Jane Reyer (#0296521)
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

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 Minnesota 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

Minnesota State Cases

Other State Cases

Federal Statutes

State Statutes

Federal Rules

State Rules

Other Resources

STATEMENT OF ISSUE

Issue: Did the Minnesota Pollution Control Agency ("MPCA") err under the plain language of 40 C.F.R. § 122.4(i) in issuing a combined National Pollutant Discharge Elimination System ("NPDES") permit to the Cities of Annandale and Maple Lake (the "Cities"), when the Cities' new wastewater discharge will contribute to water quality impairments in Lake Pepin and a wasteload allocation allowing for the discharge has not been completed?

MPCA decision: MPCA found the NPDES permit to the Cities could be issued under 40 C.F.R. § 122.4(i).

Decision of the Court of Appeals: The Minnesota Court of Appeals found MPCA issued the permit to the Cities in error as it was in violation of 40 C.F.R. § 122.4(i).

Most apposite cases, statutes, or rules: 40 C.F.R. § 122.4(i); *Friends of the Wild Swan, Inc. v. United States Environmental Protection Agency,* 74 Fed. Appx. 718, 2003 WL 21751849 (9th Cir. 2003).

STATEMENT OF THE CASE

In May 2004, the Minnesota Pollution Control Agency ("MPCA") published notice of a draft NPDES permit (the "Permit") for the cities of Annandale and Maple Lake (the "Cities"). Minnesota Center for Environmental Advocacy ("MCEA") objected to the issuance of the Permit based upon 40 C.F.R. § 122.4(i). (R. 1068, 1071 and MCEA Appendix pp. 3 and 5).[1] On September 28, 2004, the MPCA Citizens' Board

[1]MCEA will hereafter cite to its own appendix as "App." and to the appendices of appellants as "MPCA App." or "Cities App.".

("MPCA Board") issued the Permit to the Cities and prepared Findings and Conclusions. (R. 1479 and App. 21). On October 27, 2004, MCEA petitioned for and obtained a Writ of Certiorari for review of the MPCA's decision in the Minnesota Court of Appeals. (App. 30). On August 9, 2005, the Court of Appeals found MPCA issued the Permit to the Cities in violation of 40 C.F.R. § 122.4(i). (MPCA App. 1 et seq.) On September 8, 2005, MPCA and the Cities petitioned the Minnesota Supreme Court for review of the Court of Appeals' decision. This Court accepted the matter for review by Order of October 26, 2005. (App. 31).

STATEMENT OF FACTS

This case concerns a new combined wastewater treatment plant for the Cities of Annandale and Maple Lake. (R. 1481; App. 21). The new combined plant will discharge to the North Fork of the Crow River, a tributary of the Mississippi, and represents an increase of the total amount of pollutants in the river and to Lake Pepin. (R. 1487; App. 22). Of particular concern to this Court's review, the new plant will increase phosphorus, a pollutant for which a number of Minnesota's waters fail to meet water quality standards, standards for ecological and human health. Minn. R. chapter 7050 (2003). Phosphorus contributes to the degradation of water quality as its feeds algae blooms which in turn negatively impact water clarity, oxygen levels, aquatic vegetation, recreation, and if severe enough, can result in indirect impacts such as fish kills. (R. 435, 1755; App. 86).

The Clean Water Act ("CWA") requires states to establish water quality standards sufficient to "protect the public health or welfare, enhance the quality of water and serve

the purposes of this chapter." 33 U.S.C. § 1311(c)(2)(A). A state's water quality standards must maintain the water quality necessary to support designated uses of each water body, such as swimming, fishing, recreation, drinking water, or propagation of fish and wildlife. *Id.*

The increased pollutants from the new combined plant will be discharged into impaired waters. The CWA requires states to regularly assess their waters for compliance with water quality standards and report the results to EPA. 33 U.S.C. §1313(d). Waters that are "impaired" (so polluted as to not meet standards) are listed as such and a Total Maximum Daily Load ("TMDL") must be prepared. *Id.* The TMDL is the assessment and calculation of how much of a pollutant a body of water can assimilate and still meet water quality standards. *See also, American Iron & Steel Institute v. U.S. Environmental Protection Agency*, 115 F.3d 979, 1002 (D.C.Cir. 1997). An important part of the TMDL is the wasteload allocation, the sum of all point source discharges of pollutants.[2] A TMDL further serves as the formula for the level of pollutants or the reduction in the level of pollutants necessary for that body of water.

MPCA staff scientists identified the Crow River as an area of concern and studies show that it is significantly over-enriched with phosphorus. (R. 94-95, 1562-63, 1602, 1753-55; App. 34-35; 69-70, 73, 85-87). MPCA scientists identify the Crow River as a major source of phosphorus pollution to the Mississippi River. (R. 94, 1562-63; App. 34,

[2] TMDL is the sum of the Waste Load Allocation, (all point source allocations of the pollutant), the Load Allocation, (the portion of the pollutant attributable to non-point sources); and Margin of Safety, (amount allocated to uncertainty). 33 U.S.C. § 1313(d)(1)(C). The sum must be calculated so the waters in question will meet water quality standards. *Id. See also,* 40 C.F.R. §§ 130.2(i) and 130.7(c)(1).

69-70). The Crow River Diagnostic study calls for an immediate short term reduction of phosphorus of 25% and a long-term reduction of 50%. (R. 1657, 1758; App. 82, 89).

The Crow River drains to the Mississippi River and the Mississippi River flows into Lake Pepin. MPCA lists Lake Pepin as impaired for excess phosphorus. (R. 992, 1108; App. 81, 83). MPCA's Record also reflects that because phosphorus is an element, it does not break down, and new discharges of phosphorus like Annandale/Maple Lake will contribute phosphorus to the cumulative load "causing the water quality standard violation in Lake Pepin". (R. 321, 435; App. 42). MPCA has not developed wasteload allocations or TMDLs for Lake Pepin or the Crow River, but is in the process of developing the wasteload allocation and TMDL for Lake Pepin with an estimated completion date of 2008. (R. 1110; App. 20).[3]

MCEA objected to the issuance of the Annandale/Maple Lake Permit because 40 C.F.R. § 122.4(i) provides that a state cannot issue an NPDES permit to a new source or discharger of pollutants if those pollutants will cause or contribute to a violation of water quality standards. The regulation further provides that should a new source or discharger cause or contribute to such violation, the permit can be issued only if a wasteload allocation (part of a TMDL) has been completed for the water body and the permittee demonstrates there are sufficient pollutant load allocations –that there is room– to allow for the new source or discharge and also demonstrates that other point sources in the waste load calculation are subject to schedules of compliance. 40 C.F.R. § 122.4(i). As

[3] MPCA recently communicated by e-mail with the Lake Pepin stakeholders indicating the possibility of completion of the Lake Pepin TMDL in 2007. (App. 110).

MCEA pointed out in its objections, the new combined plant will contribute to the existing phosphorus water quality violations in Lake Pepin and therefore the permit is prohibited pursuant to federal regulation. Even though the Record demonstrates MPCA staff agreed the Cities' new discharge would contribute to the water quality violations in Lake Pepin, the MPCA Board issued the Permit for the new Annandale/Maple Lake wastewater treatment plant, claiming that a last-minute, unrelated "offset" from the Litchfield waste treatment plant excused the Cities from the application of section 122.4(i) to their new Permit. (App. 21). MCEA appealed the Permit. (App. 30).

ARGUMENT

I. STANDARD OF REVIEW.

A. An Agency Decision Will Be Reversed When Contrary To Law.

MCEA argues, and the Court of Appeals found, an error of law in MPCA's interpretation of 40 C.F.R. § 122.4(i). Courts review agency decisions pursuant to Minn. Stat. §§ 14.63-14.69 (2004) and reverse or modify the agency's decision when the decision is affected by error of law. Minn. Stat. § 14.69 (2004). *See also, Northern States Power Co. v. Minn. Public Util. Comm'n,* 344 N.W.2d 374, 377 (Minn. 1984), and *In the Matter of City of Owatonna's NPDES/SDS Proposed Permit Reissuance for the Discharges of Treated Wastewater,* 672 N.W.2d 921, 926 (Minn. Ct. App. 2004). MPCA's issuance of an NPDES permit to the Cities' wastewater plant is contrary to the plain language of federal regulation. This court should affirm the lower court holding because the Cities' plant is a new discharge of phosphorus pollution that will contribute

to the phosphorus impairments in Lake Pepin and there is no wasteload allocation to which the new plant can conform.

