

No. A06-1371

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STATE OF MINNESOTA  
IN SUPREME COURT

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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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**APPELLANT MINNESOTA POLLUTION CONTROL AGENCY'S  
REPLY BRIEF AND APPENDIX**

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

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## INTRODUCTION

In its responsive brief,<sup>1</sup> Minnesota Center for Environmental Advocacy (MCEA) fails in its attempt to distinguish this Court's decision in *Annandale/Maple Lake*<sup>2</sup> from the legal questions at issue in this case. MCEA also largely fails to engage this Court's three-part test in *Annandale/Maple Lake* for determining whether MPCA is entitled to deference in interpreting 40 C.F.R. § 122.44(d)(1). MCEA's heavy reliance on secondary authorities, such as EPA Regional Office correspondence, to convey the meaning of the regulation undermines its already weak arguments that the regulation is unambiguous. Apart from conceding that MPCA has "ample authority" to determine how to derive numeric effluent limits under the regulation, MCEA completely omits any argument on "step two" of the *Annandale/Maple Lake* analysis: whether MPCA's expertise is needed to interpret the rule. Finally, MCEA's arguments on the reasonableness of MPCA's interpretation of the federal regulation are marred by MCEA's misstatement of key facts in the record and by its unfounded claim that EPA explicitly disapproved of the kind of schedule of compliance MPCA used in the ALASD permit. This Court should reject MCEA's arguments and affirm the ALASD permit reissued by MPCA.<sup>3</sup>

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<sup>1</sup> References to MCEA's Brief are denoted by "MCEA \_\_\_\_." References to MCEA's Appendix are denoted by "Resp. App \_\_\_\_."

<sup>2</sup> *In the Matter of Annandale/Maple Lake NPDES/SDS Permit*, 731 N.W.2d 502 (Minn. 2007).

<sup>3</sup> MPCA objects to references and documents in MCEA's Brief at 47, footnote 16, and in its Appendix, and in the Brief and Appendix of Amicus L'Homme Dieu Lake Association (Footnote Continued On Next Page.)

## ARGUMENT

### I. MCEA'S RECASTING OF THE LEGAL ISSUES AND ITS ARGUMENTATIVE AND INACCURATE RECITATION OF ADDITIONAL "FACTS" SHOULD NOT DIVERT THE COURT FROM THE LEGAL ISSUES STATED IN MPCA'S BRIEF.

MCEA attempts to reframe the legal issues in this appeal to avoid addressing this Court's three-part test for deference to agency interpretation of rules under *Annandale/Maple Lake*. That three-part test, which requires the reviewing court to examine the ambiguity of the rule, the necessity for the agency to use its expertise to interpret and apply the rule, and the reasonableness of the agency's interpretation, is the proper framework to address the legal issues in this case.

In restating the legal issues and making additions to the facts, MCEA misstates a key factual premise which it uses to support its legal arguments. MCEA wrongly asserts that the effluent limits in the ALASD permit will "worsen water quality" in Lake Winona. MCEA 1 (Issue #1) and 6. The record shows otherwise. MPCA's expert determined that a slight increase in phosphorus concentration projected for Lake Winona under maximum expanded capacity and peak flow from the ALASD facility will have no effect on nutrient

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relating to a "Use Attainability Assessment Petition" filed by ALASD. This petition is a separate administrative matter outside of the ALASD permit reissuance proceeding and is not before the Court. MPCA asks the Court to disregard any argument and documents submitted by MCEA or Amicus Lake Association on this matter. MPCA also objects to Amicus Lake Association's submittal in its Appendix of a 2003 report on property values in the Mississippi Headwaters Region submitted to the Legislative Commission on Minnesota Resources, and to Amicus' arguments based on this document, which is outside the record in the ALASD permit proceeding and irrelevant to this case.

conditions in the lake.<sup>4</sup> PCA App. 70<sup>5</sup> (Table 2 of MPCA June 8, 2006 Memorandum showing that discharge of 0.3 mg/L phosphorus at ALASD's expanded design flow slightly increases total phosphorus but decreases chlorophyll-a and maintains water clarity (Secchi disk measurement)). MCEA's assertion that the expanded ALASD facility will increase phosphorus and "worsen" water quality in Lake Winona seeks to obscure the crucial difference between the addition of *phosphorus* to a water body and changes in *water quality*. MPCA rules clearly establish that merely adding to the phosphorus concentration in a water body does not equate to diminished water quality under MPCA's nutrient narrative standard. *See* Minn. R. 7050.0150, subd. 5. An increase in phosphorus does not degrade water quality unless there is also an increase in chlorophyll-a or a decrease in water clarity. *Id.*

MCEA "additions and exceptions" to the facts include thinly-veiled legal arguments and critical misstatements of the record. For example, MCEA asserts as a "fact" that the 0.3 mg/L phosphorus effluent limit in the ALASD permit is the "final effluent limit on phosphorus established in the permit" which will "make [the impairment] slightly worse." MCEA's statement is simply false on both points. The

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<sup>4</sup> Indeed, the record shows that the initial effluent limits set in the ALASD permit prevent further nutrient degradation of Lake Winona at maximum capacity of the expanded facility and at peak flow levels during wet weather, while likely improving conditions in the lake under more normal or realistic operating conditions. PCA App. 71-74 (MPCA expert testimony to MPCA Citizens Board).

<sup>5</sup> References to the Appendix to MPCA's opening Brief are denoted by "PCA App. \_\_\_\_."

0.3 mg/L is not the final limit in the permit and it will not make the nutrient impairment of Lake Winona worse.

As the record makes abundantly clear, the permit contains three effluent limits for phosphorus: (1) the intervention limit of 0.45 mg/L which applies during construction and until ALASD commences full operation of its improved and expanded facility; (2) the post-construction limit of 0.3 mg/L which applies when full operation commences and “until the MPCA has determined phosphorus limits consistent with the waste load allocation in an approved nutrient TMDL for Lake Winona;” and (3) a limit that is “consistent with the Permittee’s waste load allocation for phosphorus” which applies “[o]nce the Lake Winona TMDL is approved.” PCA App. 40 (ALASD Permit, Chapter 3 “Compliance Schedule”) and PCA App. 22 (MPCA Findings of Fact, paragraph 22.)

