

No. A08-1198

STATE OF MINNESOTA

IN COURT OF APPEALS

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.

Respondent Minnesota Pollution Control Agency's Brief and Appendix

Christopher M. Hood (#229386)
Robert T. Scott (#330759)
FLAHERTY & HOOD, P.A.
525 Park Street, Suite 470
St. Paul, MN 55103
(651) 225-8840

Attorneys for Petitioner
Coalition of Greater Minnesota Cities

LORI SWANSON
Attorney General
State of Minnesota

ROBERT B. ROCHE (#298589)
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 215-1506

Attorneys For Respondent
Minnesota Pollution Control Agency

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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LEGAL ISSUES

- I. Does Petitioner have standing to bring a facial challenge to Minn. R. 7053.0255 where there has been no application or threatened application of the rule which would allegedly harm any of CGMC's members?

Neither the Administrative Law Judge nor the MPCA were asked to rule on this issue.

Rocco Altobelli, Inc. v. Minn. Dep't of Comm., 524 N.W.2d 530 (Minn. Ct. App. 1994)

- II. Is Minn. R. 7053.0255, which was adopted to limit the amount of phosphorus discharged from point sources in order to prevent excess algal growth in Minnesota waters, arbitrary and capricious?

The Administrative Law Judge concluded that Minn. R. 7050.0255 is needed and reasonable and the MPCA adopted that conclusion.

Manufactured Housing Inst. v. Pettersen, 347 N.W.2d 238 (Minn. 1984)

Minn. Chamber of Comm. v. MPCA, 469 N.W.2d 100 (Minn. Ct. App. 1991)

- III. Does Minn. R. 7053.0255, which prescribes specific circumstances when a discharger will be excused from complying with a phosphorus limitation, provide reasonably clear standards for its implementation ?

The Administrative Law Judge concluded that Minn. R. 7050.0255 grants the MPCA an appropriate level of discretion and the MPCA adopted that conclusion.

Lee v. Delmont, 36 N.W.2d 530 (Minn. 1949)

Manufactured Housing Inst. v. Pettersen, 347 N.W.2d 238 (Minn. 1984)

- IV. Did the MPCA comply with the requirements of the Administrative Procedures Act in promulgating Minn. R. 7053.0255?

The Administrative Law Judge concluded that the MPCA had complied with the requirements of the Administrative Procedures Act and the MPCA adopted that conclusion.

Minn. Stat. ch. 14.

STATEMENT OF THE CASE

This case involves a challenge by a group of Minnesota cities to a rule that requires the cities to limit the amount of phosphorus that they discharge to Minnesota's surface waters in order to prevent excessive algal levels that impair surface waters.

The rule at issue, Minn. R. 7053.0255, (along with a substantial package of water quality rules) was subject to the contested case rulemaking procedures set forth in Minn. R., ch. 1400.¹ Administrative Law Judge ("ALJ") Steve Mihalchick presided over hearings on the proposed rules on August 29 and 30, September 4, 5, 6, 11 and 12, 2007. ALJ Mihalchick issued a report recommending adoption of the rules on November 16, 2007. The MPCA voted to adopt the rule at issue at a public meeting of the agency's Citizens Board on December 18, 2007. The rules became effective when the U.S. EPA approved them on May 23, 2008.

Petitioner, Coalition of Greater Minnesota Cities ("CGMC") commenced this declaratory judgment action under Minn. Stat. §§ 14.44-14.45. The rule at issue has not been applied to any dischargers yet, so this case involves a facial challenge to the rule.

STATEMENT OF FACTS

I. BACKGROUND.

The addition of phosphorus degrades the quality of surface waters in two important ways. First, as a nutrient, phosphorus promotes excessive algal growth in

¹ Although the rest of the package of rules that went through the contested case proceeding are not being appealed in this action, the MPCA has filed the entire administrative record with the Court.

surface waters. P. 16²; *Minn. Ctr. for Env't'l. Advoc. v. MPCA and City of St. Cloud*, 696 N.W.2d 398, 400 (Minn. Ct. App. 2005) (hereafter *St. Cloud II*); *In re Cities of Faribault & Owatonna*, 672 N.W.2d 921, 924 (Minn. Ct. App. 2004); *In re Proposed Revisions Of Minnesota Rules Chapter 7050 and Proposed Addition of New Rule, Chapter 7053 SONAR* (RA 10-11³). Second, as algae die off and decompose, they consume oxygen that is needed by other beneficial forms of aquatic life. *Id.*

Before the rule that is being challenged in this litigation was adopted, phosphorus limits were required only for discharges that were directly to or that were demonstrated to individually affect a lake or reservoir. Minn. R. 7050.0211, subp. 1a (2005); *In re City of St. Cloud Wastewater Treatment Facility Request To Adopt Summary Disposition*, no. C3-03-75, 2003 WL 22136314 (Minn. Ct. App. Sep. 12, 2003) (unpublished decision produced at RA 96-101) (hereafter *St. Cloud I*); *St. Cloud II*, 696 N.W.2d at 401; *Faribault and Owatonna*, 672 N.W.2d at 923.

The historical effects-based rule was problematic in several respects. First, the rule was based on an outdated and mistaken presumption that phosphorus only affected still waters such as lakes and reservoirs and not flowing waters such as rivers and streams. *St. Cloud II*, 696 N.W.2d at 405; SONAR, RA 10-12. Second, the effects-based rule gave rise to substantial controversy and litigation over whether a given discharge did, in fact, affect a lake or reservoir. SONAR, RA 5. Third, the effects-based rule did not adequately address situations where receiving waters were adversely impacted by

² "P." refers to Petitioner's Appendix.

³ "RA" refers to Respondent's Appendix.

cumulative phosphorus loading from multiple sources. *St. Cloud II*, 696 N.W.2d at 405-06; *Faribault & Owatonna*, 672 N.W.2d at 926; RA 104-106 (showing 23% of Minnesota's impaired waters are impaired due to cumulative nutrient loading).

Given these problems with the effects-based phosphorus discharge rule, the MPCA decided to amend the rule through formal notice and comment rulemaking in order to better protect Minnesota's surface waters; both flowing waters and still waters.

II. REVISED PHOSPHORUS DISCHARGE RULE.

The revised phosphorus discharge rule that is being challenged in this litigation requires new or expanded dischargers of phosphorus that discharge above a *de minimus* amount of phosphorus to treat their discharges to a level of one milligram per liter. Minn. R. 7053.0255. Unlike the previous phosphorus discharge rule, there is no prerequisite in the revised rule that the discharge in question be directly to or have an individually measurable impact on a lake or reservoir. *Id.*

In order to maintain flexibility, the revised rule provides three exemptions (referred to as "off ramps" in the administrative record) when a 1 mg/L phosphorus limit will not be imposed on a discharger who would otherwise receive such a limit. *Id.* The first exemption applies when there is an approved total maximum daily load ("TMDL") study that establishes how much phosphorus can be discharged to a receiving water. Minn. R. 7053.0255, subp. 4(A). In such a case the TMDL study will dictate the phosphorus discharge limit. *Id.* The second exemption applies when the environmental benefits to meeting a phosphorus limit are outweighed by the environmental harms caused by meeting the limit. Minn. R. 7053.0255, subp. 4(B). The third exemption

applies when a treatment works using chemical treatment to comply with the 1 mg/L limit and the discharge is to certain specific watersheds listed in the rule. Minn. R. 7053.0255, subp. 4(C). In such cases, a seasonal limit applies instead of a year-round limit. *Id.*

III. SONAR SUPPORTING REVISED PHOSPHORUS DISCHARGE RULE.

As required by the Administrative Procedures Act, the MPCA Staff prepared a Statement of Need and Reasonableness (“SONAR”) to explain and justify the revised phosphorus discharge rule. SONAR, RA 1-72.

