



Minnesota Center for Environmental Advocacy

The legal and scientific voice protecting and defending Minnesota's environment

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April 30, 2010

Paul Eger
Commissioner, Minnesota Pollution Control Agency
520 Lafayette Road
Saint Paul, MN 55155

**Re: Completion of the Lake Winona TMDL and Imposition of Effluent
Limit in ALASD NDPEs Permit**

Dear Commissioner Eger,

The Minnesota Center for Environmental Advocacy (MCEA) writes to express significant concerns with regard to the on-going pollution of Lake Winona and adjoining lakes from the Alexandria Lakes Area Sanitary District (ALASD) wastewater treatment facility. In particular, MCEA is concerned that the Minnesota Pollution Control Agency (MPCA) is not executing its duty to develop and implement a total maximum daily load (TMDL) for Lake Winona and impose on ALASD a TMDL-based effluent limit that complies with federal and state law and is consistent with the representations the MPCA made to the Minnesota Supreme Court.

On-going pollution, impairment and destruction of Lake Winona, a natural resource of the state, is resulting from the MPCA's failure to execute its duties and is in violation of the Minnesota Environmental Rights Act (MERA).

We ask for your immediate attention and assistance in resolving these concerns. Specifically, we request that you respond in writing to these concerns so MCEA and other public stakeholders will know the specific steps MPCA intends to take to fulfill its stated commitment to impose a TMDL-based effluent limit on ALASD's discharge and to otherwise execute its duties to abate the pollution entering Lake Winona.

I. BACKGROUND

A. Legal Challenge to the ALASD Permit

As you know, ALASD's 2005 request to expand its treated sewage discharge into the already severely impaired Lake Winona was the subject of a permit dispute that was resolved, ultimately, by the Minnesota Supreme Court. The crux of the dispute was the meaning of a federal regulation that requires permits to have "water quality-based effluent limits," that is, effluent limits that are calculated to achieve water quality standards of receiving and downstream waters. At the time of the lawsuit, Minnesota had a narrative water quality standard for nutrients and the specific regulation at issue in the case dealt with calculation of effluent limits to meet narrative standards.

MCEA challenged the ALASD permit because it contained a 0.3 mg/l phosphorus limit and MPCA's modeling showed that the 0.3 mg/l limit would maintain Lake Winona's nutrient impairment or make it slightly worse. (Modeled total phosphorus under the then current permit which was 225 ug/l; under the proposed permit it would be 229 ug/l.¹ The numeric water quality standard for Lake Winona, adopted in 2007 after the permit was issued, requires total phosphorus of 60 ug/l or less.²) MCEA asserted that permitting an expanded discharge from a facility that had already impaired a lake with an effluent limit that modeling showed would maintain the impairment violated the Clean Water Act. Instead, MCEA argued, the MPCA should have calculated a limit that it could show would lead to attainment of water quality standards.

The MPCA defended the permit, arguing that the 0.3 mg/l phosphorus limit was really only an interim limit and that the required water quality-based effluent limit would be calculated as part of the TMDL for Lake Winona:

MPCA has never claimed that the interim limits are sufficient by themselves to constitute full compliance with 40 C.F.R. § 122(d)(4)(1); rather the interim limits are reasonable components of a package of limits, along with a TMDL-based effluent limit, which together fully comply with the regulation.³

In its brief to the Minnesota Supreme Court, the MPCA repeatedly stated that an effluent limit consistent with attaining water quality standards would be calculated and imposed on ALASD within the five-year term of the 2006 permit:

[T]o assure that the more stringent effluent limits 'will attain and maintain applicable water quality criteria' . . . MPCA incorporated a TMDL-based effluent limit in the ALASD permit. This requires ALASD to meet an effluent limit consistent with its permissible loading of phosphorus under the Lake Winona TMDL as soon as that TMDL is completed. The Lake Winona TMDL was already

¹ MPCA Sup. Ct. Br., App. 70.

² Minn. R. 7050.0222, subd. 3.

³ MPCA Sup. Ct. Br., at 39 (emphasis in original).

