not unreasonable. EPA's and MPCA's longstanding interpretation of the adopted rules and CWA Section 303(d) requirements allows states to establish precisely the type of limitations set forth in the ALASD permit. Consequently, the Court of Appeals should have given deference to that rule interpretation. *Annandale/Maple Lake*, 731 N.W 2d at 517.

I. 40 C.F.R. § 122.44(d) Is Unclear and Ambiguous; Therefore Deference to Reasonable MPCA Interpretation Is Appropriate.

The Court of Appeals decision establishes a bizarre dichotomy: new facilities may be permitted to discharge to impaired waters absent the available final effluent limit that ensures standard attainment, but existing facilities cannot be permitted unless that limit is known. This conclusion was reached by considering the requirements of §§ 122.44(d) and 122.4(d) together although neither rule specifically sets forth that permitting prohibition. The Court of Appeals' decision is an unreasonable and inappropriate reading of each rule.

In a similar case involving a new discharge to impaired waters, this Court appropriately deferred to the MPCA's interpretation of 40 C.F.R. § 122.4(i), finding the following terms within it ambiguous and capable of multiple interpretations:

No permit may be issued:

(i) To a new source or a new discharger, if the discharge from its construction or operation will *cause or contribute* to the violation of water quality standards.

40 C.F.R. § 122.4(i) (2006) (emphasis added); *Annandale/Maple Lake*, 731 N.W.2d 502 at 518. In particular, this Court noted that the term "cause and contribute" was subject to several reasonable interpretations and that EPA's administrative practices confirmed that a

strict reading of the provision was inappropriate. *Id.* at 522. By contrast, in the decision below, the Court of Appeals determined that a far more detailed regulation using many of the same terms, clearly and unambiguously established a requirement for immediate WQBEL calculation for existing discharges. The language of that “clear” rule that the lower court decision focused on follows:

(vi) Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits using one or more of the following options:

(A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, October 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents; or

(B) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of the CWA, supplemented where necessary by other relevant information; or

(C) Establish effluent limitations on an indicator parameter for the pollutant of concern, provided:

(1) The permit identifies which pollutants are intended to be controlled by the use of the effluent limitation;

(2) The fact sheet required by Sec. 124.56 sets forth the basis for the limit, including a finding that compliance with the effluent limit on the indicator parameter will result in controls on the pollutant of concern which are sufficient to attain and maintain applicable water quality standards;

(3) The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards; and

(4) The permit contains a reopener clause allowing the permitting authority to modify or revoke and reissue the permit if the limits on the

indicator parameter no longer attain and maintain applicable water quality standards.

40 C.F.R. § 122.44(d)(1)(vi) (2006) (App. at 22 – 23); *see also* App. at 16.

The Court of Appeals' decision concluded that this language clearly required that MPCA determine the effluent limit necessary to meet the state's narrative nutrient standard where a plant "causes or contributes" to a standards exceedance. We generally agree; however, that does not mean that the rule precludes MPCA from using the TMDL process to make that determination, or that the MPCA cannot utilize interim permitting approaches in the meantime. 40 C.F.R. § 122.44(d) essentially mirrors the requirements of 303(d) of the Act. However, the rule does not address (1) the timing of developing such permit limitations; (2) whether the 303(d) process may be employed for the development of final WQBELs; (3) the ability of the state to set interim limitations; or (4) set a permit prohibition absent the availability of the final WQBEL. Rather than finding "clear" language in the rule addressing these critical issues, the Court cites to the rule "preamble" and § 122.4(d) to conclude immediate calculation of WQBEL's is required. App. at 17. The cited preamble language hardly qualifies as a clear edict to immediately set WQBELs regardless of the circumstances. Moreover, MCEA's attempt to utilize legislative history to explain the words of 122.44(d) would only be appropriate if the regulation were ambiguous. Minn. Stat. § 645.16; *Chevron U.S.A., Inc , v. NRDC, Inc* , 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). MCEA, however, has taken the position that the regulation is clear and unambiguous. Therefore, the reference to legislative history is entirely inconsistent with MCEA's position.

Moreover, without prior explanation, the Court of Appeals also cited the language of 122.4(d) that "no permit may be issued when the imposition of conditions cannot ensure

compliance with and applicably water quality requirements” to support its conclusion. App. at 17. As discussed below, § 122.4(d) is directed at impacts occurring in other downstream states, and clearly does not set forth a pre-TMDL permit prohibition as specified in § 122.4(i). Apparently the Court of Appeals interpreted the term “imposition of conditions” to be the same as “imposition of WQBEL sufficient to ensure standards compliance.” The rule could have, but does not state this.

