

CASE NO. A04-2033

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STATE OF MINNESOTA

IN SUPREME COURT

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**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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**BRIEF OF *AMICUS CURIAE* NATIONAL  
ASSOCIATION OF CLEAN WATER AGENCIES**

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## **STATEMENT OF LEGAL ISSUES**

In determining whether a new source or new discharger will cause or contribute to a violation of water quality standards under 40 C.F.R. § 122.4(i) in order to assess whether a National Pollution Discharge Elimination System (“NPDES”) permit can be issued, can a permitting authority, such as the Minnesota Pollution Control Agency (“MPCA”), determine that such source or discharger will not cause or contribute to a violation of water quality standards where such new discharges are effectively offset by decreased discharges from other entities into the same waterbody.<sup>1</sup>

Decision: MPCA determined that it could consider offsets from decreased discharges in its 40 C.F.R. § 122.4(i) analysis, and, therefore, found it appropriate to issue an NPDES permit to the Cities of Annandale and Maple Lake. The Court of Appeals reversed MPCA’s issuance of the permit.

Apposite Authority: *Arkansas v. Oklahoma*, 503 U.S. 91 (1992); *In re: Carlota Copper Co.*, 2004 EPA App. LEXIS 35 (Env. App. Bd. Sept. 30, 2004); 40 C.F.R. 122.4(i).

## **STATEMENT OF THE CASE**

On September 30, 2004, MPCA issued an NPDES permit to the Cities of Annandale and Maple Lake and found that the issuance of the permit complied with, among other regulations, 40 C.F.R. § 122.4(i), which provides that “No permit may be

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<sup>1</sup> Pursuant to Minnesota Rule of Civil Appellate Procedure 129.03, the National Association of Clean Water Agencies (“NACWA”) states that its counsel was solely responsible for drafting this brief. Further, no person or entity other than NACWA has contributed funds to the preparation or submission of this brief.

issued . . . (i) To 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.” Specifically, MPCA determined that its issuance of a permit to Annandale and Maple Lake for a joint wastewater facility was proper because, although MPCA found that the discharges allowed under the requested permit if evaluated alone would contribute additional pollutants to an impaired waterbody status under the CWA, the impact of the Annandale and Maple Lake new discharges would be effectively offset by a decrease in discharges from the City of Litchfield into the same waterbody, due to Litchfield’s construction of a new wastewater treatment facility.

On August 9, 2005, the Court of Appeals reversed MPCA’s issuance of the NPDES permit despite the offset from the decreased Litchfield discharge. In short, the Court found that MPCA could not consider offsets from other entities into the same waterbody when issuing NPDES permits and, thus, MPCA’s issuance of the permit violated 40 C.F.R. § 122.4(i). Subsequently, MPCA, Annandale, and Maple Lake filed Petitions for Review with this Court, which were granted on October 26, 2005. On the same date, the Court also granted NACWA’s motion to file a brief as an *amicus curiae*.

## **STATEMENT OF THE FACTS**

### **I. Statutory and regulatory framework for pre-TMDL permitting.**

The objective of the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.* (“CWA”) “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA further sets forth goals for the nation’s water quality, which include, among others, that all waters should provide for the protection

and propagation of fish, shellfish, and wildlife, and recreation in and on the water. 33 U.S.C. § 1251(a)(2). To pursue these goals, the CWA prohibits any person from discharging any pollutant into the waters of the United States from a point source unless the discharge complies with the CWA's statutory requirements. 33 U.S.C. § 1311(a). Section 402 of the CWA authorizes the Administrator for the U.S. Environmental Protection Agency ("EPA") to issue NPDES permits for the discharge of pollutants, provided the discharge meets particular statutory requirements. 33 U.S.C. § 1342(a). As the U.S. Supreme Court described, "[g]enerally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *South Florida Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004).

The CWA also recognizes "that the States should have a significant role in protecting their own natural resources." *International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987). To this end, the CWA allows EPA to delegate to states the authority to implement and administer the NPDES permit program. 33 U.S.C. § 1342(b). In order to implement its own NPDES program, the governor of such a state "may submit to the Administrator [of EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." *Id.* Once a state elects to implement its own program, and EPA approves such "submitted program" under the criteria of section 402(b)(1) through (9) (33 U.S.C. §§ (b)(1) - (9)), these state programs can issue permits that ensure compliance with the CWA. *Id.* Moreover, once a state program is established, EPA will cease to issue NPDES permits in the state's



jurisdiction and “shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless [EPA] determines that the State permit program does not meet the requirement of subsection (b) of this section . . .” 33 U.S.C. § 1342(c). The State of Minnesota established an NPDES permitting agency, which is administered through MPCA. *See* Minn. Stat. § 115.03, subd. 5; *see also*, Minn. R. 7001.1000 - 1100.

