

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

OFFICE OF
APPELLATE COURTS

SEP 26 2008

FILED

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.)

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Petitioner the Coalition of Greater Minnesota Cities (“CGMC”) makes the following Reply to Respondent Minnesota Pollution Control Agency (“MPCA” or the “Agency”).

CGMC’s appeal raises a precise attack on the language of Minn. R. 7053.0255 (the “Phosphorus Rule” or the “Rule”). Specifically, CGMC asserted that the use of the term “may” in subpt. 4 of the Rule makes the granting of the listed exemptions, or “off ramps,” to the Rule completely discretionary, with no discernable standard or policy to guide the administrative officers charged with enforcing the Rule, a claim MPCA does not refute. MPCA’s responsive brief and the administrative record confirm that CGMC’s objections are well-founded and not speculative.

CGMC further asserted that MPCA would utilize other factors that were not identified in the Rule or the rulemaking record to determine whether an off ramp request would be granted. MPCA’s response amply confirms this assertion as well. These additional factors and the Agency’s intention to reserve discretion were never noticed to the public in rulemaking, in violation of Minnesota’s Administrative Procedures Act. MPCA told the public that the off ramps would be granted based on the precise factors listed in the Rule, but its response confirms that it no longer intends to apply the Rule in this manner.

Finally, CGMC argued that application of the Rule to non-degraded waters or during the winter non-growing season was without rational basis, as there is

absolutely no evidence in the record to support such an application, in lieu of other existing less-restrictive regulatory protections. MPCA's brief, however, points to no relevant record information countering these arguments. Both individually and collectively, these undisputed facts demonstrate that the Rule is arbitrary and capricious.

MPCA attempts to cloak all of these illegal actions in assertions of agency discretion, broad justifications for the rulemaking, and regulatory complexity. However, these concepts do not permit MPCA to ignore aspects of its own Rule it considered necessary for its reasonable application, to adopt open-ended rules, to ignore its own findings, or to fail to disclose to the public the true manner in which it intends to apply the rules. Similarly, the defenses raised in MPCA's brief do not address CGMC's arguments. CGMC did not initiate a generalized attack on the need for the Rule, the statutory authority to issue the rules, or the underlying information supporting the Rule. Neither did CGMC claim that the Rule had to spell out all possible scenarios that would be encountered in this application. Instead, CGMC objected that 1) the Rule language improperly grants unbridled discretion to MPCA to impose limits even where off ramp language applies; 2) MPCA never intended to adhere to the specific off ramps despite repeatedly and consistently telling the public that off ramps were both reasonable and necessary; and 3) the Rule mandates phosphorus reductions unrelated to the stated purpose of the Rule. MPCA's brief actually confirms the accuracy of CGMC's arguments. Consequently, the revised Phosphorus Rule should be vacated.

ARGUMENT

I. CGMC HAS STANDING TO BRING THIS FACIAL CHALLENGE TO MINN. R. 7053.0255.

MPCA has asserted that CGMC lacks standing to bring this declaratory judgment action because the Agency has not applied or enforced the Rule, and has not threatened such action. MPCA Br. pp. 16-19.¹ This argument lacks merit.

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.*

Emphasis added. Thus, an authorized rule-based challenge does not have to await application of the Rule, threatened or otherwise.

In arguing that CGMC lacks standing, MPCA relies on two holdings of this Court: *Minn. Educ. Ass'n v. Minn. State Bd. Of Educ.*, 499 N.W.2d 846 (Min. Ct. App. 1993) and *Rocco Altobelli, Inc. v. Minn. Dep't of Comm.*, 524, NW.2d 30 (1994). The Agency's reliance on these cases is misplaced.

¹ References to Respondent Minnesota Pollution Control Agency's Brief will take the form of MPCA Br. p. ____, and references to the Brief of Petitioner will take the form of CGMC Br. p. ____.

Minn. Educ. Ass'n involved a union's challenge to an agency rule stating that daily preparation time for elementary school teachers must be "comparable" to that provided by secondary teachers in the school district within a student contract day. 499 N.W.2d at 847. During the rulemaking proceedings in that case, the agency had communicated its intention to interpret the word "comparable" to mean "proportional." *Id.* The union objected to this interpretation and challenged it in a § 14.44 pre-enforcement declaratory judgment action, but acknowledged that the rule was valid on its face and that it expressly complied with the authorizing statute. *Id.* at 848.