The record also makes abundantly clear that the 0.45 mg/L and 0.3 mg/L limits are worse. PCA App. 69 (MPCA June 8, 2006 Memorandum) (“We believe that the phosphorus concentration of Lakes Winona and Agnes will increase from 4-6 µg/L above existing levels at current AWWDF [average wet weather design flow] if ALASD maintains its current level of phosphorus removal with its expanded facility, *but chlorophyll-a and secchi levels will remain unchanged.*”) (emphasis added).<sup>6</sup> And, the

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<sup>6</sup> The lake modeling conducted by MPCA to determine that the phosphorus effluent limit of 0.3 g/L will assure that there is no worsening of nutrient conditions in Lake Winona was based on the assumptions that ALASD is always discharging at its maximum allowed concentration of 0.3 mg/L, and is operating at its maximum expanded capacity and under peak effluent flow conditions during wet weather. PCA App. 68 (MPCA June 8, 2006 Memorandum, Table 1). Even in this projected “worst case,” MPCA’s expert concluded (Footnote Continued On Next Page.)

TMDL-based limit in the permit is set at a level required by the Lake Winona TMDL to *restore* the lake to compliance with applicable water quality standards. MPCA respectfully urges the Court to disregard MCEA's attempt to rewrite the facts and to focus on the key legal issues in this case.<sup>7</sup>

Finally, in MCEA's additional "Legal Background" on the Clean Water Act (CWA) and the National Pollution Discharge Elimination System (NPDES) regulations, MPCA calls the Court's attention to the last paragraph of MCEA's lengthy quotation from *American Iron and Steel Institute v. EPA*, 115 F.3d 979, 990-91 (D.C. Cir. 1997). This quote aptly sets the stage for the legal issues in this case:

The problem is how one derives numerical values from general, non-numerical narrative criteria. EPA has addressed this problem in the past. It promulgated 40 C.F.R. § 122.44(d)(1)(vi)(2007) [sic] to deal with it on a national basis.

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there would be no worsening in nutrient conditions in Lake Winona. PCA App. 73 (Transcript of MPCA Board Meeting). MPCA's expert also opined on the record that ALASD will likely have to maintain an *annual* average concentration of phosphorus of around 0.15 mg/L in order to meet a maximum *monthly* limit of 0.3 mg/L. PCA App. 73-74. This would result in a reduced discharge of phosphorus from ALASD to Lake Winona.

<sup>7</sup> MPCA has never disputed that there are continuing violations of MPCA's nutrient water quality standard in Lake Winona and that discharges from the ALASD facility are causing or contributing to that impairment. Those are "jurisdictional" facts that triggered the federal regulation at issue in this case. However, the Court should ignore the additional "facts" recited by MCEA related to consideration of "feasible alternatives" to ALASD's expansion. The issue of "feasible alternatives" is not a factor in setting effluent limits under 40 C.F.R. § 122.44(d)(1), and is entirely extraneous to the legal issues in this appeal.

MCEA 13, citing 115 F.3d 979, 990. This quote succinctly highlights the real issues before this Court--whether 40 C.F.R. § 122.44(d)(1) gives MPCA the necessary leeway to solve this problem and whether the solution crafted by MPCA in the ALASD permit is a reasonable interpretation of the regulation.

## **II. CONTRARY TO MCEA'S ARGUMENTS, 40 C.F.R. § 122.44(d)(1) IS AMBIGUOUS.**

This Court's analysis of MPCA's actions in the *ALASD* proceeding must begin with the first part of the three-part test enunciated in *Annandale/Maple Lake*: whether the regulation MPCA applied is "ambiguous." 731 N.W.2d 502, 516. MPCA demonstrated in its opening Brief how the same factors analyzed by this Court to determine that a similar NPDES rule was ambiguous in *Annandale/Maple Lake* apply equally or with greater force to the NPDES rule at issue in this case. MPCA 11-15.<sup>8</sup> MPCA also cited other legal authorities including EPA's rulemaking preamble and federal case-law to demonstrate that setting effluent limits under 40 C.F.R. § 122.44(d)(1) requires interpretation by the permitting authority. Contrary to MCEA's arguments, the regulation is ambiguous.

### **A. Annandale/Maple Lake Is The Controlling Precedent In This Case.**

MCEA vainly attempts to distinguish *Annandale/Maple Lake* by asserting that MPCA, ALASD and Amicus League of Minnesota Cities ("League of Cities") "overstate the similarities between this case and *Annandale/Maple Lake*." MCEA 40. The Court must reject MCEA's argument. *Annandale/Maple Lake* is controlling here for two

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<sup>8</sup> References to MPCA's opening Brief are denoted by "MPCA \_\_\_\_."

reasons. First, it is the most recent and comprehensive statement by this Court of the principles for determining whether an agency is entitled to deference in interpreting a rule it is charged to administer. Second, the similarities between the regulations and the legal and policy questions at issue in the two cases are striking. The regulations at issue have a similar purpose and function, and they share the same legal and regulatory context under the CWA. *Annandale/Maple Lake* is the central and controlling precedent that this Court must apply in this case.

Both NPDES regulations require MPCA to regulate discharges to surface water that cause or contribute to an existing violation of water quality standards. 40 C.F.R. § 122.4(i) and § 122.44(d)(1)(i). If the “cause or contribute” language is triggered, the rule at issue in *Annandale/Maple Lake* would impose a permit ban on a new discharge while the rule at issue in *ALASD* would require more stringent effluent limits on an existing discharge. 40 C.F.R. § 122.4(i) and § 122.44 (d)(1)(iii).

