**STATE OF MINNESOTA**

**MINNESOTA POLLUTION CONTROL AGENCY**

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| **In the Matter of the Decision to Deny the Petitions**  **For a Contested Case Hearing and to Submit the**  **Draft Little Rock Creek Dissolved Oxygen, Nitrate, Temperature, and Fish Bioassessment**  **Total Maximum Daily Load Study to the**  **U.S. Environmental Protection Agency For Approval** | **FINDINGS OF FACT,**  **CONCLUSIONS OF LAW**  **AND ORDER** |

Pursuant to the federal Clean Water Act (33 U.S. Code §§ 1251-1387) the Minnesota Pollution Control Agency (MPCA) staff prepared the Draft Little Rock Creek Dissolved Oxygen (DO), Nitrate, Temperature, and Fish Bioassessment Total Maximum Daily Load (TMDL) study (referred to herein as “the Little Rock Creek TMDL”) for submission to the U.S. Environmental Protection Agency (EPA) for approval. After affording all interested persons the opportunity to present written and oral data, statements, and arguments to the MPCA, and after considering all of the evidence in the records, files, and proceedings herein, the MPCA Commissioner, being fully advised, hereby adopts the following Findings of Fact, Conclusions of Law and Order.

**I. FINDINGS OF FACT**

1. ***Jurisdiction***
2. The MPCA is authorized and required to administer and enforce all laws relating to the pollution of any waters of the state. Minn. Stat. § 115.03, subd. 1(a) (2015).
3. The MPCA is also authorized “to investigate the extent, character, and effect of the pollution of the waters of this state and to gather data and information necessary or desirable in the administration or enforcement of pollution laws, and to make such classification of the waters of the state as it may deem advisable.” Minn. Stat. § 115.03, subd. 1(b).
4. The MPCA is authorized to develop and approve TMDLs for impaired waters and submit an approved TMDL to EPA for final approval. Minn. Stat. § 114D.25, subd. 1(2).
5. The approval of a TMDL by MPCA is a final agency decision and is subject to contested case hearing procedures in accordance with agency procedural rules. Minn. Stat. § 114D.25, subd. 2.
6. The MPCA Commissioner is authorized to decide on behalf of the MPCA whether to grant or deny the Petitioners request for a Contested Case Hearing in this matter. Minn. Stat. § 116.03, subd. 1(c).
7. ***Background/* *Overview of TMDL Process***

**Clean Water Act goal and water quality standards**

1. The Clean Water Act (CWA) seeks to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” through the elimination of discharge of pollutants into navigable waters. 33 U.S.C. § 1251(a).
2. The CWA requires states to establish water quality standards to protect designated beneficial uses for water bodies. 33 U.S.C. § 1313 (a)-(c). Minnesota water quality standards are established in Minn. R. ch. 7050 (2015).

***To meet the goal and meet established water quality standards, the CWA requires encouragement of best practices controls for nonpoint sources of pollution and permit-based controls for point sources of pollution***

1. The CWA focuses on two possible sources of pollution: point sources and nonpoint sources. 33 U.S.C. § 1251(a)(7); 40 C.F.R . § 130. Point sources are “any discernible, confined, and discrete conveyance,” including pipes, ditches, conduits or vessels “from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Nonpoint sources include any non-discrete source that does not meet the 33 U.S.C. § 1362(14) definition of “point source,” such as runoff from agriculture, silviculture, forestry or construction activities.
2. Pollution from nonpoint sources is controlled by best management practices. 40 C.F.R. § 130.0 (d). Nonpoint sources are not regulated by permits due to the difficulty involved in tracing pollution to a particular point, measuring it and setting an acceptable level for that point. *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002).
3. For control of pollution from point sources, the CWA includes two types of permit-based pollution control requirements: technology-based effluent limits (TBELs) (40 C.F.R. § 125); and water quality-based effluent limits (WQBELs) (40 C.F.R. § 130). *See* 33U.S.C. §§ 1311(b)(1)(C) and (b)(2)(A), 1313, 1342(a).
4. TBELs are minimum pollution control requirements that must be met regardless of the potential impact a discharge may have on a receiving water. 40 C.F.R. § 125.3(a). TBELs are discharge limitations based on the capabilities of an industry or class of dischargers to treat influent by using pollution control technology. 33 U.S.C. § 1311. TBELs consider technological feasibility and cost and specify the quality of effluent a discharger may release to surface waters. *Id.*
5. If TBELs are not sufficient to ensure attainment of water quality standards in the receiving water, WQBELs must be used. WQBELs consider the impact a discharge will have on the receiving water. 40 C.F. R. § 130.7. When WQBELs are developed, technical feasibility and economic reasonableness are not factors considered. *Id.*
6. Both TBELs and WQBELs for point sources are imposed on point source dischargers through the National Pollution Discharge Elimination System (NPDES) permit process. 40 C.F.R. § 125. The NPDES permit process sets quantitative limits on the amount of pollutants released from a point source. *See* 33 U.S.C. § 1342.
7. Pursuant to 33 U.S.C. §1342(b), the EPA delegated its duties to establish and operate its NPDES permit programming authority to the State of Minnesota, which operates the program through the MPCA. Minn. Stat. § 115.03, subd. 5.