In holding that the agency's proposed interpretation of the word "comparable", which interpretation *was not part of the rule itself*, was not reviewable in a pre-enforcement declaratory judgment action, this Court drew a distinction between the "threatened application" of a rule and a "proposed interpretation" of a rule that is valid on its face. *Id.* at 849. This Court acknowledged that a declaratory judgment action is a proper method to challenge a rule prior to its application or enforcement, but declined to conduct "broad and far reaching scrutiny" of a facially valid rule based on hypothetical facts. 499 N.W. 2d at 848-49. This Court succinctly paraphrased its holding thusly: "We cannot review what does not exist." *Id.* at 849.

In *Rocco Altobelli*, this Court simply rejected a hair salon's declaratory judgment challenge to an administrative rule that provided certain tax exemptions to chair leasing cosmetology shops on the grounds that the complained of rule was

not contrary to the hair salon's fiscal interests. 524 N.W.2d at 34-36. In so holding, this Court recognized that petitioners "must have a direct interest in the validity of that [rule] which is different in character from the interest of the citizenry in general." *Id.* at 34.

The present case is distinguishable from *Minn. Educ. Ass'n* because CGMC's challenge is rooted not in hypothetical or proposed interpretations of a rule that is undisputedly valid on its face, but in the unconstitutional and invalid language of the Rule itself. In its principal brief, CGMC raised a very precise attack on the language of the Rule. Specifically, CGMC asserted that the use of the term "may" instead of "shall" in subpt. 4 of the Rule leaves the application of the off ramps to the complete and unbridled discretion of the administrative officers charged with enforcing the Rule, with no discernable standard or policy to guide or otherwise constrain their action. CGMC Br. pp. 36-37. As opposed to the rule at issue in *Minn. Educ. Ass'n*, CGMC asserts that, on its face, Minn. R. 7053.0255 violates Minn. Const. art. III, § 1. Therefore, according to this Court's holding in *Minn. Educ. Ass'n*, CGMC has standing.

This Court's holding in *Rocco Altobelli*, which rested on its determination that the challenged rule did not harm the petitioner, is simply inapplicable to the instant case because there is no dispute that the overbroad application of the Rule's 1 mg/L total phosphorus effluent limit (or "TP limit") is detrimental to the interests of CGMC and its members, particularly if, as CGMC has argued, the off ramps to the Rule are illusory. MPCA itself estimates that statewide 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. 188-190.² With specific reference to CGMC member cities, compliance with the 1 mg/L TP limit in the Rule is projected to increase the phosphorus removal costs the City of New Ulm from \$573,000 to over \$2 million, whereas when the City of Moorhead expands its wastewater treatment facility, which is currently operating at capacity, it is estimated that it will incur \$4 million in upfront capital expenses and \$330,000 annually in phosphorus removal costs thereafter to meet a 1 mg/L TP limit. P64.³

Section 14.44 plainly confers standing upon a party to bring a pre-enforcement declaratory judgment action when either (1) the language of “the rule” itself, or (2) the “threatened application” of the Rule “interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner:” In this case, the Rule itself violates the Minnesota Constitution and compliance with the 1 mg/L TP limit contained in the Rule, by the Agency’s own admission, will impose large financial burdens on municipalities throughout Minnesota, including CGMC members. CGMC’s standing therefore is not contingent upon it showing that the Agency has enforced or threatened to enforce

² These amounts are in 2005 dollars.

³ References to Petitioner’s Appendix herein will take the form of P ____, and references to Respondent’s Appendix will take the form of RA ____.

the Rule against a member city,⁴ and the Agency's contrary assertions (*See* MPCA Br. p. 17) are unsupported by law or fact. If the Agency's interpretation of Minn. Stat. § 14.44 were given effect, the Agency would have an unlimited ability to pass unconstitutional or otherwise invalid rules so long as a petitioner could not show that the Agency had threatened to apply such rule(s) against it, forcing a costly and time consuming contested case process. Section 14.44 clearly does not grant the Agency this ability, and together with Minn. R. 7053.0255, confers standing on CGMC to bring this action.

In addition, MPCA's standing challenge ignores that CGMC's challenge to the Rule as improperly noticed. *See* CGMC Br. pp. 41-43. MPCA has confirmed that it will be considering information that it never requested the public to address as part of the off ramp process. P107 at 142-45. The SONAR never disclosed that such information would be the basis for applying the otherwise clear language of the exemptions. *See* CGMC Br. pp. 41-43. Procedural rulemaking violations are a well recognized injury that supports an immediate rule challenge. *White Bear*

⁴ Even if Minn. Stat. § 14.44 required CGMC to make a showing of threatened application of the rule, which it does not, two pieces of evidence in the record would establish "threatened application." First, the Agency's letter to Steven Nyhus dated August 12, 2008 (RA 102) clearly contemplates that the City of Willmar, a CGMC member, will be subject to Minn. R. 7053.0255 should it decide to seek an amendment of its current NPDES permit. Second, the Agency's actions in the NPDES permitting process, in which its (unauthorized and unadopted) practice since 2000 has been to invariably require a 1 mg/L TP limit for all point source dischargers seeking permits, without regard to the effect of such discharge on surrounding water bodies (*See* P113-36). These facts, when considered together with the Rule's open ended language, should remove any doubt that the Agency intends to enforce the 1 mg/L TP limit without exception.

