

No. A10-1025

STATE OF MINNESOTA
IN COURT OF APPEALS

State of Minnesota ex rel. Swan Lake Area Wildlife Association,
Appellant,

vs.

Nicollet County Board of County Commissioners,
Respondent,

vs.

Marlin Fitzner, et al., intervenors,
Respondents,

vs.

Minnesota Department of Natural Resources,
Respondent.

RESPONDENT DEPARTMENT OF NATURAL RESOURCES'
BRIEF AND ADDENDUM

RINKE NOONAN
Kurt A. Deter (#22342)
300 U.S. Bank Plaza, P.O. Box 1497
St. Cloud, MN 56302-1497
(320) 251-6700

*Attorneys for Marlin Fitzner, et al.,
Intervenors, Respondents*

BARNETT LAW, LTD.
Garry D. Barnett (#4820)
600 South Second Street
P.O. Box 3008
Mankato, MN 56002
(507) 345-7733

PETERSON LAW OFFICE, P.A.
William G. Peterson (#86435)
3601 Minnesota Drive, Ste 800
Bloomington, MN 55435
(952) 921-5818

*Attorneys for Swan Lake Area Wildlife
Association, Petitioner-Appellant*

RATWIK, ROSZAK & MALONEY,
P.A.
Scott T. Anderson (#157405)
300 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402
(612) 339-0060

*Attorneys for Nicollet County Board of
County Commissioners, Respondent*

LORI SWANSON
Attorney General
State of Minnesota
Jill Schlick Nguyen (#0292874)
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 757-1325

*Attorney for Minnesota Department of
Natural Resources, Third Party
Defendant, Respondent*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

DID THE DISTRICT COURT COMPLY WITH THE REMAND MANDATE OF THE COURT OF APPEALS?

The District Court did not rule on this issue.

Swan Lake Area Wildlife Ass'n v. Nicollet County Bd. of Comm'rs, et al., 771 N.W.2d 529 (Minn. Ct. App. 2009).

Janssen v. Best & Flanagan, LLP, 704 N.W.2d 759 (Minn. 2005).

Duffey v. Duffey, 432 N.W.2d 473 (Minn. Ct. App. 1988)

IS THE DISTRICT COURT ORDER REQUIRING THE COUNTY TO REBUILD THE DAM AT THE OUTLET OF LITTLE LAKE AT AN ELEVATION OF 973.8 FEET ABOVE SEA LEVEL CONSISTENT WITH MERA?

The District Court ruled in the affirmative.

Minn. Stat. § 116B.07 (2008)

Wacouta Township v. Brunkow Hardwood Corp., 510 N.W.2d 27 (Minn. Ct. App. 1993).

Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc., 624 N.W.2d 796 (Minn. Ct. App. 2001).

STATEMENT OF THE CASE

Appellant Swan Lake Area Wildlife Association (“Association”) filed suit against Nicollet County (“County”) in Nicollet County District Court in 2003, seeking to have a dam at the outlet of Little Lake reconstructed at an elevation of 973.8 feet above sea level.¹ The Association sought relief under the Minnesota Environmental Rights Act (“MERA”) and common law nuisance. (AA² 2-9.) Landowners adjacent to Little and Mud Lakes intervened in the suit.

The County brought a motion for summary judgment. The District Court granted the County summary judgment as to count one of the Association’s Complaint, which alleged that the County had violated MERA by failing to comply with a 1972 public waters work permit (the “1972 Permit”) issued by the Department of Natural Resources (“DNR”). The District Court denied the County’s motion with respect to counts two and three of the Complaint alleging that the County had violated MERA by failing to repair or replace the dam at the outlet of Little Lake and had caused a nuisance. (AA 25-33.)

The District Court denied a subsequent motion by the County to dismiss the Complaint (AA 36-37), and granted a motion by the Association to amend the Complaint and serve the DNR (AA 34-35). These two orders were appealed to this Court. This Court upheld the District Court’s orders in *State ex rel. Swan Lake Area Wildlife Ass’n v. Nicollet County, et al.*, 711 N.W.2d 522 (Minn. Ct. App. 2006) (*Swan Lake I*).

¹ Contrary to its assertion in its brief (Appellant’s Brief, p. xxii), the Association sought this relief pursuant to each count of its Complaint.

² “AA” refers to the Association’s Appendix.

The Association served an Amended Complaint which added two counts -- mandamus and declaratory judgment. In contrast to the original Complaint, the Amended Complaint requested that the dam be rebuilt at an elevation of 976 feet above sea level or alternatively, at an elevation of 973.8 feet above sea level. (AA 38-46.)

The Association also served DNR with a Third Party Complaint. In its Third Party Complaint, the Association alleged that it would be difficult or impossible to obtain relief without adding the DNR as a party due to the Commissioner's authority to issue permits for structures in public waters. The Association did not allege that the DNR had violated MERA. (AA 61-63.)

This matter was tried before Judge John R. Moonan in Nicollet County District Court beginning on April 9, 2007. The court concluded in an order dated September 17, 2007 (the "Original Order"), that the County had violated MERA by failing to repair the dam and allowing Little and Mud Lakes to drain. (AA 94.) The court also concluded that the DNR had violated MERA by failing to order the County to repair the dam. (AA 95.) The court dismissed the claims of nuisance and mandamus and limited the declaratory judgment claim to declaratory relief under MERA. (*Id.*) The court ordered the County to construct a new dam at the outlet of Little Lake capable of storing water in Little Lake to a depth of three feet with specifications determined by the DNR. (AA 96.) The court ordered the DNR to build dikes within the meandered boundaries of Little and Mud Lakes to protect farmland, homesites and roads, and to build lift stations and pumps. (*Id.*)

All four parties moved for post-trial relief. Due to Judge Moonan's death, Judge John R. Rodenberg heard the parties' post-trial motions. Following a hearing before Judge Rodenberg in May 2008, the District Court granted in part the motions for amended findings and denied the motions for a new trial in an order dated July 30, 2008 (the "Amended Order"). The District Court concluded that DNR had exclusive jurisdiction to set lake elevations and therefore ordered the dam to be rebuilt at the elevation established by DNR in the 1972 Permit. (AA 126.) The District Court ordered the County to build a new dam at the outlet of Little Lake at an elevation of 973.8 feet above sea level in conformity with DNR specifications. (AA 113.) The court also deleted the requirement in the Original Order for DNR to construct dikes, pumps and lift stations. (AA 113.)

The Association appealed from the Amended Order and the DNR filed a Notice of Review. This Court held that the District Court had jurisdiction to establish the elevation of Little Lake. *See Swan Lake Area Wildlife Ass'n v. Nicollet County Bd. of Comm'rs, et al.*, 771 N.W.2d 529, 536-37 (Minn. Ct. App. 2009) (*Swan Lake II*). This Court also held that DNR had not violated MERA by failing to take enforcement action against the County. *See id.* at 538. This Court did not address the arguments raised by the parties as to the appropriate elevation for the dam but rather remanded the matter to the District Court for it to determine the necessary and appropriate remedy under MERA. *See id.* at 537.

