

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0986**

In the Matter of Denial of a Contested Case Hearing Request and Reissuance of National Pollutant Discharge Elimination System/State Disposal System Permit No. MN0020228 for the City of Osakis Wastewater Treatment Facility.

**Filed May 2, 2022
Reversed and remanded
Johnson, Judge**

Minnesota Pollution Control Agency

Daniel M. Marx, Robert T. Scott, Gretel L. Lee, Flaherty & Hood, P.A., St. Paul, Minnesota
(for relator City of Osakis)

Keith Ellison, Attorney General, Philip S. Pulitzer, Assistant Attorney General, St. Paul, Minnesota
(for respondent Minnesota Pollution Control Agency)

Considered and decided by Reyes, Presiding Judge; Johnson, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

The Minnesota Pollution Control Agency (PCA) re-issued a water-discharge permit to the City of Osakis that limits the discharge of phosphorus from the City's wastewater-treatment facility. The PCA also denied the City's request for a contested-case hearing on factual issues related to the permit. The City appeals. We conclude that the PCA erred by misinterpreting administrative rules and regulations and by denying the City's request for

a contested-case hearing. Therefore, we reverse and remand for reconsideration and for a contested-case hearing.

FACTS

The federal Clean Water Act (CWA) “was enacted ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” *In re Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738*, 763 N.W.2d 303, 308 (Minn. 2009) (*Alexandria Lake*) (quoting 33 U.S.C. § 1251 (2006)). “To effectuate this policy, the CWA authorizes states to implement the [National Pollutant Discharge Elimination System (NPDES)] permit program” *Id.* at 308-09 (citing 33 U.S.C. § 1342(a)-(d) (2006)). The CWA requires that every NPDES permit contain: “(1) ‘effluent limitations’ that reflect the practicable pollution reduction a state can achieve; and (2) any more stringent limitations required for a body of water to meet ‘water quality standards.’” *Id.* at 309 (quoting *American Paper Inst., Inc. v. U.S. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993)).

The PCA is the state agency charged with implementing the requirements of the CWA by, among other things, adopting water-quality standards for the state’s waters, preparing total-maximum-daily-load (TMDL) studies for waters on the state’s impaired-waters list, and issuing permits that allow limited discharges of pollutants into the state’s waters. *See* 33 U.S.C. §§ 1313(a), (d)(1)(C), 1342(b) (2018); Minn. Stat. §§ 114D.25, subd. 1(a)(2), 115.44 (2020); *see also Alexandria Lake*, 763 N.W.2d at 312-13 (discussing PCA’s duties in relation to NPDES permits); *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502,

510-11 (Minn. 2007) (*Annandale*) (discussing PCA’s duties in relation to water-quality standards and TMDL studies).

The City of Osakis, which has a population of approximately 1,750, is located in Douglas County and Todd County. The City owns and operates a wastewater-treatment facility that discharges water directly to the Clifford Wetland and indirectly to nearby Faille Lake and Lake Osakis.

Lake-Eutrophication Standards

In 2008, the PCA adopted lake-eutrophication standards as amendments to the state’s pre-existing water-quality standards. *See* 32 Minn. Reg. 1699, 1722-23 (Mar. 10, 2008); 32 Minn. Reg. 87, 156, 162 (July 23, 2007). The term “eutrophication” is defined by an administrative rule to mean

the increased productivity of the biological community in water bodies in response to increased nutrient loading. Eutrophication is characterized by increased growth and abundance of algae and other aquatic plants, reduced water transparency, reduction or loss of dissolved oxygen, and other chemical and biological changes. The acceleration of eutrophication due to excess nutrient loading from human sources and activities . . . causes a degradation of water quality and possible loss of beneficial uses.

Minn. R. 7050.0150, subp. 4(L) (2021). Stated differently, “Eutrophication refers to the over-enrichment of waters with nutrients, which stimulates excessive growth of aquatic plants.” *Minnesota Environmental Sci. & Econ. Rev. Bd. v. Minnesota Pollution Control Agency*, 870 N.W.2d 97, 99 n.1 (Minn. App. 2015).

The PCA’s lake-eutrophication standards include both narrative and numeric criteria. Minn. R. 7050.0222, subp. 1(A) (2021). For a lake with Class 2B waters in the

North Central Hardwood Forest Ecoregion, such as Faille Lake and Lake Osakis, the narrative criteria are that “[t]he quality of [the] waters shall be such as to permit the propagation and maintenance of a healthy community of cool or warm water aquatic biota, and their habitats” and that the waters “shall be suitable for aquatic recreation of all kinds, including bathing, for which the waters may be usable” but that the waters are “not protected as a source of drinking water.” Minn. R. 7050.0222, subp. 4; *see also* Minn. R. 7050.0222, subp. 4a.

