No. A04-2033

STATE OF MINNESOTA
IN SUPREME COURT

In the Matter of the Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, and Request for Contested Case Hearing

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APPELLANT MINNESOTA POLLUTION CONTROL AGENCY'S BRIEF

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LEGAL ISSUES

I. Should the Minnesota Court of Appeals extend judicial deference to a state agency's interpretation of an ambiguous federal regulation that the state agency is legally required to implement and administer?

The Minnesota Court of Appeals ruled that a state agency is not entitled to judicial deference when the agency interprets a federal regulation that the agency is legally required to administer.

In re Excess Surplus Status of Blue Cross & Blue Shield of Minn., 624 N.W.2d 264 (Minn. 2001)

In re Southeastern Minn. Citizens' Action Council, Inc. v. Minn. Dep't of Hum. Serv., 359 N.W.2d 60 (Minn. Ct. App. 1984)

II. Does 40 C.F.R. § 122.4(i) establish a total ban on any level of discharge to an impaired water, even where the discharge is more than offset by a reduction in loading from other sources such that there is a substantial net reduction in the amount of pollution entering the impaired water?

The Minnesota Court of Appeals ruled that the regulation establishes a total ban on any level of discharge to an impaired water even where there are offsets in place such that there is a substantial net reduction in the amount of pollution entering the impaired water.

Arkansas v. Oklahoma, 112 S.Ct. 1046 (1992)

In re Carlotta Copper Co., Nos. 00-23 & 02-06, 2004 WL 3214473 (Envtl. App. Bd. Sep. 30, 2004)

STATEMENT OF THE CASE

This case involves a challenge to Appellant Minnesota Pollution Control Agency's (MPCA's) decision to issue a disposal permit for a proposed joint wastewater treatment facility that would serve the cities of Annandale and Maple Lake. The facility would discharge treated wastewater to a river that flows into the Mississippi River upstream of Lake Pepin. Lake Pepin is impaired due to excess phosphorus.

During the public comment period for the permit, Respondent Minnesota Center for Environmental Advocacy (MCEA) submitted written comments opposing the facility. MCEA argued that the regulation at issue in this case, 40 C.F.R. § 122.4(i), precluded issuance of a permit for the facility because the discharge from the facility would cause or contribute to existing impairments in downstream waters for which a total maximum daily load (TMDL) study had not been completed.

The MPCA Citizens' Board concluded that 40 C.F.R. § 122.4(i) does not, as MCEA suggested, impose a categorical ban on pre-TMDL discharges to impaired waters. The MPCA Board concluded that the regulation allows a discharge to an impaired water as long as the discharge does not cause or contribute to the impairment. The MPCA Board also concluded that the discharge from the proposed Annandale - Maple Lake facility would not cause or contribute to the phosphorus impairment in Lake Pepin because the discharge would be more than offset by reductions from other sources so that there would be a substantial net reduction in the total amount of phosphorus entering the lake.

MCEA appealed MPCA's decision to issue the permit to the Minnesota Court of Appeals. The court unanimously rejected MCEA's assertion that 40 C.F.R. § 122.4(i) precludes the issuance of any permits for pre-TMDL discharges to impaired waters until a TMDL has been completed. [1] *In re Cites of Annandale & Maple Lk. NPDES/SDS Permit Issuance For Discharge of Treated Wastewater*, 702 N.W.2d 768 (Minn. Ct. App. 2005) (A. 1-10.)[2] A majority of the court ruled that MPCA is not entitled to judicial deference in its interpretation of federal regulations that MPCA is required to administer. The majority also ruled that 40 C.F.R. § 122.4(i) does not allow MPCA to consider an offset that results in a substantial net reduction in the amount of phosphorus entering an impaired water to determine whether a discharge would cause or contribute to the phosphorus impairment. *Id*. Judge Robert Schumacher dissented. *Id*. Judge Schumacher concluded that the court should extend deference to MPCA's interpretations of federal regulations that MPCA is required to administer. *Id.* Judge Schumacher also concluded that it was reasonable for MPCA to conclude that the Annandale-Maple Lake facility would not cause or contribute to the impairment of Lake Pepin based on the net reduction in phosphorus loading to Lake Pepin as a result of the offset. *Id.* This appeal followed.

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[1] This part of the Court of Appeals' ruling has not been appealed.

[2] Citations to MPCA's Appendix are noted by the letter 'A' followed by the appendix page number.

STATEMENT OF FACTS

The Cities of Annandale and Maple Lake are in Wright County, Minnesota. (R. 704.)[3] The cities currently operate separate wastewater treatment facilities. (R. 1480.) Both facilities are over forty years old and nearing the end of their design lives. (R. 1384.) Additionally, since the facilities were constructed both cities have experienced significant population growth. (R. 498.) Between 1980 and 2000, Annandale's population increased 27% and Maple Lake's population increased 44%. *Id.* The overall population of Wright County is expected to grow by 54% between 2000 and 2030. *Id.*

In order to address their wastewater treatment needs, the cities submitted an application to MPCA to build and operate a new joint wastewater treatment facility. (R. 1481.) The joint facility would replace both of the current facilities. *Id.*

Annandale's current wastewater treatment facility does not discharge to a surface water. (R. 1487.) Instead, the current Annandale facility discharges treated wastewater via spray irrigation onto the land. *Id.* Maple Lake's current facility discharges treated effluent to Mud Lake which flows into the North Fork of the Crow River (North Fork) and ultimately into Lake Pepin via the Mississippi River. *Id.* Maple Lake's current facility discharges approximately 1400 pounds of phosphorus per year to the North Fork. *Id.*

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[3] Citations to MPCA's administrative record are noted by the letter 'R.' followed by the page number.

The joint facility would discharge treated effluent to the North Fork. The joint facility would be subject to a one milligram per liter phosphorus effluent limit. *Id.* With this limit, the joint facility would discharge a total of approximately 3600 pounds per year of phosphorus. *Id.* In other words, the joint facility would increase the phosphorus load to the North Fork by approximately 2200 pounds per year. *Id.*

MPCA has determined that Lake Pepin is impaired for nutrients. (R. 1108.) MPCA therefore evaluated whether the discharge from the joint facility would cause or contribute to the phosphorus impairment in Lake Pepin in violation of 40 C.F.R. § 122.4(i). (R. 1480-88.) MPCA concluded that the discharge from the joint facility would not cause or contribute to the phosphorus impairment in Lake Pepin because it is more than offset by reductions from other sources. *Id.*

Specifically, MPCA found that the 2200 pound increase in annual phosphorus loading from the joint facility would be more than offset by phosphorus reductions from the City of Litchfield. (R. 1487.) Litchfield, which also discharges to the North Fork, recently completed upgrades to its wastewater treatment facility that include phosphorus reduction technology. *Id.* As part of these upgrades, the City of Litchfield received a phosphorus limit in its disposal permit that decreases the amount of phosphorus entering the North Fork by approximately 53,500 pounds per year. *Id.*

MPCA concluded that the reduction in phosphorus loading from the Litchfield facility more than offsets the increase from the joint facility; resulting in a substantial net decrease in the total amount of phosphorus entering the North Fork. *Id.* MPCA therefore

concluded that the discharge of phosphorus from the joint facility would not cause or contribute to the phosphorus impairment in Lake Pepin in violation of 40 C.F.R. § 122.4(i). *Id*.