MCEA argues that *Annandale/Maple Lake* is distinguishable because the language that this Court found ambiguous there--the triggering language of whether a discharge “causes or contributes” to a water quality violation--is not directly at issue in the *ALASD* case. But it is nonsensical to argue, because the specific language subject to interpretation is different, that somehow the legal principles for analyzing agency interpretive authority and reasonableness in *Annandale/Maple Lake* do not apply. And, given the court of appeals’ broad conclusion that 40 C.F.R. § 122.44(d)(1) is unambiguous, it is far from clear whether MPCA would be entitled to any deference in

applying the cause or contribute standard under that regulation if the lower court's decision is allowed to stand. As a result, MPCA would have leeway to apply the triggering language under 40 C.F.R. § 122.4(i), the rule at issue in *Annandale/Maple Lake*, but would be held to a very rigid interpretation when applying the same language under 40 C.F.R. § 122.44(d)(1). Such a result would be administratively unworkable and inequitable to regulated parties.

The striking similarity of the NPDES regulations at issue in *Annandale/Maple Lake* and *ALASD* demonstrates that MPCA's interpretation of 40 C.F.R. § 122.44(d)(1) is entitled to the same careful three-step analysis of deference that this Court gave to the parallel rule in *Annandale/Maple Lake*. Contrary to MCEA's assertions, MPCA does not argue that these similarities alone are determinative of the outcome in the *ALASD* case. Rather, MPCA argues that, when the language and context of 40 C.F.R. § 122.44(d)(1) are examined under the same criteria as set forth in *Annandale/Maple Lake*, as the court of appeals conspicuously failed to do, this Court must conclude that the rule is ambiguous and subject to reasonable interpretation by MPCA. MCEA's argument that MPCA's interpretation of this Court's holding in *Annandale/Maple Lake* would give the agency "carte blanche" authority to administer the NPDES program, or would eliminate any meaningful role for judicial review, are totally unfounded. On the contrary, MPCA is merely seeking the same careful review of the agency's interpretation of 40 C.F.R. § 122.44(d)(1) as afforded by this Court in *Annandale/Maple Lake*.

**B. The Likely Adverse Consequences Of the Court of Appeals' Decision As Asserted By MPCA And Reinforced By Amicus League Of Minnesota Cities Are Well Founded.**

MCEA asserts that MPCA and Amicus League of Cities have overstated the potential for serious statewide impact if MPCA is required to apply the court of appeals' reading of 40 CFR § 122.44(d)(1). MCEA 42-43. MCEA attempts to support this argument by comparing the gravity of imposing a permit ban on new facilities under 40 C.F.R. § 122.4(i) versus imposing stricter effluent limits on existing facilities under 40 C.F.R. § 122.44(d)(1). At first blush, a permit ban may appear to be a more severe result than setting more stringent effluent limits. However, if MPCA is required to set effluent limits for existing facilities without being allowed to phase in more stringent limits, or if it is precluded from considering TMDLs in setting more equitable and realistic watershed-based effluent limits for dischargers in the affected watershed, the result may be equally severe. The court of appeals' decision may discourage necessary improvements, replacements and expansions of existing treatment facilities. The League of Cities' Brief, which cites the hundreds of existing waste water treatment facilities that discharge into already impaired waters that could be affected by a narrow reading of the regulation, reinforces this concern.

Furthermore, the court of appeals concluded below that any failure by MPCA to set effluent limits under 40 C.F.R. 122.44(d)(1) is tied to 40 C.F.R. 122.4(d) which prohibits issuance of permits "when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states." PCA

Add. 13.<sup>9</sup> In making this link, the court of appeals effectively introduced a permit ban into a regulation that otherwise did not provide for one.

MCEA tries to dampen the potential severity of the court of appeals' rigid reading of 40 C.F.R. § 122.44(d)(1) by arguing that stricter effluent limits are not required where MPCA determines that existing facilities do not cause or contribute to a downstream impairment. That is true enough, but begs the question of how strictly MPCA must read the cause or contribute language in this regulation. MCEA suggests this should not be a problem, citing the new wastewater facility proposed by the cities of Annandale and Maple Lake as an example of a facility that does not cause or contribute to a downstream impairment of Lake Pepin. MCEA's argument cannot be taken seriously. The only reason MPCA is able to determine under 40 C.F.R. § 122.4(i) that the Annandale/Maple Lake facility does not cause or contribute to impairment of Lake Pepin is because this Court in *Annandale/Maple Lake* ruled that the regulation was ambiguous and that MPCA's interpretation of the cause and contribute language in that regulation was reasonable.

**C. MPCA Identified Ambiguous Language In 40 C.F.R. § 122.44(d)(1).**

MCEA argues that MPCA has not identified any specific provision in 40 C.F.R. § 122.44(d)(1) that could be considered ambiguous. That is not true. MPCA pointed out that the requirements of 40 C.F.R. § 122.44(d)(1) are "couched in general terminology"

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<sup>9</sup> The unpublished opinion of the court of appeals is reproduced in the Addendum ("PCA Add.") to MPCA's opening Brief.

that require the MPCA to decide whether the requirements have been met. MPCA 15. This brings the regulation squarely within this Court's precedent in *Minn. Ctr. for Env't Advocacy v. MPCA*, 644 N.W.2d 457 (Minn. 2002), which the Court cited in *Annandale/Maple Lake* as one basis for evaluating whether interpretation of an environmental rule is required. 731 N.W.2d 514. In addition, MPCA pointed out in its Brief that setting effluent limits and determining whether the limits will attain the desired water quality result is a quintessential example of the exercise of MPCA judgment and technical expertise. MPCA 24-25. Although MPCA made this argument under the second step of the *Annandale/Maple Lake* deference test (need for the agency to exercise its professional expertise), it also demonstrates that the language of 40 C.F.R. § 122.44(d)(1) poses issues of judgment and interpretation for the permitting agency.

MPCA also pointed out that 40 C.F.R. § 122.44(d)(1) Subparagraph (vi)(A) ("Option A") expressly gives the agency considerable room for judgment in selecting how it will derive numeric effluent limits to meet narrative standards. 40 C.F.R. § 122.44(d)(1)(vi)(A) (allowing the permitting authority to use "a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion" to derive numeric limits). MCEA now concedes that Option A "provides state agencies with ample flexibility in figuring out how to derive a numeric effluent limit." MCEA 19-20. MCEA's admission that the regulation gives MPCA "ample flexibility" to select the sources for deriving limits under Option A demonstrates that the regulation

leaves important decisions and judgments to the agency, and therefore must be considered ambiguous under *Annandale/Maple Lake*.

