CASE NO. A04-2033

STATE OF MINNESOTA

IN SUPREME COURT

MINNESOTA POLLUTION CONTROL AGENCY, THE CITY OF ANNANDALE, AND THE CITY OF MAPLE LAKE,

Appellants,

vs.

MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY,

Respondent.

APPELLANTS' BRIEF

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STATEMENT OF THE CASE

In July 2003, Appellants the City of Annandale and the City of Maple Lake (collectively the "Cities") submitted to Appellant Minnesota Pollution Control Agency (the "MPCA") an application for a National Pollutant Discharge Elimination System/State Disposal System ("NPDES/SDS") permit, which related to the discharge of treated effluent from the Cities' proposed joint wastewater treatment facility (the "WTF") into an unnamed tributary of the North Fork of the Crow River. (Record "R." at 182-95, 1001). The proposed WTF would replace two aging wastewater treatment facilities operated separately by the Cities.[1] (R. at 553, 1001). The existing facilities will be abandoned upon completion of the WTF. (R. at 553, 1001).

Based on a condition imposed on the Cities by the Wright County Planning Commission, which condition required direct discharge of treated effluent from the WTF into the North Fork of the Crow River, the Cities, in March 2004, submitted to the MPCA a letter requesting a slight modification of their application for a NPDES/SDS permit. (R. at 341, 1002). In May 2004, the MPCA issued to the Cities a Public Notice of Intent to Issue a NPDES/SDS permit for the proposed WTF. (R. at 551-53). On September 28, 2004, and after a review of the Cities' application, commentary, and other relevant record information, the MPCA concluded that the requirements for issuance of a NPDES/SDS

[1] The City of Annandale's current discharge permit expired on March 31, 2004. (R. at 1480). The City of Maple Lake's permit expired on August 31, 2005. (R. at 1480). The new regional, jointly operated WTF is necessary "to continue to provide safe and reliable wastewater treatment now and into the future." (R. at 765). The two 40-year-old facilities are nearing the end of their useful lives. (R. at 1384).

permit had been met. (R. at 1005, 1479-88). The MPCA therefore authorized issuance of the discharge permit to the Cities. (R. at 1479, 1488).

Respondent Minnesota Center for Environmental Advocacy (the "MCEA") filed a Petition for Writ of Certiorari to the Minnesota Court of Appeals on October 27, 2004, seeking review of the MPCA's decision to grant a NPDES/SDS permit to the Cities. (Appellants' Appendix ("A.A.") at 10). The Clerk of Appellate Courts issued a Writ of Certiorari, and a certiorari appeal followed. (A.A. at 12).

On August 9, 2005, the Minnesota Court of Appeals filed a split opinion, reversing the MPCA's issuance of the discharge permit.[2] The Cities filed a Petition for Review in the Minnesota Supreme Court.[3] (A.A. at 24). The Minnesota Supreme Court issued an order granting review, and this appeal follows. (A.A. at 34).

STATEMENT OF FACTS

The Cities' application to the MPCA for a NPDES/SDS permit provides that the proposed WTF will have an average wet weather design capacity of 1.184 million gallons per day ("mgd").[4] (R. at 185). The combined flow for the Cities from May 2003,

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[2] *See In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for Discharge of Treated Wastewater and Request for Contested Case Hearing*, 702 N.W.2d 768 (Minn. Ct. App. 2005) (reversing MPCA's issuance of discharge permit in split opinion). Judge Robert H. Schumacher filed a dissenting opinion concluding that he "would give deference to the [MPCA's] interpretation of [40 C.F.R. § 122.4(i)] and affirm its decision to issue the permit." *Id.* at 779 (Schumacher, J., dissenting).

[3] The MPCA also filed a Petition for Review. (A.A. at 29).

[4] The design capacity is based on the Cities' projected flow in the year 2024. (R. at 643). An average wet weather flow refers to a facility's highest flows under wettest conditions; the WTF's average dry weather flow at capacity is 0.627 mgd. (R. at 643).

through April 2004, was only 0.345 mgd, which is less than 30 percent of the total capacity of the proposed WTF. (R. at 1480-81). The Cities' engineers estimated that, at start up, the average flow of the WTF will be 0.624 mgd or less. (R. at 643).

In March 2004, the MPCA submitted to the Cities a set of preliminary discharge effluent limitations regarding the proposed WTF. (R. at 389-92). The preliminary concentration limit[5] for total phosphorus was one milligram per liter (1 mg/L). (R. at 392). A mass limit[6] for phosphorus also remained under consideration. (R. at 391). The MPCA's draft of the Cities' NPDES/SDS permit, which was placed on public notice in May 2004, contained the same concentration limits as the MPCA's preliminary limits. (R. at 564). The draft permit also included requirements regarding the weekly monitoring of influent and effluent for total phosphorus. (R. at 551, 564-65).

As part of its environmental review of the WTF, the MPCA considered the need for an Environmental Impact Statement ("EIS"). (R. at 765). In particular, the MPCA examined whether effluent containing phosphorus would contribute to the degradation of Minnesota's waters. (R. at 772-73). Based on its review, the MPCA incorporated into the Cities' NPDES/SDS permit a 1 mg/L phosphorus limit,[7] which arose from an

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[5] A concentration limit for phosphorus refers to the mass (measured in milligrams) that is contained in one liter of treated effluent discharged by a facility.

