

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 SUPPLEMENTAL BRIEF**

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INTRODUCTION

In response to the Court's request for supplemental argument on the applicability of Minn. Stat. § 115.03, subd. 10(a) to this case, Minnesota Center for Environmental Advocacy ("MCEA") asserts that the statute has no effect on the Alexandria wastewater discharge permit. The Clean Water Act and the Supremacy Clause of the U.S. Constitution prohibit Minnesota from having less stringent water pollution requirements than are mandated by federal law. Moreover, even if Minn. Stat. § 115.03, subd. 10(a) somehow created a valid exception to the federal law, the Alexandria wastewater discharge permit does not comply with the state statute.

ARGUMENT

I. MINN. STAT. § 115.03, SUBD. 10(A) HAS NO BEARING ON RESOLUTION OF THIS CASE AND DOES NOT PROVIDE AUTHORITY TO THE MINNESOTA POLLUTION CONTROL AGENCY ("PCA") TO ISSUE THE ALEXANDRIA WASTEWATER DISCHARGE PERMIT.

A. Minnesota Water Pollution Statutes And Rules Must, At A Minimum, Be As Stringent As Federal Requirements.

Although the federal Clean Water Act ("CWA") employs cooperative federalism, preserving a significant role for delegated states such as Minnesota in administration of the CWA's permitting program, it is a bedrock principle that states cannot relax federal standards and requirements when issuing water

pollution permits.¹ While a state may elect to implement greater protections for its waters, it must, at a minimum, satisfy federal requirements set out in the CWA and federal regulations. 33 U.S.C. § 1370(1)(B) (states “may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard or standard of performance which is less stringent” than established in federal law).

The federal law at the heart of this case is the requirement that National Pollutant Discharge Elimination System (“NPDES”) permits for dischargers that are causing or could cause a water-quality impairment contain water quality-based effluent limits, i.e., stringent effluent limits calculated so that the receiving water achieves water quality standards. This requirement is firmly rooted in the CWA and regulations promulgated pursuant to the CWA by the U.S. Environmental Protection Agency (“EPA”). *See* 33 U.S.C. § 1311(b)(1)(C) (“there shall be achieved . . . any more stringent limitation, including those necessary to meet water quality standards . . .”); 40 C.F.R. § 122.44(d)(1) (“each NPDES permit shall include . . . (d) . . . any requirements . . . necessary to: (1) Achieve water quality standards . . . including State narrative criteria for water quality.”)

If the PCA wishes to continue its role as a delegated state agency administering the NPDES program within the State, it *must* comply with this

¹ The U.S. Supreme Court describes as “cooperative federalism” federal legislation that offers to states “the choice of regulating . . . according to federal standards or having state law pre-empted by federal regulation.” *New York v. United States*, 505 U.S. 144, 167-68 (1992) (citing Clean Water Act as example).

federal requirement. The U.S. EPA may not delegate NPDES permitting authority to states unless state-issued permits ensure compliance with the requirements of the federal act, including the requirement for water quality-based effluent limits. *See* 33 U.S.C. § 1342(b)(1)(A); *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 226 (1976) (“the EPA obviously need not, and may not, approve a state plan which the State has no authority to issue because it conflicts with federal law”).

B. The Minnesota Legislature Has No Authority To Exempt The Alexandria Wastewater Discharge Or Any Other Discharge That Is Causing A Water-Quality Impairment From The Requirements Of Federal Law.

- 1. The Alexandria wastewater discharge permit violates 40 C.F.R. 122.44(d)(1) because it does not contain an effluent limit derived from a numeric water quality criterion which PCA can demonstrate will attain the narrative standard and protect the designated uses of Lake Winona.**

To summarize, PCA determined that 40 C.F.R. § 122.44(d)(1), the federal regulation requiring water quality-based effluent limits, is triggered in this case because the Alexandria wastewater discharge is causing the water quality impairment in Lake Winona. *See* R. 2115 (PCA counsel stating: “PCA does agree that this federal rule has been triggered. PCA doesn’t dispute that at this point in time the ALASD facility is causing or contributing to a violation of a water quality standard, the standard for nutrients that this Board has set by rule.”); *see also* PCA Brief, 26-27. PCA only argues that it complied with the requirements of 40 C.F.R. § 122.44(d)(1) by following EPA’s regulatory

instructions for calculating water quality-based effluent limits for narrative water quality standards set out in § 122.44(d)(1)(vi)(A). The Court of Appeals disagreed, finding that the effluent limits PCA put in the permit “are based on what the proposed facility is designed to achieve, rather than what is required for the lake to attain and maintain water quality” as demanded by the federal regulation. PCA Addendum, 13.

