NO. A04-2033

State of Minnesota

In Supreme Court

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

BRIEF OF *AMICI CURIAE* CLEAN UP THE RIVER ENVIRONMENT, COALITION FOR A CLEAN MINNESOTA RIVER, NEW ULM AREA SPORTSFISHERMEN AND FRIENDS OF THE MINNESOTA VALLEY

Brian Wojtalewicz (#118369)
139 North Miles
P.O. Box 123
Appleton, MN 56208-0123
Tel: (320) 289-2363
Fax: (320) 289-2369

Attorney for Amici Curiae Clean Up the River Environment (CURE), Coalition for Clean Minnesota River, New Ulm Area Sportsfishermen, and Friends of the Minnesota Valley

Janette K. Brimmer (#174762)
MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY
26 East Exchange Street, Suite 206
St. Paul, MN 55101-1667
Tel: (651) 223-5969
Fax: (651) 223-5967

Attorney for Respondent Minnesota Center for Environmental Advocacy

Edward J. Laubach, Jr. (#61025)
Christopher W. Harmoning (#285948)
GRAY, PLANT, MOOTY, MOOTY & BENNETT, P.A.
1010 West St. Germain Street, Suite 600
St. Cloud, MN 56301
Tel: (320) 252-4414
Fax: (320) 252-4482

Attorneys for Appellants City of Annandale and City of Maple Lake

(Additional Counsel Listed on following pages)

2006 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

Mike Hatch
Minnesota Attorney General
Robert B. Roche (#289589)
OFFICE OF THE MINNESOTA
ATTORNEY GENERAL
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
Tel: (651) 296-1506
Fax: (651) 296-4139

Attorneys for Appellant Minnesota Pollution Control Agency

Charles N. Nauen (#121216)
William A. Gengler (#210626)
David J. Zoll (#0330681)
LOCKRIDGE GRINDAL NAUEN
P.L.L.P.
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
Tel: (612) 339-6900
Fax: (612) 339-0981

Attorneys for Amicus Curiae Metropolitan Council

Susan L. Naughton (#259743)
LEAGUE OF MINNESOTA CITIES
145 University Avenue West
St. Paul, MN 545103-2044
(651) 281-1232

Attorney for Amicus Curiae League of Minnesota Cities

Michael D. Madigan (#129586)
Edward M. Tillman (#322337)
MADIGAN, DAHL & HARLAN, P.A.
701 Fourth Avenue South, Suite 1700
Minneapolis, MN 55415
(612) 604-2000

Attorneys for Amicus Curiae Trout Unlimited and the Minnesota Lakes Association

Jane Reyer (#296521)
220 Pike Lake Road
Grand Marais, MN 55604
(218) 387-3377

Albert Ettinger, Senior Attorney
ENVIRONMENTAL LAW & POLICY
CENTER OF THE MIDWEST
35 East Wacker, Suite 1300
Chicago, IL 60601
(312) 795-3707

Nancy Stoner, Senior Attorney
NATURAL RESOURCES DEFENSE
COUNCIL
1200 New York Avenue N.W.
Washington, D.C. 20005
(202) 289-2394

Andrew Hanson
702 East Johnson Street
Madison, WI 53703
(608) 251-5047

Katherine Baer
Director, River Advocacy
AMERICAN RIVERS
1025 Vermont Avenue N.W.
Suite 720
Washington, D.C. 20005
(202) 347-7550, Ext. 3053

Attorneys for Amici Curiae Environmental Law and Policy Center of the Midwest, the Natural Resources Defense Council, Midwest Environmental Advocates, and American Rivers

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Interest of Amici

Clean Up The River Environment (CURE), the Coalition for A Clean Minnesota River (CCMR), the New Ulm Sportsfisherman (NUS) and Friends of the Minnesota Valley are non-profit organizations comprised of hundreds of individual citizens and small businesses, most of whom live and work along the entire length of the Minnesota River. The organizations share a goal of cleaning up the Minnesota River and its watershed, halting and reversing its pollution and restoring its biological integrity.[1]

[1] The undersigned counsel for CURE, CCMR, NUS and Friends of the Minnesota Valley certifies, pursuant to Rule 129.03 of the Minnesota Rules of Appellate Procedure, that no counsel for any other party authored this brief in whole or in part and that no one made a monetary contribution to the preparation or submission of this brief other than CURE, CCMR, NUS and Friends of the Minnesota Valley.

THE MINNESOTA POLLUTION CONTROL AGENCY SHOULD ESTABLISH THE TOTAL MAXIMUM DAILY LOADS FOR OUR WATERS AND NOT COLLABORATE IN MORE POLLUTION.

Progress is slowly beginning on reducing the pollution in the Minnesota, albeit years after the deadline demanded by the people of the United States in the Clean Water Act. Some Total Maximum Daily Loads (TMDL's) have been established for our watershed. See http://www.pca.state.mn.us/water/basins/mnriver/, and the "Basin Phosphorus Permit" link. It is obvious that the Minnesota Pollution Control Agency can establish a TMDL for an impaired water, specifically the Minnesota River, particularly when it is spurred by the demands of citizens, political leaders and organizations of citizens like CURE, CCMR, NUS and Friends of the Minnesota Valley. We now have phosphorus discharges from over 150 wastewater treatment plants regulated toward the goal of stopping this pollution. Interestingly, the plan allows trading among phosphorus point sources, once the goal of establishing the TMDL for the Minnesota River was scientifically reached.

Our citizen organizations are extremely concerned that the PCA will allow pollution increases, as it attempted for the cities in this case. If it is allowed to permit pollution increases at points A, on the excuse that someone else is cutting pollution at points B, how can we trust that the overall pollution

of our Minnesota waters will decrease? The Clean Water Act mandated the TMDL program as a logical method to prevent this very danger. The failure of the Minnesota PCA to establish the mandated TMDL's in too many of our watersheds is a failure of Minnesota's executive branch. Whether it is a product of mismanagement, or a product of succumbing to short-sited local political pressures, the dangerous and illegal result is obvious.

We citizens want our Clean Water Act enforced. We want our pollution control agency to do its job, and not be an accessory to more pollution. Will there be a political clamor if the judicial branch orders the executive to truly execute the mandate of cleaning up our waters? Perhaps. Will that clamor include small governments and industry demanding permits? Perhaps. Are these legitimate reasons for the executive branch to refuse to enforce the law? No. Hopefully, any political clamor will compel the executive branch in Minnesota to complete what it has failed to accomplish for decades -- establishing TMDL's for the watersheds. With these TMDL programs established, cities and businesses can participate in legitimate trading programs that are truly focused on stopping the growth of pollution and reducing it to the point of elimination. This is the intent of the Clean Water Act.

CONCLUSION

CURE, the CCMR, the NUS and Friends of the Minnesota Valley request that the Minnesota Court of Appeals decision be affirmed.

RESPECTFULLY SUBMITTED,

Brian Wojtalewicz
WOJTALEWICZ LAW FIRM, LTD.
139 No. Miles, P.O. Box 123
Appleton, MN 56208-0123
(320) 289-2363
MN Lic. No.: 118369

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Jane Reyer (#0296521)
220 Pike Lake Road
Grand Marais, MN 55604
(218) 387-3377

Nancy Stoner
Jon Devine
NATURAL RESOURCES DEFENSE COUNCIL
1200 New York Avenue, N.W.
Washington, D.C. 20005
(202) 289-2394

Katherine Baer
Director, River Advocacy
AMERICAN RIVERS
1025 Vermont Avenue N.W.
Suite 720
Washington, D.C. 20005*
(202) 347-7550, Ext. 3053

As of January 30, 2006, AMERICAN RIVERS' address will be: 1101 – 14th St. N.W., Suite 1400, Washington D.C. 20005

Albert Ettinger
Brad Klein
ENVIRONMENTAL LAW & POLICY CENTER OF THE MIDWEST
35 East Wacker, Suite 1300
Chicago, IL 60601
(312) 795-3707

Andrew Hanson
MIDWEST ENVIRONMENTAL ADVOCATES, INC.
702 East Johnson Street
Madison, WI 53703
(608) 251-5047

Attorneys for Amici Curiae Environmental Law and Policy Center of the Midwest, Natural Resources Defense Council, Midwest Environmental Advocates and American Rivers

(Additional Counsel Listed on following pages)

2006 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

Janette K. Brimmer (#174762)
MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY
26 East Exchange Street, Suite 206
St. Paul, MN 55101-1667
Tel: (651) 223-5969
Fax: (651) 223-5967

Attorney for Respondent Minnesota Center for Environmental Advocacy

Mike Hatch
Minnesota Attorney General
Robert B. Roche (#289589)
OFFICE OF THE STATE ATTORNEY GENERAL
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
Tel: (651) 296-1506
Fax: (651) 296-4139

Attorneys for Appellant Minnesota Pollution Control Agency

Edward J. Laubach, Jr. (#61025)
Christopher W. Harmoning (#285948)
Heather I. Olson (#342117)
GRAY, PLANT, MOOTY, MOOTY & BENNETT, P.A.
1010 West St. Germain Street
Suite 600
St. Cloud, MN 56301
Tel: (320) 252-4414
Fax: (320) 252-4482

Attorneys for Appellants City of Annandale and City of Maple Lake

Michael D. Madigan (#129586)
Edward M. Tillman (#322337)
MADIGAN, DAHL & HARLAN, P.A.
701 Fourth Avenue South, Suite 1700
Minneapolis, MN 55415
(612) 604-2000

