OAH 8-2002-37733

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of Amendments to Various Water Appropriation Permits	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

These matters came before Administrative Law Judge Eric L. Lipman for a series of evidentiary hearings in October and December 2023. The disputes between the parties relate to the appropriateness of amendments made by the Commissioner of Natural Resources to water appropriation permits held by municipalities neighboring White Bear Lake.

Colin P. O'Donovan and Oliver J. Larson, Assistant Attorneys General, appeared on behalf of the Minnesota Department of Natural Resources (Department or DNR).

David K. Snyder, Johnson Turner, appeared on behalf of the City of Hugo.

James J. Thomson, Sarah J. Sonsalla, David T. Anderson, and Michelle E. Weinberg, Kennedy & Graven, Chartered, appeared on behalf of the City of Lake Elmo and the City of Oakdale.

Jay T. Squires, Squires, Waldspurger & Mace, P.A., appeared on behalf of the City of Lino Lakes.

David L. Sienko and Michael J. Hirak, LeVander, Gillen & Miller, P.A., appeared on behalf of the City of Mahtomedi.

James C. Erickson, Jr., Erickson, Bell, Beckman, & Quinn, P.A., appeared on behalf of the City of Vadnais Heights.

Monte A. Mills and Nicholas B. Scheiner, Greene Espel, PLLP, appeared on behalf of the City of White Bear Lake.

Richard B. Allyn and Shira T. Shapiro, Robins Kaplan LLP, and Byron E. Starns, Stinson LLP, appeared on behalf of the White Bear Lake Restoration Association (Restoration Association) and the White Bear Lake Homeowners Association (Homeowners Association).

STATEMENT OF THE ISSUES

1. Whether the permit amendment requiring the appellant permit holders to submit a contingency plan for a total or partial conversion to surface water sources for water supplies is reasonably necessary for the "safety and welfare of the people of the state?"

2. Whether the permit amendment requiring the appellant permit holders to "prepare, enact, and enforce a residential irrigation ban" when notified by the DNR that the elevation of White Bear Lake has fallen below 923.5 feet (and to continue this prohibition until notified by DNR that the lake elevation has reached an elevation of 924.0 feet) is reasonably necessary for the "safety and welfare of the people of the state?"

3. Whether the permit amendment requiring the appellant permit holders to submit enforceable plans to phase down per capita residential water use to 75 gallons per day and total per capita water use to 90 gallons per day, is reasonably necessary for the "safety and welfare of the people of the state?"

4. Whether the permit amendment requiring the appellant permit holders to submit annual reports to DNR detailing their efforts to develop plans to phase down per capita residential water use to 75 gallons per day and total per capita water use to 90 gallons per day is reasonably necessary for the "safety and welfare of the people of the state?"

SUMMARY OF DISPOSITIONS

For the reasons detailed in the Findings of Fact, Conclusions of Law, and Memorandum below, the Administrative Law Judge concludes that:

1. The permit amendment requiring the appellant permit holders to submit a contingency plan for total or partial conversion to surface water sources for water supplies is reasonably necessary for the "safety and welfare of the people of the state."

2. The permit amendment requiring the appellant permit holders to "prepare, enact, and enforce a residential irrigation ban" is so underinclusive that it is an arbitrary and unlawful condition on appropriations of groundwater. An arbitrary condition cannot be reasonably necessary for the "safety and welfare of the people of the state," as those words are used in Minn. Stat. § 103G.315, subd. 6 (2022).

3. The permit amendment requiring the appellant permit holders to submit enforceable plans to phase down per capita residential water use to 75 gallons per day and total per capita water use to 90 gallons per day, is reasonably necessary for the "safety and welfare of the people of the state."

4. The permit amendment requiring the appellant permit holders to submit annual reports to DNR detailing their efforts to develop plans to phase down per capita residential water use to 75 gallons per day and total per capita water use to 90 gallons per day is reasonably necessary for the "safety and welfare of the people of the state."

Based upon the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. White Bear Lake as a Water Resource in the East Metro

1. White Bear Lake is an approximately 2,400-acre lake located between Ramsey and Washington Counties, Minnesota, in the northeast quadrant of the Twin Cities Metropolitan Area.[1]

2. White Bear Lake overlays the Prairie du Chien and Jordan aquifers – which are collectively known as the Prairie du Chien-Jordan system.[2]

3. The lake is a public water within the meaning of Minn. Stat. § 103G.005, subd. 15 (2022).[3]

4. White Bear Lake is primarily managed by the DNR for walleye and muskellunge, but many other aquatic species thrive in the lake.[4]

5. Riparian landowners and the citizens of Minnesota use White Bear Lake for swimming, angling and boating.[5]

6. There are three public beaches on White Bear Lake.[6]

7. For homeowners living next to White Bear Lake, and those traveling to the lake for recreation purposes, low levels of the lake have been a concern for many years.[7]

8. Elevation data for White Bear Lake has been collected since 1924.[8]

9. White Bear Lake's ordinary high-water level is 924.89 feet.[9]

10. White Bear Lake's elevation has fluctuated over that time within an 8.16-foot range.[10]

11. White Bear Lake's highest recorded lake elevation was observed in June 1943, when the lake reached an elevation of 926.7 feet.[11]

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[1] *White Bear Lake Restoration Ass'n v. Minnesota Dept. of Natural Resources,* 2017 WL 9833672, slip op. at *2 (Minn.Dist.Ct. 2017) (*WBL-Dist*).
[2] *See id.* slip op. at *3-*4.
[3] *Id.* slip op. at *57.
[4] *See e.g.,* DNR Exhibit (Ex.) 302 at 1.
[5] *See WBL-Dist,* slip op. at *1, *39 -*40, *61.
[6] *See id.* slip op. at *40.
[7] *See id.* slip op. at *11-*12.
[8] *Id.,* slip op. at *3.
[9] *Id*.
[10] *Id.* (June 1943 level of 926.7 feet, subtracting January 2013 level of 218.54 feet, equals 8.16 feet).
[11] *Id.*

12. White Bear Lake's lowest elevation, 918.54 feet, was recorded in January 2013.[12]

13. Lake levels at or above 924.80 were measured in 1942 through 1947, 1950 through 1953, 1985 through 1987, 1995 through 1999, and 2003.[13]

14. Periods of water levels at the lower end of White Bear Lake's historic range (918.84 feet to 921.5 feet) were measured between 1924 to 1927, 1934 to 1935, 1989 to 1991, and 2009 to 2015.[14]

15. White Bear Lake has no natural inlet and has a single constructed outlet.[15]

16. The outlet for White Bear Lake was first established in 1906 at 926.3 feet.[16]

17. At the time, the Ramsey County Board directed that a sloping concrete slab be installed at 926.3 feet to facilitate outflow from White Bear Lake.[17]

18. The slab was breached in 1943, and there was extensive flooding around the lake.[18]

19. In 1943, the slab was converted to a culvert.[19]

20. Further, at the request of landowners along the shore of White Bear Lake, the lake's outlet was lowered to 925.5 feet. The landowners urged that, at this lower level, problems with flooding lakeshore properties would be reduced.[20]

21. In 1982, the DNR issued Ramsey County a permit to lower the culvert to 924.5 feet.[21]

22. Ramsey County constructed the actual outlet at 924.3 feet.[22]

II. Withdrawals of Groundwater and its Impacts to White Bear Lake

23. Each of the appellant permit holders in this case holds a water appropriation permit and makes withdrawals of groundwater from the Prairie du Chien and Jordan aquifers for use in their respective communities.[23]

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[12] *Id*.
[13] DNR Ex. 320 at 2.
[14] *Id*.
[15] *WBL- Dist,* slip op. at *2.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *See generally* DNR Ex. 3, Attachment A at 6.