The explicit language of 40 C.F.R. § 122.44(d)(1)(vi)(A) requires PCA to establish a permit effluent limit “using a calculated numeric water quality criterion for the pollutant which [the PCA] demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use [of Lake Winona].” PCA failed to do this here.

The narrative water quality criterion for Lake Winona, applicable at the time this permit was issued, prohibited any “material increase in undesirable slime growths or aquatic plants, including algae.” Minn. R. 7050.0150, subp. 3 (2006). The narrative standard² prohibits material increases of undesirable algal growth

² As noted in PCA’s Brief, the Agency uses the term “narrative water quality *standard*” for what federal regulations term “narrative water quality *criteria*.” PCA Brief, 33 fn. 15. MCEA employs the same convention based on historical custom. It may be helpful, however, for the Court to review the federal definitions of these terms. As used in the federal regulation, water quality “standards” consist of both the “designated uses” of a water body and the water quality “criteria” that will protect those uses. 40 C.F.R. § 131.3(i). Water quality “criteria” may be “numeric” or “narrative” and express the condition of the water that supports designated uses. 40 C.F.R. § 131.3(b). “When criteria are met, water quality will generally protect the designated use.” *Id.* Thus, when the parties refer to the “narrative standard” for nutrients or eutrophication (which prohibits the material

over baseline, natural conditions. Counsel for MCEA may have failed to clarify this point during oral argument of this matter. Lake Winona has *already* experienced a “material increase in undesirable slime growths” and it is because of that material increase that the Lake does not support its designated uses and is on the impaired waters list. The objective of the CWA and 40 C.F.R. § 122.44(d)(1) is to restore the Lake to the condition prior to the material increase in algal growth so that it supports its designated uses. PCA has never interpreted its “no material increase” standard simply to prohibit a material increase in the *severity* of algal blooms in a waterbody that is already impaired by nutrients. *See, e.g., R. 2115* (PCA counsel describing the narrative nutrient standard to the PCA Board: “it’s a narrative standard that says you can’t have so much algae, you can’t have conditions that impair the designated uses of the water because of algae growth essentially.”) Indeed, any interpretation of the standard that based the “material increase” on an increase over existing impaired conditions would be illogical because standards must protect designated uses. 40 C.F.R. § 131.11(a)(1). If the “no material increase” standard only meant that already-impaired lakes cannot be made worse, designated uses would remain unattained and the standard would be meaningless.

The narrative standard for nutrients applicable here has been and is evaluated based on measures of total phosphorus concentration in the lake and

increase in algae growth), they are, under terminology used in the federal regulation, referencing a “narrative water quality criterion.”

measures of water clarity. Minn. R. 7050.0150, subp. 5 (2006). The best scientific information available, the result of years of study by PCA limnologists, says that Lake Winona, based on its depth and its location in the State, will achieve its unimpaired condition and support its designated uses when the total phosphorus concentration in the lake is less than 60 micrograms per liter (“µg/L”), and either (1) the chlorophyll-a concentration is under 20 µg/L, or the secchi disk reading is greater than one meter. *See* R. 7868 (PCA Guidance Manual for Assessing Surface Waters); R. 7428 (PCA proposed numeric water quality standard for eutrophication which has since been adopted).

PCA’s modeling of the facility’s current design flow (based on 2003 - 2005 figures) shows an in-lake total phosphorus concentration of 225 µg/L, and that figure increases to 229 µg/L under the permitted expansion. R. 1772. With regard to chlorophyll-a, the model shows a total concentration of 98 µg/L under the existing design flow and 94 µg/L with the permitted expansion. R. 1772. The record makes plain that the effluent limits PCA put in the Alexandria wastewater discharge permit *are not* based on any numeric criterion that PCA can show will restore Lake Winona to its unimpaired condition so that the Lake can be used for its designated uses. In fact, the record demonstrates the opposite – that the effluent limits will *maintain* the severe impairment, with phosphorus concentrations remaining nearly four times and chlorophyll-a concentrations remaining more than four times what they need to be for Lake Winona to meet the narrative water quality standard.

2. Minn. Stat. § 115.03, subd. 10(a) creates an unauthorized exemption from federal law and is therefore of no effect.

Minn. Stat. § 115.03, subd. 10(a), as applied to discharges that trigger 40 C.F.R. § 122.44(d)(1), creates an unauthorized exemption from federal law. The state statute purports to authorize the PCA to issue permits for new or expanded discharges if the permit “results in decreased loading to the impaired water.”

Minn. Stat. § 115.03, subd. 10(a). However, a permit limit that results in decreased loading does not satisfy 40 C.F.R. § 122.44(d)(1), which requires a limit calculated to attain water quality standards and protect designated uses.