The CWA also required states to develop water quality standards for all waterbodies within the state’s borders to further the goals of the CWA. 33 U.S.C. § 1313(a). In establishing water quality standards, the CWA specifies that states must take fishable/swimming goals -- and several other uses -- into consideration:

Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of [the CWA]. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

33 U.S.C. §1313(c)(2)(A). In addition, in adopting a water quality standard, the state must account for any downstream standards in designating uses for its waters:

In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of the downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.

40 C.F.R. § 131.10(b). These water quality standards, which states promulgate and then submit to EPA for approval, must have three components: (1) one or more “designated

uses” of each waterbody or waterbody segment; (2) water quality criteria specifying the amounts of various pollutants that the water may contain without impairing designated uses; and (3) an antidegradation provision. 33 U.S.C. § 1313(c)(2)(A). Because the CWA provides that the states have the primary role in developing water quality standards, “EPA’s role in formulating these water quality standards is limited.” *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10<sup>th</sup> Cir. 2005).

In issuing an NPDES permit, a state permitting authority must also comply with the CWA’s attendant regulations. *See* 40 C.F.R. § 122.4; 40 C.F.R. § 122.44. As pertinent in this case, 40 C.F.R. § 122.4(i) provides that “No permit may be issued: . . . (i) To 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 CWA also imposes technology-based limitations that “reduce levels of pollution by requiring a discharger to make equipment or process changes, without reference to the effect on the receiving water.” *City of Arcadia v. EPA*, 411 F.3d 1103, 1105 (9<sup>th</sup> Cir. 2005). With both technology-based limitations and water quality standards in place, the CWA requires states to identify water segments where technology-based effluent limits are insufficient to achieve the applicable water quality standards:

Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters.

33 U.S.C. § 1313(d)(1)(A); *see also*, 40 C.F.R. § 130.7. A waterbody that is not meeting a state water quality standard is called a “water quality limited segment” or “impaired water,” and is defined in the regulations as:

Any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act.

40 C.F.R. § 130.2(j). Once a water quality limited segment is identified, the states are required to “establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.” 33 U.S.C. § 1313(d)(1)(A). The list of these impaired waters is known as the “303(d) list.” *City of Arcadia*, 411 F.3d at 1105.

Once a state identifies a segment as impaired or “water quality limited” and places the impaired water on the state’s 303(d) list, the CWA requires the state to develop total maximum daily loads (“TMDLs”) for that segment:

Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

33 U.S.C. § 1313(d)(1)(C). A TMDL sets forth the total amount of a pollutant from point sources, nonpoint sources, and natural background that a water quality limited segment

can tolerate without violating water quality standards. 40 C.F.R. § 130.2(i). TMDLs consist of wasteload allocations (“WLAs”)<sup>2</sup> for point sources discharging into the impaired segment and load allocations (“LAs”)<sup>3</sup> for nonpoint sources and natural background. *Id.* Once a state develops a TMDL, EPA is required to approve or disapprove a state’s TMDL within thirty days of its submission. 33 U.S.C. § 1313(d)(2). Once EPA approves the TMDL, the state must incorporate the TMDL into its continuing planning process under section 303(e) of the CWA. 33 U.S.C. § 1313(d)(2). After the TMDL is incorporated into the continuing planning process, it can be implemented by using the WLAs to establish discharge limits in NPDES permits to ensure compliance with water quality standards. *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9<sup>th</sup> Cir. 1995); *American Littoral Society v. EPA*, 199 F. Supp.2d 217, 229 (D.N.J. 2002). In essence, a “TMDL is not self-enforcing, but serves as an informational tool or goal for the establishment of further pollution controls.” *City of Arcadia*, 411 F.3d at 1105.