Following remand Judge Rodenberg asked the parties to submit memoranda as to whether additional evidence should be submitted to the court. Because all four parties concluded that no additional evidence was necessary and the court could decide the matter on the evidence in the record, the court did not hold an evidentiary hearing. (AA 154-59.) The court then asked the parties to submit memoranda on the appropriate remedy in this matter, and based on these memoranda, the parties' oral arguments, and the record, the court ordered the County to rebuild the dam at an elevation of 973.8 feet above sea level. (AA 160-187.) The court indicated in its memorandum supporting its order dated March 30, 2010 (the "Remand Order"), that installing a dam at 976 feet above sea level as requested by the Association would flood large areas and cause undue hardship. (AA 183.)

The Association appealed from the District Court's Remand Order.

STATEMENT OF FACTS

Little and Mud Lakes are prairie pothole wetlands located in Nicollet County. (T. 726.)³ Nicollet County Ditch No. 46A (originally Nicollet County Ditch 46) was established in 1907 and constructed in approximately 1908 ("Ditch 46A"). (NC-1; NC-3.) It extends from Mud Lake to Little Lake, through Little Lake, and then joins Seven Mile Creek, a tributary of the Minnesota River. (NC-4.3; T. 1093, 1117.) Ditch 46A was intended to partially drain Little and Mud Lakes. (NC-2.3.)

³ "NC" refers to a Nicollet County exhibit; "DNR" refers to a DNR exhibit, and "RL" refers to an Association exhibit. "T" refers to the transcript of the District Court trial.

In 1949 a petition to improve Ditch 46A was filed with Nicollet County. (NC-3.) A local conservation group requested that the improvement include a dam at the outlet of Little Lake to preserve the conservation values of Little and Mud Lakes. (NC-3.) The County approved the improvement which included constructing a dam at the outlet of Little Lake, deepening the ditch below the dam, and cleaning out the ditch above the dam to its original elevation. (*Id.*)

The County installed a sheet pile dam at the outlet of Little Lake in approximately 1950. (T. 1341, DNR-16.) The dam was constructed at an elevation of 973.2 feet above sea level and was nine feet wide, and it controlled the runout elevation⁴ of both Little and Mud Lakes. (DNR-16; T. 1344; NC-17; T. 766.) DNR approved the construction of the dam. (T. 1278; RL-29.)

A second petition for improvement of Ditch 46A was filed with the County in 1969. (NC-15.1.) The Engineer's Final Report for this improvement called for replacing the nine foot dam with a wider dam at the same elevation, deepening the ditch below the dam, cleaning out the ditch above the dam to its original elevation, and widening the ditch above the dam. (NC-15.8.) The County provided DNR with a copy of the Final Engineer's Report, and DNR commented that the County would have to raise the level of the dam. (NC-16.5.) DNR also noted that the County would need a DNR public waters work permit to do any work affecting Little or Mud Lakes. (*Id.*)

⁴ A runout elevation is the elevation at which a lake or wetland begins to flow out. Actual lake elevations may be higher or lower than the runout elevation at any given time. (T. 1295.)

DNR required the County to raise the level of the dam for several reasons, including that the wider dam would drain Little and Mud Lakes more quickly and the planned clean out upstream and improvement downstream of the dam would increase the efficiency of Ditch 46A. (NC-16.5; T. 1280-81.) DNR concluded that raising the elevation of the dam would maintain the level of Little Lake in a similar condition to that existing after completion of the 1949 improvement. (*Id.*)

The County filed an application with DNR for a public waters work permit for construction of the dam (NC-16.7), and DNR granted the County a permit (NC-17). The 1972 Permit allowed the County to construct a twenty-five foot wide dam at an elevation of 973.8 feet above sea level. (NC-17.)

The County did not apply for, and the DNR did not grant to the County, a permit to do any work in the bed of Little or Mud Lake. (NC-16.7; T. 1282.) Acting without a public waters work permit, the County dredged Ditch 46A through the beds of Little and Mud Lakes in the early 1970s. (T. 1056-58; RL-102.) The County also deepened Ditch 46A downstream of the dam. (RL-102.)

The County did not rebuild the original dam at the outlet of Little Lake. (T. 1282.) The County has not completed any maintenance on the dam since the 1960s and it has fallen into complete disrepair, causing Little and Mud Lakes to drain. (NC-14; T. 1277; T. 1300-02.) DNR requested that the County repair the dam several times in the 1960s, 1970s, 1980s, and 1990s, but the County has not repaired the dam. (RL-51; RL-65; RL-121; DNR-5.)

DNR, the County, landowners owning property adjacent to Little and Mud Lakes and conservation groups had discussions in the 1990s to attempt to restore these lakes in a manner agreeable to all parties, but these discussions were not ultimately successful. (T. 743-44, 827.) Little Lake and Mud Lake are presently almost completely drained. (NC-26.1; T. 1318-19.)

At trial the Association presented a prima facie case that the County's failure to repair or replace the dam violated MERA. (AA 94-95.) DNR did not attempt to rebut the Association's prima facie case but rather presented evidence that the dam was not in operable condition and should be repaired. (T. 1277; T. 1300-02.)

DNR also presented evidence about why the dam elevation specified in the 1972 Permit would be an appropriate elevation for Little Lake. (T. 1280-81.) Both DNR Wildlife Section Chief Dennis Simon and DNR Area Hydrologist Leo Getsfried testified that benefits to wildlife and water quality would result from restoring the lakes to a runout elevation of 973.8 feet above sea level, rather than maintaining them in a drained condition. (T. 828, 1287-89.) In particular, restoring Little and Mud Lakes would increase water storage along Seven Mile Creek. (T. 1287-89.) Water storage reduces peak flows into the creek, which results in less erosion and lower levels of sediment. (T. 1287-88.)

The Association's witnesses testified that raising the runout elevation of Little and Mud Lakes to approximately 976 feet above sea level would benefit waterfowl. (T. 1012, 1220-21.) Though he did not testify in support of any particular water elevation, DNR Wildlife Section Chief Dennis Simon testified that ideal conditions for waterfowl would

be a hemi-marsh with 40% to 50% open water. (T. 715, 720.) Generally, to achieve these conditions, it is necessary to maintain three feet or more of water over 40% to 50% of the lake. (T. 716.) Deeper water prevents narrowleaf cattail, an invasive species, from spreading throughout the basin and allows muskrats to over winter. (T. 721-22.) When muskrats over winter, they eat cattail down to the water surface, causing it to die, and thus assist in maintaining hemi-marsh conditions. (T. 722-23.) Limnologist Richard Osgood testified that a runout elevation of 976 feet above sea level would maintain three feet of water on Little Lake all year. (T. 1022.)