The numeric criteria for lake-eutrophication standards consist of three variables that describe the extent of eutrophication. *See* Minn. R. 7050.0222, subps. 4, 4a(B). The first variable, “total phosphorus” (which is defined by an administrative rule to mean “the sum of all forms of phosphorus,” Minn. R. 7083.0020, subp. 22 (2021)), is the maximum permissible concentration of phosphorus in a body of water. Minn. R. 7050.0222, subp. 4. For lakes in the North Central Hardwood Forest Ecoregion, such as Lake Osakis, the lake-eutrophication standards set a total-phosphorus criterion of 40 micrograms per liter (µg/L). *Id.* For a shallow lake in the same region, such as Faille Lake, the criterion is 60 µg/L. *Id.*

The second variable, chlorophyll-a, is a pigment in green plants, including algae. Minn. R. 7050.0150, subp. 4(I) (2021). The concentration of chlorophyll-a may be measured by a chemical test of a water sample. For lakes in the North Central Hardwood Forest Ecoregion, the lake-eutrophication standards set a numeric criterion of 14 µg/L for chlorophyll-a. Minn. R. 7050.0222, subp. 4. For shallow lakes in the same region, the numeric criterion is 20 µg/L. *Id.*

The third variable, “Secchi disk transparency,” is a measurement of the transparency of water. Minn. R. 7050.0150, subp. 4(E). A Secchi disk is an eight-inch weighted disk, which is either white or black and white, that is suspended on a calibrated rope. Minn. R. 7050.0150, subp. 4(D). To measure water transparency with a Secchi disk, a person lowers the disk into the water on the shaded side of a boat and gradually raises the disk until it reappears, at which time the tester notes the water depth on the calibrated rope. *Id.* For lakes in the North Central Hardwood Forest Ecoregion, the lake-eutrophication standards establish a numeric criterion of not less than 1.4 meters. Minn. R. 7050.0222, subp. 4. For shallow lakes in the same region, the numeric criterion is not less than 1 meter. *Id.*

The lake-eutrophication standards further provide, “Exceedance of the total phosphorus *and* either the chlorophyll-a *or* Secchi disk transparency standard is required to indicate a polluted condition.” Minn. R. 7050.0222, subp. 4a(B) (emphasis added). Similarly, another administrative rule provides that a “finding of an impaired condition must be supported by data showing” an elevated level of total phosphorus and an elevated level of either chlorophyll-a or Secchi-disk transparency. Minn. R. 7050.0150, subp. 5a(A). This court has referred to total phosphorus as a “cause criterion” and chlorophyll-a and Secchi-disk transparency as “response criteria.” *Minnesota Ctr. for Environmental Advocacy v. City of Winsted*, 890 N.W.2d 153, 155 (Minn. App. 2017) (*Winsted*). Thus, a lake is not in compliance with the lake-eutrophication standards if the first variable (total phosphorus) and, in addition, either the second variable (chlorophyll-a) or the third variable (Secchi-disk transparency) are exceeded.

TMDL Studies

A TMDL study is “a scientific study that contains a calculation of the maximum amount of a pollutant that may be introduced into a surface water and still ensure that applicable water quality standards for that water are restored and maintained.” Minn. Stat. § 114D.15, subd. 10 (2020). A TMDL study determines a body of water’s “loading capacity” (*i.e.*, the total amount of a pollutant that may flow into it) and allocates that allowable load by setting “wasteload allocations for point sources” (such as wastewater-treatment facilities) and “load allocations” for non-point sources (such as agricultural runoff). *See* 40 C.F.R. § 130.2; Minn. Stat. § 114D.15, subd. 10.

The PCA must prepare a TMDL study for each water listed on the state’s impaired-waters list. 33 U.S.C. § 1313(d)(1)(C); *see also* 40 C.F.R. § 130.7(d)(1) (requiring PCA to submit biannual impaired waters list to federal government). A TMDL study prepared by the PCA must be approved by the United States Environmental Protection Agency (EPA). 33 U.S.C. § 1313(d)(2) (2018). If the EPA has approved a TMDL that assigns a wasteload allocation to a point source, a NDPES permit authorizing discharges from that point source must include a water-quality-based effluent level (WQBEL) that is consistent with the wasteload allocation in the TMDL study. 40 C.F.R. § 122.44(d)(1)(vii)(B).

PCA’s TMDL Studies

In May 2013, the PCA finalized a TMDL study for the Lake Osakis area, which encompasses Smith Lake, Faille Lake, and Lake Osakis. At that time, all three lakes were on the impaired-waters list because of exceedances of lake-eutrophication standards. The 2013 TMDL study did not assign a total-phosphorus wasteload allocation to the City’s

wastewater-treatment facility for Smith Lake, Faille Lake, or Lake Osakis. The EPA approved the 2013 TMDL study in June of that year.

