

STATE OF MINNESOTA  
IN COURT OF APPEALS  
CASE NO.: A08-1198

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Coalition of Greater Minnesota	)
Cities,	)
	)
Petitioner,	)
	)
vs.	)
	)
Minnesota Pollution Control	)
Agency, and Brad Moore, in	)
his capacity as Commissioner	)
of the Minnesota Pollution	)
Control Agency,	)
	)
Respondent.	)

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**BRIEF OF PETITIONER**

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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 LEGAL ISSUES

I. **Issue:** Does Minn. R. 7053.0255, by failing to include a reasonably clear policy or standard of action to guide administrative officers in the Minnesota Pollution Control Agency (“MPCA” or the “Agency”) in deciding whether to grant exemptions from the rule’s 1 mg/L phosphorus effluent limit to petitioning point source dischargers, grant unbridled discretion to administrative officers in the Agency in violation of Article III of the Minnesota Constitution?

**Agency Action:** The MPCA adopted Minn. R. 7053.0255 without specifically addressing whether the rule grants unbridled discretion to administrative officers in violation of the Minnesota Constitution.

**Most Apposite Authority:** Minn. Const. art. 3; *Lee v. Delmont*, 228 Minn. 101, 36 N.W.2d 530 (1949); *Blocher Outdoor Adver. Co., Inc. v. Minnesota Dep’t of Transp.*, 347 N.W.2d 88 (Minn. Ct. App. 1984).

II. **Issue:** Does the lack of a reasonably clear policy or standard of action in Minn. R. 7053.0255 to guide administrative officers in the MPCA in deciding whether to grant exemptions from the rule’s 1 mg/L phosphorus effluent limit to petitioning point source dischargers render the rule arbitrary and capricious and beyond the Agency’s statutory rulemaking authority?

**Agency Action:** The Agency found, in error, that Minn. R. 7053.0255 is reasonable and adopted the rule.

**Most Apposite Authority:** Minn. Stat. § 115.03 (2006); Minn. Stat. § 115.44 (2006); Minn. Stat. § 14.002; *Vang v. Commissioner of Public Safety*, 432 N.W.2d 203 (Minn. Ct. App. 1988).

III. **Issue:** Did the MPCA violate the Administrative Procedures Act in adopting Minn. R. 7053.0255?

A. Did the Agency violate the public notice and public comment rulemaking requirements in adopting Minn. R. 7053.0255, which lacks a reasonably clear policy or standard of action to guide administrative officers in the Agency in deciding whether to grant exemptions from the 1 mg/L phosphorus effluent limit to petitioning point source dischargers?

**Agency Action:** The MPCA erroneously found that it complied with the public notice and public comment requirements of the Administrative Procedures Act and adopted the rule.

**Most Apposite Authority:** Minn. Stat. § 14.02; Minn. Stat. § 14.14; *White Bear Lake Care Ctr. v. Minnesota Dep't of Pub. Welfare*, 319 N.W.2d 7 (Minn. 1982); *In re Hibbing Taconite Co.*, 431 N.W.2d 885 (Minn. Ct. App. 1988).

B. Is Minn. R. 7053.0255 overly prescriptive and inflexible in violation of Minn. Stat. § 14.002?

**Agency Action:** The Agency found, in error, that R. 7053.0255 is sufficiently flexible and adopted the rule.

**Most Apposite Authority:** Minn. Stat. § 14.002.

## STATEMENT OF THE CASE

In 2003, the Coalition of Greater Minnesota Cities (the “CGMC”), the Petitioner herein, together with the Minnesota Environmental Science and Economic Review Board (“MESERB”), the League of Minnesota Cities (“LMC”), and the Minnesota Association of Small Cities (“MAOSC”) filed a joint petition with the Minnesota Pollution Control Agency (the “MPCA” or the “Agency”) for amendment to the then-existing phosphorus rule<sup>1</sup> with the purpose of clarifying key terms, such as “affect” and “reservoir,” which had been the subject of prolonged and costly litigation for a number of cities. P39-P44.<sup>2</sup>

The MPCA responded by undertaking to rewrite the phosphorus rule as part of its triennial review of water quality standards required of the Agency by the federal Clean Water Act, § 303 (c) (1). P45. The rule at issue, however, is not a water quality standard; it is a mandated effluent limitation that applies regardless of water quality needs. *See add.* pp. 47-50; P1-P4.

Instead of simply clarifying the then-existing rule provisions used to assess whether or not phosphorus caused adverse environmental impacts, the MPCA responded with a wholesale rewriting of the rule and proposed an automatic phosphorus effluent limit of 1 mg/L on any new or expanding facility discharging more than 1,800 pounds of phosphorus per year. *Id.* The stringent limitation is imposed by the rule without requirements for either a demonstration of impacts

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<sup>1</sup> Minn. R. 7050.0211, subpt. 1a (2003).

<sup>2</sup> References in the form of ‘P\_\_’ are to Petitioner’s Appendix.

analysis or a showing that the phosphorus discharge has any effect on downstream waters as was required by the prior rule and affirmed by this Court. *See e.g.* MPCA Statement of Need and Reasonableness (“SONAR”), Exhibits A-19, p. 2, and A-15b; *see also MCEA v. MPCA and City of St. Cloud*, 696 N.W.2d 398, 399 (Minn. Ct. App. 2005). The rule, in essence, now *assumes* all facilities are causing measurable adverse impacts on water quality.

The CGMC and MESERB participated extensively throughout the rulemaking process, and submitted written comments to the Agency on the need to provide effective exemptions, or “off ramps,” for well recognized circumstances where it is clear the more restrictive requirement is not justified. *See e.g.* SONAR Exs. A-8b, A-11b, A-32a, A-32b, A-34, A-35, and A-40a; P70-P71; P72-P75; P76-P80; P91-P100.

On June 21, 2007, the Agency filed copies of the proposed Notice of Hearing, proposed rules, and draft SONAR with the Office of Administrative Hearings. P10, ¶ 11.

The Agency scheduled and hosted seven public meetings in June 2004 to provide interested members of the public an opportunity to learn about the proposed revisions, and to provide comments and ask questions. *See* P46-P59; P60-P69. MESERB offered testimony on the proposed rules at the hearing in St. Paul on August 30, 2007, and the CGMC offered testimony at the public hearing held in Rochester on September 12, 2007. *Id.* Much of the focus of this testimony was to ensure that the off ramps, which had been added to the proposed

rule by this time, would work as intended in practice in light of inconsistent statements from the Agency throughout the rulemaking process. *Id. See also infra* pp. 18-24.

Following the public hearings on the Agency's proposed amendments to its phosphorus effluent limits, both the CGMC and MESERB submitted final, written comments to the Administrative Law Judge. P70-P71; P72-P75; P76-P80. Again, the focus of these submissions was on the ever shifting MPCA interpretations of the off ramps. *Id.*

On November 14, 2007, Administrative Law Judge Steve M. Mihalchick issued a report recommending that the proposed amendments be adopted. P5-P38.

The CGMC and MESERB jointly offered written comments and testimony in opposition to the proposed expanded phosphorus rule before the MPCA's Citizen's Board meeting on December 18, 2007 and again reiterated the organizations' frustration over the inconsistent explanations offered by the Agency regarding how it would apply the new rule. P91-P100. The MPCA Citizen Board nevertheless formally adopted the proposed amendments at its meeting on December 18, 2007. P109-P110. The expanded phosphorus rule, Minn. R. 7053.0255, took effect on May 1, 2008.

## **STATEMENT OF THE FACTS**

### **I. BACKGROUND**

The Coalition of Greater Minnesota Cities ("CGMC") is a nonprofit, nonpartisan advocacy organization comprised of eighty municipalities throughout

the State of Minnesota that are collectively dedicated to a strong Greater Minnesota. The CGMC's mission is to develop viable, progressive communities for businesses and families through strong economic growth and good local government. CGMC member cities serve the wastewater treatment needs of their communities, and the CGMC supports an environmental protection program that is based on sound science, rather than administrative ease, and works to ensure that water quality rules are balanced and backed by state funding so that Minnesota will be able to clean its impaired waters and prevent new impairments in the future, while using scarce resources wisely.