*underway when MPCA issued the ALASD permit and is scheduled to be completed in 2009, before the end of the five-year ALASD permit reissued in June 2006.*⁴

*MPCA included a schedule of compliance in the permit that requires ALASD to comply with the TMDL-based limit as soon as the Lake Winona TMDL is completed.*⁵

*MPCA reasonably expected ALASD to comply with a TMDL-based limit during the five year term of the permit that the agency reissued in June 2006.*⁶

*Under the schedule for completion of the Lake Winona TMDL, a TMDL-based effluent limit will be imposed on ALASD within the five year term of the permit.*⁷

A divided Minnesota Supreme Court reversed the Court of Appeals and affirmed the MPCA-issued permit, restating in the fact section what MPCA had represented to it: “[The MPCA permit] required the facility to comply with the results of the TMDL study and implementation plan to be completed in 2009.” *In re ALASD*, 763 N.W.2d 303, 307-08 (Minn. 2009). The Court found that the federal regulation “unambiguously requires the agency to establish effluent limits for phosphorus that ‘will attain and maintain applicable narrative water quality criteria’ and ‘will fully protect the designated use’ of the waterbody.” *Id.* at 311. But it found ambiguity in applying the regulation to a discharge into an impaired water where a TMDL is underway. *Id.* The majority expressed “concerns about the consequences of delaying the restoration of impaired waters in Minnesota” but concluded that MPCA’s decision to defer imposition of the required effluent limit until after the TMDL was complete was reasonable. *Id.* at 316.

B. Development of the TMDL and Water Quality-Based Effluent Limit

MPCA listed Lake Winona, a shallow lake in the North Central Hardwoods Ecoregion, as impaired by excess nutrients/eutrophication in 2002. The impairment is severe. Minnesota’s water quality standards applicable to Lake Winona, found at Minn. R. 7050.0222, Subp. 4, require in-lake conditions to meet the following:

⁴ *Id.* at 29.

⁵ *Id.*, at 40.

⁶ *Id.*

⁷ *Id.* at 41.

Total Phosphorus	< or =60 ug/l
Chlorophyll-a	< or =20 ug/l
Secchi Disk depth	Not less than 1 meter

In 2006, when it authorized ALASD's expansion, MPCA reported data collected between 2003 and 2005 showing a severe impairment. Total phosphorus concentration in the lake was more than three times the numeric criterion; the chlorophyll-a concentration was more than four times the numeric criterion:

Total Phosphorus	219 ug/l
Chlorophyll-a	97 ug/l
Secchi Disk depth	0.5 meter

In December 2007, the MPCA issued a work plan and request for proposals (RFP) to "develop a nutrient TMDL [for Lake Winona] with waste load and load allocations for phosphorus."⁸ The RFP explains that ALASD's permit requires it to meet a TMDL-based effluent limit for phosphorus. The RFP requires that the TMDL and Implementation Plan be completed by December 31, 2009. The RFP states that "[t]he TMDL will specifically include development of P effluent limits for the ALASD..."⁹

Although the MPCA said the TMDL was underway in 2006, in fact the first of three contracts to complete the TMDL and Implementation Plan was not awarded to Earth Tech/AECOM until February 2008. The three contracts, all awarded to Earth Tech/AECOM, total \$199,994.¹⁰

In November 2009, Earth Tech/AECOM provided the MPCA with a draft TMDL.¹¹ The draft TMDL, which has not been placed on public notice by the MPCA, assigns a waste load allocation to ALASD of 207 kilograms per year, which translates to a discharge limit of 0.042 mg/l phosphorus at 3.75 million gallons per day of flow.

⁸ Lake Winona TMDL workplan and request for proposals, MPCA, December 18, 2007, page 3.

⁹ *Id.*

¹⁰ Email from Jim Courneya, MPCA Lake Winona TMDL Project Manager, April 28, 2010.

¹¹ *Draft Lake Winona TMDL*, AECOM, Inc., November 2009.

Between 2005 and the present, water quality in Lake Winona has worsened. According to the November 2009 draft TMDL, the total phosphorus has increased and the reported chlorophyll-a reading is now more than eight times the numeric criterion¹²:

Total Phosphorus	239 ug/l
Chlorophyll-a	174 ug/l
Secchi Disk depth	0.3 meter

In sum, a draft TMDL has been completed for Lake Winona which contains a wasteload allocation for ALASD. It requires an effluent limit of 0.042 mg/L on ALASD's phosphorus discharge. The 0.042 mg/L effluent limit is the water quality-based effluent limit the MPCA told the Supreme Court it would impose on the ALASD facility. The 2006 permit which authorized ALASD's expansion and contains a 0.3 mg/L phosphorus limit failed to "hold the line" on worsening the impaired state of Lake Winona while the agency completed a TMDL. Further delay will cause on-going pollution, impairment and destruction of Lake Winona.