ARGUMENT

I. MINNESOTA LAW REQUIRES JUDICIAL DEFERENCE TO A STATE AGENCY'S INTERPRETATION OF AN AMBIGUOUS REGULATION THAT THE AGENCY ADMINISTERS.

The majority below erred in failing to defer to MPCA's interpretation of 40 C.F.R. § 122.4(i). Under state and federal law, MPCA is the agency charged with administering the federal Clean Water Act and its attendant regulations. 40 C.F.R. § 123.25(a)(1); Minn. Stat. § 115.03, subds. 1 and 5 (2004). Thus, MPCA is legally required to administer the regulation at issue in this case, 40 C.F.R. § 122.4(i), as its own. As a result, the majority below should have extended judicial deference to MPCA's reasonable interpretation of ambiguous provisions in the regulation.

A. Minnesota Law Provides For Judicial Deference To Agency Interpretations Of Laws That The Agency Administers.

MPCA does not dispute that as a general rule, courts retain the power to review *de novo* errors of law that arise when an agency decision is based upon the meaning of words in a statute. *In re Denial of Eller Media Co.'s App. for Outdoor Adver. Device Permit in City of Mounds View*, 664 N.W.2d 1, 7 (Minn. 2003) (citations omitted). As this Court has stated, however, "judicial deference, rooted in the separation of powers doctrine, is extended to an agency decision-maker in the interpretation of statutes that the agency is

charged with administering and enforcing." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) (citations omitted).

In this case, MPCA is the agency decision-maker charged with enforcing and administering the regulation in question. The Court of Appeals was therefore required to extend deference to MPCA's interpretation of the regulation in question as required by this Court's decision in *Blue Cross & Blue Shield*.

B. The Majority Below Misconstrued Minnesota Supreme Court Precedent On Deference To Agency Legal Interpretations.

The majority below cites three cases to support its conclusion that it was not required to defer to MPCA's interpretation of the regulation in question. *Annandale & Maple Lake*, 702 N.W.2d at 721-22. None of the cases that the majority cites, however, actually support the proposition that a Minnesota court should not extend deference to a state agency's interpretation of an ambiguous regulation that the agency is charged with administering.

The first case the majority cites, *MCIMetro Access Transmission Serv., Inc. v. Bellsouth Telecomm., Inc.*, 352 F.3d 872 (4th Cir. 2003), is a federal case. In that case, a North Carolina agency interpreted a federal telecommunications regulation in a manner that conflicted with an order of the Federal Communications Commission. *Id.* The federal court declined to defer to the North Carolina agency's interpretation of the federal regulation. *Id.*

This case is not on point. The question in this case is not whether a federal court in another jurisdiction should defer to a different state's interpretation of a federal

regulation; especially when that interpretation conflicts with that of the federal agency. The question in this case is whether Minnesota law requires a Minnesota court to defer to a Minnesota agency's interpretation of an ambiguous federal regulation that the Minnesota agency is legally required to administer.[4] The federal case that the majority below cites does not speak to this issue at all.

The two Minnesota cases that the majority below cites similarly fail to support the conclusion that a Minnesota state agency is not entitled to deference in its interpretation of a regulation that the agency administers. The majority relies on statements from this Court in *Eller Media*, 664 N.W.2d at 7, and *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003), that questions of statutory construction are reviewed *de novo*. As noted above, MPCA does not dispute this point. The question in this case, however, is not whether questions of law are reviewed *de novo*. The question in this case is whether a state agency is entitled to judicial deference in its interpretation of an ambiguous regulation that the agency administers. A review of *Eller Media* and *Denelsbeck* actually supports the conclusion that a Minnesota agency is entitled to deference in its interpretation of an ambiguous regulation that it administers.

In the passages from the *Eller Media* and *Denelsbeck* decisions that the majority below cites, this Court cites its decision in *St. Otto's Home v. Minn. Dep't of Hum. Serv*.

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[4] Moreover, as discussed in Part II, unlike the state agency's interpretation in *MCIMetro* which conflicted with the FCC's order, MPCA's interpretation of the regulation in this case is entirely consistent with EPA' interpretation.

See Eller Media, 664 N.W.2d at 7 and *Denelsbeck*, 666 N.W.2d at 346 (both citing *St. Otto's Home v. Minn. Dep't of Hum. Serv.*, 537 N.W.2d 35, 39-40 (Minn. 1989)). In *St. Otto's Home*, this Court stated:

> When a decision turns on the meaning of words in a statute or regulation, a legal question is presented. In considering such questions of law, courts are not bound by the decision of the agency and need not defer to agency expertise. *When the agency's construction of its own regulation is at issue, however, considerable deference is given to the agency interpretation, especially when the relevant language is unclear or susceptible to different interpretations. If a regulation is ambiguous, agency interpretation will generally be upheld if it is reasonable*.
>
> *Id*. at 39-40 (emphasis added).

Thus, this Court's precedent establishes that judicial deference is required when an agency interprets a regulation that the agency administers; especially if the regulation is ambiguous as in this case. The majority below focused on the first two sentences of this Court's ruling in *St. Otto's Home* and ignored the remainder of the Court's ruling. By ignoring the remaining part of this Court's precedent, the majority below erred as a matter of law.

C. Minnesota Precedent Establishes That Deference Is Appropriate When A State Agency Interprets A Federal Regulation That The Agency Administers.

In ruling that it need not defer to a state agency's interpretation of a federal regulation that the agency administers, the majority below also ignored its own published and unpublished precedent.

For example, in *Conagra, Inc. v. Swanson*, 356 N.W.2d 825, 827 (Minn. Ct. App. 1984), the Court of Appeals reviewed the interpretation of a federal labor regulation

administered by the Minnesota Department of Labor and Industry. In that case, the Court of Appeals ruled that deference to the agency's interpretation was appropriate. The court specifically stated that "[c]ourts often will defer to an agency's statutory construction, particularly where the statutory program is complex, the subject of the program is highly technical and the agency possesses expertise in the field." *Id*. (citations omitted). The court went on to affirm the agency's interpretation of the applicable federal regulation because it concluded that the agency's interpretation was reasonable. *Id*.