Section 122.4(d) states “[n]o permit may be issued when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states.” (emphasis supplied). Although the section number has changed, this prohibition language has remained the same since 1980.¹² Before 1980, however, the language of 122.13(d) (modern day 122.4(d)) included the qualifier “as required by section 401(a)(2) of the act.”¹³ 44 Fed. Reg. 32854, 32904 (June 7, 1979). Section 401(a)(2) provides procedural

¹² 45 Fed. Reg. 33290, 33442 (May 19, 1980) (App. at 133 – 135).

¹³ CWA Section 401(a)(2); 33 U.S.C. § 1341(a)(2). “Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.”

protections for 'downstream' states from potentially harmful discharges. Interestingly, the 401(a)(2) language was removed from the final rule after being included in the rule's proposal.¹⁴ The final rule contains absolutely no discussion or rationale as to its removal. To the contrary, the comments describe the applicable subpart as 'for the most part identical [to the past regulations]' and then go on to summarize the 'major changes' from the proposal.¹⁵ If EPA decided to extend the application of 122.52(d) (modern day 122.4(d)) beyond the downstream state context to proscribe instate permitting as interpreted by the Court of Appeals, it would have been a major amendment and it would have been discussed. Furthermore, when cited by other courts, 122.4(d) has usually been discussed in the 'downstream' state context.¹⁶ In any event, this rule nowhere discusses how it applies to determinations made under the 303(d) program and therefore contains no "clear" requirements on this issue. Thus the Court's reliance on this provision for its decision was misplaced.

Consistency with the *Annandale/Maple Lake* decision (and CWA) requires that if 40 C.F.R. § 122.4(i) is ambiguous and appropriate for deference to MPCA expertise, so too must be 40 C.F.R. § 122.44(d). The entire purpose of the Minnesota nutrient TMDL/WQBEL development program is to determine appropriate site-specific water quality

¹⁴ 44 Fed. Reg. 34244, 34288 (June 14, 1979) (proposed section 122.67(d)) (App. at 132); 45 Fed. Reg. 33290, 33442 (May 19, 1980) (final Section 122.52(d)) (App. at 135).

¹⁵ 45 Fed. Reg. 33290, 33336 (May 19, 1980) (App. at 134).

¹⁶ *In re: City of Moscow, Idaho*, NPDES Appeal No. 00-10, Environmental Appeals Board, 2001 EPA App. LEXIS 12, *76-*77 (2001); *James River II v State of Washington, Department of Ecology*, Pollution Control Hearings Board, PCHB Nos. 91-140, 143, 146, 147, 148, 150, 151, 154, 169 and 182, 1992 WA ENV LEXIS 96, *23, *24 (1992); *In the Matter of City of Waskom, Texas*, Docket No. TX0020036, NPDES Appeal No. 90-18, Environmental Appeals Board, 1991 EPA App. LEXIS 45, *4-*5.

standards and allocate pollutant loads to meet them, where existing effluent limits and control measures have failed to prevent impairment. *See* 33 U.S.C. § 1313(d) (2004); *see also supra* page 14. As noted by this Court:

“In making its determination, the MPCA must also deal with difficult policy issues related to accommodating population growth in a state with significant surface waters, many of which are considered impaired. *See NPDES Permits* at 4. As previously noted, these are issues on which the CWA does not provide clear guidance. Because the MPCA’s application of 40 C.F.R. § 122.4(i) requires a careful balancing of competing policies and interests across the state, the agency must necessarily draw on its expertise and special knowledge. *See Arkansas*, 503 U.S. at 106 (stating that in the CWA, Congress struck a careful balance among competing policies and interests). Here, we believe that any necessary policy determinations in interpreting the regulation are more properly left to the MPCA, the agency responsible for interpreting its regulation.

Annandale/Maple Lake, 731 N.W.2d at 523. To hold otherwise is to render the 303(d) statutory provision ineffective, because such a decision forces the MPCA to calculate an immediate, final WQBEL for any existing discharge to ensure standards and uses are fully protected in 303(d) listed waters. In turn, this effectively prohibits permit issuance where data are unavailable to make such determinations. As both the Minnesota and U.S. Supreme Courts have concluded, CWA regulations do not require this result or preclude MPCA from making appropriate policy decisions for facilities located on impaired waters. Consequently, the Court of Appeals decision should be reversed.