## **II. MPCA’s issuance of an NPDES permit to Annandale and Maple Lake.**

On September 30, 2004, MPCA issued an NPDES permit to the Cities of Annandale and Maple Lake for a joint wastewater treatment plant to replace their existing

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<sup>2</sup> WLAs are defined as “The portion of a receiving water’s loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.” 40 C.F.R. § 130.2(h).

<sup>3</sup> LAs are defined as “The portion of a receiving water’s loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished.” 40 C.F.R. § 130.2(g).

plants. (R. at 1479, 1488).<sup>4</sup> The replacement wastewater treatment plant would discharge 3,600 pounds of phosphorus per year to the North Fork of the Crow River (the “North Fork”). (R. at 1487). The Crow River subsequently flows into the Mississippi River, which contributes to the Lake Pepin watershed. Although the segment of the North Fork to which the replacement plant would discharge is not listed as impaired, one segment 17.9 miles downstream from the discharge point is listed as impaired for dissolved oxygen under the CWA. (R. at 1012). Lake Pepin is also listed as impaired under section 303(d) due to excessive nutrient (phosphorus) levels. (R. at 1108).

MPCA determined that its issuance of this permit was proper and did not violate 40 C.F.R. § 122.4(i) because, although the discharges allowed under the permit requested by Annandale and Maple Lake standing alone would contribute to the impairment of water with an impaired status under the CWA (*i.e.*, the nutrient impairment in Lake Pepin), the discharges from the Annandale and Maple Lake wastewater treatment plant would be effectively offset by a decrease of phosphorus discharges from the City of Litchfield into the North Fork by approximately 53,500 pounds per year, due to Litchfield’s construction of a new wastewater treatment facility. (R. at 1487). As a result, the net discharges into the North Fork would not be increased, and the issuance of permits to Annandale and Maple Lake would not violate 40 C.F.R. § 122.4(i).

In addition, MPCA found that the issuance of a permit was appropriate even though no total maximum daily load (“TMDL”) had been set for the North Fork or Lake Pepin. Under section 303(d) of the CWA, because the North Fork is impaired for

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<sup>4</sup> Citations to the administrative record will be provided as “R. at [page number]”.

insufficient dissolved oxygen and Lake Pepin is impaired for excessive nutrient levels (phosphorus), MPCA is required to establish TMDLs for these waterbodies. MPCA estimates that these TMDLs will not be set before 2012 for North Fork and 2009 for Lake Pepin. (R. at 420 & 1105). MPCA found that prior to the establishment of these TMDLs that will result in water quality standards attainment, it could permit new discharges based on offsets from decreased discharges from other entities, such as the City of Litchfield's facility, into the same water segment. As a result, the permit issued by MPCA, in effect, would allow Annandale and Maple Lake to discharge until the TMDLs were in place.

### **III. The Court of Appeals reversal of MPCA's permit issuance.**

On August 9, 2005, the Court of Appeals reversed the MPCA's issuance of an NPDES permit to Annandale and Maple Lake, ruling that under 40 C.F.R. § 122.4(i), an NPDES permit may not be issued for a new source or new discharger when its discharge will cause or contribute to the impairment of waters with impaired status under the CWA, regardless of whether the discharge is effectively offset by a reduction in another existing source discharging to the same waterbody. More specifically, the Court of Appeals held that MPCA improperly issued an NPDES permit to Annandale and Maple Lake under 40 C.F.R. § 122.4(i) in reliance on the offset from the new Litchfield facility.

Following the Court of Appeals ruling, MPCA, Annandale, and Maple Lake petitioned this Court for review. On October 26, 2005, the Court granted those petitions. Further, pursuant to Minnesota Rules of Appellate Procedure 129.01 and 117, subd. 5,

NACWA filed a Request for Leave to Participate as an *amicus curiae*, which this Court granted on October 26, 2005.

## ARGUMENT

### **I. Standard of review.**

Because this case involves the review of an agency decision, it is governed by the Minnesota Administrative Procedure Act, which provides:

In a judicial review . . . the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision 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. Further, “decisions of administrative agencies 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). Moreover, “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 the Matter of the Excess Surplus Status of Blue Cross and Blue Shield of Minnesota*, 624 N.W.2d 264, 278 (Minn. 2001). Because MPCA was administering and enforcing the CWA and its attendant federal regulations necessary to

issue an NPDES permit, MPCA's decision to issue permits to Annandale and Maple Lake and its interpretation of 40 C.F.R. § 122.4(i) are entitled to deference.