The Association provided no evidence, however, that the runout elevation of Little Lake has ever been as high as 976 feet above sea level. The Association relies upon the 1972 Permit issued by the DNR which stated that the natural ordinary high water level⁵ of Little Lake is not lower than 976 feet above sea level. (AA 13.) The District Court concluded this elevation represents the ordinary high water level which existed before the establishment of Ditch 46A. (AA 184.) John Scherek, Waters Survey Crew Supervisor, testified that an ordinary high water level is almost always higher than a runout elevation. (T. 1313.) Consistent with Mr. Scherek's testimony, limnologist Richard Osgood testified that with a runout elevation of 976 feet above sea level, Little Lake would actually be larger than the area contained by the meander lines from the original government land survey. (T. 1003-06.)

⁵ An ordinary high water level is the boundary of a wetland and is the "highest water level that has been maintained for a sufficient period of time to leave evidence upon the landscape." Minn. Stat. § 103G.005, subd. 14 (2008).

The Association also relies upon evidence in a DNR survey that the toe of a bank on the southwest side of Little Lake has an elevation of 977.4 feet above sea level, which may be indicative of a historic elevation of the lake prior to the establishment of Ditch 46A. (T. 1331; Ex. NC-47.) (Appellant's Brief, p. xii.) This evidence suggests another possible ordinary high water level of Little Lake *prior* to the establishment of Ditch 46A. If this was the pre-settlement ordinary high water level, the pre-settlement runout elevation would likely have been lower. (T. 1313.)

The Association has not proven that the runout elevation of Little Lake was as high as 976 feet above sea level even prior to the establishment of Ditch 46A. There is certainly no evidence to suggest that the runout elevation of Little Lake was this high at any time after the establishment of Ditch 46A. With a runout elevation of 976 feet above sea level, Little Lake would be larger than it was in 1948. (T. 1003-06.) The record also reflects that the runout elevation of Little Lake has not been higher than 973.2 feet above sea level since the County improved Ditch 46A in the 1950s (T. 1296, 1299, 1301, 1304, 1306 & 1344), and the 1972 Permit to rebuild the dam at 973.8 feet above sea level was intended to maintain the lake at an elevation consistent with that existing after the 1950s improvement proceeding. (T. 1280-81; AA 11-17.)

The evidence at trial further demonstrated that approximately 146 acres of farmland near Mud Lake are located at or below 975 feet above sea level and this farmland would be flooded if the runout elevation were raised to 976 feet above sea

level.⁶ (NC-26.2; RL-178; T. 865, 867.) One home located on the shore of Mud Lake has a basement elevation of approximately 976 feet above sea level. (NC-26.2.)

SCOPE OF REVIEW

Appellate courts review a district court's compliance with remand instructions under the abuse of discretion standard. *See Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005); *Halverson v. Village of Deerwood*, 322 N.W.2d 761, 767 (Minn. 1982). Similarly, the decision of a district court to issue an injunction in a MERA suit is reviewed under the abuse of discretion standard. *See Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 806 (Minn. Ct. App. 2001).

This Court reviews a district court's conclusions of law de novo. *See State by Fort Snelling State Park Ass'n v. Minneapolis Park and Recreation Bd.*, 673 N.W.2d 169, 174 (Minn. Ct. App. 2003).

ARGUMENT

The District Court complied with this Court's remand instructions and did not abuse its discretion in ordering the County to rebuild the dam at the outlet of Little Lake at an elevation of 973.8 feet above sea level. The District Court's decision should be upheld.

⁶ The Association asserts that this land is "historic lake bottom" (Appellant's Brief, p. 26), but that is not established by the record. Geoffrey Griffin, an engineer and former DNR employee, testified that some land which is being farmed on the west side of Mud Lake may be part of the historic lake bottom. (T. 973-74.) The evidence does not establish that all of the land which may be impacted by installing a dam at 976 feet above sea level is located on the historic bed of Mud Lake.

I. THE DISTRICT COURT COMPLIED WITH THIS COURT'S MANDATE TO ESTABLISH AN ELEVATION FOR THE DAM AT THE OUTLET OF LITTLE LAKE.

In *Swan Lake II*, this Court addressed the question of whether the District Court had jurisdiction to set the elevation of the dam at the outlet of Little Lake pursuant to the Minnesota Environmental Rights Act ("MERA") or whether that jurisdiction rested with the DNR. *See* 771 N.W.2d at 536-37. This Court held that the District Court had jurisdiction to set the elevation and remanded the matter. *See id.*

Contrary to the Association's assertions in its brief (Appellant's Brief, pp. 1-4), this Court did not determine that 976 feet above sea level was the proper elevation for the dam. If the Court had reached that conclusion, no remand would have been necessary.

The Court stated as follows:

Because we are remanding for the district court's determination of the appropriate crest elevation, we need not consider respondents' various arguments regarding the advisability of a three-foot lake depth. The question of the necessary and appropriate remedy for these particular lakes was, and is, for the district court to decide in accordance with MERA and applicable precedent.

771 N.W.2d at 537. Thus, this Court did not address the factual or legal issues raised by the parties as to what would be an appropriate remedy under MERA for the County's failure to repair or replace the dam at the outlet of Little Lake. These issues were remanded to the District Court for its consideration. This Court mandated the District Court to consider the language of MERA, applicable precedent, and the particular facts and circumstances of this case in determining an appropriate remedy. *See* 771 N.W.2d at 536-37.

The Association argues that this Court determined a three-foot lake depth was advisable based on the following language in the opinion:

[R]espondents claim that there was evidence at trial that lower water levels could benefit the environment and that the flooding caused by raising the crest elevation would actually “harm” other kinds of wildlife in the area. We find no support for these contentions in the record.

771 N.W.2d at 536. This statement is dicta because the Court did not directly address any arguments raised by the parties as to an appropriate lake depth.

The Association also argues that the following language in *Swan Lake II* supports its position:

[I]t is well within the district court’s authority to set the dam’s crest elevation in order to raise the lakes’ water levels to protect them as natural resources.

771 N.W.2d at 537. (Appellant’s Brief, p. 2.) In this statement this Court merely affirmed the District Court’s jurisdiction to set the lake elevation; it did not specify what crest elevation would protect the lakes as natural resources.

Minnesota courts have held that “district courts are given broad discretion to determine how to proceed on remand, as they may act in any way not inconsistent with the remand instructions provided.” *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005). “When the trial court receives no specific directions as to how it should proceed in fulfilling the remanding court’s order, the trial court has discretion in handling the course of the cause to proceed in any manner not inconsistent with the remand order.” *Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. Ct. App. 1988). The district court must execute the mandate strictly according to its terms and has no power to

alter or amend it. See *Halverson v. Village of Deerwood*, 322 N.W.2d 761, 766 (Minn. 1982).

Here the District Court set the elevation of the dam at the outlet of Little Lake as directed by this Court, and in determining the appropriate remedy, the District Court considered the language of MERA, applicable precedent and the facts of the case. (AA 154-85.) The District Court's consideration of each of these factors is discussed below. The District Court did not abuse its discretion and its decision should be upheld.