***To improve waters that do not meet water quality standards the CWA establishes the TMDL program for impaired waters***

1. Section 303(d) of the CWA establishes the TMDL program, a water-quality based approach to regulating waters that fail to meet water quality standards despite the application of effluent limits and other pollution control requirements. 33 U.S.C. § 1313(d)(1)(A)-(C). A TMDL expresses the maximum amount of a particular pollutant that can pass through a water body each day without violating water quality standards (i.e. the receiving water’s loading capacity). *Id.* TMDLs are water-quality based controls used to supplement technology-based controls where necessary. 33 USC § 1313(d)(1)(C) and(D).
2. Section 303(d)(1) of the CWA requires each state to provide EPA a list of all waters within the state boundaries that fail to meet applicable water quality standards despite the application of effluent limits and other pollution control requirements to those waters. 33 U.S.C. § 1313(d)(1)(A)-(B). This list is known as the “impaired waters list” or the “303(d) list.”
3. Each body of water where it is known that water quality does not meet applicable water quality standards, or is not expected to meet applicable water quality standards, even after the application of required TBELs is known as a “water quality limited segment” (WQLS). 40 C.F.R. § 130.2(j).
4. Minnesota must set a TMDL in each WQLS for every pollutant that is preventing or impeding compliance with applicable water quality standards. 33 U.S.C. § 1313(d)(1)(C); 40 CFR 130.7(c)(1)(ii).

***Components of a TMDL and EPA guidance for developing TMDLs for dissolved oxygen (DO), nutrient eutrophication (nitrates), temperature, and fish bioassessment impairments***

1. The EPA promulgated guidance for states to follow in developing proposed TMDLs. The Little Rock Creek TMDL is consistent with EPA guidance as set forth in: 1) *Technical Guidance Manual for Developing Total Maximum Daily Loads: Book 2, Rivers and Streams; Part 1 Biochemical Oxygen Demand/DO and Nutrient Eutrophication*, EPA/823/B-97-002, Year 1997 <http://water.epa.gov/scitech/datait/models/upload/2006_12_05_standards_tmdl_guidance.pdf>; and 2) *Protocol for Developing Nutrient TMDLs*, EPA 841-B-99-007, Year 1999 <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/2000_01_10_tmdl_nutrient_nutrient.pdf> ; and 3) *Quality Criteria for Water*, EPA, Year 1986 <http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/upload/2009_01_13_criteria_goldbook.pdf>.
2. In characterizing a receiving water’s loading capacity, a TMDL is expressed as the sum of the allocated loads of pollutants set at a level necessary to meet the applicable water quality standards. 40 C.F.R. § 130.2(i). A TMDL includes: wasteload allocations from point sources; load allocations from nonpoint sources; natural background conditions; a margin of safety; and in some cases a reserve capacity if determined to be necessary for future growth. *Id.* A TMDL must also consider seasonal variations. 33 U.S.C. § 1313(d)(1)(C) and (d)(1)(D)(3); 40 C.F.R. § 130.7(6)(c)(1); 40 C.F.R. § 130.7(c)(1). (*See also,* U.S. Environmental Protection Agency, *Guidance for Water Quality-based Decisions: The TMDL Process*, Office of Water, *WH-S53,* Washington D.C., April 1991, <http://water.epa.gov/scitech/datait/models/upload/1999_11_05_models_SASD0109.pdf>).
3. A Wasteload Allocation (WLA) is the portion of a receiving water’s loading capacity allocated to existing and/or future **point sources**. 40 C.F.R. § 130.2(h).
4. The Little Rock Creek TMDL sets WLA at zero for point sources because there are no concentrated agricultural feeding operations (CAFOs), industrial point sources, or municipal wastewater treatment facilities in the Little Rock Creek TMDL project area. Construction stormwater and industrial stormwater are combined in a categorical WLA based on an approximation of the land area covered by those activities. To account for industrial stormwater, as well as reserve capacity (to allow for the potential of higher rates of construction and additional industrial facilities), this TMDL assumes 0.1 percent of the land area for a combined construction and industrial stormwater category. The allocation to this category (WLA) is made after an explicit margin of safety (MOS) (where applicable) is subtracted from the total loading capacity. That remaining capacity is divided up between construction and industrial stormwater and all of the nonpoint sources (the LA) based on the percent land area covered. See Draft *Little Rock Creek Watershed Total Maximum Daily Load Report: Dissolved Oxygen, Nitrate, Temperature and Fish Bioassessment Impairments* (Draft Little Rock Creek TMDL), MPCA January 2013, at 26.
5. A Load Allocation (LA) refers to the portion of a receiving water’s loading capacity attributed to **nonpoint sources** of pollution and **natural background sources**. Load allocations are best estimates of the loading from these sources, which can range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, nonpoint source loads and natural background source loads should be distinguished. 40 CFR § 130.2(g).
6. In the Little Rock Creek TMDL, the LAs representing nonpoint agricultural and natural background sources are made after the WLAs are determined and the MOS is subtracted from the total loading capacity. Subtracting the 0.1 percent allocated to construction and industrial stormwater WLA and 10% for MOS results in the other 89.9% of loadings allocated to the LA. Nonpoint pollution sources are not subject to NPDES permit requirements, therefore, implementation of pollutant reductions by landowners is voluntary. See Draft *Little Rock Creek TMDL* at 26.
7. The EPA defines “natural background levels” as “chemical, physical, and biological levels representing conditions that would result from natural processes, such as weathering and dissolution.” U.S. E.P.A., *Clean Water Act, Total Maximum Daily Loads (303d): Glossary*, <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/glossary.cfm>.
8. The Minnesota Statute governing TMDLs, the Clean Water Legacy Act (CWLA), defines “natural background” as “characteristics of the water body resulting from the multiplicity of factors in nature, including climate and ecosystem dynamics, that affect the physical, chemical, or biological conditions in a water body, but does not include measurable and distinguishable pollution that is attributable to human activity or influence.” Minn. Stat. § 114D.15, subd. 10.
9. Minnesota’s water quality standards rule defines “natural causes” as the multiplicity of factors that determine the physical, chemical, or biological conditions that would exist in a water body in the absence of measurable impacts from human activity or influence. Minn. R. 7050.0150, subp. 4.
10. Based on the definitions provided by EPA and in Minnesota Statute and Rule, the MPCA hereby finds that “natural background” is the condition that occurs outside of human influence.
11. An important distinction must be made between a water body impaired due to natural background and a water body impaired due to anthropogenic (i.e. human influenced) factors. If a water body is determined not to meet water quality standards solely due to natural background conditions, a TMDL is not required and the natural background condition becomes the standard. Minn. R. 7050.0170; U.S. E.P.A., Office of Wetlands, Oceans, and Watersheds, *Consolidated Assessment and Listing Methodology, Toward a Compendium of Best Practices* (2002), <http://water.epa.gov/type/watersheds/monitoring/calm.cfm>.
12. A Margin of Safety (MOS) accounts for the uncertainty about the relationship between the pollutant loads and the quality of the receiving water body. The MOS is normally “implicit” which means the MOS is incorporated into the conservative assumptions used to develop TMDLs (generally within the calculations or models). This is particularly true where the pollution is largely by nonpoint sources. If the MOS needs to be larger than the “implicit” levels, additional MOS can be added explicitly and expressed as a separate component of the TMDL. See *Technical Guidance Manual for Developing Total Maximum Daily Loads: Book 2, Rivers and Streams; Part 1 Biochemical Oxygen Demand/DO and Nutrient Eutrophication*, EPA/823/B-97-002, Year 1997.
13. A ten percent (10%) explicit MOS was used to account for uncertainty within the TMDL calculation process for the Little Rock Creek TMDL. See Draft *Little Rock Creek TMD*, at 28.
14. Reserve Capacity (RC) is that portion of the receiving water’s loading capacity, as expressed as a TMDL, that accommodates future loads. See *Technical Guidance Manual for Developing Total Maximum Daily Loads: Book 2, Rivers and Streams; Part 1 Biochemical Oxygen Demand/DO and Nutrient Eutrophication*, EPA/823/B-97-002, Year 1997. Reserve capacity can be ascribed to the WLA, the LA or both. Inclusion of an allocation for reserve capacity is necessary in a number of situations where future loading is anticipated. These situations include: new and expanding Wastewater Treatment Facilities (WWTFs); Municipal Separate Storm Sewer Systems (MS4s) that will be covered by a permit in the future or that are permitted now and may expand; or anticipated land use changes. If an allocation for reserve capacity is not included, either no new future loads are anticipated or allowed, or increased loads must be accommodated by pollutant trading. *Id.*
15. Reserve capacity to account for future increased industrial development and construction activity was built into the categorical WLA assigned to industrial and construction stormwater in the proposed Little Rock Creek TMDL. See Draft *Little Rock Creek TMDL* at 26.
16. Combining all of the components described above, a TMDL may be expressed as the equation:  ∑WLA + ∑LA + MOS + RC = TMDL (note: seasonal flow variations are considered throughout the TMDL development by using a load duration curve approach).
17. The proposed Little Rock Creek TMDL is consistent with EPA guidance. The MPCA followed EPA protocols in calculating all components (i.e., WLA, LA, MOS and RC) of the EPA recommended approach for developing dissolved oxygen (DO), nutrient eutrophication (nitrates), temperature, and fish bioassessment impairments TMDLS. *Technical Guidance Manual for Developing Total Maximum Daily Loads: Book 2, Rivers and Streams; Part 1 Biochemical Oxygen Demand/DO and Nutrient Eutrophication*, EPA/823/B-97-002, Year 1997 <http://water.epa.gov/scitech/datait/models/upload/2006_12_05_standards_tmdl_guidance.pdf>*; Protocol for Developing Nutrient TMDLs*, EPA 841-B-99-007, Year 1999 <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/2000_01_10_tmdl_nutrient_nutrient.pdf> ; *Quality Criteria for Water*, EPA, Year 1986 <http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/upload/2009_01_13_criteria_goldbook.pdf>.