Phosphorus is a vital nutrient for life, but too much phosphorus can, depending on the physical setting, contribute to eutrophication—or the overabundance of plant growth—in water bodies. *See* SONAR Ex. UC-17, p. ii. The purpose of phosphorus reduction is to reduce excessive algal growth in water bodies. *Id.*

Phosphorus is commonly found in organic materials, household detergents, lawn fertilizers, human waste, food waste, and agricultural runoff. There are two general methods through which a wastewater treatment facility (“WWTF”) will address the phosphorus present in the waste stream that it must treat. SONAR Ex. PL-4, p. ES-3. The first method is through chemical addition, where a chemical such as alum or ferric-chloride is added to the waste stream to precipitate the phosphorus out of the waste stream. *Id.* The second method is to use biological treatment whereby the treatment facility manages aerobic and anaerobic areas

where naturally occurring organisms digest the phosphorus and settle it out of the waste stream. *Id.* Under both the chemical addition and biological treatment processes, the phosphorus by-product then becomes part of the facility's bio-solids that must be disposed of through land application or incineration. *Id.*

Phosphorus entering the surface waters of Minnesota comes from both point and nonpoint sources. SONAR, Book II, p. 102. Point sources consist mainly of municipal and industrial wastewater dischargers, including facilities operated by CGMC member cities and other municipalities and sanitary districts. Nonpoint sources include runoff from natural weathering, agricultural fields, feedlots, urban areas, and on-site sewage treatment systems. SONAR Ex. EU-6, pp. viii-ix. Point sources of phosphorus are relatively constant over time while nonpoint sources are largely dependent on the amount of precipitation falling on the landscape. SONAR, Book II, p. 102. In an average flow water year, nonpoint sources comprise 69 percent of all phosphorus contributions to Minnesota surface waters, and point sources contribute 31 percent. SONAR Ex. UC-17, Figure EX-3. Nonpoint sources are not currently subject to regulation in Minnesota, whereas point sources are highly regulated as part of the National Pollutant Discharge Elimination System ("NPDES") permitting process administered by the MPCA. *See infra* pp. 8-11.

Not all waters exhibit adverse impacts from nutrients and site-specific conditions control the degree to which such effects may be manifested. *See* SONAR Ex. EU-6; *see also* P114. As discussed below, the federal Clean Water

Act (“CWA”) has established procedures for identifying those waters where excessive plant growth due to nutrient loadings are identified and solutions are developed to protect water uses.

## II. REGULATORY FRAMEWORK

### A. Federal Regulations

Under the CWA, every state must establish water quality standards (“WQs”) for each body of water within the State’s borders. 33 U.S.C. § 1313(a)-(c). Such standards are set at the level of water quality that is necessary to protect the designated water body uses. 40 C.F.R. 131.2. The CWA does not ban the discharge of pollutants into waterways that are in violation of state water quality standards. *Arkansas v. Oklahoma*, 503 U.S. 91, 109 (1992). Instead, the CWA “vests in the EPA and the States broad authority to develop long-range, area wide programs to alleviate and eliminate existing pollution.” *Id.*; 33 U.S.C. § 1288(b)(2). CWA Section 303(d) sets forth a planning process under which States are to evaluate waters that do not achieve applicable standards and to establish limitations necessary to achieve the adopted standards. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). These impaired waters are known as “water quality limited segments” (“WQLSs”). The process for conducting this evaluation is to be clearly described in the State Continuous Planning Process (“CPP”). 40 C.F.R. § 130.7(a). States must identify, prioritize, and list those WQLSs for which the technology-based effluent limitations and other required controls are not stringent enough to achieve the applicable water quality standards. 33 U.S.C. §

1313(d)(1)(A); 40 C.F.R. §§ 130.0(e) (describing the iterative nature of the 303(d) process).

The 303(d) list is a tool that identifies pollutants that are likely affecting the water and causing a violation of the water quality standards, which requires further evaluation. *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 16 (D. Mo. 2003); 40 C.F.R. § 130.7. The list does not establish regulatory requirements; instead it is a process under which evaluations occur. *Id.* The 303(d) list must be submitted to the EPA for its approval. 33 U.S.C. § 1313(d)(2). States must then update and revise these lists every two years. 40 C.F.R. § 130.7(b)(1).

For each WQLS on the 303(d) list confirmed to be impaired, the State must establish a Total Maximum Daily Load (“TMDL”) so that standards are met and water quality is restored. *Missouri Soybean Ass'n*, 102 S.W.3d at 16; 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1). TMDLs set the quantity of a pollutant that may be introduced into a receiving water without exceeding applicable water quality standards, taking into account seasonal variations and an adequate margin of safety. 33 U.S.C. § 1313(d)(1)(C). A TMDL is the “sum of the individual [wasteload allocations (“WLAs”)] for point sources and [load allocations (“LAs”)] for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments.” 40 C.F.R. § 130.2(i). These approved loadings

are incorporated into the State's water quality management ("WQM") plans and NPDES permits. 40 C.F.R. § 130.7(a). The TMDL may allocate load reduction responsibilities in any manner that will ensure water quality standards compliance. 40 C.F.R. § 130.2(i).<sup>3</sup>

The CWA's NPDES permit system parallels the 303(d) process and provides a two-step process for establishing effluent limitations. First, the permittee must comply with technology-based effluent limitations (TBELs), which are based on the best available or practical technology for the reduction of water pollution and are established in rule by the MPCA. 33 U.S.C. § 1311(b)(1)(A); 40 C.F.R. § 122.44(a); *Communities for a Better Env't v. State Water Resources Control Bd.*, 109 Cal. App. 4<sup>th</sup> 1089, 1093 (2003). Second, if water quality standards are not being met under the TBELs (or other more restrictive state law requirement), then the permittee must comply with the more stringent water quality-based effluent limitation (WQBEL). *Id.* Such WQBELs are established as "necessary to [a]chieve water quality standards established under Section 303 of the CWA." 40 C.F.R. § 122.44(d)(1). Thus, under applicable federal law, more restrictive limitations, such as those now proposed by MPCA, would only apply upon a site-specific demonstration of environmental need. Such limitations would not be more restrictive than those demonstrated to be scientifically necessary pursuant to the TMDL process.

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<sup>3</sup> The MPCA used this procedure to set the nutrient TMDL for the Minnesota River that would reduce the level of algal growth occurring in that river system. See SONAR, Book II, p. 134.

## B. MPCA's Previous Regulations of Phosphorus Effluent Discharges

In the early 1970's, the MPCA adopted its phosphorus effluent rule requiring point sources to meet a phosphorus limit of 1.0 mg/L if the discharge is "directly to or affects a lake or reservoir." Minn. R. 7050.0211, subpt. 1a (2005); *see also MCEA v. MPCA and City of St. Cloud*, 696 N.W.2d 398, 399 (Minn. Ct. App. 2005). That rule required a site-specific demonstration of environmental need. *Id.* The MPCA interpreted the rule to evaluate "affects" in terms of measurable impacts on the surface water in question, but also utilized a "50-mile rule of thumb" to rule out point source discharges more than 50 miles upstream of the lake or reservoir in question. *Id.* The express purpose of this rule was to protect lake water quality from excessive algal growth using a site-specific analysis to determine whether a facility had a measurable affect on a downstream lake or reservoir such that a limit of 1 mg/L was warranted. *Id.* This prior rule did not regulate discharges to rivers or streams, except to the extent a reservoir or lake was part of a river or stream. *Id.*

### Phosphorus Strategy

In March 2000 the MPCA adopted the Phosphorus Strategy, a set of policy documents addressing among other things the application of phosphorus effluent regulations to NPDES permits and the development of more stringent

requirements under the TMDL program if the phosphorus rule limitations were insufficient to protect uses.<sup>4</sup> P113-136. This Court found that the Strategy:

(1) states the Agency will, under the phosphorus rule, require a 1 mg/L limit on phosphorus in wastewater discharge if the discharge affects a lake or reservoir and, under certain other circumstances, require a permit applicant to provide a phosphorus management plan; [and] (2) defines “affects” and “measurable impact” in terms of the detrimental response to phosphorus in a body of water and the individual contribution of the discharge in causing any of certain adverse changes...

