

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

**BRIEF OF *AMICUS CURIAE*
LEAGUE OF MINNESOTA CITIES**

Kevin Reuther (#266255)
MINNESOTA CENTER FOR
ENVIRONMENTAL ADVOCACY
26 East Exchange Street, Suite 206
St. Paul, MN 55101-1667
Tel: (651) 223-5969
Fax: (651) 223-5967

*Attorney for Respondent Minnesota
Center for Environmental Advocacy*

Susan L. Naughton (#259743)
LEAGUE OF MINNESOTA CITIES
145 University Avenue West
St. Paul, MN 55103-2044
Tel: (651) 281-1232
Fax: (651) 281-1296

*Attorney for Amicus Curiae
League of Minnesota Cities*

Alan C. Williams (#117328)
Assistant Attorney General
OFFICE OF THE STATE
ATTORNEY GENERAL
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
Tel: (651) 296-7200
Fax: (651) 282-2151

*Attorney for Appellant Minnesota
Pollution Control Agency*

Steven W. Nyhus (#296193)
FLAHERTY & HOOD, P.A.
525 Park Street, Suite 470
St. Paul, MN 55103-2111
Tel: (651) 225-8840
Fax: (651) 225-9088

*Attorney for Appellant Alexandria
Lake Area Sanitary District*

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LEGAL ISSUE

A state agency's interpretation of a federal regulation is entitled to deference if the agency is legally required to enforce and administer the regulation, the regulation is ambiguous, and the agency's interpretation is reasonable. Is MPCA's interpretation of 40 C.F.R. § 122.44(d)(1) entitled to deference where MPCA is required to enforce and administer the regulation, (2) § 122.44(d)(1) is reasonably subject to differing interpretations, and (3) MPCA's interpretation of § 122.44(d)(1) fulfills its purpose of protecting water quality while addressing the wastewater-treatment needs of Minnesota citizens?

The Minnesota Court of Appeals held that MPCA's interpretation was not entitled to deference because § 122.44(d)(1) is unambiguous.

INTRODUCTION

The League of Minnesota Cities (LMC) has a voluntary membership of 830 out of 854 cities in Minnesota. LMC represents the common interests of cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, advocacy and insurance services. LMC has a public interest in this case as a representative of hundreds of cities throughout the state that will be affected by the outcome of this appeal.

The wastewater issues in this appeal are urgent and will continue to recur throughout the state. These issues are particularly important to LMC because cities play a significant role in protecting the public health by treating and disposing of our state's sewage. LMC has a particular interest in confirming that 40 C.F.R. § 122.44(d)(1) does not require immediate calculation of final water quality based effluent limits (WQBELs) and does not prohibit reissuance of National Pollutant Discharge Elimination System (NPDES) permits before final WQBELs have been calculated.

This case involves review of a decision by the Minnesota Pollution Control Agency (MPCA) to reissue an NPDES permit to the Alexandria Lake Area Sanitary District (ALASD) for an existing and expanding municipal wastewater-treatment facility that discharges into Lake Winona, a water body impaired due to excess nutrients. In this case, MPCA—using its expertise as the agency charged with administering the Clean Water Act and its regulations—interpreted 40 C.F.R. § 122.44(d)(1) to allow reissuance of the permit.

The Minnesota Center for Environmental Advocacy (MCEA) appealed claiming 40 C.F.R. § 122.44(d)(1) requires immediate calculation of final WQBELs and prohibits reissuance of NPDES permits to existing and expanding facilities before final WQBELs have been calculated even though the plain language of the regulation does not specify the timing for calculation of final WQBELs and does not contain any prohibition on the reissuance of NPDES permits without final WQBELs. The court of appeals agreed with MCEA determining that MPCA's interpretation of 40 C.F.R. § 122.44(d)(1) was not entitled to deference because the regulation is unambiguous.

If the court of appeals' decision is not reversed, there will essentially be a categorical ban on the reissuance of NPDES permits to all existing and expanding facilities discharging to an impaired water until calculation of final WQBELs — even in situations where MPCA concludes that a total-maximum-daily-load (TMDL) determination is needed to calculate a technically defensible final WQBEL. This result is inconsistent with this Court's decision in 2007 to defer to MPCA's interpretation of an analogous federal regulation and to reject a similar categorical ban that would have prohibited the issuance of NPDES permits to new facilities discharging to impaired water before completion of TMDLs. *In the Matter of the Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502 (Minn. 2007) (interpreting 20 C.F.R. § 122.4(i)).