Lake Care Ctr. v. Minnesota Dep't of Pub. Welfare, 319 N.W.2d 7, 9 (Minn. 1982). As such injury exists and has been alleged in this case, CGMC has standing to challenge the Rule at this time on APA procedural grounds.

Finally, CGMC also challenged the need for and reasonableness of applying the Rule during the winter or to unimpaired waters, as well as the statutory authority for enacting the Rule. Such challenges have been routinely entertained by Minnesota courts. See e.g. *Manufactured Housing Inst. v. Pettersen*, 347 N.W.2d 238 (Minn. 1984); *Stasny by Stasny v. Minn. Dept. of Commerce*, 474 N.W.2d 195 (Minn. Ct. App. 1991). CGMC members located on unimpaired waters will be adversely impacted if a less restrictive approach to phosphorus regulation was acceptable to meet the Rule's objectives. This is also a facial challenge to the Rule that is permissible at this time and does not rely on any case-specific facts for the court to decide the matter. *Id.*

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

In response to CGMC's argument that Minn. R. 7053.0255 grants unbridled discretion to MPCA officers in violation of Article III of the Minnesota Constitution (CGMC Br. pp. 35-38), MPCA claims broad discretionary authority in complex regulatory areas. (MPCA Br. pp. 27-37.) The constitutionality of Minn. R. 7053.0255 thus turns on precisely how much discretion Article III permits the Agency to afford itself.

A. *Lee v. Delmont* confirms CGMC's position that Minn. R. 7053.0255 fails to establish the constitutionally required "clear standard or policy" to guide administrative actions.

The leading case on the issue of the amount of discretion that may permissibly be granted to administrative agencies in Minnesota, as recognized by both parties, is *Lee v. Delmont*, 228 Minn. 101, 36 N.W.2d 530 (Minn. 1949). Both parties rely heavily on *Lee* to support their respective positions on the issue of the Rule's constitutionality. CGMC Br. p. 35; MPCA Br. pp. 27–29.

At issue in *Lee* was a statute identifying the qualifications for a barber school instructor which required instructors to pass an examination in certain subjects prescribed by statute in order to obtain a license. *Lee*, 228 Minn. at 109, 36 N.W.2d at 536. The relevant legal challenge in *Lee* centered on whether this statute was an unlawful delegation of authority to the state board of barber examiners. *Id.* 228 Minn. at 104, 36 N.W.2d at 534. The Minnesota Supreme Court's holding in *Lee* upholding the statute clearly restricted agencies from establishing unbounded regulatory requirements:

. . . . the legislature may confer upon a board or commission a discretionary power to ascertain . . . some fact or circumstance upon which the law by its own terms makes, or intends to make, its own action depend. The power to ascertain facts, which automatically brings a law into operation by virtue of its own terms, is not the power to pass, modify, or annul a law. *If 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, the discretionary power delegated to the board or commission is not legislative.

Id., 228 Minn. at 113, 36 N.W.2d at 538 (*emphasis added*).

Lee clearly prohibits an agency from adopting a wholly open-ended rule, as it requires that the law take effect upon an agency's factual determinations *by virtue of its own terms*. *Id.* Without directly refuting CGMC's reliance on this language, MPCA instead focused its argument on language in *Lee* noting the obvious that "the legislature cannot provide a crystal ball for the automatic determination of the proficiency of each examinee," and that administrative rules consequently are not required to anticipate every possible future scenario for application. *Lee*, 228 Minn. at 114, 36 N.W.2d at 539 (citations omitted). MPCA argues against a straw man when it implies that CGMC has asked MPCA to peer into a crystal ball and construct its Rule in such a way as to predict in advance whether an off ramp will be granted or not. MPCA Br. pp. 28–29. This is not what CGMC argued. Simply stated, CGMC argued that MPCA had unconstitutionally granted itself unbridled discretion and the ability to ignore the very language the Agency itself created to ensure proper application of the Rule. CGMC Br. pp. 36-37.