II. EPA’s Administrative Practice Confirms MPCA’s Approach Is Acceptable.

In reaching its decision in *Annandale*, this Court determined that it should rely on

EPA's "existing administrative practice" when interpreting a federal NPDES permitting regulation.¹⁷ Moreover, this Court determined that EPA's "existing administrative practice" was compelling evidence that a regulation is susceptible to different reasonable interpretations. *Id.* As such, EPA's existing administrative practice with regard to 122.44(d) can be used to show both, that the approach used by MPCA in this case was reasonable, and, that 122.44(d) is susceptible to different reasonable interpretations. The following is a review of information from USEPA presented to the Court of Appeals explaining how other state agencies and EPA regions have implemented 122.44(d) where TMDL activities were still pending:

In Delaware, "[d]ischarges to impaired waters of any pollutants of concern are capped at existing levels until the TMDL/WLA is established. Permits include reopening clauses for establishing new limits upon adoption of a TMDL"¹⁸

In Maryland, "WQBELS for discharges to impaired waters without a TMDL are developed case by case. In some situations it is appropriate to include a loading limitation to ensure no increased load while the TMDL is being developed. In other cases, goals are established with a provision for the permit to be reopened if the goal is not achieved. In other situations, the WQBEL already fully anticipates the pending TMDL requirements. Additional approaches may also apply in different discharge scenarios."¹⁹

¹⁷ *Annandale/Maple Lake*, 731 N.W.2d 502, 521 (Minn. 2007): "But contrary to the court of appeals' assertion, the EPA's brief in *Clifford* expressly identifies the EPA's existing 'administrative practice' that reflects its interpretation of 40 C.F.R. § 122.4(i). Thus, we conclude that *Bowen* does not preclude the MPCA from relying on the EPA's brief in *Clifford* in its interpretation of 40 C.F.R. 122.4(i). Moreover, the position advanced by the EPA is compelling evidence that 40 C.F.R. 122.4(i) is susceptible to different reasonable interpretation."

¹⁸ Letter from Francisco Cruz, Environmental Engineer, EPA Region III to John C. Hall, with attachments (September 3, 2006) (App. at 88 – 93), Attachment "Sections of the Permitting for Environmental Results NPDES Profiles for the Region III States concerning the development of water quality-based effluent limits before a TMDL is developed for the impaired waterbody." (last updated 12/8/04). App. at 91.

¹⁹ App. at 92.

In Pennsylvania, “WQBELs for impaired waters without a TMDL are developed the same as WQBELs for all other waters – to meet the criteria and protect the uses. If a water is listed as impaired by a specific pollutant, the water generally cannot be made worse by permitted addition of the same pollutant, and existing effluent limits would be used.”²⁰

EPA Region VII states that “In Missouri, several majors [dischargers of nutrients] have been required to meet technology-based Phosphorus limits prior to the development of a TMDL: this interim measure was implemented as “line item” in MO water quality rules. We are not aware of any situations where WQ-based nutrient limits have been imposed prior to development of a TMDL.”²¹

Washington guidance states that “[i]t’s more likely that a permit writer will be renewing a permit and discover the receiving water body is on the 303(d) list. The applicable federal regulations in this case are the same as the previous case [40 C.F.R. 122.44(d)(1)(i),(ii),(iii), and (vii)]. ... If the pollutant is a far-field pollutant, is present in the discharge and is the subject of a TMDL in progress, the permit writer may defer any water-quality based limits on the pollutant until the TMDL is completed and a WLA is assigned. When the WLA is assigned the permit writer may modify the permit or incorporate the WLA at the next reissuance, depending on timing.”²²

On the issue, EPA Region X states that “We recognize that in some circumstances, deferring these decisions makes sense. For example, when a TMDL is imminent, it is better to wait to set permit limits until the watershed analysis of the TMDL has been completed. In cases where a point source is not the cause of the impairment, it may not be appropriate to impose burdens on a point source that will not help remedy the impaired water. However, in our experience as a permitting authority, there are also times when point sources are discharging pollutants that are significant contributors to impaired water quality. In those cases, it is essential to use permits as a tool to require

²⁰ App. at 93.

²¹ E-mail from John Dunn, EPA Region VII to John C. Hall, with attachment (October 25, 2006). App. at 95.

²² Letter from Michael J. Lidgard, NPDES Permit Unit Manager, EPA Region X to John C. Hall, (September 14, 2006) with attachment Water Quality Program Permit Writer’s Manual, Washington State Department of Ecology (July 2005), vi-33. App. at 101.

reductions for those pollutants, even if a TMDL has not yet been completed. In many cases, TMDLs are years away.”²³

Based on this review, it is clear that MPCA is not unique or isolated in its approach to interpreting 122.44(d) with respect to setting nutrient effluent limitations pending TMDL development. Although there are plenty of variations on the specifics, permitting authorities throughout the country have generally interpreted the regulation in a manner similar to the MPCA with EPA’s oversight. Therefore, in addition to providing compelling evidence that 122.44(d) is susceptible to different reasonable interpretations, EPA’s “existing administrative practice” confirms that MPCA interpreted the regulation in a reasonable manner.