As the SONAR states, both CGMC and the Minnesota Center for Environmental Advocacy (“MCEA”) had submitted competing petitions outlining how the phosphorus rule should be revised. CGMC urged the MPCA to continue to impose limits only when it could be shown that an individual discharge measurably affected a lake or reservoir and to simply provide definitions for the terms affect, lake and reservoir. *Id.*, at RA 2-6. MCEA, on the other hand, urged the MPCA to impose phosphorus limits whenever a discharger contributed to a cumulative phosphorus impact in a downstream water. *Id.*

The MPCA adopted elements of both proposals. *Id.* The MPCA defined the terms affects, lake, and reservoir as CGMC urged, and expanded the applicability of phosphorus discharge limits as MCEA had urged. *Id.* The MPCA did not, however, agree to continue to impose phosphorus limits only when it could be shown that an individual discharger measurably affected a lake or reservoir as CGMC had urged. *Id.*

Instead, as noted above, the revised rule requires phosphorus limits for all new or expanded dischargers above a certain size unless one of the exemptions applies. Minn. R. 7053.0255.

As the SONAR explains, several years prior to the rule change, the MPCA had adopted a Phosphorus Strategy under which new or expanded dischargers were asked to voluntarily accept a 1 mg/L phosphorus discharger limit. SONAR, RA 3. Under that Phosphorus Strategy, thirty-five to forty facilities had accepted phosphorus limits in their permits; including in situations where the downstream affects from those discharges may not have been individually measurable. *Id.* The MPCA explained that the Phosphorus Strategy had achieved significant progress in reducing total phosphorus loading from point sources. *Id.* The MPCA declined to adopt CGMC's suggested approach because it would have undermined that progress and "result[ed] in a step backwards in the control of point source phosphorus." *Id.*

In explaining why the revised phosphorus discharge rule is needed, the SONAR identifies the problems that the rule is designed to address. SONAR, RA 2-24. In broad terms, the SONAR states that the revised phosphorus discharge rule is needed to:

- (i) reduce phosphorus loading to Minnesota's waters in order to avoid the degradation of water quality caused by nutrient overenrichment;
- (ii) protect watersheds that are not yet impaired by excess phosphorus;
- (iii) help achieve phosphorus reductions that are required by TMDLs or watershed plans;
- (iv) help protect downstream waters (including waters outside of Minnesota);

- (v) support and encourage biological (as opposed to chemical) phosphorus removal;
- (vi) codify in rule the progress in phosphorus removal that has been attained through voluntary compliance with MPCA's Phosphorus Strategy;
- (vii) simplify the process for establishing phosphorus limits in permits in order to reduce the need for administrative contested case hearings and litigation; and
- (viii) further the goals of statewide executive and legislative efforts to improve Minnesota's water quality.

Id., at p. 120.

More specifically, the SONAR states that phosphorus from human sources adversely effects surface waters by promoting algal growth. *Id.* This is true of both still waters (lakes and reservoirs) and flowing waters (rivers and streams). SONAR, RA 10-11. Increased monitoring of flowing waters has shown that, like lakes and reservoirs, excess phosphorus in these waters harms the waters by creating excess algal blooms. *Id.* In the case of the Minnesota River, excess phosphorus and the nuisance algal blooms associated with it have caused the dissolved oxygen levels in the river to fall below standards. *Id.* Additionally, several of the major river systems in Minnesota drain to lakes or reservoirs such as Lake Pepin, Lake of the Woods, and Lake Winnipeg. SONAR, RA 11. As a result, phosphorus discharged to these rivers can be flushed into the lakes and cause nuisance algal blooms and loss of water quality in these important lakes. *Id.*

Improved water quality monitoring data demonstrates that algal growth does not stop during the winter season. SONAR, RA 11-12. Depending on light conditions, algal

growth can take place under ice in rivers and in backwater conditions. *Id.* The SONAR specifically cites data from the Minnesota River that demonstrates that nuisance algal blooms have occurred in that river during winter months. *Id.*

Moreover, even if phosphorus does not contribute to actual algal growth during winter months, it does necessarily follow that phosphorus discharged during the winter months is harmless. SONAR, RA 12. This is because phosphorus that is discharged during winter months can adhere to particulates. *Id.* As the particulates move downstream, they settle when they reach stiller waters. *Id.* During the summer, these particulates can resuspend and become available to promote algal growth. *Id.*; *See also* P. 50 (expert testimony at ALJ hearing describing process by which phosphorus discharged in winter can become available for algal growth in summer). For example, the Mississippi River has extensive backwater areas which respond to phosphorus more like lakes than rivers. These backwater areas often act as sinks for sediments laden with phosphorus that contribute to eutrophication (nuisance algal blooms) in the summer. *Id.*

For these reasons, and the reasons summarized above, the SONAR concluded that the revised phosphorus discharge rule is needed. *Id.*

In explaining why the revised phosphorus discharge rule is reasonable, the SONAR discussed the benefits that the rule is designed to achieve. SONAR, RA 25-72. According to the data in the SONAR, the revised phosphorus discharge rule could reduce total phosphorus loading to Minnesota waters by as much as forty-seven percent. *Id.*, at 10-11. By reducing total phosphorus loading, the MPCA expects that the rule will help

prevent high-quality waters from becoming impaired while at the same time achieve progress towards restoring waters that are already impaired. *Id.*, at 72.

According to the SONAR, most Minnesotans will benefit from the improvements to water quality that will result from the revised phosphorus discharge rule. *Id.*, at 25. Although the benefits of incremental improvements to water quality may be difficult for many individuals to notice, the public would suffer if the MPCA had not adopted the rule because failure to act would perpetuate and exacerbate poor water quality conditions. *Id.*, at 25; 27.

As noted above, one of the key reasons for the revised phosphorus discharge rule is to prevent the deterioration of waters that are not yet impaired due to excess phosphorus. *Id.*, at 24; 72. Minnesotans will further benefit from this proactive approach to protect unimpaired waters because it is significantly more difficult and expensive to attempt to restore an impaired water to full health than it is to prevent the water from being impaired. *Id.*, at 37; 61.

As the SONAR points out, 1 mg/L phosphorus limitations are already being implemented throughout much of the State of Minnesota. *Id.*, at 37-41. In several of the State's major watershed, phosphorus reduction to 1 mg/L is already required pursuant to other rules, TMDLs, watershed management plans, and agreements with other governments. *Id.* In other areas, facilities have voluntarily agreed to the 1 mg/L limit in accordance with the MPCA's Phosphorus Strategy. *Id.*, at RA 3. A number of other States (Wisconsin, Illinois, and Massachusetts) have also successfully implemented 1 mg/L phosphorus limitations. *Id.* at 69-70. As a result, the revised phosphorus

discharge rule simply seeks to extend an approach that has already been demonstrated to succeed. *Id.* at 72; *See also* P. 48 (expert testimony at ALJ hearing describing Wisconsin's 1 mg/L phosphorus limit as a major success story).