B. This Court Reviews Agency Interpretations Of Law De Novo.

No deference is accorded an agency interpretation of law if, as here, the language of the regulation is clear and capable of understanding. *St. Otto's Home v. Dept. of Human Serv.*, 437 N.W.2d 35, 39-40 (Minn. 1990); *Hy-Vee Food Stores, Inc. v. Minn. Dept. of Health,* 705 N.W.2d 181, 185 (Minn. 2005); *Resident v. Noot,* 305 N.W.2d, 311, 312 (Minn. 1981) (disagreeing with agency that court must defer to agency interpretation of the regulation because it is the agency charged with the rule's execution; court found it does not defer when the language employed or standards delineated are clear and capable of understanding); *Minnesota Microwave, Inc. v. Public Service Commission*, 190 N.W.2d 661, 665 (Minn. 1971). Only where language in the regulation is ambiguous or technical requiring specialized expertise, will a court potentially defer to a state agency. *Resident v. Noot,* 305 N.W.2d at 312. This principle is a corollary to cases finding agencies are entitled to no deference when interpreting statutes where the language of the statute is clear and there is no ambiguity in the expression of legislative intent. *See, Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 21 (Minn. 2002); *City of Lake Elmo v. Metropolitan Council,* 665 N.W.2d 1, 4, fn. 2 (Minn. 2004).[4]

---

[4] MPCA cites two additional Minnesota Supreme Court cases concerning deference to state agencies. Those cases are of limited value in that they simply restate the basic law as set forth above and neither is specific to the situation here, state agency interpretation of a *federal regulation* as opposed to *state statute*. *See Benda v. Girard,* 592 N.W.2d 452 (Minn. 1999) (state statute at issue which statutory authority is explicitly placed with administering agency); *George A. Hormel & Co. v. Asper* 428 N.W.2d 47 (Minn. 1988)

The court in *St. Otto's Home* also held that deference to an agency interpretation of law is not warranted where the agency definition is not long-standing: where the agency has no history of interpretation and application of the law in question. *St. Otto's Home*, 437 N.W.2d at 39-40. *See also Minnesota Microwave, Inc.*, 190 N.W.2d at 665 (no deference where interpretation of state agency was challenged almost immediately); *Holbrook v. State of Minnesota Gambling Control Board*, 532 N.W.2d 578, 582 (Minn. Ct. App. 1995) (no deference where language is clear and law at issue is newly-enacted with no prior interpretive history.)

Section 122.4(i) is clear and capable of understanding. It uses common language that requires no technical expertise and contains no ambiguity. Furthermore, there is no history of MPCA having interpreted and applied section 122.4(i). As can be seen from the Record, MPCA's interpretation in this case was ad hoc and largely unsupported. During the whole time the permit was under review, MPCA was trying to decide how to implement the requirements of section 122.4(i) and still lacked a coherent position at the time the permit issued. Therefore, deference to the state agency is not warranted.

Finally, deference to the state agency is not warranted in interpreting a federal regulation. As will be set forth in Part V below, federal courts have consistently held that deference to state agency interpretation of federal statute and regulation is inappropriate. The Minnesota Supreme Court has generally agreed that deference to an agency that is interpreting a regulation that is not that agency's own, is not warranted.

(concerning interpretation and application of state statute by state agency). All other cases cited by MPCA are court of appeals opinions that simply restate the rule of review and most involve state interpretation of state statutes. *See,* footnote 23, *infra.*

II. THE PLAIN LANGUAGE OF SECTION 122.4(i) PROHIBITS ISSUANCE OF THE NPDES PERMIT TO THE CITIES OF ANNANDALE AND MAPLE LAKE.

A. The Clean Water Act's Purpose Of Restoring The Integrity Of Our Nation's Waters Is Broad And Federal Regulations Implementing That Purpose Control States' Action On Pollution Permits.

The Clean Water Act's ("CWA") stated purpose and intent is to restore and maintain the chemical, physical and biological integrity of our nation's waters. 33 U.S.C. §1251. The CWA originally intended to eliminate all discharges to all waters by 1985, *id.*, a goal that unfortunately is yet far from realized. The CWA prohibits all point source discharges to the nation's water absent an NPDES permit, which permit is required to impose technological and water quality based controls on pollutants in the permit holder's effluent. 33 U.S.C. §§ 1311 and 1342. *See also* 40 C.F.R. § 122.44(d).

When Congress passed the CWA, it created a system of shared authorities and obligations between the federal and state governments. Initially, Congress provided the federal government would administer NPDES permits, with the ability to delegate permitting to states, after states demonstrated compliance with various provisions of federal statute and regulation, including the promulgation of protective water quality standards and permitting requirements. 33 U.S.C. § 1342. EPA retains oversight authority and in some instances final authority over a number of state actions under the CWA (such as final approval authority over water quality standards or TMDLs). *See e.g.*, 33 U.S.C. § 1313. Minnesota is a delegated state, meaning that MPCA administers the NPDES program in the state, subject to the CWA and regulations thereunder. 33 U.S.C. § 1442(b)-(d); 40 C.F.R. § 123.25 and Minn. Stat. § 115.03, subd. 5 (2004).

40 C.F.R. chapter 122 sets forth requirements for NPDES permits and parameters under which they may be issued. Particular to this case are the requirements and prohibitions of section 122.4(i) which provides:

> 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 owner or operator of a new source or a new discharger proposing to discharge into a water segment which does not meet applicable water quality standards ... and for which the State ... has performed a pollutants load allocation for the pollution 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...

40 C.F.R. § 122.4(i). MPCA has failed to comply with the plain language of this provision in issuing the NPDES permit to the Cities for their new combined plant.

B. The Cities' Combined Wastewater Plant Is A New Discharger Of Phosphorus Pollution Which Pollution Will Contribute To The Water Quality Violations In Lake Pepin.

The federal regulation prohibits MPCA from issuing a NPDES Permit to the new Annandale/Maple Lake wastewater treatment plant. The Permit is prohibited pursuant to the plain terms of section 122.4(i) because the Cities' plant is a new and increased discharge of phosphorus pollution to Lake Pepin which is failing to meet water quality standards for phosphorus. Furthermore, there is no method by which the Permit can currently be issued, because MPCA has not prepared a wasteload allocation for the impaired waters showing there is adequate allocation to allow for the new discharge and because appellants cannot demonstrate schedules of compliance for other dischargers

designed to bring Lake Pepin into compliance with water quality standards.[5] The plain language of section 122.4(i) prohibits the Annandale/Maple Lake Permit under the facts of this case.

The language of section 122.4(i) is common-usage English requiring no technical expertise and it is not ambiguous. Words in laws are normally construed in accordance with their ordinary or natural meaning. Minn. Stat. § 645.08(1) (2004); *Smith v. U.S.*, 508 U.S. 223, 228, 113 S. Ct. 2050, 2054 (1993). "Contribute" is a word commonly understood, defined as "to give or provide jointly with others", *Websters New World Dictionary,* College ed., or as to "help cause or bring about". *Concise Oxford Dictionary,* Tenth Ed. The plain language of the regulation as applied to the facts of this case, demonstrate that MPCA had no authority to issue the Cities' Permit.

The parties do not dispute that the Cities' new combined plant is a new discharge of phosphorus pollution. (R. 94, 101, 102; App. 34, 38, 39). The Record demonstrates an increase in phosphorus over current conditions of 2197 pounds annually, from a wholly new facility.[6] (R. 1109, 1480; App. 19, 28).

Similarly, MPCA's own staff and scientists concede the new combined plant (and new dischargers above Lake Pepin generally), will contribute to the existing violations of

---

[5] MPCA, the Cities and various amici claim that compliance with the plain language of the regulation will somehow interfere with "long range area-wide planning". Yet, the very absence of comprehensive watershed wasteload allocations, TMDLs or schedules of compliance bespeaks the complete lack of "long range area-wide planning" in this case.

[6] Minnesota Science and Environmental Review Board's ("MSERB") assertion in its amicus brief that the Cities are not a new source or discharge is without merit. The Cities' new plant is a discharge under the definition in 40 C.F.R. § 122.2. Furthermore, new issues cannot be raised for the first time on appeal, especially by amicus curiae. *Sletten v. Ramsey County*, 675 N.W.2d 291, 302 (Minn. 2004).

phosphorus water quality standards in Lake Pepin. *See e.g.* "this is a mass increase at 1 mg P/L to the North Fork of the Crow, Mississippi and eventually Lake Pepin" (R. 321); "New dischargers of phosphorus above Lake Pepin will contribute phosphorus to the cumulative load of phosphorus causing the water quality standards violation in Lake Pepin" (R. 385); " modeling work completed for the Minnesota River dissolved oxygen TMDL indicates that there is no distance upstream of a lake or reservoir beyond which a phosphorus discharge can be presumed to have no effect on the lake or reservoir" (R. 408). (*See also* R. 340, 431; App. 42, 43, 46, 48).[7] Repeatedly, MPCA scientists call for *reductions* in phosphorus loading to the Crow River, for its own sake and because the Crow River is the single largest source of nutrient pollution to the Mississippi River, thence to Lake Pepin. (R. 94-95, 1562-63; App. 33-34).[8] Under the plain language of section 122.4(i), MPCA's Record shows that the new Permit is prohibited.