II. THE DISTRICT COURT'S DECISION TO ORDER THE LITTLE LAKE DAM TO BE REBUILT AT AN ELEVATION OF 973.8 FEET ABOVE SEA LEVEL IS CONSISTENT WITH MERA.

A. Establishing A Dam At An Elevation Of 976 Feet Above Sea Level Is Not Necessary Or Appropriate To Protect Natural Resources.

The Minnesota Environmental Rights Act ("MERA") provides that that "[t]he court may grant declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are *necessary or appropriate* to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction." Minn. Stat. § 116B.07 (2008) (emphasis added). The question then is what dam elevation is necessary or appropriate to protect Little and Mud Lakes.

1. The MERA violation at issue here is the County's failure to repair or replace the dam at the outlet of Little Lake.

In determining what is an appropriate remedy, an initial issue is the nature of the MERA violation. Here, the District Court found that the MERA violation was the County's failure to repair or replace the dam at the outlet of Little Lake: "That neglect of

the outlet structure and the failure to repair it is the MERA violation which must be remedied.” (AA 181.)

The Association asserts that this case is not about repairing the dam at the outlet of Little Lake but rather about restoring Little and Mud Lakes to a condition that “once again provides natural environmental values.” (Appellant’s Brief, p. 7.) The Association apparently seeks to restore Little and Mud Lakes to the condition that would have existed if County Ditch No. 46A had not been established in 1907 or improved in the 1950s. The Association’s assertion that the County violated MERA by establishing Ditch No. 46A or constructing the Little Lake dam in the 1950s is contrary to the record and the District Court’s findings.

Judge Moonan made the following findings and conclusions regarding the MERA violation resulting from the County’s failure to repair or replace the dam:

Failure to repair or replace the dam has a material adverse effect on the environment because it has resulted in unnecessary drainage of Little Lake and Mud Lake, a severe adverse effect on those resources. (AA 82.)

Because Nicollet County Board of Commissioners failed to construct a dam, it is appropriate to grant equitable relief and impose conditions on the Board which include preventing of unnecessary draining of Little and Mud Lake and constructing a dam and paying for such construction. (AA 83-84.)

Respondent Nicollet County Board of Commissioners has violated the Minnesota Environmental Rights Act and has caused pollution, destruction, and impairment of Little Lake and Mud Lake by all but draining said lakes. Nicollet County failed to repair the dam in 1970’s after receiving a petition to do so. The failure to take action when needed in 1970-1972 caused a continuous run-out of water from Little Lake and Mud Lake and caused nitrate chemicals and phosphorous chemicals to enter the Seven-Mile Creek and the Minnesota River. The failure to repair the dam or construct a replacement dam, and the results thereof, was continuing up to and beyond

the time Relators filed this action. The failure to construct the dam has had and continues to have material adverse effects on the environment. (AA 94-95.)

The Association did not appeal these findings and they were affirmed by this Court in *Swan Lake II*. See 771 N.W.2d at 532.

The District Court made no finding that either the original establishment of Ditch No. 46A in 1908 or the construction of the dam at the outlet of Little Lake in the early 1950s was contrary to law or constituted a MERA violation. Judge Moonan found as follows:

The Court now makes a finding of fact that Ditch 46A shall continue to run in its same course through Mud Lake and Little Lake with its outlet into the Seven-Mile Creek watershed.

(AA 78.) This Court has recognized that the “District Court affirmed the County’s establishment of the ditch, which was constructed in 1908.” *Swan Lake Area Wildlife Ass’n*, 771 N.W.2d at 532. The Association cannot now argue that the original establishment of Ditch 46A in 1907 was contrary to MERA.

2. Installing a dam at 976 feet above sea level is not a necessary or appropriate remedy.

MERA authorizes Minnesota courts to grant relief which is necessary or appropriate to protect natural resources from pollution, impairment or destruction. See Minn. Stat. § 116B.07 (2008). This Court has stated in MERA cases that the district court may issue an injunction which “provides an adequate remedy without imposing unnecessary hardship on the enjoined party.” *Wacouta Township v. Brunkow Hardwood Corp.*, 510 N.W.2d 27, 31 (Minn. Ct. App. 1993) (quoting *Cherne Indus., Inc. v. Grounds*

& Assoc., Inc., 278 N.W.2d 81, 93 n. 6 (Minn. 1979)). Further, to issue an injunction in a MERA case, the legal remedy must be inadequate, and “the injunction must be necessary to prevent irreparable injury.” *Citizens for a Safe Grant v. Lone Oak Sportsmen’s Club, Inc.*, 624 N.W.2d 796, 806 (Minn. Ct. App. 2001).

An injunction must be consistent with the evidence in the record. *See Wacouta Township*, 510 N.W.2d at 31. For example, in *Wacouta Township v. Brunkow Hardwood Corporation*, Wacouta Township brought a MERA action to prevent logging in an area with the largest bald eagle winter roost site in the State. 510 N.W.2d at 28-29. The plaintiff’s experts testified that it was necessary to avoid physical changes to the environment within 500 meters of the roost. *See id.* at 31. The district court issued an injunction which was consistent with this recommendation, and the injunction was upheld by this Court. *See id.* The Court concluded that the scope of the injunction was supported by the evidence in the record. *See id.*

Moreover, an injunction must be tailored to effectuate the relief to which the plaintiff is entitled. *See Cherne Indus., Inc.*, 278 N.W.2d at 92. The Eighth Circuit Court of Appeals overturned an injunction in a MERA case which required clean-up of all past pollution on a site. *See Kennedy Building Associates v. Viacom, Inc.*, 375 F.3d 731, 747-48 (8th Cir. 2004). The court concluded that MERA only authorizes an injunction for clean-up of past pollution to the extent the pollution poses the threat of continuing contamination of soil or groundwater, and therefore the injunction issued by the trial court was too broad. *See id.*

Courts generally avoid granting overly broad injunctive relief:

Injunctions must be narrowly drawn and precise, and never more extensive in scope than is reasonably necessary to protect the interests of the aggrieved parties. A trial court abuses its discretion by entering an overly broad injunction which grants more relief than a plaintiff is entitled to by enjoining a defendant from conducting lawful activities or from exercising legal rights. A trial court should craft an injunction in a manner that is the least oppressive to the defendant, while still protecting the valuable rights of the plaintiff.

43A C.J.S. § 347 (2004).

Because the record makes clear that the MERA violation is the County's failure to repair or replace the dam, an appropriate remedy is an order replacing the dam. Further, an appropriate remedy presumably recreates conditions which would have existed if the County had acted in accordance with the law. Thus, the District Court's order establishing a dam at 973.8 feet above sea level, the elevation specified in the 1972 Permit, was an appropriate remedy.

Installing a dam at an elevation of 976 feet above sea level would not be appropriate because it would not restore the pre-MERA violation water level. Indeed, it would recreate conditions which existed, if at all, prior to the establishment of Ditch 46A in 1907. At trial, limnologist Richard Osgood testified that with a runout elevation of 976 feet above sea level, Little Lake would actually be larger than it was in 1948 prior to the construction of the dam, and larger than the area contained by the meander lines from the original government land survey. (T. 1003-06.)