***State guidance for developing TMDLs***

1. In June 2009, MPCA formed a “Natural Background for Streams Workgroup” to develop an approach for considering natural background conditions when assessing streams for dissolved oxygen. Similarly, in June 2010, MPCA formed a workgroup to develop an approach for considering natural background conditions when assessing lakes for eutrophication.
2. Based on the work of the two workgroups, the MPCA developed and issued documents related to the assessment of natural background in water quality: Minnesota Pollution Control Agency, *Natural Background and Water Quality: Guidance Document for Assessment of Aquatic Life Use Support,* Doc. No. wq-s1-62 (2009), <http://www.pca.state.mn.us/index.php/view-document.html?gid=8603>. Minnesota Pollution Control Agency, *Guidance for Considering Natural Background When Assessing Lakes for Eutrophication.* Document number wq-s1-63 (2011), <http://www.pca.state.mn.us/index.php/view-document.html?gid=16325>.
3. In addition to EPA’s guidance documents on the topics of dissolved oxygen and biota assessments in TMDLs, the MPCA developed “Dissolved Oxygen TMDL Protocols and Submittal Requirements” and “Biota TMDL Protocol and Submittal Requirements” guidance documents to further aid local entities in the development of TMDLs. Minnesota Pollution Control Agency, *Dissolved Oxygen TMDL Protocols and Submittal Requirements*, (2008), <http://www.pca.state.mn.us/index.php/view-document.html?gid=8529>; Minnesota Pollution Control Agency, *Biota TMDL Protocols and Submittal Requirements*, (2008), <http://www.pca.state.mn.us/index.php/view-document.html?gid=8524>.
4. The MPCA followed the guidance and processes for setting a TMDL specified by the CWA, EPA guidance, state law and MPCA’s own policy in developing the Little Rock Creek TMDL.
5. ***Development of the Little Rock Creek Dissolved Oxygen, Nitrate, Temperature and Fish Bioassessment TMDL***
6. The proposed TMDL study at issue in this case is the Little Rock Creek Dissolved Oxygen, Nitrate, Temperature and Fish Bioassessment TMDL study which encompasses two impaired reaches (or WQLS); a segment of Little Rock Creek (07010201-548); and Bunker Hill Creek (07010201-511), a major tributary to Little Rock Creek. See *Draft Little Rock Creek Watershed TMDL*, Figure 1-1. Little Rock Creek is impaired for lack of coldwater fish assemblage, dissolved oxygen, and nitrates in drinking water. Bunker Hill Creek is impaired for nitrates in drinking water. *2014 Proposed Impaired Waters List,* MPCA (2014)
7. The specific objective of the Little Rock Creek TMDL is to determine the type and degree of pollutant source reductions needed to achieve the water quality standards of 7 mg/L dissolved oxygen as a daily minimum (Minn. R. 7050.0222, subp. 2), 10 mg/L nitrate for drinking water(Minn. R. 4717.7860, subp. 13), and 19°C temperature at each of the impaired reaches (Minn. R. 7050.0222, subp. 2).
8. MPCA staff began working with Benton and Morrison County Soil and Water Conservation Districts (SWCDs) on Phase I of the Little Rock Creek TMDL study in 2002. Phase II (stressor identification development) began in 2006 and Phase III (TMDL development) began in 2010 after a Request for Proposals (RFP) was developed and sent to potential consultants.
9. MPCA created a Little Rock Creek Technical Advisory Committee (TAC) that reviewed and scored the Phase III proposals. Barr Engineering Inc. was selected to conduct the modeling and develop the TMDL.
10. Cooperatively, MPCA, Benton SWCD staff and Barr Engineering, Inc., in conjunction with the Little Rock Creek Technical Advisory Committee, and other local, state and federal entities, developed the Little Rock Creek TMDL work plan (Phase III).
11. The draft Little Rock Creek TMDL study was developed in a manner consistent with EPA guidance, MPCA protocol, and previous EPA approved Dissolved Oxygen, nitrate and temperature TMDLs.