C. MCEA's And The Court Of Appeals' Interpretation And Application Of Section 122.4(i) Prohibiting The Cities' Permit Is Consistent With Application By Other Courts.

The plain language of section 122.4(i) prohibits the Permit as a new discharge that will contribute to an existing violation of water quality standards. The rule does not allow for informal "offsets" to avoid its straight-forward application as MPCA submits. Few courts have yet analyzed and applied section 122.4(i) or addressed the direct

---

[7] MSERB and the Cities seek to muddy the Record and law arguing MPCA's phosphorus rule and guidance, irrelevant to this case. The phosphorus rule and guidance go to the assignment of a phosphorus effluent limit in a permit. This case is about whether the permit should issue at all, not about effluent limits under the phosphorus rule.

[8] The Crow River studies call for immediate phosphorus reductions of 25% and long term reductions of 50% from the current situation. (R. 1657, 1758; App. 82, 89).

question of application of the rule, none in Minnesota. Those that have rule consistently with MCEA's position and the Minnesota Court of Appeals.

Only two courts have directly addressed the issues with which this court is confronted in this case.[9] In *Friends of the Wild Swan v. United States Environmental Protection Agency*, 74 Fed. Appx. 718, 2003 WL 21751849 (9th Cir. 2003), the Ninth Circuit Court of Appeals upheld the Montana federal district court's stay of a group of NPDES permits for new sources or discharges of stormwater to impaired waters pending completion of TMDLs. *Friends of the Wild Swan*, 74 Fed. Appx. at 723-24. The district court ordered relief upon section 122.4(i) as a remedy to compel the state to complete TMDLs for a number of impaired waters. *Id. See also Friends of the Wild Swan v. United States Environmental Protection Agency*, 130 F.Supp.2d 1199, 1203 (D.Mt. 2000), *Friends of the Wild Swan v. United States Environmental Protection Agency*, 130 F.Supp.2d 1207, 1209 (D.Mt. 2000), and *Friends of the Wild Swan v. U.S. Environmental Protection Agency*, 130 F.Supp. 2d 1204 (D. Mt. 2000). The district court ordered "until all necessary TMDLs are established for a particular water quality limited segment, neither the EPA nor the State of Montana shall issue any new permits or increase

---

[9] Cases that noted the prohibition language of section 122.4(i) and the role a TMDL plays in allowing new dischargers, without specifically analyzing its application are *San Francisco Baykeeper v. Browner*, 147 F.Supp.2d 991, 995 (N.D.Cal. 2001), and *Sierra Club v. Hankinson*, 939 F.Supp. 872, 874 (N.D.Ga. 1996). *See also Crutchfield v. State Water Control Board*, 612 S.E.2d 249 (Va. Ct. App. 2005), a case more about agency fact-finding and expertise after administrative evidentiary hearing, than about interpretation of the regulation. The *Crutchfield* court agreed that the Virginia version of section 122.4(i) prohibits NPDES permits if a new source or discharger will contribute to a violation of water quality standards, *Crutchfield*, 612 S.E.2d at 255, but found the new discharge at issue would not contribute to the fecal coliform bacteria impairment, relying on agency fact-finding.

permitted discharge for any permittee. . ." *Friends of the Wild Swan*, 130 F.Supp. 2d at 1206-07. The court noted:

> every new or increased-discharge permit issued for a water quality limited segment site after June 26, 1979, would have and should have been preceded by a TMDL. . . To require the State to develop TMDLs before it issues new or increased-discharge permits is to require the State to proceed in the fashion it should have proceeded had it complied with the law for the past twenty-eight years.

Friends of the Wild Swan, 130 F.Supp. 2d at 1211. The district court and the Ninth Circuit recognized that new discharges of stormwater to impaired waters that contribute to the impairment are prohibited under section 122.4(i). The district court and the Ninth Circuit further recognized that the method for allowing a NPDES permit to issue under these circumstances is found in the second part of section 122.4(i). Upon completion of wasteload allocations or TMDLs for the subject impairments which wasteload allocations or TMDLs have adequate room for the new discharges and where existing dischargers are subject to compliance schedules for bringing the impaired waters back to meeting water quality standards, NPDES permits may issue. This is a straight-forward reading in keeping with the regulation's plain language.

There is a decision from a state district court in Texas where the court directly addressed interpretation of section 122.4(i) and interpreted section 122.4(i) in the manner urged here by MCEA. (App. 90 et seq.). The case, *City of Waco v. Texas Natural Resource Conservation Commission,* Cause No. GV1-00389 (Dist. Ct., Travis County, TX May 6, 2004) concerned application of section 122.4(i) to new dischargers or new sources of pollutants from animal feeding operations. The case first went to the Texas

Court of Appeals on an issue of ripeness. The Court of Appeals recites the underlying facts, including the position of the State of Texas that new discharges of pollutants to impaired waters can be permitted if they do not demonstrably increase the total load of pollutants making the situation worse, a position like MPCA's here. The Court of Appeals found interpreting and applying section 122.4(i) purely legal interpretation and therefore ripe, remanding the matter back for full consideration. *City of Waco v. Texas Natural Resources Conservation Commission*, 83 S.W.2d 169 (Tex. App. 2002).

Upon remand, the Travis County District Court ordered that Texas may not issue NPDES permits to any new concentrated animal feeding operation that proposes to discharge waste or wastewater to an impaired water if the discharge will cause or contribute to a violation of water quality standards. (App. 91-92). The court further ordered Texas may not issue NPDES permits to new operations proposing to discharge pollutants into an impaired water unless the state performs pollutant load allocations for the pollutants beforehand, the state can demonstrate that the wasteload allocation contains sufficient remaining pollutant load allocations to allow the discharge and still meet water quality standards, and that all existing dischargers of the pollutants are subject to compliance schedules designed to bring the segment into compliance with water quality standards. *Id.* The Texas court agreed with MCEA's reading of the regulation.

The case before this Court is not complicated. A federal regulation, promulgated to carry out the dictates of the Clean Water Act to protect and restore our waters' integrity, limits allowing new sources or discharges of pollution to already-polluted waters. This is consistent with the purposes of the CWA.

Moreover, the regulation furthers the intent and purpose of the CWA by fostering preparation of TMDLs, the method by which polluted waters will get clean. The CWA requires TMDLs for waters that are violating water quality standards. 33 U.S.C. § 1313. Section 122.4(i) recognizes TMDLs and the wasteload allocation as the proper method for allowing new permits for additional pollution in a manner that moves toward meeting water quality standards. This Court should implement the plain language of section 122.4(i) and maintain the integrity of the CWA system for cleaning up polluted waters by affirming the decision that the Cities' NPDES permit is currently prohibited.

D. Appellants' Arguments Regarding The Litchfield "Offset" Are Not Supported By The Plain Language Of Section 122.4(i).

1. Offsets are not part of NPDES rules.

MPCA and the Cities would have this Court add a word and an entire concept to the language and the application of section 122.4(i) with no arguments in support except convenience and desire to continue to permit discharges to the Lake Pepin watershed without limitation. "Offsets" are mentioned nowhere in the language of section 122.4(i). For that matter, "offsets" are not mentioned in all of chapter 122. Rather, section 122.4(i) sets forth a specific procedure for allowing new sources and discharges—that of a wasteload allocation and compliance schedules. MPCA and the Cities fail to show any text-based support for their invention. The offset concept is found nowhere in the plain language of the regulation.

2. The Litchfield "offset" meets neither the plain requirements nor intent of section 122.4(i).

MPCA is not claiming (and likely cannot claim) that the improvements from Litchfield (assuming that they actually occur) will return any of the impaired waters to meeting water quality standards. There is no evidence in the Record of to what extent the improvements at Litchfield will affect any of the waters in question and there is no evidence that the improvements at Litchfield will return Lake Pepin to meeting water quality standards. (*See e.g.* R. 1527 et seq., *Heiskary/Markus study*; App. 62 et seq.) In fact, it is almost certain that the reductions from Litchfield, with or without the new discharge from Annandale/Maple Lake, will leave Lake Pepin polluted and impaired. Similarly, MPCA concedes it has not completed a wasteload allocation showing that with Litchfield's reductions, sufficient pollutant load allocations exist to allow the new combined discharge to occur and for the waters in question to *still meet water quality standards*. 40 C.F.R. § 122.4(i). Again, MPCA does not know what allocation among the myriad point sources in either the Crow River or the Lake Pepin watersheds is necessary or allowable in order to return the water bodies to meeting water quality standards for phosphorus. Regardless of the Litchfield reductions, the Cities will still be contributing pollutants to an impairment and the new combined plant is still subject to the requirements of section 122.4(i).[10]

[10] The lack of complete understanding and casual nature of this unsupported "offset" approach undermines proper preparation of TMDLs and provides disincentives for prompt compliance with TMDL requirements, a core component of the CWA's approach to cleaning and restoring our nation's waters.