The PCA later decided to revise the 2013 TMDL study to assign a total-phosphorus wasteload allocation to the City's wastewater-treatment facility for Faille Lake. A 2016 draft TMDL study assigned a wasteload allocation to the City's wastewater-treatment facility for Faille Lake of 150.3 pounds per year (lb./year), which the PCA determined to be "the [phosphorus] loading expected to be delivered to Faille Lake if the facility were to discharge its entire 121 kg/yr permitted load" and "consistent with the permit's final effluent limit." The 2016 draft TMDL study does *not* assign a wasteload allocation to the City's wastewater-treatment facility for Lake Osakis. In December 2016, the PCA gave notice of the 2016 draft TMDL study. In February 2017, the City filed comments and a petition for a contested-case hearing on the 2016 draft TMDL study.

In September 2020, the PCA granted the City's request for a contested-case hearing on the 2016 draft TMDL study on two issues related to the impact of the wastewater-treatment facility's phosphorus discharges on Faille Lake. After this appeal was filed, the assigned administrative-law judge (ALJ) granted the City's motion to stay the contested-case proceedings on the 2016 draft TMDL study pending this appeal. The 2016 draft TMDL study will not be finalized until the contested-case hearing is held, the ALJ issues a recommendation, the PCA issues a final decision, and the EPA approves the PCA's decision. *See* 33 U.S.C. § 1313(d)(2); Minn. Stat. § 14.61-.62 (2020); Minn. R. 7000.2000 (2021).

NPDES Permits

The CWA prohibits the discharge of a pollutant without a permit. *See* 33 U.S.C. §§ 1311, 1342 (2018). The discharge of a pollutant occurs if there is “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12) (2018). A point source is defined by statute to mean “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” *Id.*, § 1362(14).

An NPDES permit is one type of permit that may be issued under the CWA. *See* 33 U.S.C. § 1342. The CWA authorizes the issuance of NPDES permits by states with approved NPDES permit programs. 33 U.S.C. § 1342(b). Minnesota is such a state. *See* 39 Fed. Reg. 26061 (July 16, 1974). An NPDES permit allows discharges of pollutants otherwise prohibited under the CWA. 33 U.S.C. §§ 1311(a), 1342(a). But an NPDES permit must include a WQBEL that is “necessary to . . . [a]chieve water quality standards.” 40 C.F.R. § 122.44(d)(1) (2021); *see also* 33 U.S.C. § 1342(b); Minn. Stat. § 115.03, subd. 5 (2020).

City’s Previous NPDES Permit

In October 2012, the PCA issued an NPDES permit to the City that allowed the City to discharge water from its wastewater-treatment facility for a five-year period. The 2012 permit was the first NPDES permit issued to the City after the PCA’s adoption of the lake-eutrophication standards in 2008.

Before issuing the 2012 permit, the PCA conducted a reasonable-potential analysis and determined that a WQBEL for total phosphorus of 121 kilograms per year (kg/year) was necessary to ensure that Clifford Lake, which is near the City’s wastewater-treatment

facility, complied with the lake-eutrophication standards. The 2012 permit imposed an interim total-phosphorus limit of 283 kg/year and required compliance with the 121-kg/year limit by not later than July 1, 2021.

When the 2012 permit was issued, Clifford Lake was on the state's impaired-waters list because its water exceeded the lake-eutrophication standards. *See* 33 U.S.C. § 1313(d)(1)(A); Minn. Stat. § 114D.25, subd. 1(a)(1) (2020). But the PCA later determined, based on additional data, that Clifford Lake was not a lake but, rather, a wetland. Because the lake-eutrophication standards do not apply to wetlands, the PCA notified the City in January 2014 that the 121-kg/year total-phosphorous WQBEL imposed by the 2012 permit would be revised. But the WQBEL was not revised. In September 2014, the PCA determined that the 121-kg/year total-phosphorus limit for the wastewater-treatment facility should remain in place to protect Faille Lake, which receives output from Clifford Wetland and was impaired for phosphorus at that time.

City's Application for Re-issuance of NPDES Permit

In March 2017, the City applied for the re-issuance of the five-year 2012 NPDES permit. The City requested that the interim total-phosphorus limit of 283 kg/year be adopted as the total-phosphorus limit in the new permit. By operation of law, the City was allowed to continue to operate its wastewater-treatment facility under the 2012 permit while the application was pending. *See* Minn. R. 7001.0160 (2021).

In October 2018, the City requested that the PCA remove Faille Lake from the state's impaired-waters list. The PCA did so in February 2021. In March 2021, the EPA approved the PCA's removal of Faille Lake from the state's impaired-waters list.