***Stakeholder involvement, EPA review, Public Notice and comment period***

1. EPA advises that, “Analysts should be resourceful and creative in selecting TMDL approaches. Decisions regarding the extent of the analysis should always be made on a site-specific basis as part of a comprehensive, problem-solving approach.” *Protocol for Developing Nutrient TMDLs*, EPA 841-B-99-007, Year 1999 <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/2000_01_10_tmdl_nutrient_nutrient.pdf>

1. To gain site-specific perspectives, MPCA partnered with the Benton County Soil and Water Conservation District (SWCD) to implement a stakeholder and technical advisory committee process for the development of the draft Little Rock Creek TMDL study. The MPCA and SWCD invited local, state, and federal agencies, interest groups, organizations, and citizens to participate in this process, many of which provided input in the development of the TMDL study.
2. Stakeholders and Technical Advisory Committee members reviewed and provided comments on the draft TMDL study throughout the process and prior to the public notice comment period. Stakeholder meetings were held on: May 15, 2012, at the Pine Country Bank Conference Room in Rice, MN; on June 21, 2012, at the City of Foley Council Boardroom in Foley, MN; and on August 3, 2012, at the Benton County Commissioner Boardroom in Foley, MN.
3. To gain additional local perspectives, public information meetings were held in Sauk Rapids on: September 3, 2003; September 23, 2007; and September 16, 2009.
4. On November 8, 2012, the MPCA sent the draft TMDL study to EPA for preliminary review and comment. EPA submitted preliminary comments to MPCA on November 30, 2012. The MPCA revised the draft TMDL study based on EPA preliminary comments.
5. The MPCA published notice of a public comment period for the Little Rock Creek TMDL in the Minnesota *State Register* on February 4, 2013. The public comment period was February 4, 2013, through March 6, 2013. 37 *State Register*, 1162-64.
6. In addition to the public notice, on February 4, 2013, the MPCA posted the draft Little Rock Creek TMDL and a press release on its website.

***Comments and petitions for a contested case hearing received during public comment period***

1. The MPCA received a total of nine (9) timely written comments during the comment period for the draft Little Rock Creek TMDL study.
2. The MPCA prepared a Response to Comments that is hereby incorporated by reference as Appendix A to these findings.
3. In order to be valid, contested case hearing petitions must be received during the public comment period. Minn. R. 7000.1800, subp. 1.A.
4. On March 6, 2013, the MPCA received two (2) timely requests, each with multiple signatures, for a Contested Case Hearing (CCH) on the draft Little Rock Creek TMDL study. The letters requesting a CCH are hereby incorporated by reference as Appendix B to these findings. The two letters are hereinafter identified as “CCH A” and “CCH B.” The text of the two letters is identical except for one additional “matter of concern” on stream classification in CCH B.
5. On March 29, 2013, the MPCA received a letter identical in content to CCH B with five (5) signatures. The MPCA received the March 29, 2013, letter outside the comment period and therefore, the letter was not timely.
6. ***Criteria for Content and Evaluation of Petitions for a Contested Case Hearing***
7. The MPCA must determine if a request for a contested case hearing meets certain criteria specified in Minnesota Rules. Minn. R. 7000.1800, subp. 2(A), requires that a contested case hearing petition include:
8. a statement of reasons or proposed findings supporting a board or commissioner decision to hold a contested case hearing pursuant to the criteria in Minn. R. 7000.1900, subp. 1; and
9. a statement of the issues proposed to be addressed by a contested case hearing and the specific relief requested or resolution of the matter.
10. The MPCA notes that while the information specified in Minn. R. 7000.1800, subp. 2(B) is not required in a contested case hearing petition, it is information that is helpful to the agency as it considers whether a hearing will aid the agency in making a final decision. The information specified in subp. 2(B) is:

(1) a proposed list of prospective witnesses to be called at the hearing, including experts, with a brief description of the testimony they will provide;

(2) a proposed list of publications, references, or studies that the petitioner would introduce at the hearing; and

(3) an estimate of the time required for the petitioner to present the case at a hearing.