24. These permits are "perpetual" – because they do not have specific end dates listed – but, as detailed below, include annual appropriation limits:

Permit Holding Municipality	Year Permit Issued	Annual Authorized Withdrawals in Millions of Gallons
Hugo	1975	650
Lake Elmo	1961	260
Lino Lakes	1985	900
Mahtomedi	1969	315
Oakdale	1978	1,210
Vadnais Heights	1980	579
White Bear Lake	1969	1,150[24]

25. Not every community withdraws the entire amount of groundwater authorized by its appropriation permit each year. In fact, the limits are structured to "allow groundwater users to respond to rare emergencies, such as firefighting or emergency inter-connections with other communities, without violating the permit."[25]

26. The Prairie du Chien and Jordan aquifers are hydro-geologically connected to White Bear Lake. Groundwater flows both into and out of White Bear Lake.[26]

27. As groundwater is pumped from the aquifers for domestic, agricultural, and industrial uses, the withdrawal of water creates a "cone of depression" and draws surface water from White Bear Lake down into the aquifers below.[27]

28. In this way, the level of White Bear Lake is directly affected by the water level in the aquifers below – and by extension, the withdrawals of groundwater made by the permit holders out of those aquifers.[28]

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[24] *See* DNR Ex. 19 at 7; Hugo Ex. 9; Lake Elmo (Elmo) Ex. 1; Lino Ex. 1; Oakdale (Oak) Ex. 1; Mahtomedi (Maht) Ex. 11; White Bear Lake (WBL) Ex. 3; Vadnais Heights (VH) Ex. 3. *See also* Minn. R. 6115.0750, subp. 2 (2023) ("Long-term permits will remain in effect subject to applicable permit provisions and conditions of the permit, the law, and [Minn. R. ch. 6115]").

[25] DNR Ex. 3., Attachment A at 17.

[26] Hearing Transcript (Tr.) Volume (Vol.) 4 at 68-71 (Grubb). In order to "to simplify the process of judicial review" of the hearing record "as well as increase its ease and availability" (*see* Minn. Stat. § 14.001 (7) (2022)) the evidentiary hearing transcripts are denominated as follows: October 17, 2023 (Vol. 1); October 18, 2023 (Vol. 2); October 19, 2023 (Vol. 3); October 30, 2023 (Vol. 4); October 31, 2023 (Vol. 5); December 11, 2023 (Vol. 6); December 12, 2023 (Vol. 7); December 13, 2023 (Vol. 8); December 14, 2023 (Vol. 9); December 15, 2023 (Vol. 10).

[27] Volume (Vol.) 4 at 131-32 (Grubb).

[28] *Id.* at 39, 47-48, 59, 70-71, 88-89, 91-93, 120-21, 125-26.

29. Groundwater pumping also reduces water pressure in the Prairie du Chien and Jordan aquifers.[29]

30. If communities near White Bear Lake significantly reduced their pumping of groundwater, the level of White Bear Lake would rise.[30]

31. Accordingly, the needs and interests of the communities with water appropriation permits clash with the needs and interests of those who use and enjoy White Bear Lake for fishing and recreation.[31] This case is about the lawful resolution of those conflicts.

III. The Power to Regulate Groundwater Supplies in Minnesota

32. The Commissioner of Natural Resources has the duty to:

> [m]anage water resources to assure an adequate supply to meet long-range seasonal requirements for domestic, municipal, industrial, agricultural, fish and wildlife, recreational, power, navigation, and quality control purposes.[32]

33. Minn. Stat. § 103G.261 (a) establishes a hierarchy of priority uses for "the consumptive appropriation and use of water." The statute includes six priorities, four of which touch upon the contested cases in this matter:

A. The first priority is domestic water supply which is defined as water used for "general household needs such as cooking, cleaning, drinking, washing, and waste disposal."

B. The second priority is uses that are less than 10,000 gallons per day.

C. The third priority is agricultural irrigation and processing in excess of 10,000 gallons per day.

D. The sixth priority is all non-essential uses.[33]

34. DNR maintains that whenever there is not a sufficient supply of water, the DNR allocates water according to the statutory hierarchy of priorities.[34]

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[29] *Id.* at 131.
[30] Tr. Vol. 3 at 221 (Champion).
[31] *See generally* Tr. Vol. 5 at 70-71 (Grubb); D. Owen, *Taking Groundwater*, 91 Wash. U.L. Rev. 253, 256-67 (2013) ("Most aquifers span property boundaries, and one property owner's pumping can compromise or even dry out her neighbors' wells. That pumping also can strain ecological systems protected under a wide variety of environmental laws. Consequently, groundwater use routinely activates the tension between a widely shared desire to protect private property rights from regulation and an equally widely recognized need to use regulation to curb problematic uses of property. As many commentators have noted, resolving that tension forms one of the central challenges of American property and constitutional law.").
[32] Minn. Stat. § 103G.265, subd. 1 (2022).
[33] Minn. Stat. § 103G.261 (a); DNR Exs. 3, 6, 32; Tr. Vol. 3 at 221, 223-24, 228 (Champion); Tr. Vol. 4 at 100 (Grubb); Tr. Vol. 5 at 66 (Grubb).
[34] Tr. Vol. 10 at 9-10 (Moeckel); Tr. Vol. 10 at 241 (Doneen).

35. DNR also uses the priority allocation law when evaluating whether and when to grant water appropriation permits.[35]

36. During times of "critical water deficiency," Minnesota law gives the Governor broad powers to impose water conservation restrictions. Minn. Stat. § 103G.291, subd. 1 (2022), provides:

> (a) If the governor determines and declares by executive order that there is a critical water deficiency, public water supply authorities appropriating water must adopt and enforce water conservation restrictions within their jurisdiction that are consistent with rules adopted by the commissioner.
>
> (b) The restrictions must limit lawn sprinkling, vehicle washing, golf course and park irrigation, and other nonessential uses, and have appropriate penalties for failure to comply with the restrictions.[36]

37. As of the date of this Order, the Governor has not declared a "critical water deficiency" in the Northeast Metro.[37]

IV. The Purpose, Use, and Development of Protective Elevations

38. The Commissioner of Natural Resources is directed by statute to administer: "(1) the use, allocation, and control of waters of the state; (2) the establishment, maintenance, and control of lake levels and water storage reservoirs; and (3) the determination of the ordinary high-water level of waters of the state."[38]

39. These administrative powers include the authority to "establish water appropriation limits to protect groundwater resources."[39]

40. When establishing water appropriation limits, the commissioner works to preserve "the sustainability of the groundwater resource, including the current and projected water levels," and "the ability of future generations to meet their own needs."[40]

41. To set appropriate sustainability levels, Minnesota law also grants the Commissioner of Natural Resources the power to both set "protective elevations" for bodies of water in Minnesota, and to limit water appropriations to amounts that will not reduce water basins below those elevations.[41]

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[35] Tr. Vol. 10 at 9-10 (Moeckel).
[36] Minn. Stat. § 103G.291, subd. 1.
[37] *See* Archive of Executive Orders from Governor Walz (https://mn.gov/governor/newsroom/executive-orders/) (last accessed, May 13, 2024).
[38] Minn. Stat. § 103G.285, subd. 3(b) (2022).
[39] Minn. Stat. § 103G.287, subd. 3 (2022).
[40] *Id*.
[41] Minn. Stat. § 103G.255 (2022).

42. Minn. R. 6115.0630, subp. 13 (2023) defines a protective elevation as "the water level of the basin necessary to maintain fish and wildlife habitat, *existing uses of the surface basin by the public and riparian owners*, and other values which must be preserved in the public interest."[42]

43. When setting a protective elevation for White Bear Lake, the DNR found both that: (1) periodic fluctuations in lake elevation were important to the ecological health of White Bear Lake; and (2) the recorded range of fluctuation of elevations within the lake basin has not significantly reduced the acreage of the lake's "littoral zone."[43]

44. A lake's littoral zone is that area of the lake where water depths are equal to, or less than, 15 feet deep and represents the near-shore area where aquatic plant growth is typically most abundant. This area of a lake provides critical "shallow water" habitat for many fish and wildlife species.[44]

45. The "littoral zone acreage" of White Bear Lake when the lake level is 926.0 feet is 1,158 acres. There is only a modest change in the littoral zone acreage of the lake even when the lake level drops by eight feet. At a level of 918.0 feet, the littoral zone acreage of the lake is approximately 1,111 acres.[45]

46. From this finding, the Department concluded that "the size of the littoral zone, which is critical in supporting associated fish, wildlife, and plant resources, is not significantly affected over the range of observed lake levels on White Bear Lake."[46]

47. DNR further concluded that "the existing recreational uses of White Bear Lake by the public and riparian landowners provide the only justification for establishing a protective elevation for White Bear Lake that is within the historic range of water level elevation recorded for White Bear Lake."[47]

48. Lower levels on White Bear Lake have resulted in a series of adverse impacts; including "dock extensions, beach closure, increased requests to control Eurasian milfoil, and reduced access at public ramps and limitations on shore fishing."[48]

49. After assessing the various impacts, the DNR set a protective elevation for White Bear Lake at 922.0 feet, mean sea level.[49]

50. None of the parties to the contested cases challenged DNR's determination of the protective elevation.[50]

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[42] Minn. R. 6115.0630, subp. 13 (emphasis added).
[43] *See* DNR Ex. 3, Attachment A at 7-8.
[44] *Id.* at 18.
[45] DNR Ex. 302, at 10.
[46] DNR Ex. 3, Attachment A at 20.
[47] DNR Ex. 302, at 17.
[48] DNR Ex. 4 at 3.
[49] Findings of Fact and Order: White Bear Lake Protective Elevation White Bear Lake, Ramsey and Washington Counties (December 21, 2016); DNR Ex. 4 at 3; Associations (RAHA) Ex. 35; Tr. Vol. 10 at 294 (Doneen).
[50] Tr. Vol. 10 at 12 (Moeckel).