Attorneys for Amicus Curiae Trout Unlimited and the Minnesota Lakes Association

Brian Wojtalewicz (#118369)
139 North Miles
P.O. Box 123
Appleton, MN 56208-0123
(320) 289-2363

Attorney for Amici Curiae Clean Up the River Environment (CURE), Coalition for Clean Minnesota River, New Ulm Area Sportfisherman, and Friends of the Minnesota Valley

Charles N. Nauen (#121216)
William A. Gengler (#210626)
David J. Zoll (#0330681)
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
Tel:(612) 339-6900
Fax: (612) 339-0981

Attorneys for Amicus Curiae Metropolitan Council

Susan L. Naughton (#259743)
LEAGUE OF MINNESOTA CITIES
145 University Avenue West
St. Paul, MN 545103-2044
(651) 281-1232

Attorney for Amicus Curiae League of Minnesota Cities

Robert S. Halagan (#136402)
HALAGAN LAW FIRM, LTD.
101 Courthouse Square
15 Second Street N.W.
Buffalo, MN 55313
(763) 682-8975

Attorneys for Amicus Curiae Wright County Mayors Association

Timothy P. Flaherty (#0029920)
Christopher M. Hood (#229386)
Steven W. Nyhus (#296193)
Kari J. Thurlow (#303008)
FLAHERTY & HOOD, P.A.
525 Park Street, Suite 470
St. Paul, MN 55103
(651) 225-8840

Attorneys for Amici Curiae Minnesota Environmental Science and Economic Review Board and Coalition for Greater Mimesota Cities

Lloyd W. Grooms (#0188694)
Thomas H. Boyd (#0200517)
WINTHROP & WEINSTINE, P.A.
225 South Sixth Street, Suite 3500
Minneapolis, MN 55402
(612) 604-6400

Attorneys for Amicus Curiae Builders Association of the Twin Cities

Molly Mc Kee (#341885)
LARKIN HOFFMAN DALY & LINDGREN, LTD.
1500 Wells Fargo Plaza
7900 Xerxes Avenue South
Minneapolis, MN 55431-1194
(952) 835-3800

Fredric P. Andes
Erika K. Powers
David T. Ballard
BARNES & THORNBURG, LLP
1 North Wacker Drive, Suite 4400
Chicago, IL 60606-2809
(312) 357-1313

Attorneys for Amicus Curiae the National Association of Clean Water Agencies

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INTRODUCTION

Appellants and the various amici curiae who support appellants argue that the Court of Appeals' interpretation of the federal regulation, which prohibits allowing new discharges that contribute to a violation of water quality standards, is not compelled by the regulatory language or by the policies adopted by Congress in the Clean Water Act. Appellants and the amici have also argued that the Court of Appeals' reading of the federal regulation will stifle economic growth in Minnesota. They are wrong on both counts.

The interpretation of 40 CFR § 122.4(i) adopted by the Court of Appeals is plainly required by the language of the regulation. Moreover, the Court of Appeals' reading of the regulation is compelled by the Congressional objectives for the Clean Water Act, set forth in Section 101 of the Act, to restore the nation's waters and eliminate all discharges. 33 U.S.C. § 1251(a).

Moreover, the fear that the Court of Appeals' ruling will stifle growth or the Minnesota economy is entirely unjustified. First, the parade of horribles presented by the Minnesota Pollution Control Agency ("PCA") is based on a misinterpretation of the law and the Court of Appeals' decision. The Court of Appeals' decision does not prohibit new wastewater treatment plants or other steps that would improve water quality, and it does not logically or practically inhibit economic growth. In fact, from working to restore and maintain water quality in the Midwest and across the country, the Environmental Law & Policy Center of the Midwest ("ELPC"), the Natural Resources Defense Council ("NRDC"), Midwest Environmental Advocates ("MEA") and American Rivers are aware of numerous

ways in which municipalities and economies can freely grow without violating the Clean Water Act or frustrating the national goal of restoring the nations' rivers, lakes and streams.[1]

INTEREST OF AMICI

ELPC, NRDC, MEA and American Rivers are all organizations committed to the realization of the Congressional objective of the Clean Water Act to restore and maintain the chemical, physical and biological integrity of the nation's waters. 33 U.S.C. § 1251(a). We have sought through our work to promote achievement of the national goal that the nation's waters provide for fish, wildlife and recreation and the elimination of the discharge of pollutants to the nation's waters that was to be achieved two decades ago. 33 U.S.C. § 1251(a)(1),(2).

In particular, ELPC, NRDC, MEA and American Rivers have worked to implement the requirement of Section 303 of the Clean Water Act, 33 U.S.C. § 1313(d), that the total maximum daily load ("TMDL") be calculated for waters that do not meet the fishable/swimmable water quality standards to establish the water body's capacity to tolerate pollution while still meeting water quality standards. These Section 303(d) requirements should have been implemented beginning in 1979. *American Canoe Assoc. v. U.S. Environmental Protection Agency*, 54 F. Supp. 2d 621, 623 (E.D. Va. 1999); *Sierra Club v. Browner*, 843 F. Supp. 1304, 1307 (D. Minn. 1993). Unfortunately, U.S. EPA and many

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[1]Undersigned counsel for ELPC, NRDC, MEA and American Rivers certify pursuant to Rule 129.03 of the Minnesota Rules of Appellant Procedure that no counsel for any party authored this brief in whole or in part and that no one made a monetary contribution to the preparation or submission of this brief other than ELPC, NRDC, MEA and American Rivers.

states, including Minnesota, have moved very slowly in fulfilling this obligation with the result that many impaired waters, including Lake Pepin, still do not have TMDLs established more than 25 years later.

ELPC, NRDC, MEA and American Rivers have also worked actively to prevent and remediate the kind of pollution directly at issue here, nutrient pollution in the form of phosphorus. Nutrient pollution (mainly phosphorus and nitrogen) is a major national problem. As explained by U.S. EPA:

> Human health problems can be attributed to nutrient enrichment. One serious human health problem associated with nutrient enrichment is the formation of trihalomethanes (THMs). Trihalomethanes are carcinogenic compounds that are produced when certain organic compounds are chlorinated and bromated as part of the disinfection process in a drinking water facility. Trihalomethanes and associated compounds can be formed from a variety of organic compounds including humic substances, algal metabolites and algal decomposition products. The density of algae and the level of eutrophication in the raw water supply has been correlated with the production of THMs.
>
> * * *
>
> Nutrient impairment can cause problems other than those related to human health. One of the most expensive problems caused by nutrient enrichment is the increased treatment required for drinking water... Adverse ecological effects associated with nutrient enrichment include reductions in dissolved oxygen (DO) and the occurrence of HABs (harmful algal blooms). High algal and macrophyte biomass may be associated with severe diurnal swings in DO and pH in some water bodies. Low DO can release toxic metals from sediments contaminating habitats of local aquatic organisms. In addition, low DO can cause increased availability of toxic substances like ammonia and hydrogen sulfide, reducing acceptable habitat for most aquatic organisms, including valuable game fish. Decreased water clarity (increased turbidity) can cause loss of macrophytes and creation of dense algal mats. Loss of

macrophytes and enrichment may alter the native composition and species diversity of aquatic communities.[2]

Amici have worked to prevent waters from being impaired by nutrients and to develop TMDLs and other means to restore waters, such as Lake Pepin, that are impaired by nutrients.

ARGUMENT

I. The unambiguous language of 40 CFR § 122.4(i) and the Clean Water Act mandate the Appellate Court's interpretation of the regulation.

The plain language of 40 CFR § 122.4(i), the Clean Water Act and essentially all of the relevant authority support the Court of Appeals' position that the new discharge could not be permitted.

A. The Clean Water Act and 40 CFR § 122.4(i)

The 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). In the CWA, Congress set as an interim national goal, known as the "fishable/swimmable goal," that "wherever attainable ... water quality which provides for the protection and propagation of fish, shellfish and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." 33 U.S.C. § 1251(a)(2). Further, "[o]ne of the primary objectives of the Act, as stated in section 101, 33 U.S.C. § 1251(a)(1), is to achieve the national goal 'that the discharge of pollutants

[2] U.S. Environmental Protection Agency, Nutrient Criteria, Technical Guidance Manual, Rivers and Streams, EPA -822-B-00-002 (July 2000) (pp. 4-5, citations omitted).

into navigable waters be eliminated by 1985.'" *In re Ocoee River Dam No. 2 Hydroelectric Project*, 717 F.2d 992, 998 (6th Cir. 1983).

Obviously, creation of new discharges moves our waters in the opposite direction from achieving the discharge-elimination and fishable/swimmable goals of the CWA. This is particularly true if the new discharge under consideration is allowed into a water body that is already failing to meet the fishable/swimmable standards or is in danger of doing so. Section 301(b)(1)(C) of the Act, 33 U.S.C. § 1311(b)(1)(C), prohibits allowing any discharge if it would cause a violation of state water quality standards. As explained by *American Paper Institute v. U.S. Environmental Protection Agency*, 996 F.2d 346, 350 (D.C. Cir. 1993), permit "[l]imitations must control all pollutants or pollutant parameters (either conventional, nonconventional or toxic pollutants) which ... are or may be discharged at a level which will cause, have a reasonable potential to cause, or contribute to an excursion above any State water quality standard, including state narrative criteria for water quality." If the receiving waters are already violating state standards, a new discharge will exacerbate the problem.

40 CFR § 122.4(i) straightforwardly implements the policies and requirements of the Clean Water Act in providing:

> [No NPDES permit may be issued to] 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.