**II. The Court of Appeals interpretation of 40 C.F.R. § 122.4(i) will negatively impact the proper treatment of the nation's waters.**

The Court of Appeals holding will have a national impact because it is the first court decision to interpret 40 C.F.R. § 122.4(i) - a regulation used in states and by EPA nationwide - in a manner that so dramatically restricts an agency's discretion in making permitting decisions under the CWA, and will potentially be applied by courts, administrative entities, and permitting authorities in all jurisdictions. In reaching its decision, the Court of Appeals incorrectly interpreted the United States Supreme Court precedent of *Arkansas v. Oklahoma*, 503 U.S. 91 (1992) (which is more specifically discussed in section IV, *infra*), again raising concerns about the decision's adverse impact on wastewater treatment and permitting issues. Because of this broad effect, the impact of the Court of Appeals ruling is not limited solely to Minnesota's waters.

In effect, the Court of Appeals decision has imposed a moratorium on permitting in pre-TMDL situations where, as is the case here, a waterbody is listed under section 303(d) and TMDLs are many years from completion. This moratorium is inconsistent with the objectives of the CWA, as demonstrated by the facts in the instant case. Specifically, during its permitting process, MPCA found that there would be a 2,200 pound increase in phosphorus discharges to the North Fork as a result of allowing discharges from the Annandale and Maple Lake proposed wastewater treatment plant. At the same time, the City of Litchfield was set to reduce its discharges of phosphorus into



the North Fork by approximately 53,500 pounds per year by constructing and operating its own new wastewater treatment plant. Accordingly, considering the offset from the Litchfield decrease, the net discharges of phosphorus into the North Fork would be decreased by 51,300 pounds per year. The Court of Appeals decision, however, voids this offset and requires Annandale and Maple Lake to continue discharging into the North Fork from their old wastewater facilities until at least 2012 when the TMDLs for North Fork and Lake Pepin are both completed.

Further, because the existing Maple Lake wastewater facility has been and is currently discharging phosphorus into the North Fork, while Annandale separately spray irrigates its wastewater, these cities are being denied the opportunity to pool their wastewater into a replacement facility that will more effectively treat their discharges with improved technologies. This denial of MPCA's ability to decrease discharges into the North Fork by allowing for the construction of new wastewater facilities directly conflicts with the CWA's objective of improving and restoring the quality of the nation's waters. The Court of Appeals interpretation of 40 C.F.R. §122.4(i) stifles the ability of permitting authorities and dischargers to develop new and more effective facilities to deal with pollutants in a pre-TMDL setting, because the construction of any improved facilities will not be possible until TMDLs are developed. Such a result is not envisioned by the CWA and should be reversed by this Court.

### **III. The CWA and its corresponding regulations provide NPDES permitting authorities discretion to consider offsets.**

In addition to offending the objectives of the CWA, the Court of Appeals decision also improperly limits a state's ability to exercise discretion in issuing permits and will impair the ability of dischargers to obtain permits in order to provide safe wastewater treatment to protect water quality and public health. Generally, the CWA vests the states with primary responsibility for controlling discharges in the nation's waterways:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and **implement the permit programs under sections 402 and 404** of this Act [33 U.S.C. §§ 1342, 1344].

33 U.S.C. § 1251(b) (emphasis added). Under the CWA, the states are required to develop water quality standards for all waterbodies within the state to further the objectives of the CWA. 33 U.S.C. § 1313(a)(3)(A). Further, section 402(b) of the CWA allows the states to implement and administer their own NPDES permitting programs. 33 U.S.C. § 1342(b). If a state has elected and been approved to administer its own NPDES program, as Minnesota has, EPA's involvement in the permitting process is limited to approving water quality standards and the state's permitting programs. *See* 33 U.S.C. §§ 1313(c)(2)(A) & 1342(b). In other words, although EPA has statutory oversight and approval powers over the states' permitting activities, the CWA allows the states autonomy to control water quality standards and the issuance of NPDES permits such

that “the States should have a significant role in protecting their own natural resources.”  
*International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987).