1. The MPCA’s decision whether to grant the petitions for a contested case hearing is governed by Minn. R. 7000.1900, subp. 1, which states:

Subpart 1.**Board or commissioner decision to hold Contested Case Hearing.** The board or commissioner must grant the petition to hold a contested case hearing or order upon its own motion that a contested case hearing be held if it finds that:

1. there is a material issue of fact in dispute concerning the matter pending before the board or commissioner;
2. the board or commissioner has the jurisdiction to make a determination on the disputed material issue of fact; and
3. there is a reasonable basis underlying the disputed material issue of fact or facts such that the holding of a contested case hearing would allow the introduction of information that would aid the board or commissioner in resolving the disputed facts in making a final decision on the matter.
4. To satisfy the first requirement, Minn. R. 7000.1900, subp. 1(A), the hearing requester must show there is a material issue of fact in dispute as opposed to a disputed issue of law or policy. A fact is material if its resolution will affect the outcome of a case. *O’Malley v. Ulland Brothers,* 540 N.W.2d 889, 892 (Minn. 1996).
5. In order to satisfy the second requirement, Minn. R. 7000.1900, subp. 1(B), the petitioner(s) must show that the MPCA has jurisdiction or authority to make a determination on the disputed issues of material fact. “Agencies are not permitted to act outside the jurisdictional boundaries of their enabling act.” *Cable Communications Board v. Nor-West Cable,* 356 N.W.2d 658, 668 (Mum. 1984). Therefore, each issue in the contested case request has to be such that it is within the MPCA’s authority to resolve.
6. Finally, under Minn. R. 7000.1900, subp. 1(C), the petitioner(s) has the burden of demonstrating there is a reasonable basis underlying the disputed material issue of fact or facts such that the holding of a contested case hearing would allow the introduction of information that would aid the MPCA in making a final decision on the matter. *In the Matter of Solid Waste Permit for the NSP Red Wing Ash Disposal Facility,* 421 N.W.2d 398, 404 (Minn. App. 1988). To do so, the petitioner(s) may provide the MPCA with specific expert’s names, and with any indication of what specific *new facts* an expert might testify to at a contested case hearing. The Minnesota Supreme Court has recognized that to meet this test, “it is simply not enough to raise questions or pose alternatives without some showing that evidence can be produced which is contrary to the action proposed by the MPCA.” *See* *In the Matter of Amendment No. 4 to Air Emission Facility Permit,* 454 N.W.2d 427, 430 (Minn. 1990).
7. All three criteria of Minn. R. 7000.1900, subp. 1 must be satisfied for the MPCA to grant a petition for a contested case hearing.
8. ***Evaluation of Contents of Petitions for Contested Case Hearing Against Criteria***
9. The CCH A and CCH B petitions contained identical language identifying issues to be addressed by a contested case hearing. The issues identified relate to the topics of: (1) natural background in load allocations; and (2) the effect of reducing nitrate loading on bio-accumulative toxin methyl-mercury and for blue-green algae.
10. CCH B identifies an additional matter of concern related to the classification of Little Rock Creek and Bunker Hill Creek as trout streams.
11. The MPCA evaluated the CCH A and CCH B petitions to determine if they meet the threshold requirements for petition content of Minn. R. 7000.1800, subp. 2( A). The MPCA finds that the petitions do meet the threshold petition content requirements by stating reasons to hold a contested case hearing and by stating issues to be addressed and specific relief requested.
12. The MPCA also evaluated the CCH A and CCH B petitions to determine if the petitions meet the three required criteria for granting a request for a contested case hearing in Minn. R. 7000.1900, subp. 1. The petitions for a contested case hearing fail to satisfy the requirements of Minn. R. 7000.1900, subpart. 1, for the reasons stated in the following specific Findings.

***Regarding the CCH A and CCH B petitions’ matter of concern related to natural background, the petitions fail criterion A of Minn. R. 7000.1900, subp. 1, because they fail to state a disputed material issue of fact and instead dispute an issue of law or policy***

1. The CCH A and CCH B petitions contend that the Little Rock Creek TMDL fails to properly account for and quantify natural background levels as required by state law, specifically the Minnesota Clean Water Legacy Act (CWLA) (Minn. Stat. § 114D.15, subd. 10), and Minn. R. 7050.0170, regarding natural water quality.
2. The CCH A and CCH B petitions mischaracterize the requirements of the CWLA and Minn. R. 7050.0170, and ignore additional federal rule and guidance.
3. Federal rule and EPA guidance state that a separate, explicit load allocation for natural background sources is not required if it is not possible to separate natural background from nonpoint sources (i.e., the two components of load allocations). 40 CFR § 130.33(b). The final sentence of the federal definition of load allocation in 40 CFR § 130.2 (g) states that natural and nonpoint source loads should be distinguished “wherever possible.” *Technical Guidance Manual for Developing Total Maximum Daily Loads: Book 2, Rivers and Streams; Part 1 Biochemical Oxygen Demand/DO and Nutrient Eutrophication*, EPA/823/B-97-002, Year 1997 <http://water.epa.gov/scitech/datait/models/upload/2006_12_05_standards_tmdl_guidance.pdf>
4. The CCH A and CCH B petitions’ contention that the State CWLA requires separate quantification of natural background levels is inaccurate. Similar to the Federal rules, the State definition of a TMDL in the CWLA indicates nonpoint sources and natural background are both part of the load allocation, however, the definition does not require a separate, explicit load allocation for natural background sources in a TMDL. Minn. Stat. § 114D.15, Subd. 10.
5. The Little Rock Creek TMDL project area is highly altered by human influenced agricultural land uses. Alterations include removal of native perennial cover and hydrologic modification through irrigation and artificial drainage. According to the National Agricultural Statistical Service, in 2009 the land use in the watershed consisted of 50% crops, 14% woodland, 22% grass/pasture, 13% water/wetlands and less than 1% residential development. Due to the predominance of sandy soils in the watershed, 16% of row crops are irrigated. Channelization is not prevalent on the main stem of Little Rock Creek although many tributaries in the upper watershed have been ditched and straightened. See *Draft Little Rock Creek Watershed TMDL* at 6 and A-9.
6. The MPCA finds the CCH A and CCH B petitions’ contention that Minn. R. 7050.0170 requires separate quantification of natural background levels in a TMDL is a misapplication of the rule. Minn. Rule 7050.0170, states that natural background levels can be used as the water quality standard in streams that are in a “natural condition.” Minn. R. 7050.0170 further states that, “Natural conditions exist where there is no discernible impact from point or nonpoint source pollutants attributable to human activity or from a physical alteration of wetlands.” The Little Rock Creek TMDL project area is not in a natural condition due to human activity such as extensive agricultural cultivation, thus the Little Rock Creek TMDL project area is not in a natural condition at present. As Minn. R. 7050.0170 is not applicable for the TMDL project area the load allocation sources in the Little Rock Creek TMDL project area include both human influenced factors and natural background conditions, therefore a TMDL is required and natural background levels cannot be used as a water quality standard.
7. The MPCA does not dispute that the Little Rock Creek TMDL does not include a separate, explicit load allocation for natural background sources. Natural background loading is included in, but not separately identified, in the load allocations. Natural background sources are not separately identified in the LAs because nearly the entire pollutant loading to Little Rock Creek is from nonpoint sources and natural background, and current research is not sufficient to differentiate between nonpoint and natural background sources of pollutants.
8. Following federal and state law and guidance, the MPCA determined that it was not possible to distinguish natural background loads clearly enough from nonpoint sources to support separate load allocations in the Little Rock Creek TMDL.
9. On the CCH A and CCH B petitions’ matter of concern related to natural background, the MPCA finds that the petitioners fail to show the existence of a disputed material issue of fact concerning the matter pending before the board or commissioner. The petitions instead dispute the interpretation and application of law and guidance. This is a question of law or policy, not a question of fact. The MPCA finds the petitions’ contention that the proposed Little Rock Creek TMDL fails to properly account for and quantify natural background levels as required by state law, specifically the CWLA fails the criterion of Minn. R. 7000.1900, subp. 1(A) because the petitions state an issue of law or policy, not of fact.