As held by the Court of Appeals, the first sentence of this regulation prohibits a new discharge if it will contribute to a violation of water quality standards, and provides that a new discharge that would significantly increase the discharge of a pollutant to a water body that was already in violation of water quality standards for that pollutant would fall into this category. *In re Cities of Annandale & Maple Lk. NPDES/SDS Permit Issuance For Discharge of Treated Wastewater,* 702 N. W. 2d 768, 775 (Minn. Ct. App. 2005). The rest of the regulation quoted above further confirms the Court of Appeals' interpretation by making clear that although a new discharge to a water body in violation of standards would normally be prohibited, it is permissible to allow certain new discharges to waters that violate water quality standards under certain limited circumstances where the owner or operator has made a particular demonstration. Not by coincidence, the circumstances in which new discharges may be allowed into an impaired water body are precisely those in which the owner or operator has demonstrated that the fishable/swimmable goal of the Clean Water Act will not be frustrated because the new discharge will be allowed as part of a plan that will bring the water into compliance with standards.

B. The new discharge at issue here clearly would "contribute" to the violation of water quality standards and is not "offset" by potential reductions at Litchfield

Disdaining to read the regulation as a whole, the Pollution Control Agency has offered an interpretation of 40 CFR § 122.4(i) based on an interpretation of the first sentence of the regulation that fails to give the word "contribute" its plain meaning and ignores the rest of the regulatory language. There is no dispute that the new Annandale/Maple Lake permit considered by itself would add to the phosphorus impairment of the Crow River and Lake Pepin. Yet, PCA claims that because a separate facility in Litchfield will reduce phosphorus loadings, the increased discharge of phosphorus from the Cities of Annandale and Maple Lake does not "contribute" to the phosphorus impairment of Lake Pepin. However, the interpretation of "contribute" offered by PCA simply does not accord with English usage.

To see that PCA is trying unreasonably to stretch the meaning of "contribute," it is important to keep two things in mind. First, no one claims that the Litchfield reduction of phosphorus will end the Lake Pepin impairment. Second, it is not claimed that Litchfield's reduction is in any way related to the Annandale and Maple Lake increases. Annandale and Maple Lake did not pay Litchfield to make reductions that Litchfield was not otherwise required to make and the Litchfield reductions are not required by or enforceable through the Annandale/Maple Lake NPDES permit. The only relationship between the Litchfield reduction and the Annandale/Maple Lake increase is that they are expected to occur at roughly the same time.

Under these circumstances, the Annandale/Maple Lake permit plainly would "contribute" to the impairment under any normal use of the term. The Annandale/Maple Lake discharge will "help bring about" the Lake Pepin impairment. *See American Heritage College Dictionary* 303 (3d ed. 2000). No one would deny that a person who tossed his garbage on the sidewalk had contributed to a neighborhood litter problem just because someone else was cleaning up the neighborhood on the same day. Certainly, a taxpayer has "contributed" to a charity and would be able to deduct the amount given on his tax return even if another regular contributor decided not to contribute that year.

PCA cites *In re Carlota Copper Co.*, NPDES Appeal Nos. 00-23 & 02-06, 2004 EPA App. LEXIS 35 (September 30, 2004), in support of its position that the Annandale/Maple Creek discharge would not "cause or contribute" to the Lake Pepin impairment (PCA Brief p. 35), because its pollution allegedly will be "offset". But even assuming that the regulations permit the use of offsets to permit new discharges to an impaired water, *Carlota Copper* actually serves to further illustrate that what PCA attempted to permit here is not an "offset" and does "cause or contribute." As stated by PCA itself in its brief, in *Carlota Copper* "EPA's permit required the permittee to offset its new discharge of copper by remediating an old mining site on the same creek." (PCA Brief at 35). Here, the Annandale/Maple Creek permit has nothing to do with the Litchfield permit and PCA is not requiring Annandale or Maple Creek to take responsibility for any reduction of phosphorus loadings to Lake Pepin as part of the permit. Moreover, in *Carlota Copper* after the actions to be permitted are fully

implemented, there is to be no impairment. *Carlota Copper*, 2004 EPA App. LEXIS 35 at *126. Here, it is clear that the Litchfield reduction will still leave Lake Pepin impaired.

Rather than being any sort of "offset" for the Annandale/Maple Lake increase, the Litchfield reduction should be viewed as partial step to remediate the numerous other loadings to Lake Pepin that have been permitted over the past decades. Similarly, claims by appellants and the amici supporting reversal that the Court of Appeals' decision is inconsistent with U.S. EPA trading policies misinterpret U.S. EPA's January 13, 2003 trading policy. *See* http://www.epa.gov/owow/watershed/trading/tradingpolicy.html (visited Dec. 29, 2005). The EPA trading policy is based on a cap and trade scheme in which the overall pollution cap is set based on the assimilative capacity of the water body and trades are made within that pollution cap. Here, PCA did not develop any overall pollutant cap to allow a "cap and trade" scheme. Further, Annandale and Maple Lake did not trade anything to Litchfield and Litchfield provided no reduction of pollution here that was not already required under PCA's rules. PCA is simply attempting to allow Annandale and Maple Lake to reap an unjustifiable benefit from a pollution reduction that they did not sow.

Still further, appellants' interpretation of 40 CFR § 122.4(i) ignores most of the regulation, violating the basic principles that legal language should always be construed as a whole and that it is unsafe to parse out separate words or phrases from a legal provision. *See Tankar Gas, Inc. v. Lumbermen's Mut. Casualty Co.*, 215 Minn. 265, 269-70, 9 N.W. 2d 754, 757-58 (Minn. 1943). The second quoted sentence of the regulation describes what kind of program would allow a new discharge of a pollutant to a water body not meeting water

quality standards for that pollutant.[3] The kind of pollutant load allocations and compliance schedules set forth as preconditions for allowing a new discharge of pollutants into an impaired stream are precisely the kind of "long-range areawide programs to alleviate and eliminate existing pollution" contemplated by the Supreme Court in *Arkansas v. Oklahoma*. 503 U.S. 91, 108 (1992). The regulation and the Court of Appeals' decision do not enact any absolute ban on new discharges of pollutants to water bodies impaired by those pollutants but they do follow the Clean Water Act by insisting that new discharges not be allowed except pursuant to a plan that will bring the water body back into compliance. However, in this case the PCA allowed a new discharge that falls far outside of what is permitted by the Clean Water Act, regulation 40 CFR § 122.4(i), or *Arkansas v. Oklahoma*.

PCA's position allows it to arbitrarily grant indulgences to new dischargers based on whatever reductions happen to come in at the time. If another permit applicant wants to build a new discharge that contributes to the Crow River and Lake Pepin impairments, will PCA just grant such permits on first-come first-served basis until the Litchfield "offset" is exhausted? If so, the Litchfield reduction will prove ultimately to have done nothing for the receiving waters, and other dischargers that may need to increase discharges more than Annandale and Maple Creek may be unjustly frustrated. Only with an actual long-term area

[3] Indeed, under PCA's interpretation of 40 CFR § 122.4(i), the second sentence of the regulation details a number of requirements for demonstrations that would never actually be required of any new discharger because any new discharger that could identify reductions that "offset" his increase would be deemed not to "cause or contribute." Under the PCA interpretation, it would be childishly easy to circumvent the safeguards provided in the second sentence against allowing new pollution that makes it harder to bring water bodies into compliance with water quality standards.

wide program developed with public input that reduces pollution enough to remove the impairment can PCA protect the environment or act with any degree of openness and fairness.

II. Compliance with the Clean Water Act will not foreclose economic development or municipal growth given the practical alternatives.

The Appellate Court's ruling has been portrayed by Appellants and the amici that support appellants as an obstacle to economic growth and affordable housing. It is even claimed that the Court of Appeals ruling will prevent cities from upgrading old and overloaded sewerage treatment facilities. (PCA Brief at 28) This portrayal is completely inaccurate and fails to recognize that there are a number of practical ways that growth can be permitted in impaired watersheds without violating the Clean Water Act.

A. Using wastewater systems that do not discharge to water

Cities and businesses can grow without creating new discharges at all. This is exactly what Congress expected when it passed the Clean Water Act setting the goal of eliminating all discharges by 1985. Specifically, with regard to municipal discharges, Congress sought to encourage wastewater treatment that, instead of discharging pollutants to the nation's waters, reused and recycled wastewater and returned water to the ground. *See* 33 U.S.C. § 1281. The legislative history of the Clean Water Act discloses that Congress specifically sought to promote ecologically sound land disposal systems of wastewater and that most municipalities would eventually use such systems. The Senate Committee quoted an EPA study of the time and stated in its report on the bill:

> Alternative waste treatment methods, which requires the return of pollutants to natural cycles, are only new in the sense that they have re-emerged for application. This method is most commonly associated with the Muskegon project although other recent examples include work at Penn State University and Michigan State University and elsewhere.
>
> The Environmental Protection Agency, in Volume II of the 1971 report on "The Cost of Clean Water", states:
>
> > They (ground disposal procedures) have the great virtue of recycling the materials so disposed, both by replenishing water tables and by converting and utilizing organic and inorganic waste matter in natural life processes of decay and growth. Their secondary merit is more germane to this discussion. Water reaching watercourses after passage through the filtering and decomposition processes afforded by soil is far purer—provided that soil loading rates are not exceeded—than any waste treatment process short of distillation could make them.
>
> The Committee emphasizes that the policy in Section 201, read with the policy stated in Section 101, requires the Administrator to direct his research and development authority under sections 104 and 105 to carry out those policies.