C. MPCA's Failure to Publish the Draft TMDL and Expressed Intentions for Further Delay.

MPCA staff recently indicated that the Agency, rather than moving ahead with notice, a comment period, and final approval of the Lake Winona TMDL, is instead searching for ways to recalculate the TMDL, apparently to delay and ease the limitations that would have to be imposed on ALASD's discharge in order for Lake Winona to meet water quality standards. MCEA's understanding of MPCA staff's current position is based on a March 24, 2010 conversation between Kris Sigford and Jim Ziegler, participation in an April 7, 2010 stakeholder meeting, review of a MPCA document distributed to TMDL stakeholders entitled "Lake Winona TMDL Options Discussion," and MPCA's minutes of the April 7 meeting.

MCEA understands that the MPCA may abandon its original approach, and the basis for the contracts fulfilled by Earth Tech/AECOM, which focused on meeting the total phosphorus criterion. Instead, a new TMDL study would be completed that would calculate load and waste load allocations to meet the chlorophyll-a and Secchi disk criteria. In addition, MPCA staff have discussed a revised TMDL that would represent "staged" or "phased" water quality goals different from existing water quality standards for phosphorus, chlorophyll-a and Secchi depth, in which the load and waste load allocations would change depending on when the Lake responds to various inputs and attains a "clear water state." Finally, MCEA understands that MPCA staff seeks to modify the applicable nutrient water quality criteria, criteria that have been duly adopted and established in state law.

¹² Reported as "existing conditions" in the Draft Lake Winona TMDL, p. 5.

As set out below, the MPCA appears to be on the verge of making decisions that will not only delay the recovery of Lake Winona, but that lack any legal foundation and place the Agency at risk of further legal action in this matter.

II. THE MPCA HAS NO LEGAL BASIS TO “START OVER” WITH THE LAKE WINONA TMDL.

MPCA’s suggestion that the TMDL should be further delayed and reworked as described above is not justified and appears to be based on misapprehensions of Clean Water Act requirements. MCEA urges you to direct Agency staff to move forward expeditiously with finalizing, adopting, and implementing the waste load allocation for the draft TMDL already completed for Lake Winona.

MCEA’s multiple objections are explained below and include the following: (1) The Agency told the Minnesota Supreme Court that a TMDL-based effluent limit would be imposed in ALASD’s current permit; (2) modeling completed for the TMDL already targets chlorophyll-a and Secchi depth in addition to total phosphorus; (3) the TMDL process is not intended to be used to modify state water quality standards and no change to the applicable water quality standard is justified here; (4) federal law prohibits a TMDL based on “phased” or “stepped” load and waste load calculations and water quality goals; and (5) the fact that ALASD made imprudent investments in an expansion is not relevant to development of a scientifically sound TMDL.

A. The MPCA told Minnesota’s Highest Court that a TMDL-based Effluent Limit Would Be Incorporated into ALASD’s Permit by 2011.

As set out above, the MPCA defended its 2006 permit for the ALASD expansion in part by stating to the Supreme Court that the federally-required water quality-based effluent limit would be developed and incorporated into ALASD’s permit within the five-year term of the permit. The Agency should live up to the representations it made to the State’s highest court.

In addition to the multiple references quoted above from MPCA’s brief, counsel for the Agency indicated at oral argument that the MPCA’s permit was consistent with federal requirements because a TMDL-based effluent limit would be imposed within the permit’s five-year term. In response to a Justice’s question, counsel stated: “The other applicable water quality standard in this case is a TMDL, because the TMDL is going to be finished within the five-year term of this permit. That’s why we believe this permit complies with all applicable standards.”¹³

Justices more than once expressed concerns about authorizing an expansion without first knowing to what degree ALASD would have to remove phosphorus. MPCA’s counsel and counsel for ALASD, however, were reassuring, repeatedly asserting that ALASD would have to

¹³ http://www.tpt.org/courts/MNJudicialBranchvideo_NEW.php?number=A06-1371.

comply with the results of the TMDL study. In response to a question about how the plant, if designed for a 0.3 mg/l limit would meet a hypothetical lower requirement, MPCA's counsel said: "The district is going to have to meet the standard . . . whatever it [, the TMDL,] requires, they are bound by this permit to do it."¹⁴ In response to a Justice's suggestion that the TMDL may ultimately conclude that the discharge would have to be removed, ALASD's counsel admitted that "is one of the possibilities." He agreed with the Justice, who said that the "permit requires you to comply with that ultimate order [referring to MPCA's TMDL-based limit] whatever that is, correct?"¹⁵

There are no intervening events or newly discovered facts that would justify MPCA's sudden departure from representations it made to the Supreme Court. To reverse course now and fail to follow through on statements offered to the Minnesota Supreme Court in defense of the permit would severely tarnish the Agency's credibility.