[6] A mass limit for phosphorus refers to the total mass discharged annually by a facility.

[7] The MPCA also determined that a mass limit for phosphorus was unnecessary because the concentration limit, combined with the WTF's design capacity, "will accomplish the necessary phosphorus reductions and controls." (R. at 773).

application of the MPCA's Phosphorus Strategy.[8] (R. at 773). Such a limit would "ensure protection of the river's water quality standards and [was] intended to protect the uses of the receiving water." (R. at 772). The MPCA therefore concluded that effluent discharged by the proposed WTF would not adversely affect water quality in the North Fork of the Crow River or in other water resources. (R. at 773-74, 777, 780).

In July 2004, the MCEA submitted to the MPCA a letter claiming that the proposed NPDES/SDS permit for the Cities failed to comply with 40 C.F.R. § 122.4(i) as a new source or new discharger of phosphorus. (R. at 1068-69). The MCEA submitted a follow-up letter to the MPCA in August 2004, objecting to the issuance of the NPDES/SDS permit and raising concerns regarding proposed levels of phosphorus. (R. at 1071-74). After reviewing the comments received from the MCEA, the MPCA issued formal responses to the MCEA's alleged concerns. (R. at 1104-10).

The MPCA responded by stating that the proposed NPDES/SDS permit included an effluent-concentration limit of 1 mg/L for phosphorus. (R. at 1109). Based on the highest design flow at capacity, the WTF would discharge annually no more than 3,600 pounds of phosphorus in the year 2024. (R. at 1109). Maple Lake's current facility has a design flow of 0.461 mgd, which (at capacity) would result in the discharge of 1,403 pounds of phosphorus each year into the North Fork of the Crow River. (R. at 1481, 1487). Annandale's current facility, which discharges by spray irrigation, does not discharge phosphorus into the North Fork of the Crow River. (R. at 1480, 1487).

[8] For a discussion of the MPCA's Phosphorus Strategy, see *infra* Part II.C.1.

In examining the impact from the Cities' phosphorus discharge, the MPCA considered other facilities discharging into the North Fork of the Crow River and into the Lake Pepin watershed that will be assigned mandatory, enforceable concentration limits.[9] (R. at 1109). One such neighboring, upstream facility is located in the City of Litchfield, which operates under a compliance schedule and must achieve a phosphorus limit of 1 mg/L.[10] (R. at 1109). Implementation of the concentration limit will result in a reduction in Litchfield's total phosphorus discharge by more than 53,500 pounds per year. (R. at 1109). The MPCA therefore stated that implementation of new limits for existing facilities, including but not limited to Litchfield, will result in an aggregate reduction in the annual phosphorus load for the North Fork of the Crow River. (R. at 1109).

The MPCA further commented that a mass limit for phosphorus discharged by the WTF was unnecessary. (R. at 1109). If such a limit is deemed necessary after completion of a total maximum daily load ("TMDL") study for Lake Pepin,[11] the MPCA noted that it expressly reserved the right to adopt pollution-control rules, standards, or orders that are more stringent than those in existence and to insert such rules, standards, or orders into the conditions of the Cities' discharge permit. (R. at 1110).

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[9] Facilities currently without concentration limits for phosphorus in their existing permits will receive new limits upon expansion or application for reissuance. (R. at 1109).

[10] From August 2001, to December 2003, Litchfield's concentration level for its phosphorus discharge was 10.5 mg/L. (R. at 1487).

[11] A TMDL for Lake Pepin is in progress and is scheduled for completion in 2008. (R. at 1110). A TMDL for the Crow River is scheduled for 2006 to 2012. (R. at 1105).

Based on the MPCA's staff recommendation regarding issuance of the NPDES/SDS permit to the Cities, and based on its review of the Cities' application, commentary, responses, and other information contained in the record, the MPCA, on September 28, 2004, made the following findings of fact:

- The Cities' NPDES/SDS permit will meet Minnesota Rules regarding effluent limits (R. at 1481);
- The Cities' operation of the WTF will comply with all applicable state and federal pollution-control statutes and rules administered by the MPCA (R. at 1482);
- The Cities' proposed increase in phosphorus loading (2,197 pounds per year) is significantly less than the reduction in loading from Litchfield (53,544 pounds per year), which reduction began September 1, 2004 (R. at 1487);
- Because of the net reduction in phosphorus loading in the watershed, the discharge of phosphorus from the WTF will not contribute to the violation of water-quality standards in Lake Pepin (R. at 1487); and
- Final effluent limits in the Cities' NPDES/SDS permit will not lead to violations of water-quality standards nor will the limits contribute to the impairments in the North Fork of the Crow River or Lake Pepin (R. at 1487).

The MPCA therefore concluded that the requirements of Minn. R. 7001.0140 for issuance of the NPDES/SDS permit had been met and authorized issuance of the discharge permit to the Cities. (R. at 1488).