Unlike the present case, in *Lee*, the regulation at issue, by specifically identifying the subjects on which examinees were to be examined, provided

specific parameters within which the board was to exercise its discretion in determining an applicant's proficiency and suitability to be an instructor. *Lee*, 228 Minn. at 109, 36 N.W.2d at 536. The statute merely left it to the agency to interpret the statutory language as drafted. *Id.* The board did not include additional criteria after the fact that were not noticed to those affected by the statute in the rulemaking process, or provide highly specific qualifications to ensure proper rule application but then grant itself the right to ignore the very rules it had set forth.. *Id.*

Unlike the statute challenged in *Lee*, the Rule at issue in this case is, on its face, internally inconsistent. In fact, this Rule expressly allows MPCA to make up the rules as it goes along, in violation of *Lee*. *See also Hassler v. Engberg*, 233 Minn. 487, 515, 48 N.W.2d 343, 359-60 (1951) (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). For example, the express language of the TMDL off ramp states that the "TMDL *will determine* the applicable phosphorus effluent limit." *Emphasis added.* However, preceding Rule language only indicates that relief *may* be granted if there is a controlling TMDL, which obviously leaves open the possibility that such relief *may not* be granted, contrary to the off ramp language. As CGMC has argued, even if an agency rule contains specific criteria, as the Rule's off ramps unquestionably do, the criteria may be effectively nullified by the word *may*. CGMC Br. p. 36 *Citing Minnesota Administrative Procedure* at 363

(George A. Beck ed., Weekend Publications 2d ed. 1998).⁵ This defect in the Phosphorus Rule violates the precepts delineated in *Lee* because the Rule *does not* take effect by virtue of its own terms. MPCA has simply failed to confront this fatal defect in the language of the Rule.

CGMC argues that the necessary and appropriate off ramps provided in subpt. 4 of the Phosphorus Rule are illusory, because the Rule states that MPCA *may* grant them, and because MPCA has indicated that other, undisclosed factors that are known to MPCA will make the off ramps unavailable. CGMC Br. pp. 31, 36–37. In response, MPCA confirmed that in adopting Minn. R. 7053.0255, it reserved the power to utilize other, undisclosed factors to deny off ramps to applicants:

The revised phosphorus discharge rule appropriately identifies the standard for granting an exemption from the 1 mg/L limit but leaves open the possibility that an

⁵ The MPCA's post-rulemaking response to Willmar (RA 102) aptly demonstrates this point and further supports CGMC's constitutional objection to the Rule. During the public hearings MPCA stated that, with regard to the TMDL off ramp, the Minnesota River TMDL "will control what the effluent limit will be for those discharges." CGMC Br. p. 28. However, MPCA confirmed to Willmar that other hurdles, not specified in the rules, must be met. The Court's consideration of this post-rulemaking document is appropriate given the regulatory confusion created by MPCA and because MPCA failed to clarify how the rule would be applied during the rulemaking process despite repeated requests. *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 735 (Minn. App. 1997). In addition, the Willmar response demonstrates that the imposition of the 1 mg/L TP limit prior to the revised rule was not 'voluntary'. MPCA Br. pp. 6, 9, 22. If it were voluntary, as MPCA now claims, it is hard to understand why altering such "voluntary" action must now meet new mandatory regulatory hurdles.

exemption may not be available if unforeseen circumstances arise.⁶

MPCA Br. at 35. Moreover, during MPCA's Board meeting at which the Rule was adopted, the Agency admitted that it was going to consider factors such as out-of-state impacts on Canadian waters such as Lake Winnipeg, or on the Gulf of Mexico, even though MPCA acknowledged that the Rule did not require consideration of that information and the public was not required to submit such information in requesting an off ramp approval. P. 107 at 142-45.

MPCA's acknowledgements in its brief clearly illustrate that the Agency has sought to grant itself unbridled discretion to deny an off ramp for any reason it can develop in the context of a specific request. Contrary to the requirements of *Lee*, the off ramps do not take effect "by virtue of (their) own terms," but rather will be applied unconstitutionally "according to the whim and caprice" of the administrative officers.

B. Vagueness is not an issue in this Case, and MPCA's reliance on precedent confirming an agency's authority to interpret regulatory language is misplaced.

⁶ MPCA offers a specific example of such "unforeseen circumstances" as the operation of a completely separate federal Clean Water Act regulation. MPCA Br. p. 35. Indeed, CGMC does not dispute that it is possible that a federal regulation could independently require a more or less restrictive limit than the 1 mg/L limit in the Rule. SONAR, Book II, p. 115. But the granting of an off ramp under the Rule is a state law determination that must be made by MPCA; federal regulations do not affect whether an off ramp is available. 40 C.F.R. § 122.44(d); *see also* P106 at 141 and P108, at 146 (MPCA counsel testimony that MPCA must make water quality based permits determination aside from the TP Rule application). Thus, the proper approach would be to grant the exemption to the state law and independently apply other federal law requirements, as opposed to basing a refusal to follow state law such federal requirements.

