

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

**RESPONDENT MINNESOTA CENTER FOR
ENVIRONMENTAL ADVOCACY'S BRIEF AND APPENDIX**

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

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STATEMENT OF THE ISSUES

I. Issue: Whether a permit effluent limit that the Minnesota Pollution Control Agency's ("PCA's") record shows will maintain or worsen water quality in an already-impaired lake comports with a federal regulation requiring the PCA to calculate an effluent limit that will achieve water quality standards.

PCA decision: The PCA issued a permit for an expanded sewage discharge that it admits will cause or contribute to a violation of water quality standards without calculating or imposing an effluent limit it can show will achieve water quality standards.

Decision of the Court of Appeals: The Minnesota Court of Appeals remanded the permit to the PCA for calculation of an effluent limit necessary to achieve water quality standards as required by the plain language of 40 C.F.R. § 122.44(d)(1) (2007).

Most apposite cases, statutes or rules: 40 C.F.R. § 122.44(d)(1)

II. Issue: Whether reference in the permit to an undetermined effluent limit to be prepared and imposed at an uncertain future date qualifies as a "schedule of compliance" under Clean Water Act permitting regulations.

PCA decision: The PCA issued a permit without calculating or imposing an effluent limit it can show will achieve water quality standards, instead deferring calculation of such a limit until an unspecified date when it has completed and U.S. Environmental Protection Agency ("EPA") has approved the Lake Winona Total Maximum Daily Load.

Decision of the Court of Appeals: The Minnesota Court of Appeals found that deferring calculation of an enforceable water quality-based effluent limit until an uncertain future date did not qualify as a schedule of compliance.

Most apposite cases, statutes or rules: 33 U.S.C. § 1362(17) (2007); 40 C.F.R. § 122.47 (2007)

STATEMENT OF THE CASE

This case involves a National Pollutant Discharge Elimination System (“NPDES”) permit issued by the Minnesota Pollution Control Agency (“PCA”) Board for an expanded discharge of treated sewage to Lake Winona.

The Minnesota Center for Environmental Advocacy (“MCEA”) objected to issuance of the permit because the phosphorus limit in the permit does not comply with federal law. Lake Winona is severely impaired with excess nutrients due to phosphorus in the wastewater discharge from the Alexandria sewage treatment plant. Federal regulations require that the PCA calculate an effluent limit for the permit that is stringent enough to achieve water quality standards, such a permit limit is often referred to as a “water quality-based effluent limit” or WQBEL. Instead, PCA staff recommended an effluent limit that its own modeling shows will increase the phosphorus concentration in the already-impaired Lake. On June 27, 2006, the PCA Board approved issuance of the permit without a water quality-based effluent limit.

MCEA appealed by writ of certiorari to the Minnesota Court of Appeals seeking remand of the permit for calculation of an effluent limit consistent with federal requirements. The Court of Appeals evaluated PCA's arguments under the analytical framework set forth by this Court in *In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502 (Minn. 2007) ("*Annandale/Maple Lake*"). Based on that evaluation, the Court of Appeals concluded in a unanimous unpublished decision issued August 28, 2007, that the effluent limit in the permit did not satisfy the plain language of the federal regulations and remanded the permit to the PCA for calculation of an appropriate effluent limit.

On November 21, 2007, this Court granted the PCA's and Alexandria Lake Area Sanitary District's ("ALASD's") Petitions for Review.

STATEMENT OF FACTS

MCEA agrees with the PCA's recitation of facts with the following exceptions and/or additions.

Lake Winona has been and continues to be severely impaired.

Although PCA cites to a report commissioned by ALASD that notes "dramatic improvements" in the water quality of Lakes Agnes and Henry, the same report notes that water quality in Lake Winona – the receiving water and only lake that is relevant to this case – has improved little. *Compare* PCA Br. at 6

with R. 99 (noting “only modest water quality improvements in Lake Winona, the direct recipient of the ALASD discharge”).¹

According to the PCA’s Environmental Assessment Worksheet (“EAW”), Lake Winona was placed on the state’s impaired waters list in 2002 “for excess nutrients (phosphorus), which impede swimming in the lake and other activities.” R. 8315. The EAW states that “[p]hosphorus is the primary nutrient responsible for excess algal growth in Lake Winona.” *Id.* In addition, “[e]xcess phosphorus causes nuisance algae blooms and reduced water transparency . . . [and the n]uisance algae blooms can contribute to the reduction of dissolved oxygen in surface waters, which can lead to fish kills.” *Id.*

In fact, the concentration of phosphorus in Lake Winona far exceeds the level needed to achieve water quality standards under PCA’s water quality rules. PCA’s scientists report the current (2005) in-lake phosphorus concentration in Lake Winona is 219 micrograms per liter (“µg/L”). R. 1403, PCA App. 70. In order to meet the standards set out in PCA’s water quality rules, the in-lake concentration will have to be reduced to 60 µg/L. R. 7335.² Thus, the record

¹ In fact, the record evidence suggests that Lake Winona’s impairment may have become worse over the last decade. *See, e.g.*, R. 7790 (PCA powerpoint stating in-lake phosphorus averaged 195 µg/L between 1996 – 1998) and R. 1403 (in-lake phosphorus averaged 219 µg/L between 2003 – 2005).

² At the time the permit in this matter was issued, PCA had published “Proposed Water Quality Standards Rule Revisions” on its website that included the numeric standard cited here. *See* R. 7332 – 7381. On December 18, 2007, the PCA Board adopted the proposed rule amendments to Minn. Rule Chapter 7050. *See Proposed Water Quality Standards Rule Revisions at* <http://proteus.pca.state.mn.us/water/standards/rulechange.html> (last updated

evidence is clear that Lake Winona is severely impaired with a total phosphorus concentration nearly four times the level at which the Lake would be able to be used for its designated uses, such as swimming, fishing, and support of the natural aquatic community.

The sewage discharge from ALASD is the cause of Lake Winona's impairment.

There is no question in this case about what has caused or is causing the water quality impairment to Lake Winona. PCA asserts that ALASD has exhibited "exemplary performance in controlling its phosphorus discharge." PCA Br. at 6. In truth, whether exemplary or not, ALASD's phosphorus removal performance has not been sufficient to protect Lake Winona. According to a 1994 study cited in PCA's Findings of Fact, ALASD "contributes approximately 89 percent of the external [phosphorus] load to Lake Winona." PCA App. at 20 (FOF ¶ 17). PCA staff concluded that ALASD's discharge of phosphorus "is a source of nutrients that is, actually or potentially, detrimental to preservation or enhancement of designated water uses for Lake Winona." *Id.*; *see also* PCA App. 65 (PCA scientist memo) ("As the flow from the facility has increased, the

Dec. 20, 2007); PCA Br., 16 – 17, fn 9. The adopted provision, consistent with the proposed amendment, establishes a maximum in-lake phosphorus concentration of 60 µg/L for shallow lakes in the north central hardwood forest region where Lake Winona is located. *See Proposed Amendment to Minnesota Rules Chapter 7050*, Rule 7050.0222, subp. 3 available at <http://proteus.pca.state.mn.us/water/standards/7050-amendments.pdf>, p. 80 (July 16, 2007).

effluent phosphorus concentration has decreased. Thus, the load of phosphorus to Lake Winona from ALASD has remained relatively constant since 1979.”)

Whether ALASD’s discharge is the cause of Lake Winona’s impairment is not disputed in this case. It is both demonstrated beyond question by the facts in the record and admitted by the PCA: “MPCA does not dispute that the discharge of phosphorus from ALASD’s wastewater treatment facility causes or contributes to the violation of MPCA’s narrative water quality standard for nutrient conditions in Lake Winona” Resp. App. at 3; PCA Br. at 26-27. This is a significant fact setting this case in stark contrast to *Annandale/Maple Lake* where the PCA had found that the proposed discharge did *not* “cause or contribute” to an impairment.

Moreover, PCA agrees that the final effluent limit on phosphorus established in the permit PCA issued to ALASD, 0.3 milligrams per liter (“mg/L”), will maintain Lake Winona’s severe level of impairment by keeping the total phosphorus concentration the same, or making it slightly worse. PCA App. at 21-22 (FOF ¶ 19) (“[T]he final proposed permit will assure that there will be no change in levels of chlorophyll-a or water clarity in Lake Winona The modeling indicates further that, although phosphorus levels may increase slightly . . . the increase will have no effect on the nutrient conditions of the lake . . .”).

There are feasible alternatives to the expanded discharge ALASD has proposed.