Rather than restore Little Lake to its pre-MERA violation water level, the Association insists that this Court should raise Little Lake to an elevation which creates

optimum waterfowl habitat. The evidence suggests, however, that Little Lake would not provide ideal waterfowl habitat now if the County had properly repaired or replaced the dam. The Association asks this Court to ensure that Little Lake provides *better* waterfowl habitat than it did in the early 1970s, when the dam was still largely intact. The 1972 Permit issued to the County for construction of a new dam states that Little Lake was a type three wetland providing “moderate waterfowl production habitat.” (NC-17, p. 3.) Though the dam had maintenance issues as early as the 1960s (RL-51), DNR surveyor John Scherek testified that dam was in operable condition in 1972. (T. 1295.) Thus, with an operable dam with a runout elevation of 973.2 feet above sea level, Little Lake was a type three wetland. Gerald Gray, one of the Association’s expert witnesses, testified that raising the runout elevation of Little Lake to 976 feet would convert the lake from a type three to a type four wetland and improve waterfowl habitat. (T. 1242-43.) Similarly, DNR Wildlife Section Chief Dennis Simon testified that in the 1990s he proposed diverting Ditch 46A around Little Lake and raising the elevation of Little Lake to 974.8 feet above sea level, but he was not able to obtain the necessary landowner consent to complete this project. (T. 743-44; 770.) He noted that rather than restoring the lake, this project would have improved wildlife habitat on Little Lake. (T. 827.)

The Association insists that Little Lake must be three feet deep in part due to the invasion of narrowleaf cattail in Minnesota. DNR Wildlife Section Chief Dennis Simon testified that in the past it was possible to maintain ideal conditions for waterfowl, that is, approximately 50% open water and 50% emergent vegetation, with two feet of water, but

now, due to the impact of the invasive species narrowleaf cattail, three feet of water is required for ideal waterfowl conditions. (T. 720-22.) Admittedly, with a dam at 973.8 feet above sea level, if the water level were at the top of the dam, the average depth of Little Lake would be about two feet. (T. 880.) The Association seeks to create a deeper lake that may be less vulnerable to narrowleaf cattail, but the Association has not demonstrated that these optimum conditions would now exist if the County had repaired the dam or replaced it pursuant to the 1972 Permit.

An injunction requiring construction of a dam at an elevation of 976 feet above sea level would be overly broad; it would reverse *legal* activity by the County -- the establishment of Ditch No. 46A in 1907 and the 1949 improvement proceeding, which resulted in the original construction of the dam. Like the injunction which was overturned in *Kennedy Building Associates*, it would grant the Association relief to which it is not entitled under MERA. *See* 375 F.3d at 747-48. If the District Court had issued an injunction requiring the dam to be rebuilt at an elevation of 976 feet above sea level, the District Court would have abused its discretion.

3. Installing a dam at 976 feet above sea level would cause undue hardship.

Ordering the dam to be rebuilt at 976 feet above sea level would cause undue hardship and therefore is not consistent with Minnesota law on injunctions. *See Wacouta Township*, 510 N.W.2d at 31. The District Court concluded as follows:

Under the appellate cases, as the Court reads them, the fact that the Association has proven a MERA violation does not mean that the Court must or even should attempt to go back and try to recreate the wetlands as they existed before there was any man-made drainage at all. Doing that

would result in not just lake levels rising into areas that are agricultural, it would also result in flooding of homes, business, roads and other developments. Areas that were farmed long before MERA was enacted would be converted into a shallow lake. That is an undue and unwarranted hardship to impose on area landowners in light of the MERA violation found by Judge Moonan. The MERA violation was neglect of the outlet structure. The remedy should and must be related to the violation.

(AA 183-84.) The hardship which would result from the Association's suggested remedy would fall not just on the party which committed the MERA violation, the County, but also on the Intervenors and on landowners who are not parties to this action.

The Association claims to find the District Court's conclusion on undue hardship to be "astonishing" (Appellant's Brief, p. 21), but the court's conclusion is in fact consistent with its factual findings. Judge Moonan made the following finding:

The request by Relator for a remedy of a run-out elevation of the dam at 976 feet, if granted, would cause flooding on many acres of surrounding farmland, perhaps as much as 148 acres of land now used in agricultural production. That agricultural land contains tiling which Intervenors or others have relied upon for years. Some homesteads and roadways would also be impacted by such a water level.

(AA 91.) The Association did not appeal from this finding in *Swan Lake II* and it was affirmed by this Court. *See* 771 N.W.2d at 532.

This finding is also consistent with the record. The evidence at trial demonstrated that approximately 146 acres of farmland located near Mud Lake are at or below 975 feet above sea level and this farmland would be flooded if the runout elevation were raised to 976 feet above sea level. (NC-26.2; RL-178; T. 865, 867.) One home located on the shore of Mud Lake has a basement elevation of approximately 976 feet above sea level. (NC-26.2.) It is also important to note that if the weir were placed at an elevation of

976 feet above sea level, after a large rainfall, the lake's elevation could be even higher than the weir elevation. (RL-180.)

The District Court correctly concluded that ordering the construction of a dam at the elevation of 976 feet above sea level was not a necessary or appropriate remedy and would cause undue hardship. The District Court did not abuse its discretion and its decision should be upheld.

B. The Association Seeks A Remedy For Conduct Approved By The DNR.

Further, the District Court did not abuse its discretion because MERA does not provide a remedy for the original construction of the dam, conduct which was approved by the DNR. By requesting that the dam be rebuilt at an elevation of 976 feet above sea level, the Association in effect challenges the 1949 improvement proceeding pursuant to which the dam was originally constructed.

The original establishment of the Little Lake dam is not actionable under MERA because the evidence reflects that it was approved by DNR. (T. 1278, RL-29.) Minn. Stat. § 116B.03, subd. 1 (2008) states that MERA does not provide a cause of action for “conduct taken by a person pursuant to any environmental quality standard, limitation, rule, order, license, stipulation agreement or permit issued by the . . . Department of Natural Resources” As part of the 1949 improvement proceeding, the County sought and received DNR's approval of the final engineering plans. (*Id.*) This approval is the equivalent of a permit for construction of the dam, and therefore MERA does not apply to this conduct.

C. The Association Seeks A Remedy Which Requires A Retroactive Application Of MERA.

In addition, the District Court's Remand Order should be upheld because overturning the original establishment of Ditch 46A or the 1949 improvement proceeding would require the retroactive application of MERA. The Association seeks a remedy which would apply MERA retroactively by setting the runout elevation of Little Lake at a level higher than any elevation that has existed or been permitted since the 1950s. The record in this case reflects that the runout elevation of Little Lake has not been higher than 973.2 feet above sea level since the County improved Ditch 46A in the 1950s. (T. 1296, 1299, 1301, 1304, 1306 & 1344.) Further, the 1972 Permit issued by the DNR, which required a runout elevation of 973.8 feet above sea level with a 25-foot dam, was designed to maintain the lake at an elevation consistent with that existing after the 1950s improvement proceeding. (T. 1280-81; AA 11-17.)