In addition to the terms, conditions, and provisions discussed above, the five-year NPDES/SDS permit, which expires on August 31, 2009, also contained an express requirement that the Cities must, 180 days before expiration, submit to the MPCA a Phosphorus Management Plan that includes:

- A summary of recent phosphorus concentrations and mass loadings for influent and effluent;
- The identification of high sources of phosphorus and the development of a plan to evaluate specific reduction opportunities;
- An evaluation of facility operations to determine the procedures that result in phosphorus removal to the fullest practicable extent; and
- Information and data related to potential expansions or modifications, population growth, and phosphorus removal plans that will help to evaluate potential effects on receiving waters.

(R. at 1515). The permit further states that it may be modified, suspended, or revoked based on the establishment of a new or amended pollution standard, limitation, or effluent guideline applicable to the WTF. (R. at 1525). Finally, the permit provides that issuance does not prevent the MPCA's adoption and enforcement of pollution control rules, standards, or orders that are more stringent than those now in existence. (R. at 1526).

STATEMENT OF THE ISSUES

1. Whether appellate courts must defer to an agency decision-maker in the interpretation of a federal regulation that the state agency is charged with administering and enforcing?

Decision: The Minnesota Court of Appeals concluded that the MPCA is not entitled to any deference in interpreting 40 C.F.R. § 122.4(i) (2004), which is a federal regulation the state agency is charged with administering and enforcing.

Apposite authority: *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) (concluding that courts, based on separation-of-powers doctrine, extend deference to agency decision-makers in interpreting statutes

that agency is charged with administering and enforcing); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977) (stating that presumption of correctness and deference should be shown by courts to agencies' expertise and special knowledge in field of technical training, education, and experience).

2. Whether the MPCA, which is charged with regulating new sources and dischargers, may apply a system of trading/offsets in administering and enforcing section 122.4(i)?

Decision: The Minnesota Court of Appeals concluded that the MPCA erred as a matter of law by issuing a NPDES/SDS permit to the Cities where the phosphorus discharge, at a 20-year capacity, was immediately offset by a neighboring discharger's contemporaneous reduction in phosphorus that is more than 24 times greater than the Cities' maximum loading into the North Fork of the Crow River.

Apposite authority: *Arkansas v. Oklahoma*, 503 U.S. 91, 107-08, 112 S. Ct. 1046, 1057-58 (1992) (rejecting argument that Clean Water Act ("CWA") mandates categorical ban on new dischargers of effluent into impaired waters, stating that such ban might frustrate construction of new wastewater treatment plants that would improve existing water conditions, and acknowledging states' broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution); *In re Carlota Copper Co.*, 2004 WL 3214473 (Envtl. App. Bd. Sept. 30, 2004) (concluding that offset analysis was consistent with reasonable interpretation of federal law and stating that, based on net reduction of pollutant loading discharged into impaired water, new source did not cause or contribute to violation of water-quality standards) (A.A. at 64-71, 78-85).

ARGUMENT

I. Standard of Review

The decisions of administrative agencies, including decisions by the MPCA,

> enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience.

Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 824 (Minn. 1977). The MPCA has technical expertise regarding water, air, and land pollution. *See* Minn. Stat. § 116.01 (2004). And on appeal from an agency's decision, courts may reverse or modify only if

> the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:
>
> (a) in violation of constitutional provisions; or
> (b) in excess of the statutory authority or jurisdiction of the agency; or
> (c) made upon unlawful procedure; or
> (d) affected by other error of law; or
> (e) unsupported by substantial evidence in view of the entire record as submitted; or
> (f) arbitrary and capricious.

Minn. Stat. § 14.69 (2004); *see also Minnesota Ctr. for Envtl. Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn. 2002) (stating that Administrative Procedures Act applies in matters other than review of contested cases).

Reviewing courts generally apply a substantial-evidence test in examining an administrative agency's findings of fact. *In re Max Schwartzman & Sons, Inc.*, 670 N.W.2d 746, 752 (Minn. Ct. App. 2003). Substantial evidence includes:

> (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.

Minnesota Ctr. for Envtl. Advocacy, 644 N.W.2d at 464 (citation omitted). In addition, appellate courts defer to an agency's fact-finding and will affirm an agency's decision, "so long as it is lawful and reasonable." *In re City of Owatonna's NPDES/SDS Proposed Permit Reissuance for the Discharge of Treated Wastewater*, 672 N.W.2d 921, 926 (Minn. Ct. App. 2004) (stating that court will affirm decision of agency if it engaged in reasoned decision-making, even though court may have reached different conclusion as finder-of-fact) (citations omitted); *see also In re Northern States Power Co. for Review of Its 1999 All Source Request for Proposals*, 676 N.W.2d 326, 331 (Minn. Ct. App. 2004) (warning that court may not substitute its judgment for that of administrative agency when finding is properly supported by evidence).

On appeal, courts may also review an administrative agency's decision to determine whether the conclusions are arbitrary or capricious. *Schwartzman*, 670 N.W.2d at 753. An agency's decision is arbitrary and capricious if the decision represents the agency's will rather than its judgment. *Owatonna*, 672 N.W.2d at 926. In addition, a decision is deemed arbitrary and capricious

> if the agency relied on factors which the legislature had not intended it to consider, if it entirely failed to consider an important aspect of the problem, if it offered an explanation for the decision that runs counter to the evidence, or if the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Schwartzman, 670 N.W.2d at 753 (citation omitted).