V. The State Court Litigation

51. After the level of White Bear Lake fell to its lowest-recorded elevation, the Restoration Association and the Homeowners Association filed suit against DNR in the District Court of Ramsey County. The suit claimed claiming that the water appropriations made by thirteen communities in the northeast Twin Cities Metropolitan Area reduced the levels of White Bear Lake, causing unlawful impairments to the lake.[51]

52. The Associations asserted that DNR's management of the water appropriation permitting process resulted in "pollution, impairment, or destruction" of White Bear Lake – a water resource of the state.[52]

53. DNR asserted that the District Court had no jurisdiction to make orders regulating the Department's issuance of water appropriation permits.[53]

54. During proceedings before the District Court, the Associations' expert, Stuart Grubb, maintained that the collective water withdrawals authorized by the DNR in the Northeast Metro had a negative impact on the level of White Bear Lake. Mr. Grubb submitted a "water budget model" to show that cumulative withdrawals of groundwater by municipal pumping had lowered the level of the lake.[54]

55. Mr. Grubb opined that "to effect needed change, all wells within at least a five-mile radius should be subject to groundwater use restrictions."[55]

56. The water budget model presented to the District Court did not attribute amounts of reduction in the level of White Bear Lake to the withdrawals made by each permit holder. Instead, the budget model only described the aggregated impacts of the annual withdrawals of groundwater.[56]

57. On August 30, 2017, after a three-week bench trial, the District Court found in favor of the Restoration Association and the Homeowners Association. The District Court concluded that the DNR's administration of the water appropriation permit process resulted in excessive withdrawals of groundwater from the Prairie du Chien and Jordan aquifers and impairments to White Bear Lake. These impairments, continued the District Court, violated the Minnesota Environmental Rights Act.[57]

58. Among the key findings of the District Court were:

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[51] *See generally White Bear Lake Restoration Association v. Minnesota Department of Natural Resources*, No. 62-CV-13-2414, 2017 WL 9833672 (Dist. Ct. Ramsey Cnty. 2017) (*WBL-Dist)*.
[52] *See WBL-Dist,* slip op. at *1.
[53] *See generally White Bear Lake Restoration Ass'n ex rel. State v. Minnesota Dep't of Nat. Res.,* 928 N.W.2d 351, 355 (Minn. Ct. App. 2019), *aff'd in part, rev'd in part,* 946 N.W.2d 373 (Minn. 2020) (*WBL I*) (the DNR argued "the district court was without jurisdiction to make orders concerning the DNR's issuance of well permits").
[54] Tr. Vol. 2 at 96-97 (Bauer).
[55] *See WBL-Dist,* slip op. at *26.
[56] Tr. Vol. 2 at 97-98 (Bauer).
[57] *See WBL-Dist,* slip op. at *70 ("Because the DNR violated MERA, Plaintiffs are entitled to declaratory and injunctive relief as set forth in the Order for Judgment").

a. White Bear Lake is hydrologically connected to the Prairie du Chien and Jordan aquifers.

b. The model [from the U.S. Geologic Survey] demonstrates that a 30 percent increase in groundwater pumping (from the 2002-2013 average) causes White Bear Lake to fall by 1.5 feet.

c. A 30 percent reduction in groundwater pumping (from the 2002-2013 average) would cause White Bear Lake to rise by 1.5 feet.

d. The [U.S. Geologic Survey's] findings are "conclusive proof that water from White Bear Lake is entering the Prairie du Chien Aquifer and is being pumped out by [DNR-permitted wells] in the area of White Bear Lake."

e. As a general rule, groundwater use increases in dry years and declines in wet years.

f. The increase in use is primarily due to non-agricultural irrigation; that is, lawn watering.

g. This non-essential use accounts for about 30 percent of annual (not just summer) water use in the northeast metro.

h. To have an impact on the water level in [White Bear Lake] actual groundwater use must be reduced, not just the permitted amount, [because] not everyone pumps their total appropriation.

i. Pumping from wells five or more miles from the lake does impact it. Mr. Grubb testified that five miles is the minimum range of impact, and identified a number of wells of that distance that had a "very significant influence" on the lake. Dr. Tonkin found a significant number of wells between 6-12 miles from White Bear Lake that had an impact, and Dr. Berg agreed that wells "far" from the lake can have "a significant effect" depending on their pumping rate.

j. Ms. Ekman, from the DNR, calculated that by implementing an irrigation ban, the DNR could reduce use by as much as 25 to 40 percent. The DNR admits there is "significant opportunity" to reduce water use by targeting summer water use, and that "we need to find ways to reduce this dramatic increase [in water use] in the summer.

k. This “profligate use of summertime irrigation” is the major driver of the outsized increase in water consumption in this area.

l. Mr. Sather [White Bear Lake City witness] testified that the citizens of the City of White Bear Lake voluntarily reduced their water use by 20 percent in response to a water emergency caused by drought. They did so only for a short time: With the passing of dry years and with the return of normal rainfall, the city went back to using their previous volume of water.[58]

59. The District Court ordered the DNR to take the following actions with respect to “groundwater permits within a five-mile radius of White Bear Lake”:

a. Within six months after August 30, 2017, prepare, enact, and enforce a residential irrigation ban when the lake elevation of White Bear Lake is below 923.5 feet. DNR was further ordered to continue the irrigation ban until the lake reaches an elevation of 924.0 feet.

b. Require all existing permits to have an enforceable plan to phase down per capita residential water use to 75 gallons per day and total per capita water use to 90 gallons per day on or before August 30, 2018.

c. Require all groundwater permittees to report annually to DNR on collaborative efforts with other northeast metro communities to develop enforceable plans to phase down per capita residential water use to 75 gallons per day and total per capita water use to 90 gallons per day.

d. The court's order also directed the DNR to “immediately amend all permits to require that, within one year of August 30, 2017, all permittees must submit a contingency plan in their water supply plans for conversion to total or partial supply from surface water sources.”[59]

60. Additionally, the District Court directed the DNR to:

Analyze the cumulative impact of these permits within the five-mile radius of White Bear Lake to determine whether pumping at the maximum rates allowed by the permits is sustainable. The specific results of the analysis

[58] *WBL-Dist,* at *6 -*54.
[59] *Id.* at 71.

> will be published in a public newspaper, in a form understandable to the general public.[60]

61. DNR appealed the District Court's order to the Minnesota Court of Appeals.[61]

62. On September 10, 2018, the District Court partially stayed the effectiveness of its order pending the resolution of the appeal by the appellate courts.[62]

63. In April of 2019, a divided Court of Appeals panel reversed the District Court's judgment on jurisdictional grounds, dismissed the Associations' Public Trust Doctrine claim and remanded Petitioners' Minnesota Environmental Rights Act claim for administrative proceedings.[63]

64. In May of 2019, the Associations petitioned for further review of the Court of Appeals' decision by Minnesota Supreme Court, and their petition was granted.[64]

65. Following a remand from the Minnesota Supreme Court, the Court of Appeals affirmed the District Court's order in part, but also allowed permit holders to request a contested case hearing prior to any of the permit amendments being effective.[65]

66. Importantly, while the Court of Appeals allowed permit holders to request a contested case hearing on the amendments, the appellate panel made clear that the permit holders could not relitigate whether "appropriations within a five-mile radius of the lake have or will have a negative impact on surface waters" of White Bear Lake.[66]

67. In setting out this middle path, the appellate panel did not rule out the possibility of inconsistent judgments between the outcomes of the District Court litigation and the contested case processes. It noted:

> We nevertheless caution the district court that heed must be taken of the permit holders' statutory right to a hearing as it administers the injunction and that, depending on the evidence adduced at the contested-case hearings, modifications may be appropriate.[67]

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[60] *Id.*

[61] *See White Bear Lake Restoration Ass'n v. Dep't of Nat. Res., et. Al.,* No. A18-0750, 2020 WL 7690268, slip op. at *10 (Minn. Ct. App. 2020) (*WBL III*).

[62] *See WBL I,* 928 N.W.2d at 358.