In *Ross v. Minn. Dep't of Hum. Serv.*, 469 N.W.2d 739 (Minn. Ct. App. 1991), a disabled person who had entered the workforce challenged the state agency's decision limiting the deductibility of his income taxes and FICA contributions for purposes of evaluating eligibility for medical assistance payments. Finding that "resolution of [the] case turn[ed] on the proper interpretation of the federal financial participation statute," the Court of Appeals affirmed the agency's position. *Id.* at 740. The Court of Appeals noted that this Court's decision in *Resident v. Noot*, 305 N.W.2d 311, 312 (Minn. 1981), calls for deference to an agency's interpretation of technical statutory language. *Id*. The court went on to state that although the agency's interpretation might provide a disincentive for disabled persons to enter the workforce, it was "constrained by the reasonableness of statutory construction" and affirmed the agency's decision. *Id.* at 742.

Similarly, in *Hy-Vee Food Stores, Inc. v. Minn. Dep't of Health*, No. A04-548, 2004 WL 2340189 (Minn. Ct. App. 2004) (unpublished decision, A. 1-4), the relator challenged the state agency's interpretation of the term "sale" as used in a federal

regulation administered by the state agency. The relator argued that the agency's interpretation was not entitled to deference because the agency was not interpreting its own regulation. The Court of Appeals flatly rejected this argument as "directly contrary to the 'fundamental concept that decisions of administrative agencies enjoy a presumption of correctness and deference should be shown by courts to agencies' expertise and their special knowledge in the field of their training, education, and experience.'" *Id.* at p. 2 (citing *Blue Cross & Blue Shield*, 624 N.W.2d at 278).[5] *See also Simonson v. Comm. of Employ. & Eco. Develop't*, No. A03-1143, 2004 WL 885721 (Minn. Ct. App. 2004) and *Guma v. Globe Security Screeners*, No. A03-1916, 2004 WL 1965851 (Minn. Ct. App. 2004) (unpublished decisions A. 15-22 (noting state agency entitled to deference in interpretation of federal employment statute).

In a case highly similar to the case at bar, the Minnesota Department of Health was delegated the responsibility of administering a federal program and its interpretation of one of the applicable federal regulations was challenged. *In re Southeastern Minnesota Citizens' Action Council, Inc. (SEMCAC)*, 359 N.W.2d 60, 63 (Minn. Ct. App. 1984). In that case, the Court of Appeals noted that the state agency was interpreting a federal regulation rather than its own rule. *Id.* On the question of deference, the court specifically stated that "[s]ince the Health Department must directly apply the federal

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[5] This Court recently affirmed the Court of Appeals decision in *Hy-Vee* without reaching the deference issue because this Court concluded that the regulation in question was unambiguous. *Hy-Vee Food Stores, Inc. v. MDH*, 702 N.W.2d 181, n. 5. (Minn. 2005).

rules as if they were its own we will use the same deference in reviewing the Department's interpretation of them as we would use if the Department had promulgated them." *Id*.

The cases cited above refute the conclusion of the majority below that Minnesota law does not call for deference to a state agency's interpretation of a federal law that the agency administers. On the contrary, the cases cited above demonstrate that the majority below should have extended judicial deference to MPCA's interpretation of 40 C.F.R. § 122.4(i) in this case.

Under both state and federal law, MPCA is required to administer and implement the federal Clean Water Act and its regulations. Minn. Stat. § 115.03, subds. 1 and 5 (2004); 40 C.F.R. § 123.25(a)(1). The Clean Water Act is unquestionably a complex statutory program with a technical subject matter. Moreover, this Court has specifically stated that "[t]he MPCA has technical expertise regarding water . . . pollution." *Minn. Ctr. for Envtl. Advoc. v. MPCA & Boise Cascade Corp.*, 644 N.W.2d 457, 465 (Minn. 2002). As a result, the majority below should have extended deference to MPCA's interpretation of the regulation in question. *Conagra*, 356 N.W.2d at 827.

The majority below should have extended deference to MPCA's interpretation of the regulation in question under *SEMCAC* as well. *SEMCAC*, 359 N.W.2d at 63. Like the Department of Health in *SEMCAC*, MPCA has been delegated the responsibility for administering the regulatory program at issue. Like the Department of Health in *SEMCAC*, MPCA must administer the specific regulation in question as if it were

MPCA's own regulation. Minn. Stat. § 115.03, subds. 1 and 5 (2004). As a result, like the Department of Health in *SEMCAC*, MPCA was entitled to judicial deference to its interpretation of the regulation in question.

As the cases cited above demonstrate, the majority below departed from established Minnesota law in ruling that a state agency's interpretation of a federal regulation that the agency must administer is not entitled to deference. The majority's ruling on this point should therefore be reversed.

D. Minnesota Law Does Not Limit Judicial Deference To Agency Interpretations Of Law To Only Those Regulations Promulgated By The Agency.

The majority below asserts that deference is not appropriate in this case because MPCA did not promulgate the regulation in question.[6] *Annandale & Maple Lake*, 702 N.W.2d 771-72. This assertion is in conflict with several rulings from both the Court of Appeals and this Court holding that an agency is entitled to deference in its interpretation of a statute or regulation because the agency administers the law in question or has expertise in the subject matter; not simply because the agency adopted the law in question.

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[6] The majority's position on this issue is actually based on a false premise because MPCA's rules specifically include any requirements imposed on a discharge by the Clean Water Act and its implementing regulations. Minn. R. 7050.0210, subp. 6(c) (2005).

1. Minnesota law provides for deference to an agency interpretation of law when the agency administers the law in question, even if the law was enacted by another body.

The legislature passed the Minnesota Environmental Policy Act (MEPA) to establish Minnesota's environmental review program. Minn. Stat. ch. 116D (2004). The Environmental Quality Board, not MPCA, is responsible for promulgating the rules that implement MEPA. Minn. Stat. § 116.04, subd. 5a (2003).

Nevertheless, the Minnesota Court of Appeals has held that MPCA's interpretation of MEPA is entitled to deference because the statute is couched in general terms leaving the duty of determining precisely what standards will satisfy the statute to the agencies. *In re Univ. of Minn. App. for Air Emission Facility Permit*, 566 N.W.2d 98, 103-104 (Minn. Ct. App. 1997) (citing *In re Independent Fuel Storage Installation*, 501 N.W.2d 638, 649 (Minn. Ct. App. 1993)). Thus in that case, the Court of Appeals extended deference to MPCA's interpretation of "another" agency's statute.

According to this precedent, the majority below should have extended deference to MPCA's interpretation of the regulation in question in this case. The regulation in question precludes issuance of a permit to a new discharge if it will "cause or contribute" to a water quality impairment. 40 C.F.R. § 122.4(i). The regulation does not define or explain the term "cause or contribute." *Id.* Thus, like MEPA, the regulation at issue in this case is couched in general terms; leaving the duty of determining precisely what standards will fulfill the regulatory requirements to the agency charged with implementing the regulation. In this case, MPCA is the agency charged with

implementing the regulation and its interpretation was therefore entitled to deference. *Univ. of Minn.*, 566 N.W.2d at 103-04.