EPA has recommended that states make progress in controlling and reducing loading pending TMDL completion. *See* page 11 *supra*. In reissuing the ALASD permit, the MPCA reduced the effluent concentration and mass limits dramatically (effluent limits reduced from 1.0 mg/L to 0.8 mg/L, and then to 0.3 mg/L, and mass limits reduced from 11.3 kg/day to 5.4 kg/day) to avoid adverse water quality impacts.²⁴ Because the Lake Winona TMDL is contemplated for completion before the expiration of the ALASD’s current NPDES permit cycle, the permit will be re-opened to impose more stringent phosphorus limits if determined necessary by the Lake Winona TMDL. *App.* at 9; *see also supra* page 6, n. 4. This approach establishes conditions to “provide for compliance with applicable requirements of the Act or regulations promulgated under the Act.” 40 C.F.R. § 122.4(a). Thus, the proposed permit is

²³ Letter from Randall Smith, EPA Region X to Megan White, Washington Department of Ecology, June 25, 2007, pg. 1-2. *App.* at 109 – 110.

²⁴ The Court of Appeals’ concerns regarding interim water quality impact were misplaced. The 0.3mg/L monthly maximum permit limit applies independent of the load limit and will require the facility to further improve effluent quality to avoid permit violations.

consistent with the applicable NPDES regulations and the Court of Appeals's conclusions to the contrary were misplaced.²⁵ To be certain, there is no clear EPA rule mandating a different result.

III. The Clean Water Act Structure and EPA Guidance Supports MPCA's Approach.

In determining whether 40 C.F.R. § 122.44(d) is ambiguous, this Court must consider the context of the regulation, even if the meaning of the statutory language is, arguably, plain. (*King*, 502 U.S. at 221; *Donaldson*, 41 Minn. at 80). In this case, the CWA and EPA's implementing guidance provide the context for interpreting 122.44(d). The central reason the CWA was adopted in 1972 was to address widespread water quality impairment. *See Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 695 (D.C. Cir. 1975). It is well established that the CWA does not prohibit or otherwise impose specific requirements on discharges to impaired waters pending TMDL development. This issue was squarely addressed by the U. S. Supreme Court in *Arkansas v. Oklahoma*:

The Court of Appeals construed the Clean Water Act to prohibit any discharge of effluent that would reach waters already in violation of existing water quality standards. We find nothing in the Act to support this reading... The statute does, however contain provisions designed to remedy existing water quality violations and to allocate the burden of reducing undesirable discharges between existing and new sources. See, e.g. 1313(d) [CWA Section 303(d)]. Thus, rather than establishing a categorical ban announced by the Court of Appeals – which might frustrate the construction of new plants that would improve existing conditions – the Clean Water Act vests in

²⁵ The Court of Appeals held that the schedule of compliance cited to by MPCA as part of the reissued permit was inadequate to ensure Lake Winona's compliance with the state narrative standard. App. at 17. This Court need not reach the question of whether the schedule of compliance is adequate, because the more stringent effluent and mass limits imposed in the reissued permit in the proper exercise of the MPCA's technical expertise satisfies 40 C.F.R. § 122.44(d)(1)(vi) as well as the CWA.

the EPA and the States *broad authority* to develop *long range* area wide programs to alleviate and eliminate existing pollution. (emphasis added).

503 U.S. at 108; *see also Annandale/Maple Lake*, 731 N.W.2d 502 at 520.

As described by the Supreme Court, the 303(d) process is the process by which states are to develop WQBELs. Moreover, other than for toxics there is no provision of the CWA mandating immediate compliance with WQS to receive an NPDES permit. *American Paper Institute v. EPA*, 996 F.2d 346, 353 (“*API*”) (“Section 303(d) directives say nothing about chemicals other than the listed toxics”). If such a provision did exist, few permits could be issued under the CWA. Clearly, Congress did not adopt any provision that would frustrate the state’s ability to issue NPDES permits such that, over time, waters would be improved as necessary to achieve the adopted WQS and other objectives.