B. Modeling for Clarity Indicators (Chlorophyll-a and Secchi Depth) Has Already Been Done in the Existing Draft TMDL.

There is no basis for the MPCA to pursue an additional study that focuses on chlorophyll-a concentrations and Secchi disk readings rather than total phosphorus. The suggestion is not consistent with Agency practice and reflects political will rather than scientific judgment by serving no purpose other than further delay. First, it is impossible to express load and waste load allocations in terms of Secchi depth and chlorophyll-a, which are responsive conditions to the causal phosphorus loading. Second, the modeling for chlorophyll-a and Secchi depth response to decreased phosphorus loads has already been done in the draft TMDL. Moreover, this modeling shows that the clarity indicators, not total phosphorus, are driving the lower waste load and load allocations.

Lake Winona TMDL contractor AECOM ran 18 modeled scenarios representing different combinations of flow and phosphorus concentration from ALASD as well as different percentages in reductions from internal load and runoff to predict the water quality responses in Lake Winona for total phosphorus, chlorophyll-a and Secchi depth. Table 3-2 from the final Phase 3 Report for the TMDL which shows the results of the modeling is reproduced and attached to this letter.¹⁶ As shown in the table, AECOM modeled responses for all three indicators, not just total phosphorus. Moreover, the results indicate that meeting the chlorophyll-a criterion (≤ 20 ppb) requires a lower waste load allocation than meeting the total phosphorus criterion (≤ 60 ppb).

Put another way, a "chlorophyll-a" TMDL for Lake Winona, utilizing its applicable water quality standard, has already been done. Indeed, the modeling for chlorophyll-a and Secchi depth is discussed in section 4.3 of the Draft TMDL. The modeling demonstrates that increasing reductions in phosphorus loading actually meet the standard for total phosphorus before the

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Lake Winona TMDL Phase 3 Report, AECOM, Inc., November 2009, page 17.

standards for chlorophyll-a or Secchi depth. In the "Lake Winona TMDL Options Discussion" staff posit the question: "What if the TMDL was written in such a way as to make one of the other two standards components the target?" This makes no sense, and would waste taxpayer dollars. Such a TMDL has already been completed. A do-over would only reach a different result if a relaxed water quality standard for Lake Winona were used.

C. There is No Legal Basis for Relaxing the Water Quality Standard Applicable to Lake Winona.

1. Water quality standards are not the subject of TMDLs.

As an initial matter, federal regulations require TMDLs for the purpose of determining the amount of pollutant loading allowable for a waterbody to attain and maintain water quality standards and to assign load and wasteload allocations for sources of that pollution. 33 U.S.C. § 1313(d)(1)(C); 40 CFR § 130.7(c). TMDLs are *not* regulatory mechanisms for changing the water quality standards that apply to the impaired waterbody, nor should MPCA staff encourage the regulated community or others participating in the TMDL process to view the process as an invitation to change water quality standards.

Staff have provided incorrect and misleading information at stakeholder meetings, encouraging stakeholders to consider changes to water quality standards as part of the TMDL process. This is not correct. Any change in water quality standards would have to be fully scientifically justified and proceed pursuant to a separate administrative proceeding and be approved by EPA.¹⁷ Staff's mischaracterizations are confusing to stakeholders and provide a false sense that the problem ALASD created in Lake Winona can somehow be addressed without drastic changes to ALASD's discharge. This misrepresentation of federal requirements should be corrected immediately by those charged with preparing the TMDL.

2. There is no basis for changing Lake Winona's water quality standard through a use attainability analysis or a site-specific standard.

Even if it were appropriate to use the TMDL process (and TMDL funding) to pursue a change to the water quality standard of the impaired waterbody, there is no basis to do so in the case of Lake Winona. It is very clear from the record of this case that ALASD's desire to continue to pollute the Lake is the only force driving repeated investigations into ways of changing the water quality standard. This is causing unjustified delay and a waste of limited public funds that are intended to be used to *clean up* Minnesota's impaired waters, not to justify continued pollution.