II. Discussion

A. Courts Must Afford Deference to MPCA's Interpretation of Section 122.4(i) Because State Agency Is Charged with Administering and Enforcing Federal Regulation

The MCEA argues that 40 C.F.R. § 122.4(i) prohibits issuance of a NPDES/SDS permit for the Cities' WTF. Section 122.4.(i) states that no permit may be issued

> [t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by sections 301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:
>
> (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
>
> (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

Id. Therefore, the fundamental question presented for consideration and determination by the MPCA was whether the discharge of phosphorus from the Cities' proposed WTF will cause or contribute to the violation of water-quality standards.

The MPCA expressly found that, based on Litchfield's contemporaneous phosphorus reductions, effluent from the Cities' WTF will not cause or contribute to the violation of water-quality standards or to impairments in the North Fork of the Crow River or Lake Pepin. (R. at 1487). But on appeal, the Minnesota Court of Appeals stated

that "so long as some level of discharge may be causally attributed to the impairment of Section 303(d) waters, a permit shall not be issued." *In re Cities of Annandale and Maple Lake*, 702 N.W.2d at 775. The court of appeals also stated that, "notwithstanding the reduction in phosphorus resulting from other sources, the waters at issue remain impaired" and that phosphorus from the WTF "will contribute to impaired nutrient levels in Lake Pepin." *Id.* (holding that MPCA erred as matter of law by issuing permit).

In reaching its decision, the Minnesota Court of Appeals reasoned that interpretation of 40 C.F.R. § 122.4(i) is a question of law that must be reviewed de novo and that deference to the MPCA's interpretation was not required. *Id.* at 771. The court of appeals also determined that section 122.4(i) was unambiguous and that, in any event, the United States Environmental Protection Agency (the "EPA") has not interpreted the regulation in a manner that would incorporate a system of offsets.[12] *Id.* at 772, 774-75.

As discussed above, the decisions of the MPCA enjoy a presumption of correctness. *See Reserve Mining Co.*, 256 N.W.2d at 824. In addition, Minnesota courts defer to a state agency's interpretation of its own regulations. *See, e.g., Minnesota Ctr. for Envtl. Advocacy*, 644 N.W.2d at 465. And courts, based on the separation-of-powers doctrine, extend judicial deference "to an agency decision-maker in the interpretation of statutes that the agency is charged with administering and enforcing." *See, e.g., In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278

[12] The EPA has provided guidance regarding trading/offsets. *See infra* Part II.B.2-5. Furthermore, because section 122.4(i) does not identify factors for state agencies to consider in applying the term "cause or contribute," the regulation is ambiguous and open to reasonable interpretation by the MPCA, relying on its special training, education, and experience, including but not limited to its technical expertise regarding water pollution.

(Minn. 2001) (citing *Krumm v. R.A. Nadeau Co.*, 276 N.W.2d 641, 644 (Minn. 1979)); *Schwartzman*, 670 N.W.2d at 754.

The stated objective of the CWA is to "restore and maintain the chemical, physical and biological integrity of the nation's waters." 33 U.S.C. § 1251(a) (2004). But Congress has also expressed its intended policy

> to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution and to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.

33 U.S.C. § 1251(b). Congress has therefore delegated to each state the authority to administer permit programs for discharges into navigable waters within its jurisdiction. 33 U.S.C. § 1342(b) (2004); *see also* 39 Fed. Reg. 26,061 (1974) (granting Minnesota's request for approval of MPCA's authority to administer NPDES permit program).

Under state law, the MPCA is given and charged with the powers and duties to

> administer and enforce all laws related to the pollution of the waters of the state; [and]
>
> * * *
>
> issue * * * permits * * * in order to prevent, control or abate water pollution, or for the installation or operation of disposal systems.

Minn. Stat. § 115.03, subd. 1(a), (e) (2004). In addition, the MPCA has authority to perform any and all acts related to the establishment of conditions for discharge permits. *Id.*, subd. 5; *see also* Minn. R. 7001.0140, subpt. 1 (2004) (stating that MPCA shall issue permit upon determination that permittee will comply with state and federal pollution-

control statutes and rules administered by agency). Furthermore, 40 C.F.R. § 123.25(a)(1) (2004), provides that state permitting agencies, such as the MPCA, must have authority to implement federal regulations, including section 122.4(i). *Id.*

Because both state and federal law confer upon the MPCA the authority to administer and enforce 40 C.F.R. § 122.4(i), courts must defer to the MPCA's interpretation.[13] And a thorough review of the record and all relevant authority demonstrate that the MPCA's administration and enforcement of section 122.4(i) was consistent with federal law and was otherwise reasonable. *See In re University of Minn.*, 566 N.W.2d 98, 103 (Minn. Ct. App. 1997) (stating that when agency reasonably interprets statute, it is role of legislature or supreme court, not court of appeals, to overrule such interpretation). The Cities therefore maintain that the Minnesota Court of Appeals erred by refusing to defer to the MPCA's interpretation of the federal regulation and by reversing the MPCA's decision regarding issuance of the discharge permit. *See Reserve Mining Co.*, 256 N.W.2d at 824 (recognizing need for exercising judicial restraint and for restricting judicial functions to avoid substituting judgment for agency).