Finally, MPCA cannot claim that existing dischargers in the Crow River or Lake Pepin watersheds are subject to compliance schedules for the nonexistent wasteload allocations, which compliance schedules are *designed to bring the impaired segments into compliance with water quality standards*. A compliance schedule is defined at 40 C.F.R. § 122.2:

> Schedule of compliance means a schedule of remedial measures included in a "permit", including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and regulations.

40 C.F.R. § 122.2.[11] There is no evidence in the Record of any schedules of compliance in any permits in the Crow River or in the larger Lake Pepin watershed—a complete lack of the kind of "long range area-wide planning" approach urged by appellants and amici. There is not even evidence of a schedule of compliance in the Litchfield permit.

The *City of Waco* case is instructive here. Texas argued that new permits should be allowed under section 122.4(i) because the state believed the situation was at least not getting worse in the water bodies. *City of Waco*, 83 S.W.2d at 174. The Texas district court rejected this concept under the plain language of the regulation, recognizing that the state could not know whether it was meeting the requirements of section 122.4(i) without at least doing the wasteload calculation. The court recognized that the wasteload allocation was required under the regulation to understand the pollutants in the water, contributors to those pollutants, and what reductions and allocations would be necessary

---

[11] MPCA rules use the term similarly to mean a schedule in a permit that leads to compliance with the appropriate federal or state statute or rule and which requires compliance within the shortest reasonable time or by a specified deadline, including dates, if possible. Minn. R. 7001.0150, subp. 2 (2003).

to meet water quality standards. Anything else was nothing more than an educated guess, inadequate under the unambiguous terms of the regulation. The Texas district court ordered wasteload allocations prior to permitting, (App. 91-92), a sound approach, consistent with the regulation

3. When it intends to allow offsets, EPA expressly does so.

Appellants cannot claim EPA meant to include the use of offsets to avoid strict application of the regulation when it promulgated section 122.4(i). EPA knows how to use and require offsets and is explicit when it does so. Under the Clean Air Act, EPA sets forth a detailed system of requiring and using offsets when assessing or allowing a new source of air pollution. *See Clean Air Act and applicable regulations*, 42 U.S.C. § 7503(a)(1)(A); 40 C.F.R. § 51, Appendix S-*Emission Offset Interpretive Ruling;* and Minn. R. 7007.4000 et seq. (2003) In the cited provisions, EPA expressly uses the term "offsets" and outlines procedures for using them. EPA has done nothing of the kind here.

Use of the Litchfield ad hoc "offset" to avoid application of the plain requirements of section 122.4(i) is contrary to the regulation's clear language and to the intent and purpose of the regulation and the Clean Water Act itself. MCEA respectfully requests this Court reject appellants' arguments regarding informal "offsets" under the rule.

III. MPCA HAS NO HISTORY OF INTERPRETING AND APPLYING SECTION 122.4(i), THEREFORE MPCA'S INTERPRETATION IS NOT ENTITLED TO DEFERENCE.

As noted above, an agency's interpretation of a regulation receives no deference from a court when the agency can demonstrate no history (much less long-standing history) of using that interpretation. Such is the case here.

A. Annandale/Maple Lake Is The First Time MPCA Attempts To Interpret Or Apply Section 122.4(i).

The Cities' Permit is the first instance of MPCA confronting application of section 122.4(i) to an NPDES permit.[12] MPCA's Record shows no previous interpretation or application of section 122.4(i). Early discussion of this permit does not mention section 122.4(i). (*See e.g.*, R. 94-98, 105-108, 323, 389-90). It appears that MPCA invented its Litchfield offset interpretation in response to MCEA raising the issue.

MPCA appears to have started to think about application of the regulation and what it may mean to the permitting program in early spring of 2004, a scant few months prior to placing the Annandale/Maple Lake permit on notice. (R. 326 et seq., 342, 383, 385, 407-08, 416, 420 et seq., 433, 440-41, 452 et seq., 484, 496, 608 et seq., 881, 882 et seq., 913, 946 et seq., 958). In a July 22, 2004 e-mail, staff note MCEA's objection to the Annandale/Maple Lake Permit and state relative to the section 122.4(i) issue, "[we] need to decide what we are going to say at the Board meeting next week." (R. 866). Through the spring, summer and early fall, MPCA staff were exchanging proposals, and having meetings and discussions that evolved into how to avoid strict application of section 122.4(i) to the Cities' permit. *Id.* The Litchfield "offset" was MPCA's last minute scramble to avoid application of section 122.4(i) to the Cities' Permit.

---

[12] The court should note that another federal regulation on permitting, 40 C.F.R. § 122.44(d) also uses the terms cause or contribute. In determining proper effluent limits under section 122.44(d), MPCA has for years had to assess to what extent a discharge may cause or contribute to a violation. The Record is devoid of "offsets" being used to define away or excuse a need for effluent limits over MPCA's years of applying this regulation in determining NPDES permit effluent limits. MCEA is unaware of any instance where offsets were used.

B. The Litchfield "Offset" Was A Convenient Last Minute And Ad Hoc Action With No Evidence That It Will Mean Anything For The Lake Pepin Impairment.

The Record is clear Litchfield was never considered and did not arise until after MCEA raised its objections. The first and only reference to Litchfield is in the Board Findings and Conclusions themselves. (R. 1109; App. 28). The Record contains no link between Litchfield's reductions as a component of, or requirement for, allowing more pollution from the Cities. The Record contains no calculations or assessment of the potential reductions. Litchfield was simply going to reduce phosphorus in its discharge at some unstated future time in accordance with the requirements of MPCA phosphorus guidance documents---it would happen regardless of the situation with Annandale/Maple Lake and regardless of any downstream impairment. *Id.*

What the Record does reflect is an e-mail between MPCA managers, sent after MCEA's objections and shortly before the Board meeting, showing that Dr. Howard Markus and Mr. Steve Heiskary, two of MPCA's scientists that had done the phosphorus pollution diagnostic work on the Crow and other rivers, plant the seed for the Litchfield "offset". The e-mail states:

> According to Howard, unless we can show a net decrease in phosphorus loading to the North Fork of the Crow, similar to the net decrease we can show for the whole Lake Pepin watershed, both he and Steve would be inclined to testify (if it comes to that) that Annandale/Maple lake should be required to trade its phosphorus load down to zero. . . Failing that, both Howard and Steve would argue that the additional TP load will contribute to the downstream D.O. [dissolved oxygen] problem.

(R. 957; App. 64). Sometime between the September 9 e-mail and the September 28 Board meeting, MPCA comes up with Litchfield.

MPCA cannot show any history of interpreting and applying section 122.4(i). MPCA's hopeful, back-of-the-envelope figuring on Litchfield is no substitute for compliance with section 122.4(i). Litchfield was a convenient afterthought for MPCA to try and extricate itself from application of section122.4(i). MCEA asks the court to reject MPCA's interpretation that would allow it to avoid application of section 122.4(i) through the use of informal "offsets".

IV. DEFERENCE TO MPCA'S INTERPRETATION OF A FEDERAL REGULATION IS NOT WARRANTED AND EPA DOES NOT INDICATE INFORMAL "OFFSETS" ARE AN EXCUSE FOR NONCOMPLIANCE.

A. If Deference Is To Be Accorded It Is To The EPA And EPA Has Not Authorized Offsets.

Should this Court determine deference to an agency is appropriate, the proper agency is EPA, the author of the regulation at issue, not MPCA. A number of federal courts have addressed the issue of deference to state agency interpretation of federal regulation. Those courts generally find that state agency interpretations of federal laws are not to be accorded deference. *In re Permanent Surface Min. Regulation Litigation*, 653 F.2d 514, 523 (D.C.Cir. 1981). *See also GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999); *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997) ("a state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes," noting the need for coherent and uniform construction of federal law nationwide). EPA, conspicuously absent in this case, has not authorized the addition of language or concepts to section

122.4(i) that would excuse compliance with the plain language of the regulation and intent of the CWA.