¹⁷ As confirmed in a letter to MCEA from EPA Region 5 "MPCA indicated agreement . . . that any site-specific modification would be preceded by public participation that satisfies that requirements specified in 40 CFR §131 for revisions to a water quality standard and would need to be submitted to and approved by EPA under CWA 303(c) before it could serve as the basis for an NPDES permit or TMDL." That commitment must be communicated to staff and the regulated community.

First, the MPCA has already evaluated and formally denied ALASD's petition to conduct a use attainability analysis and downgrade Lake Winona's designated uses.¹⁸ In 2007, ALASD sent an email to the stakeholder group stating "due to the lack of progress on the Lake Winona TMDL, ALASD feels this would be a good time for a Use Attainability Analysis to be performed."¹⁹ It filed a formal petition, arguing that Lake Winona had never been used for fishing or swimming. The MPCA denied the petition, finding that "each of the designated uses that ALASD asks MPCA to eliminate are, in fact, existing uses in Lake Winona . . . As these are existing uses, federal law prohibits the action that ALASD requests."²⁰

Second, there is no scientific basis for setting a new "site-specific" water quality standard for Lake Winona. Any modification of the nutrient water quality standards for Lake Winona would have to be supported by scientific evidence showing that natural background conditions in the Lake justify the conclusion that designated uses would be protected by a standard different from the one adopted in rule. Such evidence does not exist. Indeed, ALASD, in 2008, requested that a site-specific water quality standard be considered as part of the TMDL process. MPCA, again using public clean water funding, contracted with the Science Museum of Minnesota to conduct a sediment core sampling study to determine Lake Winona's past phosphorus levels.²¹ The results show conclusively that the natural background total phosphorus concentration in Lake Winona was fully consistent with the duly adopted and applicable standard. As reported in the Draft TMDL, this study found:

- Historically, Lake Winona's total phosphorus concentration was between 24 and 40 ppb;
- Between WWII and 1976, total phosphorus increased to between 54 and 60 ppb;
- After 1976, total phosphorus increased rapidly to current hypereutrophic conditions—a time period coinciding with the beginning of operations in 1977 at the ALASD WWTP at the south end of Lake Winona.

Thus, the water quality standard for shallow lakes in the Central Hardwood Forest ecoregion, which requires total phosphorus to be at or below 60 ppb, is fully supported by the historical evidence, and any further expense or time in pursuit of a site-specific standard would be unjustified.

¹⁸Lake Winona is classified as a Class 2B water. Class 2B waters shall have water quality that "permits the propagation and maintenance of a healthy community of cool or warm water sport or commercial fish and associated aquatic life, and their habitats" and "shall be suitable for aquatic recreations of all kinds, including bathing."Minn. R. 7050.0222 Subp. 4. ALASD's petition sought to eliminate the Class 2B classification, arguing that Lake Winona has never been used for fishing or swimming.

¹⁹ August 16, 2007 Email from Scot Spranger, ALASD Plant Superintendent to Lake Winona Advisory Committee.

²⁰ October 11, 2007 Letter from Brad Moore, MPCA Commissioner, to Bruce Nelson, ALASD Executive Director.

²¹ This contract, for \$79,950, funded core sampling for 12 lakes in the North Central Hardwoods ecoregion, including Lake Winona. The amount used to study Lake Winona is unknown. Source: April 28, 2010 email from Jim Courneya, MPCA Lake Winona TMDL Project Manager.

3. There is no basis for applying a standard from a different eco-region.

MPCA staff have suggested that Minnesota Rule Part 7050.0222, subpart 3a(A), may provide a basis for lowering the water quality standard applicable to Lake Winona. However, that rule allows “case-by-case” application of the standards only to waterbodies that “lie on the border between two ecoregions.” *Id.* Lake Winona does not “lie on the border” between ecoregions. In fact, Lake Winona falls squarely in the Central Hardwood Forest eco-region, 18 miles east of the closest border with the Northern Glaciated Plains eco-region and 34 miles west of the closest border with the Northern Lakes and Forests eco-region. The Lake does not “lie on the border between two eco-regions” and to find so would be to ignore the plain language of the MPCA’s rule.