The SONAR also includes an explanation of why the revised phosphorus discharge rule includes the three off ramps or exemptions discussed above and how those exemptions are intended to work. *Id.* at 55-66. The SONAR explains that the exemptions are loosely based on exemptions that have been included in Wisconsin's rules since 1992. *Id.* at 55.

As noted above, the first exemption is available when there is an approved TMDL that specifically prescribes how much phosphorus a discharger can release to a given surface water. *Id.* at 57-63. In such a situation "the TMDL will determine the need for and magnitude of the [phosphorus] effluent limit." *Id.* at 58. The SONAR specifically spells out the basic steps that must be met for the agency to apply the TMDL exemption. *Id.* at 63.

The second exemption is available when the environmental harm from meeting the 1 mg/L limit outweighs the environmental benefit of meeting the limit. *Id.*, at 63-64. The SONAR explains that this exemption would apply if meeting the 1 mg/L limit results in environmental costs such as additional sludge production from chemical addition, energy consumption, nonrenewable resource depletion or materials transport outweigh the environmental benefits that the limit would achieve. *Id.*

The third exemption is available if the discharge is to one of three specifically identified watersheds and the discharger would use chemical treatment to meet the

1 mg/L limit. *Id.* at 64-65. As the SONAR explains, chemical treatment has its own environmental costs. *Id.* The MPCA concluded that seasonal limits are appropriate for these watersheds when chemical treatment is used to meet the limit because these watersheds have environmental make ups that tend to limit algal growth and the impacts from phosphorus loading is not as severe in the winter. *Id.* at 64. As a result, the MPCA believes that seasonal limits are appropriate in these watersheds in order to minimize the environmental effects associated with chemical treatment. *Id.*

The SONAR outlines the process that the MPCA will use to evaluate requests for exemptions under these provisions. *Id.*, at 65-66. In summary, the applicant will submit a request for an exemption along with supporting information. *Id.* The Agency staff will review the request and make a preliminary determination to grant or deny the request. *Id.* Agency staff will spell out the reasons for its preliminary determination to both the applicant and the general public. *Id.* Requests for exemptions may be brought before the MPCA's nine member citizen board for ultimate decision. *Id.* Additionally, any party who is dissatisfied with the Agency's preliminary determination regarding an exemption request can obtain a contested case hearing before an Administrative Law Judge. *Id.*

Finally, the SONAR notes that it is impossible for the agency to anticipate every scenario that might warrant an exemption from the 1 mg/L discharge limit. *Id.* at 55. The SONAR explains that the express exemptions, along with the availability of a variance under MPCA's existing rules, provide sufficient flexibility to allow the MPCA to grant exemptions from the 1 mg/L discharge limitation under the wide variety of situations that may arise. *Id.* at 55.

IV. ALJ CONCLUSIONS ON REVISED PHOSPHORUS DISCHARGE RULE.

As noted above, the revised phosphorus discharge rule was the subject of a set of contested case rulemaking hearings before ALJ Steve Mihalchick pursuant to the Administrative Procedures Act. P. 5-38. ALJ Mihalchick issued detailed findings of fact and conclusions on the revised phosphorus discharge rule. *Id.*

The ALJ meticulously outlined the MPCA's compliance with the procedural and statutory rulemaking requirements under Minnesota's Administrative Procedures Act. *Id.* ALJ Mihalchick expressly listed the MPCA's statutory authority to adopt the rule. P. 9, ¶ 5-8. The ALJ detailed the MPCA's compliance with the procedural and other statutory requirements for rulemaking under Minnesota law. P. 9-12, ¶ 9-15; P. 15-23, ¶ 28-72. The ALJ also detailed MPCA's compliance with notice requirements. P. 12-15, ¶ 16-27. The ALJ specifically found that "[t]he Agency went to great lengths to inform interested parties and the affected public in this rulemaking. The active participation of these persons and the accommodation by the Agency of many of their concerns demonstrates that the Agency more than adequately satisfied the notice requirements." *Id.* at ¶ 27. Based on these findings, the ALJ concluded that the MPCA gave proper notice for the rulemaking, fulfilled all substantive procedural requirements for the rulemaking, and established its statutory authority to adopt the rule. P. 37, ¶ 1-3.

In addition to finding that the MPCA had satisfied the procedural and statutory requirements to adopt the rule at issue in this case, ALJ Mihalchick concluded that the rule is both needed and reasonable. *Id.* at ¶ 4; P. 25, ¶ 78. The ALJ specifically found that:

Most citizens of Minnesota should benefit from the proposed extension of the [total phosphorus] limit to new and expanded discharges that discharge more than 1,800 pounds of [total phosphorus] per year. The benefits will be largely intangible and the expected improvements in water quality are likely to go unnoticed by most Minnesotans. *But the benefits are real and will be apparent to the many who pay closer attention to water quality. Reduced loadtion of [total phosphorus] from point sources should reduce the growth of attached algae in streams and rivers, and suspended algae in larger rivers, and it could improve dissolved oxygen conditions in rivers already impacted by excess nutrients.* Reducing the growth rate is undeniably a sign of progress toward reducing actual levels of attached algae.

P. 16, ¶ 31 (emphasis added).

The ALJ also found that adoption of the revised phosphorus discharge rule would be beneficial because the revised rule is clearer than the former rule. The ALJ specifically found that “the proposed rule is clear in its application and implementation will be straightforward. Because of this, it is not unreasonable to assume that there could be cost savings to some outside parties and the Agency due to fewer contested case hearings and less litigation under the proposed rule.” P. 18, ¶ 42.

In his report, the ALJ addressed CGMC’s arguments against the revised phosphorus discharge rule. P. 32-33, ¶ 88. The ALJ found that CGMC’s objections were based on the mistaken presumption that the MPCA should and must wait until phosphorus has already demonstrably harmed a receiving water before taking any action to protect the receiving water. *Id.* Quoting the MPCA staff, the ALJ specifically found that:

On their face [CGMC’s proposed changes] may seem like reasonable suggestions, except for one major and overriding concern on the part of the Agency. That is, under [CGMC’s] suggestions, a [total phosphorus] limit is implemented only after a waterbody has become impaired, a TMDL is

complete or pending, or where impacts to the receiving stream can be documented. Excess nutrients, [total phosphorus] in particular are having impacts on rivers and streams throughout the state (e.g., see Ex. PL-7 and Ex. PL-8). In the face of this mounting evidence, the Agency cannot fulfill its responsibility to protect surface waters by waiting until an impaired condition is manifested.

Id.

The ALJ also addressed the propriety of the off ramps or exemptions in the revised phosphorus discharge rule and concluded that the exemptions provided the MPCA with the necessary and proper amount of flexibility to decide when not to require a 1 mg/L phosphorus limit. P. 20-22, ¶ 54-64. As the ALJ found:

Examples of appropriately flexible rule language in the proposed amendment 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.*

P. 21, ¶ 59 (emphasis added). ALJ Mihalchick went on to find that the rules, including the revised phosphorus discharge rule, are consistent with Minn. Stat. § 14.002. P. 22, ¶ 63.