In addition to *Lee*, MPCA has highlighted on pages 30-34 of its brief several additional cases that it claims support its grant of unlimited discretion to itself in this case: *W.J. Reyburn v. Minn. St. Bd. Of Optometry*, 247 Minn. 520, 78 N.W.2d 351 (Minn. 1956); *Anderson v. Comm. of Highways*, 267 Minn. 308, 126 N.W.2d 778 (Minn. 1964); and *J.B. Press Co. v. Minneapolis*, 553 N.W.2d 80, 85 (Minn. Ct. App. 1996). However, each of these cases dealt with challenges to specific regulatory language which the various petitioners objected to as vague. *W.J. Reyburn* 247 Minn. at 522, 78 N.W.2d at 354 (objection to the phrase “unprofessional conduct”); *Anderson*, 267 Minn. at 311, 126 N.W.2d at 780 (objection to the phrase “habitual violator”); *J.B. Press*, 553 N.W.2d at 84 (objection to ordinance language authorizing agency director to regulate door thickness to certain specified standards). These cases counter an argument that CGMC never raised. The issue is not that the language of the off ramps vague; the issue is that MPCA negated the clear language of its Rule by stating that relief *may* be granted upon satisfying the off ramps’ clear regulatory language, and in the process *granted itself unbounded discretion* to ignore the clear language of the Rule it adopted.

As noted above, the Agency has confirmed that it now has unbridled discretion to deny an exemption even where it is clear that the express terms of the exemption are met. *See supra*, pp. 14-15 *citing* MPCA Br. p. 35. The ALJ’s finding of “flexibility” in the Rule (*see* MPCA Br. pp. 14, 34) does not give

MPCA *carte blanche* to invent additional criteria for the off ramps without giving notice to the public of its intended actions or to create a totally open ended rule.

III. MINN. R. 7053.0255 IS UNREASONABLE AND EXCEEDS THE AGENCY'S STATUTORY RULEMAKING AUTHORITY.

As MPCA correctly states, when evaluating the legitimacy of a pre-enforcement regulatory challenge under Minn. Stat. § 14.44, a court should review the regulation using the traditional 'arbitrary and capricious' standard.

Manufactured Housing Inst. v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). As stated in *Pettersen*, this standard requires the court to make "a *searching and careful inquiry of the record* to ensure that the agency action has a rational basis." *Id.* (emphasis added) Furthermore, the agency "must explain on what evidence it is relying and how that evidence connects rationally with the agency's choice of action to be taken." *Id.*

The express purpose of the Rule is to prevent phosphorus discharges from causing excessive plant growth that impairs waters. MPCA Br. p. 2. MPCA's brief extensively defends the rulemaking it undertook in general, asserting that the applicable statutes allow MPCA to prevent waters from degradation. MPCA Br. pp. 21-28. CGMC does not dispute this general authority of the Agency, and contrary to MPCA's characterization, is not "resistant to the idea of taking additional steps to protect Minnesota's surface water from eutrophication due to excess phosphorus." *See* MPCA Br., p. 23. Neither does CGMC ask the Court to

“re-weigh” scientific evidence in the record (*Id.* pp. 24-25), generally attack MPCA’s rationale for enacting the Phosphorus Rule (*Id.*, p. 23), or question the appropriateness of MPCA’s stated objective in enacting the Rule to prevent “excessive algal levels that impair surface waters” (*Id.* pp. 6, 22.)⁷ Rather, CGMC’s objections to the Rule are narrow and limited to specific instances in which the evidence in the rulemaking record is undisputed that the Rule overreaches by mandating unnecessary phosphorus reduction that is unrelated to eutrophic conditions. Significantly, each of CGMC’s objections to the 1 mg/L limit are directed at ensuring that MPCA will grant the exemptions MPCA itself determined were reasonable and necessary. Had MPCA not eviscerated the specificity of the criteria outlined in the off ramps by providing the Agency the

⁷ In fact, MPCA’s brief lists eight reasons why it adopted changes to the Rule, seven of which go beyond the issue of avoiding nutrient enrichment in Minnesota’s surface waters. MPCA Br. pp. 6, 22. Most of these are completely unsupported in the record. For example, (ii) nothing in the record supports a specific limit of *1 mg/L on point sources* as being necessary to protect unimpaired waters from excess phosphorus; (iii) a fully functioning TMDL off ramp would require site-specific phosphorus limits pursuant to the TMDL, a product of *federal* law, regardless of what this state Rule may require; (iv) nothing in the record links the 1 mg/L limit to protecting extraterritorial waters such as Lake Winnipeg and the Gulf of Mexico, and to require an analysis of such would be an invalid exercise of MPCA’s regulatory authority; (v) the Rule as adopted rule eliminated prior language that promoted biological phosphorus removal does nothing to “promote” one treatment method over another, and virtually guarantees continued use of chemical treatment to avoid violations; (vi) allegations of “voluntary compliance” with MPCA’s Phosphorus Strategy are outright false, as the Strategy was adopted as an MPCA policy in March 2000 and has been enforced as a regulation ever since (*see supra* n. 5); and (vii) claims of administrative efficiency must fail where a rule is adopted without support for it in the record.

discretion to ignore such criteria, CGMC would have no objection to the new Rule.