**D. The First Sentence Of Option A Of The Regulation, On Which MCEA Relies, Is Not Unambiguous.**

MCEA's argument that the federal regulation is unambiguous relies almost entirely on its reading of the first sentence of Option A. MCEA argues that this sentence is unambiguous and trumps the "ample flexibility" MCEA conceded to MPCA in selecting the sources from which the agency derives numeric effluent limits. The sentence relied on by MCEA requires the permitting authority to set effluent limits that "will attain and maintain applicable narrative water quality criteria and will fully protect the designated use." 40 C.F.R. § 122.44(d)(1)(vi)(A). Assuming *arguendo* that this sentence has the meaning that MCEA claims for it, that more stringent effluent limits must be imposed whether or not a TMDL has been completed, the sentence is nevertheless ambiguous and, in any event, the ALASD effluent limits fully satisfy its language.<sup>10</sup>

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<sup>10</sup> It is noteworthy that MCEA does not rely on the "plain words" of the regulation in order to make out the meaning of this sentence of Option A. Rather, MCEA invokes the EPA regulatory preamble and EPA administrative decisions, and even resorts to Regional EPA correspondence on this subject. Of course, MCEA is entitled to cite authoritative legal sources such as the EPA preamble, relevant case-law and EPA administrative decisions to help explain the meaning of 40 C.F.R. § 122.44(d)(1). However, this Court need not and should not waste its time attempting to parse the correspondence of EPA regional staff, giving direction to other states on their NPDES programs or permits, to see what may be gleaned about the meaning or ambiguity of this EPA regulation. The parties have cited adequate authoritative legal sources for the Court to consider. Moreover,  
(Footnote Continued On Next Page.)

First, by using the words “*will* attain” and “*will* fully achieve,” rather than “attain” or “achieve,” the language cited by MCEA invites interpretation on the very issue that is of primary concern in this case: namely, *when and how soon must MPCA’s nutrient narrative water quality standard be attained.* Contrary to MCEA’s assertion, this language supports the need for MPCA to use its judgment to provide a reasonable phase-in of more stringent facility-specific effluent limits needed to restore impaired waters. Nothing in this language or in EPA’s interpretation as urged by MCEA precludes MPCA from *phasing in* the effluent limits that will attain the water quality standard. Nor does this language preclude MPCA from considering, as part of that phase-in, whether it is reasonable to make use of a TMDL that is about to be completed to provide a watershed-based effluent limit for one discharger that more equitably shares the pollution control burden with other dischargers in the watershed.<sup>11</sup>

Moreover, the record shows that the effluent limits in the ALASD permit meet the requirement of the first sentence of Option A relied upon by MCEA; that is, the permit imposes more stringent numeric effluent limits--the 0.45 mg/L and 0.3 mg/L limits--which take effect regardless of the completion of the Lake Winona TMDL. The 0.45

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MCEA’s reliance on secondary, non-authoritative sources vividly illustrates that the regulation is not as clear as MCEA asserts.

<sup>11</sup> A TMDL sets waste load allocations for all point sources and load allocations for all nonpoint sources in the watershed of an impaired water body that are necessary to restore the quality of that water body. *See* Minn. State. § 114D.15, subd. 10. Using a TMDL to set effluent limits assures both that the water is restored and that multiple sources of the impairment share the burden of achieving restoration.

intervention limit takes effect immediately, and the still more stringent 0.3 mg/L limit takes effect after completion of facility construction. These permit requirements culminate in an effluent limit based upon the Lake Winona TMDL, which in this case is scheduled to be completed within the term of the permit. MPCA has determined that these limits meet the requirements of 40 C.F.R. § 122.44(d)(1); that is, they “will attain” the applicable nutrient water quality standard for Lake Winona.

**E. In Evaluating Ambiguity A Court Is Not Limited To The Surrounding Language Of The Regulation.**

MCEA argues that in evaluating whether a regulation is ambiguous the Court should confine its inquiry into the legal context of the regulation to “the surrounding language of the regulation or statute.” MCEA’s argument has no legal merit and the Court should reject it.

First and most importantly, MCEA’s argument is in conflict with *Annandale/Maple Lake*. In that case, this Court stated that its “determination of whether words or phrases are ambiguous . . . relies on the meaning assigned to the words or phrases in accordance with the apparent *purpose* of the regulation as a whole.” 731 N.W.2d 517. (emphasis added.) In assessing this “purpose,” the Court said the “regulation must be interpreted within the context of the language of the CWA,” the statute that gives rise to the regulation. 731 N.W.2d 518. Thus, the Court clearly looked beyond the words of the regulation to regulatory “purpose” and to the language of the statute on which the regulation is based. But the Court’s inquiry did not stop there. It also considered authoritative judicial and administrative interpretations of the CWA,

including *Arkansas v. Oklahoma*, 503 U.S. 91, 112 S. Ct. 1046 (1992), a decision of the Environmental Appeals Board or EAB,<sup>12</sup> a brief filed by EPA in federal court expressing national EPA policy on pollution offsets, and a formal national offset policy adopted by EPA. 731 N.W.2d 519-522, 524. Clearly, the Court in *Annandale/Maple Lake* did not limit itself to the “surrounding words of the regulation” in reviewing the legal context of the NPDES regulation.

MCEA tries to support its argument by using cases cited by this Court in *Annandale/Maple Lake*. See 731 N.W. 2d 518 (citing *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 112 S. Ct. 570 (1991); *Chiodo v. Bd. of Educ.*, 298 Minn. 380, 215 N.W.2d 806 (1974); and *State v. Donaldson*, 41 Minn. 74, 42 N.W. 781 (1889)). But this Court cited those cases to *support* its inquiry into regulatory context, not to *limit* it. *Id.* Nothing in these cases limits this Court’s examination of the broader legal context of the regulation at issue here to determine whether it is ambiguous.