V. MPCA BOARD HEARING ON REVISED PHOSPHORUS DISCHARGE RULE

As noted above, the MPCA Citizens Board held a hearing on the revised phosphorus discharge rule on December 18, 2007. P. 101-09. During that hearing, the MPCA Citizens Board heard and considered testimony about CGMC's objections to the revised phosphorus discharge rule. *Id.*

The MPCA Staff engaged in a dialogue with CGMC about how the revised phosphorus discharge rule would work; especially the exemptions. P. 105-08. The MPCA Staff walked through how the exemptions would work with CGMC's attorney. *Id.* Counsel for the MPCA Staff advised the MPCA Board that the state law exemptions were, however, subject to being effectively overridden by federal law. P. 106. Specifically, counsel for the MPCA Staff advised that under federal law if a discharger was subject to a TMDL that required a more stringent phosphorus limit than the revised phosphorus discharge rule required, then the TMDL would control. *Id.* Counsel for the MPCA staff further advised that if a discharger that sought one of the exemptions caused or contributed to a downstream water quality impairment, then federal law would require the imposition of phosphorus controls in the permit to address the impairment. P. 107-08. Both the MPCA Board Chair and counsel for CGMC thanked staff counsel for the clarifying legal advice. *Id.*

At the conclusion of the hearing, the MPCA Citizens Board voted to adopt the rules in accordance with the ALJ's recommendations. P. 109-10.

ARGUMENT

I. CGMC LACKS STANDING TO BRING A FACIAL CHALLENGE TO MINN. R. 7053.0255 BECAUSE THERE HAS BEEN NO APPLICATION OR THREATENED APPLICATION OF THE RULE AGAINST CGMC OR ANY OF ITS MEMBERS.

This case is a pre-enforcement declaratory judgment action under Minn. Stat. § 14.44 and 14.45 (2008). (*See* Pet. for Dec. J.; Pet. Br., p. 34.) Under Minnesota law, to have standing to bring such an action, a petitioner must be able to show that the application or threatened application of the rule in question will interfere with the petitioner's rights or privileges. Minn. Stat. § 14.44 (2006); *Minn. Educ. Ass'n. v. Minn. State Bd. of Educ.*, 499 N.W.2d 846, 849 (Minn. Ct. App. 1993); *Rocco Altobelli, Inc. v. Minn. Dep't of Comm.*, 524 N.W.2d 530, 534 (Minn. Ct. App. 1994).

This Court has refused to consider pre-enforcement challenges to administrative rules in cases like the present one where the Petitioner fails to show that the application or threatened application of the rule in question will harm the petitioner's interests. For example, in a case highly similar to the case at bar, a teachers union challenged an administrative rule because the teachers union disagreed with the way the SONAR said that the agency would interpret the word 'comparable' as it was used in the rule in question. *Minn. Educ. Ass'n.*, 499 N.W.2d at 847.

This Court stated that "[a] difference exists between the 'threatened application' of a rule and a proposed interpretation of a rule." *Id.*, at 849. This Court went on to hold that the union's declaratory judgment challenge to the agency's proposed interpretation of the word 'comparable' was premature because there was no actual or threatened application of the rule. *Id.*

The same reasoning applies in this case. Here, CGMC's objections to the revised phosphorus discharge rule are not based on any application or threatened application of the rule. Instead, CGMC's objections to the rule are based on the MPCA's proposed interpretation of the rule in different hypothetical situations that CGMC presented during the rulemaking proceedings. (See Pet. Br., p. 27-30.) Under this Court's holding in *Minn. Educ. Ass'n.*, such a challenge is premature and should be dismissed.

In another case similar to the case at bar, this Court held that a hair salon lacked standing to challenge the validity of a Department of Commerce rule providing certain tax exemptions for chair leasing cosmetology shops. *Rocco Altobelli*, 524 N.W.2d at 30. In *Rocco Altobelli*, this Court stated that it could "consider the validity of a rule only 'when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights of the petitioner.'" *Id.* at 34 (citing Minn. Stat. § 14.44 and *Minn. Educ. Ass'n.*, 499 N.W.2d at 849). The Court went on to state that "[t]he mere possibility of an injury in and of itself is insufficient to confer standing." *Id.* (citing *Byrd v. Ind. Sch. Dist. No. 194*, 495 N.W.2d 226, 231 (Minn. Ct. App. 1993)). The Court held that because the petitioner in *Rocco Altobelli* had failed to demonstrate that the application or threatened application of the rule at issue would harm its interests, the petitioner lacked standing to challenge the rule. *Id.* at 36.

The same reasoning clearly applies in this case. CGMC has failed to establish that the application or threatened application of the revised phosphorus discharge rule would harm its interests.

The only attempt that CGMC makes to establish standing is through erroneous and misleading references to the City of Willmar's permit. (*See* Pet. Br., pp. 29-30; 37-38.) CGMC describes the City of Willmar's permit as MPCA's "first opportunity to issue a permit under the TMDL off ramp" and then infers that the MPCA has refused to allow Willmar to avail itself of the TMDL off ramp. *Id.*

CGMC's description of the Willmar permit is inaccurate in two critical respects. First, the Willmar permit was not, as CGMC claims, the Agency's first opportunity to utilize the TMDL off ramp. On the contrary, the Willmar permit was issued (at the City of Willmar's request) before the rule establishing the TMDL off ramp was effective. P. 143, ¶ 7 (noting that off ramp rule not yet effective); RA 102 (noting that the Willmar permit was issued before the TMDL exemption was available at the City's request). Second, now that the rule creating the TMDL exemption has become effective, the MPCA has expressly invited the City of Willmar to apply for the off ramp if it wishes to do so. RA 102. The City of Willmar has not done so. As a result, there has been no application or threatened application of the revised phosphorus discharge rule against the City of Willmar, and CGMC cannot point to Willmar to try to establish standing.⁴

⁴ As discussed below, the Court's review in this case is limited to the administrative rulemaking record before the MPCA. The documents relating to the Willmar permit are not, in fact, part of that record and are therefore not properly before this Court. MPCA respectfully submits that this Court should decline to consider any documents or argument relating to the Willmar permit. If, however, the Court decides to consider the Willmar documents, then MPCA respectfully requests that the Court also consider MPCA's response to Willmar inviting it to apply for the TMDL exemption. RA 102.

CGMC has not established that the application or threatened application of the revised phosphorus discharge rule threatens its interests. Instead, CGMC has brought a challenge to proposed agency interpretations based on hypothetical situations. Under this Court's precedent in *Minn. Educ. Ass'n.* and *Rocco Altobelli*, CGMC lacks standing to challenge the rule and this appeal should be dismissed.

II. SCOPE AND STANDARD OF REVIEW FOR FACIAL CHALLENGE TO ADMINISTRATIVE RULE UNDER MINN. STAT. § 14.44.

Under Minnesota law, a limited standard and scope of review applies in a pre-enforcement challenge to an administrative rule. As the Minnesota Supreme Court has held, judicial review in a pre-enforcement challenge of a rule's validity pursuant to Minn. Stat. §§ 14.44 and 14.45 is limited to the record made during the rulemaking proceeding. *Manufactured Housing Inst. v. Pettersen*, 347 N.W.2d 238, 241 (Minn. 1984) (affirming lower court's decision to confine its review of rule to the administrative record).

When addressing a facial challenge to an administrative rule "the standard of review is necessarily more restricted. Broad and far-reaching scrutiny of a rule or regulation, based upon hypothetical facts, is a premature exercise of the judiciary when the application or enforcement of the rule remains subject to prosecutorial discretion or formal or informal variance or waiver procedures." *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 363 (Minn. 1979) (reversing lower court ruling invalidating regulations adopted by the Commerce Department); *Minn. Chamber of Comm. v. MPCA*, 469 N.W.2d 100,102-03 (Minn. Ct. App. 1991) (rejecting challenge to

MPCA rules that allowed for establishment of water quality standards on case-by-case basis); *Pettersen*, 347 N.W.2d at 241 (Court of Appeals should not engage hypothetical applications in pre-enforcement challenge and reasonableness of rule as applied cannot be considered); *Peterson v. Minn. Dep't of Lab. and Ind.*, 591 N.W.2d 76, 78-79 (Minn. Ct. App. 1999) (same). Thus, the scope of review in this case is limited to the MPCA's rulemaking record and this Court is not required to engage in hypothetical analyses as to how the challenged rule might theoretically be applied.