Moreover, as discussed above, the evidence from the lake-bed core sampling study shows that the numeric phosphorus water quality criterion that applies to shallow lakes in the Central Hardwood Forest eco-region (≤ 60 ppb) is the correct criterion. Prior to ALASD’s discharge into Lake Winona, its total phosphorus concentration was below 60 ppb; there are no “natural causes” as that term is defined in rule, which would support the MPCA’s departure from this applicable standard.

D. Federal Law Prohibits the “Stepped” Calculation of a TMDL.

MPCA has told stakeholders that it is possible to re-write the TMDL to include a “stepped approach.” In the “Lake Winona TMDL Options Discussion” document MPCA says such an approach “would require an initial reduction from point sources to some yet to be determined ‘interim’ level. In-lake reductions would need to be completed and evaluation of progress would determine what level of further reductions might be necessary from point sources to reach and maintain a clear water state.”²²

The stepped approach to developing a TMDL as described by MPCA staff violates federal law.

The federal requirement that TMDLs be calculated to achieve water quality standards is clear and has already been interpreted by the federal court in Minnesota to prohibit the MPCA from issuing stepped or phased TMDLs. MPCA’s fecal coliform TMDL for Southeast Minnesota contemplated a similar stepped approach. The federal court, however, remanded the TMDL: “the Court agrees with MCEA that a phased calculation that is not designed to return impaired segments to water quality standards is not in accordance with law. . . . [B]y the explicit terms of the CWA, the TMDL must be ‘established at a level necessary to implement the applicable water quality standards.’” *MCEA v. U.S. EPA*, 2005 WL 1490331 *5 (D. Minn. June 23, 2005).

²² Lake Winona TMDL Options Discussion (MPCA, undated), p. 2.

The Lake Winona TMDL must contain a waste load allocation, a load allocation, and a margin of safety that add up to a total maximum daily load which is calculated to meet the water quality standard for Lake Winona. Anything less, including a stepped plan based on first making in-lake changes such as removal of carp, evaluation of whether a "clear water state" has been achieved, and then calculating appropriate allocations, will not suffice.

E. The Fact that ALASD May Have to Dramatically Limit or Withdraw its Discharge After Having Made an Imprudent Investment in an Expansion Does not Justify a Modified Water Quality Standard or Further Delay.

That ALASD was the source of Lake Winona's nutrient impairment and that the phosphorus discharge from the facility would have to be severely restricted as part of Lake Winona's restoration has been well known for years and was clear to all parties at the time ALASD requested and MPCA granted a permit for an expanded discharge. MCEA and others invested considerable resources pointing out the error of investing in an expanded discharge rather than alternatives. To be frank, ALASD had many, many warnings. *See In re ALASD*, 763 N.W. 2d at 327 ("by deferring the establishment of more stringent effluent limitations, MPCA has risked that the facility will not be able to comply with effluent limits that are developed after total-maximum-daily-load completion.") (Anderson, P, dissenting).

ALASD, with MPCA's imprimatur, chose to proceed with an imprudent investment. Its decision is unfortunate but not relevant to development of the TMDL. Calculation of the waste load allocation in a TMDL is a matter of science. While ALASD and MPCA's poor decision to move ahead with an expansion has made TMDL implementation more complicated and costly, it is not relevant to calculation of the load allocation, waste load allocation, and margin of safety at issue in the TMDL itself.

III. THE MPCA WILL BE LIABLE UNDER MERA IF IT FAILS TO COMPLETE AND IMPLEMENT THE TMDL, INCLUDING FAILING TO IMPOSE A TMDL-BASED EFFLUENT LIMIT IN ALASD'S PERMIT.

As you know, the Minnesota Environmental Rights Act (MERA) prohibits the "pollution, impairment or destruction" of the State's natural resources. Minn. Stat. § 116B. MERA allows for injunctive relief against government agencies as well as private actors whose conduct and failure to act result in pollution, impairment or destruction of the environment.

Arguably, MPCA's actions to date with regard to Lake Winona, which was listed as impaired in 2002, has resulted in on-going pollution, impairment and destruction of the Lake in violation of MERA. Certainly, if the MPCA now fails to follow through on the commitments it made to the Supreme Court in defense of the permit approving ALASD's expanded discharge, abandons an already-completed draft TMDL which contains scientifically justified waste load allocations for the point source discharges in favor of further delay, and seeks to change the target water quality standard for Lake Winona in clear violation of the plain language of Minnesota Rules and federal law, MPCA will be liable to suit under MERA.

