

No. A06-1371

**STATE OF MINNESOTA
IN SUPREME COURT**

In the Matter of the Alexandria Lake Area Sanitary District NPDES/SDS
Permit No. MN0040738, Reissuance for the Expanded Discharge of
Treated Wastewater, Douglas County, Alexandria, Minnesota

**APPELLANT ALEXANDRIA LAKE AREA
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INTRODUCTION AND STATEMENT OF THE ISSUES

This Court ordered¹ the parties to file supplemental briefs to address the implications of the following statutory language on the case at bar:

Subd. 10. Nutrient loading offset. (a) Prior to the completion of a total maximum daily load for an impaired water, the Pollution Control Agency may issue a permit for a new discharger or an expanding discharger if it results in decreased loading to an impaired water. Where a new discharger or an expanding existing discharger cannot effectively implement zero discharge options, the agency may issue a permit if the increased loading is offset by reductions from other sources of loading to the impaired water, so that there is a net decrease in the pollutant loading of concern. The term "new discharger" is as defined in Code of Federal Regulations, title 40, section 122.2.

(b) The legislature intends this subdivision to confirm and clarify the authority of the Pollution Control Agency to issue the authorized permits under prior law. The subdivision must not be construed as a legislative interpretation within the meaning of section 645.16, clause (8), or otherwise as the legislature's intent that the agency did not have authority to issue such a permit under prior law.

Minn. Stat. § 115.03, subd. 10 (2006). The Court requested the parties brief the following specific issues:

1. How, if at all, did Minn. Stat. § 115.03, subd. 10(a) (2006) affect the authority of the Minnesota Pollution Control Agency to issue the permit here?
2. If Minn. Stat. § 115.03, subd. 10(a) (2006) did affect the authority of the Minnesota Pollution Control Agency to issue the permit here, did the issuance of the permit comply with the statute?

Appellant Alexandria Lake Area Sanitary District (herein "ALASD" or the "District") responds to the first question in the negative, and concurs with the analysis provided by Appellant Minnesota Pollution Control Agency (MPCA) in its Supplemental

¹ Order filed April 22, 2008.

Brief. In this Supplemental Brief, ALASD offers further analysis regarding the consideration of permitted loads in determining whether MPCA's issuance of a permit to ALASD was proper. Because ALASD answers the first question in the negative, ALASD does not brief, and the Court need not address, the second question.

ARGUMENT

ALASD has reviewed and concurs with the MPCA's analysis of Minn. Stat. § 115.03, subd. 10 as set forth in MPCA's Supplemental Brief. Because no offsets were ever considered in this permit proceeding, Minn. Stat. § 115.03, subd. 10 simply does not apply in this case. To the extent the Court has questions about whether the permit in this case actually results in phosphorus load reductions to Lake Winona, ALASD offers the following information to clarify this issue.

Prior to the MPCA's authorization of the proposed ALASD expansion that is at issue here, ALASD's permitted maximum wet-weather design flow was 3.75 million gallons per day, with a maximum monthly average phosphorus effluent limit of 1.0 milligrams per liter and a maximum monthly average mass limit of 11.3 kilograms per day. ALASD App. at 6.² This means that ALASD was authorized to discharge a maximum of 11.3 kg/day multiplied by 365 days, for a total of 4,124 kilograms of phosphorus per year under the old permit.

The permit at issue in this case, while authorizing an increase in maximum wet-weather design flow to 4.70 million gallons per day, would reduce the District's permitted phosphorus discharge to 0.3 milligrams per liter and 5.4 kilograms per day, or a total permitted discharge of 1,971 kilograms of phosphorus per year. ALASD App. at 8.

² "ALASD App." refers to the appendix to Appellant ALASD's brief, filed with this Court on December 21, 2007.

ALASD's *actual annual average* phosphorus discharge in 2003 – 2005 was 0.29 milligrams per liter and 2.87 kilograms per day, or 1,047 kilograms of phosphorus per year. *Id.* The Court of Appeals below, as well as Respondent MCEA (*see* MCEA Response Brief at 6), inappropriately compared ALASD's *actual* long term annual average performance in 2003 – 2005 to maximum monthly *permitted* loads under the reissued permit. This comparison is apples and oranges and does not demonstrate that any increased loading was authorized.³ The permitted load is based on conditions occurring in the worst case wet weather month, not conditions occurring on average over a year (or multiple years) that primarily reflect stable operating conditions under dry weather. Plant performance is always designed to be far better under these long term average conditions to ensure compliance will still be achieved under the worst case wet weather month. Thus, permitted loads must be compared to permitted loads, and it is obvious from these facts that the permitted phosphorus loading authorized by the MPCA will dramatically *decrease* after the expansion of the facility.

The new permit, by now imposing a 0.3 mg/L effluent concentration as a *maximum monthly average*, forces the facility to achieve a far lower annual average effluent concentration than that achieved from 2003-2005. As a practical matter, to consistently meet a maximum monthly average phosphorus effluent limit of 0.3 milligrams per liter, ALASD will have to operate at approximately half that discharge

³ The average of 12 values will always be lower than the highest value in the set (unless all values are identical which does not occur in plant operational settings). The permit controls the highest allowable value. This does not mean the long term average will be identical to it. In fact, the record data confirm this will not be the case. Moreover, as a matter of statistics, the maximum wet weather month obviously does not occur on a continuous basis for 12 months. Minnesota, like all regions of the country, has wet and dry weather periods and the approved permit accounts for that fact.

concentration. *See* R. at 1876 (James E. Robin memorandum of June 20, 2006) (comparing ALASD performance to the cities of Bemidji and Ely, both of which have 0.3 mg/L limits). Thus, even comparing ALASD's *actual* pre-expansion phosphorus discharge of 0.29 mg/L to the predicted post-expansion phosphorus discharge of 0.15 mg/L (using the Bemidji and Ely facilities as benchmarks), it is clear that the expanded ALASD facility will decrease the loading of phosphorus to Lake Winona.

CONCLUSION

The District concurs with the MPCA's arguments that Minn. Stat. § 115.03, subd. 10 has no effect on the MPCA's authority to issue a permit to the ALASD for an expanded wastewater discharge. Because ALASD answers this question in the negative, the District does not brief and the Court need not address the second question posed by the Court. The District respectfully requests the Court to ignore this statutory provision and reverse the Court of Appeals decision in this matter.

Respectfully submitted,

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Dated: 05/07/08


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County, Alexandria, Minnesota

**APPELLANT ALEXANDRIA
LAKE AREA SANITARY
DISTRICT'S CERTIFICATE OF
BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1, 3, and 4 for supplemental briefs. The length of this brief, exclusive of pages containing the table of contents, table of authorities, and addenda but including footnotes, is four (4) pages. This brief was prepared using Microsoft Word 2003.

Dated: May 7, 2008

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