***Regarding CCH A and CCH B petitions’ matter of concern related to increased impairment of Little Rock Lake, the petitions fail criterion A of Minn. R. 7000.1900, subp.1 , because they fail* *to state a material issue of fact in dispute concerning the matter pending before the commissioner[[1]](#footnote-1)as issues related to Little Rock Lake do not relate to the matter pending before the commissioner***

1. The CCH A and CCH B petitions assert that the load allocations for nitrate established in the Little Rock Creek TMDL will result in increased impairment of Little Rock Lake, which they contend is contrary to federal and state law prohibiting increased loading of a pollutant to an already impaired water body. Specifically, petitioners assert that bio-accumulative toxin methyl-mercury and blue-green algae will be increased in Little Rock Lake if nitrate loading is decreased as planned in the Little Rock Creek TMDL.

1. The Little Rock Creek TMDL project area encompasses two impaired stream reaches that contribute to impairments of Little Rock Creek; a segment of Little Rock Creek (07010201-548); and Bunker Hill Creek (07010201-511), a major tributary to Little Rock Creek. The Little Rock Creek TMDL does not cover Little Rock Lake, which is located downstream from the two impaired stream reaches that are the focus of the TMDL. See *Draft Little Rock Creek Watershed TMD,* Figure 1-1.
2. In 2011, a TMDL was completed for nutrient impairments in Little Rock Lake. *Little Rock Lake Nutrient TMDL,* MPCA, November 2011. The EPA approved the Little Rock Lake Nutrient TMDL on February 2, 2012.
3. The MPCA finds that the petitioners’ matters of concern related to Little Rock Lake do not relate to the matter pending before the commissioner as required by Minn R. 7000.1900 subp. 1 A, because the matter pending is the Little Rock Creek TMDL and its project area does not include Little Rock Lake.

***The CCH A and CCH B petitions’ assertion that meeting the nitrate water quality standard in the Little Rock Creek TMDL will decrease nitrate loading in Little Rock Lake is not a disputed fact***

1. Petitioners CCH A and CCH B also claim that blue-green algae will be increased in Little Rock Lake if nitrates are reduced in Little Rock Creek, as is needed to meet the objective of the Little Rock Creek TMDL.
2. The MPCA does not dispute the fact that when implemented, the Little Rock Creek TMDL will result in the decrease of nitrate loading downstream into Little Rock Lake.
3. The MPCA does not dispute the fact that decreases in nitrates flowing in to Little Rock Lake may result in increases in blue-green algae. The MPCA states this fact on page 47 of the *Little Rock Lake Nutrient TMDL:* “The predominance of blue-green algae could be enhanced by decreases in summer nitrate loads…”
4. Cyanobacteria (also known as blue-green algae) are common native algae naturally occurring in lakes, ponds and rivers around the world. Wetzel, Robert G., *Limnology Lake and River Ecosystems*, 3rd edition, 2001. Blue-green algae is not a pollutant for which a water quality standard is established.
5. Because the MPCA completed the Little Rock Lake Nutrient TMDL prior to the Little Rock Creek TMDL, the fact that blue-green algae could increase in Little Rock Lake if nitrates were reduced in Little Rock Creek was known to MPCA during the development of the Little Rock Creek TMDL. The issue of the potential for blue-green algae increases in Little Rock Lake because of decreases in nitrate loading from Little Rock Creek was addressed in the Little Rock Lake TMDL. (Little Rock Lake TMDL at 47) Revisiting the issue of the effect of reduced nitrate loading on Little Rock Lake did not, and will not, result in a different conclusion for the Little Rock Creek TMDL because the fact was well known to the MPCA prior to, and throughout, the development of the Little Rock Creek TMDL.
6. The MPCA finds that when implemented the Little Rock Creek TMDL will result in the decrease of nitrate loading downstream into Little Rock Lake is not in dispute and was known to MPCA during the development of the Little Rock Creek TMDL. Therefore, petitioners fail to state fail to show the existence of a disputed material issue of fact concerning the matter pending before the board or commissioner as required by Minn. R. 7000.1900, subp. 1(A).