It is obvious from the rulemaking record that the availability of the off ramps is essential to the reasonableness of the Rule in general. *See* CGMC Br., pp. 25-27. Consequently, this Court must decline the Agency's invitation to invalidate only the off ramps and leave the 1 mg/L TP limit in effect. *See* MPCA Br., n. 5. The Agency's argument in this regard constitutes nothing more than a *post hoc* rationalization of its fatally flawed Rule, and such rationalization must not be given effect. *See SEC v. Chenery Corp.*, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943) (an agency's action must be upheld, if at all, on the same basis articulated by the agency itself).

The importance and necessity of the off ramps is addressed in turn below.

A. MPCA has no rational basis to impose a 1 mg/L TP limit in situations where an adopted TMDL establishes a different limit.

In its principal brief, CGMC identified portions of the record and testimony from MPCA staff at the August 30, 2007 public hearing indicating that the language would be interpreted by MPCA as written. *See* CGMC Br. pp. 27-28; MPCA Br. pp. 4, 10. Testimony by MPCA counsel at the December 18, 2007 hearing further outlined where federal regulation may come into play. 40 C.F.R. § 122.44(d); *see also* P106 at 141, P108 at 146. Then, when the City of Willmar requested identification as to whether the Lower Minnesota River dissolved oxygen TMDL could be utilized for this off ramp, MPCA's response imposed new

requirements not identified in the Rule. RA 102; CGMC Br. at 30; MPCA Br. at 18.⁸

MPCA admits in its brief – and in fact cites as an example – that it may base a decision to *deny* an application for a TMDL off ramp on federal law. MPCA Br. p. 35. For the TMDL off ramp, a discussion of federal law should not even come into play. A TMDL is the direct product of federal Clean Water Act regulation. 33 U.S.C. § 1313(d). Under federal law, the phosphorus limit provided for in that nutrient-related TMDL applies, regardless of the application of any other law. 40 C.F.R. § 122.44(d)(vii). Therefore, other federal law cannot be used as a justification for denying the TMDL off ramp. As the TMDL off ramp states, the TMDL *is the alternative limit* that will be applied since it was specifically determined to be necessary to achieve state water quality standards and protect stream uses. The possibility that the TMDL may change in the future, or that some other as yet unknown TMDL may be derived for some other location with more restrictive limits, is not a basis to deny application of what is known today. *See e.g. Appalachian Power Co. v. EPA*, 341 U.S. App. D.C. 46, 208 F.3d

⁸ MPCA's response to Willmar cites two factors nowhere identified in the rule as the basis for denying the nutrient TMDL off ramp: federal nondegradation rules (*see supra* n. 6) and two downstream *turbidity* TMDLs. How turbidity even relates to nutrients is not known at this time. A recent TMDL issued for the Wild Rice River stated that turbidity problem was due to soil runoff during high flow conditions. *See Lower Wild Rice River TMDL*, available at <http://www.pca.state.mn.us/water/tmdl/project-lowerwildrice-turbidity.html>. Apparently, MPCA is using the open ended study language of the rule "at a minimum the permittee must provide..." to force the permittee into a new water quality analysis of uncertain magnitude and content not otherwise called for in the off ramp.

1015, 1022 (D.C. Cir. 2000)(“if the possibility . . . of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule . . . would ever be final as a matter of law.”)

B. MPCA has no rational basis to impose a 1 mg/L TP limit on discharges to non-degraded waters.

The Rule’s stated purpose is to limit the amount of total phosphorus discharged from point sources in order to “prevent excessive algal levels that impair surface waters.” MPCA Br. p. 2. Nonetheless, MPCA applied the new 1 mg/L TP limit to *all* waters, even those that are *not* degraded and do *not* exhibit excessive algal growth, asserting that the Rule was also necessary to prevent future degradation of state waters.