ALASD is currently permitted to discharge 3.75 million gallons per day (average wet weather flow) to Lake Winona. It proposes, by 2025, to discharge up to 6.7 million gallons per day (average wet weather flow), and in the matter under consideration here, sought a five-year permit for an expanded discharge of up to 4.7 million gallons per day (average wet weather flow). R. at 1154 (Grubb memo); R. at 8309 (EAW). ALASD commissioned private consultants to prepare a wastewater feasibility study on technology options based on the 6.7 million gallon per day average wet weather flow projected for 2025. *Id.*

Alternatives to the proposed sewage discharge expansion to Lake Winona are set out in ALASD's wastewater feasibility report. R. at 2154 – 2498; *see* Ch. 9 "Alternative Treatment Systems." Among the options are at least two which would eliminate the discharge altogether – an explicit goal of the Clean Water Act.³ MCEA's technology expert Stuart Grubb reviewed the feasibility report and concluded that there are

viable alternative treatment technologies [] that would reduce the phosphorus loading to Lake Winona. The report examines 1) spray irrigation and 2) rapid infiltration basins, either of which would reduce or eliminate effluent discharges to Lake Winona. Both technologies were shown to have reasonable costs, but rapid infiltration basins were lower cost . . .

³ Congress set as a goal in the Clean Water Act, the elimination of all discharges to all waters by 1985. 33 U.S.C. §1251 (2007).

R. at 1155. Expert Grubb also noted that control technologies are available that could reduce the phosphorus concentration in ALASD's effluent to below 0.1 mg/L. R. at 1145 (Grubb Aff.). Despite having the feasibility study in its record as well as a copy of Mr. Grubb's review, PCA made no evaluation of alternatives and had no response to MCEA's request that alternatives be considered. R. at 1762 (Response to MCEA Comments 36-3); R. at 1764 (Response to MCEA Comments 36-10) ("MPCA has not required the ALASD to conduct an analysis of the 'practicability' of other options").

PCA has sufficient information and expertise to calculate an effluent limit that complies with the federal regulation.

The record makes clear that PCA has all the information it needs to calculate an effluent limit for the ALASD permit that would comply with the federal regulation but made no attempt to do so. PCA scientist Dennis Wasley's analysis for the permit effluent limits used the same data that would be required to calculate a water quality-based effluent limit, or WQBEL. PCA App. 64 – 70. As MCEA's expert limnologist Andrea Plevan stated to the PCA Board:

In the work done for this memo . . . quite a substantial portion of the work for the WQBEL was completed. The model was created which included summarizing the loading data and the in-lake water quality data. Several scenarios were run based on current conditions and different permit scenarios. And in order to complete the WQBEL, the next step would be to run a goal scenario in which the in-lake phosphorus concentration is set at 60 micrograms per liter and the phosphorus loads are lowered until the goal is achieved.

R. 2058 (Transcript p. 68). Despite having sufficient information and a model available to calculate an effluent limit that would comply with the federal regulation, the PCA failed to take the final steps.

The final effluent limit on phosphorus in the permit is 0.3 mg/L.

PCA's attempt to cast the 0.3 mg/L effluent limit in the ALASD permit as an "interim" limit is disingenuous and contrary to the record. In fact, as the Court of Appeals correctly concluded, the 0.3 mg/L limit on phosphorus is the *final* effluent limit in the permit.

The permit itself makes clear that 0.3 mg/L is the final permit limit on phosphorus. The permit contains a list of effluent limits applicable to what is termed the "interim period" and a list of effluent limits applicable to what is termed the "final period." PCA App. at 34 – 36. In the interim period list, the concentration limit for total phosphorus is 0.8 mg/L (with a 0.47 mg/L "intervention" limit). PCA App. at 34. The concentration limit on total phosphorus applicable to the final period is 0.3 mg/L. PCA App. at 36.

The PCA Board's findings reiterate that 0.3 mg/L is the final effluent limit contained in the permit:

The final proposed permit for the proposed expansion of the ALASD WWTF . . . includes two sets of effluent limits for phosphorus: one that applies during an interim period beginning at permit issuance and ending six months after completion of construction of the expansion, and one that applies during a final period after the expansion is fully operational.

The interim period limits for total phosphorus are as follows: [0.47 mg/L intervention limit and 0.8 mg/L maximum concentration limit.]

The final period limits for total phosphorus in the final proposed permit are as follows: a maximum concentration limit of 0.3 mg/L (calendar month average) . . .

PCA App. at 21 (FOF ¶ 17); *see also* R. at 1732-33 (Response to Comments 8-3).

Thus, the permit has *two* sets of effluent limits, one interim and one final. The 0.3 mg/L limit is the final limit.

While the permit makes reference to a total maximum daily load (“TMDL”) study for Lake Winona, it does not impose an enforceable effluent limit: “Once the Lake Winona TMDL is approved, the Permittee shall comply with permit conditions which are determined by the MPCA to be consistent with the Permittee’s waste load allocation for phosphorus.” PCA App. at 40. This is simply a re-statement of a separate legal requirement for TMDL compliance generally. *See* 40 C.F.R. § 122.44(d)(1)(vii)(B)(2007).

REGULATORY BACKGROUND

The United States Congress enacted the Clean Water Act (“CWA”) “to restore and maintain the chemical, physical and biological integrity of our nation’s waters.” 33 U.S.C. § 1251 (2007). In the absence of eliminating a discharge altogether, the CWA requires that direct “point source” discharges be permitted through the National Pollutant Discharge Elimination System (“NPDES”) permit program. NPDES permits are required to impose limits on the pollution in the effluent (wastewater) that is discharged. 33 U.S.C. §§ 1311, 1342 (2007); *see also* 40 C.F.R. § 122.44(d) (2007).

There are two types of effluent limits imposed in NPDES permits to protect the water quality of the nation's waters. First, technology-based limits for pollutants in discharged effluent are established and incorporated into all NPDES permits for a given pollutant discharge. 33 U.S.C. § 1311(b)(1)(A) (2007). These technology-based effluent limits ("TBELs") are based on available control technologies. Second, in instances where technology-based limits are not sufficient to protect the water quality of the receiving waters, the law mandates water quality-based effluent limits ("WQBELs"). 33 U.S.C. § 1131(b)(1)(C) (2007). Water quality-based effluent limits are limits based not on an evaluation of technology, but rather on what the receiving water can handle and still maintain or achieve water quality standards.

The requirement for permit limitations that are based on water quality standards is long-standing and non-controversial. As the federal D.C. Circuit Court of Appeals put it: "[O]nce a water quality standard has been promulgated, section 301 of the CWA requires all NPDES permits for point sources to incorporate discharge limitations necessary to satisfy that standard." *American Paper Institute, Inc., v. EPA, et al.*, 996 F.2d 346, 350 (D.C. Cir. 1993).

Water quality standards consist of the "designated uses" for the waterbody and "water quality criteria" that will protect those designated uses. 33 U.S.C. § 1313(c)(2)(A) (2007). States must identify and list those waterbodies that are not achieving water quality standards. 33 U.S.C. § 1313(d) (2007). These

waterbodies are often referred to as the “impaired waters list” or the state’s “303(d) list.”

Lake Winona’s designated uses require that the water quality be maintained so that fish and other aquatic life can flourish and so that the Lake is suitable for recreational uses, including fishing and swimming. Minn. R. 7050.0222, subp. 4 (2007). The water quality criterion that protected these uses at the time the permit was issued was “narrative” (rather than “numeric”) and prohibits any “material increase in undesirable slime growths or aquatic plants, including algae . . .”

Minn. R. 7050.0150, subp. 3 (2006); *See also* PCA, *Guidance Manual For Assessing the Quality of Minnesota Surface Waters for the Determination of Impairment 305(b) Report and 303(d) List*, p. 63 (October 2005) available at <http://www.pca.state.mn.us/publications/wq-iw1-06.pdf#search=%22pca%20assessing%20the%20quality%20of%20minnesota%20surface%22> (R. at 7868).

The PCA has used numeric criteria to measure whether a lake is meeting this narrative standard by calculating the total phosphorus concentration in the lake and analyzing the water clarity by measuring chlorophyll-a concentrations and Secchi disk reading depths. Minn. Rule 7050.0150, subp. 5 (2006). These same numeric criteria have now been adopted in Rule. *See, supra*, footnote 2.

The D.C. Circuit Court of Appeals has provided a relatively succinct description of water quality standards, the obligation to protect standards by imposing limits in permits, and the role “narrative” and “numeric” water quality criteria play:

The centerpiece of the CWA is the NPDES permitting program. Pollutants cannot be discharged into the waters of the United States unless the discharger has an NPDES permit. Each permit contains discharge limitations depending on levels of pollution-control technology, and – this is the significant part for our purposes – any more stringent limitations necessary to protect the quality of the receiving waters. But what is necessary to protect water quality? The answer lies in “water quality standards” which contain, among other things, “criteria” setting forth the legally permissible amounts of pollutants in a particular water segment. . . . Here are a few [examples of “narrative” criteria]: waters shall be free of “substances that will cause the formation of putrescent or otherwise objectionable bottom deposits”; waters shall be free of “materials that cause odor, color or other conditions in such a degree as to cause a nuisance”; and waters shall be free from “substances in concentrations or combinations harmful or toxic to humans or aquatic life.” There is another type of “criterion” in water quality standards – one containing a numerical limitation on the concentration of a particular pollutant in the water. For example, waters shall not contain more than 200 fecal coliform per 100 milliliters.