1. EPA makes no provision for offsets in section 122.4(i) and in other contexts sets forth an interpretation of the rule similar to MCEA's.

As noted above, EPA is fully capable of speaking to offsets and explicitly requiring them where it so desires. *Clean Air Act and applicable regulations*, 42 U.S.C. § 7503(a)(1)(A); 40 C.F.R. § 51, Appendix S-*Emission Offset Interpretive Ruling;* and Minn. R. 7007.4000 et seq. (2003). EPA has not done so here.

EPA's most recent published statements regarding section 122.4(i) are in agreement with MCEA's position in this case: that a new source or discharge that will contribute to a violation of water quality standards must wait for permitting until a wasteload allocation is completed that allows for the new source or discharge in its wastelaod allocation and where the other existing dischargers are subject to schedules of compliance. In January 2004, EPA published guidance titled "Stormwater Program Questions and Answers", for NPDES permits for stormwater. (the "Guidance"). The Guidance is at http://cfpub.epa.gov.npdes/whatsnew.cfm?program_id=0.[13] A partial copy of the published Guidance (only a portion of it applies to impaired waters), is included in MCEA's Appendix. Section E of the Guidance addresses NPDES permitting in situations with impaired waters and TMDLs. (App. 105). Question and response E8

[13] Last visited December 21, 2005. The Guidance can be accessed by going to EPA's website at epa.gov, then to the Office of Water, then Wastewater/NPDES, then stormwater, then clicking on "Recent Additions" in the box on the right.

addresses the situation of a new discharge to an impaired water for which a TMDL has not yet been developed. (App. 106-07). The published Guidance provides:

> if the discharge contains the pollutant for which a waterbody is impaired, 40 C.F.R. § 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.

(emphasis added.) *Id.* As can be seen from the text of this statement, less than six months before this case arose, EPA published its interpretation of section 122.4(i), which conforms to MCEA's interpretation and which makes no mention of offsets. It is inconsistent with MPCA's interpretation in its brief and to the extent that it is inconsistent with statements in EPA's *Clifford* brief *infra*, the Guidance should control.

EPA made similar statements regarding section 122.4(i) in the Federal Register, October 30, 2000. On October 30, 2000, EPA published its Final Reissuance of the NPDES Stormwater Permit for Industrial Activities. 65 Fed. Reg. 64746 et seq. (2000). In that document, EPA addresses new stormwater discharges to impaired waters and cites 40 C.F.R. § 122.4(i). EPA identifies a portion of the Industrial Permit as applying to new stormwater discharges which:

> . . .is designed to *better ensure compliance* with NPDES regulations at 40 C.F.R. 122.4(i), which include certain special requirements for new discharges into impaired waterbodies. . . .NPDES regulations at 40 C.F.R. 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.

(emphasis added). 65 Fed. Reg. at 64756. The court should note that the entirety of this provision applies, according to EPA, *before* a TMDL has been completed for the impaired or water quality limited segment, not after as suggested by the court of appeals. The next section in the Federal Register describes the obligation *after* a TMDL is completed as requiring any coverage under a permit of a new discharge be consistent with the existing TMDL. *Id. See also,* 65 Fed. Reg. at 64809, where EPA incorporates this same understanding into the stormwater permit terms. Again, EPA does not provide for offsets. EPA provides only the mechanism of wasteload allocations and compliance schedules to allow a permit otherwise prohibited under section 122.4(i) to be issued.

2. The July 2000 rule-making, to the extent applicable, is mischaracterized by appellants and supports MCEA's position.

EPA statements relied upon by MPCA and the Cities are in some instances mischaracterized by appellants. Appellants (along with the dissent at the Court of Appeals) rely heavily on statements by EPA in a *withdrawn* rule-making in 2000.[14] Putting aside the issue of citing to a rule-making that was affirmatively withdrawn by the agency, the *full text* of the statements by EPA in July of 2000 actually favor MCEA's position in this case. Appellants would have this Court believe that EPA favors the use of offsets by states as a 'flexible' (as opposed to required) approach to application of section 122.4(i), citing to the preamble for the withdrawn rule. The appellants cite only to the court of appeals dissenting opinion's citations, thereby missing much of the

[14] The July 2000 rules were withdrawn by EPA without ever taking effect. 68 Fed. Reg. 13608 (March 19, 2003).

discussion by EPA on this issue. Appellants' efforts in this regard mischaracterize the actual statements made by EPA in its 2000 publication.

In August of 1999, EPA published proposed rules for TMDLs and related matters. *See* 64 Fed. Reg. 46058 et seq. (Aug. 23, 1999). In 2000, when EPA published the final draft rules, EPA explained changes it had made since 1999. 65 Fed. Reg. 43586 et seq. (July 13, 2000). (App. 90 et seq.) One of those changes was to withdraw a requirement for new sources and significant expansions of existing sources[15] to impaired waters to obtain offsets in order to achieve "reasonable further progress" toward attaining water quality standards. 65 Fed. Reg. at 43639. (App. 96). EPA explained that it was withdrawing the requirement for offsets. Appellants wrongly claim EPA gave the need for state flexibility as the reason, citing to pages 43639-40. The full measure of what EPA says actually supports MCEA, not MPCA's ad hoc Litchfield offsets.

Contrary to appellants' claim, nowhere on those pages is there any reference to the need for state flexibility to use or not use offsets as *the* reason for EPA to withdraw the rule. On the cited pages of the Federal Register, EPA summarizes the *comments* it received in response to the August 1999 proposed rule, *not its own position* on offsets. 65 Fed. Reg. 43639-40. (App. 96-97). Some commenters opposed required offsets as a "one size fits all" approach, others raised technical issues with respect to certain types of discharges, and still others objected on fairness grounds. *Id.* EPA points out that one set of comments observed that offsets may adversely affect formal trading.[16] Importantly,

---

[15] EPA proposed new definitions for these terms as well. 65 Fed. Reg. at 43639.
[16] Indicating that offsets and formalized trading are not regarded as the same thing.

EPA notes a number of comments pointed out that requiring offsets may "undercut the ability to interpret section 122.4(i) as requiring an absolute prohibition on new discharges to impaired waters." 65 Fed. Reg. at 43640. (App. 97). There is no reference anywhere on those pages to the desire to retain "flexibility" for states in allowing or requiring offsets. EPA received many comments on many topics, including the assertion that requiring offsets would in fact interfere with strict application of section 122.4(i). Clearly, for appellants to claim that EPA withdrew the offsets requirement in response to comments asking to allow states greater flexibility in using offsets is simply wrong.

In withdrawing the offset requirement, EPA did not indicate that any specific comment or set of comments particularly informed its decision. Rather, EPA states it believes, given all the comments, that offsets are unnecessary to further progress toward achieving water quality standards and that reasonable progress is better achieved through consistent enforcement of §§ 122.4(i) and 122.44(d). 65 Fed. Reg. at 43640-41. (App. 97-98). Specifically, EPA notes that environmental benefits from requiring offsets "would have been minimal at best" and that any such requirement "would have been *a requirement over and above* the requirements under *current NPDES permitting regulations* at §§ 122.44(d)(1)(vii) and *122.4(i).*" 65 Fed. Reg. at 43641 (emphasis added). (App. 98). EPA points out that these sections move impaired waters toward meeting water quality standards and that section 122.4(i) does so in prohibiting the issuance of NPDES permits to a new source or a new discharger if the discharge will cause or contribute to a violation of water quality standards. *Id.* EPA states that for those discharges that would have been subject to the offset requirement, existing EPA rules and

guidance provide for NPDES permits, *if issued*, that contain strict water quality based effluent requirements. *Id.* EPA notes:

> [a]lthough EPA is not promulgating regulations containing the offset requirement, EPA expects to achieve progress toward the attainment of water quality standards in impaired waters in the absence of a TMDL. EPA believes 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.

Id.

Upon complete review of EPA's statements in the withdrawn 2000 rule-making, it becomes clear appellants cite only to commenters' statements, not EPA's position. EPA's position is section122.4(i) may prohibit the issuance of permits, and EPA believes consistent implementation of this and related requirements are what will move the nation's waters to meeting water quality standards. Appellants' reliance on the withdrawn rule-making to support ad hoc offsets is misplaced.

3. The *Carlota* case does not apply as it is post-TMDL.

The *Carlota* case is not applicable to the Cities' Permit, because *Carlota* is post-TMDL, a significant difference in terms of the portion of the rule at issue. *In re Carlota Copper Company*, 2004 WL 3214473 (EAB, 2004)[17] (MPCA App. 104). Furthermore, that difference actually points up how MCEA's approach to this case and the decision of the court of appeals is correct and consistent with that of EPA.