Both this Court and the Minnesota Supreme Court have held that the standard of review in a pre-enforcement challenge under Minn. Stat. § 14.44 is likewise limited. Specifically, “the traditional ‘arbitrary and capricious’ test, rather than the more rigorous ‘substantial evidence’ test [is] to apply in rulemaking proceedings. *Pettersen*, 347 N.W.2d at 244; *see also Minn. Chamber of Comm. v. MPCA*, 469 N.W.2d at 102-03 (Minn. Ct. App. 1991); *Peterson v. Minn. Dep't of Lab. and Ind.*, 591 N.W.2d at 78 (Minn. Ct. App. 1999) (rejecting challenge to labor and industry rule under arbitrary and capricious standard).

To satisfy the arbitrary and capricious test, the Court must be satisfied that the challenged rule is reasonable. Put another way, the Court must make a searching and careful inquiry of the record to ensure that the agency action has a rational basis. *Pettersen*, 347 N.W.2d at 244. The agency record must explain on what evidence it is relying and how that evidence connects rationally with the agency's decision. *Id.*

As the Minnesota Supreme Court has stated, under this standard of review the party attacking a rule on reasonableness grounds “bears a heavy burden; the statute or

rule need only bear some rational relation to the accomplishment of a legitimate public purpose to be sustainable.” *Id.*, at 243; *Blocher Outdoor Ad. Co., Inc. v. Minn. Dep’t. of Transp.*, 347 N.W.2d 88, 91 (Minn. Ct. App. 1984) (rejecting challenge to agency rule because rule was rationally related to the end sought to be achieved); *Vang v. Comm. Pub. Safety*, 432 N.W.2d 203, 207 (Minn. Ct. App. 1988) (rule is reasonable if it is rationally related to the end sought to be achieved and the public safety rule was reasonable because the rule rationally related to the purpose of keeping inebriated drivers off roads).

As discussed below, the MPCA’s rulemaking record in this case demonstrates that the revised phosphorus discharge is rationally related to the legitimate public purpose of preventing the degradation of Minnesota’s surface waters. As a result, the rule is reasonable and valid.

III. THE REVISED PHOSPHORUS DISCHARGE RULE IS REASONABLE BECAUSE THE RULE IS RATIONALLY RELATED TO THE LEGITIMATE PUBLIC INTEREST OF PREVENTING THE DEGRADATION OF MINNESOTA’S SURFACE WATERS.

The rulemaking record in this case more than adequately demonstrates that the revised phosphorus discharge rule is rationally related to the legitimate public interest of protecting the degradation of Minnesota’s waters.

As noted above, the MPCA had acknowledged that the previous phosphorus discharge rule did not adequately protect rivers and streams from eutrophication. *St. Cloud II*, 696 N.W.2d at 405. Protecting Minnesota’s rivers and streams from eutrophication is clearly a legitimate State interest that the revised phosphorus rule is designed to further.

The revised phosphorus discharge rule is also rationally related to the following legitimate public interests:

- (i) reducing phosphorus loading to Minnesota's waters in order to avoid the degradation of water quality caused by nutrient overenrichment;
- (ii) protecting watersheds that are not yet impaired by excess phosphorus;
- (iii) helping achieve phosphorus reductions that are required by TMDLs or watershed plans;
- (iv) helping protect downstream waters (including waters outside of Minnesota);
- (v) supporting and encouraging biological (as opposed to chemical) phosphorus removal;
- (vi) codifying in rule the progress in phosphorus removal that has been attained through voluntary compliance with MPCA's Phosphorus Strategy;
- (vii) simplifying the process for establishing phosphorus limits in permits in order to reduce the need for administrative contested case hearings and litigation; and
- (viii) furthering the goals of statewide executive and legislative efforts to improve Minnesota's water quality.

SONAR, at RA 24.

As required, the SONAR identifies the evidence on which the Agency relied and explained how that evidence connects with the Agency's choice of action. The SONAR cites data that shows that phosphorus from human sources adversely effects surface waters by promoting algal growth. *Id.* This is true of both still waters (lakes and reservoirs) and flowing waters (rivers and streams). SONAR, RA 10-11. Increased monitoring of flowing waters has shown that, like lakes and reservoirs, excess phosphorus in these waters harms the waters by creating excess algal blooms. *Id.* In the

case of the Minnesota River, excess phosphorus and the nuisance algal blooms associated with it have caused the dissolved oxygen levels in the river to fall below standards. *Id.* Additionally, several of the major river systems in Minnesota drain to lakes or reservoirs such as Lake Pepin, Lake of the Woods, and Lake Winnipeg. SONAR, RA 11. As a result, phosphorus discharged to these rivers can be flushed into the lakes and cause nuisance algal blooms and loss of water quality in these important lakes. *Id.*

Although CGMC is clearly resistant to the idea of taking additional steps to protect Minnesota's surface waters from eutrophication due to excess phosphorus, CGMC cannot and does not seriously suggest that such a goal is not a legitimate public interest. (*See* Pet. Br., pp. 39-41.) Instead, CGMC's argument is limited to a vague allegation that the revised phosphorus discharge rule is arbitrary and capricious. CGMC offers two equally meritless assertions as to why the rule is arbitrary and capricious. *Id.*

First, CGMC offers the naked assertion that the rule might impose a 1 mg/L limit in situations where it is "unnecessary." *Id.*, at 40. This argument must fail. CGMC is asking this Court to invalidate the revised phosphorus discharge rule based on unsupported speculation that the rule might hypothetically impose a limit in a situation where a limit is "unnecessary." Such hypothetical analysis is prohibited under *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d at 363 (courts must not engage in analysis of rule based upon hypothetical facts where application of rule remains subject to prosecutorial discretion or formal or informal variance procedures) and *Pettersen*, 347 N.W.2d at 241 (Court of Appeals should not engage hypothetical

applications in pre-enforcement challenge and reasonableness of rule as applied cannot be considered).

In this case, CGMC does not and cannot claim that the revised phosphorus discharge rule has been applied to impose a limit in a situation where it is “unnecessary.” Instead, CGMC improperly asks this Court to reverse the rule based on speculations. Moreover, in any future case where a discharger feels that the imposition of a limit under the revised phosphorus discharge rule is “unnecessary,” that discharger is free to avail itself of MPCA’s variance procedures. Minn. R. 7053.0195. As a result, CGMC’s claim that the revised phosphorus discharge rule is unreasonable because it might result in “unnecessary” limits is entirely without merit.