The Minnesota Court of Appeals has held that judicial deference is appropriate to agency interpretations of laws other than regulations promulgated by the agency in several other cases as well. In these cases, the court has indicated that deference is available because the interpreting agency administers the law in question and has expertise in the subject matter of the law; not because the agency adopted the law in question.

For example, in *In re Twedt*, 598 N.W.2d 11 (Minn. Ct. App. 2000), a retired university professor challenged a state agency's interpretation of a statute governing his retirement benefits. The Minnesota Court of Appeals affirmed the agency's interpretation noting that "when the meaning of the terms of a statute are in doubt, courts give great weight to the construction given *by the body charged with administering the problem sought to be remedied by the statute*." *Id.* at 13 (citing *Mammenga v. State Dep't of Sum. Serv.*, 442 N.W.2d 786, 792 (Minn. 1989) (emphasis added)). *See also McDermott v. Minn. Teachers Ret. Fund*, 609 N.W.2d 926, 928-29 (Minn. Ct. App. 2000) (same). In these cases, the court extended deference based on the agency's role as the administrator of the law; not because the agency was the author of the law. *Id.*

In re Am. Iron & Supply. Co., 604 N.W.2d 140, 144-45 (Minn. Ct. App. 2000), involved a challenge to MPCA's interpretation of special legislation enacted to govern the environmental review process for a proposed metal shredding facility. Opponents of

the project challenged MPCA's interpretation of the statute. The Minnesota Court of Appeals held that MPCA's interpretation of the statute was entitled to deference. *Id.* at 144-45. Despite the fact that the case did not involve a regulation promulgated by MPCA, the court held that "[b]ecause [the statute] falls within the purview of the MPCA, the agency's interpretation will be upheld if is reasonable." *Id.* at 145.

Similarly, in *Max Schwartzman & Sons, Inc. v. MPCA*, 670 N.W.2d 746, 754 (Minn. Ct. App. 2003), the Minnesota Court of Appeals held that MPCA's interpretation of a statute that it administers was entitled to deference. In *Schwartzman*, a metal recycler used shredder fluff from scrap automobiles and appliances to construct a berm. MPCA concluded that this activity constituted the 'disposal' of hazardous waste under the Minnesota Waste Management Act. The metal recycler challenged MPCA's interpretation of the statute, and the Court of Appeals affirmed MPCA's position. The Court of Appeals specifically stated that "[t]he Waste Management Act is a statutory framework that the MPCA is charged to administer, and it is appropriate to extend judicial deference to the agency in its interpretation of the provisions of the act." *Id.* at 755. *See also Healthpartners, Inc. v. Bernstein*, 655 N.W.2d 357, 360 (Minn. Ct. App. 2003) (court extends judicial deference to agency interpretation of statutes agency charged with administering); *Mattice v. Minn. Prop. Insur. Place.*, 655 N.W.2d 336, 340 (Minn. Ct. App. 2002) (same).

In accordance with these precedents, the majority below should have deferred to MPCA's interpretation of 40 C.F.R. § 122.4(i). The regulation is unquestionably within

MPCA's purview. *Am. Iron & Supply Co.*, 604 N.W.2d at 145. In fact, as noted above, the Clean Water Act is a statutory and regulatory framework that MPCA is specifically charged to administer. 40 C.F.R. § 123.25(a)(1); Minn. Stat. § 115.03, subds. 1 and 5 (2004). As a result, MPCA's interpretation was entitled to deference. *Schwartzman & Sons*, 670 N.W.2d at 754.

The assertion of the majority below that judicial deference to an agency's interpretation of law is not available unless the matter involves a regulation that the agency actually promulgated is contradicted by the Court of Appeals' own published precedent. As the cases discussed above establish, Minnesota law provides that judicial deference is required when an agency interprets a law that the agency administers; even if the law was enacted by another body. The departure of the majority below from the Court of Appeals' published precedent is legal error.

More importantly, the majority's position is contrary to a long line of precedent from this Court. For over forty-five years, this Court has held that deference to an agency interpretation of law the agency administers is required based on the agency's expertise and familiarity with the subject matter of the law; regardless of whether the law in question was promulgated by the agency or not.

For example, in *Knopp v. Gutterman*, 302 N.W.2d 689 (Minn. 1960), this Court reviewed an order of the Industrial Commission regarding workmen's compensation benefits. In affirming the agency's decision, this Court stated that "[w]hen [the] meaning of [a] statute is doubtful, great weight is to be given by courts to [the] construction placed

upon it by [the] department charged with its administration." *Id*. at 695 (citations omitted). In other words, this Court based its decision to extend deference to the agency's legal interpretation on the fact that the agency administered the law in question; not because the agency had adopted the law in question. *Id.*

This Court has repeatedly confirmed the holding in *Knopp* that agencies' interpretations of laws they administer are entitled to deference; including laws enacted by other entities. For example, as noted above, in *Blue Cross & Blue Shield*, this Court expressly stated that "judicial deference is extended to an agency decision-maker in the interpretation of *statutes* that the agency is charged with *administering and enforcing*." *Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) (citations omitted) (emphasis added).

While it is true that agencies have the authority to adopt rules, it goes without saying that only the legislature can pass statutes. The majority's ruling below that deference to an agency's legal interpretation is only appropriate when the agency has enacted the law in question would therefore mean that deference is never appropriate to an agency's interpretation of a statute. In fact, the majority below suggests that this is the case. *Annandale & Maple Lake*, 702 N.W.2d at 772, n. 1 (suggesting deference not available to agency interpretations of statutes). Yet in *Blue Cross & Blue Shield* and in numerous other cases this Court has repeatedly and unambiguously held that deference to

an agency's interpretation of statutes the agency administers is required.[7] Thus, the assertion of the majority below that deference is not available to an agency interpretation of law unless the agency itself adopted the law in question is in direct conflict with this Court's long-standing precedent and it should be reversed.

2. Minnesota law provides for deference to an agency interpretation of laws based on the agency's expertise and familiarity with the subject matter of the law.

In its caselaw, this Court has further explained that deference to an agency legal interpretation is appropriate because the agency has expertise and familiarity with the subject matter of the law in question; not because the agency enacted the law in question.

For example, in *Goodman v. Dep't of Pub. Safety*, 282 N.W.2d 559 (Minn. 1979), a driver challenged the Department of Public Safety's interpretation of a statute governing suspension of driving privileges for failure to pay traffic tickets. In affirming the agency's interpretation of the statute, this Court explained that "[o]ur practice when faced with such [statutory] ambiguity is to accord substantial consideration to the interpretation of the administrators working daily with the problem sought to be remedied." *Id*. at 560.