In February 2021, the PCA provided notice of its intent to re-issue a permit for the City’s wastewater-treatment facility with a 121-kg/year limit for total phosphorus. In the Statement of Basis for the permit, the PCA explained that the total-phosphorus limit was “assigned . . . to protect for eutrophication impairment in Faille Lake.” The City submitted comments on the draft permit and requested a contested-case hearing on certain disputed factual issues, including the two issues for which the PCA had granted a contested-case hearing with respect to the 2016 draft TMDL study.

In July 2021, the PCA issued a 14-page order in which it re-issued the permit for the City’s wastewater-treatment facility with a 121-kg/year total-phosphorus limit and denied the City’s request for a contested-case hearing with respect to the permit. The PCA’s written decision explains that the total-phosphorus limit is necessary to maintain Faille Lake’s compliance with the lake-eutrophication standards and to protect Lake Osakis as well as Lake Pepin (a naturally occurring lake on the Mississippi River in Goodhue County and Wabasha County, nearly 200 miles southeast of Lake Osakis), both of which are impaired for excess nutrients. The decision also states that a contested-case hearing is not warranted because, although the City identified disputed factual issues, a contested-case hearing would not aid the PCA commissioner in resolving those disputes. The City appeals by way of a writ of certiorari.

DECISION

This court’s review of the PCA’s issuance of an NPDES permit and denial of a contested-case hearing is governed by the Minnesota Administrative Procedure Act, Minn. Stat. §§ 14.001-.69 (2020) (MAPA). Minn. Stat. § 115.05, subd. 11(1), (4) (2020); *In re*

NorthMet Project Permit to Mine Application, 959 N.W.2d 731, 749 (Minn. 2021)

(*NorthMet*). In conducting our judicial review of an agency decision, we

may affirm the decision of the agency or remand the case for further proceedings; or [we] may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

Minn. Stat. § 14.69. We give “substantial deference” to agency decisions, which enjoy a presumption of correctness. *In re Minnesota Power’s Petition for Approval of EnergyForward Res. Package*, 958 N.W.2d 339, 344 (Minn. 2021) (*EnergyForward*); see also *NorthMet*, 959 N.W.2d at 749. A relator challenging an agency decision bears the burden of demonstrating that the decision violates one or more of the provisions of section 14.69. *EnergyForward*, 958 N.W.2d at 344; *In re Enbridge Energy, Ltd. P’ship*, 964 N.W.2d 173, 189 (Minn. App. 2021) (*Enbridge*), rev. denied (Minn. Aug. 24, 2021).

The City makes three arguments. First, the City argues that the 121-kg/year total-phosphorus limit in the re-issued permit is based on an error of law. See Minn. Stat. § 14.69(d). Second, the City argues that the re-issuance of the permit is based on unlawful

procedures. *See* Minn. Stat. § 14.69(c). Third, the City argues that the 121-kg/year total-phosphorus limit in the re-issued permit and the decision to deny a contested-case hearing are unsupported by substantial evidence and are arbitrary or capricious. *See* Minn. Stat. § 14.69(e), (f).

I. Total-Phosphorus Limit

We begin by considering the City’s first argument and part of its third argument, which are intertwined. The City argues that the PCA erred by misinterpreting the lake-eutrophication standards when it determined that a total-phosphorus limit of 121 kg/year is necessary to maintain compliance with water-quality standards and that, when the lake-eutrophication standards are properly interpreted, there is a lack of substantial evidence to support the 121-kg/year total-phosphorus limit.

A. Law Applicable to WQBEL

The first part of the City’s argument requires this court to interpret the applicable state administrative rules and federal administrative regulations. If the language of an administrative rule is “clear and capable of understanding,” a court does not defer to an administrative agency’s interpretation of the rule. *In re Reissuance of an NPDES/SDS Permit to United States Steel Corp.*, 954 N.W.2d 572, 576 (Minn. 2021) (*U.S. Steel*). But if the relevant language of an administrative rule is ambiguous, a court generally should defer to the responsible agency’s interpretation of the rule, so long as the interpretation is reasonable. *Id.*; *see also Annandale*, 731 N.W.2d at 516. To determine whether an agency’s interpretation of an ambiguous administrative rule is reasonable, a court should consider several factors, “including the nature of the regulation at issue and the agency’s

expertise and judgment in relation to the subject matter of the regulation.” *U.S. Steel*, 954 N.W.2d at 576. We apply the same criteria to a state administrative agency’s interpretation of an ambiguous federal regulation that the agency is responsible for administering. *Alexandria Lake*, 763 N.W.2d at 312-13.

The City argues that the PCA misinterpreted the lake-eutrophication standards when the PCA imposed the 121-kg/year total-phosphorus limit on the City’s wastewater-treatment facility. Specifically, the City argues that the PCA erred by relying on data relating to only one of the three variables of the lake-eutrophication standards: the cause criterion for total phosphorus. The City argues that the PCA also should have considered data relating to the response criteria for chlorophyll-a and Secchi-disk transparency.