The Court of Appeals decision unduly restricts Minnesota’s ability to protect its own natural resources in a way that is not supported by the CWA. Under the Court of Appeals reasoning, 40 C.F.R. § 122.4(i) uniformly bars a permitting authority from allowing new discharges into a 303(d) impaired waterbody, regardless of any net environmental benefits. MPCA, as well as EPA and other state permitting authorities, however, need the discretion and flexibility to consider various factors when making permitting decisions under the CWA. The CWA grants states the independence to develop water quality standards, as well as control over permitting discharges to enforce such standards. The Court of Appeals failure to honor this autonomy is error and should be reversed.

To illustrate the state’s discretion, in assessing whether to issue a permit and determining whether a discharge has the reasonable potential to cause or contribute to an exceedance of a water quality standard, a permitting authority has the discretion to take into account other discharges into the same waterbody and the net effects of such discharges:

- (ii) When determining whether a discharge, causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluation the whole effluent

toxicity), and where appropriate, the dilution of the effluent in the receiving water.

40 C.F.R. § 122.44(d)(1)(ii). This language gives a permitting authority significant flexibility in issuing a permit, under which the permitting authority can examine “existing controls on point and nonpoint sources of pollution.” *Id.* In other words, in taking into account beneficial existing pollution controls on a waterbody, the permitting authority has the discretion to find that there will not be a reasonable potential to exceed, and, therefore, no permit limit is needed. *Id.* This regulation provides yet another example of the discretion granted to a permitting authority under the CWA’s attendant regulations, which will be abrogated by the Court of Appeals restrictive ruling.

If the Court of Appeals decision is followed, MPCA will not be able to use a necessary flexible approach that allows consideration of important issues such as environmental benefits or public health. Indeed, under the Court of Appeals ruling, MPCA will not be able to issue permits for the replacement of failing facilities with new or updated facilities, because MPCA would have to disregard the offsets and net environmental benefits involved with the increased efficiency of a replacement facility’s water treatment processes, a failing facility’s existing discharges, and the overall net benefit to the environment. For example, the Court of Appeals decision will make it impossible for the MPCA (or any permitting authority) to issue NPDES permits to install new sewer systems for dischargers in previously unsewered areas (*e.g.*, areas currently using septic tanks). The Court of Appeals decision is therefore inconsistent with the CWA and its federal regulations, and should be reversed.

**IV. The Court of Appeals interpretation of 40 C.F.R. § 122.4(i) is an improper ban on discharges into a waterway.**

The Court of Appeals decision is also an improper ban on discharges into a waterway. The United States Supreme Court has held that such a ban is not contemplated by the CWA:

Although the Act contains several provisions directing compliance with state water quality standards, see, *e.g.*, § 1311(b)(1)(C), the parties have pointed to nothing that mandates a complete ban on discharges into a waterway that is in violation of those standards.

*Arkansas v. Oklahoma*, 503 U.S. 91, 108 (1992). The Court of Appeals interpretation of 40 C.F.R. § 122.4(i) is a direct violation of the *Arkansas* Court's holding. Specifically, the Court of Appeals ruled that there cannot be any new discharges into the North Fork, even if MPCA finds that there is a net environmental benefit to allowing such a discharge, until a TMDL is implemented. In other words, there is a ban on new discharges into the North Fork until 2012.

In the *Arkansas* case, the State of Arkansas sought and received a discharge permit from EPA for a new point source within Arkansas' borders, but 39 miles upstream from the Oklahoma state line. *Id.* at 94-95. The permitted discharge entered a stream in Arkansas that flowed through a series of creeks and then entered the Illinois River at a point 22 miles upstream from the Arkansas-Oklahoma border. *Id.* at 95. Although the permit contained quantity, content, and character limitations on the discharge, Oklahoma challenged the permit based on the premise that the discharges violated Oklahoma's water quality standards. *Id.* After hearings by an administrative law judge and the EPA's

Chief Judicial Officer, who both upheld the issuance of the permit, the parties appealed to the Circuit Court of Appeals for the Tenth Circuit. *Id.* at 97. The Tenth Circuit reversed the issuance of the permit and held that “the Illinois River in Oklahoma was ‘already degraded,’ that Fayetteville effluent would reach the Illinois River in Oklahoma, and that that effluent could ‘be expected to contribute to the ongoing deterioration of the scenic [Illinois R]iver’ in Oklahoma even though it would not detectably affect the river’s water quality.” *Id.* at 98 (quoting *Arkansas v. Oklahoma*, 908 F.2d 595, 621-29 (10th Cir. 1990)) (alteration in original). The primary issue before the Supreme Court, similar to the issue presented to this Court, was “does the [CWA] provide, as the Court of Appeals held, that once a body of water fails to meet water quality standards no discharge that yields effluent that reach the degraded waters will be permitted.” *Id.* at 104.