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[7] See also *Atkinson v. Minn. Dep't of Hum. Serv.*, 564 N.W.2d 209, 213 (Minn. 1997) (when meaning of statute is doubtful courts should give great weight to construction by agency charged with its administration); *Mammenga v. State Dep't of Hum. Serv.*, 442 N.W.2d 786, 792 (Minn. 1989) (same); *Krumm R.A. Nadeau Co.*, 276 N.W.2d 641, 644 (Minn. 1979) (same); *Benda v. Girard*, 592 N.W.2d 452, 455 (Minn. 1999) (administrative agency's interpretation of statute it administers entitled to deference); *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988) (agency's interpretation of law it administers entitled to deference and should be upheld if not in conflict with express purpose of act and intent of legislature).

MPCA is the agency working daily with the problem sought to be remedied in this case. Minn. Stat. § 115.03, subds. 1 and 5 (2004). As noted above, MPCA is specifically required to implement the federal Clean Water Act regulations as if they were MPCA's own regulations. 40 C.F.R. § 123.25(a)(1); Minn. R. 7050.0210, subp. 6(c) (2005). As a result, the majority below erred in ruling that MPCA's legal interpretation was not entitled to deference.

In a case highly analogous to the case at bar, MCEA challenged MPCA's determination that a proposed forestry project did not have the potential for significant environmental effects per the Minnesota Environmental Policy Act. *Minn. Ctr. for Envtl. Advoc. v. MPCA & Boise Cascade Corp.*, 644 N.W.2d 457. As in the case at bar, MCEA claimed that MPCA was not entitled to deference because the laws at issue were not enacted by MPCA. In *Boise*, MCEA argued that because the issue presented required interpretation of MEPA and the Environmental Quality Board rules implementing MEPA, the Court should review *de novo*. *Id.* at 464.

This Court rejected MCEA's argument and extended deference based on MPCA's expertise in environmental issues. This Court concluded that the evaluation of the environmental effects from the project was primarily factual and necessarily required the application of MPCA's technical expertise. *Id*. As a result, this Court held that "it is appropriate to defer to the agency's determination of whether the statutory standard is met." *Id*. Noting that MPCA has technical expertise in the areas of water, air and land pollution, the Court went on to affirm MPCA's decision. *Id*. at 465.

The same reasoning clearly applies in this case. As in the *Boise* case, MPCA had to evaluate the environmental effects of the proposed project in this case. In *Boise*, MPCA had to determine whether the project had the potential for significant environmental effects with the various mitigation measures that were in place. *Id.* Here, MPCA had to determine whether an increase in phosphorus loading of 2200 pounds per year from the Annandale - Maple Lake facility would "cause or contribute" to a downstream water quality impairment with an offset from the City of Litchfield that results in a net reduction of total phosphorus loading to the watershed of 51,300 pounds per year. 40 C.F.R. § 122.4(i); (R. 1487.) As in *Boise*, this analysis calls for an application of MPCA's expertise in environmental issues. As a result, the majority below should have deferred to MPCA's determination of whether the regulatory standard was met. *Boise*, 644 N.W.2d at 645.

The majority's assertion below that judicial deference to agency legal interpretations only applies to regulations that the agency has promulgated is in direct conflict with this Court's long-standing precedent. As discussed above, this Court has repeatedly and consistently ruled that judicial deference to an agency interpretation of a law is appropriate when the agency administers or has expertise in the subject matter of the law in question. In this case, MPCA both administers and has expertise in the subject matter of the law in question. The majority below therefore erred as a matter of law in ruling that it would not defer to MPCA's interpretation of the regulation in question.

E. Persuasive Authority From Other Jurisdictions Supports Extending Judicial Deference To MPCA's Interpretation of 40 C.F.R. § 122.4(i) In This Case.

Persuasive authority from other jurisdictions demonstrates that a state environmental agency's interpretation of federal environmental protection laws that the state agency administers and enforces is entitled to judicial deference.

For example, in *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1058-60 (U.S. 1992), the U.S. Supreme Court held that the Tenth Circuit Court of Appeals "exceeded the legitimate scope of judicial review" by failing to defer to EPA's interpretation of Oklahoma water quality standards because those standards were effectively incorporated into federal law.

As noted above, the federal law that MPCA interpreted in this case is incorporated into MPCA's rules. Minn. R. 7050.0210, subp. 6(c) (2005) (MPCA rules include any requirements imposed on a discharge by the Clean Water Act and its implementing regulations). Thus, like EPA in *Arkansas v. Oklahoma*, MPCA's interpretation of law was entitled to deference in this case.

A federal court also addressed whether EPA was entitled to deference in its interpretation of a state's environmental laws in *Ohio Valley Envtl. Coalition v. Horinko*, 279 F.Supp.2d 732 (S.D. W. Va. 2003). There the court concluded that even though EPA was not the body charged with enforcing and administering the laws in questions, the court would defer to EPA's reasonable interpretations of the state laws "in light of the EPA's particular knowledge and expertise in this area." *Id*. at 756.

In this case, MPCA not only has "particular knowledge and expertise in this area," but it is the agency charged with enforcing and administering the law in question. Thus, *Horinko* supports the extension of judicial deference to MPCA's interpretation of law in this case.

Deference is particularly appropriate to a state environmental agency's interpretation of a Clean Water Act regulation in light of the primary role that Congress clearly intended states to play under the federal Clean Water Act. The Senate Report accompanying the 1972 Amendments to the Act specifically states that "[t]he States shall lead the national effort to prevent, control and abate water pollution. As a corollary, the Federal role has been limited to support of, and assistance to, the States." S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News, 3668 - 69. Given that Congress has specifically delegated the primary responsibility for implementing the Clean Water Act to the states, it naturally follows that a state environmental agency's interpretation of Clean Water Act regulations is entitled to judicial deference.

Caselaw from other state courts also demonstrates that deference to MPCA's interpretation of a federal environmental regulation that MPCA administers and enforces is appropriate.

For example, in a case similar to the case at bar, an environmental group challenged a California state agency's interpretation of a federal Clean Water Act regulation that the state agency was required to administer. *Communities for a Better*

Envt. v. State Water Res. Ctrl. Bd., 1 Cal.Rptr.3d 76 (Cal. Ct. App. 2003). The California Court of Appeals extended deference to the state agency's interpretation of the federal regulation. In upholding the state agency's interpretation of the federal regulation, the California Court of Appeals said:

> Generally, we extend considerable deference to an administrative agency's interpretation of its own regulations *or the regulatory scheme which the agency implements or enforces.* The agency interpretation is entitled to great weight unless unauthorized or clearly erroneous.

Id. at 89 (citations omitted) (emphasis added). *See also Communities for Better Envt. v. State Water Res. Ctrl. Bd.*, 34 Cal. Rptr.3d 396, 406-07 (Cal. Ct. App. 2005) (deferring to state environmental agency's interpretation of federal Clean Water Act antibacksliding requirements); *Bldg. Indus. Assoc. of San Diego County v. State Water Res. Ctrl. Bd.*, 22 Cal.Rptr.3d 128, 137 n. 9 (Cal. Ct. App. 2004) (appellate court gives due deference to state environmental agency's interpretation of federal Clean Water Act provisions).