*City of St. Cloud*, 696 N.W.2d at 401; *see also* discussion at 402 and 404 (in which this Court declined to extend the phosphorus effluent rule based on the uses of the water body in question). A key feature of the adopted Phosphorus Strategy is a “decision tree” illustrating how the MPCA would consider factors to decide the appropriate phosphorus controls, if any, to impose in an NPDES permit. P113.

This decision tree contains the following note:

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

*Id. Emphasis added.* The MPCA explains the purpose of the decision tree as follows:

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<sup>4</sup> The Agency did not engage in the rulemaking process in enacting its Phosphorus Strategy.

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

*MPCA Phosphorus Strategy*, <http://www.pca.state.mn.us/water/phosphorus.html> (June 2007).

In practice, the MPCA has utilized this unadopted rule to require all point source dischargers applying for NPDES permits to accept 1 mg/L phosphorus effluent limits in their permits since the Agency adopted the phosphorus strategy in 2000. The Agency acknowledged as much in its SONAR, noting that

The acceptance of 1 mg/L TP limits under the Phosphorus Strategy by dischargers (for a variety of reasons) has made this a very successful policy for over five years. It has resulted in dramatic reductions in the amount of TP discharged, but it has had economic ramifications as well. This policy was formally approved by the Agency Board in March 2000 which enhanced its authority. Promulgation of the Strategy is the proper course of action. By promulgating what essentially is being implemented now under the Strategy, the Agency is assuming the responsibility to meet all the burdens listed above.

SONAR, Book II, pp. 108-09.<sup>5</sup>

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<sup>5</sup> As part of the rulemaking process, MPCA was requested to produce evidence that imposition of a 1 mg/l limitation (and the resulting phosphorus load reductions) had resulted in a demonstrable reduction in plant growth in surface waters. MPCA was unable to produce any such evidence. See SONAR Ex. A-141; P149-P150. MPCA requested that the State of Wisconsin provide such data,

### III. THE NEW PHOSPHORUS EFFLUENT LIMIT, Minn. R. 7053.0255

#### A. The 1 mg/L Phosphorus Effluent Limit

In response to the joint petition to amend the previous phosphorus rule to clarify how the Agency would determine if phosphorus is impacting lake environments, the MPCA simply rewrote the rule to apply to all environmental settings regardless of whether the discharge was causing adverse impacts.

The new phosphorus effluent limit in the rule reads as follows:

Phosphorus removal to one milligram per liter is required when subitem (1), (2), or (3) applies:

(1) the discharge of effluent is directly to or affects a lake, shallow lake, or reservoir;

(2) the discharge is to the specific basins and water bodies designated in subpart 5; or

(3) the discharge is new or expanded as defined in subpart 2, except when the discharger can demonstrate to the commissioner that the discharger qualifies for an alternative phosphorus limit as provided in subpart 4.

Minn. R. 7053.0255, subpt. 3A.

According to the MPCA, the “overall net effect (of the 1 mg/L phosphorus effluent limit for all new and expanding point source dischargers) may not be discernable improvements in water quality,” but a reduction in the “rate of increase in future TP loadings.” P89 *emphasis in orig.* With the new rule, the

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as they had adopted a similar rule in the 1990s and had a decade of reductions. Such information was not produced by that state, despite MPCA’s request. Thus, while MPCA has clearly restricted phosphorus loadings, the environmental benefits of that action have never been demonstrated.

Agency seeks to reduce the growth of attached algae in streams and rivers, and suspended algae in larger rivers, and improve dissolved oxygen conditions in rivers already impacted by excess nutrients, but the Agency acknowledges that the benefits will be largely intangible, and that the expected improvements in water quality are likely to go unnoticed by most Minnesotans. SONAR, Book II, p. 121; *See also supra* n. 4.

Costs to achieve a 1 mg/L phosphorus limit on a year-round basis can be very expensive and are dependent on many site-specific factors. SONAR Ex. A-40a. Certain facilities may accomplish this very cost-effectively; others cannot. For example, the cost of phosphorus removal to 1 mg/L for trickling filter facilities or lagoons is 3 – 5 times that of activated sludge plants that may more readily incorporate biological phosphorus (“bio-P”) removal. *Id.*

Moreover, some activated sludge facilities can easily achieve phosphorus effluent in the 1.5 – 2.0 mg/L range, but would need to add chemicals to attain a year-round limitation of 1 mg/L. *Id.* For the City of New Ulm, for example, the total present worth costs are projected to increase from \$573,000 for bio-P (1 – 2 mg/L) to over \$2 million if a monthly limit of 1 mg/L must be maintained. *Id.* Likewise, if the City of Moorhead expands its WWTF, which is currently operating at capacity, and is required to meet a 1 mg/L TP limit, it is estimated that it will need to incur \$4 million in upfront capital expenses and \$330,000 annually

in phosphorus removal costs thereafter. P64.<sup>6</sup> Statewide, the MPCA estimates that compliance with the 1 mg/L TP limit will cost municipalities up to \$91 million in capital expenditures and up to \$42.8 million in operation and maintenance expenditures over the next five years for chemical addition phosphorus removal. SONAR, Book II, pp. 188-190.<sup>7</sup> Moreover, a WWTF's removal of phosphorus itself has unintended environmental consequences, such as the production of increased amounts of sludge, which is itself an environmental hazard and must be disposed of. *See* SONAR, Book II, p. 159.

There are three situations in which the rulemaking record makes crystal clear that imposition of a 1 mg/L TP limit on point source dischargers is neither reasonable, necessary, nor desirable. First, in situations where a nutrient-related impairment has been identified and a nutrient-related TMDL has been developed and implemented, imposition of a 1 mg/L TP limit would serve no purpose. In such cases, through the TMDL process and assigning WLAs, the Agency will have already determined the specific quantity of phosphorus effluent that may be introduced into the specific watershed without exceeding applicable water quality standards, and imposing an arbitrary numeric limit would serve no purpose.

A key example on this point is the Minnesota River nutrient/dissolved oxygen TMDL, which was completed in 2005, and which encompasses a large

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<sup>6</sup> The Red River of the North is documented to have low plant growth despite elevated TP levels. SONAR, Book II, p. 135. Thus, phosphorus reduction at this location is not expected to produce any demonstrable benefits in Minnesota.

<sup>7</sup> These amounts are in 2005 dollars.

portion of central and southern Minnesota. *See* SONAR, Book II, p. 134. This TMDL assessed how phosphorus affects algal growth, which causes a dissolved oxygen impact on the lower Minnesota River. *Id.* To avoid excessive algal growth and to achieve dissolved oxygen standards, the TMDL requires phosphorus reductions from 41 point sources only during low-flow summer conditions, to assist the lower 22 miles of the Minnesota River. *Id.* MPCA has typically referred to this TMDL as a “nutrient-related” TMDL. *See e.g.* P55-P56; P105-P106. Imposing a year round more stringent 1 mg/L TP limit on a point source discharge in the Minnesota River watershed (or on any other watershed for which a TMDL has been developed and implemented) would be neither necessary nor reasonable considering that the MPCA has already conducted a site-specific analysis of the Minnesota River, and has determined the quantity of phosphorus effluent that may be introduced into the watershed without exceeding applicable water quality standards. To do otherwise would render meaningless the adopted TMDL and corresponding WLAs and the regulated public’s reliance thereon through the NPDES permitting process and subsequent capital expenditures to make modifications to their WWTFs.