S. Rep. No. 92-414 (1971), reprinted in 1972 U.S.C.C.A.N. 3668 at 3691.

As intended by Congress, use of natural treatment systems that emphasize water reuse, nutrient recycling and the use of wastewater for crop production has been revived as a result of the passage of the Clean Water Act. Metcalf & Eddy, *Wastewater Engineering: Treatment, Disposal and Reuse*, pp 928-929 (3d. ed. 1991).[4] Numerous communities across the country are now treating their wastewater by reusing it instead of discharging it to surface waters. For example:

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[4] Examples of these natural systems are discussed in Ronald W. Crites, *Natural Wastewater Treatment Systems*, Taylor & Francis (2005), and Sherwood C. Reed, *Natural Systems for Wastewater Treatment*, Water Environment Federation (2d. ed. 2001).

- In Virginia, to minimize nutrient inputs to Chesapeake Bay, Hampton Roads Sanitation District in Virginia reclaims water for reuse for industrial purposes. (0.5 million gallons per day ("MGD")) This is the first case in Virginia in which water is reused for industrial purposes as opposed to irrigation. Hampton Roads Sanitation District, http://www.hrsd.state.va.us/waterreuse.htm (visited Dec. 29, 2005).

- Also, in Virginia, housing development and growth has occurred despite the impaired state of the Chesapeake Bay through use of decentralized wastewater systems that have no discharge and that recharge groundwater. Danielson, Todd, "No Long Pipelines and No TMDLs," Danielson, Todd, "No Long Pipelines and No TMDLs," *Water Environment and Technology*, p. 22 (Nov. 2004).

- In Texas, the total amount of municipal wastewater reuse reported for 1998 was approximately 160 MGD, mostly for golf course irrigation, manufacturing, and cooling towers. Five cities in Texas reused more than 10 MGD in 2002. Texas Water Development Board, http://www.twdb.state.tx.us/assistance/conservation/Municipal/Reuse/Reuse.asp (visited Dec. 29, 2005).

- Tucson Water, a department of the City of Tucson, delivers reclaimed water to 14 golf courses, 32 parks, 40 schools, and over 300 residents for irrigation. City of Tucson, Tucson Water Department, http://www.ci.tucson.az.us/water/reclaimed_water.htm (visited Dec. 29, 2005).

- Returning treated wastewater to the ground and land application of wastewater have been practiced for many years in California. Also, municipal wastewater, instead of being a source of pollution, has been a resource for prevention of saltwater intrusion to drinking water and for irrigation of crops. Hammer M.J and Hammer Jr. M.J., *Water and Wastewater Technology*, pp. 485, 499 (3d. ed. 1996).

- In a 2002 survey in California, over 250 facilities reported reusing some portion of their wastewater for a total of approximately 525,000 acre-ft per year. Most of the water is used for landscape and agricultural irrigation. California Environmental Protection Agency, State Water Resources Control Board, http://www.waterboards.ca.gov/recycling/munirec.html (visited Dec. 29, 2005).

- Several Midwestern communities, homebuilders, industries, resorts, schools, and other institutions are using wastewater reclamation and reuse systems to manage wastewater as a raw material in the production of food and fiber. Some examples include the communities of Muskegon, Michigan, Kewanna, Indiana, and Cortland, Illinois; subdivisions in Long Grove, Round Lake Park, and Kane County, Illinois;

industrial farms in Decatur, Illinois, Guthrie Center, Iowa, Atlantic, Iowa, and Clarke County, Iowa; and resorts in Mercersburg, Pennsylvania, Glen Arbor, Michigan, and Lockport Township, Illinois. Information on these projects is available at Sheaffer Systems Projects, http://www.sheafferinternational.com/projects.html (visited Dec. 29, 2005).

- Natural and constructed wetlands are being used as cost-effective and environmentally sound alternatives for wastewater treatment, even in cold northern climates. For example, a restored bulrush marsh at Frank Lake, Alberta (60 km south of Calgary) is providing effective wastewater treatment for a local beef slaughterhouse and municipality. White, J.S., *et al.*, Sediment storage of phosphorus in a northern prairie wetland receiving municipal and agro-industrial wastewater, White, J.S., *et al.*, Sediment storage of phosphorus in a northern prairie wetland receiving municipal and agro-industrial wastewater, *Ecological Engineering* 14, 127-138 (2000); *see also* Luederitz, V., *et al.*, Nutrient removal efficiency and resource economics of vertical flow and horizontal flow constructed wetlands, *Ecological Engineering* 18, 157-171 (2001); Maehlum, P.D., *et al.*, Cold-Climate Constructed Wetlands, *Wat. Sci. Tech.*, 32(3), 95-101 (1995).

- U.S. EPA describes a wide variety of water reuse approaches that allow municipal wastewater to be handled without a discharge. U.S. Environmental Protection Agency, Water Recycling and Reuse: The Environmental Benefits, http://www.epa.gov/region9/water/recycling/index.html (visited Dec. 29, 2005); *see also* General Accounting Office, Information on the Use of Alternative Wastewater Treatment Systems, GAO/RCED-94-109 (September 1994).

We do not know whether systems that do not discharge are suitable for Annandale and Maple Creek.[5] However, for many communities in impaired watersheds, these systems have proven to be an effective way to allow growth that is not affected at all by the Clean Water Act general prohibition on new discharges that cause or contribute to the violation of a water quality standard.

[5] Annandale had a land disposal system that it decided to replace with a discharging system. While the Annandale land treatment system is said to be old, it is unknown whether Annandale would have chosen to replace its land treatment system with a system that increased loadings of phosphorus to Lake Pepin had PCA insisted that Annandale not create a new discharge that contributed to the Lake Pepin impairment.

B. Using More Advanced Wastewater Treatment

In many cases, growth and increased discharges can be allowed if the discharger simply improves its level of wastewater treatment. Construction or operation of a new source or new discharge that does not increase loading of the pollutant causing the impairment would not "cause or contribute" to a violation of water quality standards. Also, even optimizing or upgrading existing plants "can sometimes produce surprisingly high nutrient removal levels for a very modest capital expenditure." Solley, D., and Barr, K., Optimize What You Have First! Low Cost Upgrading of Plants for Improved Nutrient Removal, *Wat. Sci. Tech.* 39(6), 127-134 (1999).[6]

Appellants and the amici who support their position have all treated this case as though there is no way to avoid discharging more than 3,600 pounds of phosphorus into the Crow River, but that is simply not the case. The 1.0 mg/L limit in the Annandale/Maple Creek permit is not stringent and the cities could certainly do better as are a number of other cities around the country. For example:

- A recent paper by the national engineering firm CH2M Hill details how the cities of Las Vegas, Nevada; Alexandria, Virginia; Rock Creek, Oregon; Durham, Oregon; Cauley Creek, Georgia; Lone Tree, Colorado; Walton, New York; Iowa Hill, Colorado; Pinery, Colorado; and Stamford, New York all have phosphorus limits of 0.2 mg/L or less and how they are meeting those limits. CH2M Hill, Evaluation of Exemplary WWTPs Practicing High Removal of Phosphorus, http://www.client-ross.com/Spokane-river/docs/Technology_WWTP%20evaluation%20by%20CH2MHill%2011-21-05.pdf (visited Dec. 29, 2005).

[6] The City of Ann Arbor provides a good example of this principle of optimization. *See* Shehab, O., Optimizing Phosphorus Removal at the Ann Arbor Wastewater Treatment Plant, *Wat. Sci. Tech.* 34(1-2), 493-499 (1996).

- A recent article highlights how the city of Las Vegas, N.M, which has a phosphorus limit of 0.17 mg/L, has discharged consistently under 0.1 mg/L. "Las Vegas Wins with Team Approach," *Water Environment and Technology*, pp. 64, 68 (Dec. 2004).

- The Environmental Appeals Board recently decided a case in which U.S. EPA had set a phosphorus permit limit for a municipal wastewater treatment plant of 0.1 mg/L. The Board remanded the case to the agency on the ground that 0.1 mg/L might not be sufficiently restrictive. *In re City of Marlborough, Massachusetts Easterly Wastewater Treatment Facility,* NPDES Appeal No. 04-13, 2005 EPA App. LEXIS 14 (August 11, 2005).

These examples make clear that by using wastewater treatment technologies that are in use in many places across the country, Annandale and Maple Creek could have "constructed and operated" a new or upgraded plant under 40 CFR § 122.4(i) without making any new contribution of phosphorus to the Lake Pepin watershed.[7] Using such treatment would not be a superhuman feat and there is certainly no showing that so limiting phosphorus concentrations from the Annandale/Maple Creek plant would have worked a great economic hardship on the cities or made growth impossible.

C. Completing the Crow River and Lake Pepin TMDLs or at least completing a phosphorus load allocation and compliance schedules

Finally, of course, PCA could allow new discharges to impaired water bodies if it complies with 40 CFR § 122.4(i) by completing a TMDL or at least a phosphorus load allocation and compliance schedule. PCA could prioritize its work on TMDL development to

[7] To have avoided any increased new discharge of phosphorus to Lake Pepin, it would be necessary for Annandale/Maple Creek to treat the wastewater to a lower concentration of phosphorus than the 1.0 mg/L level that is required by the permit at issue. Although the record is not sufficiently clear to allow Amici to calculate the necessary concentration limit with certainty, it appears that lowering the permit limit to .38mg/L (1400 ÷ 3600) would have been adequate to avoid any new loading.

complete TMDLs first for watersheds with growing communities seeking new permits. *See Friends of the Wild Swan, Inc. v. U.S. Environmental Protection Agency*, 130 F. Supp. 2d 1204, 1205 (D. Mont. 2000).