In *Air-A-Plane Corp. v. N.C. Dep't of Envt., Health & Nat. Res.*, 454 S.E.2d 297 (N.C. Ct. App. 1995), a manufacturer challenged the state environmental agency's interpretation of the federal Resource Conservation and Recovery Act. Noting that the court owed deference to the agency's reasonable interpretation of a statute that the agency administers, the North Carolina Court of Appeals upheld the agency's action. *Id*. at 301.

Finally, in another case highly similar to the case at bar, the operator of a hydroelectric dam project argued that the State of Maine's environmental agency was not entitled to deference when it interprets the federal Clean Water Act because it is federal

law. *S.D. Warren Co. v. Bd. of Envtl. Prot.*, 868 A.2d 210, 213-14 (Me. 2004).[8] The Supreme Judicial Court of Maine rejected this argument and held that the state environmental agency was entitled to "substantial deference" when it interprets the Clean Water Act. *Id.* The *Warren* court explained that "[t]he rationale underlying our deference to [the state agency] is that [the state agency] has greater expertise in matters of environmental concern and greater experience administering and interpreting those particular statutes." *Id.*

The cases discussed above clearly demonstrate that judicial deference to MPCA's interpretation of 40 C.F.R. § 122.4(i) is appropriate in this case. Like the agencies in the cases discussed above, MPCA has special training and expertise in matters of environmental concern. *Boise*, 644 N.W.2d at 465. Moreover, like the agencies in the cases discussed above, MPCA is charged with administering and enforcing the federal regulation at issue in this case. As a result, MPCA's interpretation of that regulation is entitled to deference.

II. THE MAJORITY BELOW ERRED IN CONCLUDING THAT 40 C.F.R. § 122.4(I) PROHIBITS OFFSETS.

Having refused to extend deference to MPCA's interpretation of 40 C.F.R. § 122.4(i) even though MPCA is charged with administering the regulation, the majority below compounded its error by reading a prohibition against offsets into the regulation.

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[8] *Cert. granted*, 74 USLW 3228 (U.S. Oct. 11, 2005) (No. 04-1527) (cert. granted on question unrelated to deference issue).

The relevant language of the regulation provides that "[n]o permit may be issued . . . [t]o a new source or a new discharger, if the discharge from its operation or construction will cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i). As set forth below, MPCA's interpretation that the regulation allows for offsets is reasonable because it is consistent with federal caselaw and EPA's interpretation of the regulation.

A. The Majority's Interpretation of 40 C.F.R. § 122.4(i) Conflicts With The U.S. Supreme Court's Ruling In Arkansas v. Oklahoma.

In *Arkansas v. Oklahoma*, EPA issued a permit for a new wastewater treatment facility in Arkansas. *Arkansas v. Oklahoma*, 112 S.Ct. at 1051. The new facility would discharge treated wastewater to the Illinois River at a point not far upstream of the Oklahoma border where the river was already violating water quality standards. *Id*. Like the majority below in this case, the Tenth Circuit Court of Appeals reversed the permit and ruled that the Clean Water Act prohibited the issuance of the permit because it would discharge pollutants to a water already in violation of water quality standards. *Id*. at 1052. The Supreme Court explained that "[t]he importance and novelty of the Court of Appeals' decision persuaded us to grant certiorari. We now reverse." *Id*.

The Supreme Court noted that the Tenth Circuit had construed the Clean Water Act to prohibit any discharge that would reach waters already in violation of water quality standards. *Id*. at 1057. The Supreme Court ruled that there was "nothing in the Act to support this reading." *Id*. The Supreme Court concluded that:

> [R]ather than establishing the categorical ban announced by the Court of Appeals -- which might frustrate the construction of new plants that would improve existing conditions -- the Clean Water Act vests in the EPA *and*

> *the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution*.

Id. at 1058 (citations omitted) (emphasis added).

MPCA's construction of 40 C.F.R. § 122.4(i) as allowing a new discharge to an impaired water where an offset is in place that will result in a substantial net reduction of pollution to the impaired water is consistent with this ruling from the Supreme Court. As the emphasized language indicates, the Supreme Court has expressly ruled that the Clean Water Act gives the states broad authority to develop appropriate solutions to water quality impairments. That broad authority specifically includes the authority to develop area-wide programs to alleviate existing pollution as MPCA did in this case. *Id*.

By adopting the approach it did in this case, MPCA is looking at the watershed on a holistic basis and utilizing an area-wide approach that results in a substantial net reduction of pollution to the impaired water. This approach is expressly supported by the Supreme Court's ruling in *Arkansas v. Oklahoma*. As a result, MPCA's construction of the regulation should be upheld.

The position of the majority below, on the other hand, is in direct conflict with the Supreme Court's ruling in *Arkansas v. Oklahoma*. Just as there was nothing in the Clean Water Act to support the Tenth Circuit's reading of a total ban on new discharges to impaired waters in *Arkansas v. Oklahoma*, there is nothing in the Clean Water Act to support the majority's reading of a prohibition against offsets in this case. As a result, like the Tenth Circuit, the majority below in this case should be reversed.

Moreover, the position of the majority below strips MPCA of the broad authority that the Supreme Court has ruled the Clean Water Act provides the agency. *Id.* The majority's position also is in direct conflict with the Supreme Court's reasoning because it frustrates the construction of new plants that would improve existing conditions. *Id.*

As noted above, the existing Maple Lake and Annandale wastewater treatment facilities are both over forty years old and nearing the end of their design lives. (R. 1384.) Moreover, since the facilities were constructed, both cities have experienced significant population growth. (R. 498.) Between 1980 and 2000, Annandale's population increased 27% and Maple Lake's population increased 44%. *Id.*

MPCA's decision would allow these two old facilities that are nearing the end of their design lives to be replaced by a single new joint facility while achieving a net reduction in phosphorus loading to the watershed of 51,300 pounds per year as a result of the offset from the Litchfield facility. (R. 1487.) The majority's ruling, however, prevents this. *Annandale & Maple Lake*, 702 N.W.2d at 776. Instead, the majority's ruling requires the people in these communities to continue sending their waste to facilities that were built for much smaller populations and that are approaching the end of their useful lives. (R. 498; 1384.) When these facilities begin to fail, as they inevitably must given that they cannot be replaced, any problems in the watershed can only get worse; not better. The majority's ruling below is thus in direct conflict with the U.S. Supreme Court's decision in *Arkansas v. Oklahoma*. As a result, it should be reversed.

B. MPCA's Interpretation Of 40 C.F.R. § 122.4(i) As Allowing Offsets Is Reasonable Because It Is Consistent With EPA's Interpretation.