As explained above, the lake-eutrophication standards require consideration of three variables. There is no violation of the lake-eutrophication standards if only one of the three criteria are exceeded. In addition, there is no violation if only the second and third criteria are exceeded. Rather, there is a violation of the lake-eutrophication standards only if there is an exceedance of the first criterion (total phosphorus) and either the second criterion (chlorophyll-a) or the third criterion (Secchi-disk transparency).

The multi-variable nature of the lake-eutrophication standards appears in the PCA’s administrative rules in two places. First, the rule governing determinations of exceedances of water-quality standards provides as follows:

For lakes, shallow lakes, and reservoirs, a finding of an impaired condition must be supported by data showing:

(1) elevated levels of nutrients under subpart 5, item A [which includes total phosphorus]; *and*

(2) *at least one factor* showing impaired conditions resulting from nutrient overenrichment under subpart 5, items B [*i.e.*, chlorophyll-a] and C [*i.e.*, Secchi-disk transparency].

Minn. R. 7050.0150, subp. 5a(A) (emphasis added). Second, the rule containing the lake-eutrophication standards states, “Exceedance of the total phosphorus *and* either the chlorophyll-a *or* Secchi disk transparency standard is required to indicate a polluted condition.” Minn. R. 7050.0222, subp. 4a(B) (emphasis added).

The PCA contends that the first rule quoted above, rule 7050.0150, does not apply on the ground that it merely “provides the framework by which MPCA assesses compliance with the standards and determines whether to place a lake on the state’s list of impaired waters.” The PCA states further, “Assessment for placement on the state’s impaired waters list is not at issue in this appeal.” The first subpart of the rule indicates that the rule guides the PCA in determining more than whether a water should be on the impaired-waters list. The rule states, “The agency shall determine *an exceedance of water quality standards or* an impaired condition.” Minn. R. 7050.0150, subp. 1 (emphasis added). Under federal law, an NPDES permit must include a WQBEL for a particular pollutant if the WQBEL is necessary to ensure compliance with state water-quality standards. 40 C.F.R. § 122.44(d)(1); *Alexandria Lake*, 763 N.W.2d at 308-17. As the PCA states, rule 7050.1050 provides a framework by which the agency determines compliance with state water-quality standards. Thus, rule 7050.0150 applies, and its plain language supports the City’s argument that the PCA is required to consider more than just the first variable, total phosphorus.

The PCA also contends that this court should refer only to the second rule quoted above, rule 7050.0222, the rule containing the lake-eutrophication standards. But that rule also supports the City’s argument. The rule not only provides specific numeric criteria for each of the three variables but also describes how the agency should consider those variables, and it does so in a way that is consistent with rule 7050.0150: “Exceedance of the total phosphorus *and* either the chlorophyll-a *or* Secchi disk transparency standard is required to indicate a polluted condition.” Minn. R. 7050.0222, subp. 4a(B) (emphasis added). Again, the plain language of rule 7050.0222 supports the City’s argument that the PCA is required to consider more than just the first variable, total phosphorus.

The PCA further contends that its exclusive reliance on the first, cause variable (total phosphorus) is required by a provision in a federal regulation that provides, in pertinent part:

Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits using one or more of the following options:

(A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use.

40 C.F.R. § 122.44(d)(1)(vi)(A). The PCA cites this provision in support of its argument that “federal regulations provide that for purposes of WQBELs, each of the numeric criteria comprising the standards must be attained and maintained.” We note that the words “each

of” do not appear in the provision on which the PCA relies. *See* 40 C.F.R. § 122.44(d)(1)(vi)(A). Furthermore, paragraph (d)(1)(vi) of section 122.44 applies only if “a State has *not* established a water quality criterion for a specific chemical pollutant.” 40 C.F.R. § 122.44(d)(1)(vi) (emphasis added). But the PCA *has* established a water-quality criterion for phosphorus. Indeed, the PCA’s brief states that “Minnesota’s lake eutrophication standards include numeric criteria for phosphorus, chlorophyll-a (which is a measurement of algae growth), and Secchi disk transparency (which is a measurement of water clarity).” Accordingly, paragraph (d)(1)(vi) of section 122.44 does not apply.¹

The PCA contends further that another federal regulation, 40 C.F.R. § 122.44(d)(1)(iii), “clearly directs MPCA to consider individual numeric criteria within the eutrophication standards.” The relevant language in that regulation provides that an NPDES permit must include a WQBEL if there is a “reasonable potential” that a discharge will cause or contribute to “an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant.” 40 C.F.R. § 122.44(d)(1)(iii). Contrary to the PCA’s contention, paragraph (d)(1)(iii) does not require the PCA to include a WQBEL in an NPDES permit