B. Federal Caselaw and Regulatory Authority Expressly Permit Use of Trading/Offsets Under Section 122.4(i)

In its opinion, the Minnesota Court of Appeals stated that section 122.4(i) "is not intended to incorporate a system of offsets" and that there is no "indication that a

[13] In *Hy-Vee Food Stores, Inc. v. Minnesota Dept. of Health*, No. A04-548, 2004 WL 2340189 (Minn. Ct. App. Oct. 29, 2004), *aff'd* 705 N.W.2d 181 (Minn. 2005), the Minnesota Court of Appeals specifically rejected the assertion that a state agency's interpretation of a federal rule was not entitled to deference. *Id.* at *1 (citing *Blue Cross & Blue Shield*, 624 N.W.2d at 278) (A.A. at 135-36).

discretionary system of offsets is authorized." *In re Cities of Annandale and Maple Lake*, 702 N.W.2d at 774-75. But contrary to such assertions, a close review of federal cases, commentary, and other authority demonstrates that, with respect to issuance of wastewater discharge permits, application of trading and offsets is expressly allowed.

1. *Arkansas v. Oklahoma*

The United States Supreme Court, in *Arkansas v. Oklahoma*, 503 U.S. 91, 112 S. Ct. 1046 (1992), reversed a decision by the United States Court of Appeals for the Tenth Circuit, which decision improperly construed the CWA "to prohibit any discharge of effluent that would reach waters already in violation of existing water quality standards." *Id.* at 107, 112 S. Ct. at 1057; *see also Arkansas v. Oklahoma*, 908 F.2d 595, 616 (10th Cir. 1990) (holding that CWA prohibits granting discharge permit where applicable water-quality standards have already been violated). The Tenth Circuit, in interpreting Oklahoma's water-quality standards, had ruled that

> where a proposed source would discharge effluents that would contribute to conditions currently constituting a violation of applicable water quality standards, such [a] proposed source may not be permitted.

908 F.2d at 620. Because the receiving waters were "already degraded," the court of appeals barred the discharge of effluent from the sewage treatment plant. *Id.* at 621-29.

The Supreme Court rejected the court of appeals' ruling that the CWA mandates a categorical ban on new dischargers of effluent into impaired waters, stating that such a ban "might frustrate the construction of new plants that would improve existing conditions." 503 U.S. at 108, 112 S. Ct. at 1058. The Supreme Court's decision also

acknowledged states' "broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution." *Id.* (citation omitted).

Here, despite the majority's statements to the contrary, the decision of the Minnesota Court of Appeals – based on an unreasonably broad reading of the phrase "cause or contribute"[14] – "effectively preclude[s] issuance of a permit prior to completion of a TMDL" study. *In re Cities of Annandale and Maple Lake*, 702 N.W.2d at 779-80 (stating that decision frustrates purposes of CWA and prevents MPCA from exercising its authority to take actions necessary to ameliorate water quality) (Schumacher, J., dissenting). As a result, the decision creates a "categorical ban" prohibited by the United States Supreme Court. *See Arkansas*, 503 U.S. at 108, 112 S. Ct. at 1058. The decision also invalidates the MPCA's long-range, area-wide program of offsets and delays the construction of new facilities that would improve existing water conditions. *See id.*

2. *Sierra Club v. Clifford*

The EPA, in *Sierra Club v. Clifford*, No. Civ.A. 96-0527, 1999 WL 33494861 (E.D. La. Oct. 1, 1999), argued that 40 C.F.R. § 122.4(i) allowed the issuance of new permits regarding discharges into impaired waters where the proposed discharge will not cause or contribute to the violation of water-quality standards. Brief for Defendant EPA at 49-50, *Sierra Club*, 1999 WL 33494861 (stating that determination regarding permit issuance is based on EPA's interpretation of its own regulation and is made on case-by-case basis) (A.A. at 128-29). In its memorandum to the district court, the EPA referenced

[14] The majority's "plain reading" of the phrase concluded that, "so long as some level of discharge may be causally attributed to the impairment of Section 303(d) waters, a permit shall not be issued." *In re Cities of Annandale and Maple Lake*, 702 N.W.2d at 775.

three situations in which permits may be issued to new sources or new dischargers proposing the discharge of effluent into impaired waters. *Id.* at 52 (A.A. at 131).

First, the EPA interprets section 122.4(i) to allow the issuance of permits for discharges that do not contain the pollutant causing the impairment. *Id.* Next, the EPA allows permits containing effluent limitations that are at or below either numeric water-quality criteria or a quantification of a narrative water-quality criterion. *Id.* at 53 (A.A. at 132). Finally, the EPA allows the issuance of permits "where it is demonstrated that other pollutant source reductions * * * will offset the discharge in a manner consistent with water quality standards." *Id.*

In analyzing the third of the three situations, the EPA concluded that

> [t]he ultimate result of this type of "offset" or "trade" may be a net decrease in the loadings of the pollutant of concern in the CWA § 303(d) listed water, and, therefore, EPA, by practice, has considered a discharge which has been offset in accordance with permit requirements not to "cause or contribute to a violation of water quality standards."