**F. *Arkansas v. Oklahoma* Is The Leading Authority For Understanding The Legal Context Of 40 C.F.R. § 122.44(d)(1).**

This Court should reject MCEA’s argument that *Arkansas v. Oklahoma* is irrelevant to this case. In *Annandale/Maple Lake*, this Court relied heavily on *Arkansas v. Oklahoma* to illuminate the context of an NPDES regulation that prohibited new discharges to already impaired waters. See 731 N.W.2d 519-522 (extensive discussion of *Arkansas v. Oklahoma*). MCEA argues that *Arkansas* is distinguishable here because the

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<sup>12</sup> The EAB is an arm of the United States Environmental Protection Agency, which administers the regulation.

*ALASD* case deals with existing rather than new discharges; because the regulation in this case does not involve a categorical permit ban; and because the *ALASD* facility, in MCEA's view, does not improve existing conditions. MCEA's arguments fail to distinguish the *Arkansas* case.

First, as MPCA points out in Part II.B of this Reply, the court of appeals effectively read a permit ban into 40 C.F.R. § 122.44(d)(1), and the consequences of that court's decision may well be as severe as a permit ban. In addition, the record shows that *ALASD*'s expanded facility will also improve removal of phosphorus by replacing an aging filtration system with a different type of system that is more efficient. R. 2175.

Second, and more importantly, *Arkansas v. Oklahoma* is relevant to understanding the legal context of 40 C.F.R. § 122.44(d)(1) because it stands for the principle that the CWA vests "EPA and the states with broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution" and that this authority may be used to balance otherwise overly rigid regulatory requirements that discourage improvement of the nation's waters. *Arkansas v. Oklahoma* 503 U.S. at 108; and *see* 731 N.W.2d 525 (stating that the Supreme Court in *Arkansas* sought to avoid "adoption of such a rigid approach that construction of new facilities that would improve existing conditions would be thwarted."). This principle, which the Court found relevant to understanding the context of the EPA rule in *Annandale/Maple Lake*, is even more relevant in this case because MPCA relies on a TMDL as the last stage for phasing in the facility-specific effluent limits needed to restore Lake Winona. The TMDL process is exactly the kind of

watershed-based planning process that the Supreme Court favored over rigid facility-specific requirements in *Arkansas*.

**III. MCEA FAILS TO ADDRESS STEP TWO OF THE ANNANDALE/MAPLE LAKE THREE-PART TEST--NECESSITY FOR AGENCY EXPERTISE TO INTERPRET THE REGULATION.**

The second step of the three-part deference test in *Annandale/Maple Lake* is to consider whether the MPCA's expertise and special knowledge are needed to interpret and apply 40 C.F.R. § 122.44(d)(1). This Court has found this factor to be especially important "when the construction of the regulation's language is so technical in nature that the agency's field of technical training, education, and experience is necessary to understand the regulation." 731 N.W.2d 516. That description surely fits 40 C.F.R. § 122.44(d)(1). MPCA addressed this element of the three-part deference test in Part III.A of its opening brief and will not repeat those arguments here. MPCA 23-26. MCEA has not contested this issue in its Brief. As a result, the issue is conceded.

**IV. MPCA'S PHASED APPROACH TO IMPOSING EFFLUENT LIMITS IN THE ALASD PERMIT TO ATTAIN THE NARRATIVE WATER QUALITY STANDARD IS REASONABLE UNDER 40 C.F.R. § 122.44(d)(1)(VI)(A).**

If this Court determines that 40 C.F.R. § 122.44(d)(1) is ambiguous and that MPCA's special expertise, training and policy judgment are necessary to interpret it, as MPCA believes it must, the final question for the Court is whether the effluent limits set by MPCA in the ALASD permit represent a reasonable interpretation of the regulation.<sup>13</sup>

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<sup>13</sup> MPCA's arguments for the reasonableness of MPCA's phased approach to effluent limits are laid out in Part III of its opening brief. MPCA 26-46.

MCEA characterizes MPCA's interpretation of 40 C.F.R. § 122.44(d)(1) as allowing the agency to indefinitely delay or defer setting of water quality-based effluent limits for existing facilities discharging into impaired waters until TMDLs are approved. MCEA 1, 20-21, 39. That assertion is totally unfounded. Any ruling by this court affirming the effluent limits set by MPCA in this case would be limited to the facts of the ALASD permit. Under the facts in the record here, MPCA has imposed effluent limits that provide a phased approach to attaining the nutrient narrative water quality standard in Lake Winona. Beginning at the time of permit reissuance, ALASD was required to meet a more stringent phosphorus effluent limit (0.45 construction intervention limit), followed by the 0.3 mg/L limit upon completion of construction, and culminating in a limit based on ALASD's phosphorus waste load allocation in the Lake Winona TMDL. PCA App. 40. Furthermore, MPCA scientifically modeled Lake Winona's response to ALASD's expanded, post-construction discharge and determined that the 0.3 mg/L effluent limit assures that the expanded discharge will not further impair the lake for nutrients. PCA App. 64-70. In addition, the record shows that work on the Lake Winona TMDL had already begun at the time of permit reissuance in 2006 and that MPCA had scheduled the TMDL for completion and expected approval by EPA before the expiration of the five-year ALASD permit in 2011. R. 7930-7932.

Thus, the facts of this case do not justify MCEA's alarm that MPCA is seeking "carte blanche" authority to indefinitely defer more stringent effluent limits for existing discharges to impaired waters. Just as this Court's ruling in *Annandale/Maple Lake* on

the reasonableness of MPCA's pollution offset determination was limited to the facts of that case, and did not automatically approve all future agency offset decisions, any ruling affirming the ALASD permit will be similarly limited.