Because narrative criteria do not specify numerical limitations on the concentration of a particular pollutant in the water, a problem arises when it comes to formulating discharge limitations in permits. We have already mentioned that permits must incorporate discharge limitations necessary to ensure that the water quality standards are met. This requirement applies to narrative criteria as well as to criteria specifying maximum amounts of particular pollutants. And so the problem is how one derives numerical values from general, non-numerical narrative criteria. EPA has addressed the problem in the past. It promulgated 40 C.F.R. § 122.44(d)(1)(vi) (2007) to deal with it on a national basis. That regulation sets forth three broadly-defined methods to translate narrative criteria into numerical values.

American Iron and Steel Institute v. E.P.A., 115 F.3d 979, 990-91 (D.C. Cir. 1997)

(citations and footnote omitted).

As noted by the D.C. Circuit, EPA addressed the issue of deriving numerical values for narrative standards which can be used to calculate water

quality-based effluent limits for permits in its regulations at 40 C.F.R. § 122.44(d)(1)(vi). As the Minnesota Court of Appeals determined in the decision under review, the permit PCA issued to ALASD does not satisfy the requirements of 40 C.F.R. §122.44(d)(1)(vi).

ARGUMENT

I. THE COURT OF APPEALS DECISION IS FULLY CONSISTENT WITH *ANNANDALE/MAPLE LAKE*.

The Court of Appeals decision correctly applied the analytical framework set out in *Annandale/Maple Lake* and is fully consistent with the *Annandale/Maple Lake* decision. PCA has misinterpreted this Court's holding in *Annandale/Maple Lake* as providing carte blanche to the Agency in administering the NPDES permitting program. In fact, *Annandale/Maple Lake* left unaltered a bedrock tenet for courts reviewing agency application of an administrative rule: If the meaning of language in a rule is clear and unambiguous, no deference to the agency interpretation is due. *Annandale/Maple Lake*, 731 N.W.2d at 516 ("If a court concludes the meaning of the words in the regulation is clear and unambiguous, it need not defer to the agency's interpretation . . ."). Moreover, regardless of whether a rule is unambiguous, courts will not defer to an interpretation that is unreasonable. *Id.*

PCA, here, seeks to expand the deference this Court granted in *Annandale/Maple Lake* to include an agency interpretation that is wholly inconsistent with the plain meaning of a federal regulation and EPA's statements

explaining what its regulation means. If granted, PCA's request would eliminate any meaningful role for judicial review and eviscerate the mandate of the Legislature that courts reverse agency decisions affected by errors of law. Minn. Stat. § 14.69 (2007). Nothing about the Clean Water Act or its regulations requires a court to defer to agency interpretation contrary to language that is clear on its face. Indeed, if an agency believes its approach to water quality would be preferable to the approach dictated by EPA's regulations, its remedy would be to work to change the regulation, not ignore it. *See Friends of the Earth, Inc. v. Environmental Protection Agency*, 446 F.3d 140, 145 (D.C. Cir. 2006) (agency cannot avoid the intent of a law clearly expressed in its text simply because it believes its approach would be better or because it believes the rule may lead to undesirable consequences).

PCA is requesting authority to ignore clear instructions in EPA's regulations about how to administer the Clean Water Act and the NPDES program. This Court should reject that request.

A. The Regulation Is Clear And Capable Of Understanding.

Review of an agency interpretation, according to this Court, begins "with the language of the regulation itself." *Annandale/Maple Lake*, 731 N.W.2d at 517. PCA and ALASD in their primary briefs, however, have failed to identify any specific provision in the regulation that would be considered ambiguous. Indeed, they cannot, because the regulatory language, while "lengthy and complex" (PCA Br. at 5), is straightforward and clear in its meaning. *Farmers Home Mut. Ins. Co.*

v. Lill 322 N.W.2d 635, 638 (Minn. 1984) (insurance policy that is complex and “must be read with some care” is not ambiguous); *Moorhead Machinery and Boiler Co. v. Employers Commercial Union Ins. Co. of America*, 285 N.W.2d 465, 468 (Minn. 1979) (complexity of contract does not equate with ambiguity).

The parties agree that 40 C.F.R. § 122.44(d)(1) is triggered by the ALASD discharge and that the regulation requires establishment of a numeric effluent limit in the permit so the pollutant, phosphorus, is controlled and the receiving water can attain water quality standards. PCA has clearly stated that it “does not dispute that the discharge of phosphorus from ALASD’s wastewater treatment facility causes or contributes to the violation of MPCA’s narrative water quality standard for nutrient conditions in Lake Winona and that 40 C.F.R. § 122.44(d)(1) applies to the permit for this facility.” *See* Resp. App. at 3; PCA Br. at 26-27. Moreover, PCA has agreed that 40 C.F.R. § 122.44(d)(1) “requires establishment of a numeric effluent limit for the pollutant that is causing the violation in order to control that pollutant and attain the narrative standard.” Resp. App. at 2.

The only point of disagreement arises over whether PCA complied with EPA’s regulatory instructions for calculating and imposing an appropriate effluent limit when 40 C.F.R. § 122.44(d)(1) is triggered. PCA says it relied on the provision in Section 122.44(d)(1)(vi)(A) to establish the 0.3 mg/L effluent limit in the ALASD permit, and it is there that the Court’s inquiry must start.

1. Section 122.44(d)(1)(vi)(A) unambiguously requires an effluent limit that will attain water quality standards.

EPA regulations provide for three different options when a pollutant in a discharge triggers 40 C.F.R. § 122.44(d)(1) by causing or contributing to a violation of a “narrative” standard and when the state has not yet established a water quality criterion for that pollutant.⁴ PCA argues that it chose “Option A”:

(vi) Where a State has not established a water quality criterion . . . 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.

40 C.F.R. § 122.44(d)(1)(vi) (emphasis added).

There is nothing ambiguous about the instructions for establishing an effluent limit found in Option A. Indeed, when this regulation was promulgated,

⁴ MCEA maintains that PCA *has* numeric water quality criteria that it uses to interpret the narrative standard prohibiting excessive algae growth. *See, supra*, footnote 2. Therefore, Option A is arguably not available in this instance. However, PCA has claimed throughout this case that the authority for the permit it issued is found in Option A. Therefore MCEA assumes *arguendo* that PCA could rely on Option A and limits its legal arguments to challenging PCA’s stated theory. Thus, the question before this Court is whether the ALASD permit satisfies 40 C.F.R. § 122.44(d)(1) by including an effluent limitation consistent with Option A. Because the result is the same, MCEA has not argued here, and this Court need not address, whether Option A even applies.

EPA's Director of the Office of Water Enforcement and Permits, James R. Elder, issued a memorandum in which he wrote:

Prior to the promulgation of these new regulations the subsection was non-specific, requiring only that NPDES permits be issued with requirements more stringent than promulgated effluent guidelines as necessary to achieve water quality standards. We have strengthened considerably the requirements of § 122.44(d). The new language is very specific

August 21, 1989 Memorandum of James R. Elder, USEPA, available at <http://www.epa.gov/npdes/pubs/owm0264.pdf>, pp. 197-201 of 335. Resp. App. at 5. PCA admits that the regulation “establishes *specific requirements* for how to set [a more stringent] limit if required.” PCA Br. 15 (emphasis added).

The regulation very clearly requires that the PCA develop an “effluent limit” using a “numeric water quality criterion” and, most importantly, that the resulting effluent limit be stringent enough so that the permitting authority can demonstrate that it “will attain and maintain applicable narrative water quality criteria and will fully protect the designated use.”

The terms used in EPA's instructions are not susceptible to multiple interpretations. They are defined terms. An “effluent limit” is a “restriction imposed . . . on quantities, discharge rates, and concentrations of pollutants which are discharged from point sources into waters of the United States” 40 C.F.R. § 122.2 (2007) (internal quotations omitted); *see also Annandale/Maple Lake*, 731 N.W.2d at 509-10 (“effluent limitations . . . ‘restrict the quantities, rates, and concentrations of specified substances which are discharged from point

sources.”). Water quality “criteria” are “elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use.” 40 C.F.R. § 131.3(b) (2007). “Designated uses” are “those uses specified in water quality standards for each water body or segment whether or not they are being attained.” 40 C.F.R. § 131.3(f) (2007).

The regulation, which requires PCA to “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” clearly means what it says. PCA must establish an effluent limit for the ALASD permit using a numeric criterion and must be able to demonstrate that the effluent limit will fully protect Lake Winona so that it can be used for swimming and fishing and will protect aquatic life. The limit PCA imposed in the ALASD permit falls far short of this standard.

PCA has failed to identify any ambiguity in the text of the regulation. Rather, the Agency focuses on the flexibility and discretion EPA provided to states when it set out multiple options. *See, e.g.*, PCA Br. at 18 (arguing that the regulation “left considerable discretion to MPCA to identify and select the sources from which it may derive numeric effluent limits for the ALASD facility.”) PCA’s argument misses the point. MCEA does not question that this subsection of the regulation provides state agencies with ample flexibility in figuring out how

to derive a numeric effluent limit. But that flexibility does not create ambiguity in the regulation's clear mandate to derive the required permit limit. Regardless of the "source" from which PCA derives its numeric effluent limit, it still must ensure that the effluent limit imposed in the permit is stringent enough to meet water quality standards and protect designated uses.