***The MPCA also finds that, in addition to failing to state an issue that relates to the matter pending before the commissioner, the petitioners’ issues related to Little Rock Lake fail to raise a material issue of fact in dispute as the applicable nitrate standard for Little Rock Creek TMDL is a matter of law, not a matter of fact***

1. The relief requested by the CCH A and CCH B petitions is to revise the Little Rock Creek TMDL to allow for nitrate loading to Little Rock Creek in excess of the maximum loading required by the water quality standard for nitrate in state and federal law.
2. Little Rock Creek is a Class 2A water (Minn. R. 7050.0470, subp. 4, A(148)) which is protected for the following beneficial uses: *“The quality of Class 2A surface waters shall be such as to permit the propagation and maintenance of a healthy community of cold water sport or commercial fish and associated aquatic life, and their habitats. These waters shall be suitable for aquatic recreation of all kinds, including bathing, for which the waters may be usable. This class of surface waters is also protected as a source of drinking water.”* Minn. R. 7050.0222, subp. 2.
3. Little Rock Creek, which discharges via the Harris Channel upstream of St. Cloud to the Mississippi River, is a designated drinking water source for the cities of St. Cloud, Minneapolis and St. Paul. See *City of St. Cloud Source Water Assessment, MDH,* September 2001.
4. The federal Safe Drinking Water Act (SDWA) establishes standards to protect drinking water in the United States. 42 U.S.C. §300(f) et seq. Under the SDWA, the EPA must determine the level of contaminants in drinking water at which no adverse health effects are likely to occur. The federal drinking water standard for nitrate is 10 milligrams per liter (mg/L) of nitrate-nitrogen in drinking water. 42 U.S.C. §300( g)-(l).
5. The Minnesota Department of Health (MDH) implements provisions of the SWDA in Minnesota to ensure public water supplies are safe for human consumption. The MDH has set a standard of 10 mg/L for nitrate in drinking water. Minn. R. 4717.7860, subp. 13.
6. The federal and state nitrate standards are set to be protective of human health. Drinking water with nitrate levels above 10 mg/L can cause methemoglobinemia and lead to death. Infants under six (6) months of age and pregnant women are especially susceptible to high levels of nitrates.
7. When assessing a waterbody for impairments, the CWA requires the MPCA to apply standards set by the state to protect the designated use classification for the waterbody. 33 U.S.C. §1313 (a)-(c). The MPCA uses the MDH standard of 10 milligrams per liter for nitrate in Class 2A waters protected for drinking water beneficial uses. Minn. R. 7050.0220.subp. 3a(18).
8. Since Little Rock Creek and Bunker Hill Creek are Class 2A waters protected as a drinking water sources, the MPCA finds that it is a matter of law that the nitrate standard applicable to the Little Rock Creek TMDL is 10 mg/L because the MDH has established this standard as protective of human health. The MPCA has no discretion to apply a standard that exceeds the standard established by the MDH and MPCA must apply that standard as the objective of the Little Rock Creek TMDL.
9. MPCA assessments clearly show both Little Rock Creek and Bunker Hill Creek exceeded the state and federal human health nitrate standards of 10 mg/L, and therefore, are included on the federal 303(d) list as impaired for nitrate in drinking water.
10. Regarding the CCH A and CCH B petitions’ matter of concern related to the applicable nitrate standard for the Little Rock Creek TMDL, the MPCA finds that the petitions fail to show the existence of a disputed material issue of fact concerning the matter pending before the board or commissioner. The petitioners instead dispute a matter of law (i.e., the applicable nitrate water quality standard), and therefore, fail to meet the criterion of Minn. R. 7000.1900, subp. 1(A) that requires that petitions state a disputed material issue of fact.

***The CCH A and CCH B petitions’ assertion that meeting the nitrate water quality standard in the Little Rock Creek TMDL will result in increased methyl-mercury levels in Little Rock Lake is not related to the matter before the commissioner***

1. The CCH A and CCH B petitions also claim that the bio-accumulative toxin methyl mercury will increase in Little Rock Lake if nitrates are reduced in Little Rock Creek.
2. Little Rock Lake (ID: 05-0013-00) has been on the Minnesota impaired waters list for mercury in fish tissue since 1998. See *Minnesota Statewide Mercury TMDL;* Appendix A, Table 3; MPCA March 2007
3. The Statewide Mercury TMDL approved in 2008 covers impairments for mercury in fish tissue for all waterbodies of the state listed in Appendix A of the *Minnesota Statewide Mercury TMDL.*
4. The MPCA finds that the petitions’ claim that methyl mercury may increase in Little Rock Lake is not related to matter before the commissioner because it concerns Little Rock Lake and the Statewide Mercury TMDL, neither of which are related to the matter before the commissioner which is the Little Rock Creek TMDL.

***Regarding the CCH B petitions’ matter of concern related to stream classification, the CCH B petition fails criterion A of Minn. R. 7000.1900, subp. 1, because it fails to state a disputed material issue of fact and instead disputes an issue of law or policy and fails criterion B of Minn. R. 7000.1900, subp. 1, as it fails to raise an issue where the board or commissioner has jurisdiction***