By requesting that this Court set the runout elevation of Little Lake at 976 feet above sea level, the Association asks that this Court apply MERA -- which was adopted in 1971 -- retroactively to reverse the partial drainage of Little and Mud Lakes resulting from the original establishment of Ditch 46A in 1907 or from its improvement in the 1950s. This Court should reject the Association's request.

Minnesota laws are not applied retroactively unless there is clear evidence the Legislature intended that result. *See* Minn. Stat. § 645.21 (2008); *Baron v. Lens Crafters, Inc.*, 514 N.W.2d 305, 307 (Minn. Ct. App. 1994). Statutes are presumed to apply prospectively only. *See Sletto v. Wesley Constr., Inc.*, 733 N.W.2d 838, 842 (Minn. Ct.

App. 2007). Minnesota courts have found sufficient evidence of the Legislature's intent to apply a law retroactively when the Legislature uses the term "retroactive." *See U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98, 101 (Minn. Ct. App. 2008).

The word "retroactive" does not appear anywhere in MERA. *See* Minn. Stat. § 116B.01-.13 (2008). In addition, "pollution, impairment or destruction" is defined in the present tense as conduct that "materially adversely affects or is likely to materially adversely affect the environment."⁷ Minn. Stat. § 116B.02, subd. 5 (2008). MERA does not show the requisite Legislative intent that it be applied retroactively.

Thus, MERA cannot be interpreted broadly enough to remedy the partial drainage of Little and Mud Lakes which occurred when Ditch 46A was originally established or improved in the 1950s. Though, as the Association argues, MERA gives courts broad authority to craft a remedy, there are limits to such authority. The District Court did not abuse its discretion when it declined to establish the runout elevation of Little Lake at 976 feet above sea level.

⁷ The U.S. District Court in Minnesota has held that past pollution is not conduct which may be enjoined in a MERA suit. *See Werlein v. U.S.*, 746 F. Supp. 887, 898 (D. Minn. 1990), *vacated by* 793 F. Supp. 898 (D. Minn. 1992). The Court noted that "if MERA were so construed, courts could use MERA to order cleanup of all pollution anywhere within the state." *Id.*

D. The District Court Properly Considered That Raising The Little Lake Dam To 976 Feet Above Sea Level Could Result In Takings Claims.

The Association incorrectly asserts that the District Court found a taking would result if the dam were reconstructed at 976 feet above sea level. (Appellant's Brief, p. vii.) The District Court made the following comment regarding inverse condemnation in its memorandum:

[I]f in fact MERA applies so as to require a remedy that would produce the optimum [waterfowl] environment because of the County's neglect of the outlet structure, and if restoration to the *original* state of the area, as it existed prior to the construction of Ditch 46A, is determined to be the proper remedy in that circumstance, then this Court would find alternatively that 976 feet is, based upon the record, the ordinary high water mark that preexisted Ditch 46A. If in fact that is the scope of the remedy that is determined to be required under MERA, then it seems very likely that additional inverse condemnation proceedings will be required. There will be large-scale flooding of areas currently occupied by homes, farms, roads, and other improvements.

(AA 184.) Judge Rodenberg merely stated that claims of inverse condemnation were likely if the Association obtained the remedy which it sought; he did not conclude takings would in fact occur or make any factual findings on this issue. He further stated, "if the injunction would result in an inverse condemnation proceeding, that would be addressed elsewhere than in this case." (AA 179.) The Intervenors did not raise the issue of inverse condemnation in their Answer (Intervenors' Answer dated November 17, 2003) and the parties did not address it at trial.

This Court should not consider for the first time on appeal the factual question of whether installing a dam at an elevation of 976 feet above sea level would result in the taking of the Intervenors' property. *See Trovatten v. Minea*, 213 Minn. 544, 550,

7 N.W.2d 390, 393 (1942).⁸ This Court also does not need to reach this issue because the Association has failed to demonstrate that installing a dam at 976 feet above sea level is a necessary or appropriate remedy.

Further, contrary to the Association's assertions, the District Court did properly consider the possibility that takings claims could result if the dam were raised to 976 feet above sea level. The Association cites to *Floodwood-Fine Lakes Citizens Group v. Minnesota Environmental Quality Council*, a MERA case involving the siting of a power line, for the proposition that courts should not hesitate to order condemnation of land

⁸ This Court should also decline to address this issue as a matter of law as the Association requests. The Association's argument that as a matter of law, no taking would result from raising the dam at the outlet of Little Lake to 976 feet above sea level is not correct. (Appellant's Brief, p. 26-27.) The Association cites several cases for the proposition that raising a lake to its natural elevation is not a taking. See *In Re Lake Elysian High Water Level*, 208 Minn. 158, 165, 293 N.W. 140, 143 (1940) (landowners are entitled to no more than "the equivalent of what nature provided for their lands"); *Stenberg v. Blue Earth County*, 112 Minn. 117, 120, 127 N.W. 496, 497 (1910) (riparian owner has no right to complain of improvements which maintain water in its natural condition); *Anderson v. District Court of Kandiyohi County*, 119 Minn. 132, 136, 137 N.W. 298, 299 (1912) (landowner not entitled to damages for raising of lake to ordinary high water mark); *Melander v. Freeborn County*, 170 Minn. 378, 380, 212 N.W. 590, 591 (1927) (landowners have no right to challenge dam which maintains water at its usual level). Only one of these cases -- *In Re Elysian High Water Level* -- addresses a lake affected by a public ditch, and in that case, the court concluded that the ditch was only intended to drain wetlands adjacent to the lake, not the lake itself. See 208 Minn. at 164, 293 N.W. at 143. These cases are simply not on point. Minnesota law provides that landowners who have been assessed for benefits relating to the establishment of a ditch have certain property rights in the maintenance of that ditch system. See *Fischer v. Town of Albin*, 258 Minn. 154, 156, 104 N.W.2d 32, 34 (1960). The parties have not addressed the extent of those rights in this case and the State will not attempt to do so now on appeal. Based on this case law, however, it appears that the fact a lake is partially drained by a public ditch is a relevant factor in determining whether raising the lake's water level would cause a taking.

when necessary to remedy a MERA violation. (Appellant's Brief, p. 26.) This Court should read *Floodwood-Fine Lakes* more narrowly.

In *Floodwood-Fine Lakes* the Supreme Court remanded a power line siting matter, and noted that under the applicable statutory scheme, in selecting a route the Environmental Quality Council should give greater weight to environmental concerns than to displacement of families:

Neither the legislature, the courts, nor the environmental agencies are insensitive to the human problems of dislocating families. The task of balancing the impact on the environment with the impact on those who may be dislocated is a difficult and delicate one. Nevertheless the legislature has adopted a policy that leans strongly to the preservation of undeveloped areas which remain in a state of nature.