The effluent limit in the permit PCA claims it derived from its "explicit state policy" will not meet water quality standards or protect designated uses.⁵ See PCA Br. at 27 -28. To the contrary, based on PCA's own modeling, it is undisputed that the 0.3 mg/L limit will maintain Lake Winona as impaired and ensure that Lake Winona will *not* be used for fishing and swimming.

PCA appears to concede that the interim (0.8 mg/L) and final (0.3 mg/L) effluent limits established in the permit do not satisfy 40 C.F.R. § 122.44(d)(1) when it turns in its Brief to the purported "effluent limit based on the Lake Winona TMDL." PCA Br. at 40. ALASD and Amicus League of Minnesota Cities are more obvious in making this concession. ALASD Br. at 22 (agreeing that the regulatory language requires PCA to calculate an effluent limit necessary to meet the state's narrative nutrient standard, but that PCA can defer doing so

⁵ While PCA has asserted that it arrived at the 0.3 mg/L limit pursuant to its "explicit State policies," the record suggests other likely explanations. The limit was negotiated between the PCA and the Alexandria sewage plant. ALASD's attorney stated this fact flatly to the PCA Board: "We came to the .3 through negotiation with the agency. We agreed to it. The district is not particularly thrilled about it, but we recognize that this is a very controversial issue . . ." R. at 2093. The 0.3 mg/L limit is also the target goal ALASD identified for the consultant that conducted its feasibility study back in 2004. R. at 2154, 2197.

until after the TMDL is complete); Amicus League Br. at 3 (arguing that the regulation does not prohibit issuance of permits “without final WQBELs”).

But the permit’s vague reference to an undisclosed effluent limit to be established at an unidentified future date pursuant to a TMDL study does not save this permit. PCA has utterly failed to show how referencing the obligation for ALASD to comply with unspecified future permit limits calculated based on a TMDL satisfies the regulatory mandate that “each NPDES permit” – i.e., Permit No. MN0040738 issued to ALASD – “shall include” limits that meet the requirements of the regulation. 40 C.F.R. § 122.44. The regulation clearly requires PCA to “establish [an] effluent limit using a calculated numeric water quality criterion” for phosphorus in *this permit*.

As this Court noted in *Annandale/Maple Lake*, the starting point of regulatory interpretation is the words themselves and “the letter of the law shall not be disregarded . . .” *Annandale/Maple Lake*, 731 N.W.2d at 516 (quoting Minn. Stat. § 645.16). The plain language of the regulation under review requires PCA to impose an effluent limit in the ALASD permit which it “demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use” of Lake Winona. It has not.

2. A contextual analysis of this regulation supports the Court of Appeals conclusion.

In *Annandale/Maple Lake*, this Court reiterated that the meaning of terms in a regulation may depend on the context in which they are used. *See*

Annandale/Maple Lake, 731 N.W.2d at 518 (“the meaning of statutory language, plain or not, depends on context”) (citing and quoting *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991)). PCA grasps futilely at this notion in its attempt to find some justification for ignoring the plain language of 40 C.F.R. § 122.44(d)(1)(vi)(A). In its quest to find ambiguity in a regulation that is clear and capable of understanding, the Agency seeks to extend a textual analysis to include the political and factual context within which its regulatory decisions are made. *See*, PCA Br. at 11 – 14 (urging similarities between the factual “context” of regulations at issue in *Annandale/Maple Lake* and here – the impaired condition of receiving waters, the lack of a TMDL, and the policy judgments required by the Agency).

a. PCA’s focus on the factual context of its decision is misplaced and irrelevant.

PCA’s argument misapplies the interpretation doctrine that directs the courts to the “context” within which terms are used. The cases make clear that the “context” that may affect meaning is the surrounding language of the regulation or statute, not the political and factual “context” of a decision. In *Annandale/Maple Lake*, for example, this Court said: “Here, the regulation must be interpreted within the *context of the language* of the [Clean Water Act].” *See*, *Annandale/Maple Lake*, 731 N.W.2d at 518 (emphasis added). Similarly, the decisions relied on in *Annandale/Maple Lake*, show that the text of the regulation or statute being construed provides the relevant “context” for rendering a decision

on ambiguity. *See, e.g., King*, 502 U.S. at 220-21 (concluding that affirmative declarations in neighboring provisions of a statute mean that the absence of such declarations in the provision under review is deliberate); *Chiodo v. Bd of Educ.* 215 N.W.2d 806, 808 (Minn. 1974) (analyzing other words in the statute to determine if statutory definition of “teacher” included coaches); *State v. Donaldson*, 41 Minn. 74, 80, 42 N.W. 781, 782 (1889) (noting that courts may look to other provisions of a statute when the meaning of the phrase under review is not clear). Consideration of “context” means viewing “the words of the regulation ‘in their setting, not isolated from their context.’” *Annandale/Maple Lake*, 731 N.W.2d at 518 (citing *Chiodo*, 215 N.W.2d at 808).

PCA has failed to point to any words or phrases in the regulation requiring water quality-based effluent limits, 40 C.F.R. § 122.44(d), or for that matter, the entire NPDES permitting regulation, 40 C.F.R. § 122 *et seq.*, that in any way create ambiguity in the meaning of words used in Option A, 40 C.F.R. § 122.44(d)(1)(vi)(A). Indeed, viewing the language of Option A as part of a whole makes it even more clear that the ALASD permit does not satisfy 40 C.F.R. § 122.44(d)(1).

- b. A textual analysis supports the Court of Appeals decision because PCA’s interpretation renders other provisions of the regulation superfluous.**

PCA’s contention that it can wait until after a TMDL is completed to calculate an appropriate effluent limit would render significant portions of EPA’s regulation meaningless. It is an affront to a basic canon of construction:

“Whenever it is possible, no word, phrase or sentence should be deemed superfluous, void or insignificant.” *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999).

PCA’s interpretation is inconsistent with the provisions in 40 C.F.R. § 122.44(d)(1) that refer to the TMDL process. The regulation clearly requires both that water quality-based effluent limits must be imposed where discharges cause or contribute to water quality violations *and* that the effluent limits be based on TMDL’s where TMDL’s have been approved. These are separate and distinct obligations:

When developing water quality based effluent limits under this paragraph the permitting authority shall ensure that:
(A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; *and*
(B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements *of any available* wasteload allocation from the discharge prepared by the State and approved by EPA pursuant to a [TMDL].

40 C.F.R. 122.44(d)(1)(vii) (2007) (emphasis added).

Section 122.44(d)(1)(vii)(B) mandates that the permit limit be consistent with the wasteload allocation from the TMDL *if a TMDL is available*. PCA has simply restated this regulatory obligation in the ALASD permit in requiring compliance “with permit conditions . . . consistent with the Permittee’s waste load allocation for phosphorus” after the TMDL is approved. PCA App. at 40.

Here, the wasteload allocation from a TMDL is not available. That does not excuse the PCA from the requirement to calculate a water quality-based effluent limit for phosphorus now that will ensure Lake Winona achieves water quality standards. If it did, there would be no need for Section 122.44(d)(1)(vii)(A) or the other provisions that require effluent limits necessary to achieve water quality standards.

The regulation “as a whole” clearly contemplates the need to calculate water quality-based effluent limits in the absence of a completed TMDL, which is exactly the case here. The PCA must ensure that the limit it develops is derived from and achieves all applicable water quality standards, *and* that it is consistent with “any available” TMDL wasteload allocation. 40 C.F.R. § 122.44(d)(1)(vii). To adopt PCA’s interpretation would render the obligation to derive an effluent limit that achieves water quality standard in the absence of a TMDL superfluous, violating a basic tenet of statutory construction. *See Mayco, Inc. v. Eggink*, 739 N.W.2d 148, 155 (Minn. 2007) (“We generally reject interpretations that render statutory language purposeless”); *Amaral*, 598 N.W.2d at 384; *see also National Ass’n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2535 (2007) (rejecting interpretation that would render terms of an EPA regulation “mere surplusage”); *Baker v. Ploetz*, 616 N.W.2d 263, 269 (Minn. 2000) (court must give effect to all regulation’s provisions and avoid interpretation that would render any provision superfluous or unnecessary); *Chiodo*, 215 N.W.2d at 808 (rejecting interpretation that would render terms superfluous).

When viewed as a whole, this regulation clearly requires PCA to calculate and impose an effluent limit in the ALASD permit which it can demonstrate will achieve water quality standards. Deferring calculation until after completion of a TMDL is not contemplated by, nor is it consistent with, the regulation's plain language or structure.

B. EPA, The Agency That Promulgated This Regulation, Interprets Its Regulation To Require WQBELs In Permits Regardless Of Whether a TMDL Is Available.