Id. The EPA further stressed that its discussion of the three situations was not intended to be an exhaustive list of the options regarding issuance of permits for discharges into impaired waters prior to completion of a TMDL study. *Id.* at 54 (reiterating that determination whether new discharge will cause or contribute to violation of water-quality standards can and should be made on case-by-case basis) (A.A. at 133). The district court ultimately approved the EPA's determination to allow the issuance of new permits when the discharge did not interfere with the attainment or maintenance of water-quality standards. *Sierra Club*, 1999 WL 33494861, at 2 (A.A. at 120).

Here, the court of appeals summarily rejected the MPCA's analysis that was based, in part, on a contemporaneous pollutant-source reduction by the City of Litchfield that more than offset the Cities' proposed increase in phosphorus discharged by the WTF, which reduction and corresponding offset would have ultimately resulted in a net decrease of the phosphorus loading in the North Fork of the Crow River. Thus, the court improperly ignored the EPA's guidance regarding section 122.4(i).

3. Summary of Trading and Offset Programs

In November 1999, Environomics, an organization that provides consulting services in environmental regulatory analysis, prepared for the EPA's Office of Water a summary of 37 effluent trading and offset activities throughout the United States. Environomics, *A Summary of U.S. Effluent Trading and Offset Projects*, at i (Nov. 1999) <http://www.epa.gov/owow/watershed/trading/traenvrn.pdf> (A.A. at 151). The summary, which includes trading and offset programs related to new or expanding dischargers, contains descriptions of both traditional and non-traditional trading programs. *Id.* (describing programs involving facilities affecting common body of water as well as studies of potential programs and cooperative efforts aimed at reducing pollution). The "common denominator" for the programs is "flexibility in the allocation of pollution control responsibilities." *Id.*

Examples of various trading/offset programs are as follows:

- Tampa Bay Cooperative Nitrogen Management – a program in which participants work cooperatively to meet shared goal of pollution reduction, through efforts similar to trading, but where no trades actually take place;

- Lower Boise River Effluent Trading Demonstration Project – a watershed-wide trading program developed by the Idaho Department of Environmental Quality and the EPA that includes upstream trading by treatment facilities intended to achieve actual downstream phosphorus reductions;

- Town of Acton Municipal Treatment Plant – a program allowing a new point-source discharge into an impaired river based on reductions from other sources that will offset all of the additional phosphorus discharged by the treatment facility; and

- Michigan Water Quality Trading Rule Development – a program developed by the Michigan Department of Environmental Quality aimed at improving water quality through trading, including "open trading" in situations where sources face water-quality-based effluent limitations but where overall caps and allocations, based on a TMDL study, have not been established.

Id. at 11, 13, 16, 20 (A.A. at 167, 169, 172, 176). The offset implemented by the MPCA for the North Fork of the Crow River and for the Cities is, undoubtedly, a cooperative effort for facilities affecting a common body of water that allows flexibility in allocating pollution control responsibilities among a number of municipal dischargers.

4. EPA's Water Quality Trading Policy

The EPA, in an effort to find solutions to complex water-quality problems, refers to trading as "an approach that offers greater efficiency in achieving water quality goals on a watershed basis." United States Environmental Protection Agency, Office of Water, *Final Water Quality Trading Policy*, at 1 (Jan. 13, 2003) <http://www.epa.gov.owow/watershed/trading/finalpolicy2003.html> (A.A. at 140). The EPA's Final Water Quality Trading Policy, which was formally adopted in January 2003, expressly supports the implementation of water-quality trading by states where such trading:

> Achieves early reductions and progress towards water quality standards pending development of TMDLs for impaired waters [and]
>
> Offsets new or increased discharges resulting from growth in order to maintain levels of water quality that support all designated uses.

Id. at 3 (A.A. at 142). The formal, written policy also provides EPA support for pre-TMDL trading to achieve progress towards or the attainment of water-quality standards in impaired waters, which progress "may be accomplished by individual trades that achieve a net reduction of the pollutant traded." *Id.* at 4 (A.A. at 143).

In this instance, the offset described in the MPCA's written findings is consistent with the EPA's written trading policy. Specifically, the MPCA's decision will

- achieve a net reduction in phosphorus pending completion of TMDL studies for the North Fork of the Crow River and Lake Pepin;
- achieve progress toward the attainment of water-quality standards in such waters; and
- offset new or increased phosphorus discharges resulting from the Cities' growth in order to maintain levels of water quality.

Therefore, the MPCA's offset analysis is entitled to deference and should have been affirmed on appeal. *See supra* Part II.A.