¹We note that paragraph (d)(1)(vi) applied in the *Alexandria Lake* case, which also concerned a WQBEL for total phosphorus in an NPDES permit for a wastewater-treatment facility. 763 N.W.2d at 305. But the agency decision in that case was made in 2006, before the PCA promulgated the lake-eutrophication standards in 2008, so the PCA was, at that time, bound only by narrative criteria. *See id.* at 308; *see also* Minn. R. 7050.0222, subp. 4 (2005). In a subsequent opinion concerning a WQBEL for phosphorus in an NPDES permit for a wastewater-treatment facility based on the river-eutrophication standards, we did not apply paragraph (d)(1)(vi) but, rather, applied paragraph (d)(1)(iii). *Winsted*, 890 N.W.2d at 157-60.

solely because total phosphorus in a receiving water exceeds the first, cause criterion. The regulation uses the plural word “criteria,” not the singular word “criterion.” *See id.* As noted above, Minnesota’s lake-eutrophication standards require consideration of three numeric criteria. *See* Minn. R. 7050.0222, subp. 4a(B); Minn. R. 7050.0150, subp. 5a(A).

Furthermore, the PCA’s argument is inconsistent with this court’s caselaw concerning the federal regulation. In *Winsted*, this court considered whether the PCA properly declined to include a WQBEL in an NPDES permit for a wastewater-treatment facility pursuant to the state’s river-eutrophication standards, which were promulgated in 2014. 890 N.W.2d at 157-59. The river-eutrophication standards are similar to the lake-eutrophication standards in that they include one cause variable and multiple response variables. *See* Minn. R. 7050.0222, subp. 4a(B). We noted in our *Winsted* opinion that the PCA had obtained “data on phosphorus *and response-criteria levels*” for the purpose of determining “whether there was a reasonable potential for *exceedance of water-quality standards.*” 890 N.W.2d at 159 (emphasis added). The PCA had urged the court to engage in such reasoning by arguing in its brief in that case that “PCA’s interpretation of 40 C.F.R. § 122.44(d)(1)(i)-(iii) is reasonable because for an impairment to be found under the eutrophication water quality standard *both the causal criterion—phosphorus—and one or more response criteria must exceed the value in the standard.*” Brief of Resp. Minn. Pollution Control Agency, at 17, *Winsted*, 890 N.W.2d 153 (No. A16-0854), 2016 WL 6571688, at *17 (emphasis added). The PCA’s interpretation of paragraph (d)(1)(iii) of section 122.44 at the time of the *Winsted* appeal reflects the proper interpretation of the regulation.

Thus, in this case, the PCA misinterpreted the applicable rules and regulations, which are unambiguous for purposes of this appeal, by considering only the cause criterion in determining that there is a reasonable potential that discharges from the City's wastewater-treatment facility will cause or contribute to a violation of the lake-eutrophication standards and in determining that a WQBEL for the facility is necessary to ensure compliance with the lake-eutrophication standards. The PCA is required to consider whether there is a reasonable potential that a discharge will cause or contribute to an exceedance of the lake-eutrophication standards based on measurements that exceed the criteria for *both* the one cause variable *and* at least one of the two response variables. Furthermore, the PCA is required to include in the permit a WQBEL that is necessary to ensure compliance with the lake-eutrophication standards based on consideration of both the cause variable and the response variables. Therefore, the PCA's issuance of the permit was affected by an error of law. *See* Minn. Stat. § 14.69(d).

B. Evidence Supporting WQBEL

To resolve the City's arguments concerning the total-phosphorus limit in the permit, we must determine whether there is substantial evidence in the record to support a total-phosphorus WQBEL of 121 kg/year.

The PCA states in its brief that "all parties agree that . . . Faille Lake is not impaired because at the moment the chlorophyll-a and Secchi depth criteria are being met" and because Faille Lake has been removed from the state's impaired-waters list. Nonetheless, the PCA contends that the 121-kg/year total-phosphorus limit is justified by its finding of a reasonable potential that the conditions of Faille Lake will fail to comply with the lake-

eutrophication standards in the future. But the PCA's contention is based on the premise that its reasonable-potential analysis may be based solely on the cause criterion in the lake-eutrophication standards, *i.e.*, the question whether the total-phosphorus level of Faille Lake will exceed 60 µg/L. The PCA asserts that "the relationship between phosphorus and the response variables specific to Faille Lake is irrelevant because the Clean Water Act requires that permit limits be set at the level necessary to achieve the numeric criteria adopted in rule (*i.e.*, 60 µg/L phosphorus for Faille Lake)." For the reasons stated above, the PCA's premise is incorrect. The PCA's reasonable-potential analysis requires consideration of both the cause variable and the response variables in the lake-eutrophication standards.