[63] *White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res.,* 928 N.W.2d 351, 368-75 (Minn. App. 2019) (*WBL I*).

[64] *See* Petition for Further Review, A18-0750 (Minn. 2019); *White Bear Lake Restoration Ass'n ex rel. State v. Minnesota Dep't of Nat. Res.*, 946 N.W.2d 373, 379 (Minn. 2020) (*WBL II*).

[65] *WBL III,* slip op. at *9-*11.

[66] *Id.* at 10.

[67] *WBL III,* slip op. at *11; Minn. R. 6115.0740, subp. 3 and Minn. R. 6115.0750, subp. 5(c) (2023) extend the right to a contested case hearing prior to "[a]ll actions" "amendments and modifications" to water appropriation permits.

68. On February 28, 2018, in compliance with the District's Court order, the DNR amended 44 water appropriation permits. The amendments directed the appellant municipal permit holders to do the following:

> New Condition 1: Submit a revised Water Supply Plan to the DNR that includes a contingency plan to fully or partially convert "the source water" for the municipality from groundwater to surface water source(s). The contingency plan must include a schedule for funding[,] design, construction, and conversion to a surface water supply.
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> New Condition 2: The permittee must prepare, enact, and enforce a residential irrigation ban when notified by DNR that the lake level of White Bear Lake has fallen below 923.5 feet, to continue until notified by the DNR that the lake level has reached an elevation of 924 feet.
>
> New Condition 3: Submit an enforceable plan to the DNR to phase down per capita residential water use to 75 gallons per day and total per capita water use to 90 gallons per day.
>
> New Condition 4: Annually submit a report to DNR detailing [the permit holder's] collaborative efforts with northeast metro communities to develop plans to phase down per capita residential water use to 75 gallons per day and total per capita water use to 90 gallons per day.[68]

69. With respect to plans for conversion from groundwater sources to surface water sources, as provided in new Condition 1, the DNR noted that "[w]hether any conversion would occur shall be determined by the DNR and the holder of this permit."[69]

70. Following the DNR's amendment of 44 water appropriation permits in the Northeast Metro, 17 permit holders sought contested case hearings on the amendments. It is uncontested that each of the appellants timely sought a contested case hearing.[70]

71. Of the 17 permit holders that demanded a contested case hearing, seven municipal permit holders proceeded to an evidentiary hearing.[71]

72. The water appropriation permits held by the cities of New Brighton, Shoreview and Woodbury – each of which lies more than five miles from White Bear Lake – were not revised by the Department following the District Court's order.[72]

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[68] *See e.g.,* Maht Ex. 11 at 3.
[69] *Id.*
[70] Tr. Vol. 10 at 18 (Moeckel); *see also WBL III,* slip op. at *16, n. 7 ("The DNR notes in its supplemental brief to this court that all of the municipalities have requested contested-case hearings").
[71] *See* Tr. Vol. 1 at 2-7 (Notices of Appearance).
[72] Tr. Vol. 10 at 283-84 (Doneen) (the permits were not amended "because the Court didn't order us to"); *see also* Tr. Vol. 2 at 15-16 (Bauer).

VI. The Commissioner's Powers to Amend Water Appropriation Permits

73. When granting a water appropriations permit, the Commissioner of Natural Resources may include permit terms as to both the amount and manner of uses for appropriated water, "as appear reasonably necessary for the safety and welfare of the people of the state."[73]

74. Additionally, water appropriation permits are subject to:

a. cancellation by the commissioner at any time if necessary to protect the public interests;

b. further conditions on the term of the permit or its cancellation as the commissioner may prescribe and amend and reissue the permit; and,

c. applicable law existing before or after the issuance of the permit.[74]

75. Likewise important, the Commissioner's power to authorize withdrawals of groundwater is limited to occasions when the purported withdrawals "avoid known negative impacts to surface waters." Minn. Stat. § 103G.287, subds. 2, 3 (2022), provide:

> Groundwater appropriations may be authorized only if they avoid known negative impacts to surface waters. If the commissioner determines that groundwater appropriations are having a negative impact to surface waters, the commissioner may use a sustainable diversion limit or other relevant method, tools, or information to implement measures so that groundwater appropriations do not negatively impact the surface waters.
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> ….
>
> When establishing water appropriation limits to protect groundwater resources, the commissioner must consider the sustainability of the groundwater resource, including the current and projected water levels, cumulative withdrawal rates from the resource on a monthly or annual basis, water quality, whether the use protects ecosystems, and the ability of future generations to meet their own needs.[75]

76. Moreover, Minn. R. 6115.0740 (2023) makes clear that permit holders do not have a firm right to future withdrawals of groundwater: "In no case shall a permittee be considered to have established a right of use or appropriation by obtaining a permit."[76]

[73] Minn. Stat. § 103G.315, subd. 6(b) (2022).
[74] Minn. Stat. § 103G.315, subd. 11 (2022).
[75] Minn. Stat. § 103G.287, subds. 2, 3.
[76] Minn. R. 6115.0740, subp. 2(a) (2023).

77. Revising water appropriation permits was the key regulatory mechanism that the Department had when meeting the requirements of the District Court's order.[77] DNR has no statutory authority to direct municipalities to prepare, enact, or enforce local ordinances.

VII. Additional Regulatory Controls

78. Apart from protective elevations, Minnesota law sets absolute limits on the volume of water that may be appropriated from water basins. Collective annual withdrawals from water basins may "not exceed a total volume of water amounting to one-half acre foot per acre of [the] water basin …."[78]

79. Accordingly, six vertical inches of water on top of the Lake's acreage is the total water volume that can be annually appropriated from White Bear Lake.[79]

80. In the DNR's view, however, to maintain White Bear Lake's Protective Elevation, the annual withdrawal limit set in statute must be lowered by an additional 20 percent – namely from 0.05 acre-ft/acre down to 0.4 acre-ft./acre. It notes:

> [DNR's] model experiments indicated that long-term withdrawals at a constant annual rate of 0.5 acre-ft./acre (393 million gallons per year) could have caused the lake level to fall below 922 feet during the winters of 2010-11 and 2012-13. At a constant withdrawal of 0.4 acre-ft/acre (314 million gallons per year) calculated lake levels remained above the protective elevation of 922 ft (MSL, 1912) during the 2002 through 2018 period.[80]

81. During the evidentiary hearing, Randall Doneen, the Manager of DNR's Conservation Assistance and Regulations Section, characterized the withdrawals of groundwater beyond the annual limit of 314 million gallons of water, as a "severe" situation.[81]

82. The Department is charged with allocating the water volume within the collective annual withdrawal limit among all water appropriation permits.[82]

83. Further, Minn. Stat. § 103G.287 (2022) grants DNR the authority to:

> [D]esignate groundwater management areas and limit total annual water appropriations and uses within a designated area to ensure sustainable use of groundwater that protects ecosystems, water quality, and the ability of future generations to meet their own needs.[83]

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[77] Minn. Stat. § 103G.287, subd. 3.
[78] Minn. Stat. § 103G.285, subd. 3(a) (2022).
[79] *Id.;* Tr. Vol. 10 at 294 (Doneen).
[80] DNR Ex. 3 at 11; Tr. Vol. 10 at 294 (Doneen).
[81] *See* Tr. Vol. 10 at 299 (Doneen).
[82] *Id.* at 236-40.
[83] Minn. Stat. § 103G.287, subd. 4; RAHA Ex. 387; Tr. Vol. 10 at 26 (Moeckel).