CGMC’s second argument is equally without merit. CGMC claims that the rule is unreasonable because the rule will, in some circumstances, impose phosphorus limits in the wintertime. *Id.*, at 40-41. In CGMC’s opinion, the environmental effects of phosphorus loading in the wintertime are not sufficiently severe to justify wintertime controls; ever. *Id.*

CGMC’s argument on this point must fail. The evidence in the record clearly explains why the MPCA chose to impose wintertime phosphorus limits in some circumstances. Improved water quality monitoring data demonstrates that algal growth does not stop during the winter season. SONAR, RA 11-12. Depending on light conditions, algal growth can take place under ice in rivers and in backwater conditions. *Id.* The SONAR specifically sites data from the Minnesota River that demonstrates that nuisance algal blooms have occurred in that river during winter months. *Id.*

Moreover, even if phosphorus does not contribute to actual algal growth during winter months, it does necessarily follow that phosphorus discharged during the winter months is harmless. SONAR, RA 12. This is because phosphorus that is discharged during winter months can adhere to particulates. *Id.* As the particulates move downstream, they settle when they reach stiller waters. *Id.* During the summer, these particulates can resuspend and become available to promote algal growth. *Id.*; *See also* P. 50 (expert testimony at ALJ hearing describing process by which phosphorus discharged in winter can become available for algal growth in summer). For example, the Mississippi River has extensive backwater areas which respond to phosphorus more like lakes than rivers. These backwater areas often act as sinks for sediments laden with phosphorus that contribute to eutrophication (nuisance algal blooms) in the summer. *Id.*

The evidence in the record thus clearly supports MPCA's decision to impose wintertime phosphorus limits in some circumstances. On this point, CGMC is simply asking this Court to re-weigh the evidence and second guess the MPCA's judgment on a technical environmental issue. This is clearly improper. *Minn. Ctr. for Env't'l. Advoc. v. MPCA and Boise Cascade*, 644 N.W.2d 457, 465-66 (Minn. 2002) (holding that reviewing courts must defer to MPCA's technical expertise in environmental issues and reversing court of appeals for re-weighing environmental evidence as trier of fact).

The availability of the express chemical treatment exemption coupled with MPCA's variance procedure further defeat CGMC's argument on this point. As noted above, the revised phosphorus discharge rule expressly provides for seasonal limits in specific watersheds if chemical treatment will be used to meet the 1 mg/L limit. In any

other situation, the discharger is free to seek a variance. Minn. R. 7053.0195. Thus, CGMC's argument on this point is without merit under *Minnesota-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d at 363 and *Pettersen*, 347 N.W.2d at 241.

The ALJ in this case made specific findings regarding the reasonableness of the revised phosphorus discharge rule. As noted above, ALJ Mihalchick specifically found that:

Most citizens of Minnesota should benefit from the proposed extension of the [total phosphorus] limit to new and expanded discharges that discharge more than 1,800 pounds of [total phosphorus] per year. The benefits will be largely intangible and the expected improvements in water quality are likely to go unnoticed by most Minnesotans. *But the benefits are real and will be apparent to the many who pay closer attention to water quality. Reduced loadtion of [total phosphorus] from point sources should reduce the growth of attached algae in streams and rivers , and suspended algae in larger rivers, and it could improve dissolved oxygen conditions in rivers already impacted by excess nutrients.* Reducing the growth rate is undeniably a sign of progress toward reducing actual levels of attached algae.

P. 16, ¶ 31 (emphasis added).

The ALJ also found that adoption of the revised phosphorus discharge rule was reasonable because the new rule is clearer than the former rule. The ALJ specifically found that “the proposed rule is clear in its application and implementation will be straightforward. Because of this, it is not unreasonable to assume that there could be cost savings to some outside parties and the Agency due to fewer contested case hearings and less litigation under the proposed rule.” P. 18, ¶ 42.

Finally, the ALJ agreed with the MPCA that waiting until the adverse effects from phosphorus loading were manifested, as CGMC encouraged, would not be reasonable.

Quoting the MPCA staff, the ALJ specifically found that:

On their face [CGMC's proposed changes] may seem like reasonable suggestions, except for one major and overriding concern on the part of the Agency. That is, under [CGMC's] suggestions, a [total phosphorus] limit is implemented only after a waterbody has become impaired, a TMDL is complete or pending, or where impacts to the receiving stream can be documented. Excess nutrients, [total phosphorus] in particular are having impacts on rivers and streams throughout the state (e.g., see Ex. PL-7 and Ex. PL-8). In the face of this mounting evidence, the Agency cannot fulfill its responsibility to protect surface waters by waiting until an impaired condition is manifested.

P. 32-33, ¶ 88.

The record in this case clearly establishes the reasonableness of the revised phosphorus discharge rule. As set forth above, the rule is rationally related to the legitimate public purpose of protecting Minnesota's lakes, reservoirs, rivers, and streams from degradation. The rule is designed to benefit all Minnesotans through improved water quality protection. As a result, the rule is reasonable and valid.

IV. THE REVISED PHOSPHORUS DISCHARGE RULE PROVIDES REASONABLY CLEAR STANDARDS FOR IMPLEMENTING THE THREE EXPRESS EXEMPTIONS.

Under Minnesota law, a statute or rule that vests discretion in an agency is legally valid if the statute or rule furnishes a reasonably clear policy or standard for its implementation. *Lee v. Delmont*, 36 N.W.2d 530 (Minn. 1949).

In *Lee*, the owner of a barber school challenged the constitutionality of a statute that regulated the qualifications of instructors at barber schools. *Id.* The statute at issue authorized a state agency to administer examinations in specific subjects to determine

whether persons were qualified to be instructors at barber schools. *Id.* The district court held that the statute unconstitutionally delegated unfettered discretionary power to the state agency. *Id.* The Minnesota Supreme Court reversed. *Id.*

In establishing the framework for its analysis, the Minnesota Supreme Court held that:

If the law furnishes a reasonably clear policy of 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., at 538-39. The court further stated that:

The policy of the law and the standard of action to guide the administrative agencies *may be laid down in very broad and general terms. What is a sufficiently definite declaration of policy and standard obviously varies in some degree according to the complexity of the subject to which the law is applicable.*

Id., at 539 (emphasis added).

Like CGMC, the petitioner in *Lee* claimed that the statute at issue was invalid because the agency might theoretically arbitrarily deny a registration certificate for a whole host of unfair reasons. *Id.* The Minnesota Supreme Court rejected that argument; stating that “[i]t is the nature of the power, and not the liability of its abuse or the manner of its exercise which determines the validity of its delegation. . . . The law provides an ample remedy for the abuse of a power without attacking the validity of its delegation.” *Id.* (citations omitted).

Like CGMC, the petitioner in *Lee* also objected to the lack of a more definite standard as to when an examinee would be certified as an instructor. *Id.* The Minnesota Supreme Court rejected this argument. The court held that the provision of the statute that authorized the agency to administer examinations before certifying barber instructors was sufficient because it identified the subjects of the examinations. *Id.* The court recognized that “[o]bviously, the legislature cannot provide a crystal ball for the automatic determination of the proficiency of each examinee. Certain discretionary powers must be conferred on ministerial officers for the preparation and conduct of examinations.” *Id.*

The same reasoning clearly applies in this case. Like the statute at issue in *Lee*, the revised phosphorus discharge rule spells out when exemptions from the 1 mg/L limit apply. The rule provides that phosphorus removal to 1 mg/L is required when “the discharge is new or expanded *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. 7053.0225, subp. 3(A)(3) (emphasis added). Subpart 4 to the rule spells out the three exemptions discussed above and identifies the information that a discharger seeking an exemption must provide. *Id.*, at subp. 4.

Like the petitioner in *Lee*, CGMC’s primary objection is that the rule does not provide a crystal ball for an automatic advance determination as to whether an individual request for an exemption will be granted or not. As the Minnesota Supreme Court did in *Lee*, this Court should reject CGMC’s argument.