**A. MCEA Has Effectively Conceded That The 0.45 mg/L And 0.3 mg/L Limits In The ALASD Permit Constitute Reasonable Interim Limits Under 40 C.F.R. § 122.44(d)(1)(vi)(A).**

MCEA has made important concessions in its brief concerning the reasonableness of the construction (0.45 mg/L) and post-construction (0.3 mg/L) effluent limits that MPCA incorporated in the ALASD permit. MCEA concedes that MPCA had ample authority under 40 C.F.R. § 122.44(d)(1)(vi)(A) to determine the sources from which it derived these numeric effluent limits. Nothing in MCEA's Brief shows that MPCA's use of its explicit pre-TMDL permitting policy and its phosphorus effluent rule to derive those limits was inappropriate or unreasonable. Further, MCEA concedes that the ALASD permit "does contain a schedule of compliance--it is the schedule providing interim effluent limits during a period of construction, leading to required compliance with the ultimate 0.3 mg/L effluent limit." MCEA 34. As noted earlier, MCEA's implied argument that 0.3 mg/L is the "ultimate" effluent limit does not square with the terms of the permit or MPCA's findings in this matter. *See* Part I of this Reply, citing PCA App. 40 (ALASD Permit, Compliance Schedule) and PCA App. 22 (Findings of Fact, para. 21). Further, the record, including scientific lake modeling and the testimony of the MPCA expert who did the modeling, demonstrates that the 0.3 mg/L limit will prevent further nutrient impairment of Lake Winona. Thus, it cannot be disputed that MPCA has

set an enforceable set of interim effluent limits that halts further impairment of Lake Winona. These construction and post-construction limits clearly provide reasonable steps toward attainment of the nutrient narrative standard required by 40 C.F.R. § 122.44(d)(1).

The only issue left for the Court to decide is whether MPCA's incorporation of a TMDL-based effluent limit in the permit schedule of compliance provided the appropriate last step needed to assure that ALASD "will attain" MPCA's nutrient water quality standard as required by 40 C.F.R. § 122.44(d)(1).

**B. MPCA's Incorporation Of A TMDL-Based Effluent Limit In The Schedule Of Compliance In The ALASD Permit Is A Reasonable Last Step Under 40 C.F.R. § 122.44(d)(1) To Assure Attainment Of The Nutrient Water Quality Standard And The Schedule Does Not Violate Other Federal Requirements.**

MCEA makes three arguments to try to show that MPCA's incorporation of the TMDL-based effluent limit in the ALASD schedule of compliance does not meet applicable legal requirements: (1) that MPCA's inclusion of the TMDL-based limit in a schedule of compliance would render other provisions of 40 C.F.R. § 122.44(d)(1) superfluous; (2) that EPA has expressly disapproved the type of schedule of compliance used by MPCA in the ALASD permit; and (3) that incorporating in a schedule of compliance an effluent limit that has not yet been calculated is inconsistent with CWA and NPDES definitions of "schedule of compliance." None of these arguments has legal merit and the Court should reject them.<sup>14</sup>

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<sup>14</sup> MPCA's arguments on inclusion of the TMDL-based effluent limit are found in Part III.B.4 of its opening brief. MPCA 40-46.

**1. MPCA's inclusion of a TMDL-based limit in the ALASD permit schedule of compliance does not render other provisions of 40 C.F.R. § 122.44(d)(1) superfluous.**

MCEA concedes that MPCA has "ample flexibility" to decide what sources to use to derive effluent limits under Subparagraph (vi)(A) or "Option A." MPCA's incorporation of the TMDL-based limit in the permit is consistent with MPCA's pre-TMDL permitting policy which MPCA used to derive the 0.45 mg/L and 0.3 mg/L interim limits in the permit under Option A. PCA App. 83 (MPCA September 21, 2004 Memorandum setting forth MPCA's Pre-TMDL Permitting Policy) ("Once EPA approves a completed TMDL, the TMDL becomes the tool for identifying point and nonpoint source reductions needed to restore a water body to meeting its designated uses. A TMDL's point source reductions will be implemented through NPDES permits."). There can be no dispute that a TMDL-based effluent limit "will attain" MPCA's narrative water quality standard for nutrients as required by 40 C.F.R. § 122.44(d)(1)(vi)(A). As EPA states in its regulatory preamble "[T]his [TMDL] process results in effluent limits that protect aquatic life and human health because the limits are derived from water quality standards." PCA App. 114.

Nevertheless, MCEA argues that, by incorporating a limit in the permit that is based on a not yet completed TMDL, MPCA rendered superfluous another provision of the regulation that expressly deals with TMDL-based limits. MCEA points to Subparagraph (vii)(B) of the regulation which requires that, in setting effluent limits for a discharge in order to "protect a narrative water quality criterion," the limit must be

consistent with an “*available* waste load allocation” for the discharge. The schedule of compliance in the ALASD permit requires ALASD to comply with “permit conditions which are . . . consistent with the Permittee’s waste load allocation for phosphorus.” PCA App. 40 (Ch. 3, Sec. 1.10).<sup>15</sup> It is difficult to see how MPCA has acted in conflict with Subparagraph (vii)(B) by requiring ALASD to meet conditions based on a waste load allocation in a TMDL that MPCA has scheduled for completion within the five year life of the permit. It is not unreasonable to consider a TMDL that is completed within the term of the permit to be “available” for implementation as part of that permit. Rather than rendering Subparagraph (vii)(B) superfluous, as MCEA argues, it seems more reasonable to conclude that MPCA’s action complies with *both* Subparagraph (vi)(A) and Subparagraph (vii)(B). Indeed, that is what MPCA argued in its brief to the court of appeals in this case. MPCA Brief to Court of Appeals 45.

**2. EPA’s disapproval of California’s use of certain schedules of compliance in NPDES permits under that State’s Toxic Implementation Policy does not affect MPCA’s action in the ALASD proceeding.**

MCEA asserts in its Brief that “EPA has explicitly rejected the interpretation of a schedule of compliance that PCA offers in defense of the ALASD permit.” MCEA 35. MCEA bases this assertion on two documents not in the record but submitted in MCEA’s

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<sup>15</sup> A waste load allocation is part of the TMDL process, and represents the amount of a pollutant that a facility may discharge to a receiving water and still assure compliance with applicable water quality standards for the water body. See 40 C.F.R. § 130.2(h) (defining “wasteload allocation” or “WLA” as “[t]he portion of a receiving water’s loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.”).