84. With this authority, DNR established the Northeast Groundwater Management Area. The area includes a five to seven-mile area around White Bear Lake.[84]

85. Only three such Groundwater Management Areas exist in Minnesota. The Northeast Groundwater Management Area was established to respond to shortages in groundwater supplies.[85]

VIII. Development and Application of a Transient Water Model

86. The District Court's findings on the impacts of groundwater pumping to White Bear Lake followed from the "steady state" water model. The steady state model was developed by the United States Geological Service.[86]

87. Among the shortcomings of a steady state water model, however, is that it lacks a time component. It cannot represent conditions between White Bear Lake and the underlying aquifers over time.[87]

88. And, as groundwater flows in and out of White Bear Lake, over time, the hydrology of the area changes.[88]

89. A "transient water model" can reflect those changes in its results.[89]

90. A workable transient water model was not available to the District Court in 2017.[90]

91. To set a collective annual withdrawal limit, and to meet the District Court's directive to analyze the impacts and sustainability of groundwater withdrawals, DNR developed new analytical tools.[91]

92. DNR contracted with a leading water modeling firm, S.S. Papadopulos & Associates, to develop a "transient water model." The model – also known as the Northeast Metro Lakes Groundwater model – incorporates eight different layers of geology representing each major hydrogeologic unit.[92]

93. DNR also incorporated soil-water balances and the rates at which water deposited on the ground, seeps through the soil and "recharges" the water table below.[93]

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[84] Tr. Vol. 10 at 181-82 (Moeckel).
[85] *Id.* at 182-83.
[86] *WBL Dist* at *12, *22-24, *33, *66.
[87] Tr. Vol. 2 at 95 (Bauer); Tr. Vol. 3 at 19-20, 58 (Champion); Tr. Vol. 5 at 22 (Grubb).
[88] Tr. Vol. 3 at 20-21 (Champion).
[89] Tr. Vol. 2 at 92-93 (Bauer); Tr. Vol. 3 at 15 (Champion).
[90] *WBL-Dist*, at *24, 66; Tr. Vol. 3 at 24-25 (Champion).
[91] *See* Tr. Vol. 3 at 25 (Champion); Tr. Vol. 10 at 238 (Doneen); *see also* Minn. Stat. § 103G.285, subd. 3(a).
[92] DNR Ex. 3 at 5; Tr. Vol. 3 at 20 (Champion).
[93] Tr. Vol. 3 at 21 (Champion).

94. Further, the DNR's transient model included detail on the rates at which surface waters evaporate – items that were not part of the steady-state model.[94]

95. DNR tested the transient water model during the fall of 2017, incorporated new data as it became available, and updated the model still further in both 2018 and 2019.[95]

96. The transient model "allows the DNR and communities to evaluate, for the first time, the cumulative and individual effects of permitted groundwater pumping on water levels within White Bear Lake."[96]

97. The model quantifies current and projected future impacts to White Bear Lake from the groundwater appropriation by various permit holders.[97]

98. The DNR transient model is the best available science with respect to the likely impacts of permit conditions. It is more accurate than the steady-state and "water budget" models that were available at the time of the District Court's decision.[98]

99. By October of 2017, DNR knew the impacts that withdrawal of groundwater by specific cities had upon the level of White Bear Lake. According to the transient water model,[99] the rank order of influencers is:

Rank	City
1	City of White Bear Lake
2	White Bear Township – Pump 2
3	Mahtomedi
4	Vadnais Heights
5	Oakdale
6	North St. Paul
7	Shoreview
8	Saputo Dairy Foods
9	Woodbury
10	Hugo

[94] *Id.* at 22.
[95] *Id.* at 26-27.
[96] DNR Ex. 3., Attachment A at 5.
[97] *Id.* at 22; *see also* Tr. Vol. 3 at 28 (Champion).
[98] *See* Tr. Vol. 2 at 95-96 (Bauer); Tr. Vol. 3 at 15-16, 19-20, 243 (Champion); Tr. Vol. 4 at 58, 96 (Bauer).
[99] DNR Ex. 3, Attachment B-1, Figure 8-8; Tr. Vol. 3 at 60, 222-25, 228 (Champion); *see also* DNR Ex. 6 at 6; DNR Ex. 11 at 10.

Rank	City
11	Stillwater
12	Lino Lakes
13	New Brighton
14	White Bear Township – Pump 1
15	Lake Elmo

100. DNR likewise discovered that groundwater appropriations by cities that are closer to White Bear Lake tend to have a greater impact on lake levels than appropriations from more remote locations – even if the volume of groundwater withdrawn by a more distant appropriator is greater. In this way, explains the Department, "distance is actually a larger effect than magnitude."[100]

101. The municipal permit holders in this matter are all within the top 15 largest influencers upon the levels of White Bear Lake.[101]

102. Without some interventions, the impacts to White Bear Lake will be greater as the populations in these communities continue to grow and their demand for water increases.[102]

103. The analysis from the transient model differed from the steady-state water model in significant ways. First, it made clear that not every permit holder's appropriation of groundwater had the same, or similar, impact upon levels of White Bear Lake.[103]

104. Additionally, the transient model also revealed that the shortages were much worse that originally projected by the DNR. To keep White Bear Lake above its Protective Elevation, withdrawals of groundwater from the aquifers needed to be reduced by 40 percent – instead of 25 percent – and new water appropriation permits in the area are not sustainable.[104]

105. Worse still, the DNR projects that if water appropriation practices in the Northeast Metro are not significantly changed, by 2040, the collective withdrawals of groundwater by the permit holders above could reduce lake levels by almost three feet.[105]

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[100] Tr. Vol. 3 at 18, 54 (Champion); DNR Ex. 3, Attachment B-1 at ES 1-2 ("The relative proportions of [stage] effects are related strongly to the rates of pumping, the distance of the pumping from the lake, and the aquifer(s) from which the water is pumped").
[101] *See* DNR Ex. 6 at 17.
[102] DNR Ex. 12 at 28.
[103] DNR Ex. 3, Attachment B-1 at ES 1-2 ("the elimination of pumping associated with each permit individually illustrates the proportionally larger effects of pumping associated with some permits versus others on lake levels"); DNR Ex. 3, Attachment B-1, Figure 8-8.
[104] DNR Ex. 12; Hugo Ex. 23; Tr. Vol. 10 at 18 (Moeckel); Tr. Vol. 10 at 243, 256 (Doneen).
[105] DNR Ex. 32 at 28.

106. With the transient model reports, the DNR concluded that reducing area use of groundwater to an average of 90 gallons per resident, per day, would be insufficient to maintain the elevation of White Bear Lake at 922 feet.[106]

107. Instead, the DNR projected that water use would need to be reduced to 55 gallons, per person, per day, to maintain the elevation of White Bear Lake at 922 feet.[107]

108. While average for daily water use in Minnesota is 55 gallons, per person, per day, the per capita averages in many of the suburban communities that ring White Bear Lake is much higher.[108]

109. Among the permitted water systems within five miles of White Bear Lake, the public and private water supply use during the 10-year period from 2011 through 2020, ranged between 73 and 108 gallons of water per person, per day.[109]

110. Moreover, even if one assumes that water usage could be slashed to 55 gallons per person, per day, there would not be any remaining water for any use other than household uses.[110]

111. Randall Doneen, the Manager of DNR's Conservation Assistance and Regulations Section, maintains that a 55 gallon, per person, per day limit is simply too low to be achievable in the near term.[111]

112. Jason Moeckel, a limnologist with DNR, concurs with this assessment.[112] As described below, the DNR proposes more modest conservation goals in the near term.

113. Another difficulty that complicates compliance with the District Court's order, is that the range of persons included in the term "per capita" is not clear. For example, it is not clear from the text of the order whether the per capita limitation is calculated by tabulating the water usage of all residents within a particular community, or merely those residents who are receiving municipal water services. Put another way: Do the water usage limitations apply to residents who are drawing water from private wells?[113]

114. In September of 2023, the DNR declared its view as to the proper method of tabulating per capita water use. It explained:

> Population served can be different than the total population of a community. Population served does not include residences or other facilities within a community that are not connected to the water supply system

[106] Tr. Vol. 3 at 12 (Champion).
[107] Tr. Vol. 10 at 240-41, 266 (Doneen).
[108] Tr. 2 at 144 (Bauer); Tr. Vol. 10 at 241 (Doneen); Tr. Vol. 9 at 137-38 (Griffin).
[109] DNR Ex. 3 at 5 (Conclusion 1).
[110] Tr. Vol. 10 at 241 (Doneen).
[111] *Id.* at 299.
[112] Tr. Vol. 19 at 269-70. Limnologists are scientists who study the physical, chemical and biological properties of lakes, rivers and streams. *See WBL-Dist,* at *29, n. 249.
[113] Tr. Vol. 10 at 241 (Doneen).

(*i.e.* private/individual wells) nor does it include that part of a population served by another municipality. However, it does include any residences outside of the community to which it supplies water. For example, when Lake Elmo residences purchased water from Oakdale, Lake Elmo could not include those residences in its population count, but Oakdale would count those residences in its population count.

Residential population includes single-family homes, apartments, trailer parks, senior living facilities, and state prisons.

We recommend determining residential population served by multiplying your residential connections by your community's average persons per household as determined either by the State Demographic Center, or the U.S. Census ….