MPCA has the authority and also the *duty* to “control or abate” water pollution, including “requiring the discontinuance of the discharge of sewage, industrial waste or other wastes into any waters of the state resulting in pollution in excess of the applicable pollution standard...” Minn. Stat. § 115.03, subd. 1(e). The failure to timely develop and impose an effluent limit on ALASD sufficiently stringent to begin to correct the severe impairment in Lake Winona is a violation of that duty and is causing on-going pollution, impairment and destruction of Minnesota’s natural resources in violation of the Minnesota Environmental Rights Act.

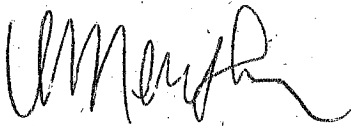
IV. CONCLUSION

As Justice Paul Anderson stated in his dissent in the *ALASD* decision:

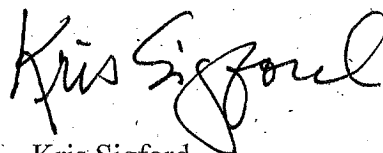
*Water quality standards are important in Minnesota. Minnesota has more surface waters than any of the 48 contiguous states—and a large number of our state's waters are impaired. *** We must not lose sight of what this case is about. The Clean Water Act requires the MPCA to focus on attaining and maintaining a water quality for Lake Winona that will fully protect the lake's designated use. ***We are beyond the stage when merely shifting the deck chairs on a sinking ship will suffice.*

MCEA requests that you take immediate action, instructing responsible MPCA staff to bring the Lake Winona TMDL to completion and impose a TMDL-based effluent limit on the ALASD discharge in accordance with the Agency’s representations to the Minnesota Supreme Court. We request that you provide us with a written response to these concerns and confirmation of what specific steps MPCA intends to take to fulfill its commitments and meet its obligations under state and federal law. If you have questions regarding any of MCEA’s concerns, please feel free to contact us.

Sincerely,



Kevin Reuther
Legal Director



Kris Sigford
Water Quality Director

cc: Tinka Hyde, Director, Water Division, Environmental Protection Agency Region 5
Alan Williams, Esq.
Lake Winona TMDL Stakeholders (via e-mail)

Lake Winona TMDL Phase 3 Report

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November 2009.

Table 3-2

Bathtub Results with ALASD, Internal and Runoff Load Reductions¹

Scenario	ALASD Flow [MGD]	ALASD Inflow Phosphorus Conc. [ppb]	South Winona			North Winona		
			Total P [ppb]	Chl-a [ppb]	Secchi Depth [m]	Total P [ppb]	Chl-a [ppb]	Secchi [m]
2008 Observed	2.5	284	250	179	0.3	227	169	0.3
50 Percent Internal and Runoff Load Reduction	0	--	189	134	0.3	168	117	0.4
	1.25	60	121	70	0.5	116	68	0.5
		100	131	78	0.4	124	75	0.5
	2.5	60	100	53	0.5	97	53	0.5
		100	114	64	0.5	109	63	0.5
3.75	60	89	45	0.6	87	45	0.6	
75 Percent Internal and Runoff Load Reduction	0	--	113	63	0.5	103	57	0.5
	1.25	60	84	41	0.6	81	41	0.6
		100	91	46	0.6	87	45	0.6
	2.5	60	71	32	0.7	69	32	0.7
		100	86	43	0.6	83	42	0.6
3.75	60	67	29	0.7	65	30	0.7	
80 Percent Internal and Runoff Load Reduction	1.25	60	71	32	0.7	69	32	0.7
		100	64	28	0.8	62	28	0.8
	2.5	60	60	25	0.8	59	26	0.8
85 Percent Internal and Runoff Load Reduction	1.25	42	58	24	0.8	57	25	0.8
	2.5	42	52	21	0.9	51	21	0.9
		42	49	19	0.9	48	19	0.9
90 Percent Internal and Runoff Load Reduction	1.25	42	50	19	0.9	49	20	0.9
	2.5	42	46	17	1.0	45	18	1.0
		42	44	16	1.0	44	17	1.0

¹ Model based on 2004-2008 Averaged Input Calibration.

² Ecosystem standards are 60 ppb total phosphorus, 20 ppb chlorophyll-a, and not less than 1 meter secchi depth.

³ Bathtub output for the load reduction scenarios is found in Appendix D.