While PCA apparently has completed only one TMDL for phosphorus, pollution control agencies for some other states have done better. Just looking at states in the region, it is clear that completing a TMDL for phosphorus in a timely manner is not an impossible mission:

Approved Phosphorus TMDLs for Michigan, North Dakota, South Dakota, and Wisconsin			
State / Date	**TMDL Name**	**State / Date**	**TMDL Name**
MI 12/05/00	BELLEVILLE LAKE	SD 11/09/01	LAKE ALVIN TMDL
MI 12/05/00	BELLEVILLE LAKE	SD 04/12/99	LAKE BYRON
MI 02/29/00	BRIGHTON LAKE	SD 04/12/99	LAKE FAULKTON
MI 12/05/00	FORD LAKE	SD 04/12/99	LAKE FAULKTON
MI 11/09/04	GREAT BEAR LAKE	SD 06/03/04	LAKE HANSON
MI 03/10/00	KENT LAKE	SD 04/12/99	LAKE HENDRICKS/ UPPER DEER CREEK
MI 04/24/01	LAKE ALLEGAN	SD 04/12/99	LAKE HENDRICKS/ UPPER DEER CREEK
MI 04/24/01	LAKE ALLEGAN	SD 04/12/99	LAKE HENDRICKS/ UPPER DEER CREEK
MI 04/13/00	LAKE MACATAWA	SD 09/29/04	LAKE HERMAN
MI 04/13/00	LAKE MACATAWA	SD 04/12/99	LAKE HIDDENWOOD
MI 04/13/00	LAKE MACATAWA	SD 04/12/99	LAKE HIDDENWOOD
MI 02/18/00	ORE LAKE	SD 11/09/01	LAKE LOUISE
MI 08/02/00	STRAWBERRY LAKE	SD 11/09/01	LAKE LOUISE
ND 02/27/97	GOODMAN CREEK	SD 04/12/99	LAKE MADISON
ND 02/06/04	HEART RIVER - LOWER SEGMENT	SD 04/12/99	LAKE MADISON
ND 02/0604	HEART RIVER - UPPER SEGMENT	SD 04/12/99	LAKE MADISON
ND 02/06/04	PATTERSON LAKE	SD 04/12/99	LAKE MADISON
ND 02/06/04	PATTERSON LAKE	SD 04/22/97	LAKE MITCHELL,

			FIRESTEEL CREEK
ND 02/06/04	RICE LAKE	SD 11/09/01	LAKE OLIVER
ND 02/06/04	RICE LAKE	SD 04/12/99	LAKE REDFIELD/ TURTLE CREEK
ND 02/06/04	RICE LAKE	SD 04/12/99	LAKE REDFIELD/ TURTLE CREEK
SD 12/26/96	BIG STONE LAKE	SD 04/02/03	LOYALTON DAM
SD 02/07/01	BLUE DOG LAKE	SD 04/02/03	MINA LAKE
SD 02/07/01	BLUE DOG LAKE	SD 04/02/03	MINA LAKE
SD 09/29/04	BRAKKE DAM	SD 04/02/03	MINA LAKE
SD 04/12/99	BRANT LAKE	SD 04/12/99	RAVINE LAKE
SD 04/12/99	BRANT LAKE	SD 04/12/99	RAVINE LAKE
SD 06/03/04	BYRE LAKE	SD 04/12/99	RAVINE LAKE
SD 02/07/01	CLEAR LAKE	SD 04/02/03	ROSE HILL LAKE
SD 02/07/01	CLEAR LAKE	SD 04/02/03	ROSE HILL LAKE
SD 02/07/01	CLEAR LAKE	SD 04/12/99	SWAN LAKE/ TURKEY RIDGE CR.
SD 11/09/01	COTTONWOOD LAKE	SD 04/12/99	SWAN LAKE/ TURKEY RIDGE CR.
SD 11/09/01	COTTONWOOD LAKE	SD 04/12/99	SWAN LAKE/ TURKEY RIDGE CR.
SD 11/09/01	COTTONWOOD LAKE	SD 09/01/05	SYLVAN LAKE
SD 12/03/03	CRESBARD LAKE	WI 08/20/04	CASTLE ROCK CR. & GUNDERSON VALLEY CR.
SD 04/12/99	ELM LAKE	WI 08/20/04	CASTLE ROCK CR. & GUNDERSON VALLEY CR.
SD 04/12/99	ELM LAKE	WI 08/19/03	CEDAR LAKE
SD 01/14/05	FATE DAM	WI 08/19/03	CEDAR LAKE
SD 09/29/04	FISH LAKE	WI09/08/04	HALF MOON LAKE
SD 09/29/04	HAYES LAKE	WI 09/08/04	HALF MOON LAKE
SD 04/02/03	JONES LAKE	WI 03/23/04	SILVER LAKE
SD 04/02/03	JONES LAKE	WI 03/23/04	SILVER LAKE
SD 06/03/04	LAKE ALICE	WI 08/24/00	SQUAW LAKE
SD 11/09/01	LAKE ALVIN TMDL		
Total Phosphorus TMDLs Nationwide: 898			
U.S. Environmental Protection Agency, List of Approved TDMLs, http://oaspub.epa.gov/pls/tmdl/waters_list.tmdls?polid=29&pollutant= PHOSPHORUS (visited Dec. 29, 2005)			

The PCA has had over 25 years to do a TMDL for the Crow River and Lake Pepin and cannot justly blame the Clean Water Act for any delay in its ability to grant permits needed for new development. *See Friends of the Wild Swan*, 130 F. Supp. 2d at 1211. Had PCA completed such calculations for Lake Pepin, under the Court of Appeals decision and the rule, the PCA might have allowed a new discharge to Annandale and Maple Lake that increased the discharge of phosphorus from those cities. Of course, having done this work, PCA might learn that it could not allow some or all of the proposed increase without causing unjustified hardship to other dischargers. But in that case, this proposed new discharge in fairness should not be granted.

CONCLUSION

The impairment of the Crow River and Lake Pepin can only be repaired if a substantial net reduction of phosphorus loading occurs. PCA cannot use pollution reductions already required to compensate for past loadings as an excuse to allow new or increased loadings that will move the Crow River and Lake Pepin further away from meeting the goals of the Clean Water Act.

It is not necessary for economic growth for PCA to have flexibility to grant permits which violate the Clean Water Act and federal regulations established to implement the Act. Minnesota municipalities and industries can grow and expand without causing or contributing to impairments of Minnesota water bodies. This can be done by developing systems that fulfill the goals of the Clean Water Act by handling wastewater through systems

do not create a new discharge, by advanced wastewater treatment and by preparing the TMDLs that are required by the Clean Water Act.

Respectfully submitted,

Date: Jan. 4, 2006

Jane Reyer #0296521
Counsel for Amicus Petitioners
220 Pike Lake Road
Grand Marais, MN 55604
218-387-3377

Nancy Stoner
Jon Devine
Natural Resources Defense Council
1200 New York Ave, NW
Washington, DC 20005
202-289-2394

Katherine Baer
Director, River Advocacy
American Rivers
1025 Vermont Ave., NW
Suite 720
Washington, DC 20005*
202-347-7550 x3053

Albert Ettinger
Brad Klein
Environmental Law and Policy Center of the Midwest
35 East Wacker Drive, Suite 1300
Chicago, IL 60601
312-795 3707

Andrew Hanson
Midwest Environmental Advocates, Inc.
702 E. Johnson St.
Madison, WI 53703
608-251-5047

* As of January 30, 2006, American Rivers' address will be: 1101 14th St. NW, Suite 1400, Washington DC, 20005.

NO. A04-2033

State of Minnesota
In Supreme Court

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

BRIEF OF AMICI CURIAE TROUT UNLIMITED AND MINNESOTA LAKES ASSOCIATION

Michael D. Madigan (#129586)
Edward M. Tillman (#322337)
MADIGAN, DAHL & HARLAN, P.A.
701 Fourth Avenue South, Suite 1700
Minneapolis, MN 55415
Tel: (612) 604-2000
Fax: (612) 604-2599
Attorneys for Amici Curiae Trout Unlimited and Minnesota Lakes Association

Mike Hatch
Minnesota Attorney General
Robert B. Roche (#289589)
OFFICE OF THE STATE ATTORNEY GENERAL
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
Tel: (651) 296-1506
Fax: (651) 296-4139
Attorneys for Appellant Minnesota Pollution Control Agency

Janette K. Brimmer (#174762)
MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY
26 East Exchange Street, Suite 206
St. Paul, MN 55101-1667
Tel: (651) 223-5969
Fax: (651) 223-5967
Attorney for Respondent Minnesota Center for Environmental Advocacy

Edward J. Laubach, Jr. (#61025)
Christopher W. Harmoning (#285948)
Heather I. Olson (#342117)
GRAY, PLANT, MOOTY, MOOTY & BENNETT, P.A.
1010 West St. Germain Street, Suite 600
St. Cloud, MN 56301
Tel: (320) 252 4414
Fax: (320) 252-4482
Attorneys for Appellants City of Annandale and City of Maple Lake

(Additional Counsel Listed on following pages)

Jane Reyer (#296521)
220 Pike Lake Road
Grand Marais, MN 55604
Tel: (218) 387-3377

Albert Ettinger, Senior Attorney
ENVIRONMENTAL LAW & POLICY CENTER OF THE MIDWEST
35 East Wacker, Suite 1300
Chicago, IL 60601
Tel: (312) 795-3707
Fax: (312) 795- 3730

Nancy Stoner, Senior Attorney
NATURAL RESOURCES DEFENSE COUNCIL
1200 New York Avenue N.W.
Washington, D.C. 20005
Tel: (202) 289-2394