Appendix. MCEA App. 65-72. The documents are a May 10, 2007 memorandum from EPA's Office of Water Management to the Director of Region IX EPA, and a letter dated October 23, 2006 from Region IX EPA to the State of California.<sup>16</sup> The Region IX letter disapproved part of a compliance schedule policy in California's plan for issuing NPDES permits for toxic discharges to surface waters.<sup>17</sup>

The first of the two documents that MCEA contends are fatal to MPCA's use of a schedule of compliance in the ALASD permit states as follows:

A compliance schedule *based solely on time needed to develop a Total Maximum Daily Load* is not appropriate, consistent with EPA's letter of October 23, 2006, to Celeste Cantu . . . in which EPA disapproved a provision of the Policy for Implementation of Toxic Standards for Inland Waters, Enclosed Bays, and Estuaries for California.

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<sup>16</sup> MPCA reiterates that these two documents are not authoritative sources of law. They are not part of the formal rulemaking process for 40 C.F.R. § 122.44(d)(1), not a binding decision of a court or administrative agency, or even formal EPA guidance or policy. They are informal statements by EPA regions other than Region V (which has authority over Minnesota), which involve permitting policies and practices of other states the details of which are unknown to this Court. Therefore, these documents should not be considered or given any weight by this Court. MPCA emphatically rejects MCEA's assertion that anything in the two EPA documents constitutes an "explicit interpretation of its own regulation [that] establishes what is required by *federal law*." MCEA 39 (emphasis in original). However, because of MCEA's sweeping claim that statements in the two documents directly contravene MPCA's use of the compliance schedule in the ALASD permit, MPCA is bound to address them.

<sup>17</sup> Because it deals with permits to control discharges of toxic chemicals, rather than the non-toxic pollutants such as phosphorus which contribute to nutrient violations, the California schedule of compliance policy has little relevance to MPCA's use of such a schedule of compliance in this case. Furthermore, in EPA Region V's communication to MPCA concerning the ALASD permit, Region V did not raise any objection to the schedule of compliance. PCA App. 75.

Resp App. 67 (May 10, 2007 Memo, para. 10) (emphasis added). As the record clearly shows, of course, the ALASD schedule of compliance is not based solely on time needed to develop a TMDL, but rather incorporates two explicit numeric effluent limits that must be met during and after construction of facility improvements, and a third limit that is effective when the TMDL is completed within the five year term of the permit.

Nevertheless, MCEA devotes two and a half pages of its Brief to quote from EPA's letter to Ms. Cantu regarding the reasons Region IX disapproved part of California's policy. Critically, however, MCEA's lengthy quote omits the language that discloses which part of California's policy EPA approved and which part it disapproved.

Region IX quotes "Provision A," which it previously approved, as follows:

The schedule of compliance for point source dischargers in a NPDES permit shall be as short as practicable but in no case exceed the following:

A. Up to five years from the date of permit issuance, reissuance, or modification to complete actions . . . necessary to comply with CTR criterion-based effluent limitations that are derived with or without a TMDL.

Resp. App. 69 (quoting Section 2.1.A. of the California policy) (emphasis in original).

Notably, the part of the California policy which EPA *approved* authorizes schedules of compliance with a five year duration that matches the schedule of compliance in the five year ALASD permit.

By contrast, Region IX quotes "Provision B," which it disapproved in the 2006 letter, as follows:

The schedule of compliance for point source dischargers in a NPDES permit shall be as short as practicable but in no case exceed the following:

....

B. Up to *15 years from the effective date of this Policy* to develop and adopt a TMDL and accompanying Waste Load Allocations (WLAs) and Load Allocations (LAs), as described in section 2.1.1, below.

In no case (unless an exception has been granted in accordance with section 5.3) shall a compliance schedule for these dischargers exceed, from the effective date of this Policy: (a) 10 years to establish and comply with CTR criterion-based effluent limitation; or (b) *20 years to develop and adopt a TMDL, and to establish and comply with WLAs derived from a TMDL* for a CTR criterion (i.e., up to 15 years to complete the TMDL and up to five years to comply with a TMDL-derived effluent limitation).

Resp. App. 69 (citing Section 2.1.B. of the California policy) (emphasis added).

The Region IX letter further explains that

[w]e are concerned that as written, Provision B could allow permitting authorities to defer development of water quality-based effluent limitations until a TMDL is adopted. Section 2.1(b) of the Policy limits Provision B compliance schedules to “20 years to develop and adopt a TMDL, and to establish and comply with WLAs [waste load allocations] derived from a TMDL for a CTR [California Toxics Rule] criterion.”

Resp. App. 71 (emphasis in original).

Nothing in the ALASD schedule of compliance remotely resembles the 15-20 year compliance schedules allowed by the California policy disapproved by EPA Region IX. Furthermore, a schedule of compliance that contains interim WQBELs such as the 0.45 and 0.3 mg/L limits in the ALASD permit cannot be said to “defer development of water quality effluent limitations until a TMDL is adopted.” Thus, contrary to MCEA’s assertions, the EPA memorandum and Region IX letter have no bearing whatsoever on

the validity of the ALASD schedule of compliance and these statements should be disregarded by this Court.

However, this Court can and should consider the EPA Administrator's decision cited as underlying authority in the EPA memorandum and the Region IX letter. Resp. App. 65 and 68 (*In the Matter of Star-Kist Caribe, Inc.*, NPDES Appeal No. 88-5, 1990 WL 324290 (E.P.A.)).<sup>18</sup> In *Star-Kist*, the EPA Administrator ruled that EPA had no authority to include schedules of compliance in NPDES permits unless the state where the permit applied had adopted standards that allow schedules of compliance. PCA Reply App. 2-3. After surveying the relevant provisions of the CWA, the Administrator states:

In sum, the language, structure, and objectives of the Act, as set forth in §§ 101(a) and (b), 402(a)(3), and 510, all support an interpretation of § 301(b)(1)(C) that Congress intended the States, not EPA, to become the proper authorities to define appropriate deadlines for complying with their own state law requirements. Just how stringent such limitations are, or whether limited forms of relief such as variances, mixing zones, and compliance schedules should be granted are purely matters of state law, which EPA has no authority to override.