EPA's interpretations of its regulation are consistent with a plain language reading that a water quality-based effluent limit is required regardless of whether a TMDL is available. The Preamble to this regulation as well as all of EPA's public statements – including the federal agency's response to questions from ALASD's consultant – show that the agency that promulgated this rule requires states to calculate and impose effluent limits in permits that are calculated to achieve water quality standards, with or without the help of a TMDL.

First, the Preamble to the Final Rule amending Section 122 in 1989 makes clear that EPA expected water quality-based effluent limits to be calculated and imposed where necessary in the absence of a completed TMDL:

The final point about paragraph (vi) is that in a majority of cases where paragraph (vi) applies, waste load allocations and total maximum daily loads will not be available for the pollutant of concern. Nonetheless, any effluent limit derived under paragraph (vi) must satisfy the requirements of paragraph (vii). Paragraph (vii) requires that all water quality-based effluent limitations comply with "appropriate water quality standards, and be consistent with "available" waste load allocations. Thus for the purposes of complying with paragraph (vii), where a waste load allocation is

unavailable, effluent limits derived under paragraph (vi) must comply with narrative water quality criteria and other applicable water quality standards.

54 Fed. Reg. 23868, 23878 (June 2, 1989) (emphasis added); PCA App. at 112. Although this Court need not rely on the Preamble to reach a conclusion in this case because the regulatory language is plain on its face, the fact that EPA explicitly stated what its regulation requires is relevant. *See American Federation of Government Employees, AFL-CIO v. Gates*, 486 F.3d 1316, 1326 (D.C. Cir. 2007) (finding terms unambiguous but noting that even if ambiguity had been found, court would defer to interpretation articulated in preamble to regulations); *Bricelyn School Dist. No. 132 v. Board of County Com'rs of Faribault County*, 55 N.W.2d 597, 599 (Minn. 1952) (consideration of preamble may be appropriate in ascertaining legislative intent).

The Preamble to EPA's regulation provides a clear answer to the question of whether the regulation allows PCA to wait until after it has completed a TMDL to impose a WQBEL in the ALASD permit. While EPA has built flexibility into the regulation by giving states a number of options for how to calculate a WQBEL, deferring the WQBEL until after completion of a TMDL is not one of them.

Second, EPA's published statements on this issue have all reaffirmed that permits for discharges causing or contributing to water quality violations must have effluent limits calculated to achieve water quality, regardless of whether a TMDL has been completed. Most telling is a letter from EPA to ALASD's

consultant that ALASD did *not* include in its appendix. Jeffrey Gratz, EPA Region II Chief of Point and Non-point Source Control, addresses the point explicitly in a January 31, 2006 letter “regarding application of 40 C.F. R. 122.44(d) pending TMDL Development.” He writes:

Whether or not there is a TMDL in place at the time of permit reissuance, it’s incumbent upon the permitting authority to determine the need for water quality-based effluent limits (WQBELs), and then to set a discharge limit as stringent as necessary to meet the applicable water quality standards.

Resp. App. at 10; R at 1899.

EPA has consistently and without exception stated that 40 C.F.R. § 122.44(d)(1) requires effluent limits in permits that are calculated to meet water quality standards regardless of whether a TMDL has been completed. ALASD misrepresents what it terms “EPA’s ‘existing administrative practice’” if it hopes to suggest otherwise. ALASD Br. at 26 – 28.⁶ The only statement ALASD

⁶ ALASD’s appended documents do not reflect EPA’s administrative practice, but rather appear to reflect a few selected state practices. MCEA is unable to discern what exactly ALASD has appended to its Brief at ALASD App. 88 – 93. The FOIA response, ALASD App. 90, refers to (1) “Section of the Permitting for Environmental Results NPDES Profiles for the Region III States . . .” and refers the reader to www.epa.gov/npdes/pubs/dc_final_profile.pdf; and (2) an email from Robert Chominski, EPA Region III. The second item, the email from Chominski, is not attached at all. With regard to the first item, at the referenced website, one finds a “profile characterizing key components of the NPDES program” for the District of Columbia. Among other things, the document describes EPA’s approach to permitting with regard to TMDL’s and it says:

During permit issuance, EPA performs an analysis to determine whether the pollutants discharged have a reasonable potential to cause or contribute to a violation of water quality standards. *If it is determined that a pollutant may cause such an exceedance, a WQBEL is established.* WQBELs are established in accordance with

provides in its appendix that actually expresses the federal agency's interpretation of this regulation is the EPA Region 10 memorandum and comments on Washington Department of Ecology's proposed permit writers' manual. ALASD App. at 109 – 13. EPA criticizes the manual because it does not comply with 40 C.F.R. § 122.44(d)(1):

The NPDES regulations at 40 C.F.R. 122.44(d) require that, where a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above state water quality standards that the permit must contain effluent limits and that the limits be derived from and comply with water quality standards.

The requirement to include limits as stringent as necessary to meet

EPA's [technical support document]. Background levels are determined by using available data and studies.

In the absence of TMDLs or numeric water quality standards, the narrative portions of the water quality standards apply.

(Emphasis added). In other words, EPA appears to follow the plain language of the regulation, calculating WQBEL's for permits in D.C. that will comply with narrative water quality standards even when TMDL's are not available. This, of course, is fully consistent with MCEA's position, and contrary to the position taken by ALASD. Oddly, the information accessed at the referenced website was not included in ALASD's appendix, but other information, not available at the referenced website, was. See ALASD App. 91 – 93. Further, at ALASD App. 94-95, an email is included that says "we do not have documents responsive to the FOIA request," ALASD App. 95. Yet ALASD takes a quote from that email describing an apparent EPA staff person's understanding of Missouri rules for the proposition that PCA's interpretation is consistent with "EPA's existing administrative practice." See ALASD Br. 26 – 27, fn 21. ALASD's selective inclusion of self-serving documents and communications provides no credible basis on which this Court could draw any conclusions about EPA's interpretation of 40 C.F.R. § 122.44(d)(1). EPA's Preamble and the interpretations offered by Regional Office directors, in contrast, offer solid supporting evidence that the regulation was intended to mean what it says. Moreover, that different states, like Minnesota's PCA, may wish to ignore the plain meaning of a federal regulation is not sufficient to establish ambiguity in the regulation's meaning.

Annandale/Maple Lake, 731 N.W.2d at 519, fn 13 (the fact that "reasonable minds may differ" on the plain meaning of a regulation is not the court's "standard for determining ambiguity").

water quality standards applies regardless of the TMDL schedule for the water body.

* * *

[T]he guidance implies that the performance-based interim limit will be in effect until the TMDL is completed; in this case the interim limit is really the final limit for that permit term. Where there is reasonable potential, the permit, not the Fact Sheet, must contain effluent limits necessary to meet water quality standards. It is not clear how the performance-based limits contemplated in the guidance will assure that water quality standards will be met or derived from or comply with water quality standards per 40 C.F.R. § 122.44(d). The permit record would have to support that the limits are as stringent as necessary to meet water quality standards.

ALASD App. at 112-13 (EPA Comments on Proposed Section 3.3.11 “TMDL’s and WLA’s and 303(d) – Interim Permitting” of Department of Ecology’s Permit Writer’s Manual) (emphasis added).

Moreover, EPA’s Region 10 Office of Water Director reported on a survey of how other EPA regional offices deal with WQBELs in the absence of approved TMDLs. He reported that, with few exceptions, the “standard practice” was “to calculate effluent limits based on meeting criterion at the end-of-pipe and allow compliance schedules.” He stated that the state of Washington’s proposed policy of not calculating WQBELs for discharges to impaired waters “would not appear to be consistent with standard practice across the country or in Region 10.”

ALASD App. at 110.⁷

⁷ In fact, ALASD is a prime example of what the Region 10 Director describes as “times when point sources are discharging pollutants that are significant contributors to impaired water quality.” ALASD App. at 110. Recall that PCA’s Findings note that ALASD represents up to 89% of the external load of phosphorus reaching Lake Winona. “In those cases,” EPA continued, “it is

Likewise, where EPA is the permitting entity, it imposes water quality-based effluent limits in permits for facilities discharging to impaired waters. For example, a response to ALASD consultant's FOIA request that ALASD *omitted* from its brief describes a case strikingly similar to this one where EPA calculated a WQBEL in the absence of a TMDL for an impairment based on excess nutrients. *See* Resp. App. at 12-15. USEPA Region 1 reissued an NPDES permit to the City of Keene, New Hampshire in 2006. The Fact Sheet notes that the receiving water is impaired and a TMDL is not anticipated for completion until 2009.