In *Carlota*, a TMDL had been completed for an impaired stream, unlike here. The TMDL sets a wasteload allocation and load allocation for mine waste, some related to the

[17] *Carlota* is currently pending before the Ninth Circuit Court of Appeals (briefing complete; according to parties argument expected in late 2006), Case No. 05-70785.

Gibson mine. The EPA Environmental Appeals Board found the new source or discharge adequately demonstrated the second part of section 122.4(i) in that it demonstrated sufficient remaining pollutant load allocations in the TMDL allowing for the new discharge. (MPCA App. 107, 152-53). Further, Carlota's permit required it to clean up some old site discharges in addition to addressing its new discharges. (MPCA App. 112, 117). In a sense, if "offsets" are really an issue in *Carlota*, it is the new discharge offsetting itself to comply with a TMDL allocation and cleanup plan. This is wholly unlike the Cities' situation where no TMDL is completed so there is no wasteload allocation and no way to determine whether the Cities can discharge or how much. As noted below in the section regarding pollutant trading, effective trading requires a "cap" or goal, a total amount against which participants can trade and reduce and understand the goal. That is why there is a distinction in the rule and in the cases between pre- and post-wasteload allocation.

Additionally, the Annandale/Maple Lake situation involves an ad hoc "offset" that had nothing to do with the new discharge. That is, Litchfield was independently required to reduce its phosphorus without regard to the Cities' situation as opposed to *Carlota* which was required to create its own reductions or "offsets" in addition to addressing its new discharge. The *Carlota* case suggests that proper application of section 122.4(i) requires preparation of a TMDL or at least a wasteload allocation, which has room for the the Cities' new discharge and if trading is going to be allowed, that the trading be specifically tied to the new discharge. The *Carlota* case does not support appellants' arguments.

4. EPA's old *Clifford* brief is inapplicable to this case and is contrary to the plain language of section 122.4(i).

Buried on the 52nd page near the end of a 1999 brief in a case in the Eastern District of Louisiana, *Sierra Club v. Clifford*, 1999 WL 1032129 (E.D.La. 1998). (MPCA App. 23-25). EPA made some statements about section 122.4(i). The *Clifford* opinion says little to nothing about interpretation of section 122.4(i) and ultimately did not interpret it. Therefore, there is no ruling on EPA's arguments. MPCA raises the case only to use the brief. The statements made by EPA in its old *Clifford* brief are inapplicable to the case at hand, or contrary to the plain language of the regulation.

Two of EPA's three *Clifford* brief examples for nonapplication of section 122.4(i) do not apply in this case. EPA notes section 122.4(i) will not apply if the new source or new discharge does not discharge the pollutant for which the waterbody is impaired. (MPCA App. 87). That is not the case here as acknowledged by the parties. EPA further notes section 122.4(i) will not apply to prohibit a permit if the permit contains a limitation at or below water quality criteria, giving as an example non-accumulative pollutants such as ammonia. (MPCA App. 88).[18] That also is not the case here. Phosphorus is a conservative, accumulative pollutant. (R. 408, 431, 435). MPCA agrees that "new dischargers of phosphorus will contribute phosphorus to the cumulative load in Lake Pepin causing the water quality standard violation in the lake." (R. 415, 434-35, 440; App. 48, 59).

---

[18] Another example is fecal coliform bacteria. The water quality standard for fecal coliform is no more than 200 colony forming units per 100 milliliters of water. Minn. R. 7050.0222, subp. 4 and 5 (2003). This is a concentration limit. If a discharges is at, or below, that concentration it will not cause or contribute to a violation of the standard.

EPA's third rationale for not applying the requirements of section 122.4(i) is potentially contrary to the regulation's plain language. EPA states:

> it is possible for a discharger to be issued a permit where it is demonstrated that other pollutant source reductions (such as non point source reductions implemented by the discharger) will offset the discharge in a manner consistent with water quality standards.

(MPCA App. 88) (footnote not in original). EPA does not elaborate on how such an offset might work or what its parameters must be other than suggesting it must be consistent with water quality standards.[19] In order to comply with the plain language of the regulation, an offset would work only in a limited scenario where the offset allows the impaired water to meet water quality standards, a scenario that does not apply here.

Lake Pepin is impaired for phosphorus and no wasteload allocation (or TMDL) is completed. MPCA's scientists acknowledge that phosphorus is a conservative pollutant, that it will not break down in the environment, and the Cities' new plant means a mass increase in phosphorus to the North Fork of the Crow River, the Mississippi, and Lake Pepin. (R. 90-104, 321, 415; App.). There is no evidence the reductions at Litchfield will return Lake Pepin to meeting water quality standards. There is no evidence that Litchfield will even result in the recommended short-term 25% reduction in phosphorus in the watershed. MPCA offers no evidence at all on the actual in-water impacts of Litchfield's reductions. Annandale/Maple Lake will contribute to an existing impairment, regardless of Litchfield's status. Any bare declaration by MPCA as to what it

[19] Suggesting reductions obtained by the discharger not otherwise required or available under applicable law, unlike here where Litchfield was already required to reduce. The language also seems to suggest an affirmative obligation by the discharger to obtain and implement the reductions themselves, much like in the *Carlota* case.

"considered", (i.e. automatically declared) compliant with section 122.4(i), other than the limited scenario of offsets that cause the water to meet water quality standards, fails to give effect to the rule and should be rejected.

5. The *Clifford* brief statements are post hoc rationalization of EPA for its case and therefore entitled to little, if any, weight.

EPA admits in its *Clifford* brief that prior to that time, EPA had:

> not formally interpreted 40 C.F.R. § 122.4(i) with respect to what conditions, if present, would allow for permit issuance to new sources or new dischargers proposing to discharge their effluent into impaired waters.

(MPCA App. 87). Agency positions set forth by counsel in briefs are entitled to no deference as they are set forth for litigating purposes. *See, American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 539, 101 S.Ct. 2478, 2505 (1981) ("the post hoc rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action"). *See also Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212, 109 S.Ct. 468, 473 (1988); *Wilkins v. Secretary of the Interior*, 995 F.2d 850 (8th Cir. 1993); and *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1146 (9th Cir. 2001). There is no evidence that EPA before or since set forth and adhered to the litigation position taken *Clifford* relative to the use of the Litchfield offset and section 122.4(i). The statements cannot serve as support for MPCA's actions here.

6. Trading does not excuse compliance with section 122.4(i) and must be done with a cap or goal, lacking here.

Appellants rely heavily on EPA's trading policy as alleged evidence of EPA's position regarding the ad hoc Litchfield "offsets" to excuse compliance with section 122.4(i) in this case. EPA's trading policy does not and cannot provide that excuse.

EPA's own trading policy makes this clear: "Clean Water Act provisions and regulations contain legally binding requirements. This policy does not substitute for those provisions or requirements." (MPCA App. 95). "Water quality trading and other market-based programs must be consistent with the CWA." (MPCA App. 96).

A full review of the trading policy demonstrates that trading, when allowed, is properly done with a "cap and trade," most commonly post-TMDL.[20] Any other use of "trades" is abstract, theoretical and will not accomplish water quality goals. EPA's own trading policy statement acknowledges that trading is best accomplished post-TMDL (MPCA App. 96), but if used pre-TMDL, there must be a formal trading document or program with a total load or goal against which the trades are calculated. (MPCA App. 97). Anything else is shooting in the dark.[21] The trading policy also notes that if a pre-TMDL trade doesn't achieve water quality standards (e.g. Litchfield doesn't return Lake Pepin to meeting standards), EPA expects a TMDL to be done. *Id.* Here, if a wasteload allocation is done first and there are guarantees of compliance with schedules, a trade

---

[20] MPCA knows this works as MPCA employs a post-TMDL trading program in the Minnesota River. The Minnesota River wasteload allocation allows the agency to understand what the cap on total phosphorus should be, the allocation for each discharge and formalizes trades allowing enforcement against the total cap. http://www.pca.state.mn.us/water/basins/mnriver/mnriver-phosphoruspermit.html#trading (last visited December 21, 2005).

[21] This is supported by the Environomics study in the Cities' Appendix. MCEA reviewed the 37 case studies by Environomics. The vast majority of the trading programs are post-TMDL (or will go into effect upon TMDL completion). Another very large group are not new sources/new dischargers or do not involve impaired waters and are therefore irrelevant to § 122.4(i). Only one case study is pre-TMDL in impaired waters, but there is not enough detail in the case study to know whether it applies at all to § 122.4(i) and certainly does not address whether the trades are allowing the permittees to escape compliance with § 122.4(i).

may be effective, but without that, the permit must be prohibited as a contribution to an existing violation.[22] Nothing appellants can point to from EPA provides otherwise.