CGMC challenged this assertion as unsupported and presented expert testimony that simply freezing existing loads in such situations would ensure that degradation would not occur where it did not already exist. CGMC Brief p. 22; P47-48. CGMC’s point is an obvious one because in non-degraded waters, existing phosphorus loading are not causing excessive plant growth, so the Agency’s stated reason for adopting the blanket 1 mg/L limit (to “prevent excessive algal levels that impair surface waters”) is inapplicable, and no apparent reason exists for imposing a 1 mg/L limit rather than simply freezing existing phosphorus loads to the non-degraded water. CGMC Br. pp. 21-22. MPCA did not disagree with this reasoning and acknowledged that capping existing loads

could accomplish the Rule's stated goal in non-degraded situations. *Id.*, p. 22; P47-48.

In an attempt to now rebut this point of agreement, MPCA's brief points to Judge Mihalchick's conclusion that "the Agency cannot fulfill its responsibility to protect surface waters by waiting until an impaired condition is manifested."

MPCA Br. pp. 14, 27. CGMC agrees with this observation; however it is irrelevant to the issue presented. CGMC objection did not suggest that MPCA should first let unimpaired waters become impaired. CGMC identified an alternative, less restrictive approach already being used by MPCA under its existing non-degradation rules (Minn. R. 7050.0185) as the basis for adequately and reasonably protecting those waters from degradation and reducing excessive treatment and energy costs to regulated dischargers. Thus, MPCA's attempt to rebut CGMC's objection to the Rule's application to non-degraded waters misses the mark.

As discussed in *Petterson*, "simply saying that a particular level is reasonable does not make it so . . ." 347 N.W. 2d 245. To pass the rational basis test with respect to the Rule's application to non-degraded waters, MPCA must show what evidence in the record confirms the need to impose a 1 mg/L limit. MPCA's reply does not point to any "reasoned determination" or factual information in the record that justifies the need to apply the limit in such situations. MPCA has, in fact, acknowledged that a less restrictive approach is sufficient to protect such waters from future degradation. CGMC Br., p. 22; P47-

48. Under the standard of review set forth in *Pettersen*, it is arbitrary and capricious to force communities to accept more restrictive requirements because there is no evidence or reasoned determination supporting the Agency's choice of action; in these non-degraded situations, the existing load is not causing adverse impacts and forcing a load reduction is not necessary to achieve environmental protection. MPCA should rather determine the effluent limit that maintains the existing load if it is concerned about degradation from nutrients. The Rule should therefore be vacated to the degree it applies in these situations.

C. MPCA has no rational basis to impose a 1 mg/L limit during winter months.

CGMC also identified a lack of support in the administrative record for application of the Rule to riverine wastewater discharges during the winter months. CGMC Br. pp. 17-21. In response, MPCA simply repeated the same unfounded conclusions that phosphorus discharged during the winter can cause impacts during the summer without providing any further record information to support such conclusions. MPCA Br. p. 8. That no such record information exists is confirmed by the fact that CGMC formally requested all evidence from the Agency that supports its position that phosphorus causes environmental harm during the winter, such as to justify a year-round limit, and in response was provided only with the unsubstantiated assertions of winter effects contained in the SONAR and a study that found 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. P149-66; *see also* SONAR Ex. PL-8, pp. 254, 261. Such unsupported conclusions of winter impacts cannot withstand the searching and careful inquiry into the basis of the Agency's conclusions required by *Petterson*. *See supra*, p. 15.

IV. MINN. R. 7053.0255 WAS ADOPTED IN VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT.

CGMC argues that MPCA failed to provide fair notice regarding how the Rule is intended to operate, and that the public was never informed that MPCA would ignore the terms of an off ramp in denying such relief. CGMC Br. p. 42. In responding, MPCA nowhere shows that it provided such notice, and instead attempts to distract attention from this deficiency by pointing to the extensive rulemaking proceedings it engaged in relative to its triennial water quality standards review, of which the Rule was just one part. Therefore, even if this Court determines that MPCA may lawfully adopt the Rule in the discretionary manner outlined in the preceding argument, the Rule should nonetheless be vacated at this stage because the Agency never provided the public fair notice of the manner in which it intended the Rule to operate.

Administrative rules must be adopted in accordance with specific notice and comment procedures the Administrative Procedures Act, Minn. Stat. § 14.001 *et seq.* (the "APA"). Failure to comply with the necessary procedures will result 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). As Minnesota courts have held,

“this 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) (emphasis added). Furthermore, the notice and comment requirements extend beyond the plain language of the Rule. *In re Mapleton Cmty. Home*, 391 N.W.2d 798, 801 (Minn. 1986) (“[a]n agency interpretation that 'make[s] specific the law enforced or administered by the agency' is an interpretive rule that is valid only if promulgated in accordance with the (APA).”)