The PCA also attempts to justify the 121-kg/year total-phosphorus limit by contending that the limit is necessary to protect downstream waters, especially Lake Osakis. The PCA asserts in its brief that it "found the City's facility has the reasonable potential to cause or contribute to exceedance of the eutrophication standards for Lake Osakis." To support that statement, the PCA cites a June 2020 document entitled "Justification for 121 kg/yr TP effluent limit and supplemental data" and the December 2020 Statement of Basis for the re-issued permit. But neither document supports the PCA's argument. The PCA concluded in the Statement of Basis that the City's wastewater-treatment facility "is found to have [reasonable potential] for [total phosphorus] *upstream of Faille Lake*." (Emphasis added.) But the PCA did *not* conclude in either of the cited documents that the City's wastewater-treatment facility would have a reasonable potential

to cause or contribute to a violation of state lake-eutrophication standards *in Lake Osakis*, which is *downstream* of Faille Lake.

The PCA stated in both of the cited documents that the 121-kg/year WQBEL is justified by the 2016 draft TMDL study. The justification memo states, “The 121 kg/yr TP final limit is needed in order for the TP in Faille Lake and downstream Lake Osakis to be consistent with the” 2016 draft TMDL study. Similarly, the Statement of Basis states, “Based on the results of the TMDL study, the [City’s wastewater-treatment facility] received a wasteload allocation of 121 kg/year.” The 2016 draft TMDL study assigns a wasteload allocation to the City’s wastewater-treatment facility *only* with respect to Faille Lake; it does *not* do so with respect to Lake Osakis. In any event, the PCA does not cite any legal authority for the proposition that a wasteload allocation in a *draft* TMDL study may justify a WQBEL. As stated above, a WQBEL must be included in an NPDES permit if a discharge would have a reasonable potential to cause or contribute to an exceedance of state water-quality standards, which includes lake-eutrophication standards, and the WQBEL must be “necessary to . . . [a]chieve water quality standards.” 40 C.F.R. § 122.44(d)(1), (d)(1)(iii). But the concept of state water-quality standards does not include a wasteload allocation in a draft TMDL study. *Compare* 40 C.F.R. § 131.6 (describing components of water-quality standards) *with id.*, § 130.2(i) (defining TMDL). A WQBEL must be “consistent with the assumptions and requirements of” a wasteload allocation in a TMDL study *if* the TMDL study has been approved by the EPA. 40 C.F.R. § 122.44(d)(1)(vii)(B). But a wasteload allocation in a *draft* TMDL study is not given such effect.

We note that the EPA-approved TMDL study for Lake Pepin incorporates the same wasteload allocation for the City's wastewater-treatment facility as the 2016 draft Lake Osakis area TMDL study. Consequently, the WQBEL in the City's permit must be "consistent with the assumptions and requirements of" the wasteload allocation in the Lake Pepin TMDL study. *See id.* But the EPA's approval of the Lake Pepin TMDL study states that "individual [wasteload allocations] may be adjusted during the NPDES permitting process" so long as the total allocation is achieved and "localized impairments" do not result. Nothing in the record suggests that such adjustments could not be made. Hundreds of point sources received wasteload allocations in the Lake Pepin TMDL study, and the wasteload allocation to the City's wastewater-treatment facility (121 kg/year) is a very small fraction (five thousandths of one percent) of the allowable total-phosphorus load (2,220,152 kg/year).

In sum, the record does not contain substantial evidence that there is a reasonable potential that a discharge from the City's wastewater-treatment facility will cause or contribute to an exceedance of the lake-eutrophication standards based on measurements that exceed the criteria for *both* the one cause variable *and* one of the two response variables *in either Fille Lake or Lake Osakis*. Likewise, the record does not contain substantial evidence to support the PCA's determination that the 121-kg/year total-phosphorus limit is necessary to achieve water-quality standards in either of those two lakes. Thus, there is not substantial evidence in the record to support the 121-kg/year total-phosphorus limit in the NPDES permit issued to the City. *See* Minn. Stat. § 14.69(e).

II. Contested-Case Hearing

The City also argues that the PCA erred by denying its request for a contested-case hearing with respect to the re-issued permit on the grounds that the decision is unsupported by substantial evidence and is arbitrary or capricious. *See* Minn. Stat. § 14.69(e), (f).

The PCA is required to grant a petition for a contested-case hearing if:

A. there is a material issue of fact in dispute concerning the matter pending before the board or commissioner;

B. the board or commissioner has the jurisdiction to make a determination on the disputed material issue of fact; and

C. there is a reasonable basis underlying the disputed material issue of fact or facts such that the holding of a contested case hearing would allow the introduction of information that would aid the board or commissioner in resolving the disputed facts in making a final decision on the matter.