In its holding, the Supreme Court held that there could be no categorical or complete ban on the discharges into a waterway. *Id.* at 108. The Supreme Court instead found that the CWA allows for flexibility in eliminating pollution:

The statute does, however, contain provisions designed to remedy existing water quality violations and to allocate the burden of reducing undesirable discharges between existing sources and new sources. See, *e.g.*, § 1313(d). Thus, rather 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, areawide programs to alleviate and eliminate existing pollution.

*Id.* In the case at bar, the impairment in the water segment from the Annandale and Maple Lake potential discharges will be offset by the Litchfield facility, leading to a net

decrease of phosphorus discharges of 51,300 pounds per year. The new Annandale and Maple Lake facility is intended to improve existing conditions by replacing two aging facilities, and will result in only a 2,200 pound per year increase into the North Fork. In such circumstances, and as stated in the *Arkansas* case, MPCA should have discretion to allow a new discharge without being *per se* barred by 40 C.F.R. § 122.4(i). Because the Court of Appeals decision is a complete ban on pre-TMDL discharges into an impaired waterway, the decision should be reversed.

The Court of Appeals attempted to distinguish the *Arkansas* case, stating that “The ALJ in *Arkansas* determined that the proposed source had no measurable impact on the scenic waterway. Here, the MPCA determined that the Cities’ proposed source has a measurable impact on the Section 303(d) impairment factors for the North Fork and the Lake Pepin watershed.” *In re City of Annandale*, 702 N.W.2d 768, 776 (Minn. Ct. App. 2005). This distinction is inapposite. As already stated, the new discharges from Annandale and Maple Lake will not have a net impact on the North Fork or Lake Pepin watersheds, as such new discharges are effectively offset by the decreased discharges from the City of Litchfield’s new wastewater facility. Moreover, the Supreme Court was not concerned with the fact that there was no measurable impact on Oklahoma’s waterway, but rather focused on whether the CWA permitted a categorical ban as suggested by the Tenth Circuit. *Arkansas*, 503 U.S. at 108.

Further, the Court of Appeals found that the *Arkansas* case did not apply because it only addressed section 402(h) of the CWA, and not section 303(d) “or its attendant regulations for the issuance of permits, such as 40 C.F.R. § 122.4(i).” *Annandale*, 702

N.W.2d at 776. The *Arkansas* Court, however, did not limit its decision to cases involving section 402(h) of the CWA, but broadly ruled that “rather than establishing the categorical ban announced by the Courts of Appeals -- which might frustrate the construction of new plants that would improve existing conditions -- the Clean Water Act vest in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution.” *Arkansas*, 503 U.S. at 108. Further, the Supreme Court expressly stated that section 303(d) allows for flexibility in permitting. *Id.* (“The statute does, however, contain provisions designed to remedy existing water quality violations and to allocate the burden of reducing undesirable discharges between existing sources and new sources. **See, e.g., § 1313(d).**”) (emphasis added). The Court of Appeals decision does exactly what the Supreme Court sought to prevent - the inability to construct new and improved plants to replace existing facilities - and is therefore inconsistent with the *Arkansas* case and should be reversed.

Recently, EPA confirmed that the Court of Appeals interpretation of 40 C.F.R. § 122.4(i) is incongruous with the CWA. *See In re: Carlota Copper Co.*, 2004 EPA App. LEXIS 35 (Env. App. Bd. Sept. 30, 2004). In the *Carlota Copper* case, the Environmental Appeals Board of EPA<sup>5</sup> reviewed whether the issuance of an NPDES permit to a new discharger from a proposed open-pit copper mine into Pinto Creek, an impaired body under section 303(d), was proper. *Id.* at \*13. The petitioners challenged

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<sup>5</sup> According to EPA, the Environmental Appeals Board “is the final Agency decisionmaker on administrative appeals under all major environmental statutes that the Agency administers.” <http://www.epa.gov/eab/>. This Board handles appeals of NPDES permits.