The Minnesota state average is 2.5 persons per household.[114]

115. During the evidentiary hearings on the permit amendments, the parties expressed doubt as to the proper method of calculating the court-ordered limits.[115]

IX. Chapter 60 from the 2023 Session

116. In May of 2023, the Minnesota Legislature passed the Omnibus Environment and Natural Resources bill, otherwise known as Chapter 60. Article II, section 5 of the bill appropriated sums "to develop a comprehensive plan to ensure communities in the White Bear Lake Area have access to sufficient safe drinking water to allow for municipal growth while simultaneously ensuring the sustainability of the surface water and ground water resources."[116]

117. The legislation set aside resources to plan for the conversion of surface water sources to replace the permit holders' current appropriation of groundwater. The bill provided:

> $2,000,000 the first year is to develop a comprehensive plan to ensure communities in the White Bear Lake area have access to sufficient safe drinking water to allow for municipal growth while simultaneously ensuring the sustainability of surface water and groundwater resources to supply the needs of future generations. The Metropolitan Council must establish a work group consisting of the commissioners of natural resources, health, and the Pollution Control Agency or their designees and representatives from the Metropolitan Area Water Supply Advisory Committee; the St. Paul Regional Water Services; the cities of Stillwater, Mahtomedi, Hugo, Lake Elmo, Lino Lakes, North St. Paul, Oakdale, Vadnais Heights, Shoreview, Woodbury, New Brighton, North Oaks, and White Bear Lake; and the town

[114] Vadnais Heights Ex. 15.
[115] *See e.g.,* Vol. 6 at 78 (Bear); Tr. Vol. 7 at 277-81 (Goebel) (The City of Mahtomedi believes it cannot enforce an irrigation ban against residents that use private wells).
[116] 2023 Minn. Laws Ch. 60, Art. I, § 5(f).

of White Bear to advise the council in developing the comprehensive plan. This is a onetime appropriation and is available until June 30, 2027. The comprehensive plan must:

(1) evaluate methods for conserving and recharging groundwater in the area, including:

(i) converting water supplies that are groundwater dependent to total or partial supplies from surface water sources;

(ii) reusing water, including water discharged from contaminated wells;

(iii) projects designed to increase groundwater recharge; and

(iv) other methods for reducing groundwater use;

(2) based on the evaluation conducted under clause (1), determine which existing groundwater supply wells, if converted to surface water sources, would be most effective and efficient in ensuring future water sustainability in the area;

(3) identify a long-term plan for converting groundwater supply wells identified in clause (2) to surface water sources, including recommendations on water supply governance and concept-level engineering that addresses preliminary design considerations, including supply source, treatment, distribution, operation, and financing needed to complete any changes to water supply infrastructure;

(4) include any policy and funding recommendations for converting groundwater supply wells to surface water sources, recommendations for treating and reusing wastewater, and any other recommendations for additional measures that reduce groundwater use, promote water reuse, and increase groundwater recharge;

(5) include any policy and funding recommendations for local wastewater treatment and recharge; and

(6) be submitted to the chairs and ranking minority members of the house of representatives and senate committees and divisions with jurisdiction over environment and natural resources finance and policy by June 30, 2027.[117]

118. In the view of the legislature, conversion to surface water sources is necessary "to ensure communities in the White Bear Lake Area have access to sufficient

[117] *Id*.

safe drinking water to allow for municipal growth while simultaneously ensuring the sustainability of the surface water and ground water resources."[118]

X. The Claims of the Appellants

119. Not every permit holder challenged the lawfulness of each of the four new conditions. The municipal parties made the following challenges to the new conditions:

	Condition 1 – Planning for Conversion to Surface Water Sources	**Condition 2 – The Residential Irrigation Ban**	**Condition 3 – Plans to Phase Down Residential and Total Water Usage**	**Condition 4 – Reporting on Efforts to Reduce Water Usage**
Hugo	x	x	x	x
Lino Lakes	x	x		
Lake Elmo		x	x	
Mahtomedi		x		
Oakdale		x		
Vadnais Heights	x	x	Challenge Withdrawn	Challenge Withdrawn
White Bear Lake[119]		x		

XI. Condition Number 1 – Plans for Conversion to Surface Water Sources

120. As noted above, new Condition 1 obliges the permit holder to submit a contingency plan that includes a schedule for funding, design, construction, and full or partial conversion to a surface water supply.[120]

121. Using the Northeast Metro Lakes Groundwater model, the DNR conducted several scenarios that forecasted lake levels if one or more permit holder cities converted from using groundwater to surface water sources.[121]

122. DNR ran multiple scenarios with different combinations of cities being converted away from pumping groundwater. In each scenario, regardless of which

[118] *Id*.
[119] *See* Lino Ex. 38 at 6; Tr. Vol. 7 at 50, 89 (Gronchalla); Tr. Vol. 7 at 270 (Goebel); Tr. Vol. 7 at 285 (Larson, Mills); Vol. 8 at 315-16 (Thomson); Tr. Vol. 9 at 119 (Bachmeier).
[120] *See e.g.,* Hugo Ex. 9 at 3; Elmo Ex. 1 at 3; Lino Ex. 1 at 3; Maht Ex. 11 at 3; Oak Ex. 3-4; WBL Ex. 3 at 3-4.
[121] Tr. Vol. 3 at 8 (Champion); DNR Ex. 12 at 23, 27.

combination of cities were selected, the model projected large scale increases to the level of White Bear Lake.[122]

123. The model forecasts that if two permit-holding communities converted to surface water sources, the level of White Bear Lake would rise, although not enough to maintain the lake above its Protective Elevation.[123]

124. If, however, four of the permit-holding cities converted to surface water sources, the model predicts that White Bear Lake would come close to reaching its Protective Elevation of 922 feet, mean sea level.[124]

125. Additionally, the model suggests that this stabilization in lake levels would extend toward 2040, even as the population of the Northeast metro grows.[125]

126. By contrast, if none of the permit-holding cities convert to surface water sources, the model estimates that the level of White Bear Lake will be reduced to less than 919 feet, mean sea level.[126]

127. Converting some of the northeast metro communities to surface water supplies is the best available method of achieving long-term compliance with the collective annual withdrawal limit and maintaining the Protective Elevation for White Bear Lake.[127]

128. Surface water systems are more sustainable and renewable than aquifer sources.[128]

129. Converting cities to surface water sources and away from reliance upon groundwater supplies is a costly, complex and difficult undertaking."[129]

130. Planning is a critical first step in the process of converting a municipal water system from groundwater sources to surface water sources.[130]

131. The plan required by new Condition 1, obliges the permit holder to provide a "schedule for funding[,] design, construction, and conversion to a surface water supply."[131]

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[122] *Compare* DNR Ex. 12 at 23 with 27; Tr. Vol. 3 at 31-32 (Champion).
[123] DNR Ex. 12 at 23.
[124] *See* Tr. Vol. 3 at 11, 39-40 (Champion).
[125] DNR Ex. 23 at 27.
[126] *Id.;* Tr. Vol. 3 at 33-34 (Champion).
[127] *See* Tr. Vol. 3 at 3 (O'Donovan); Tr. Vol. 3 at 252 (Champion).
[128] Tr. Vol. 4, at 122 (Grubb).
[129] *See* Tr. Vol. 3 at 40 (Champion); Tr. Vol. 5 at 56 (Grubb); Tr. Vol. 6 at 30, 227-28 (Bear); Tr. Vol. 7 at 50-51 (Gronchalla).
[130] Tr. Vol. 10 at 27 (Moeckel).
[131] *See e.g.,* WBL Ex. 3 at 3.

132. Condition 1 does not require the permit holder to fund, design or construct a surface water system with its own resources. A "schedule" is not a fully operational surface water system.[132]

133. A contingency plan sets out goals, identifies strategies to meet those goals, and ultimately guides the actions that would be needed to achieve the sought-after result – in this case, a surface water system.[133]

134. Individual conversion plans for each permit-holding city would provide the Department, the Metropolitan Council's White Bear Lake Area Comprehensive Plan Work Group, and the Minnesota Legislature, with needed detail on the opportunities and challenges facing each city when converting to surface water sources.[134]

135. Condition 1 is a reasonable and lawful method of protecting the level of White Bear Lake and sustainable use of the Prairie du Chien and Jordan aquifers.[135]

136. Condition 1 is a reasonable, necessary and lawful condition on access to future groundwater supplies. It is "necessary for the safety and welfare of the people of the state" as those words are used in Minn. Stat. § 103G.315, subd. 6(b).[136]

XII. Condition Number 2 – The Residential Irrigation Ban

137. As noted above, new Condition 2 obliges the permit holder to:

(a) "prepare, enact, and enforce a residential irrigation ban;"

(b) enforce the prohibitions on residential irrigation whenever notified by the DNR that the level of White Bear Lake has fallen below 923.5 feet; and

(c) continue enforcing the residential irrigation ban "until notified by the DNR that the lake level has reached an elevation of 924 feet."[137]

138. In this way, the prohibition on residential irrigation would be a function of the level of White Bear Lake.[138]

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[132] *See Schedule*, Black's Law Dictionary (11th ed. 2019) ("A written list or inventory; esp., a statement that is attached to a document and that gives a detailed showing of the matters referred to in the document"). Tr. Vol. 4 at 123-24 (Grubb).
[133] Tr. Vol. 10 at 27 (Moeckel).
[134] *See* Tr. Vol. 9 at 62, 111 (Bachmeier); Tr. Vol. 10 at 54 (Moeckel).
[135] *See* Tr. Vol. 4 at 124 (Grubb).
[136] Minn. Stat. § 103G.315, subd. 6(b); Tr. Vol. 10 at 300 (Doneen).
[137] *See e.g.,* WBL Ex. 3 at 3.
[138] *Id.;* Tr. Vol. 7 at 223 (Goebel); Tr. Vol. 8 at 59 (Crawford).