Although it is EPA's understanding that the TMDL will contain an allocation for phosphorus, EPA believes that it is reasonable to move forward with a water quality-based phosphorus effluent limitation in light of the existing severe nutrient impairment of the receiving water. . . . ***In the absence of a TMDL, EPA is required to use available information to establish water quality limits when issuing NPDES permits to impaired waters. See generally 40 C.F.R. § 122.44(d).***

Resp. App. at 14-15. (emphasis added)

The same is true in a recent permit EPA issued for a discharge to an impaired water in Washington. EPA states:

The Total Maximum Daily Load (TMDL) for dissolved oxygen and pH currently being developed by Ecology will establish wasteload allocations for this hatchery, as well as for the other sources of phosphorus loading in the Wenatchee watershed. NPDES requirements specify that water quality-based effluent limitations must be established for pollutants that cause or contribute to exceedence of water quality standards, regardless of whether a TMDL has been completed.

essential to use permits as a tool to require reductions for those pollutants, even if a TMDL has not yet been completed." *Id.*

See NPDES Permit No. WA-000190-2, p. 14 (June 29, 2006) available at [http://yosemite.epa.gov/r10/water.nsf/f7f8b8093cf7cf5a882569f1005bd4f2/dbb3b9edc7aec3618825719b0062ec05/\\$FILE/WA0001902%20FS.pdf](http://yosemite.epa.gov/r10/water.nsf/f7f8b8093cf7cf5a882569f1005bd4f2/dbb3b9edc7aec3618825719b0062ec05/$FILE/WA0001902%20FS.pdf).

Finally, in instances where EPA-issued permits have been appealed and evaluated by the EPA Environmental Review Board, the federal agency has also spoken clearly about the requirements of 40 C.F.R. § 122.44(d)(1). NPDES permits must contain effluent limitations that *ensure* compliance with the applicable water quality standards. See, e.g., *In re City of Marlborough, Massachusetts Easterly Wastewater Treatment Facility*, NPDES Appeal No. 04-13, 2005 WL 1993924 (E.P.A. 2005) (remanding permit with 0.1 mg/L phosphorus limit because record did not demonstrate that limit would ensure water quality standards)(Resp. App. at 16-31); *In re Government of the District of Columbia Municipal Separate Storm Sewer System*, NPDES Appeal Nos. 00-14 and 01-09, 2002 WL 257698 (E.P.A. 2002) (remanding based on failure to ensure compliance with water quality standards where permitting agency determined that permit conditions were merely “reasonably capable” of achieving water quality) (Resp. App.32-64).⁸

⁸ The same consistent interpretation of the regulation is reflected in more general statements EPA has made about its regulations. In describing the significance of water quality standards on its website, for example, EPA notes:

Water quality standards are essential to a wide range of surface water activities, including: . . . (6) calculating NPDES water quality-based effluent limitations for point sources, *in the absence of TMDLs, WLA's, LAs, and/or water quality management plans* . .

The EPA interprets its own regulation to mean what it says: Section 122.44(d)(1) requires water quality-based effluent limitations that will ensure compliance with water quality standards. EPA has spoken clearly on this issue in the Preamble to the regulation and in numerous memoranda from its Regional Offices. In addition, EPA's administrative practice reflects its stated interpretation: That an NPDES permit must contain a WQBEL to limit a pollutant causing or contributing to a water quality violation even in the absence of a final TMDL. *See Annandale/Maple Lake*, 731 N.W.2d at 521 (finding EPA's rule interpretation, as represented in a legal brief, relevant and persuasive).

In sum, when it promulgated 40 C.F.R. § 122.44(d)(1), EPA clearly contemplated and answered the question of whether effluent limits must be calculated to achieve water quality standards for permittees discharging to impaired waters even in the absence of a completed TMDL. EPA provided the answer in the express language of the regulation at 40 C.F.R. § 122.44(d)(1)(vii). It stated in the Preamble to the regulation that effluent limits must comply with water quality standards even if TMDL's are not available. And the EPA's regional offices have reiterated this point in response to inadequate state policies and questions from advocates, including ALASD's representative. PCA can find no support for its interpretation in any of EPA's policy statements on this issue.

EPA, *Water Quality Standards Program History*, available at <http://www.epa.gov/waterscience/standards/about/history.htm> (last updated May 11, 2006) (emphasis added).

II. REQUIRING THAT A FUTURE PERMIT CONTAIN AN EFFLUENT LIMIT CONSISTENT WITH A TMDL IF AND WHEN IT IS APPROVED, IS NOT A "SCHEDULE OF COMPLIANCE."

PCA's reference to its proposed delay as a "schedule of compliance" is a red herring and cannot save the failure to impose a water quality-based effluent limit in the permit it issued.

Under the NPDES permitting regime, schedules of compliance are relevant in two instances: First, if a permittee is out of compliance with an existing permit, the PCA may create a schedule by which the permittee achieves compliance. Second, in instances where a new standard is promulgated or a new, more stringent limit imposed in a permit, the permittee is often given a period of time by which to achieve the new standard or limit, which is specified in the permit. This interim period is marked by measurable and enforceable conditions and deadlines set out in a schedule of compliance. *See* 40 C.F.R. § 122.47 (2007) (setting out requirements for compliance schedules). The ALASD permit *does* contain a compliance schedule – 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. This is a "schedule of compliance" as the term is used in the NPDES program. *See* 40 C.F.R. § 122.47(a)(3) (noting requirements when facility construction takes more than one year); *see also*, *e.g.*, *City of Marlborough*, fn 12 (24-month period to design, plan and initiate construction and additional 24-month period to complete construction and reach compliance with 0.1 mg/L phosphorus limit) (Resp. App.at 29).

PCA has failed to show how its reference to an undetermined effluent limit to be calculated by an uncertain date satisfies the regulatory definition of a schedule of compliance, which is “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 (2007); 40 C.F.R. § 122.2. The permit contains no “effluent limitation” calculated to achieve water quality standards, nor does it contain any date by which ALASD will comply with such an effluent limitation, nor does it contain any enforceable interim requirements to be taken by ALASD to comply with the yet-to-be-determined water quality-based limit. *See* 40 C.F.R. § 122.44(d)(1) (requiring effluent limits that will achieve water quality standards); 40 C.F.R. § 122.47(a)(3) (requiring permit using compliance schedule to set enforceable requirements and dates for compliance).

EPA has explicitly rejected the interpretation of a “schedule of compliance” that PCA offers in defense of the ALASD permit. In a May 10, 2007 Memorandum from USEPA Headquarters to the Region 9 Water Division, James Hanlon, Director of USEPA’s Office of Wastewater Management states: “*A compliance schedule based solely on time needed to develop a Total Maximum Daily Load is not appropriate.*” Resp. App. at 67.⁹ Director Hanlon’s

⁹ The cited materials were made available to counsel for PCA on November 20, 2007, as soon as MCEA became aware of them. MCEA requested, based on these explicit statements from EPA in direct opposition to PCA’s position in this case, that the Agency withdraw its request for Supreme Court review of the Court of

memorandum adopts EPA's letter of October 23, 2006, disapproving provisions of California's proposed policy related to schedules of compliance for discharges to impaired waters for which a TMDL has not been completed.

The October 25, 2006 letter pointedly rejects use of compliance schedules as PCA hopes to do in the ALASD permit for three reasons. MCEA quotes at length from the letter because it is directly on point:

Reasons for Disapproval

1. Compliance schedule must contain an enforceable series of actions by permittee that will result in compliance with a water quality-based effluent limitation.

The Clean Water Act at section 502(17) defines a 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." This definition contemplates that there will be an enforceable series of actions by the permittee that will result in compliance with a final water quality-based effluent limitation in an NPDES permit.

* * *

Development of a TMDL does not contemplate a series of remedial measures by a permittee to achieve compliance with a water quality-based effluent limitation in an NPDES permit. Rather, TMDL development is a State process taken pursuant to CWA section 303(d) to determine appropriate loadings of a pollutant to a waterbody in order to attain applicable water quality standards. 40 C.F.R. §§ 130.3(j), 130.7. The purpose of a compliance schedule is to give a permittee time to make the necessary changes in its facility or operations in order to comply with a water quality-based effluent limitation in an NPDES permit – not to accommodate a State's need for time to develop a TMDL. *Thus, where the purpose of the authorizing provision is to accommodate a State's need for additional time to complete a TMDL, rather than to give a permittee*

Appeals decision. PCA, in an email dated December 12, 2007, declined to withdraw this appeal.

time to undertake action to meet a water quality-based effluent limitation in an NPDES permit, this is not an appropriate application of a compliance schedule.

2. It is not appropriate to defer establishment of a water quality-based effluent limitation until a TMDL has been developed.