Andrew Hanson
MIDWEST ENVIRONMENTAL ADVOCATES
702 East Johnson Street
Madison, WI 53703
Tel: (608) 251-5047
Fax: (608) 268-0205

Katherine Baer
Director, River Advocacy
AMERICAN RIVERS
1025 Vermont Avenue N.W., Suite 720
Washington, D.C. 20005
(202) 347-7550, Ext. 3053
Attorneys for Amici Curiae Environmental Law and Policy Center of the Midwest, Natural Recourses Defense Counsel, Midwest Environmental Advocates, and American Rivers

Nils Grossman (#38179)
General Counsel
METROPOLITAN COUNCIL
Mears Park Centre, 7th Floor
St. Paul, MN 55101-1634
Tel: (651) 602-1463
Fax: (651) 602-1640

Charles N. Nauen (#121216)
William A. Gengler (#210626)
David J. Zoll (#330681)
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South,
Suite 2200
Minneapolis, MN 55401
Tel: (612) 339-6900
Fax: (612) 339-0981
Attorneys for Amicus Curiae Metropolitan Council

Susan L. Naughton (#259743)
LEAGUE OF MINNESOTA CITIES
145 University Avenue West
St. Paul, MN 55103-2044
(651) 281-1232
Attorney for Amicus Curiae League of Minnesota Cities

Lloyd W. Grooms (#188694)
Thomas H. Boyd (#200517)
WINTHROP & WEINSTINE, P.A.
225 South Sixth Street, Suite 3500
Minneapolis, MN 55402
Tel: (612) 604-6400
Fax: (612) 604-6800
Attorneys for Amicus Curiae Builders Association of the Twin Cities

Alexandra Dapolito Dunn
General Counsel
NATIONAL ASSOCIATION OF
CLEAN WATER AGENCIES
1816 Jefferson Place, N.W.
Washington, D.C. 20036
Tel: (202) 533-1803

Molly McKee (#341885)
LARKIN HOFFMAN DALY &
LINDGREN, LTD.
1500 Wells Fargo Plaza
7900 Xerxes Avenue South
Minneapolis, MN 55431-1194
Tel: (952) 835-3800
Fax: (952) 896-3333

Fredric P. Andes
Erika K. Powers
David T. Ballard
BARNES & THORNBURG, LLP
1 North Wacker Drive, Suite 4400
Chicago, IL 60606-2809
(312) 357-1313
Attorneys for Amicus Curiae National Association of Clean Water Agencies

Timothy P. Flaherty (#0029920)
Christopher M. Hood (#229386)
Steven W. Nyhus (#296193)
Kari J. Thurlow (#303008)
FLAHERTY & HOOD, P.A.
525 Park Street, Suite 470
St. Paul, MN 55103
Tel: (651) 225-8840
Attorneys for Amici Curiae Minnesota Environmental Science and Economic Review Board and Coalition for Greater Minnesota Cities

Robert S. Halagan (#136402)
HALAGAN LAW FIRM, LTD.
101 Courthouse Square
15 Second Street N.W.
Buffalo, MN 55313
Tel: (763) 682-8975
Attorney for Amicus Curiae Wright County Mayors Association

Brian J. Wisdorf (#297768)
OLSON & PRICE, LTD.
220 Exchange Building
26 East Exchange Street
St. Paul, MN 55101
Tel: (651) 298-9884
Fax: (651) 298-0056
Attorney for Amici Curiae Coalition for Clean Minnesota Rives, New Ulm Area Sportfishermen, and Friends of the Minnesota Valley

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STATEMENT OF FACTS

Introduction

Trout Unlimited and the Minnesota Lakes Association[1] submit this Amicus Brief to alert the Court to the ongoing degradation of Lake Pepin and to urge the Court to affirm the Court of Appeals in protecting this irreplaceable resource.

The unparalleled beauty and spiritual value of Lake Pepin has long been recognized and treasured by Minnesotans. It inspired the "Legend of Maiden Rock" among our earliest inhabitants (later expressed by Henry Wadsworth Longfellow in the Song of Hiawatha) and led the poet William Cullen Bryant to remark that "Lake Pepin ought to be visited by every poet and painter in the land." It is host and sustenance to countless fish, waterfowl, birds, shellfish, and other wildlife, many of them threatened.[2] In the Land of 10,000 lakes, Lake Pepin truly stands out as one of our aquatic jewels.

What is not as well known, however, is the inexorable degradation of this great resource that has been allowed to occur over the course of the last century. The waters of Lake Pepin have been fouled by excessive amounts of phosphorus (the primary pollutant) and sediments. The phosphorus pollution promotes severe algae blooms which rob the lake of oxygen and aggravate turbidity levels, which

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[1] Pursuant to Rule 129.03 of the Minnesota Rules of Civil Appellate Procedure, counsel for Amici Curiae Trout Unlimited and Minnesota Lakes Association, by their signature, certify that they have authored this brief in whole, and that no person other than said Amici Curiae, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

[2] For instance, sturgeon, paddlefish, mussels, and others. Lake Pepin and the Mississippi River also host enormous fall migrations of swans, geese and ducks.

are already unacceptably high due to sediment loading. This degradation led the State to list Lake Pepin on Minnesota's Impaired Water List.

Notwithstanding this impaired status, the Minnesota Pollution Control Agency ("MPCA") recently issued a permit for a proposed wastewater treatment plant which would discharge 3,600 pounds of phosphorous each year in waters which flow into Lake Pepin. This is 2,200 pounds more each year than that already discharged by the existing municipal facilities. This phosphorus discharge would unquestionably further aggravate the existing phosphorus pollution and impairment of Lake Pepin.

Procedural History

The facts underlying this dispute are accurately and comprehensively set forth in the Brief of the Minnesota Center for Environmental Advocacy ("MCEA") and will not be repeated here. Procedurally, Appellants have taken an appeal from a Minnesota Court of Appeals decision which held that the MPCA erred by interpreting 40 C.F.R. § 122.4(i) as authorizing it to issue a National Pollutant Discharge Elimination System ("NPDES") permit to the Cities of Annandale and Maple Lake for the proposed wastewater treatment plant, when the proposed discharge of at least 3,600 pounds of phosphorus from this plant would undeniably contribute to the violation of water quality standards of this already impaired water body. This is an issue of great significance to the water quality of Lake Pepin and all of Minnesota's lakes, rivers, and streams. It is also an issue of great significance to the integrity and efficacy of the Clean Water Act.

further undermine the goals of the Clean Water Act to restore "the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

ARGUMENT

I. Statutory Framework of the Clean Water Act

Congress enacted the Clean Water Act, in its present form, for the expressly stated purpose of restoring "the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Various sections of the Clean Water Act seek to reach this goal by different yet complementary approaches. One such approach is a system of uniform effluent limitations imposed on discharges of pollutants from discrete points, such as factory outlets or wastewater treatment plants. Under this system, no entity is allowed to discharge any pollutant into a water body from any point source except in compliance with certain requirements, including the requirement to obtain a permit, commonly known as a NPDES Permit. 33 U.S.C. § 1311(a). These permits serve the congressional goal of restoring the integrity of the nation's waters by offering a means to limit the number of point source dischargers and by including conditions, such as numeric effluent imitations, placing restrictions on the permit holders' activities.

Congress knew, however, that uniform NPDES permit restrictions alone would not achieve the goals of the Clean Water Act. Thus, Congress provided other mechanisms to control water pollution, such as imposition of extraordinary, site-specific discharge limitations which exceed standard restrictions, see e.g., 33 U.S.C. § 1312, and control of non-point source pollution to a water body, such as

runoff of agricultural chemicals, see e.g., 33 U.S.C. § 1383 (providing for federal assistance to state-run non-point source management programs).

But extraordinary permit restrictions cannot be knowledgeably imposed, and programs for addressing non-point source pollution cannot be developed, unless the agencies imposing such restrictions and developing such programs have first identified the waters where such restrictions and programs are necessary, and have identified the nature and extent of the response required. That is the very purpose of the provisions of Section 303 of the Clean Water Act.

A. Section 303 Requirements

Section 303(a) of the Clean Water Act requires each state to establish minimum water quality standards for all surface waters within its boundaries. 33 U.S.C. § 1313(a). Such water quality standards must serve to protect the public health or welfare, enhance water quality, and serve the purposes of water pollution prevention and control. 33 U.S.C. § 1313(c)(2)(A). This step was to have been taken no later than 180 days after October 18, 1972. 33 U.S.C. § 1313(a)(3)(A).

Once these water quality standards are established, each state is then required to identify the waters within its boundaries that standard point source pollution controls will not bring within the water quality standards:

> Each State shall identify those waters within its boundaries for which the effluent limitations required by [other sections] of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall 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). Such waters are commonly referred to as water quality limited segments ("WQLSs").

Once a state has identified and prioritized WQLSs it must then establish total maximum daily loads ("TMDLs") for such waters:

> 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 1314(a)(2) of this title 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). Thus, a TMDL is the maximum daily amount of discharge of a pollutant at which the applicable water quality standard will be achieved, allowing for a margin of safety. Id. As a part of establishing TMDLs, and with regard to each separate WQLS, every state, including the State of Minnesota, must designate both wasteload allocations for point sources of pollution such as wastewater treatment plants, and load allocations for non-point sources of pollution such as agricultural and urban runoff.[4]

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[4] A wasteload allocation is the portion of a receiving water's loading capacity that is attributed to one of its existing or future point sources of pollution. 40 C.F.R. § 130.2(h). A load allocation is the portion of the water's receiving capacity that is attributed to an existing or future nonpoint source or to natural background sources. 40 C.F.R. § 130.2(g). The loading capacity for any water is the greatest amount of matter or thermal energy that a water body can receive without violating water quality standards. 40 C.F.R. §§ 130.2(e) and (f). Wasteload allocation plus load allocation, plus a margin of safety, combine to comprise a TMDL.