1. The CCH B petition “disagrees” with the classification of Little Rock Creek and Bunker Hill Creek as trout streams. The petition claims evidence does not exist supporting such a classification. The petitioner requests that MPCA discontinue the Little Rock Creek TMDL and “change the designated use of these streams to warm water fisheries.”
2. The Minnesota Department of Natural Resources (DNR) is responsible for officially designating trout streams to protect and foster the propagation of trout. Minn. Stat. § 97C.005. The list of DNR designated trout streams is found in Minn. R. 6264.0050, subp. 4.
3. MPCA has no jurisdiction over the designation of trout streams in Minnesota.
4. DNR designated Little Rock Creek as a trout stream in 1964. DNR Commissioner Order # 1669 (February 28, 1964). The DNR designated trout stream portion for Little Rock Creek can be found at Minn. R. 6264.0050, subp. 4, D(2) (listed as “Rock Creek, Little (Morrison)”) and subp. 4, EE(3) (listed as “Rock Creek, Little (Benton)”) .
5. The DNR designated trout stream portion for Bunker Hill Creek can be found at Minn. R. 6264.0050, subp. 4, D(1) (listed as “Bunker Hill Brook”).
6. Naturally reproducing cold-water species have been frequently documented in Little Rock Creek since 1975. DNR *Stream Population Assessment* reports of electroshocking data document naturally reproducing cold-water species in the following years: 1982, 1984, 1988, 1998, 1999, 2000, 2001, 2003 and 2006. Naturally reproducing brook trout and brown trout were documented in 2009 and 2011. Naturally reproducing cold-water species were not found in 1995, 1996 or 1997.
7. The CWA requires the MPCA to classify water bodies to protect beneficial uses. 33 U.S.C. § 1313 (a)-(c). The MPCA has the authority to classify and establish standards for waters of the state pursuant to Minn. Stat. § 115.44.
8. The CWA also requires the MPCA to protect water bodies for uses that existed on or before November 28, 1975 (referred to as “existing uses”). 40 CFR 131.12(a)(1). An "existing use" can be established by demonstrating that the use actually occurred since November 28, 1975. The CWA requires the MPCA to protect the existing use and to protect the level of water quality to protect those uses.
9. The MPCA finds that the CWA coupled with the DNR designation of Little Rock Creek and Bunker Hill Creek as trout streams requires the MPCA by law to classify the waterbodies for the protection of the existing use as trout streams. The MPCA designated Class 2A portion of Little Rock Creek can be found at Minn. R. 7050.0470, subp. 4, A(148).
10. The MPCA further finds that the MPCA has no authority to change the trout stream designation.
11. Therefore, on the petitioners’ matter of concern related to stream classification, the MPCA finds that the petitioners fail to show the existence of a disputed material issue of fact concerning the matter pending before the board or commissioner. The petitioners instead dispute a matter of law (i.e., the classification of Little Rock Creek and Bunker Hill Creek as trout streams) and jurisdiction (i.e., the MPCA does not have jurisdiction over trout stream designation), and therefore fail to meet criterion A. and B. of Minn. R. 7000.1900, subp. 1 that requires the petitioners to state a disputed material issue of fact and that the board or commissioner has the jurisdiction to make a determination on the disputed material issue of fact.
12. Based on the preceding Findings, MPCA finds there is no material issue of fact in dispute concerning the matter pending before the commissioner as required by Minn. R. 7000.1900, subp. 1 criterion A and criterion B.

***The petitions fail criterion C of Minn. R. 7000.1900, subp. 1, because there is no reasonable basis underlying a disputed material issue of fact such that the holding of a contested case hearing would allow the introduction of information that would aid the commissioner in making a final decision on the matter***

1. Petitioners raise questions of law and policy and fail to raise a disputed material issue of fact. Thus, a contested case hearing is not appropriate.
2. Based on the preceding Findings, MPCA finds there is no reasonable basis underlying a “disputed material issue of fact or facts such that the holding of a contested case hearing would allow the introduction of information that would aid the board or commissioner in resolving the disputed facts in making a final decision on the matter” as required by Minn. R. 7000.1900, subp. 1, criterion C.

**II. CONCLUSIONS OF LAW**

1. The MPCA commissioner is authorized by Minn. Stat. § 116.03, subd. 1(c) to decide on behalf of the MPCA whether to grant or deny the Petitioner’s request for a Contested Case Hearing in this matter, thereby meeting the requirement of Minn. R. 7000.1900, subp. 1(B) to show the commissioner has the jurisdiction to make a determination on a disputed material issue of fact.
2. Due, adequate and timely public notice of the proposed *Little Rock Creek TMDL* was given in accordance with Minn. R. 7001.0100, subps. 4 and 5.
3. The CCH A and CCH B Petitions for a Contested Case Hearing were timely received.
4. The letter received by the MPCA on March 29, 2013, requesting a contested case hearing was not timely received.
5. The MPCA determines the issues raised by petitioners on the proposed *Little Rock Creek TMDL* do not meet the requirements for granting a Contested Case Hearing because the petitions fail to meet the requirements of criteria A, B and C of Minn. R. 7000.1900, and therefore, the petitions should be denied, based upon the reasons set forth in this document.
6. Any finding more properly considered a conclusion shall be considered a conclusion. Any conclusion more properly considered a finding shall be considered a finding.

**III. ORDER**

All of the Petitions for Contested Case Hearing are hereby denied in their entirety.

The Draft *Little Rock Creek Dissolved Oxygen (DO), Nitrate, Temperature, and Fish Bioassessment TMDL* shall be sent to U.S. EPA for approval.

**IT IS SO ORDERED:**

John Linc Stine

Commissioner

Minnesota Pollution Control Agency

Date

**Appendix A – Comment Letters and Petitions for Contested Case Hearing**

All comment letters submitted to MPCA during the public comment period on the Draft Little Rock Creek Dissolved Oxygen (DO), Nitrate, Temperature, and Fish Bioassessment TMDL are included on the following pages. Because of their length, documents that were submitted as attachments to comment letters can be found at: <http://www.pca.state.mn.us/>..... The documents at the listed website are hereby incorporated by reference into this Appendix A and are thereby made a part of the administrative record supporting the Order of the commissioner in this matter.

**APPENDIX B – MPCA’s Response to Comments**

1. Minn. R. 7000.1900 subp. 1 refers to “board or commissioner,” however, 2015 Minn. Law ch. 4, sec. 114, eliminated the MPCA board and transferred all powers previously resting with the board to the commissioner. [↑](#footnote-ref-1)