We are concerned that as written, [the California policy] could allow permitting authorities to defer development of water quality-based effluent limitations until a TMDL is established. . . . [Under the proposed policy] the water quality-based effluent limitation is expected to be derived from the TMDL – that is, not developed until completion of the TMDL. . . . We disagree. Permitting authorities have an obligation to develop water quality-based effluent limitations based on the existing applicable water quality standard in order to ensure that the permit complies with the EPA regulations requiring permits to include requirements “necessary to achieve water quality standards” (40 C.F.R. § 122.44(d)(1)) and limits “derived from, and [that comply] with” water quality standards (40 C.F.R. § 122.44(d)(1)(vii)) – requirements implementing the Clean Water Act’s requirement in section 301(b)(1)(C) to include “any more stringent limitation, including those necessary to meet water quality standards.” Unless a permit includes an effluent limitation reflecting a [California Toxics Rule] criterion, these requirements would not be met as to that criterion. *Therefore, because [the policy] could allow the permit authority to defer development of water quality-based effluent limitations until a TMDL is developed, it is inconsistent with the Clean Water Act and EPA’s permit requirements. Compliance schedules are not appropriate for giving a State additional time to undertake actions such as development of a TMDL upon which effluent limitations will be based, but rather to give the permittee time to make the necessary facility or operational changes in order to comply with the effluent limitation.*

3. Compliance schedules must provide for achievement of water quality-based effluent limitations as soon as possible.

EPA regulations regarding compliance schedules at 40 C.F.R. § 122.47(a)(1) require that the effluent limitation be attained “as soon as possible.” . . . *The inclusion in the Policy of a separate compliance schedule-authorizing provision allowing additional*

compliance time “to develop and adopt a TMDL” indicates that the “soon as possible” determination will be based on the length of time needed to develop a TDML rather than the length of time needed to achieve compliance with an applicable water quality-based effluent limitation. As such, we find [the policy] to be inconsistent with the requirement in 40 C.F.R. § 122.47 that compliance with effluent limitations be achieved “as soon as possible.”

Resp. App. at 70-72. (italics added).¹⁰

PCA would apparently have this Court ignore the plain meaning of a defined term in the Clean Water Act *and* the explicit statements of the federal agency that promulgated the regulations under review in this case. PCA has offered no valid legal theory that can sustain its position in this matter.¹¹

¹⁰ Significantly, the California proposal was actually quite stringent and would not have accommodated a delay in calculating a WQBEL for ALASD. To even trigger the policy, it first required “demonstration that it is infeasible for the discharger to achieve” compliance with an effluent limit based on water quality criteria. Resp. App. 69. Here, ALASD has made no attempt to demonstrate infeasibility of achieving compliance with a WQBEL.

¹¹ The only case PCA cites in support of its position has been superseded by EPA’s memoranda, is not controlling in this forum, and, in any case, is wholly inapposite. In *Communities for a Better Environment v. State Water Resources Board*, 1 Cal.Rptr. 3d 76 (Cal. App., 1st Dist. 2003), both the California agency that issued the permit and the appellate court that affirmed it stressed that the decision not to impose a numeric WQBEL in the permit was limited to specific facts. *See id.*, at 77, 86. The agency found the “root cause of the violations are not within [the permittee’s] control . . .,” *id.*, at 84, and found that the permittee’s pollutant discharges were “minor compared to other storm water inputs.” *Id.* Because the permittee lacked control over the pollutant discharge, “the [agencies] in essence concluded that a numeric WQBEL was not feasible.” *Id.*, at 88. The court noted “this is not the typical case of a point-source polluter significantly contributing” to an impaired water. *Id.* Here, the facts are exactly the opposite. ALASD is the overwhelming source of phosphorus to Lake Winona. PCA has made no argument, nor could it, that calculation of a WQBEL would be infeasible. In addition, the entire basis for the California court’s holding is not consistent with the record before this Court. The ALASD permit contains neither a date certain by which a WQBEL will be imposed nor an alternative effluent limit should that

There is no ambiguity in the definition of a “schedule of compliance” or EPA’s regulations requiring that compliance schedules contain effluent limitations and dates by which compliance will be achieved. Nor could EPA have been more explicit in its on-point directive that compliance schedules *cannot* be used to defer calculation of a WQBEL until after a TMDL is completed. EPA’s explicit interpretation of its own regulation establishes what is required by *federal law*. The Clean Water Act prohibits states from setting effluent limits or standards that are less stringent than required by the federal Act. *See* 33 U.S.C. § 1370 (2007) (allowing for more stringent state standards, but requiring, at a minimum, that states enforce standards of federal law). Any state-law based justifications PCA may offer for its decision to postpone calculation of the required effluent limit run afoul of the Supremacy Clause of the U.S. Constitution. *See Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155, 1165 (9th Cir. 2003) (rejecting Montana’s attempt to exempt discharge because it conflicted with EPA’s regulations and allowing Montana’s exemption would “run squarely afoul of our Constitution’s Supremacy Clause, U.S. Const. art. VI, cl. 2.”); *see also Hillsborough County, Fla. V. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (Supremacy Clause of the U.S. Constitution invalidates state laws that “interfere with, or are contrary to,” federal law).

date not be met. *See id.*, at 89 (relying heavily on the fact that the permit contained a precise deadline for completion of the TMDL and an alternative effluent limit of zero).

In sum, PCA's reference to the fact that the limit on ALASD's phosphorus discharge will eventually have to be consistent with the results of a completed and approved TMDL is not a "schedule of compliance." The ALASD permit has a schedule of compliance by which ALASD must comply with the phosphorus limit PCA negotiated with the permittee, but it does not contain an enforceable schedule for compliance with a water quality-based effluent limit. This basic feature of the compliance schedule – the end goal – is missing. As a result, the permit fails to satisfy federal law, and the Court of Appeals decision must be affirmed.

III. THE JUSTIFICATIONS APPELLANTS OFFER FOR SKIRTING FEDERAL LAW ARE ALL MERITLESS.

A. There Is No "Conflict" – Legal Or Practical – Between *Annandale/Maple Lake* And The *ALASD* Decision Below.

PCA and ALASD as well as Amicus League of Minnesota Cities overstate the similarities between this case and *Annandale/Maple Lake*, misconstruing basic assumptions about the circumstances that give rise to the issues presented as well as the practical effect of the Court of Appeals decision. To the extent this Court's interest in reviewing this matter was based on representations that the decision below was inconsistent with *Annandale/Maple Lake* or will have wide-ranging impacts on PCA's ability to achieve the objectives of the Clean Water Act through the NPDES permitting program, the Court should probe thoroughly the underlying assumptions of such allegations.

First, a very significant and controlling distinction between this case and *Annandale/Maple Lake* is PCA's finding that the ALASD discharge causes and

contributes to a violation of water quality standards in Lake Winona. Resp. App. at 3; PCA Br. at 26-27. This Court's holding in *Annandale/Maple Lake* is premised on a contrary finding in that case, i.e., that the discharge would *not* cause or contribute to a water quality violation. See *Annandale/Maple Lake*, 731 N.W.2d at 517 (noting PCA's finding that the proposed facility "'will *not* contribute to water quality standards violations in Lake Pepin'") (emphasis added by Court). The regulatory language the Court was asked to construe in *Annandale/Maple Lake* is not at issue in this case. Here, PCA admits that the ALASD discharge causes and contributes to a water quality violation, and the dispute is over what *effluent limitation* the regulations require to be in the permit.¹² The factual circumstances underlying the *ALASD* case, as documented in PCA's own findings, are directly at odds with the factual underpinnings and findings in *Annandale/Maple Lake*. As a result, the Appellants' overwhelming and singular

¹² The regulations at issue here and in *Annandale/Maple Lake* are not "parallel regulations," nor are the "legal contexts" of the regulations "essentially the same" as has been represented by the other parties. Although both regulations are contained in the federal regulations chapter concerning NPDES permitting, they play very different roles in that regulation. Chapter 122 contains all kinds of regulatory requirements, ranging from rules for specific industries such as aquaculture and silviculture, 40 C.F.R. §§ 122.25, 122.27, to the role of Indian Tribes, 40 C.F.R. § 122.31, to rules governing modification of permits, 40 C.F.R. §§ 122.62, 122.63. The regulation in dispute in *Annandale/Maple Lake* is a general prohibition on the issuance of permits to new dischargers if the discharge will "cause or contribute" to the violation of water quality standards. 40 C.F.R. § 122.4(i). The regulation at issue here, in contrast, specifies detailed rules for "establishing limitations, standards, and other permit conditions" for all permits issued under the NPDES program and contains no general prohibition on permit issuance. 40 C.F.R. § 122.44.

reliance on *Annandale/Maple Lake* to challenge the result in *ALASD* suffers from a fundamental weakness and is unpersuasive.¹³

Second, the Appellants and Amicus overstate the effect an accurate reading of 40 C.F.R. § 122.44(d), as done by the Court of Appeals in *ALASD*, will have on permitting in the state. Their forecasts of disaster are either self-serving

¹³ PCA's failure to address this basic difference between the cases in its Petition for Review or its opening brief tarnishes its credibility. Many of PCA's contentions are simply untenable in light of the fact that *the Agency itself* concluded in this case that *ALASD's* discharge is causing and contributing to a water quality violation but concluded the opposite of the *Annandale/Maple Lake* discharge. PCA submits, for example:

Because the court of appeals' decision in *ALASD* is directly opposite the outcome reached by this Court in *Annadale/Maple Lake*, it has created a conflict in MPCA's administration of two parallel federal water quality regulations. This undermines MPCA's ability to carry out its permitting and effluent-setting responsibilities under the CWA in a fair, consistent and effective manner. Indeed, the impact of the *ALASD* decision is more far-reaching than in *Annandale/Maple Lake* because the regulation at issue in *ALASD* applies to all existing wastewater treatment facilities that cause or contribute, or potentially cause or contribute, to existing violations of water quality standards. The regulation at issue in *Annandale/Maple Lake* applied only to new facilities.

