UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAY 13 2011

REPLY TO THE ATTENTION OF:
W-15J

The Honorable Thomas M. Bakk
Minnesota Senate
147 State Office Building
100 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, Minnesota 55155-1606

The Honorable David Dill
Minnesota House of Representatives
147 State Office Building
100 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, Minnesota 55155-1606

Dear Mr. Bakk and Mr. Dill:

I am writing in response to your May 9, 2011 letter, in which you requested that the U.S. Environmental Protection Agency provide its views of two draft bills, which would alter the Minnesota Pollution Control Agency's (MPCA) implementation of the current, federally-approved water quality standard of 10 mg/L sulfate for wild rice waters. Because you requested a prompt response, we are able to offer only general comments that focus on two aspects of the bills.

As you know, H.F.1010 and S.F. 1029 propose to modify or suspend the current, federally-approved water quality standard for wild rice waters of 10 mg/L, and H.F. 1010-3 (sec. 19, lines 41.15-41.20), specifically sets 50 mg/L as the numeric criterion for sulfate in wild rice waters until a new standard is developed. To the extent that any legislation changes the EPA-approved water quality standards for Minnesota, such revised water quality standards must be submitted to EPA for review and approval pursuant to 33 U.S.C. §1313(c)(2)(A), Clean Water Act (CWA) §303(c)(2)(A), and are not effective for CWA purposes, including National Pollutant Discharge Elimination System (NPDES) permits, unless and until approved by EPA (see 40 C.F.R. §131.21). Should Minnesota wish to submit these to EPA as changes to Minnesota's water quality standards, the federal regulations at 40 C.F.R. §131.6 provide the submittal requirements. These include, among other things, the methods and analyses conducted to support the water quality standards revisions, including how the revised water quality criteria are sufficient to protect the designated uses (see generally 40 C.F.R. §131 Subpart B, and 40 C.F.R. §§ 131.11 and 131.20). Federal regulations require that criteria be protective of a state's designated uses and EPA's approval is based, among other factors, on determining that there is a scientifically

defensible basis for finding that the criteria are sufficient to protect designated uses (see generally 40 C.F.R. §§ 131.5, 131.11, and 131.21). Absent such a showing, EPA would be unable to approve a revised criterion (see generally 40 C.F.R. §131.6(b)). An EPA decision to approve water quality standards would be available for judicial review.

With respect to S.F. 1029, Sec. 62(f), lines 58.4 - 58.12 and H.F.1010-3, lines 40.34-41.13, Sec. 18(e) (both of which generally prevent MPCA from including sulfate limitations in permits until a new standard is developed), EPA believes that the effect of these respective provisions will be to prevent MPCA from including water quality based effluent limitations (WQBELs) based on the federally approved criterion in permits issued under the state's authorized NPDES program. A state with a federally authorized NPDES program is required to issue permits that ensure the protection of federally approved water quality standards. See 33 U.S.C. §1311(b)(1)(C), CWA §301(b)(1)(C); and generally, 40 C.F.R. Part 123 (see especially 40 C.F.R. §123.25(a)(1)); and 40 C.F.R. §§122.4 and 122.44(d)(1). Where a state proposes to issue a permit that fails to apply, or to ensure compliance with, any applicable requirement, including WQBELs, EPA has the authority to review and to object to such permit issuance pursuant to its authority under 40 C.F.R. §123.44. Should EPA object to a state-proposed permit, the state or any interested person would be provided 90 days (from the date on which EPA makes a specific objection) to request a public hearing on the objection, consistent with 40 C.F.R. §123.44(e). EPA would hold such a hearing, pursuant to the procedures outlined in 40 C.F.R. §§123.44(e)-(f). Pursuant to 40 C.F.R. §122.4(c), the state may not issue a permit over EPA's objection. Where EPA has provided notice of an objection, and where the state has failed to revise the permit to meet EPA's objection, EPA has the authority to issue a federal permit for a potential discharger, pursuant to the authority in 40 C.F.R. §123.44(e). Additionally, should EPA determine that a state is not administering its federally approved NPDES program in accordance with requirements of the CWA, EPA has the authority to require the state to take corrective action, and if necessary, to withdraw authorization of the program, pursuant to 33 U.S.C. §§1342(c)(2)-(3).

I hope you find this information helpful.

Sincerely,

for Tinka G. Hyde
Director, Water Division