EPA guidance identifies that up to thirteen years may be needed for TMDL development and the NPDES rules do not otherwise limit or truncate that timeframe. *Sierra Club v. EPA*, 162 F. Supp. 2d 406, 419 (D. Md. 2001). If the immediate calculation of a WQBEL were required by 40 C.F.R. § 122.44(d) for all dischargers to impaired waters, surely EPA would have expressly informed the public of such an important requirement. No such position is espoused anywhere in federal rules or preambles to those rules because it would have been illogical and self-defeating.

EPA’s detailed guidance on the TMDL program notes that in certain situations WQBELs may be easy to calculate (e.g., basic TMDL) while other such as nutrient related impairments require complex TMDLs. For toxics, EPA has published a manual entitled “Technical Support Document for Water Quality Based Toxic Control” which generally applies to a simplified mass balance approach to impose WQBELs at the time of permit issuance. App. at 138. Where such limits may be calculated and demonstrated “necessary”

they should be imposed at permit reissuance. However, even for toxics, immediate imposition of WQBELs is not required where multiple sources or more complex evaluations are needed.²⁶ See *Communities for a Better Environment v. State Water Resources Control Bd.*, 1 Cal. Rptr. 3d 76 (Cal. App. 1st Dist. 2003). This decision would not have been possible if 40 C.F.R. § 122.44(d) mandated the immediate calculation and imposition of WQBELs for all facilities alleged to “cause or contribute” to a standard exceedance as MCEA claims.²⁷

For nutrients, it is universally accepted that a complex evaluation is required due to the nature of the pollutant and the unavoidable multiple sources involved. See App at 128 (diagram of factors to assess in nutrient modeling) *USEPA Protocol for Developing Nutrient TMDLs*, First Edition. Even in the allegedly “simple” case of ALASD, non-point source loads, nutrient cycling, algal kinetics, appropriate in lake phosphorus objectives and turbidity interactions have to be assessed to determine the “necessary” limitation. *Id.* Recognizing the complex nature of nutrient WQBELs and TMDLs, the MPCA Board adopted a Phosphorus Strategy in 2000 that informed the public that the TMDL process would be used to derive nutrient limits when the state’s phosphorus rule is insufficient to attain standards. Minn. R. 7050.0150. As discussed in *Communities for a Better Environment*, the decision to defer a

²⁶ The recent adoption of Minnesota’s Statewide TMDL for mercury is an example of a toxic impact requiring a TMDL evaluation. That TMDL determined air deposition, not municipal point sources should be the focus of future load reduction requirements. MPCA, *Minnesota Statewide Mercury Total Maximum Daily Load*, <http://www.pca.state.mn.us/publications/wq-iw4-01b.pdf> (approved by EPA March 27, 2007).

²⁷ The California court’s acknowledgement that EPA agrees the imposition of WQBELs may be deferred until a TMDL is complete proves that MPCA’s similar action in this case does not violate federal law. Factual issues control whether a WQBEL may be calculated at this time or not and MCEA’s appeal did not challenge any MPCA factual conclusions.

WQBEL to a more detailed WQBEL developed under the TMDL process is a technical decision within the state's discretionary authority granted by the CWA.

Again, to claim 40 C.F.R. § 122.44(d) truncates, trumps, or otherwise impairs MPCA's discretionary authority provided by Section 303(d) of the CWA to utilize that process does not reflect the "clear" language of the adopted rules. MPCA's actions are consistent with the CWA, the adopted rules, EPA guidance and MPCA's published Phosphorus Strategy. The decision on the best method for WQBEL derivation is an exercise of discretionary authority based on consideration of scientific principles of nutrient WQBEL development as noted by EPA's TMDL guidance. *Supra* pp. 9, 11. This fact specific, technical determination is not reviewable under the cause of action brought by MCEA, and, in any event, is subject to considerable deference by the Court. *Supra* p. 17. The Court of Appeals decision should be overturned because it failed to give proper deference to that determination.

CONCLUSION

MPCA appropriately issued a NPDES permit to ALASD for an existing discharge into Lake Winona. The issued permit ensures existing water quality will be maintained, and likely improved, pending TMDL completion. No state or federal regulation requires the imposition of a final water quality-based effluent limitation prior to the identification of applicable standards and the acquisition of sufficient scientific information to develop appropriate water quality based limitations prior to a TMDL. Federal and state law clearly grant MPCA the discretionary authority to determine that the TMDL process is the best means for identifying water quality based limitations for complex parameters like nutrients and to allow permit issuance in the meanwhile. Consequently, this Court should reverse the Court of Appeals decision and uphold MPCA's legal interpretation and issuance of the NPDES permit to ALASD for their planned wastewater treatment facility improvements.

Respectfully submitted,

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