The majority's decision that 40 C.F.R. § 122.4(i) prohibits offsets should also be reversed because it is in direct conflict with EPA's interpretation of the regulation.

1. The majority below erred in disregarding EPA's interpretation of 40 C.F.R. § 122.4(i) as set forth in EPA's Brief in *Sierra Club v. Clifford*.

EPA has explained its interpretation of 40 C.F.R. § 122.4(i) in litigation before a federal district court in Louisiana. In *Sierra Club v. Clifford*, No. 96-0527, 1999 WL 33494861 (E.D. La. 1999) (unpublished decision, A. 23-25), the court reviewed the question of whether new permits could issue under the Clean Water Act while TMDLs were still being developed for impaired waters. The court upheld EPA's determination "to continue to allow new permits to be issued on waters that do not meet water quality standards when the permitted discharge would not interfere with attainment or maintenance of water quality standards." *Id*. at p. 2.

Although the district court did not explain the reasoning behind its holding, EPA explained its interpretation of 40 C.F.R. § 122.4(i) in its brief to the court. Resp. Memo. in Supp. of Sched. of Preparation of TMDLs, *Sierra Club v. Clifford*, No. 96-0527 (E.D. La. 1999) (A. 26-92) (hereafter Clifford Brief).

EPA explained that according to its practice, there are three situations when it believes a new discharge can be permitted because the discharge will not cause or contribute to a violation of water quality standards under 40 C.F.R. 122.4(i). Clifford Brief, pp. 52-54 (A. 87-89). They are: (1) when the discharge does not contain the

pollutant of concern; (2) when the discharge is subject to an effluent limitation at or below a numeric water quality standard (or a numeric quantification of a narrative water quality standard); and (3) when the permittee can demonstrate that other pollutant reductions will offset the discharge such that there is a net decrease in the loading of the pollutant of concern. *Id.*

MPCA's interpretation of 40 C.F.R. § 122.4(i) as allowing the agency to conclude that a discharge does not "cause or contribute" to a water quality impairment is thus entirely consistent with EPA's interpretation of the regulation. As a result MPCA's interpretation is reasonable and should be upheld.

Ironically, one of the cases the majority below relied on to support its refusal to extend deference to MPCA's interpretation of law in this case suggests that if MPCA had interpreted the regulation as not allowing for offsets, MPCA would have committed legal error. *MCIMetro Access Transmission Serv., Inc. v. Bellsouth Telecomm., Inc.*, 352 F.3d 872 (reversing state agency's interpretation of federal regulation because state's interpretation conflicted with federal agency's interpretation).

Thus, the majority's ruling puts MPCA in a proverbial no-win situation. When MPCA interpreted the law as allowing offsets because that is how EPA interprets the law, the majority ruled that MPCA was not entitled to deference and reversed that interpretation. On the other hand, if MPCA had interpreted the law as prohibiting offsets, then according to the caselaw cited by the majority MPCA would be subject to reversal

because MPCA's interpretation would conflict with the federal agency's interpretation.[9] *Id*. The majority's ruling is based on contradictory reasoning and it should not stand.

The majority disregarded EPA's interpretation of 40 C.F.R. 122.4(i) as allowing offsets because EPA's interpretation was set forth in a brief in the course of litigation. *Annandale & Maple Lake*, 702 N.W.2d at 774, n. 4. The majority disregarded EPA's position; fearing that it "may constitute a rationalization after the fact." *Id*.

As Judge Schumacher points out in his dissent, the majority misconstrued the law regarding when a brief may be used to discern an agency's interpretation of a law that it administers. *Id*. at 777-78. The law does not, as the majority suggests categorically reject the use of agency litigation positions as interpretive guides. *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129-30 (D.C. Cir. 1997) (rejecting argument that court should not defer to EPA's interpretation of a regulation merely because agency offered its position in litigation). Instead, the law states that courts should only decline to defer to litigation positions when they "are wholly unsupported by regulations, rulings, or *administrative practice . . .[or] where the agency itself has articulated no position on the question*." *Bowen v. Georgetown Univ. Hosp.*, 109 S.Ct. 468, 473-74 (1988) (emphasis added).

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[9] In fact, the Court of Appeals has reversed MPCA when MPCA has deviated even slightly from EPA on Clean Water Act issues. *See Minn. Ctr. for Envtl. Advoc. v. MPCA*, 660 N.W.2d 427, 436 (Minn. Ct. App. 2003) (reversing MPCA for using word "minimize" in discharge permit where Clean Water Act used word "reduce").

As Judge Schumacher notes, EPA describes the use of offsets under 40 C.F.R. § 122.4(i) as its administrative practice in the Clifford Brief. *Annandale & Maple Lake*, 702 N.W.2d at 778; Clifford Brief, p. 52 (A. 87). Thus, under the Supreme Court's reasoning in *Bowen*, the majority below erred in refusing to consider the Clifford Brief. *Bowen*, 109 S.Ct. at 473-74.

Moreover, there is no reason to believe that EPA's position on offsets in the Clifford Brief is a post hoc rationalization of its conduct. *Auer v. Robbins*, 117 S.Ct. 905, 912 (1997) (fact that agency's legal interpretation comes to court in form of brief does not make it unworthy of deference where interpretation not a post hoc rationalization defending agency action). In the Clifford Brief, EPA was simply establishing that permits can be issued on a case-by-case basis while TMDLs were being developed. Clifford Brief, p. 50 (A. 85). EPA was not trying to defend any particular permitting decision that it had already made in reliance on offsets. (A. 26-92.) As a result, there was no reason to characterize EPA's position as a post hoc rationalization and thus no legitimate reason for the majority below to disregard the Clifford Brief as it did.

2. The fact that EPA chose not to require offsets does not support the majority's conclusion that offsets are prohibited; especially given that EPA has formally interpreted 40 C.F.R. § 122.4(i) as allowing offsets.

Having decided not to defer to MPCA's interpretation of 40 C.F.R. § 122.4(i) and having disregarded EPA's interpretation of the regulation, the majority below concluded that the regulation prohibits the use of offsets. *Annandale & Maple Lake*, 702 N.W.2d at 774. The majority below based its conclusion on the fact that EPA considered and

rejected adopting a system of offsets in 2000. *Id*. For the reasons discussed below, the majority erred in concluding that EPA's earlier action meant that offsets are prohibited under 40 C.F.R. § 122.4(i).

First, as Judge Schumacher pointed out, the 2000 proposal that EPA rejected:

> would have *required* new dischargers nationwide to offset new-pollutant loading 'by securing reductions in the loading of the same pollutant from an existing source(s) located on the same waterbody.' The EPA rejected the proposal as practically 'unworkable' both because of the likely impossibility of always finding a source in a given waterbody 'from which an offset might be obtained' and because a national-scale 'one size fits all' approach to regulation would 'undercut State primacy in determining what actions are necessary to attain water quality standards.'