B. MPCA's Failures to Comply with Section 303

Like every other State, the State of Minnesota was to have submitted its first Section 303(d) list to the Administrator by June 26, 1979. The Minnesota Pollution Control Agency ("MPCA") not only failed to meet that deadline, but also failed to submit any document even purporting to qualify as a Section 303(d) List until 13 years later. Indeed, it was not until 1992 that the MPCA finally made a submission purporting to constitute its Section 303(d) List of prioritized water quality limited segments. See *Sierra Club v. Browner*, 843 F.Supp. 1304 (D.Minn. 1993).

The MPCA's effort was not only tardy by 13 years, but it was also woefully inadequate. The MPCA has only assessed a small fraction of Minnesota's waters. Today, more than 25 years after the passage of the Clean Water Act, only 14% of Minnesota's lakes and only 8% of Minnesota's streams have even been assessed. Of those that have been assessed, 40% are polluted with contaminants such as mercury, fertilizers, algae (due to phosphorous), and human and animal waste. See Minnesota Pollution Control Agency website at www.pca.state.mn.us/water/tmdl.

II. 40 C.F.R. § 122.4(i)

As mentioned earlier, the Clean Water Act requires states to identify water bodies within their boundaries that do not meet water quality standards and to establish a priority for ranking those polluted water bodies based on the severity of the pollution and the type of use of the waterway. 33 U.S.C. § 1313(d)(1)(A).

The Clean Water Act also requires each state to identify the maximum amount of each type of pollutant that a water body can handle–the TMDL of that pollutant–and still meet water quality standards. 33 U.S.C. § 1313(d)(1)(C).

The corresponding Clean Water Act regulation at issue here, 40 C.F.R. § 122.4(i) provides, in pertinent part, as follows:

> 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 even after the application of the effluent limitations required by [Section 301(b)] of [the] 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.

As appropriately argued by MCEA, 40 C.F.R. § 122.4(i) ("§ 122.4(i)" or "the Rule") prohibits the issuance of a permit for the wastewater treatment facility in question for two reasons. First, a permit should not be granted until the MPCA completes a TMDL for Lake Pepin and the proposed permittee demonstrates that its proposed discharge is in compliance with the TMDL. Second, a permit should not be granted because the proposed permittee has failed to demonstrate that its proposed discharge will not contribute to or cause the violation of water quality

standards. See *In the Matter of the Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Waste Water*, 702 N.W.2d 768 (Minn.App. 2005); *Friends of the Wild Swan v. United States Environmental Protection Agency*, 74 Fed.Appx. 718 (9th Cir. 2003), and consolidated cases decided on appeal therein, *Friends of the Wild Swan v. United States Environmental Protection Agency*, 130 F.Supp.2d 1184 (D.Mt. 2000), *Friends of the Wild Swan v. United States Environmental Protection Agency*, 130 F.Supp.2d 1199 (D.Mt. 2000), and *Friends of the Wild Swan v. United States Environmental Protection Agency*, 130 F.Supp.2d 1204 (D.Mt. 2000).

A. MPCA's Failure to Complete a TMDL Precludes the Issuance of this Permit

On its face, the plain language of § 122.4(i) precludes the issuance of this permit prior to the completion of a TMDL for the applicable water bodies. See e.g., *Friends of the Wild Swan*, 74 Fed.Appx. 718, and consolidated cases decided on appeal therein, 130 F.Supp.2d 1184, 130 F.Supp.2d 1199, and 130 F.Supp.2d 1204; *San Francisco Baykepper, Inc. v. Browner*, 147 F.Supp.2d 291 (N.D.Cal. 2001); and *City of Waco, Texas v. Texas Commission on Environmental Quality*, Cause No. GN1-00654, (Dist.Ct., Travis County, TX, 1984).

Even if the language of § 122.4(i) is considered to be ambiguous, however, the same result is mandated. When considering an ambiguous regulation, the primary consideration is "the intent of the promulgating agency, which controls unless such intent is plainly inconsistent with the language of the regulation."

Annandale and Maple Lake, 702 N.W.2d at 772 (citing *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 911 (1997)).

The EPA's most recently published statements on § 122.4(i) indicate that a new source or discharge that will contribute to a violation of water quality standards may not be issued a permit until a TMDL wasteload (point source) allocation is completed that allows for the new source or discharge, and where the other existing dischargers are subject to schedules of compliance. The EPA has published a guidance document for NPDES stormwater permits entitled "National Pollutant Discharge Elimination System (NPDES) Storm Water Program Questions and Answers – Volume III" ("Guidance"). The Guidance is dated January 21, 2004, and as having been amended on December 17, 2004. See http://www.epa.gov/npdes/pubs/sw_quanda_intro.pdf. The Guidance is largely set forth in a question-and-answer format. Section E of the Guidance, at pages 9-12, covers the topics of "Impaired Waters and Total Maximum Daily Loads (TMDLs)". Some of the questions and answers in Section E indicate that the EPA's position is that under § 122.4(i) a TMDL must be done before a permit is issued.

The question and answer at E5 are as follows:

> **E5. How can a prospective permitee find out if a water body is impaired or has an approved Total Maximum Daily Load (TMDL)?**
>
> This information must be obtained from your State TMDL authority. In states that are permitting authority, generally the same State environmental agency also develops State 303(d) lists and TMDLs.

> Many of these States have websites with lists of impaired water bodies and TMDLs, or with information on who to contact. Your permitting authority can also provide this contact information. For States where EPA is the permitting authority, EPA has developed a website with contact information for the State TMDL authority, http://cfpub.epa.gov/npdes/stormwater/tmdl.cfm.
>
> Once you have determined that your receiving water is impaired and/or has an approved TMDL, you may still need clarification from the TMDL authority on how that status affects your discharge, i.e. whether there are additional requirements you must meet. If so, these additional requirements (e.g. wasteload allocation, monitoring) must be incorporated into your Storm Water Pollution Prevention Plan ("SWPPP") or your Storm Water Management Plan ("SWMP"), and implemented accordingly.

(Emboldened typeset in original.) The very language of the question at E5 indicates that the EPA's position is that a TMDL must be performed before a permit is issued. It indicates that a "prospective permitee" would need to find out if a water body has an approved TMDL before a permit may be issued. Also, the second paragraph of the answer to question E5 indicates that once a "prospective permitee" has determined that the water body has an approved TMDL, it may still need clarification regarding possible "additional" requirements. Thus, the first requirement is a TMDL, and there may even be "additional" requirements after that.

Even more illustrative of the fact that § 122.4(i) dictates that a permit may not be issued without a TMDL having been done first are the question and answer set forth in the Guidance at E8:

> **E8. If a new discharger wants to discharge to an impaired water for which a Total Maximum Daily Load (TMDL) has not yet been developed, can the discharge be covered by a general permit?**
>
> However, if the discharge does contain the pollutant for which the water body is impaired, 40 CFR 122.4(i) expressly prohibits the issuance of a permit to a new source or a new discharger, if its discharge will cause or contribute to the violation of water quality standards, unless the operator of the proposed discharge can demonstrate that there are sufficient pollutant load allocations to allow for the discharge, and that other discharges to the water body are under compliance schedules to bring the water body into compliance with water quality standards.
>
> Permitting authorities have developed different policies for dealing with the situation when these conditions are not attainable. Please check with your permitting authority for additional guidance on this issue.

(Emboldened typeset in original; underlined emphasis added.) This language makes it absolutely clear that the EPA's position on the matter is exactly the same as that put forward by MCEA, TU and MLA. Here, the EPA, in interpreting its own Rule, uses the word "unless" to indicate that a permit may not be issued unless a TMDL has first been done.

Additionally, certain of the EPA's statements regarding § 122.4(i) in the Federal Register further make it clear that a TMDL must be done before a permit may be issued. On October 30, 2000 the EPA published its "Final Reissuance of National Pollutant Discharge Elimination System (NPDES) Storm Water Multi-Sector General Permit for Industrial Activities" (the "Reissuance"). See 65 Fed.Reg. 64746, *et. seq.* The Reissuance provides, in pertinent part, as follows:

> NPDES regulations at 40 CFR 122.4(i) prohibit discharges unless it can be shown 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 segments into compliance with applicable water quality standards.

65 Fed.Reg. 64756 (emphasis added). As does the Guidance, the language of the Reissuance also makes it absolutely clear that the intent of the EPA in promulgating § 122.4(i) was that a permit for a new discharge would not be issued unless a TMDL has first been done.