The formal requirements of EPA's trading policy are echoed in the Record by MPCA's trading experts. MPCA's draft discussion memorandum regarding the possible use of trading reiterates the need for caps or goals and for precision in a well-designed program. MPCA's trading policy requires measurable or trackable mechanisms that provide for accountability and that trading must be *in addition to what would normally occur through other programs or cultural trends* (as opposed to here where Litchfield must reduce under other applicable programs.) (R. 421). MPCA's trading policy requires legally binding agreements, strict administration and reporting. (R. 423). MPCA's trading document further notes that if there is a situation where a new discharge such as Annandale/Maple Lake will increase phosphorus above a lake, reservoir or slow part of a river (e.g. Lake Pepin), the trading program should protect the lake or reservoir by requiring the new discharge to be upstream of its trading partner. (R. 422-23). The Cities are *downstream* (nearer Lake Pepin) from their alleged "trading partner."

The agencies' trading policies weigh against the use of casual offsets to excuse compliance with section 122.4(i).

---

[22] Also, as noted in comments from the 2000 rule-making, informal, ad hoc offsets will interfere with and undermine legitimate trading programs. Dischargers will have a disincentive to work with a formalized trading program and ad hoc offsets will "use up" otherwise available credits that could be used to better implement a TMDL. Informal case by case offsets will simply delay the kind of "long range area-wide planning" desired by MPCA and various other parties.

B. State Agencies Are Not Entitled To Deference When Interpreting Regulations That Are Not Their Own, Especially Federal Regulations.

Minnesota courts have held that deference is not routinely accorded to an agency where the regulation under consideration is not the agency's own. *In the Matter of the Denial of Eller Media Company's Applications for Outdoor Advertising Device Permits*, 642 N.W.2d 492, 501-02 (Minn. Ct. App. 2002), *rev'd on other grounds*, (reversed in part on other grounds, 664 N.W.2d 1 (Minn. 2003) (where the court notes that deference to the Minnesota Department of Transportation was not warranted when it was interpreting a federal regulation and applying it to local actions, even when the federal regulation was necessary to the agency's duties.) In such cases, the court is free to substitute its judgment. MPCA glosses over the portion of *St. Otto's Home* cited with emphasis in MPCA's brief, p. 9, where the court provides that an agency's interpretation *of its own regulation*, may be entitled to some deference, but only when the language of the regulation is unclear or ambiguous.

The specific situation of an agency interpreting a regulation not its own arises in this case. Section 122.4(i) is a federal regulation promulgated by EPA to implement the requirements of the CWA. EPA is subject to the requirements of section 122.4(i) when EPA issues NPDES permits. The regulation applies to states such as Minnesota that are delegated to issue NPDES permits. Minnesota courts have not precisely addressed this issue. Cases cited by appellants, such as the *Hy-Vee* case, often involve regulations the

court found clear on their face and therefore deference was neither necessary nor desirable.[23]

Federal courts that have addressed the issue of deference to state agency interpretation of federal regulation generally find that state agency interpretations of federal laws are not to be accorded deference. On point and similar to this case is *In re Permanent Surface Min. Regulation Litigation*, 653 F.2d 514 (D.C.Cir. 1981). In that case, the court reviewed the surface mining laws and noted that Congress set up a shared system of regulation and authority, somewhat like the CWA. (In fact, the surface mining laws give even more authority and flexibility to the states than does the CWA.) The court found that although Congress gave authority and flexibility to the states, deference

---

[23] MPCA cites many cases on deference, arguing they demonstrate the court should defer to MPCA's decision to add words to a federal regulation. The majority of cases MPCA cites simply restate basic principles of deference as outlined herein without addressing key points of this case—state agency interpretation of federal regulation. *See e.g. Mattice v. Minnesota Property Ins. Placement*, 655 N.W.2d 336, 340 (Minn. Ct. App. 2002); *In the Matter of Twedt*, 598 N.W.2d 11, 12-13 (Minn. Ct. App. 1999) (state agencies interpreting state statutes entrusted to the agency); *Healthpartners, Inc. v. Bernstein*, 655 N.W.2d 357, 360-61 (Minn. Ct. App, 2003); *McDermott v. Minnesota Teachers Retirement Fund*, 609 N.W.2d 926, 928 (Minn. Ct. App. 2000); and *Ross v. Minnesota Dept. of Human Services*, 469 N.W.2d 739, 740-41(Minn. Ct. App. 1991)(state interpretation of state laws *and* court found the language clear and therefore no deference was accorded). MPCA's cites to several California cases are clearly of limited value. *Communities for a Better Environment v. State Water Resources*, 132 Cal.App.4th 1313, 34 Cal.Rptr.3d 396 (Cal.App. 1 Dist. 2005) involved a review of *fact-finding* by the agency and the need for technical expertise, *not* whether and to what extent to defer to an agency's legal interpretation of federal law. *Communities for a Better Environment v. State Water Resources*, 109 Cal.Ap.4th 1089, 1 Cal.Rptr.3d 76 (Cal.App. 1 Dist. 2003) was also about deferring to an agency's technical expertise and the court ruled on the unambiguous language of the law and did not allow the addition of a word to the plain language, contrary to what the MPCA would have the court do here. In *Building Industry Ass'n of San Diego County v. State Water Board*, 124 Cal.App.4th 866, 22 Cal.Rptr.3d 128 (Cal.App. 4 Dist. 2004) the court clearly makes its ruling and looks to the agency based upon technical ambiguity in the law, not a factor in this case.

to a state agency's interpretation of the law---even those agencies bearing primary responsibility under the law—is misplaced. Rather "ultimate responsibility for guaranteeing effective state enforcement of *uniform minimum standards* lies with the Secretary." *In re Surface Mining*, 653 F.2d at 523.

Other federal courts have similarly found, in cases involving federal law where states play an assigned role, that judicial deference to state agency interpretations of those federal laws is not warranted. *See e.g. Qwest Corp. v. Minnesota Public Utilities Comm'n*, 427 F.3d 1061, 1064 (8th Cir. 2005) ("whether an agency acts within its statutory authority is a question of law to be reviewed de novo); *GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999); *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997) ("a state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes," noting the need for coherent and uniform construction of federal law nationwide); *Chisholm v. Hood*, 110 F.Supp.2d 499, 507, fn.8 (E.D.La. 2000) (*Chevron* deference applies to formal federal agency decisions and regulations interpreting ambiguous statutes, not where a state agency interprets an unambiguous federal statute.)[24] As noted

[24] Cases where courts give limited deference to state agencies are the exception that prove the rule. Where a state receives prior express written approval from the federal agency and where the court's de novo review of the interpretation in question convinces the court that a state agency's rule or program is consistent with federal law, a court may give some limited deference to an agency decision. *See e.g., Perry v. Dowling*, 95 F.3d 231, 236-37 (2d Cir. 1996) and *Ritter v. Cecil County Office of Housing and Community Development*, 33 F.3d 323, 328 (4th Cir.1994). MPCA's interpretation is inconsistent with the rule's plain language and the federal law's purpose and intent. Moreover, MPCA has never developed an offset program or approach to section 122.4(i) for which it has obtained express authority.

in the *Belshe* decision, one of the reasons for limiting deference to state agency's interpreting federal law, is the need for a coherent interpretation nationwide. *See also, Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989). Fifty different agency applications of section 122.4(i), especially if the addition of words and concepts is allowed as argued here by MPCA, will result in significant differences in application and enforcement of the CWA, our nation's most important clean water law. As noted by the amicus brief of the Clean Water Agencies, this case is of national import emphasizing the need for consistency with federal purpose and intent and conservative adherence to the plain language of the regulation itself.

In the Matter of Southeastern Minnesota Citizens' Action Council, Inc., 359 N.W.2d 60 (Minn. Ct. App. 1984), (*"SEMAC"),* a decision of the Minnesota Court of Appeals from 20 years ago, is an outlier among state and federal cases regarding an agency's interpretation of a regulation that is not its own. *SEMAC* involved application of a federal regulation, but the structure and intent of the federal law involving a funding program from Congress was significantly different from this case. Congress directed money in the Women, Infants, and Children ("WIC") program through the federal government, to states, and ultimately to local providers. It was not a regulatory program such as the Clean Water Act with its shared authority. In the WIC program, Congress explicitly expressed a desire to have a locally-controlled program, whereas Congress reserved significant areas of control to the federal government under the CWA with a stated national purpose and intent. Finally, the *SEMAC* case is directly contrary to the Court of Appeals' more recent decision *In re Eller Media, supra,* making the Court of

Appeals' earlier *SEMAC* decision of questionable value. Due to these differences and the fact that the *SEMAC* case holds differently than every other court that has addressed the issue of deference to a state agency interpreting regulations that are not its own, particularly federal regulations, it is of limited value here. MCEA asks this Court to reject MPCA's arguments regarding deference as contrary to state and federal case law.