5. *In re Carlota Copper Co.*

In September 2004, the EPA's Environmental Appeals Board (the "EAB") reviewed a petition challenging the issuance of a permit by the EPA's Region IX (the "Region") to a new source discharging into an impaired water. *In re Carlota Copper Co.*, 2004 WL 3214473 (Envtl. App. Bd. Sept. 30, 2004) (A.A. at 36). The petitioners

alleged, among other things, that issuance of a permit based on offsets violated state antidegradation policies and 40 C.F.R. § 122.4(i). *Id.* (A.A. at 64-71, 78-85). The EAB rejected the petitioners' contentions and concluded that the Region's offset analysis was consistent with a reasonable interpretation of both state and federal law. *Id.* Specifically, the EAB commented that, in examining the prohibition against issuing permits to new sources that cause or contribute to the violation of water-quality standards, the Region's use of offsets "is consistent with prior Agency interpretation" of section 122.4(i). *Id.* (stating that, based on net reduction of pollutant loading discharged into impaired water, new source did not cause or contribute to violation) (A.A. at 82-83).

The MPCA's analysis and reasoning regarding the Cities' proposed WTF and the discharge of treated effluent into the North Fork of the Crow River would have resulted in net reductions of total phosphorus exceeding 50,000 pounds per year. Because federal law expressly permits the use of trading/offsets by state agencies charged with administering and enforcing section 122.4(i), the Minnesota Court of Appeals erred by failing to defer to the MPCA's interpretation and by concluding that issuance of a discharge permit to the Cities will contribute to the violation of water-quality standards.

C. MPCA's Analysis and Application of Its Policies Demonstrate Reasonableness of Decision

Even in the absence of federal law supporting the use of offsets, a thorough review of the MPCA's analysis and the application of its administrative policies demonstrate that, based on the principle of affording deference to the decisions of state agencies, the

MPCA reasonably concluded that the Cities' proposed WTF would not cause or contribute to the violation of water-quality standards.

1. MPCA's Phosphorus Strategy

In 1996, the MPCA developed a comprehensive strategy related to phosphorus reduction and control that included the following action steps:

1. Develop education/outreach information on environmental impacts of phosphorus.
2. Co-sponsor basin-wide phosphorus forums.
3. Use basin management as the main policy context for implementing the phosphorus strategy.
4. Broadly implement Minnesota's point-source phosphorus controls.
5. Broadly promote lake-protection activities.
6. Address phosphorus impacts on rivers.
7. Modify water-quality standards if necessary.

Minnesota Pollution Control Agency, *MPCA Phosphorus Strategy* (visited Nov. 17, 2005) <http://www.pca.state.mn.us/water/phosphorus.html> (A.A. at 204). The purpose of the strategy is to develop a consistent framework for applying phosphorus controls in permits. Minnesota Pollution Control Agency, *Strategy for Addressing Phosphorus in National Pollutant Discharge Elimination System (NPDES) Permitting*, at 1 (Mar. 2000) <http://www.pca.state.mn.us/water/pubs/phos-npdesstrategy.pdf> (A.A. at 237).

As part of the strategy, the MPCA has created a "decision tree"[15] that outlines variables to be considered by MPCA staff in reviewing discharge permits. *Id.* (stating that decision tree provides framework under which decisions are to be made). Relevant decisions include whether to apply a phosphorus limit or whether to require a phosphorus management plan. *Id.* Application of the decision tree by the MPCA assumes that decisions regarding phosphorus relate to permitting issues, including reissuance and permits for new or expanded wastewater treatment facilities. *Id.* (A.A. at 237-38). The MPCA also considers basin/watershed management approaches in addressing phosphorus issues. *Id.* (A.A. at 238).

In determining the 1 mg/L concentration limit for phosphorus discharged by the Cities' proposed WTF, the MPCA applied its Phosphorus Strategy. (R. at 773). But the MPCA has also stated that

> [d]ecisions on permit limits, whether they should be caps or concentrations, are site and water-resource specific decisions that cannot be reflected in a decision tree.

Minnesota Pollution Control Agency, *Summary of Comments and Responses: Strategy for Addressing Phosphorus in National Pollutant Discharge Elimination System (NPDES) Permits*, at 6 (Jan. 2000) <http://www.pca.state.mn.us/water/pubs/phos-response.pdf> (stating that decisions are made by MPCA scientists after reviewing data and applying their best professional judgment) (A.A. at 244). The MPCA's application of its Phosphorus Strategy and the consideration of other factors on a case-by-case basis

[15] The decision tree does not identify, and was not intended to identify, particular phosphorus limits. *Id.* For a copy of the MPCA's decision tree, see A.A. at 207.

exemplify the rationale for affording deference by courts with respect to administrative decisions that enjoy a presumption of correctness because of a state agency's expertise, special knowledge, technical training, education, and experience.

2. Other Safeguards and Protections

In addition to application of its Phosphorus Strategy, the MPCA considered and implemented other safeguards and protections before authorizing the issuance of a NPDES/SDS permit to the Cities.

a. *De Minimus* Discharges

The MPCA has determined that a publicly owned treatment works ("POTW") with a phosphorus load of 1,800 pounds per year or less will generally be considered as a *de minimus* facility for purposes of considering what, if any, phosphorus controls should be required. Minnesota Pollution Control Agency, *MPCA Phosphorus Strategy: NPDES Permits*, at 3 (Mar. 2000) <http://www.pca.state.mn.us/water/pubs/phos-npdes.pdf> (A.A. at 209). The determination of a *de minimus* threshold was based on the MPCA's general experience with small discharges that do not have a measurable impact on the environment.[16] *Id.* The MPCA also based its determination on a "quantitative basin-scale exercise to evaluate the relative (cumulative) impact of phosphorus loading * * * in three basins: Upper Mississippi, Minnesota, and St. Croix." *Id.* at 5 (A.A. at 211).