The Federal APA imposes essentially the same standard for determining whether a rule or interpretation must be afforded notice and comment. *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (when an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, it has in effect amended its rule, which requires notice and comment.); *see also Molycorp, Inc. v. EPA*, 197 F.3d 543, 546 (D.C. Cir. 1999) (An interpretation of a legislative rule cannot be modified without notice and comment that would be required to change the underlying regulation.)

Ultimately, an agency is not allowed to tell the public one thing, and then at the last minute issue a rule or interpretation which is completely different.

Environmental Integrity Project v. EPA, 425 F.3d 992, 996 (D.C. Cir. 2005) (agencies cannot use the rulemaking process to pull a “switcheroo” on regulated entities.)

Here, MPCA repeatedly and consistently told the public through hearings and in its SONAR that it intended to apply the specific criteria delineated in the three off ramps as those off ramps are written. MPCA Br. p. 39 (“MPCA included the three express exemptions in an effort to make the Rule better and to make it clearer to the public when exemptions from the limit will be available.”) The SONAR includes an explanation of why the Rule includes the off ramps and how they are intended to work. SONAR, Book II, pp. 55–66, *see also* MPCA Br. p. 10. Nowhere does the SONAR contain *any* discussion that MPCA intends to consider factors not listed in the exemptions by reserving ultimate discretion as to whether the exemption is granted. To the contrary, the SONAR repeatedly uses language that suggests the exemptions will be granted if the specific requirements are met. For instance, with regard to the TMDL off ramp, the SONAR stated that “the TMDL *will determine* the need for and magnitude of the [phosphorus] effluent limit.” MPCA Br. p. 10 (*emphasis added*). Similarly, the SONAR explains that the ‘more harm than good’ exemption “*would apply* if meeting the 1 mg/L limit results in environmental costs such as additional sludge production from chemical addition, energy consumption, non-renewable resource depletion or materials transport outweigh the environmental benefits that the limit would achieve.” SONAR, Book II pp. 63–64; *see also* MPCA Br. p. 10. Finally, the SONAR stated that the Rule should not be applied to winter dischargers on one of three specifically identified watersheds so long as the discharger would use chemical treatment. SONAR, Book II, p. 64; *see also* MPCA Br. p. 11.

However, MPCA's statements upon release of the Rule and in its brief confirm that it believes that the adopted language allows it to enforce the Rule in a much different manner. MPCA Br. p. 35 (stating that "(t)he revised Phosphorus Rule appropriately identifies the standard granting an exemption from the 1 mg/L limit but leaves open the possibility that an exemption may not be available if unforeseen circumstances arise.") This response mirrors the final MPCA discussion at Rule adoption, *after opportunities for notice and comment had ended*, at which time MPCA first stated that it could consider factors *beyond* those listed in the exemptions to deny the off ramps. P107 at 142-145.

As MPCA emphasizes in its brief, the Agency did a commendable job in notifying the public of the Rule and holding public hearings to discuss the Rule. MPCA Br. pp. 12, 38. CGMC does not argue that MPCA did not inform interested parties and allow those parties many opportunities to comment on the Rule. CGMC's 'lack of notice' claim is purely substantive, not procedural. In this particular case, MPCA didn't change the language of the Rule, it changed its meaning. Specifically, during this public review process and the published SONAR, MPCA always maintained that the off ramps would be granted if their explicit requirements were satisfied. Now MPCA confirms it *does not* intend to apply the Rule in this manner. MPCA's decision to 'let the cat out of the bag' at the time of Rule issuance clearly deprived the public of fair notice of the Agency's intentions. Consequently, under the standards set forth in *Hibbing* and

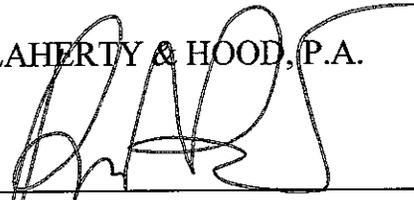
Environmental Integrity Project, the regulation should be ruled invalid. *See supra*, pp. 23-24.

CONCLUSION

Minn. R. 7053.0255, subpt. 4 grants unbridled discretion to MPCA in violation of Article III of the Minnesota Constitution, statutory rulemaking authority, and the APA's public notice requirements. Because the Rule's 1 mg/L TP limit without the exemptions contained in subpt. 4 is unreasonable, overly prescriptive, and arbitrary and capricious, this Court must hold the Rule to be invalid.

Respectfully submitted,

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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, subdiv. 3 for reply briefs. This brief contains is 6,959 words, exclusive of pages containing the table of contents and table of authorities, but including footnotes. This brief was prepared using Microsoft Word 2003.

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