A second situation in which a 1 mg/L TP limit is unnecessary and unreasonable is during winter months. While the imposition of a 1 mg/L limit may produce environmental benefit during the spring and summer growing season, when TP loading can cause or contribute to excessive algal or plant growth or other nutrient-related impairments, such a limit would be neither necessary nor

reasonable if enforced in the winter, when the plant life aided by nutrients like phosphorus is dormant or otherwise limited by physical conditions (light/temperature) rather than nutrient levels. *See generally* SONAR Ex. PL-8; P168-P175, pp. 1-2, 2-1, 3-5, 4-3, 4-9, 8-6. There is simply no evidence in the rulemaking record to support a different conclusion. The Agency points to algal bloom conditions throughout the winter of 1990-91 on the Minnesota River, but the environmental significance of this rare event is not known nor is there any apparent connection between this event and point source loadings. *See* SONAR, Book II, p. 107. Moreover, the TMDL in place for this very river imposes seasonal a TP limit which does not limit TP during winter or high flow conditions, and lends sound scientific support to the conclusion that a statewide, blanket 1 mg/L limit is not necessary during winter months. SONAR, Book II, p. 134.

John Hall of Hall & Associates, Washington D.C., who has degrees in environmental engineering and mathematics, is a former environmental engineer at the U.S. Environmental Protection Agency, and has 27 years experience specializing in water quality modeling and water standards development, testified on behalf of MESERB at the August 30, 2007 public hearing in St. Paul and questioned regulators from the Agency on the benefits to regulating phosphorus effluent during the winter months:

MR. HALL: . . . . I am going to read a quote from the SONAR and then I am going to ask a question. Page 29 of the SONAR says, "The need implies that a problem exists and needs to be fixed."

Okay. *What problem does a one milligram per liter limit in the wintertime fix?*

MR. MASCHWITZ: . . . . *It's true that most of our monitoring data which shows impacts is summer data, but we also know that phosphorus just doesn't go away. It goes somewhere, and often times phosphorus is removed in the sedimentation process, in other words, it is removed from the water column as sediments filter out and ends up in the bottom sediments. We also know that in general that phosphorus can become available, whether it got there in the wintertime or the summertime it can be become available later on for plant growth because it can become in an available form either through an aerobic situation or possibly resuspension of those sediments. So there is reason enough to believe that the phosphorus that is discharged in the wintertime has got to be a problem later on. There may be some -- one of our proposed off ramps or exemptions does allow for summer only treatment under certain conditions. But there is a practical aspect of this too that if a lot of the phosphorus is being removed through a biological phosphorus treatment technology, it probably makes sense to maintain that technology or that process or those bacteria that do that throughout the year and not try to turn it on and turn it off with the season. It's true if we are relying solely on chemical addition, then we are going to require chemical throughout winter months.*

MR. HALL: I guess I have two comments and question on that, Dr. Maschwitz. The comment is I think your points about phosphorus in the wintertime contributing to summertime problems is, politely put, is speculation. It's just not documented in the record . . . . I have been doing this for 27 years, and I know you have been doing it longer than me so you may have an example that, I don't know, *I have never seen a water quality model of a river be significantly influenced by the wintertime deposition and subsequent release of phosphorus, never . . . .* so my first question is do you have any examples that show us to be incorrect, data in

the record, models that show 30-40 percent or some substantial percent of what was discharged in the winter comes back in the summer, and even if you didn't discharge in the summer would still cause problems in the summer, I mean for streams? Lakes are difference, we all agree with that.

MR. MASCHWITZ: Well, in spite of what you said a minute ago, I am not a modeler, so I haven't done modeling myself.

MR. HALL: But you have looked at plenty of them.

MR. MASCHWITZ: *So we will talk to our colleagues here and maybe try to get a response to that, unless they have one at the moment.*

MR. HALL: The reason I pretty much know you're not going to find that is almost all sediment release for phosphorus occurs in under aerobic conditions. It's why in lakes when you look at the lake data from any of your deep lakes where the hypolimnion sets up in the wintertime if it goes anaerobic, phosphorus concentrations go through the roof in the anaerobic hypolimnion. It's because the DO [Dissolved Oxygen] basically goes to zero in the sediment layers. In streams when DO is going to zero in the sediment layer you would have a lot more problems than a little chlorophyll-a in the overlying water column. You're going to have dead fish everywhere. Because you have to have most of the overlying water column would have DOs, you know, in the 1 to 2 or less range, so you don't expect to see it occur . . . .

P50-P52, *emphasis added.*

Despite MPCA's statement that a factual basis for Dr. Maschwitz's response would be provided to prove that winter/spring phosphorus deposition in streams was a documented, significant factor affecting summer algal growth, no

such information was produced.<sup>8</sup> The CGMC later requested all evidence in the Agency's possession or control that supports its position that phosphorus causes environmental harm during the winter or high-flow conditions, such as to justify a year-round 1 mg/L TP limit. P149-P150. In response, the MPCA produced only the unsubstantiated assertions of winter effects contained in its SONAR and a study that found strong relationships between in-stream nutrients and algae and linked dissolved oxygen conditions to phosphorus, but for which samples were taken *only between the months of June through September* in 1999 and 2000. P151-P166; *see also* SONAR Ex. PL-8, pp. 254, 261.

Further the Lower Minnesota River TMDL serves as an example of where MPCA has documented environmental harm occurring during growing-season, low-flow conditions, and not during the winter or during high flows when phosphorus is transported downstream without growing algae to any significant level. In short, the only data in the record supports the CGMC's position that a year round 1 mg/L TP limit is unnecessary to protect water quality.

The third situation where a 1 mg/L TP limit is obviously not necessary is when the receiving water body is not adversely affected by nutrients, since the reason for a limit in this first place is to abate the excessive growth of algae resulting from the over-abundance of phosphorus. In such situations, simply freezing the current TP load to such water bodies at current levels would ensure

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<sup>8</sup> It should be noted that Dr. Maschwitz's response referred to sediment deposition as the concern. That is a soil runoff problem, not a wastewater plant issue where settleable solids and suspended solids are fully regulated. *See* 40 C.F.R. Part 133.

that its uses are not compromised and water quality standards are not violated.

The following exchange from the August 30 public hearing confirms this reality:

MR. HALL: Okay. For a non-impacted -- for a water body that you look at and determine is not adversely impacted from nutrients to the degree that uses are not compromised and standards are not violated, what is the need for and reasonableness of forcing a discharger to . . . an unimpacted water body to reduce its phosphorus level?

MR. MASCHWITZ: Basically the response to that is that it's not in our best interest to wait until all waters are impaired before we take action . . . .

MR. HALL: *Doesn't a load freeze for such water bodies provide that protection?*

MR. MASCHWITZ: *A load freeze might work my counsel is advising me, but it would be part of the response.*

P47-P48, *emphasis added.*

B. Exemptions to the New Phosphorus Effluent Limit

Recognizing the obvious situations described above in which imposing a 1 mg/L TP limit would be unnecessary and unreasonable, the MPCA wrote certain exemptions, or "off ramps," into the rule to permit a point source to apply for an alternate limit or no limit. The CGMC and MESERB both supported MPCA's approach in establishing exemptions to address the three situations described above. *See e.g.* P53, P70-P71; P92.<sup>9</sup> The portion of the phosphorus effluent rule

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<sup>9</sup> In fact, the CGMC's primary objection to the proposed new phosphorus rule following the public hearings was that the off ramps were discretionary rather than automatic. The CGMC suggested that the rule language be changed so that the off

containing the off ramps to the blanket 1 mg/L TP effluent limit reads, in its entirety, as follows:

**Subp. 4. Alternative phosphorus effluent limits for new or expanded discharges.** New or expanded discharges subject to a one milligram per liter phosphorus effluent limit in subpart 3, item A, subitem (3) may request an alternative limit or no limit if one or more of items A to C apply. New or expanded discharges are defined in subpart 2. The exemptions in this subpart do not apply to facilities that discharge directly to or affect a lake, shallow lake, or reservoir or to discharges to the waters listed in subpart 5. Dischargers seeking an alternative limit due to very high per capita treatment costs or economic hardship must apply for a variance under parts 7000.7000 and 7053.0195.