PCA Reply App. 7. In the next paragraph of his decision, the Administrator adds:

. . . the States have full authority to make appropriate accommodations for dischargers needing additional time for compliance, and it is up to the States, not EPA, to decide whether their water quality standards should be applied in a flexible manner.

*Id.* This Court must add *Star-Kist* to the other authoritative decisions that support MPCA in exercising a reasonable degree of latitude to craft compliance schedules by which

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<sup>18</sup> The *Star-Kist* decision is provided in an Appendix to this Reply for the Court's convenience. References to the Appendix are denoted as "PCA Reply App. \_\_\_\_."

facilities such as ALASD to comply with more stringent effluent limits needed to attain state narrative water quality standards under 40 C.F.R. § 122.44(d)(1).

**3. MPCA's incorporation in a schedule of compliance of an effluent limit that has not yet been calculated is not prohibited by other state or federal regulation.**

MCEA argues that the ALASD schedule of compliance fails to satisfy the CWA and NPDES definitions for three reasons: (1) the TMDL-based effluent limit in the schedule has not yet been calculated; (2) according to MCEA, there are no enforceable requirements to be taken by ALASD to comply with the limit; and (3) there is no express end date in the schedule of compliance by which ALASD must comply with the TMDL-based limit.<sup>19</sup>

The CWA defines "schedule of compliance" as "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." 33 U.S.C. § 1362(11) and (17). The NPDES regulation uses somewhat different terms, defining a schedule of compliance as "a schedule of remedial measures included in a 'permit', including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and regulations." 40 C.F.R.

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<sup>19</sup> Another NPDES regulation, 40 C.F.R. § 122.47, sets more specific requirements for a schedule of compliance. Although MCEA cites this section in its brief to this Court, it makes no specific arguments that the ALASD schedule of compliance fails to meet this regulation, and it did not make such arguments or cite this regulation in argument to the court of appeals. MPCA initially addressed how the schedule of compliance meets applicable legal requirements in its brief. MPCA 43-44.

§ 122.2. Contrary to MCEA's arguments, incorporation of the TMDL-based limit in the ALASD schedule of compliance, is consistent with these definitions.<sup>20</sup>

First, both the ALASD waste load allocation in the TMDL, and an effluent limit needed to meet that allocation, fall within the terms "effluent limitation, other limitation, prohibition or standard" under the CWA definition of "schedule of compliance." Under EPA's definition, "wasteload allocations" or "WLAs" expressly "constitute a type of water quality-based effluent limitation." 40 C.F.R. § 130.2(h). Neither the CWA nor NPDES definition requires that an effluent limit, other limitation or standard be a "calculated" amount, either at the time the permit is issued or at some later time. Thus, for purposes of meeting the CWA definition, there is no legal significance to the fact that the waste load allocation and the effluent limit based on that allocation have not yet been calculated. Furthermore, the only case any party has cited that challenged incorporation of an uncalculated TMDL-based limit in an NPDES schedule of compliance concluded that it was permissible. *Communities for a Better Environment ("CBE") v. State Water Resources Bd.*, 1 Cal. Rptr. 3d 76 (Cal. App., 1st Dist. 2003).<sup>21</sup>

Second, a TMDL-based effluent limit is clearly enforceable by the MPCA as are all effluent limits that are imposed in an NPDES permit. PCA App. 52-53 (ALASD

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<sup>20</sup> MCEA concedes in its brief that the construction and post-construction effluent limits are a valid schedule of compliance. MCEA 34.

<sup>21</sup> Contrary to MCEA's assertion, EPA's 2007 memorandum and Region IX's 2006 letter, discussed in Part IV.B.2 of this Reply, cannot and do not "supersede" this prior decision of the California Court of Appeals. MCEA has not shown that either the decision or the result in that case was altered by these documents.

Permit, Chapter 9, Total Facility Requirements, section 1.27) (“Noncompliance with a term or condition of this permit subjects the Permittee to penalties provided by federal and state law . . .”); and section 1.30 (Effluent Violations)). Under MPCA’s interpretation of 40 C.F.R. § 122.44(d)(1), ALASD’s compliance with the TMDL-based effluent limit is the last “action” required to assure that the nutrient water quality standard in Lake Winona will be attained. Thus, ALASD’s implementation of the TMDL-based effluent limit is clearly one part of a three-part “sequence of actions” in the ALASD schedule of compliance as that term is used in the CWA definition, and the action leads to compliance with the CWA and regulations, namely 40 C.F.R. § 122.44(d)(1).

MCEA’s third argument about the lack of an express date in the schedule of compliance is also without merit. There is nothing in the CWA or NPDES definitions that requires that any explicit dates be assigned to the actions set forth in a schedule of compliance. Further, although there is no explicit end date in the ALASD schedule of compliance, it does not extend indefinitely. The ALASD permit itself is limited to a term of five years. PCA App. 24 (ALASD Permit (stating expiration date of May 31, 2011)). Nothing in the schedule of compliance allows for compliance to extend beyond the five year term of the permit. In addition, the record of the permit proceeding shows that the Lake Winona TMDL, which is the basis for the third and final stage of the schedule of compliance, is scheduled for completion in 2009. R. 7930-7932. Based on the facts in this record, the term of the ALASD schedule of compliance is limited to five years. Nothing in the CWA or NPDES definitions requires anything different.

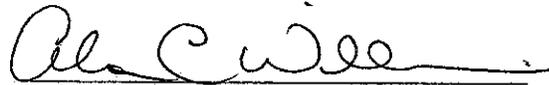
**CONCLUSION**

For all the reasons and arguments in MPCA's opening Brief and this Reply, MPCA respectfully asks this Court to grant the three-part relief requested in MPCA's opening Brief.

Dated: February 13, 2008

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

**WITH MINN. R. APP. P. 132.01, Subd. 3**

The undersigned certifies that the Brief submitted herein contains 6,927 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.

  
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ALAN C. WILLIAMS