The Minnesota Legislature has no authority to exempt pollutant dischargers from the requirements of the Clean Water Act and federal regulations. In *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155 (9th Cir. 2003) *cert. denied* 540 U.S. 967 (Oct. 20, 2003), the Ninth Circuit rejected Montana’s attempt to exempt discharges of ground water from the requirements of NPDES permitting. The court stated that “absent statutory authority in the CWA for Montana to create such exemptions, it cannot possibly be urged that Montana state law in itself can contradict or limit the scope of the CWA, for that would run squarely afoul of our Constitution’s Supremacy Clause.” *Id.*, at 1165; *see also Froebel v. Meyer*, 217 F.3d 928, 936 (7th Cir. 2000) (“Wisconsin cannot give discretion to its administrative agencies to violate federal law”); *American Iron and Steel Institute v. EPA*, 526 F.2d 1027, 1051, fn 49 (3rd Cir. 1975) (regulations promulgated under the Clean Water Act trump conflicting

state law). The same is true here. The Minnesota Legislature has no authority to authorize PCA to issue NPDES permits under conditions that do not comply with federal law.

3. Minn. Stat. § 115.03, subd. 10(a) cannot be harmonized with 40 C.F.R. § 122.44(d)(1)(vi)(A).

While PCA may assert that Minn. Stat. § 115.03, subd. 10(a), like the Phosphorus Rule or its interim permitting guidance, is an “explicit state policy” on which it can rely to justify the permit it issued, that argument finds no support in the plain text of the federal regulation. EPA’s regulation provides that states developing effluent limits to support narrative water quality standards may turn to “explicit state policies” to derive a numeric *criterion* from which to develop effluent limits. 40 C.F.R. § 122.44(d)(1)(vi)(A) (“Such a criterion may be derived using . . . an explicit State policy . . .”). But the regulation further provides that the state must be able to demonstrate that that *criterion* “will attain and maintain applicable narrative water quality criteria and will fully protect the designated use.” *Id.* The statutory provision, Minn. Stat. § 115.03, subd. 10(a), allowing PCA to issue permits to expanding dischargers “if it results in decreased loading to an impaired water,” will not ensure that water quality standards are attained or designated uses protected. Indeed, in a severely-polluted body of water such as

Lake Winona, a small decrease in pollutants would still leave the lake utterly impaired.³

Nor does consideration of Minn. Stat. § 115.03, subd. 10(a) as an “explicit state policy” change the underlying error in PCA’s request that this Court defer to its regulatory interpretation. PCA conflates flexibility and ambiguity. EPA built flexibility into its regulation: There are, for example, three options for PCA to choose from in deciding how to calculate an appropriate effluent limit. 40 C.F.R. § 122.44(d)(1)(vi)(A), (B), (C). Under Option A, it can derive a numeric criterion “using a proposed state criterion, *or* an explicit state policy or regulation interpreting its narrative water quality criterion supplemented with other relevant information” 40 C.F.R. § 122.44(d)(1)(vi)(A) (emphasis added). Flexibility, however, does not equate with ambiguity. EPA gave states options, not license to ignore the regulation’s mandate. A teenage son may be given flexibility in achieving his 11:00 o’clock curfew: take the bus; catch a ride with a friend; call by 10:30 if he needs to be picked up. The fact that flexibility was provided does not render the 11:00 o’clock curfew ambiguous, despite the best-argued teenage protest.

PCA has ignored the first sentence of § 122.44(d)(1)(vi)(A) where EPA plainly states the minimum requirement of any effluent limit derived under this regulation. Calculating and imposing effluent limits that are based on achieving

³ As set forth below in Section II, the phosphorus load to Lake Winona under the proposed permit will, in fact, increase.

water quality standards and protecting designated uses is the unambiguous objective (and requirement) of EPA's regulation. The flexibility provided to states does not change this unambiguous mandate.⁴ Thus, even if Minn. Stat. § 115.03, subd. 10(a) were an "explicit state policy interpreting [the narrative standard]" (which it clearly is not), that alone could not save this permit.