While the applicable caselaw is sparse, a number of courts that have examined § 122.4(i) have interpreted it in the same manner as that proposed by MCEA. In *San Francisco Baykeeper, Inc. v. Browner*, 147 F.Supp.2d 291 (N.D.Cal. 2001) the Court noted that under the Rule there can be no new source or new discharger unless the state has first completed a TMDL for the water body at issue. Id., 147 F.Supp.2d at 295. While the word "unless" does not appear in the language of the Rule, the *San Francisco Baykeeper* court still uses the word (as does the EPA itself, as noted above), indicating its recognition that the requirement that the state perform a TMDL is an integral part of the Rule. Also, in *Friends of the Wild Swan v. United States Environmental Protection Agency*, 74 Fed.Appx. 718 (9th Cir. 2003), the Ninth Circuit Court of Appeals upheld the district court's stay of NPDES permits for new sources or discharges to impaired waters until

TMDLs were first completed. Id., 74 Fed.Appx. at 723-724. By doing so, the Ninth Circuit upheld the district court's ruling that every new discharge permit should have been preceded by a TMDL. Id. But see *Crutchfield v. State Water Control Bd.*, 45 Va.App. 546, 612 S.E.2d 249 (2005). Finally, in *City of Waco, Texas v. Texas Commission on Environmental Quality,* Cause No. GN1-00654, (Dist.Ct., Travis County, TX, 1984) the court ordered that the state of Texas could not issue NPDES permits to new dischargers of pollutants to impaired waters unless the state first performed the required TMDL pollutant load allocations, so that it could be determined whether there was sufficient room in the pollutant allocations for the new discharges. Each of these rulings requiring a TMDL to be done before issuance of a permit is directly in line with the purposes of the Clean Water Act and § 122.4(i) to clean up the nation's waters.

B. The Undisputed Fact that the Discharge from this Proposed Plant Will Cause or Contribute to a Violation of Water Quality Standards Precludes the Issuance of this Permit

As noted above, § 122.4(i) provides in pertinent part that "[n]o 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." Even by MPCA's own admission, the annual phosphorus discharge from this proposed plant is substantially greater than the existing facilities and will "cause or contribute" to excessive nutrient impairment of Lake Pepin. As such, it is undisputed that this discharge would "cause or contribute" to a violation of water quality standards.

In a tortured and illogical construction of § 122.4(i), MPCA, not even knowing the total phosphorus loading in the watershed due to its failure to complete a TMDL, argued to the Court of Appeals that the issuance of a permit was proper because the admitted increase in the phosphorus discharged from the proposed plant was offset by reductions in the phosphorus discharged into the watershed by another new plant. As pointed out by the Court of Appeals, however, not only is this argument contrary to a plain reading of the Rule's phrase "cause or contribute to the violation of water quality standards," but it is also inconsistent with the regulatory structure and goals of the Clean Water Act. See *Annandale and Maple Lake*, 702 N.W.2d at 774-775. The Clean Water Act contemplated setting realistic, achievable goals regarding the reduction of pollutants into impaired water bodies, as well as fully understanding how each new incremental discharge will impact those goals. If new discharges are assessed and permitted without fully understanding and regulating the watershed-wide impacts on the impaired water body, the goals of the Clean Water Act will never be achieved, and Minnesota's polluted lakes and streams will remain polluted. Furthermore, the regulatory system will never be able to fairly, proactively, and appropriately allocate the discharge of pollutants among competing dischargers within a watershed.

If the Court were to embrace the argument put forth by the MPCA, the NPDES permitting system would not be principally managed toward the achievement of watershed-wide goals and the reduction of specified pollutants to

acceptable levels in impaired water bodies. As noted by the Court of Appeals, the concept of "offsets" was specifically rejected by the EPA when it considered revisions to § 122.4(i). See *Annandale and Maple Lake*, 702 N.W.2d at 775. Rather, NPDES permitting would become more ad hoc and arbitrary, rewarding those who propose their discharges after the construction of "clean" plants, without due consideration of other more important values. Each new proposed permittee whose discharge, as here, would further aggravate an impaired water body, would seek to benefit from and justify its pollution by pointing to the remedial effort and investment of other more environmentally responsible dischargers. This would certainly cause those "clean" plants to question why they alone invested in cleaner technology, would create a chilling effect on investment in such technology, and would cause further impairment of Minnesota's waters. Thus, the MPCA's focus on "offsets" is anathema to the purposes and regulatory scheme of the Clean Water Act, and overlooks the forest for the trees.

III. Prohibiting the Issuance of this Permit Will Enhance Efforts to Remediate Phosphorus Loading in Lake Pepin and Promote Comprehensive, Coordinated, and Area-wide Management of NPDES Discharges

In acknowledgment that this proposed wastewater treatment plant would cause or contribute to the violation of water quality standards applicable to Lake Pepin, Appellants and their amici offer the age-worn arguments against environmental regulation. Specifically, they argue that vigorous environmental regulation will restrain growth, circumscribe flexibility, and deter replacement of

aging wastewater treatment plants. See, e.g., Brief of Appellants City of Annandale and City of Maple Lake and Brief of Amicus Curiae Metropolitan Council. In light of their record, the arguments of the Metropolitan Council and MPCA are particularly ironic. [5]

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[5] Between 1982 and 1997 the population of the Twin Cities grew by 25.1% but the amount of land subject to urbanization grew by 61.1%. See William Fulton, et al., "Who Sprawls Most? How Growth Patterns Differ Across the U.S." Brookings Institution, Center on Urban & Metropolitan Policy, July 2001, p. 10, available at http://www.brook.edu/es/urban/publications/fulton.pdf. A particular example which highlights poor planning and sprawl is the fact that the daily vehicle miles traveled per person in the Twin Cities is higher than many metropolitan areas more commonly identified with sprawl such as Los Angeles or Atlanta. See U.S. Department of Transportation, Federal Highway Administration, "Highway Statistics 2003," Table HM-72, available at http://www.fhwa.dot.gov/policy/ohim/hs03/htm/hm72.htm. The MPCA has estimated that the Twin Cities may well go into non-attainment with national air quality standards in as little as five years due to the escalating amount of driving required by the region's sprawling settlement patterns. See "Air Quality in Minnesota: Problems and Solutions," Appendix I, Mobile Sources Emissions and Trends, January 2001, available at http://www.pca.state.mn.us/hot/legislature/reports/2001/aq-report.pdf. The Minnesota Chamber of Commerce has estimated that a non-attainment designation for air pollution could cost Minnesota citizens and businesses from $189 million to $266 million each year. See http://www.mn-ei.org/air/index.html#MinnesotaNeedsYourHelp. The additional cost to public health in the region for non-attainment has not been quantified, but the median annual cost to the region's public health for air pollution has been estimated at $725 million. See David Anderson and Gerard McCullough, The Full Cost of Transportation in the Twin Cities Region, Center for Transportational Studies, University of Minnesota, August 2000, p. 133, available at http://www.cts.umn.edu/trg/publications/pdfreport/TRGrpt5.pdf.

With respect to water pollution, the costs have not been quantified but the negative impact on Minnesota tourism is undeniable. The Minnesota tourism industry generates $9 billion annually for the state economy, is expected to grow in the coming years, and provides over 130,000 jobs. See Minnesota Department of Employment and Economic Development website at http://www.departmentresults.state.mn.us/deed/DeptDetail.htm.

While the Metropolitan Council touts its regional planning and growth management responsibilities in support of its arguments, a review of its record belies its assertions. Of the nation's 25 largest metropolitan areas, the Twin Cities has been the most sprawling in the past 20 years, with the exception of only Atlanta.[6] Our region is beginning to experience worsening traffic congestion, deteriorating air and water quality, falling affordability of housing for low and moderate income households, and the loss of farms, forest and wetlands.[7] This is largely due to a failure in regional planning and management.

Contrary to the assertion of Appellants, this experience highlights the wisdom of the regulatory scheme contemplated by the Clean Water Act and the need for a NPDES permit system which comprehensively and rigorously regulates pollutant discharges into impaired water bodies. The MPCA had over 25 years to develop WQLSs and TMDLs. But during that time, MPCA has assessed only 14% of Minnesota's lakes and only 8% of its streams. Even when measured by the most conservative yardstick, that has to be considered an abject failure.

The plain language of § 122.4(i) mandates that a proposed discharger demonstrate that its discharge will not "cause or contribute to the violation of water quality standards." While such a demonstration cannot and has not been made on the record applicable to the currently proposed plant, the fact of the matter is that Appellants could obtain a permit if MPCA simply completes a

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[6] See Fulton, et al., note 7 *supra*, at p. 5.
[7] See generally Fulton, et al., note 7 *supra*.

TMDL and the proposed permit is in compliance with that TMDL, or the proposed facility utilizes available technology to reduce phosphorus discharges.

Such a requirement embodied in current law in no way deters growth. It simply mandates that new facilities do not further pollute an already impaired, highly valued water body. Similarly, this requirement does not limit flexibility. MPCA, the Cities, and the Metropolitan Council are free and unfettered in their ability to achieve this environmental standard. The only inflexible part of the regulation is the adherence to the principle that valued waters will not be further polluted without due consideration to the impact on Lake Pepin, especially in light of all other discharges in the watershed. Finally, it is not a net loss to the environment to adhere to the plain language of the Clean Water Act and continue treatment of wastewater by the existing facilities, as the current discharge of phosphorus into Lake Pepin is still less than that proposed with the new facility.

CONCLUSION

Appellants and their amici would have the Court ignore the plain language of the Clean Water Act and the regulations promulgated thereunder, as well as the EPA's interpretation of its own Rule (which specifically rejected a system of "offsets"), and would permit the further phosphorus related degradation of Lake Pepin. TU and MLA urge the Court to see through the arguments of Appellants and their amici, to preserve the integrity of the regulatory structure of the Clean Water Act, to protect Lake Pepin as one of Minnesota's preeminent natural resources, and thus to affirm the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED,

Dated: January 5, 2006

By: _____

Michael D. Madigan (#129586)
Edward M. Tillman (#322337)
MADIGAN, DAHL & HARLAN, P.A.
701 Fourth Avenue South, Suite 1700
Minneapolis, MN 55415
Tel: (612) 604-2000
Fax: (612) 604-2599

Attorneys for Amici Curiae Trout Unlimited and Minnesota Lakes Association