The information submitted to the commissioner for consideration of an alternative limit must include, *at a minimum*, a description of the treatment technology used, influent and effluent total phosphorus concentrations, a phosphorus management plan for the facility, descriptions of any measures already taken to reduce phosphorus sources to the facility, and expected reductions in phosphorus concentrations following implementation of the phosphorus management plan. The discharger *may qualify* for an alternative total phosphorus limit or no limit if it can demonstrate:

A. the discharge is to or upstream of a water body listed on the applicable impaired water list, section 303(d) of the Clean Water Act and the total maximum daily load study is complete and approved by the United States Environmental Protection Agency at the time the new or expanding facility is in the planning and design phase. The total maximum daily

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ramps “shall” be granted upon a showing of the specific criteria contained in the off ramps, as opposed to the language in the proposed rule that the off ramps “may” be granted upon such a showing. P70-P71. The CGMC’s objections to the rule have not changed.

load study must have considered impacts from phosphorus loading on the impaired water body. *In this case the total maximum daily load study will determine the applicable phosphorus effluent limit;*

B. the environmental benefits to be achieved by meeting a phosphorus limit are outweighed or negated by the environmental harm caused by meeting a limit; or

C. the treatment works, regardless of the type of treatment technology, must use chemical addition to achieve compliance with the one milligram per liter limit and the discharge is to a receiving stream in a watershed listed in subitems (1) to (3). In this case the discharger *may be granted a seasonal one milligram per liter limit*, applicable from May 1 through September 30 and not applicable from October 1 through April 30:

(1) the lower Mississippi River and its tributaries from the mouth of the Chippewa River in Wisconsin to the Minnesota border;

(2) the Bois de Sioux and Red Rivers and their tributaries from the southern end of Lake Traverse at Browns Valley to the Canadian border; and

(3) the Missouri, Des Moines, and Cedar Rivers and their tributaries in Minnesota.

Minn. R. 7053.0255, subpt. 4, *emphasis added*. Under the plain language of this rule, it is apparent that granting any exceptions would be highly (if not completely) discretionary and that the Agency could add further demonstration requirements at will.

The MPCA explained the rationale for the three off ramps as follows:

In general, the less TP discharged to receiving water the better. However, the Agency believes that there will be situations when the imposition of a TP limit may have minimal benefits for the environment, and

the proposed rule needs to provide for these situations. The Agency intends to evaluate each request for an exemption on a case-by-case basis using a weight of evidence approach, consistent with the fundamental rationale and goal of the proposed extension of the phosphorus limit, which is to prevent the eutrophication of surface waters by reducing the loading TP from point sources.

MPCA SONAR, Book II, p. 168.

The MPCA attempted to demonstrate that its proposed changes to the Phosphorus Rule satisfy the requirements of Minn. Stat. § 14.002<sup>10</sup> in its Statement of Need and Reasonableness (“SONAR”), which was published in three volumes in July, 2007. Throughout the rulemaking process, the MPCA cited the three off ramps as evidence that the new rule is reasonable. MPCA SONAR, Book I, p. 125; Book II, pp. 124, 138, 150, 168. In fact, it is the Agency’s position that the exemptions in Minn. 7053.0255, subpt. 4 “are *needed* to allow dischargers potential relief from a TP limit in certain situations.” SONAR, Book II, p. 115 *emphasis added*.

The MPCA expressly invoked its inclusion of the three off ramps in the proposed amendments to the phosphorus rule to illustrate that its proposed amendments are reasonable, and to counter concerns submitted by the CGMC and MESERB that the new rule is arbitrary and overly expansive and inflexible:

Apart from MESERB’s issues regarding Agency authority to set effluent limits, the Agency believes that MESERB’s basic concern about TP limits being

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<sup>10</sup> Minn. Stat. § 14.002 requires state agencies, whenever feasible, to adopt rules that are not overly prescriptive and inflexible.

imposed in situations where no negative impacts have been demonstrated are substantially mitigated by the facts presented in the *reasonableness* section of this SONAR as highlighted below . . . .

*• Dischargers may request relief from the TP limit under one or more of the proposed exemptions. The third exemption provides for the possibility of summer-only limits in certain watersheds.*

MPCA SONAR, Book II, p. 138, *emphasis added*.

The MPCA has also specifically highlighted the off ramps contained in the new rule as evidence of the new rule's flexibility:

Examples of appropriately "flexible" rule language in the proposed amendments are the exemptions in Minn. R. 7053.0255, subp. 4, items A to C. The exemptions (also called "off ramps") allow a new or expanding discharger to petition the Agency for an exemption to the 1 mg/L phosphorus limit. The wording of the off ramps is general enough to give the Agency the leeway it needs to evaluate the merits of each petition on a case-by-case basis. The rule includes guidance to permittees on the types of information that should be included in their petition. The supportive information submitted by the discharger and the conditions that might justify an exemption will be very case-specific. The Agency must retain enough flexibility to make individual decisions tailored to each case while providing enough guidance in rule to inform parties of their obligations. No amount of prescriptive language in the off ramps could capture all possible relevant factors that will enter into these individual decisions; thus, more flexible language is warranted in this context.

MPCA SONAR, Book I, p. 125.

Finally, in the context of addressing the reasonableness of the three off ramps themselves (as opposed to the new Phosphorus Rule as a whole), the MPCA expressed its “belief that the three proposed off ramps, plus the variance option, can adequately address the anticipated variety of situations – that they are broad enough to apply to a wide range of individual situations.” MPCA SONAR, Book II, p. 151.

The Administrative Law Judge cited the flexibility of the three off ramps approvingly in his report recommending that the proposed Phosphorus Rule be adopted. P21-P22, ¶¶ 59, 62.

During the rulemaking process, the Agency confirmed that the off ramps in the rule were designed to provide relief to point sources who find themselves in the three situations summarized above in which the 1 mg/L phosphorus effluent limit would be unnecessary. With respect to the TMDL off ramp, the Agency indicated on numerous occasions, though not unequivocally, that this off ramp would be available to point sources subject to a nutrient-related TMDL, including the Minnesota River dissolved oxygen TMDL.<sup>11</sup> *See e.g.* P55-P56; P102-P103. Specifically with respect to the TMDL off ramp, Dr. Maschwitz testified that if “the TMDL is complete, it’s out there, (it) sets effluent limits for that watershed,

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<sup>11</sup> This position was contradicted by the Agency’s statement in its SONAR and in its response to the City of Willmar (*See infra* pp. 29-30) that the Minnesota River TMDL is not a nutrient related TMDL and would not serve as the basis for an alternate limit under the TMDL off ramp. SONAR, Book II, p. 134.

that those exemptions would be granted.” P56. Moreover, the following testimony was given before the MPCA Citizen Board at its 2007 annual meeting:

MR. NYHUS: . . . . If the petitioner is seeking to use the TMDL off-ramp based on the lower Minnesota River TMDL, will the petitioner be required to demonstrate an absence on non-growing season, i.e., winter impacts from its phosphorus discharge in order to qualify for the exemption?

MR. MASCHWITZ: . . . in that case, again, *the TMDL will control what the effluent limit will be for those dischargers . . . .*

P102-P103, *emphasis added*.