This inconsistency leaves wastewater-permitting law in a state of confusion. If the court of appeals' decision is not reversed, MPCA's interpretation regarding **existing facilities** under 40 C.F.R. § 122.44(d)(1) **would not** be given deference, and there would

be a categorical ban on the reissuance of NPDES permits for existing and expanding facilities discharging to impaired waters before completion of the WQBEL/TMDL process. In contrast, MPCA's interpretation with regard to **new facilities** under 40 C.F.R. § 122.4(i) **would** be entitled to deference, and NPDES permits for new facilities discharging to impaired waters could be issued before completion of the TMDL process. This inconsistent application of the Clean Water Act is not legally reconcilable, and it is bad public policy.

STATEMENT OF THE CASE AND FACTS

LMC concurs with Appellants' Statements of the Case and Facts.

ARGUMENT

Appellants' briefs demonstrate that MPCA's interpretation of 40 C.F.R. § 122.44(d)(1) is reasonable and is entitled to deference. LMC concurs with Appellants' arguments and will not repeat them here. Instead, LMC's brief will focus on the statewide significance of this appeal and on why it is good public policy to affirm an interpretation of 40 C.F.R. § 122.44(d)(1) that fulfills its purpose of protecting water quality, addresses the wastewater-treatment needs of Minnesota citizens, and ensures the consistent application of the Clean Water Act in Minnesota.

I. The outcome of this appeal will have a significant statewide impact.

If the court of appeals' decision is not reversed, it will harm thousands of Minnesota citizens because there will essentially be a categorical ban on the reissuance of NPDES permits for existing and expanding wastewater-treatment facilities discharging to impaired waters before completion of the WQBEL/TMDL process. Indeed, the impact

of this appeal will be even greater than the impact of the *Annandale/Maple Lake* decision because the *Annandale/Maple Lake* decision only applies to new facilities discharging to impaired waters while the outcome of this appeal will likely affect hundreds of existing facilities discharging to impaired waters. *In the Matter of the Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502 (Minn. 2007). As of March of 2007, for example, there were approximately 1,400 permitted industrial and municipal wastewater-treatment facilities and approximately 550 of these were either discharging to an impaired water or were discharging within the watershed of an impaired water. Minnesota Pollution Control Agency, *Why impaired waters are a priority for Minnesota* (March 2007) <http://www.pca.state.mn.us/publications/wq-iw3-10.pdf> (App. at A-1-A-2).

And the number of impaired waters will continue to grow. The 2008 draft list of impaired waters shows 1,469 impairments on 336 rivers and 500 lakes. Minnesota Pollution Control Agency, *Minnesota's Impaired Waters and TMDLs, 303d TMDL List of Impaired Waters* (last updated Oct. 22, 2007) <http://www.pca.state.mn.us/water/tmdl/tmdl-303dlist.html> (App. at A-3-A-5). It is estimated, however, that once all Minnesota waters have been assessed there may be more than 10,000 impairments statewide. Minnesota Pollution Control Agency, *Why impaired waters are a priority for Minnesota* (March 2007) <http://www.pca.state.mn.us/publications/wq-iw3-10.pdf> (App. at A-1-A-2).

As the number of impaired waters grows, so too will the number of costly, time-consuming TMDL projects. As of August of 2007, for example, there were

approximately 53 TMDLs currently in development, each of which typically requires about three to four years to complete. Minnesota Pollution Control Agency, *Minnesota's Impaired Waters and TMDLs, TMDLs in Development* (last updated Aug. 10, 2007) <http://www.pca.state.mn.us/water/tmdl/tmdl-development.html> (App. at A-6-A-8).

Further, MPCA has already indicated that if the court of appeals' narrow reading of 22 C.F.R. § 122.44(d)(1) is not reversed, it may be forced to impose more stringent limits on all facilities that discharge **any** amount of phosphorus in the Lake Pepin watershed, a watershed that encompasses more than half of the land area of the state. MPCA Petition For Review at 4. MPCA may be forced to enforce these rigid limits even if water-quality modeling shows that particular facilities have no measurable impact on algae conditions in particular impaired water bodies. *Id.*

Wastewater-permitting problems will also likely intensify as other cities, like Alexandria, attempt to expand their existing wastewater-treatment facilities to accommodate our state's growing population. It is estimated that Minnesota's population will grow by 518,000 between 2005 and 2015. Minnesota Planning, State Demographic Center, *Minnesota Population Projections 2005-2035* (June 2007), <http://www.demography.state.mn.us/documents/MinnesotaPopulationProjections20052035.pdf>. The reality is that our state will continue to generate increasing amounts of waste regardless of whether costly, time-consuming TMDLs have been completed for all of our impaired waters, and we must have an effective plan for disposing of our waste in the interim.

II. It is good public policy to affirm an interpretation of 40 C.F.R. § 122.44(d)(1) that fulfills its purpose of protecting water quality, addresses the wastewater-treatment needs of Minnesota citizens, and ensures the consistent application of the Clean Water Act in Minnesota.