Since the *Lee* decision was issued, Minnesota courts have consistently recognized that it is simply not possible for statutes or regulations to spell out every single possible scenario and result that might arise under the purview of a given law. As a result, both the Minnesota Supreme Court and this Court have held that laws conferring discretion upon administrative officers are valid and that in complex regulatory areas broader discretion is appropriate.

For example, in *W.J. Reyburn v. Minn. St Bd. of Optometry*, 78 N.W.2d 351 (Minn. 1956), a group of optometrists claimed that a statute giving the Board of Optometry the power to revoke or suspend a practitioner's license for "unprofessional conduct" was unconstitutional. The Minnesota Supreme Court rejected the challenge and held that the phrase "unprofessional conduct" provided a sufficient guide for and limitation upon the Board's discretion.

Like CGMC, the appellants in *Reyburn* argued that the phrase "unprofessional conduct" failed to provide a sufficient administrative standard to the Board to survive scrutiny under Article III of the Minnesota State Constitution. Specifically, the *Reyburn* appellants claimed that because the term "unprofessional conduct" was not defined or limited in the statute, the statute unconstitutionally empowered the Board to formulate its own definition whereby it could revoke or suspend licenses according to its own whim and caprice unguided by any reasonable standards of administrative action. *Id.*, at 354.

The Minnesota Supreme Court rejected the *Reyburn* appellants' argument. In upholding the validity of the statute at issue, the *Reyburn* court stated that "[t]he legislature need not enumerate what specific acts or omissions constitute unprofessional

conduct since the phrase ‘unprofessional conduct’ itself provides a guide for, and a limitation upon, the exercise by the Board of its power to revoke a practitioner’s license.” *Id.* at 355. The court went on to state that “[i]t cannot be expected of a legislature that it should forbid specifically all improper practices likely to occur.” *Id.*, at 356.

Similarly, in *Anderson v. Comm. of Highways*, 126 N.W.2d 778 (Minn. 1964), a driver claimed that a statute that authorized the Commissioner of Highways to suspend a driver’s license upon a showing that a driver was a “habitual violator” of traffic laws failed to provide a sufficiently clear and precise standard of action to the Commissioner. The Minnesota Supreme Court rejected the driver’s argument and upheld the statute.

In so ruling, the Minnesota Supreme Court recognized that it would not be possible for a statute to outline every single situation that might justify revocation of a driver’s license. Specifically, the court said:

There are . . . exceptions and qualifications to the rule that a statute which vests discretion in a public official must prescribe precise rules of action. The modern tendency is to be more liberal in permitting grants of discretion to administrative officers in order to facilitate the administration of laws as the complexity of economic and governmental conditions increase. *The rule which requires an expressed standard to guide the exercise of discretion is subject to the exception that where it is impracticable to lay down a definite comprehensive rule - such as . . . where the act relates to the administration of a police regulation which is necessary to protect the general health, welfare, and safety of the public, it is not essential that a specific standard be expressly stated in the legislation.* This is so because it is impossible for the legislature to deal directly with the many details in the varied and complex conditions on which it legislates, but must necessarily leave them to the reasonable discretion of administrative officers.

Id., at 780-81 (emphasis added).

The Minnesota Supreme Court went on to find that given the myriad of conditions that might arise in evaluating traffic infractions, it was reasonable for the Commissioner of Highways to have a flexible standard to employ. The court said that:

. . . broad, flexible standards may be necessary for the effectuation of legislative policy, and . . . standards may be expressed in broad terms where more precise and rigid standards could well destroy the administrative flexibility necessary to carry out the legislative purpose comprehended by the law. We cited *Lee v. Delmont* . . . to the effect that what is a sufficiently definite declaration of policy and standard varies in degree according to the complexity of the subject to which the law is applicable.

Id., at 782.

In affirming the constitutionality of the statute, the court observed that the Commissioner of Highways would be required to make judgments based upon “many and varied factors involving a great amount of detail.” *Id.*, at 781.

This Court has likewise ruled that in a complex regulatory area legislation may properly delegate discretionary power to administrative authorities who will use their expertise to exercise that discretion. *J.B. Press Co. v. Minneapolis*, 553 N.W.2d 80, 85 (Minn. Ct. App.1996).

In *J.B. Press*, landowners sued to have a city ordinance that required them to replace doors on their apartment buildings declared unconstitutional. The ordinance at issue required the doors to be modified in a manner approved by the city’s director of inspections so as to provide approximately the same fire resistant rating as a wood core door. *Id.*, at 84. The landowners claimed that the ordinance gave the city inspector unfettered discretion to mandate his or her own standards. *Id.*, at 85. This Court held that the ordinance did not constitute an unconstitutional delegation of power. *Id.*

In rejecting the landowner's claims, this Court stated that "[l]egislation may delegate discretionary power to administrative authorities in order to 'leave preciseness and detail of application to administrators who supposedly will bring an expert's familiarity to bear upon the problems under consideration.'" *Id.* (quoting *Wesland v. R.R. & Warehouse Comm'n.*, 88 N.W.2d 834, 838 (Minn. 1958)).

This Court also stated that "[t]he legislature, or in this case the city council, need not expressly delineate with particularity or exactness each and every phrase of the power so conferred, but may give administrators reasonable flexibility." *Id.*

The *J.D. Press* court held that by requiring the doors to be replaced in a manner that provided approximately the same level of fire resistance as a wood core door, the ordinance at issue provided a sufficient standard of action for the city inspector to approve and disapprove of individual work plans. *Id.*

As the cases cited above establish, in complex areas of regulation, broader and more flexible administrative standards are legally proper. *Lee*, 36 N.W.2d at 539; *Anderson*, 126 N.W.2d at 780-82; *J.B. Press Co.*, 553 N.W.2d at 85. This is especially true when the regulation at issue is in the nature of a police regulation for the health, safety, and welfare of the public. *Anderson*, 126 N.W.2d at 778.

In this case, the MPCA is undeniably dealing with a particularly complex regulatory area. The regulation at issue in this case is also in the nature of a police regulation to protect the general health and welfare of the public. Under these precedents, a broader and more flexible administrative standard is appropriate.

Like the Commissioner of Highways in *Anderson*, the MPCA will have to deal with exemption requests “based on many and varied factors involving a great amount of detail.” *Anderson*, 126 N.W.2d at 781. Like the building inspector in *J.B. Press*, the MPCA has technical expertise which it will bring to bear on the requests for exemption under the revised phosphorus discharge rule. *J.B. Press*, 553 N.W.2d at 85. As a result, like the regulations in those cases, this Court should affirm the validity of the revised phosphorus discharge rule.

Moreover, as with the challenged regulations in the cases cited above, it would not have been feasible for the MPCA to attempt to specifically enumerate every conceivable circumstance that might affect its decision on a request for an exemption. As the ALJ found:

Examples of appropriately flexible rule language in the proposed amendment 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.*

P. 21, ¶ 59 (emphasis added)

It is worth noting that by listing the three exemptions and specifying the information that dischargers must submit to apply for the exemptions, the rule challenged

in this case is significantly more precise than the rules and statutes that both this Court and the Minnesota Supreme Court upheld in the cases discussed above. 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 exemption may not be available if unforeseen circumstances arise. For example, as noted above, under federal law, if a discharge causes or contributes to a water quality standard or if a TMDL is in place that requires a phosphorus limit, then a limit will be required even if an off ramp would otherwise be available. P. 106-08; 40 C.F.R. § 122.4(i) (2007); 40 C.F.R. § 122.44(d)(1) (2007).