EPA's issuance of an NPDES permit because, among other arguments, "Carlota's discharges will violate the CWA and EPA regulations . . . [and] EPA cannot allow new copper discharges into any segment of Pinto Creek prior to the implementation of the Pinto Creek TMDL and restoration of the water body." *Id.* at \*165. Like the Court of Appeals, the petitioners in *Carlota Copper* "cited section 122.4(i) . . . mainly for the proposition that new sources may obtain NPDES permits allowing discharges into impaired water bodies only where a TMDL analysis has first been performed and the impaired water body was being remediated." *Id.* at \*167.

The Appeals Board found that "[s]imply put, Petitioners propound a categorical ban on new sources and new dischargers into impaired water bodies." *Id.* at \*176. The Appeals Board then held that "Petitioners, however, have not cited to any specific statutory provision, nor have they identified any case law that more precisely addresses the specific issue at hand." *Id.* at \*177. The Appeals Board then held that the *Arkansas* case specifically defeated the petitioners' claims:

The Supreme Court in *Arkansas* cautioned against interpreting the CWA in a way that would frustrate beneficial development and with it opportunities to improve existing conditions. The Court explained that rather than frustrating development, the CWA has vested EPA and the States with the authority to develop "long-range, area-wide" programs aimed at alleviating and eliminating existing pollution. The TMDL program is one such "long-range, area-wide" program.

*Id.* at \*179. The Appeals Board aptly concluded "we cannot endorse Petitioners' interpretation because to do so would perpetrate the very outcome the Supreme Court in *Arkansas* sought to avoid -- adoption of a rigid approach that might frustrate the

construction of new facilities that would *improve existing conditions.*” *Id.* at \*187 (emphasis in original).

Similar to the case at bar, the Appeals Board then examined whether EPA satisfied 40 C.F.R. § 122.4(i) in issuing a permit considering an offset of decreased discharges from another discharging mine, the Gibson Mine. *Id.* at \*189. Specifically, during the permitting process, “in response to comments concerning copper loading in Pinto Creek, Carlota proposed to partially remediate the nearby Gibson Mine to offset discharges of copper . . .” *Id.* at \*34. Petitioners argued that “any offset occurring prior to the new discharges must be of such magnitude that the stream will achieve standards even after the new loadings” and “that the Gibson Mine offset will not cause Pinto Creek to achieve compliance.” *Id.* at 189. The Appeals Board rejected this argument, and instead held that “Carlota will not cause or contribute to the violation of water quality standards but rather will improve existing conditions because the reductions that will result from its activities are greater than the projected discharges.” *Id.* The Board found this interpretation to be consistent with EPA’s interpretation of 40 C.F.R. § 122.4(i). *Id.* at \*190 (citing Final TMDL Rules, 65 Fed. Reg. 43,586, 43,641 (July 13, 2000)) (“[T]he preamble of the Final TMDL Rules of July 2000, in which the Agency stated that under section 122.4(i) a permitting authority may determine that permit limits must reflect an overall reduction in pollutant loading to the water body in order to ensure that the new discharge does not cause or contribute to a violation of water quality standards.”) The Board also held that EPA “has adopted a flexible approach that more closely mirrors the objectives of the CWA, as recognized by the Supreme Court in *Arkansas v. Oklahoma*,

503 U.S. 91 (1992), in that it promotes the improvement of existing conditions and reduction of water pollution.” *Id.* at \*192. Finally, as is the case in the instant litigation, because “. . . the partial remediation of the Gibson Mine would result in a net reduction of copper loading into the Pinto Creek . . ., Carlota will not be further degrading Pinto Creek or causing or contributing to a water quality violation. . . This, in our view, evidences that, rather than ‘causing or contributing’ a degradation, Carlota will be improving Pinto Creek’s water quality, or at the very least maintaining water quality.” *Id.* at \*196; *see also, Crutchfield v. State Water Control Bd.*, 612 S.E.2d 249, 255 (Va. App. 2005) (“Evidence in the record provides a basis for the conclusion of the [Virginia State Water Control Board] that with the established permit limits, the treated effluent will not contribute to lower DO levels in the river.”).

The thorough analysis in the *Carlota Copper* case and EPA’s interpretation of 40 C.F.R. § 122.4(i) is instructive in this case and shows the flaws in the Court of Appeals decision. For the reasons stated in *Carlota Copper*, the Court of Appeals decision should be reversed.