The Agency also pointed to the second off ramp, the harm exceeds benefits off ramp, as a remedy to the situation where a 1 mg/L limit would serve no purpose during winter months when the plant life aided by nutrients like phosphorus is dormant:

MR. HALL: . . . . What we do have more of a problem with is there is a number people that can't use biological phosphorus removal cost effectively, and they will have to use chemical removal year-round, and that does use energy, it generates sludge, and it reduces phosphorus in a time when we are not going to see much of any benefit, so we think downsides outweigh it.

MR. TOMASEK: I think that points out the exemption that we have, that we see as an opportunity for people to look at the environmental benefit versus the environmental loss benefit and gain. So we think that can be something that can be accomplished.

MR. HALL: Mr. Tomasek, I really appreciate that because that was the one issue we raised several times about environmental harm versus good . . . . and

most of the feedback we perceived we were getting on that was no. If the answer to that is yes, well, then, quite frankly, that makes some of the difficulty associated with this rule so long as it's applied to places where there is an ongoing impact . . . .

P53-P54. From this exchange it is apparent that phosphorus reduction to avoid adverse algal growth in streams during winter months was often not a concern for the Agency. Had it had scientific evidence to the contrary, this relief would not have been written into the rule.

The language of the third off ramp clearly allows for seasonal limits for specific watersheds, based on the premise that winter algal growth is minor. Under the language of the rule, no apparent impacts assessment was required to access this off ramp—merely a showing that chemical addition is needed to remove phosphorus to 1 mg/L.

#### C. MPCA's Interpretation of the New Phosphorus Rule

The Agency's (unauthorized and unadopted) practice since 2000 under its Phosphorus Strategy has been to invariably require a 1 mg/L TP limit for all point source dischargers seeking NPDES permits from the Agency, without regard to the effect of such discharge on surrounding water bodies and to not allow any exceptions to this policy, even during winter months.

Contrary to MPCA's assertions in its SONAR regarding the accessibility of the off ramps, in its first opportunity to issue a permit under the TMDL off ramp, the clearest of the three off ramps, the Agency responded to a request from the

City of Willmar, which is subject to the Minnesota River TMDL and its seasonal TP effluent limit, to qualify for the TMDL off ramp, as follows:

As for the potential off-ramp in the proposed rules, the Permit must reflect the rules and policies in effect at the time of permit issuance. The proposed rules are not in effect until five days after notice in the State Register. That is expected to be sometime after April 2008 provided the proposed rules are uncontested. If the proposed rules are contested, the effective date will be much later. The off-ramp is not available until the proposed rules are final.

I am including some language from the Statement of Need and Reasonableness (SONAR) for the proposed rules. Specifically, the MPCA has identified the facilities in the Minnesota River as follows:

On page 156 of the SONAR where the MPCA clarified the intent of the rules, we acknowledge that for the Minnesota River DO Total Maximum Daily Load (TMDL) there are seasonal limits...but those limits only apply to the DO TMDL. However, turbidity and eutrophication are also issues in the River. The point of the discussion is that imposing a seasonal total phosphorus limit may solve the DO problem, but may not be adequate to solve the eutrophication problem (excess nutrients) in the River. Since there is not an approved TMDL on eutrophication, a city may request the off-ramp, however the Agency will need to do an assessment to see if it is applicable.

P142-P144. This response is directly at odds with the Agency's statements during the public hearings before the Administrative Law Judge expressly acknowledging that the Minnesota River TMDL is a "nutrient-related" TMDL that qualifies dischargers for the first off ramp. *See supra* pp. 27-28.

Willmar requested written clarification from the Agency on this issue but to date no written response has been forthcoming from the Agency. P142-P145.

### SUMMARY OF ARGUMENT

The CGMC's petition for declaratory judgment in this case results from the Minnesota Pollution Control Agency's adoption of Minn. R. 7053.0255 on December 18, 2007, which rule became effective May 1, 2008. Minn. R. 7053.0255 purports to establish a non-effects based, one-size-fits-all, statewide phosphorus effluent limit of 1 mg/L for all new or expanding point source dischargers of waste, despite the fact, which has been acknowledged by the Agency, that imposition of such a limit in certain situations may be of little or no benefit to the environment while imposing significant financial burdens on the regulated public and ratepayers.

Minn. R. 7053.0255, subpt. 4 attempts to account for such Agency-acknowledged situations of minimal environmental benefit of the phosphorus effluent limit by providing for three "off ramps" pursuant to which dischargers may petition for an alternative phosphorus limit or no limit at all. The language of Subp. 4, however, grants unbridled discretion to administrative officers with the Agency by failing to furnish a reasonably clear policy or standard of action to control or guide such officers that will be charged with evaluating requests thereunder. That the law lacks a reasonably clear policy or standard of action to guide the Agency is evidenced by the MPCA's own confusion and incoherence in attempting to interpret the rule's specific provisions. As such, Minn. R.

7053.0255 violates of Minn. Const. art. III, the Agency's statutory rulemaking authority, and the Administrative Procedures Act.

### ARGUMENT

The entirety of the new Phosphorus Rule adopted by the MPCA on December 18, 2007 (Minn. R. 7053.0255) that is the subject of the CGMC's petition is set forth in the addendum hereto. *See add.* pp. 47-50. The specific language giving rise to this petition, however, is contained in subpt. 4, which provides as follows:

**Subp. 4. Alternative phosphorus effluent limits for new or expanded discharges.** New or expanded discharges subject to a one milligram per liter phosphorus effluent limit in subpart 3, item A, subitem (3) may request an alternative limit or no limit if one or more of items A to C apply. New or expanded discharges are defined in subpart 2. The exemptions in this subpart do not apply to facilities that discharge directly to or affect a lake, shallow lake, or reservoir or to discharges to the waters listed in subpart 5. Dischargers seeking an alternative limit due to very high per capita treatment costs or economic hardship must apply for a variance under parts 7000.7000 and 7053.0195.

The information submitted to the commissioner for consideration of an alternative limit must include, *at a minimum*, a description of the treatment technology used, influent and effluent total phosphorus concentrations, a phosphorus management plan for the facility, descriptions of any measures already taken to reduce phosphorus sources to the facility, and expected reductions in phosphorus concentrations following implementation of the phosphorus management plan. The discharger *may* qualify for an alternative total phosphorus limit or no limit if it can demonstrate:

A. the discharge is to or upstream of a water body listed on the applicable impaired water list, section 303(d) of the Clean Water Act and the total maximum daily load study is complete and approved by the United States Environmental Protection Agency at the time the new or expanding facility is in the planning and design phase. The total maximum daily load study must have considered impacts from phosphorus loading on the impaired water body. In this case the total maximum daily load study will determine the applicable phosphorus effluent limit;

B. the environmental benefits to be achieved by meeting a phosphorus limit are outweighed or negated by the environmental harm caused by meeting a limit;  
or

C. the treatment works, regardless of the type of treatment technology, must use chemical addition to achieve compliance with the one milligram per liter limit and the discharge is to a receiving stream in a watershed listed in subitems (1) to (3). In this case the discharger *may be granted* a seasonal one milligram per liter limit, applicable from May 1 through September 30 and not applicable from October 1 through April 30:

(1) the lower Mississippi River and its tributaries from the mouth of the Chippewa River in Wisconsin to the Minnesota border;

(2) the Bois de Sioux and Red Rivers and their tributaries from the southern end of Lake Traverse at Browns Valley to the Canadian border; and

(3) the Missouri, Des Moines, and Cedar Rivers and their tributaries in Minnesota.

Minn. R. 7053.0255, subpt. 4. (*emphasis added*).

## Standard of Review

Challenges to rules adopted by administrative agencies in Minnesota are permitted and governed by Minn. Stat. §§ 14.44 and 14.45. Minn. Stat. § 14.44 states that:

The validity of any rule may be determined upon the petition for a declaratory judgment thereon, addressed to the Court of Appeals, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, and whether or not the agency has commenced an action against the petitioner to enforce the rule.