Annandale & Maple Lake, 702 N.W.2d at 778 (citing *Revisions to the Water Quality Planning Regulation & NPDES Program*, 65 Fed. Reg. 43586, 43639-40 (EPA. July 13, 2000)) (emphasis in original).

The fact that EPA chose not to *require* offsets in every single case does not, as the majority below concluded, mean that offsets are *prohibited*. This is especially true in light of the explanation that EPA gave for rejecting the mandatory offset proposal. As noted above, EPA rejected mandatory offsets expressly because EPA did not want to impose a "one size fits all" approach that might infringe on a state's ability to decide for itself what actions are necessary to attain water quality standards. *Id*. In other words, EPA wanted to maintain the states' flexibility and discretion. The majority's conclusion that EPA's rejection of mandatory offsets somehow means that MPCA was precluded from utilizing offsets is thus inconsistent with EPA's own position on the subject.

Second, since rejecting the mandatory offset program, EPA has issued an official agency policy document supporting offsets in situations such as this one. U.S. EPA Office of Water Final Water Quality Trading Policy (Jan. 13, 2003) (A. 93-103).[10] In its official Water Quality Trading Policy, EPA expresses support for trading because it "allows one source to meet its regulatory obligations by using pollutant reductions created by another source that has lower pollution control costs." (A. 93.) EPA specifically "supports trading that involves nutrients (eg. total phosphorus and total nitrogen) or sediment loads." (A. 96.) In its description of when trading may occur, EPA further states that:

> EPA Supports pre-TMDL trading in impaired waters to achieve progress towards or the attainment of water quality standards. EPA believes this may be accomplished by individual trades that achieve a net reduction of the pollutant traded or by watershed-scale trading programs that reduce loadings to a specific cap supported by baseline information on pollutant sources and loadings.

Id. at p. 5 (A. 97.)

EPA's policy clearly demonstrates that the majority below erred in inferring that EPA's rejection of mandatory offsets means that offsets are prohibited. On the contrary, EPA clearly supports offsets in cases such as this one. As noted above the offset in this case achieves a net reduction in phosphorus loading to the watershed of 51,300 pounds per year. (R. 1487.) MPCA's interpretation of 40 C.F.R. § 122.4(i) as allowing this type

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[10] Available at www.epa.gov/owow/watershed/trading/finalpolicy2003.html.

of offset is consistent with EPA's interpretation of the regulation. As a result, MPCA's interpretation is reasonable and it should be upheld.

Finally, since rejecting the mandatory offset program, EPA has formally interpreted 40 C.F.R. § 122.4(i) as allowing offsets. *In re Carlotta Copper Co.*, No. 00-23 & 02-06, 2004 WL 3214473 (Enviro. App. Bd. Sep. 30, 2004) (A. 104-200) *rev. pending Friends of Pinto Creek v. EPA*, No. 05-70785 (9th Cir. Feb. 16, 2005).

In *Carlotta Copper*, EPA issued a discharge permit to a new source that would discharge copper to Pinto Creek, which was impaired for copper. (A. 104-07.) EPA's permit required the permittee to offset its new discharge of copper by remediating an old mining site on the same creek. The reduction in copper loading from the remediation of the old site would exceed the increased loading from the new discharge. *Id*. As a result, EPA concluded that the new discharge would not "cause or contribute" to the copper impairment under 40 C.F.R. § 122.4(i). An environmental group challenged the permit and the Environmental Appeals Board denied the challenge. *Id*.

Among other things, the environmental group claimed that despite the offset, the discharge would violate 40 C.F.R. § 122.4(i). In rejecting the environmental group's argument, the Environmental Appeals Board said:

> The Board declines to endorse [the environmental group's] interpretation because to do so would perpetrate the very outcome the Supreme Court in *Arkansas v. Oklahoma* . . . sought to avoid (adoption of a rigid approach that might frustrate the construction of new facilities that might improve existing conditions).

Id. (A. 107.)

The Environmental Appeals Board went on to find that there was no clear error in EPA's conclusion that the discharge would not "cause or contribute" to a violation of water quality standards because the offset would create a net reduction in the amount of pollution entering the creek. *Id*.

In confirming that 40 C.F.R. § 122.4(i) allows a permitting authority to conclude that a discharge does not "cause or contribute" to a violation of water quality standards based on an offset, the Environmental Appeals Board held that EPA had "adopted a flexible approach that more closely mirrors the objectives of the [Clean Water Act], as recognized by the Supreme Court in *Arkansas v. Oklahoma* . . . in that it promotes the improvement of existing conditions and reduction of water pollution." *Id.* (A. 158.)[11]

The *Carlotta Copper* decision clearly establishes that 40 C.F.R. § 122.4(i) allows a permitting authority to conclude that a discharge does not "cause or contribute" to a violation of water quality standard where the discharge is offset by reductions from other sources so that there is a net decrease in the amount of pollution entering the water. *Id*. The majority below erred in concluding that the regulation prohibits offsets.

As the Clifford Brief, the Water Quality Trading Policy, and the *Carlotta Copper* decision all demonstrate, MPCA's interpretation that 40 C.F.R. § 122.4(i) allows for offsets is reasonable. MPCA's conclusion that the discharge from the Annandale and

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[11] Ironically, in ruling that the regulation does allow for offsets the Environmental Appeals Board relied in part on the same Clifford Brief that the majority below refused to consider. (A. 158.)

Maple Lake joint facility will not "cause or contribute" to a violation of water quality standards in Lake Pepin is consistent with EPA's interpretation of 40 C.F.R. § 122.4(i). MPCA's decision should therefore be upheld.

CONCLUSION

The majority below committed two significant errors in this case.

First, the majority below ignored this Court's long-standing precedent on the deference issue. For over forty-five years, this Court has held that deference to an agency interpretation of law the agency administers is required based on the agency's expertise and familiarity with the subject matter of the law; regardless of whether the agency passed the law in question or not. Based on this precedent, MPCA's interpretation of 40 C.F.R. § 122.4(i) was entitled to deference. The refusal of the majority below to extend such deference is in direct conflict with this precedent and it should be reversed.

Second, the majority below erred in interpreting 40 C.F.R. § 122.4(i) as prohibiting offsets. As discussed above, the U.S. Supreme Court has rejected an interpretation of the Clean Water Act that prevents new facilities from being constructed that will help reduce the amount of pollution entering the water. The Supreme Court has also ruled that the Clean Water Act and its regulations must be interpreted to give the states broad flexibility to decide how best to alleviate water pollution in their borders. Moreover, EPA has made it abundantly clear that the regulation allows for the use of offsets. By interpreting the regulation to prohibit offsets, the majority below denied MPCA the flexibility the

Supreme Court has ruled the states must have and that EPA has ruled is provided for in the regulation.

For the reasons stated above, MPCA respectfully requests that this Court reverse the decision of the majority below.

Dated: _____

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