[16] The Wisconsin Department of Natural Resources describes a *de minimus* quantity as "an amount too small to have a demonstrable effect" in the implementation of Wisconsin's phosphorus effluent standards and limitations. *Id.* at 5 (A.A. at 211). For POTWs, the *de minimus* threshold is 1,800 pounds per year. *Id.* For facilities above the mass-loading threshold, Wisconsin generally applies a concentration limit of 1 mg/L. *Id.*

At capacity, and based on the projected average wet weather design flow of 1.184 mgd, the Cities' WTF will discharge annually no more than 3,600 pounds of phosphorus in the year 2024. (R. at 1109). But at start up, and based on a projected average flow of 0.624 mgd, the WTF will discharge less than 1,900 pounds of phosphorus.[17] (R. at 643).

At capacity, the City of Maple Lake's existing treatment facility would discharge into the North Fork of the Crow River and Lake Pepin approximately 1,400 pounds of phosphorus per year. (R. at 1487). The Cities' proposed WTF, at start up, would discharge approximately 500 pounds of additional phosphorus per year into the waters at issue. Maple Lake's current discharge (1,400 pounds) and the Cities' net increase at start up (500 pounds) are both below the MPCA's *de minimus* threshold. In addition, the initial discharge (1,900 pounds) from the Cities' proposed WTF would exceed the *de minimus* threshold by less than six percent.

b. Phosphorus Management Plans

The MPCA now recommends or requires phosphorus management plans for all new or reissued discharge permits. Minnesota Pollution Control Agency, *Phosphorus Management Planning Guidance*, at 1 (Mar. 2000) <http://www.pca.state.mn.us/water/pubs/phos-mgtplan.pdf> (A.A. at 231). Such plans should (1) establish a phosphorus goal; (2) evaluate phosphorus reduction alternatives; and (3) develop a plan for achieving the goals. *Id.* at 2 (A.A. at 232). The MPCA uses the plans to determine whether POTWs contribute substantial loads of phosphorus that

[17] The start-up mass loading for phosphorus is calculated using the following mathematical formula for conversion: 0.624 mgd x 3.79 L/gal. x 1 mg/L x 2.2 pounds/kg x 365 days/year, which equals 1,899.06 pounds of phosphorus per year.

could be reduced through pollution prevention or improved treatment methods. *Id.* at 1 (A.A. at 231). The Cities' NPDES/SDS permit requires preparation and submission of a phosphorus management plan at least 180 days before expiration of the renewable, five-year discharge permit.[18] (R. at 1515).

c. Monitoring and Sampling Requirements

Because of increased concerns regarding phosphorus in receiving waters, the MPCA recognized a need for additional information from dischargers. *Id.* at 6 (A.A. at 236). The MPCA has therefore included monitoring and sampling requirements in all new or reissued discharge permits. *Id.* Operators of the Cities' proposed WTF, which is a Class B mechanical facility, must monitor and provide samples of phosphorus levels for influent and effluent on a weekly basis. (R. at 1494, 1499-1500). For effluent, the information monitored includes both mass loading and concentration rates. (R. at 1499).

d. Permit Modifications

The Cities' discharge permit expressly provides that its terms may be modified as a result of the establishment of a new or amended pollution standard, limitation, or effluent guideline applicable to the proposed WTF or the permitted activity. (R. at 1525). In addition, the permit states that issuance does not prevent the MPCA from adopting and enforcing pollution control rules, standards, or orders that are more stringent than those now in existence. (R. at 1526). Thus, the MPCA – whether triggered by completion of a TMDL study, application for reissuance of the discharge permit, or establishment or

[18] For facilities with phosphorus concentration limits of 1 mg/L or less, the MPCA recommends maintained or improved performance. *Id.* at 4 (A.A. at 234).

adoption of a new or amended standard – maintains administrative and enforcement authority with respect to the regulation of phosphorus discharged by the WTF.

The above-referenced safeguards and protections, considered in their entirety, demonstrate the reasonableness of the MPCA's determination regarding issuance of the discharge permit and further illustrate the legal and factual bases for affording judicial deference to the decisions of state agencies made in the areas of their technical expertise. Ultimately, such safeguards and protections obviate second-guessing by courts.

CONCLUSION

For all of the above-stated reasons, Appellants the City of Annandale and the City of Maple Lake respectfully request that the Minnesota Supreme Court reverse the decision by the Minnesota Court of Appeals and reinstate the decision by Appellant Minnesota Pollution Control Agency, which authorized the issuance of a NPDES/SDS permit to the Cities for the discharge of treated effluent from the proposed WTF into the North Fork of the Crow River.

Dated this 28th day of November, 2005.

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