Substantively, Minn. Stat. § 14.45 sets forth the three standards pursuant to which a court may declare a rule that is the subject of a declaratory judgment action under § 14.44 invalid: (1) if it “violates constitutional provisions,” (2) if it “exceeds the statutory authority of the agency,” or (3) if it “was adopted without compliance with statutory rulemaking procedures.”

The Court of Appeals’ review of an administrative rule under this statutory construct is limited to the record made in the agency rulemaking process. Minn. R. Civ. App. P. 114.023, subd. 1. The Court of Appeals applies an “arbitrary and capricious” test to the agency’s proceedings, but nevertheless must make a “searching and careful” inquiry of the record to ensure that the agency action has a rational basis. *Minnesota Chamber of Commerce v. Minnesota Pollution Control*

*Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991). Further, the Court of Appeals will require the agency to explain what evidence it is relying on and how that evidence connects rationally with the agency's choice of action to be taken.

*Id.*

**I. MINN. R. 7053.0255 VIOLATES ARTICLE III OF THE MINNESOTA CONSTITUTION BECAUSE IT GRANTS UNBRIDLED DISCRETION TO ADMINISTRATIVE OFFICERS.**

The Constitution of the State of Minnesota requires that

[t]he powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

Minn. Const. art. III, § 1.

Discretionary power may be delegated to administrative officers:

[i]f the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, *so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers.*

*Lee v. Delmont*, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949) *emphasis added* (upholding delegation of discretionary power in education context); *See also City of Richfield v. Local No. 1215, Intern. Ass'n of Fire Fighters*, 276 N.W.2d 42, 45 (Minn. 1979).

Administrative officers may be clothed with power to exercise a discretion under a law, but not a discretion as to what the law shall be. *Hassler v. Engberg*, 233 Minn. 487, 515, 48 N.W.2d 343, 359-60 (1951).

Requiring more specific language to avoid excessive agency discretion is also necessary to assure that the rule will be applied in a consistent manner. *Blocher Outdoor Adver. Co., Inc. v. Minnesota Dep't of Transp.*, 347 N.W.2d 88, 91 (Minn. Ct. App. 1984). Not all rules that contain specific criteria—such as the specific criteria contained in the off-ramps themselves—furnish administrative officers with the required reasonably clear policy or standard of action. For example,

[e]ven if an agency rule contains specific criteria, the criteria may be effectively nullified by the word *may*, as in the following example: “The Commissioner may grant a license if the applicant has fully paid the fee.” Under this example, even if the applicant has fully paid the fee, the commissioner may still not grant the license. Thus, an applicant has no idea when or under what circumstances a license may be granted even though he or she has paid the fee.

Minnesota Administrative Procedure at 363 (George A. Beck ed., Weekend Publications 2d ed. 1998).

Minn. R. 7053.0255, subpt. 4 suffers from precisely the same flaw as the rule in the scenario imagined above by Administrative Law Judge Beck. The off ramps themselves, clauses A through C in subpt. 4, contain specific criteria that would constitute “a reasonably clear policy or standard of action” for MPCA staff to follow in evaluating applications from point sources. However, the

introductory clause immediately preceding the three specific off ramps, which states that a discharger *may* qualify for an alternative limit or no limit if it can demonstrate that the criteria contained in any of the three specific off-ramps apply to it, negates the specificity of the off-ramps themselves.<sup>12</sup>

A discharger applying for relief under one or more of the off ramps would have no idea when or under what circumstances such relief may be granted. Indeed, even if an applicant can demonstrate that it satisfies the requirements of one or more off-ramps, under the plain language of the rule, relief *may* not be granted. The fate of such an application by a discharger under the rule thus would depend on the whim or caprice of the administrative officers, as opposed to the terms of the rule itself. The rule therefore constitutes an unconstitutional delegation of legislative power because it does not furnish a reasonably clear policy or standard of action, which controls and guides the administrative officers in ascertaining the operative facts to which the law applies.

The MPCA's handling of the City of Willmar's request with respect to the TMDL off ramp provides evidence of the dangers of granting a regulatory agency unbounded discretion. Despite the fact that the City of Willmar is subject to the Minnesota River TMDL, which has examined the impaired water body affected by the City's discharge and determined the level of phosphorus removal required to

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<sup>12</sup> Further complicating the determination is the completely open-ended analysis ("at a minimum") that may be required to justify the third off ramp, the chemical addition off ramp which is nowhere restricted to a demonstration regarding excessive plant growth, which is the purpose of the rule.

ensure that algal levels are controlled to achieve water quality standards, the Agency has indicated that it will enforce the arbitrary, non-site specific 1 mg/L limit anyway. The stated reason of the Agency for ignoring the TMDL in existence is that it is a dissolved oxygen TMDL and not a “nutrient-related” TMDL. This is the exact opposite position from the one communicated by the Agency to the public in the public hearings, wherein MPCA acknowledged that the Minnesota River TMDL is a nutrient-related TMDL that would qualify dischargers on this river for the off ramp. *See supra* pp. 27-28.

The Agency’s reluctance to abide by the TMDL it has developed for the Minnesota River in Willmar’s case, when considered together with the fact that the Agency has invariably imposed a 1 mg/L limit on point sources applying for NPDES permits since 2000 under the Agency’s Strategy that it has been enforcing as an unadopted rule, suggests that the off ramps contained in subpart 4 of the rule are, in fact, illusory. Additionally, the paucity of data to support the need for winter phosphorus reduction further evidences arbitrary application of the rules. As a result, communities are left with no specific guidance of the type of scientific information that could possibly justify the second off ramp (environmental detriment outweighs benefit). The provision is so open ended as to invite arbitrary data production requirements unrelated to the underlying purpose of the rule, which is the reduction of excessive plant growth.

## II. THE MPCA LACKED THE STATUTORY AUTHORITY TO ADOPT MINN. R. 7053.0255.

It is axiomatic that a regulatory agency such as the MPCA has the authority only to adopt and enforce rules that are reasonable and necessary to address a demonstrated need for such regulation. *See Vang v. Commissioner of Public Safety*, 432 N.W.2d 203, 207 (Minn. Ct. App. 1988) (holding that where a board or commission has been empowered to make regulations, the law is to be interpreted as though it conferred the power and right to make reasonable regulations). The Agency's authority to adopt water quality standards and to classify waters of the state is found in Minn. Stat. § 115.03 (2006), particularly subdivisions 1(b) and 1(c). Subdivision 1(b) authorizes the Agency to classify waters, while subdivision 1(c) authorizes the Agency:

To establish and alter such *reasonable* pollution standards for any waters of the state in relation to the public use to which they are or may be put as it shall deem necessary for the purposes of this chapter and, with respect to the pollution of waters of the state, chapter 116; ...

*emphasis added.*

Additional authority for adopting standards is established under Minn. Stat. § 115.44, subd. 4. Subdivision 4 authorizes the Agency to:

...adopt and design standards of quality and purity for each classification necessary for the public use or benefit contemplated by the classification. The standards shall prescribe what qualities and properties of water indicate a polluted condition of the waters of the state which is actually or potentially deleterious, harmful, detrimental, or injurious to the public health,

safety, or welfare; to terrestrial or aquatic life or to its growth and propagation; or to the use of the waters for domestic, commercial and industrial, agricultural, recreational, or other reasonable purposes, with respect to the various classes established....

Finally, the Agency is authorized under Minn. Stat. § 115.03, subdiv. 5, to perform any and all acts minimally necessary, including the establishment and application of standards and rules, for the Agency's ongoing participation in the National Pollutant Discharge Elimination System (NPDES) permitting program.