MPCA has adopted an effective plan of “interim permitting” for existing and expanding facilities discharging to impaired waters. In this case, for example, MPCA has required ALASD to remove phosphorus to the fullest practicable extent under the Minnesota Phosphorus Rule (Minn. R. 7050.0211, subp. 1a) and to meet interim phosphorus effluent limits of .47 mg/L and .3 mg/L during the time when MPCA is completing the Lake Winona TMDL. *See* Appellants’ Statements of the Facts. MPCA has further required ALASD to meet a TMDL-based final WQBEL for phosphorus when the Lake Winona TMDL is completed in 2009. *Id.*

The court of appeals, however, concluded that MPCA does not have discretion to derive final WQBELs through the TMDL process reasoning that 40 C.F.R. §122.44(d)(1) imposes a categorical ban on reissuance of existing or expanding NPDES permits before calculation of final WQBELs even though the plain language of § 122.44(d)(1) is silent on the timing of final WQBEL development and on how the permitting process interacts with the TMDL process.

The court of appeals’ restrictive reading of § 122.44(d)(1) is unnecessary and it frustrates the purpose of the Clean Water Act by preventing the reissuance of permits to existing and expanding facilities that would actually reduce the amount of pollution entering our water. ALASD, for example, has consistently lowered its average annual phosphorus concentration levels even as its facility flow has increased, and its

phosphorous effluent has been consistently lower than the levels required in its NPDES permits. *See* Appellants' Statements of the Facts.

The court of appeals' unnecessarily restrictive reading of § 122.44(d)(1) should be rejected because it strips MPCA of its authority to find flexible solutions to protect our waters. The Clean Water Act provides that it is the "primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b). And the U.S. Supreme Court has expressly recognized that the Clean Water Act grants states broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution. *Arkansas v. Oklahoma*, 503 U.S. 91, 108, 112 S. Ct. 1046, 1058 (citing 33 U.S.C. § 1288(b)(2)). Indeed, the U.S. Supreme Court has already rejected a similar categorical ban on the issuance of wastewater permits because it would interfere with the ability of individual states to find the best solutions to protect their waters. *Id.*

Likewise, this Court should reaffirm that our state has flexibility to decide how best to implement the Clean Water Act in Minnesota. It is good public policy to ensure that MPCA has this flexibility because MPCA works daily with the wastewater issues involved in this appeal and is best suited to make decisions about whether individual wastewater permits should be reissued. The MPCA has been delegated authority to implement the Clean Water Act and its regulations. 40 C.F.R. § 123.25(a)(1); Minn. Stat. § 115.03, subds. 1 and 5. And MPCA has the scientific expertise to make technical decisions like those involving the derivation of numeric effluent limits. *See* Minn. Stat.

§116.01; *Minn. Ctr. for Env'tl. Advoc. v. MPCA & Boise Cascade Corp.*, 644 N.W.2d 457, 465 (Minn. 2002).

Water quality is an important issue for Minnesota. Our state has more surface waters than any other of the 48 contiguous states. Minnesota Pollution Control Agency, *Why impaired waters are a priority for Minnesota* (March 2007)

<http://www.pca.state.mn.us/publications/wq-iw3-10.pdf> (App. at A-1-A-2). Water quality is important to our quality of life and to our tourism and agricultural economy.

Id.

MPCA has made a reasonable determination that a watershed approach is the best method for protecting our waters. In the *Annandale/Maple Lake* decision, this Court upheld MPCA's decision to take a watershed-based approach to protect our state's waters rather than using a rigid facility-by-facility approach. MPCA is applying the same watershed-based approach in this case by setting interim effluent limits to prevent any worsening of an impaired condition while working to calculate final WQBELs through a TMDL process in order to address the impairment on a watershed-wide basis. This Court should once again affirm this watershed approach and should defer to MPCA's interpretation of 40 C.F.R. § 122.44(d)(1) because it gives our state flexibility to protect our water quality while safely treating and disposing of the increasing amounts of sewage that Minnesota citizens will generate.

CONCLUSION

In this case, MPCA—using its expertise as the agency delegated authority to administer the Clean Water Act and its regulations—reasonably interpreted 40 C.F.R. § 122.44(d)(1) to allow reissuance of an NPDES permit to an existing wastewater-treatment facility discharging to an impaired water before completion of the WQBEL/TMDL process. This interpretation should be affirmed because it fulfills the purpose of § 122.44(d)(1) by protecting water quality, addresses the wastewater-treatment needs of Minnesota citizens, and ensures the consistent application of the Clean Water Act in Minnesota.

For all of these reasons, LMC respectfully requests that this Court reverse the court of appeals' decision and reinstate MPCA's decision.

Dated December 21, 2007

Respectfully submitted,

League of Minnesota Cities

By: 
Susan L. Naughton (#259743)
145 University Avenue West
St. Paul, Minnesota 55103-2044

Attorney for Amicus Curiae