Under the cases cited above, the MPCA's choice to adopt a rule that establishes the general standards for exemptions from the 1 mg/L phosphorus limit and leaves the ultimate decision on exemptions to a case-by-case analysis by the expert regulatory agency charged with protecting the quality of Minnesota's water is valid.

This is especially true in light of the many procedural safeguard that exist to check the MPCA's discretion in applying the exemptions. Minnesota courts are particularly reluctant to interfere with laws that vest discretion in administrative agencies where there are procedural safeguards in the form of administrative contested case hearings or judicial review that check agency discretion.

For example, in *Dep't of Lab. and Ind. v. Wintz Parcel Drivers, Inc.*, 555 N.W.2d 908 (Minn. Ct. App. 1996), an employer challenged a statute that authorized the Department of Labor and Industry to impose penalties of up to \$1,000 per week for noncompliance with the Workers' Compensation Act. The employer claimed that the

statute at issue unconstitutionally delegated authority to the agency to impose penalties without including sufficient administrative standards. *Id.*, at 912-13.

This Court rejected the employer's argument. The Court found that because the statute authorized a review of any penalty by a compensation judge in the Office of Administrative Hearings and that certiorari review was available before this Court, there were sufficient safeguards to "prevent a penalty from being assessed according to the whim or caprice of the Commissioner." *Id.*, at 913. As a result, the Court held that the statute did not unconstitutionally delegate authority to the Commissioner to impose penalties with unfettered discretion. *Id.*; see also

Similarly, in *Schumann v. Comm. of Taxation*, 253 N.W.2d 130 (Minn. 1977), a renter challenged a statute that authorized the Commissioner of Taxation to apportion a taxpayer rent credit among co-tenants. The renter claimed that the statute at issue was an unconstitutional delegation of legislative power to the Commissioner because the statute did not have sufficient standards describing how the credit was to be apportioned. *Id.*, at 132-33. The Minnesota Supreme Court rejected the renter's claim and upheld the statute.

The *Schumann* Court concluded that although the statute did not establish any particular rules for the Commissioner to follow, the statute required an evidentiary hearing by implication. *Id.*, at 133. The *Schumann* Court also noted that the Commissioner's decision was subject to judicial review by the Tax Court. *Id.* As a result, the Minnesota Supreme Court held that the statute was constitutional. *Id.*

In this case, anyone seeking an exemption under the revised phosphorus discharge rule can obtain an evidentiary hearing before the Office of Administrative Hearings. SONAR, at RA 65-66; Minn. R. 7000.1800 & 7000.1900 (2007). An applicant for an exemption can also obtain a hearing before the MPCA's nine member Citizens Board. SONAR, at RA 65-66; Minn. Stat. § 116.02, subds. 6-8 (2006). If an applicant for an exemption is still unsatisfied after having an evidentiary hearing before an ALJ and a hearing before the nine member Citizens Board, then judicial review before this Court is available upon a writ of certiorari. Minn. Stat. § 115.05, subd. 11 (2008) (any person aggrieved by final decision of MPCA in permitting matter may appeal to Minnesota Court of Appeals).

The revised phosphorus discharge rule establishes sufficient administrative standards for the MPCA to determine whether to grant exemptions from the 1 mg/L effluent limit on a case-by-case basis. As discussed above, Minnesota law specifically allows for the use of broad and flexible administrative standards in statutes and rules involving complex regulatory areas; especially when the law at issue is in the nature of a police regulation as in this case. This Court should therefore hold that the exemptions in the revised phosphorus discharge rule are valid.

V. THE RECORD CLEARLY DEMONSTRATES THAT MPCA FULLY COMPLIED WITH THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURES ACT.

CGMC's final argument against the revised phosphorus discharge rule is that the MPCA violated the Administrative Procedures Act in adopting the rule. (*See* Pet. Br., pp. 41-45.) Quite frankly, CGMC's arguments on this point are disingenuous. As

discussed below, the MPCA went above and beyond the requirements of the Administrative Procedures Act in adopting the revised phosphorus discharge rule.

CGMC's first claim is that the MPCA violated the public notice and comment requirements of the Administrative Procedures Act. (See Pet. Br., pp. 41-43.)

As noted above, ALJ Mihalchick issued detailed findings of fact spelling out MPCA's compliance with the notice and comment requirements of the Administrative Procedures Act. P. 12-15, ¶ 16-27. On this point, ALJ Mihalchick specifically found that "[t]he Agency went to great lengths to inform interested parties and the affected public in this rulemaking. The active participation of these persons and the accommodation by the Agency of many of their concerns demonstrates that *the Agency more than adequately satisfied the notice requirements.*" *Id.* at ¶ 27 (emphasis added).

The fact that CGMC cannot and does not dispute any of ALJ's Mihalchick's findings regarding MPCA's compliance with the notice and comment requirements of the Administrative Procedures Act demonstrates the frivolity of CGMC's argument on this point. As the ALJ properly found, MPCA more than satisfied the public notice and comment requirements of the Administrative Procedures Act in adopting the revised phosphorus discharge rule.

CGMC's second claim is that the MPCA violated the Administrative Procedures Act because the revised phosphorus discharge rule is overly prescriptive in violation of Minn. Stat. § 14.002. (See Pet. Br., pp. 43-45.) CGMC presumes that the exemptions are invalid and that without the exemptions, the remainder of the revised phosphorus

discharge rule is invalid. *Id.* This argument is as baseless as CGMC's allegation of inadequate public notice for three reasons.

First, here again, ALJ Mihalchick made specific findings that flatly refute CGMC's claim. ALJ Mihalchick expressly found that the rules, including the revised phosphorus discharge rule, are consistent with Minn. Stat. § 14.002. P. 22, ¶ 63.

Second, CGMC's argument on this point is based on the mistaken presumption that the exemptions are invalid. As discussed above, the exemptions are valid under Minnesota law.

Third, even without the exemptions, the revised phosphorus discharge rule satisfies the Administrative Procedures Act. MPCA could have satisfied Minn. Stat. § 14.002 without including the exemptions in the rule. Minnesota's water quality rules include a general variance provision that would enable dischargers to demonstrate that a 1 mg/L phosphorus limit is not required on a case-by-case basis. Minn. R. 7053.0195. That variance provision alone is sufficient to provide the flexibility required by Minn. Stat. § 14.002. 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. Put simply, the exemptions provide a level of flexibility above and beyond that which is required by the Administrative Procedures Act. Therefore even if the

exemptions were invalid, the remainder of the revised phosphorus discharge rule would still be valid.⁵

CONCLUSION

For the reasons discussed above, MPCA respectfully requests that this Court uphold the validity of Minn. R. 7053.0255 and deny CGMC's request for a declaratory judgment.

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Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota



ROBERT B. ROCHE
Assistant Attorney General
Atty. Reg. No. 289589

445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 215-1506 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR DEFENDANT
MINNESOTA POLLUTION CONTROL
AGENCY

⁵ As discussed above, the exemptions in this case are entirely constitutional. If, however, this Court finds that the exemptions are deficient, then the proper remedy would be to invalidate the exemptions and leave the remainder of the revised phosphorus discharge rule in place. Dischargers would then be free to seek exemptions from the rule under MPCA's general water quality variance procedure. Minn. R. 7053.0195.