287 N.W.2d 390, 399 (Minn. 1979).

An earlier Minnesota Supreme Court decision, *PEER, Inc. v. Minnesota Environmental Quality Council*, also addresses the application of MERA in power line siting cases and the proper weight to give to displacement of families versus environmental damage. 266 N.W.2d 858, 869 (Minn. 1978). In *PEER*, the Supreme Court criticized the fact the Council had given greater weight to the need to condemn homes along one route than to environmental concerns caused by an alternate route:

[C]ondemnation of a number of homes does not, without more, overcome the law's preference for containment of powerlines as expressed in the policy of nonproliferation. Persons who lose their homes can be fully compensated in damages. The destruction of protectable environmental resources, however, is noncompensable and injurious to all present and future residents of Minnesota.

Id. at 869. The Court did, however, remand the matter to allow homeowners along the first route to provide evidence that their houses had characteristics which were unique

and not adequately compensated by damages, evidence which the Council could weigh along with the environmental concerns. *See id.* at 864-65.

Both *Floodwood-Fine Lakes* and *PEER* addressed complicated power line siting decisions where the Environmental Quality Council had to weigh numerous factors in selecting a route. Ultimately, whichever route was selected, land along the route presumably would have to be acquired through eminent domain. In contrast, here the Association raises an inverse condemnation issue. The Association argues that even if raising the dam at the outlet of Little Lake to 976 feet would result in a taking of the Intervenors' land, this is nonetheless the appropriate MERA remedy.

This Court should reject the Association's argument. In another MERA case, *Powderly v. Erickson*, the Minnesota Supreme Court declined to uphold an injunction which would result in a taking of the defendant's property. 301 N.W.2d 324, 326-27 (Minn. 1981). In *Powderly* the district court had enjoined the owner of historic row houses from demolishing them. *See id.* at 325. When the city council failed to acquire the row houses by eminent domain, the landowner sought relief from the injunction. *See id.* at 326. The Minnesota Supreme Court concluded that a permanent injunction would constitute a taking and that if the Minnesota Legislature did not grant a State agency authority to condemn the buildings in its next session, the landowner could apply to the district court to dissolve the injunction. *See id.* at 326-27.

Powderly is more applicable to these facts than *Floodwood-Fine Lakes* or *PEER*. Though the District Court did not find a taking in this case, the court properly considered that takings claims could result if it raised the dam to 976 feet above sea level.

III. THE DISTRICT COURT'S DECISION TO ORDER THE DAM TO BE REBUILT AT AN ELEVATION OF 973.8 FEET ABOVE SEA LEVEL IS CONSISTENT WITH THE RECORD.

The evidence in the record demonstrates that installing a dam at 973.8 feet above sea level would remedy the MERA violation at issue here, and would not cause undue hardship to the landowners. As an initial matter, the Association, not the DNR, has the burden of proof as to the appropriate remedy in this case. *See Wacouta Township*, 510 N.W.2d at 31 (holding the scope of injunction was supported by evidence presented by plaintiff). The Association suggests that the DNR should have presented evidence at trial of an “environmentally desirable” elevation for Little and Mud Lake and failed to do so. (Appellant’s Brief, p. ix.) To the contrary, after presenting a prima facie case of a MERA violation by the County, the Association had the burden to demonstrate that the remedy it sought was necessary to protect natural resources. *See* Minn. Stat. § 116B.07 (2008). MERA does not impose any burden on DNR as a defendant to prove that a different remedy is environmentally desirable.⁹

⁹ Likewise, DNR had no burden to prove that there is no feasible and prudent alternative to the Association’s suggested remedy as indicated by the Association. (Appellant’s Brief, p. xxix.) MERA provides that a defendant as an affirmative defense may offer evidence that “there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of public health, safety, and welfare in light of the state’s paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment or destruction.” Minn. Stat. § 116B.04 (2008). The “conduct at issue” presumably refers to the prima facie showing of a MERA violation described in the preceding sentence of section 116B.04. *See id.* Here DNR did not offer any evidence of an affirmative defense to the Association’s prima facie case that the County’s failure to repair or replace the dam constituted a MERA violation and in fact has consistently taken the position that the dam should be replaced.

A. Rebuilding The Little Lake Dam At An Elevation Of 973.8 Feet Above Sea Level Is A Necessary And Appropriate Remedy.

Though the DNR had no burden to demonstrate that replacing the dam at an elevation of 973.8 feet above sea level is necessary or beneficial for the protection of natural resources, the evidence in the record does support that conclusion. The record demonstrates that installing a dam at 973.8 feet would provide an adequate remedy without imposing undue hardship. *See Wacouta Township*, 510 N.W.2d at 31.

The District Court made the following finding¹⁰ regarding the remedy of rebuilding the dam at 973.8 feet above sea level in its Amended Order:

The record indicates that construction of a dam at 973.8 feet above sea level, as requested by the DNR, would in fact affect the flowage of water through Ditch 46A. It would, however, not result in the inundation of farmland to anywhere near the degree that would be the case if the dam were constructed at a level of 976.0 feet above sea level, as requested by the Association. It would slightly increase the runout elevation of the dam over the original "as built" runout elevation of 973.2 feet, but would be in conformity with the process proposed and approved during the early 1970s.

(AA 111.) This portion of the Amended Order was affirmed by this Court in *Swan Lake II*. *See* 771 N.W.2d at 532.

The above finding is consistent with the record in this case. The original dam at the outlet of Little Lake was installed at an elevation of 973.2 feet above sea level with a nine foot weir. (AA 79.) This dam was installed in 1950 pursuant to a ditch improvement proceeding. (AA 79; NC-3.)

¹⁰ The Association incorrectly asserts that the District Court should have made factual findings to support its Remand Order. Factual findings are only required following an evidentiary hearing. *See* Minn. R. Civ. P. 52.01.

The DNR issued the 1972 Permit for reconstruction of the dam at 973.8 feet above sea level with a 25-foot weir during a subsequent improvement proceeding. (AA 79.) DNR Area Hydrologist Leo Getsfried stated the higher elevation was necessary to compensate for the wider weir width proposed by the County, as well as a proposed clean out of Ditch 46A upstream and improvement downstream of the dam. (T. 1280-81.) Mr. Getsfried testified that due to the improvements as well as the wider weir, it was “necessary to raise the elevation of the dam by 6/10ths of a foot in order to maintain the lake level to what it was after the original proceeding in 1950 and ’51.” (T. 1281.) The County did not rebuild the dam, but it did improve Ditch 46A. (AA 79.) Installing a dam at 973.8 feet above sea level is necessary to return Little and Mud Lakes to their condition at the time the dam was originally installed.

The record demonstrates that significant improvements in water quality would result from rebuilding the dam at 973.8 feet above sea level. Ditch 46A empties into Seven Mile Creek, a trout stream which is a tributary of the Minnesota River. (T. 1090, 1093, 376.) Keven Kuehner, the Director of the Brown Nicollet Cottonwood Water Quality Joint Powers Board, testified that the Joint Powers Board has a goal of encouraging “water storage” in the Seven Mile Creek watershed to improve water quality. (T. 1123-25.) The Board has undertaken several wetland restorations in order to increase water storage in the watershed. (T. 1127.)