Should deference to any agency be appropriate in this case, the deference is to EPA, not MPCA. Appellants have not demonstrated that EPA has set forth an interpretation of section 122.4(i) that supports MPCA's informal ad hoc offsets to avoid compliance with section 122.4(i) in this case. Rather, the evidence from EPA indicates otherwise—that EPA strictly construes the plain language of section 122.4(i). The evidence is that EPA looks to whether a new source or discharger will cause or contribute to an existing water quality violation and that a permit is prohibited absent completion of a wasteload allocation and compliance with the second part of the rule. Nowhere does EPA set forth additional rule or guidance that differs from that plain application of the regulation. MCEA urges the court to reject appellants arguments regarding offsets as contrary to the plain language of the regulation.

V. APPLICATION OF SECTION 122.4(i) AS WRITTEN WILL FURTHER THE PURPOSE AND INTENT OF THE CLEAN WATER ACT AND WILL NOT BE A CATEGORICAL BAN ON ALL GROWTH.

A. Application Of Section 122.4(i) Is Not A Categorical Ban On Permits.

Appellants' repeated arguments that the case *Arkansas v. Oklahoma* limits the application of section 122.4(i) in this case are wrong. *Arkansas v. Oklahoma*, 503 U.S. 91, 112 S.Ct. 1046 (1992), did not concern or address section 122.4(i). Section 122.4(i)

was not mentioned anywhere in that case nor was it the basis for any of the relief requested by any of the parties. In *Friends of the Wild Swan*, the Ninth Circuit correctly pointed out that *Arkansas v. Oklahoma* involved different provisions of the Clean Water Act (than section 122.4(i)) and stands only for the proposition that the Clean Water Act does not contemplate categorical bans on the issuance of all permits. *Friends of the Wild Swan*, 74 Fed. Appx. at 724. MCEA is not requesting a categorical ban on the issuance of all permits, so *Arkansas v. Oklahoma* has little value. Even extending MCEA's interpretation of section 122.4(i) to future permits, it would not be a categorical ban. Rather, as recognized by the lower court, permits would be examined on a case by case basis to determine whether a new source or discharge contributed to or caused a violation of water quality standards with an examination of the status of any wasteload allocation or TMDL for those pollutants in those waters.

Appellants would interpret the *Arkansas v. Oklahoma* case in a way that entirely negates application of section 122.4(i), an unsupportable result. If the case means that the Cities' Permit can avoid compliance with section 122.4(i), then there are no permits that would be prohibited and the regulation rendered meaningless. Courts do not interpret laws in a manner that will render them meaningless. Minn. Stat. § 645.16 (2004); *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005). *Arkansas v. Oklahoma* does not inform the court's decision here.

B. Appellants' And Amici's Slippery Slope Arguments Are Hyperbole.

Appellants overlook the most reasonable approach to allowing issuance of the Cities' Permit. Just do the TMDL. Completion of the Lake Pepin TMDL will provide

wasteload allocations and MPCA can plan for Annandale/Maple Lake as part of the allocation. Insertion of the load allocations into NPDES permits for the other dischargers can meet the requirement for schedules of compliance and the permit can be issued. MPCA could even develop and implement a formal trading program. *See* Minnesota River example, footnote 23, *supra*.

MPCA has already spent over one year on the Lake Pepin TMDL process and could accelerate the process if it so chose.[25] MPCA put the Lake Pepin TMDL at completion in 2008, barely more than two years from now. (R. 1110; App. 20). As recognized in the amicus brief of the Clean Water Agencies, this amounts to at most a temporary moratorium in the interest of clean water, not a categorical ban and not a grinding halt to all economic development in the state. Moratoria are customary planning tools for local governments to address and get a handle on any number of impacts due to growth, from schools, to roads, to protecting the environment. Nothing more is imposed here.[26] Appellants and amici overplay their hand.

Similarly, appellants leave the option of strict effluent controls unaddressed. As can be seen from a number of EPA's publications cited by appellants, (*e.g.* 65 Fed. Reg.

---

[25] The court may note that EPA's *Clifford* brief on which appellants urge reliance, sets out a standard TMDL preparation timetable of less than three years (from start to submission to EPA for approval). (MPCA App. 52).

[26] MCEA finds repeated arguments of the Builders Association and other amici that enforcing § 122.4(i) will stand in the way of "long range area-wide planning" to be an interesting and amusing one. Long range area-wide planning for growth while cleaning up impaired waters sounds pretty much like a TMDL. Further, the Record in this case about the acclerated rates of growth in the affected communities evidence a complete lack of "long range area-wide planning", hence the problem.

43640), strict effluent controls may result in pollutants of concern being eliminated such that they do not contribute to violations. Significantly, MPCA's own recent Guidance document for new discharges to impaired waters outlines options for compliance with section 122.4(i) that includes elimination of the discharge or additional treatment to eliminate the pollutant at issue. *See* http://www.pca.state.mn.us/publications/wq-wwprm1-13.pdf (App. 115). Part of what appears to drive appellants and amici is an unwillingness to treat phosphorus more strictly than the 1 mg/L in the phosphorus rule, Minn. R. 7050.0211 (2003). The 1 mg/L level of phosphorus control is technology readily available since passage of that rule in 1973 and is hardly cutting edge here in 2005. Again, the parade of horribles set forth by appellants and amici are more about their desired strategies and business as usual than the alleged impossibilities.

Finally, MPCA especially bemoans the magnitude of the task at hand, but that is scant reason to ignore plainly written rules that are critical to fulfilling the purpose and intent of the Clean Water Act. MPCA would have this Court excuse MPCA from compliance with federal regulation because MPCA has failed or been exceedingly slow to comply with other federal law and regulation. The Clean Water Act requires TMDLs to be done in timely fashion, preferably in months rather than years. *Natural Resources Defense Council, Inc. v. Fox*, 30 F.Supp.2d 369 (S.D.N.Y. 1998); *Idaho Sportsmen's Coalition v. Browner*, 951 F.Supp. 962 (W.D.Wa. 1996) (schedule of TMDL development too slow; schedules submitted allowing for completion of all TMDLs by 2021 inadequate; role of TMDLs in cleaning up the water requires that they be developed fairly quickly in order to serve their intended purpose). The provisions of the CWA

regarding impaired waters and TMDLs, and the attendant regulations such as section 122.4(i) date back to the 1970s and the original passage of the Act. With only three other completed TMDLs under its belt in all that time, MPCA now asks the court to further excuse it from compliance because it has let it go too long. Such an argument is against public policy in the grossest way and misses the entire point of section 122.4(i)—to ensure that states' did not willy nilly continue to contribute to pollution problems without getting a handle on them first. As the federal district court in the *Wild Swan* case recognized,

> every new or increased-discharge permit issued for a water quality limited segment site after June 26, 1979, would have and should have been preceded by a TMDL. . . To require the State to develop TMDLs before it issues new or increased-discharge permits is to require the State to proceed in the fashion it should have proceeded had it complied with the law for the past twenty-eight years.

Friends of the Wild Swan, 130 F.Supp. 2d at 1211. MCEA requests that this Court reject MPCA's request to allow noncompliance now due to noncompliance in the past as against public policy.

CONCLUSION

MPCA would have this Court excuse it from the water cleanup tasks with which we are now faced and interpret a regulation in a manner that will allow new sources of pollutants to further dirty our waters and complicate efforts to clean and restore them. Based upon the plain language of 40 C.F.R. § 122.4(i), case law, EPA interpretation, and sound public policy, MCEA respectfully requests this Court to decline MPCA's invitation to dodge the CWA requirements. MCEA respectfully requests that this Court

affirm the decision of the Court of Appeals that MPCA cannot issue an NPDES permit to the new Annandale/Maple Lake facility under current conditions absent completion of a wasteload allocation with adequate allocation for Annandale/Maple Lake and absent a showing of compliance schedules for other dischargers in the watershed which are designed to return Lake Pepin to meeting water quality standards.

RESPECTFULLY SUBMITTED

Date: 12/29/05 By: _____

Janette K. Brimmer Atty. No. 174762
Minnesota Center for Environmental Advocacy
26 East Exchange Street, Suite 206
St. Paul, MN 55101
(651) 223-5969 (telephone)
(651) 223-5967 (facsimile)
ATTORNEY FOR MINNESOTA CENTER
FOR ENVIRONMENTAL ADVOCACY