PCA Br. at 4. The Pollution Control Agency, not the Court of Appeals, is the source of any "conflict" that exists in its administration of water quality regulations. PCA has provided no support for its assertion that it would not be "fair, consistent and effective" to allow new discharges that have effectively offset their pollutant contributions and therefore will not "cause or contribute" to a water quality violation while requiring dischargers that have not offset their pollutant contributions and *are* in fact causing and contributing to water quality violations to have stringent effluent limits that are calculated to achieve water quality standards. The comparison between *Annandale/Maple Lake* and *ALASD* is apples to oranges, and PCA's glossing over a major distinction in the underlying facts and its findings is disingenuous. *See also, e.g.*, PCA Br. at 14, fn 8 (referring the Court to the "cause or contribute" language in 40 C.F.R. § 122.44(d)(1) as ambiguous but failing to point out that PCA itself found that the *ALASD* discharge met this standard and triggered the need for the effluent limit required by the regulation).

exaggerations or predictions premised on a basic misunderstanding of the regulation and the *ALASD* case. The regulation, 40 C.F.R. § 122.44(d)(1), and, therefore, the need to impose an effluent limit that is calculated to achieve water quality standards, is only triggered if the Agency determines that pollutants will be discharged “at a level which will cause, have a reasonable potential to cause, or contribute to” a water quality violation. 40 C.F.R. § 122.44(d)(1)(i) (2007). If a discharge does not “cause or contribute” to the impairment in a large watershed (as, for example, with Annandale/Maple Lake’s discharge to the Lake Pepin watershed) then the regulation at issue here is not triggered. Therefore, PCA’s statements that the impact of the *ALASD* decision will be “especially severe” in the Lake Pepin watershed, are simply wrong. Likewise, there is absolutely no basis for the League of Minnesota Cities’ assertion that the *ALASD* decision “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 [sic] process.” Amicus League Br. at 4. If the pollutant load from an existing facility is not at a level that causes or contributes to the impairment, the need for a water quality based effluent limit is not triggered. The *ALASD* decision does not ban issuance of permits; it requires permits to include appropriately-calculate effluent limits so that Minnesota’s waters may achieve water quality standards – a *benefit* to all of Minnesota’s citizens. See Amicus

League Br. at 9 (“[w]ater quality is important to our quality of life and to our tourism and agricultural economy”).

B. *Arkansas v. Oklahoma* Is Inapposite And Does Not Support Appellants’ Position.

The Appellants and Amicus err in relying on *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). This Court, in *Annandale/Maple Lake*, interpreted dicta in the U.S. Supreme Court’s *Arkansas* decision as “reject[ing] a categorical ban that might frustrate the construction of new plants that would improve existing conditions.” *Annandale/Maple Lake*, 731 N.W.2d at 520.¹⁴ *Arkansas* is inapposite for two reasons.

First, nothing about the *ALASD* decision or the position MCEA has taken with regard to this permit or litigation would result in a “categorical ban” on the issuance of permits. To the contrary, the regulation at issue governs the *effluent limits* required in permits for dischargers to impaired waters. With an appropriate effluent limit, the *ALASD* permit may be issued. *See ALASD*, PCA Add. at 17 (suggesting that the *ALASD* permit could be issued if it contained an effluent limit based on PCA’s numeric criterion).

¹⁴ The EAB case, *Carlota Copper Co.*, 11 Env’tl. Admin. Decisions 692 (Sept. 30, 2004), which the *Annandale/Maple Lake* court relied on in part in interpreting *Arkansas* to prohibit “bans” on permits for new discharges to impaired waters, was reversed by the Ninth Circuit Court of Appeals. *See Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007) (finding no conflict with *Arkansas* in decision that refuses to permit new discharge to impaired water absent compliance with the regulation).

Second, one underlying rationale for the *Arkansas* decision, as construed by this Court, was that a ban would prevent the construction of a new plant “that would improve existing conditions.” The proposed expansion of the ALASD facility will *not* improve existing conditions, which is exactly the problem with this permit. PCA App. at 69 (PCA scientist memo concluding that 0.3 mg/L effluent limit will worsen phosphorus concentrations in Lake Winona and not “measurably change” the Lake’s severe impairment). Indeed, there is no scenario under which ALASD’s expansion with technology targeted to achieve an effluent limit of 0.3 mg/L will *ever* lead to Lake Winona’s water quality improving. The Appellants’ reliance on *Arkansas* is misplaced.¹⁵

C. Region 5’s Three-Sentence Facsimile Did Not Approve The ALASD Permit As Ensuring Compliance With Water Quality Standards.

At the start of the PCA Board meeting in this case, PCA produced a three-sentence facsimile from an employee at EPA Region 5, stating that EPA did not object to the permit limit based on its understanding that PCA’s “findings demonstrate that the proposed discharge limit does not cause or contribute to [an] impairment.” R. at 1881. Apparently, the employee who authored the fax had not reviewed a complete record and believed that PCA had determined that the ALASD discharge would not “cause or contribute” to a violation of water quality

¹⁵ To the extent *Arkansas* is relevant to this case, it supports the decision below because it reiterates the long-standing CWA requirement that permits must contain conditions that “ensure compliance with the applicable water quality requirements.” *Arkansas v. Oklahoma*, 503 U.S. at 105 (citing 40 C.F.R. § 122.44(d)).

standards and therefore 40 C.F.R. § 122.44(d)(1) was not triggered. This is the only meaningful reading one could give to the statement. PCA, of course, had made no finding that the ALASD discharge would not “cause or contribute” at the time of the fax, nor could it have drawn such a conclusion given its own science staff’s statements to the contrary.

In any case, PCA’s last-minute request for approval from Region 5 without disclosing the full record and controversy does not make for a credible endorsement. The Clean Water Act only provides a role for EPA to “object” to state-issued permits, not to “approve” them. 33 U.S.C. § 1342(d)(2) (2007). Moreover, even if, *arguendo*, the EPA employee had intended to authorize an exception to the Clean Water Act and EPA’s regulations for the ALASD permit, he had no authority to do so. *See Northern Plains Resource Council*, 325 F.3d at 1164.

The three-sentence fax is based on a misunderstanding of the record, sheds no light on EPA’s interpretation of the regulatory provisions, and does not resolve the issues raised here on appeal. This Court should give the fax no weight.

D. Policy Considerations Favor Affirming The Court of Appeals.

Finally, PCA’s delay in establishing an effluent limit that is consistent with what Lake Winona needs to achieve water quality standards makes no sense as a matter of public policy. PCA knows that the 0.3 mg/L effluent limit ALASD is designing its expansion to meet will not be sufficient. Delaying the inevitable helps no one, particularly not the residents who will pay for an ill-conceived

expansion now as well as the upgrades or alternatives dictated by post-TMDL permit conditions.¹⁶ PCA's decision to ignore the federal regulation is fostering poor, wasteful decisions at the local level.

The regulated community, the residents who will foot the bill for water pollution prevention, and all Minnesotans who value the state's prized water resources are entitled to rely on an expectation that state agencies will administer their rules as written. PCA's conduct in this case flouts that expectation.

CONCLUSION

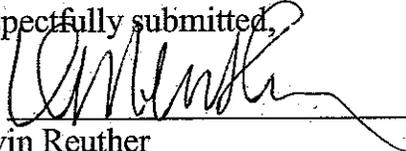
The Minnesota Pollution Control Agency is charged with protecting the quality of the State's waters and ensuring that sewage discharges do not violate water quality standards. As the court below concluded, the PCA has failed in that

¹⁶ ALASD, rather than focusing on alternatives that will return Lake Winona to meeting water quality standards, has channeled its efforts into downgrading the official status of the Lake. In an attempt to avoid more stringent controls in the future, ALASD filed a petition with the PCA asserting that Lake Winona should not be protected for such uses as swimming, fishing and the protection of aquatic plant life. PCA Commissioner Moore recently denied ALASD's petition to change the designated uses of Lake Winona. Resp. App. at 73-75.

duty here. Federal law requires a water quality-based effluent limitation for phosphorus in the ALASD permit. This Court should affirm the Court of Appeals' remand for calculation and imposition of such a limit.

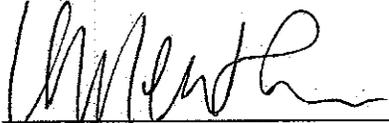
Date: 1-23-08

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**CERTIFICATION OF COMPLIANCE WITH
MINN. R. CIV. APP. P. 132.01, subd. 3(a)**

The undersigned certifies that the Respondent's Brief contains 10,892 words and complies with the type/volume limitation of the Minnesota Rules of Appellate Procedure Rule 132. This Brief was prepared using a 13-point font. The word count is stated in reliance on Microsoft Office Word 2003.


Kevin Reuther