If the dam is restored at 973.8 feet above sea level, water storage would be increased by about 500 acre feet. (T. 1287-89.) One of the benefits of this increased water storage would be a reduction in peak flows into the creek, which results in less

erosion and lower levels of sediment in the creek. (AA 90; T. 1129-31.) Mr. Kuehner testified that Seven Mile Creek is a “flashy” watershed system, meaning that water levels rise and fall quickly after a rainfall event. (T. 1119.) Mr. Kuehner explained that wetland restoration projects reduce the “flashy” quality of the watershed:

[T]he benefit would be if we can outlet these [agricultural drainage] tiles into these restored wetlands, we can create more storage, thereby reducing the peak flow rates from the tiles coming in and hopefully we can try to desynchronize, what we call desynchronize, the hydrograph from the tile water versus the -- the receiving water and, therefore, meter the water out more slowly over time rather than allowing the water to go directly to the -
- to the drainage system.

(T. 1129-30.)

Mr. Kuehner noted that high levels of sediment can negatively impact fisheries. (T. 1098.) He explained that phosphorous is typically bound to sediment. (T. 1094.) Phosphorus consumes oxygen by spurring algae growth and therefore depletes oxygen that would otherwise be available for fisheries. (T. 1098.)

DNR Area Hydrologist Leo Getsfried also testified regarding the benefits of water storage. He stated the following:

Q. And why is water storage important?

A. We have a very serious problem that is getting continually worse in the -- in the south central Minnesota area. All of our watersheds are in a very serious state of disequilibrium with regard to their hydrology that basically we've gone from -- from providing a great deal of storage on the land to providing very little. Most of our surface water storage in the form of wetlands -- and other bodies of water have -- have been drained. We're also seeing a lot of extensive agricultural tile drainage in the last few years. [Tile drainage], along with the impervious surface areas which continue to increase, is causing a lot more peak flow problems without a bank flooding, erosion of upstream banks, basically the water's all being shuttled into the nearest receptacle and it's causing a lot of problems for those that farm or

live adjacent to any of these water bodies, so what we're trying to do, at least some of us within -- within the water resource community is to try to hold more of that water on the land and bodies of water such as Little Lake could provide opportunities.

Q. And in your opinion, if the dam were set at a higher elevation, such as 973.8, would greater benefits result in terms of water storage?

A. Certainly.

(T. 1287-88.)

Another major benefit of water storage is denitrification, that is, “[converting] nitrate nitrogen to nitrogen gas.” (T. 1129.) Nitrate nitrogen pollutes drinking water and creates hypoxia in the Gulf of Mexico. (T. 1091-92.) If water in the Seven Mile Creek watershed is filtered through a wetland, the amount of nitrate nitrogen ultimately released into the stream is significantly reduced. (T. 1129; RL-161, p. 13.) Moreover, Mr. Kuehner testified that shallower wetlands, specifically, wetlands less than three feet deep, are more effective at removing nitrate nitrogen than deeper wetlands, and wetlands only one to two feet deep significantly reduce nitrate nitrogen. (T. 1185-86.)

Further, Seven Mile Creek is somewhat unique for this area of Minnesota in that a portion of the creek is a trout stream. (T. 376.) Pollutants such as phosphorus and nitrate nitrogen negatively impact trout populations. (T. 386.) High peak flows also stress trout because these flows overwhelm the cold spring water which trout rely on for their survival. (T. 387.)

The evidence in the record demonstrates that replacing the weir at an elevation of 973.8 feet would benefit the environment by reducing pollutants, creating better water quality in Seven Mile Creek and the Minnesota River, and improving habitat for brown

trout and waterfowl.¹¹ Though the Association focuses almost exclusively on habitat for waterfowl, other environmental values are at stake here and would be benefitted by a weir at 973.8 feet.

B. Rebuilding The Little Lake Dam At An Elevation Of 973.8 Feet Above Sea Level Would Not Cause Undue Hardship.

The evidence in the record also shows that installing a dam at 973.8 feet above sea level would not cause undue hardship. If the dam is reconstructed at 973.8 feet above sea level, the water level after rainfall events would be substantially lower than with a dam at 976 feet above sea level, and neither buildings nor tile lines would be impacted. (DNR-2A.) In his February 14, 2002 Wetland Restoration Feasibility Study, former DNR employee Geoffrey Griffin calculated lake elevations after certain storm events with a ten foot dam at an elevation of 973.2 feet above sea level at the outlet of Little Lake, and with a 25 foot dam at an elevation of 973.8 feet at the outlet. (*Id.*) In calculating these elevations, Mr. Griffin assumed that Little Lake was at a starting elevation of 973.2 and Mud Lake was at a starting elevation of 973.8. (*Id.*)

Mr. Griffin noted that some farmland on the western side of Mud Lake is already protected by a dike at an elevation of 975 feet above sea level, which is higher than a 25-year storm event. (*Id.*) He indicated that tile lines on Mud Lake are all above 973.8 feet and many on the west side of the lake are accompanied by lift stations. (*Id.*)

¹¹ DNR Wildlife Section Chief Dennis Simon indicated that restoring the dam to 973.8 feet above sea level would at least marginally improve waterfowl habitat in Little and Mud Lakes. (T. 828.)

The fact that both the Intervenor and the County have indicated that a dam at 973.8 feet above sea level is acceptable to them also strongly suggests no undue hardship would result from this elevation. (Intervenor Memorandum on Crest Elevation dated February 4, 2010, p. 2; Memorandum of Defendant Nicollet County Regarding Crest Elevation dated February 4, 2010, p. 13.) The Association now argues that such a remedy is inadequate, but in its original complaint the Association in fact also requested that a weir be installed at an elevation of 973.8 feet above sea level. (AA 8.) Though the Association suggests its request for an elevation of 973.8 feet above sea level only related to Count 1 of its original complaint which sought to enforce the 1972 Permit (Appellant's Brief, p. xxii), the Association in fact requested the same relief under each count of its complaint.

CONCLUSION

The District Court complied with this Court's remand instructions by determining an appropriate elevation for the dam at the outlet of Little Lake based on applicable law and the record in this case. The District Court's order should be upheld.

The Association seeks a remedy which is beyond the scope of MERA. Rather than correct the damage caused by the MERA violation at issue here, the Association seeks to create conditions which never would have existed if the violation had not occurred. Though the Association's goal to create optimum waterfowl habitat may be laudable, it simply cannot be achieved through a MERA lawsuit.

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Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota


JIEL SCHLICK NGUYEN
Assistant Attorney General
Atty. Reg. No. 0292874

445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 757-1325 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR MINNESOTA
DEPARTMENT OF NATURAL
RESOURCES, RESPONDENT

AG: #2707679-v1