Minn. R. 7000.1900, subp. 1 (2021). A petitioner bears the burden of establishing each of the three requirements of the rule. *See NorthMet*, 959 N.W.2d at 745 (interpreting similar language in Minn. Stat. § 93.483, subd. 3(a) (2020)). An agency's decision as to whether to conduct a contested-case hearing is entitled to deference. *Id.* at 747. If an agency's decision to deny a request for a contested-case hearing is challenged on the ground of lack of substantial evidence, a court should ask two questions: "whether the agency has adequately explained how it derived its conclusion and whether that conclusion is reasonable on the basis of the record." *Id.* at 749; *see also Enbridge*, 964 N.W.2d at 189-92 (applying two-part substantial-evidence standard).

In its petition for a contested-case hearing, the City identified eleven issues. On appeal, the City contends that the PCA erred by denying a contested-case hearing with respect to five of those issues: the first, third, fifth, ninth, and tenth. In response, the PCA contends that it properly denied the City's request for a contested-case hearing on those five issues for the reasons stated in the agency's July 2021 order.

We begin by considering whether the PCA has adequately explained the reasons for denying the City's contested-case hearing with respect to the five identified issues. *See NorthMet*, 959 N.W.2d at 749. We observe that the PCA's explanations are quite conclusory and repetitive. For each of the disputed factual issues, the order states that the PCA disagrees, that the PCA and the City have exchanged communications concerning the issue, that the City's information is in the administrative record and has been considered, and that no new information has been presented. But the order does not discuss the factual issue and the evidence in detail and does not explain with specificity why a contested-case hearing would not be appropriate. The PCA's order is similar in nature to other agency decisions that have failed the first part of the substantial-evidence test. *See id.* at 753-54 (concluding that DNR erred by denying contested-case hearing because of "conclusory statements" without "analysis of the scientific basis for [its] assumptions"); *In re PolyMet Mining, Inc.*, 965 N.W.2d 1, 9-11 (Minn. App. 2021) (concluding that PCA did not have substantial evidence to support its decision because its conclusory statements did not adequately explain its reasons), *rev. denied* (Minn. Sept. 30, 2021).

Furthermore, to the extent that the PCA has stated reasons for denying a contested-case hearing, the reasons are not legally viable. In denying the requests on each issue, the

PCA repeated the error of law that is described above. *See supra* part I.A. Specifically, the PCA's explanations consistently focus solely on the one cause variable in the lake-eutrophication standards and consistently rely on the 2016 draft TMDL study. This is an additional reason why the PCA has not adequately explained the reasons for denying the City's contested-case hearing with respect to the five identified issues.

We continue by considering whether, with respect to each disputed issue, the PCA's conclusion "is reasonable on the basis of the record." *See NorthMet*, 959 N.W.2d at 749. We have concluded that the total-phosphorus limit in the re-issued permit is not supported by substantial evidence. *See supra* part I.B. No additional evidence is cited in the July 2021 order denying the City's request for a contested-case hearing.

Thus, the record does not contain substantial evidence that there is a reasonable basis for denying the City's request for a contested-case hearing with respect to the five identified issues.

III. Conclusion

The PCA's re-issuance of the permit and its decision to deny the City's request for a contested-case hearing were based on an error of law and are not supported by substantial evidence. Accordingly, we reverse the PCA's re-issuance of the permit and remand the matter to the PCA for reconsideration in light of the legal principles discussed above in part I.A. and for a contested-case hearing on each of the five issues identified in the City's appellate brief. The contested-case hearing should focus on evidence relevant to whether there is a reasonable potential that a discharge from the City's wastewater-treatment facility will cause or contribute to an exceedance of the lake-eutrophication standards and whether

a WQBEL is necessary to ensure compliance with either the cause criterion or response criteria in the lake-eutrophication standards. *See NorthMet*, 959 N.W.2d at 754, 759-60 (reversing and remanding for contested-case hearing on issue for which agency's decision was not supported by substantial evidence); *In re City of Owatonna's NPDES/SDS Proposed Permit Reissuance*, 672 N.W.2d 921, 927, 930 (Minn. App. 2004) (reversing and remanding for contested-case hearing on questions of fact regarding phosphorus limit in NPDES permit). On remand, the PCA may, in its discretion, petition for consolidation of the contested-case hearing in this matter with the contested-case hearing in the 2016 draft Lake Osakis area TMDL study matter, OAH No. 60-2200-37167. *See* Minn. R. 1400.6350 (2021). Because we are granting relief to the City for the reasons discussed above in parts I and II, we need not consider the City's argument that the PCA's decision to grant the permit is based on an unlawful procedure or its argument that the PCA's decision to deny the request for a contested-case hearing is arbitrary or capricious.

Reversed and remanded.