4. Minn. Stat. § 115.03, subd. 10(a) cannot delay calculation of the required effluent limits.

For the same reasons that Minn. Stat. § 115.03, subd. 10(a) does not justify the effluent limits in the permit PCA issued, it likewise cannot provide legal authority for PCA's decision to wait until sometime after the completion of the

⁴ That PCA is attempting to skirt the obvious intent of this regulation is clear when one considers that it completely ignored the other EPA-suggested source for deriving an appropriate criterion and effluent limit: using "a proposed State criterion." See 40 C.F.R. §122.44(d)(1)(vi)(A) ("Such a criterion may be derived using a proposed State criterion, or an explicit State policy . . ."). When it issued this permit, PCA had a proposed numeric criterion for shallow lakes such as Lake Winona. That criterion is the 60 microgram per liter total phosphorus concentration measure used to assess the lake, which, at the time the permit was issued, was in the form of a proposed rule that has since been adopted. MCEA Br. 4, ft. 2. PCA has steadfastly refused to use this numeric criterion, which clearly *will* attain water quality standards and protect designated uses, to calculate an appropriate effluent limit for the Alexandria wastewater discharge permit. There is simply no reasonable interpretation of this regulation other than that it requires, where it is triggered, water quality-based effluent limits calculated to attain water quality standards to be imposed in permits. See, e.g., 40 C.F.R. § 122.44(d)(1)(vi)(C)(2)-(4) (requiring, where state uses an indicator parameter under Option C, that it monitor during the term of the permit to ensure that the indicator "continues to attain and maintain applicable water quality standards" and that the permit contain a reopener in case the limits "no longer attain and maintain applicable water quality standards"). PCA has ignored the clear mandate of this regulation, and this Court should not condone the Agency's bald attempt to flout federal law.

total maximum daily load (“TMDL”) study for Lake Winona to calculate the required water quality-based effluent limit.

The federal regulation clearly requires water quality-based effluent limits for dischargers causing water quality impairments *even in the absence of* completed TMDL’s. *See* 40 C.F.R. § 122.44(d)(1)(vii) (requiring effluent limits to be derived from and comply with water quality standards regardless of whether a TMDL is available); PCA Appendix, 112 (EPA Preamble noting that effluent limits must “comply with narrative water quality criteria” even if a TMDL is unavailable). To read Minn. Stat. § 115.03, subd 10(a) as authorizing a suspension of the federal requirement until after completion of a TMDL would run afoul of the Supremacy Clause. *Northern Plains Resource Council*, 325 F.3d at 1165; *Froebel*, 217 F.3d at 936; *American Iron and Steel Institute*, 526 F.2d at 1051.

II. REGARDLESS OF THE STATE STATUTE’S APPLICABILITY, THE PERMIT LIMITS IN THE ALEXANDRIA WASTEWATER DISCHARGE PERMIT DO NOT COMPLY WITH MINN. STAT. § 115.03, SUBD. 10(A).

The permit PCA issued for the Alexandria wastewater discharge does not comply with Minn. Stat. §115.03, subd. 10(a) because it does not result in “decreased loading” to Lake Winona.⁵

⁵ This statute, unlike the carefully crafted and explicit language of the federal regulation, lacks clarity. It permits new or expanded discharges to impaired waters prior to completion of a TMDL if the permit “results in decreased loading to an impaired water.” Minn. Stat. § 115.03, subd. 10(a). Reference to “loading” without additional modifiers would seem to prohibit any additional flow from a facility, but that would conflict with the apparent purpose of the provision. MCEA assumes, for purposes of the analysis provided here, that the reference to

According to PCA's modeling, the "current load" of total phosphorus to Lake Winona from the Alexandria wastewater discharge based on discharge monitoring between 2003 and 2005 is 3.1 kilograms per day. PCA Appendix, 70 (R. 1403, Wasley memorandum, Table 2). The total phosphorus load projected under the expansion authorized by the permit is 5.3 kilograms per day. *Id.* In other words, the permit PCA issued allows for a 70% increase of phosphorus loading over the amount of phosphorus currently (2003 – 2005) going into the lake.

Clearly, even if the Minnesota Legislature had the authority to carve out an exemption from federal law by enacting Minn. Stat. § 155.03, subd. 10(a), PCA's permit would not comply with that exemption.

CONCLUSION

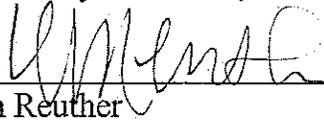
Minn. Stat. § 115.03, subd. 10(a) has no effect on this matter. Minnesota has no authority under the Clean Water Act to allow less stringent standards than are required by the CWA and EPA regulations, nor may the Minnesota Legislature create an exemption for Minnesota dischargers that conflicts with federal law. For

"decreased loading" means a decrease in the total load of the pollutant of concern despite the new or expanded flow. This would be consistent with the sentence that follows which contemplates offsets "so that there is a net decrease in the pollutant loading of concern." *Id.*

all of the reasons stated in MCEA's Brief and this Supplemental Brief, MCEA respectfully requests that this Court affirm the Court of Appeals' remand of the permit for calculation of an appropriate effluent limit.

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