**V. The Court of Appeals reliance on EPA’s proposed revisions to 40 C.F.R. § 122.4(i) is misplaced.**

The Court of Appeals also mistakenly relied on EPA’s “rejection” of a proposal that would permit a system of offsets when EPA considered revisions to 40 C.F.R. § 122.4(i). *See Annandale*, 702 N.W.2d at 774 (*citing* Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and

Management Regulation, 65 Fed. Reg. 43586 (July 13, 2000) (“EPA’s Revision”). Despite the Court of Appeals interpretation of EPA’s Revisions, EPA did not reject the principle that a permitting authority could use an offset to satisfy 40 C.F.R. § 122.4(i). Instead, EPA merely found that the inflexible system of offsets that it had proposed for new regulations for pre-TMDL permitting would be difficult to implement and should be withdrawn:

As proposed, the offset requirement . . . would be very difficult to apply and only affect a small subset of dischargers. Thus, the likelihood of achieving additional progress toward attaining water quality standards for a significant number of impaired waterbodies through the offset provision, in the aggregate would be quite small.

\* \* \*

Many commenters pointed out, and upon further analysis EPA agrees, that the proposed offset requirement, a one-size fits all method for specifying reasonable further progress, is simply unworkable. As proposed, it would have been extremely difficult for a majority of the sources within the very small subset of sources to which it would have applied, to implement an offset requirement (*e.g.*, those sources with intermittent discharges or discharges only as a result of storm events and those regulated through general permits by best management practices (BMPs)). Calculating what constitutes a one and on half to one offset for sources with intermittent discharges would have often been extremely subjective.

65 Fed. Reg. at 43640. EPA’s withdrawal of its rigid system of offsets was consistent with the concerns from the commenters during the rulemaking, which objected to the proposed system for numerous reasons. For example, EPA found that the comments expressed

widespread concern that the proposal to require offsets was virtually impossible to implement and environmental efficacy on a national scale would have therefore been unlikely. Many commenters noted that a one-size-fits-all approach was infeasible due to the differences between the types of sources subject to the offset requirement, the differences in the nature of the discharges from the sources subject to the offset requirement, and the differences in the types of NPDES permitting used for sources subject to the offset requirement.

*Id.* at 43,639. EPA also found that “while many commenters agreed that there should be reasonable further progress toward improving water quality in the period before a TMDL is approved or established, **they asserted that the proposed offset requirements would undercut State primacy in determining what actions are necessary to attain water quality standards.**” *Id.* at 43,640 (emphasis added). Commenters also found that definitions for the offset system was “confusing and unworkable” and “that the definition describing significant expansion was not scientifically based.” *Id.* EPA agreed with these comments, and instead of implementing a rigid offset system, stated “that progress toward the attainment of water quality standards prior to a TMDL would be achieved through consistent implementation of EPA's existing regulatory authorities.” 65 Fed. Reg. at 43641.

Subsequently, EPA confirmed that it only rejected the strict offset system proposed in EPA’s Revision (and not the possibility of a permitting authority using offsets to comply with 40 C.F.R. § 122.4(i)) in its 2004 decision in the *Carlota* case. As stated above, EPA specifically allowed offsets to be considered in determining whether a new discharger would violate 40 C.F.R. § 122.4(i). *Carlota*, 2004 EPA App. LEXIS 35,

at \*196. Accordingly, the Court of Appeals misinterpreted the effect of EPA's Revisions, and in light of *Carlota*, its decision should be reversed.

## CONCLUSION

For the reasons stated above, the National Association of Clean Water Agencies respectfully requests that this Court reverse the Court of Appeals August 9, 2005 ruling, affirm MPCA's issuance of an NPDES permit to the Cities of Annandale and Maple Lake, and grant all relief it deems fair and just.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief was prepared using Microsoft Word, Version 2002 software. This brief complies with the type-volume limitation of Minnesota Rule of Civil Appellate Procedure 132.01, subd. 3(c), because this brief contains 6,883 words, excluding the parts of the brief exempted by Rule 132.01, subd. 3.

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Brief of *Amicus Curiae* National Association of Clean Water Agencies, has been served by first class Unites States Mail, postage prepaid, on this 2nd day of December, 2005, on the following counsel of record:

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