The MPCA attempted to make its otherwise overly broad blanket 1 mg/L TP limit reasonable by inserting three off ramps into the rule whereby point sources could apply for an alternate limit or no limit under certain circumstances where the limit is unreasonable. However, the MPCA's attempts in this regard failed, as the language of Minn. R. 7053.0255, Subp. 4 grants unbridled discretion to the Agency's officers in violation of the Minnesota Constitution and the Administrative Procedures Act (Minn. Stat. § 14.001 *et seq.*). What remains is a blanket, arbitrary 1 mg/L limit that will apply in numerous situations where it is unnecessary. As a result, Minn. R. 7053.0255 is unreasonable, and beyond the Agency's statutory rulemaking authority. Again, the clearest example of the arbitrariness of the rule is its imposition of winter limitations, knowing that no data in the record support a conclusion that algal growth in the winter months

could have any effect on the degree of whatever plant growth is occurring.<sup>13</sup> It must accordingly be held invalid by this Court.

**III. IN ADOPTING MINN. R. 7053.0255, WHICH LACKS A REASONABLY CLEAR POLICY OR STANDARD TO GUIDE THE MPCA'S OFFICERS IN EVALUATING APPLICATIONS UNDER THE OFF RAMPS, THE AGENCY VIOLATED THE ADMINISTRATIVE PROCEDURES ACT.**

Just as the grant of unbridled discretion to administrative officers contained in Minn. R. 7053.0255, subpt. 4 violates Article III of the Minnesota Constitution, it also violates the Administrative Procedures Act, Minn. Stat. § 14.001 *et seq.* (the "APA").

**A. Minn. R. 7053.0255 Violated the Public Notice and Public Comment Provisions of the APA.**

An unauthorized, unspecific and ambiguous rule allows the administrative officer to create and apply qualification criteria without fulfilling the APA rulemaking procedures. Rules must be adopted in accordance with specific public notice and public comment procedures established by statute, and the failure to comply with necessary procedures results in the invalidity of the rule. *White Bear Lake Care Ctr. v. Minnesota Dep't of Pub. Welfare*, 319 N.W.2d 7, 9 (Minn. 1982).

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<sup>13</sup> To be clear, it is not the CGMC's position that plant growth entirely ceases for all aquatic plants during the winter; only that such growth, to the degree it occurs, is minor, does not cause environmental problems and in any event is not controlled by nutrient levels under these conditions. *See e.g.* SONAR, Book II, p. 160. MPCA never produced any information to the contrary and, as evidenced by the third off ramp, the chemical addition off ramp, which grants winter exemptions, the CGMC's position is correct. The MPCA has not explained why, in its view, this physical reality regarding plant growth is not correct for the rest of the state.

The APA's definition of a rule requires specificity (a rule must implement or make specific the law enforced or administered). Minn. Stat. § 14.02.

The APA requires agencies in Minnesota to solicit public comments on a proposed rule that by providing the public with "notice must include a description of the subject matter of the proposal and the types of groups and individuals likely to be affected." Minn. Stat. § 14.101. It also requires that an agency provide public notice of and conduct a public hearing. Minn. Stat. § 14.14.

The rulemaking process is required to ensure that an agency may not deprive the public of fair notice of the agency's intentions. *In re Hibbing Taconite Co.*, 431 N.W.2d 885, 894 (Minn. Ct. App. 1988) *citing Oglala Sioux Tribe v. Andrus*, 603 F.2d 707, 718 (8th Cir.1979).

In this case, the MPCA, in adopting a rule that lacks a clear standard for the Agency's officers to follow in evaluating applications under the rule's off ramps, circumvented the public notice and comment requirements of the APA by reserving this legislative authority to Agency staff. Under the terms of the rule itself, administrative officers in the MPCA are free to deny applications for an alternate TP limit or no limit for any conceivable reason or no reason at all. The public thus received no notice of the Agency's intentions in applying the rule's off ramps. Even if MPCA agents strictly limited their decision-making to the contours of the specific criteria contained in the off ramps, they would do so of their own volition, and not because the rule requires such a procedure, as according to the rule, proof of the conditions of one or more off ramps by an

applicant thereunder *may* entitle the applicant to relief. Nor is there any restriction in the rule that studies be limited to a demonstration that excessive plant growth is occurring in the receiving water. The MPCA has granted itself unbridled discretion under the rule to demand any type of study conceivable (“at a minimum” studies shall include . . .) before granting an off ramp. The repeated conflicting and somewhat evasive responses provided by the MPCA to the CGMC at the public hearings regarding the envisioned operation of the rule makes clear that the public was not informed of how this rule will work.

Under the APA, the public is entitled to notice and the opportunity to comment on the specific policy or procedure that a regulatory agency intends to make operative through rulemaking. That Minn. R. 7053.0255 was adopted without any constraints on the Agency’s discretion in evaluating applications under the off ramps makes clear that the rule failed to achieve the specificity required by the APA. As such, the rule must be held to be invalid by this Court.

**B. Minn. R. 7053.0255 is Overly Prescriptive and Insufficiently Flexible.**

Minn. Stat. § 14.002 requires state agencies, whenever feasible, to develop rules that are not overly prescriptive and inflexible, and rules that emphasize achievement of the Agency’s regulatory objectives while allowing maximum flexibility to the regulated parties and to the Agency in meeting those goals.

The 1 mg/L TP limit imposed on all new and expanding dischargers in Minn. R. 7053.0255, when considered in isolation, is unreasonable and overly

prescriptive and inflexible because it applies in numerous instances where the environmental benefit of the TP limit is minimal and the cost of compliance with the limit is high. MPCA has an entire program devoted to identifying waters that are impaired by nutrients, such that additional treatment may be justified. MPCA also has various non-degradation rules designed to maintain high quality waters and limit and future degradation. These programs can and do regulate the nutrients as necessary to restore and protect the waters of this state. There was no basis to conclude that effluent phosphorus levels needed to be reduced to 1 mg/L where excessive algal growth is currently not a problem.<sup>14</sup> See P47-P48. With regard to unimpaired waters, this rulemaking is clearly not reasonable and is beyond the level necessary to protect and preserve high quality waters.

The MPCA attempted to inject the requisite flexibility and reasonableness into the Rule through subpt. 4, which included off-ramps available in certain situations to dischargers. The Agency, in fact, has specifically acknowledged that the off ramps are needed to inject flexibility into the rule, and throughout the rulemaking record repeatedly pointed to the off ramps to show that R. 7053.0255 is reasonable. *Supra* pp. 24-27. But because subpt. 4 grants unbridled discretion to the Agency and lacks the specificity required by the APA, subpt. 4 is invalid.

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<sup>14</sup> MPCA has noted that untreated effluents range 5-9 mg/L TP. SONAR, Book II, p 189. Unless a WWTF were tripling its size, a 1 mg/L limit would not be needed to avoid a load increase to a non-degraded water body. Such a dramatic increase in municipal wastewater flow would be quite rare and in any event would be remedied by simply stating that permitted loads may not be increased rather than imposing a limitation far more restrictive than that.

The remainder of the rule, with its arbitrary one-size-fits-all 1 mg/L limit that would apply in numerous situations where it is unnecessary, is overly prescriptive and inflexible in violation of Minn. Stat. § 14.002.

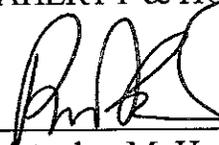
### CONCLUSION

The unspecific, open-ended language contained Minn. R. 7053.0255, Subpart 4 grants unbridled discretion to administrative officers in violation of Article III of the Minnesota Constitution, the Agency's statutory rulemaking authority, and the Administrative Procedures Act. Because Minn. R. 7053.0255 without the exemptions to its 1 mg/L TP limit contained in Subpart 4 is unreasonable, overly prescriptive, arbitrary and capricious, this Court must hold Minn. R. 7053.0255 to be invalid.

Respectfully submitted,

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Dated: August 13, 2008



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**CERTIFICATE OF COMPLIANCE WITH MINN. R. CIV. APP. P. 132.01**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subdivs. 1 and 3 for principal briefs. The length of this brief, exclusive of pages containing the table of contents, table of authorities, and addenda but including footnotes, is 453 pages. This brief was prepared using Microsoft Word 2003.

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