139. The term “residential irrigation ban” is quite broad – presumably prohibiting the watering of grass, plants, flowers, trees, shrubs or vegetable gardens at a residential property.[139]

140. The rationale for a sweeping ban is two-fold: First, irrigation of lawns, plants and trees are all “non-essential” uses of groundwater, under the statutory hierarchy of uses. Second, the Associations maintain that non-essential uses of groundwater should not be made while White Bear Lake is below its Protective Elevation.[140]

141. While the parties differ sharply as to the amount of water that is attributable to residential irrigation, it is, under each of the tabulations in the hearing record a large volume of groundwater – potentially hundreds of millions of gallons of groundwater each year.[141]

142. Residential irrigation, by volume, is the largest non-essential water use within the communities closest to White Bear Lake.[142]

143. As noted above, the irrigation ban would be effective for periods after which White Bear Lake had fallen below 923.5 feet, but before it rose to 924 feet. Based upon historic levels of White Bear Lake, such a ban could be in place for many years in a row.[143]

144. The Northeast Metro Lakes Groundwater model estimates that it would take many years of reducing groundwater withdrawals before there would be corresponding rises in the level of White Bear Lake.[144]

145. As DNR Hydrologist, Glen S. Champion, explained, for the first few years following imposition of an irrigation ban “the effect would be very, very small and then increasing over time.”[145]

146. An irrigation ban is likely to increase lake levels by about five inches over a 10-year period, with most of the increases occurring during the latter half of that period.[146]

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[139] *See* Tr. Vol. 7 at 245 (Goebel); Tr. Vol. 8 at 60 (Crawford); Tr. Vol. 8 at 250 (Watson).

[140] *See* Associations' Initial Post-Hearing Brief at 9-10 (“lawn watering is classified as a nonessential use under Minnesota’s water use priority law, having the lowest priority. There are no laws, rules, or regulations in Minnesota that grant a right to water lawns .... [T]he residential irrigation ban serves the safety and welfare for the people of Minnesota by protecting the natural resources and ensuring an adequate water supply.”) (citations omitted); *see also* Tr. Vol. 5 at 40 (Grubb).

[141] Tr. Vol. 4 at 75-77, 105, 293 (Grubb) (“in times when the level of White Bear Lake dips significantly below our trigger elevations, you need to have reductions of water use on the order of tens of millions of gallons per year”); Tr. Vol. 9 at 52-53, 63 (Bachmeier).

[142] Tr. Vol. 10 at 183-84 (Moeckel).

[143] Tr. Vol. 2 at 114-20 (Bauer); Tr. Vol. 7 at 36 (Gronchella); *see also WBL-Dist,* slip op. at *5 (the level of White Bear Lake was below 922 feet between 1924 and 1938, 1988 and 1989, and 2007 and 2016).

[144] DNR Ex. 4 at 3.

[145] Tr. Vol. 3 at 11-12 (Champion).

[146] *Id.*; Tr. Vol. 10 at 4 (O’Donovan); *see also* DNR Ex. 3, Attachment A (August 30, 2018 “Modeling Analyses”).

147. As the limnologist Jason Moeckel summarized: "the system doesn't work like a light switch."[147]

148. A multi-year ban on all irrigation of residential property interrupts the ordinary, investment-backed expectations of those who purchase a home with a yard.[148] The expectation of these homeowners is that watering one's lawn, plants, gardens, and trees is an ordinary incidence of home ownership.

149. To determine the five-mile radius, the Associations' hydrology expert, Stuart Grubb took a map, knew large pumping wells were within the five miles, and he "had a gut feeling that six miles is too far out."[149]

150. The five-mile radius is not based on a physical boundary, or groundwater flow, in the Northeast metro, but rather that "[s]omebody had to draw a line in the sand."[150]

151. The five-mile radius around White Bear Lake does not include all the "top fifteen influencers" on lake levels. The cities of New Brighton, Shoreview and Woodbury are among the top fifteen influencers of lake levels, and have municipal water appropriation permits issued by the DNR, but the DNR has not taken any steps to amend these cities' water appropriation permits.[151]

152. A multi-year ban on residential irrigation also interferes with the ability of homeowners to properly install and establish new sod, whenever the prohibitions are in effect. By comparison, the Minnesota Department of Transportation's guidance on the best practice for installing new sod (and preventing erosion) obliges daily watering of new sod for a 30-day period.[152]

153. The residential watering ban does not include exceptions for the installation of new sod.[153]

154. A multi-year ban on residential irrigation prevents homeowners from using municipal water for watering grass and plants, but this restriction does not extend to other irrigators. For example, the irrigation restrictions do not apply to commercial properties, government-owned properties, or communities within a five-mile radius of White Bear

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[147] Tr. Vol. 10 at 28 (Moeckel).
[148] *See* Tr. Vol. 8 at 71 (Crawford) ("I also do not believe that […] residential property owners would follow this ordinance[,] making it very, very challenging to be enforced"); Tr. Vol. 8 at 299 (Watson) ("From a political standpoint telling people what to do with their property is very challenging, and there's going to be people that are very passionate about their irrigation"); Restatement (Second) of Torts § 858, 1(b) (1979) (Liability for the use of Ground Water) ("A proprietor of land ... who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless ... the withdrawal of ground water exceeds the proprietor's reasonable share of the annual supply or total store of ground water").
[149] Maht Ex. 26; Tr. Vol. 5, at 49-50 (Grubb).
[150] Maht Ex. 26; Tr. Vol. 5 at 50 (Grubb).
[151] Tr. Vol. 2 at 15 (Bauer); Tr. Vol. 10 at 281-82 (Doneen).
[152] *See generally* Specification 2575.3(K)(1) Standard Specifications for Construction (MnDOT 2018).
[153] *See* Tr. Vol. 5, at 69-70, 107 (Grubb); Tr. Vol. 7 at 36 (Gronchalla).

Lake that do not have municipal water systems. Those property owners may irrigate their lawns, plants and gardens as before.[154]

155. Similarly, notwithstanding the influence of groundwater withdrawals by the cities of New Brighton, Shoreview and Woodbury on the levels of White Bear Lake, no restrictions on residential irrigation have been imposed by the DNR on these cities in return for future withdrawals of groundwater.[155]

156. When amending the water appropriation permits held by the communities in this appeal, the Department included a set of findings on the new conditions. In these findings, the Department expressed its own doubts as to the efficacy of a residential irrigation ban. It wrote:

> Based on the scientific evidence available to the DNR, the DNR further finds that implementation of a residential irrigation ban is *unlikely to have a meaningful positive effect on the elevation of White Bear Lake*.[156]

157. The findings continue that, notwithstanding its doubts as to the benefits of an irrigation ban, the DNR amended the water appropriation permits to "implement the requirements" of the District Court's order.[157]

158. The Associations urge affirmance of the irrigation bans on the grounds that all the prohibited irrigation is a "non-essential" use of water, and, over a period of years, reducing irrigation in permit-holding cities will cause lake levels to rise.[158]

159. The cities' rejoinder is that the "stage impact" – the impact that the prohibition will have on the level of White Bear Lake – from each city's residential irrigation, during any particular year, is quite small.[159]

160. Moreover, as one moves farther from White Bear Lake, the near-term "stage impacts" of prohibiting lawn and garden watering in permit-holding cities, would be imperceptible to observers on the shore of the lake. Instead, the effects on lake levels would be akin to fluctuations in barometric pressure.[160]

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[154] Tr. Vol. 4 at 163-68 (Grubb); Tr. Vol. 10 at 36 (Moeckel); *compare generally* Restatement (Second) of Torts § 858, comment (f) (1979) (Liability for the use of Ground Water) ("It is usually reasonable to give equal treatment to persons similarly situated and to subject each to similar burdens").

[155] Tr. Vol. 2 at 138 (Bauer); Tr. Vol. 3 at 152 (Champion); *see also* Tr. Vol. 3 at 50-51 (Champion) (Woodbury, Shoreview and New Brighton are "outside the five-mile buffer" and "may also affect White Bear Lake significantly or in a non *de minimis* way").

[156] *See e.g.,* VH Ex. 14 at 1 (emphasis added).

[157] *Id.* at 2.

[158] *See* Associations' Initial Post-Hearing Brief at 10 ("a 30% reduction in groundwater use would cause White Bear Lake to rise 1½ feet").

[159] *See e.g.,* Oak Ex. 7; Oak Ex. 8; Tr. Vol. 9 at 23 (Bachmeier).

[160] Tr. Vol. 2 at 91; DNR Ex. 3, Attachment B-1 at 8-3 ("[I]t is evident that the pumping associated with a fairly small number of permits appears to dominate the response of the lake, and that the pumping associated with the vast majority of permits likely has a very small effect on the lake that would be, in practical terms in the field, difficult to identify or measure").

161. The best reading of the hearing record is that both the Cities and the Associations are partially correct: A multi-city, multi-year prohibition on watering lawns would, eventually, result in a rise to White Bear Lake.[161]

162. It is also true that a multi-city, multi-year prohibition on watering lawns, that does not yield perceptible changes in lake levels for several years, would be intolerable to affected homeowners.[162]

163. Additionally, some of the permit-holding cities will face complex and difficult challenges in enforcing a residential irrigation ban. For example, Lino Lakes, Mahtomedi, and Vadnais Heights all provide municipal water service across city lines to neighboring communities – communities as to which they have no jurisdiction to enforce compliance on irrigation restrictions.[163]

164. Neither the District Court order, nor the DNR, make clear how a permit holding city that provides water supplies to a neighboring community can ensure that residents in the neighboring community will abide by the irrigation restrictions.[164]

165. The cities maintain that a condition that requires an enforcement program that it cannot legally perform is not "necessary for the safety and welfare of the people of the state" as those words are used in Minn. Stat. § 103G.315, subd. 6(b).[165]

166. During the evidentiary hearing, the Associations and its expert witness, Mr. Grubb, suggested that the Administrative Law Judge might rewrite Condition 2 to remove its harshest and least consequential features. The Associations maintain that revising Condition 2 to allow watering of personal gardens, new trees, and newly installed sod would be reasonable and appropriate.[166]

167. While some restrictions on irrigation using water from the Prairie du Chien and Jordan aquifers would be needed and reasonable, Condition 2 is so underinclusive in its application, burdening only one set of irrigators, that it is an arbitrary and unlawful condition on the appropriations of groundwater.[167]

168. Condition 2 is a not reasonable or lawful condition on access to future groundwater supplies.[168]

169. Condition 2 is not "necessary for the safety and welfare of the people of the state" as those words are used in Minn. Stat. § 103G.315, subd. 6(b).[169]

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[161] Tr. Vol. 3 at 11-12 (Champion).
[162] *See* Tr. Vol. 6 at 76 (Bear); Tr. Vol. 4 at 234 (Grubb) (if a water ordinance is "too draconian," so that it interferes with people's lives, it will not be followed and will be ineffective); Tr. Vol. 7 at 253 (Goebel).
[163] *See e.g.,* Tr. Vol. 7 at 186-88, 253 (Goebel); Tr. Vol. 8 at 252 (Watson).
[164] Maht Ex. 18; Tr. Vol. 7 at 188-89, 221, 223-24, 254 (Goebel).
[165] *See* Tr. Vol. 5 at 44 (Grubb); Tr. Vol. 7 at 188, 221-24, 230, 265 (Goebel).
[166] *See e.g.,* Tr. Vol. 5 at 71, 107 (Grubb).
[167] Tr. Vol. 6 at 73-74 (Bear).
[168] *See* Findings 151, 154, 155, 163 and 165 *supra*.
[169] *See* Tr. Vol. 10 at 300 (Doneen); Minn. Stat. § 103G.315, subd. 6(b).

170. For the reasons detailed in the Memorandum below, the Administrative Law Judge also declines the Associations' invitation to rewrite Condition 2 to remove its harshest and least consequential features.[170]

XIII. Condition Number 3 – Plans to Phase Down Residential and Total Water Usage

171. As noted above, new Condition 3 obliges the permit holder to:

> Submit an enforceable plan to the DNR to phase down per capita residential water use to 75 gallons per day and total per capita water use to 90 gallons per day.[171]

172. The DNR readily acknowledges that reducing water use to 75 gallons per day, and total per capita water use to 90 gallons per day (the 75/90 standard) will not, in and of itself, restore White Bear Lake to its protected elevation.[172]

173. Many, but not all, of the permit holding communities are meeting this standard now.[173]

174. The Northeast Metro Lakes Groundwater model estimates that (assuming 2020 population levels) if all permit holding cities met the 75/90 standard, the level of White Bear Lake would rise by "3 or 4 inches."[174]

175. As the Northeast metro moves toward projected population levels in 2040, the model forecasts an increase in lake levels of "8 inches."[175]

176. Sharper reductions to groundwater appropriations – specifically, reducing residential water use to 55 gallons per person, per day, and allocating no other water for any other uses – would be required to stay within the collective annual withdrawal limits for White Bear Lake.[176]

177. As the DNR reasons, the benefits of Condition 3 are twofold: (a) if per capita residential water use is reduced to the 75/90 standard in permit holding communities, the level of White Bear Lake would be stabilized against falling lower; and (b) as the planning process moves toward meeting the 75/90 standard, still other conservation methods could be identified and implemented.[177]

178. Lake Elmo, which does not now meet the 75/90 standard, will face significant challenges "phasing down" its use of groundwater supplies in the future. Because contamination from wastes containing perfluoro-alkyl substances have leeched

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[170] *See generally* Associations' Initial Post-Hearing Brief at 10; Tr. Vol. 5 at 70-71 (Grubb).
[171] *See e.g.,* WBL Ex. 3 at 3.
[172] Tr. Vol. 10 at 29 (Moeckel) ("even 75/90 is not going to be enough"); *see also* Tr. Vol. 4 at 119-20 (Grubb).
[173] Tr. Vol. 7 at 140 (Gronchalla); Tr. Vol. 8 at 205 (Huath).
[174] Tr. Vol. 3 at 44 (Champion)
[175] *Id*. at 45.
[176] Tr. Vol. 10 at 240-41, 299 (Doneen); *see also* DNR Ex. 3.
[177] Tr. Vol. 3 at 50 (Champion); Tr. Vol. 10 at 24, 29 59-60 (Moeckel); *see also* VH Ex. 4 at 14.

into private wells from a former County landfill, Lake Elmo projects that it needs to add another 700 homes to the municipal water system.[178]

179. Hugo, Lino Lakes and Lake Elmo also argue that imposition of the 75/90 standard will have distorting impacts upon municipal land use decisions and irrational consequences for local conservation efforts. Because apartment dwellers tend to have lower daily per capita uses of water than those living in single-family homes, these cities contend that Condition 3 unduly incentivizes approval of high-density residential projects. High-density projects contribute to compliance with the 75/90 standard, the argument continues, because they add to the number of residents counted in a community's per capita calculation, while, on average, use less water per resident. Yet, the cities argue, the total volume of groundwater pumped by the cities to serve these residents is likely to be larger than before.[179] Hugo, Lino Lakes and Lake Elmo assert that a 75/90 standard which authorizes still more withdrawals of groundwater, with certain land use mixes, shows that Condition 3 is irrational.

180. While the purposes and effects of Condition 3 might be easily undermined by local land use decisions, the condition is not so irrational as to be unlawful. Among the key benefits of the condition is that it places an upper boundary upon residential and community uses of groundwater that are not present today. Some area homeowners are using as much as 250 gallons of water per person, per day.[180]

181. Likewise important, Minn. Stat. § 103G.287, subd. 2 (2022), provides:

> If the commissioner determines that groundwater appropriations are having a negative impact to surface waters, the commissioner may use a sustainable diversion limit or other relevant method, tools, or information to implement measures so that groundwater appropriations do not negatively impact the surface waters.[181]

182. Condition 3 obliges the kind of conservation planning that is needed to avoid overuse of available groundwater supplies and negative impacts to White Bear Lake.[182]

183. Condition 3 qualifies as a "diversion limit or other relevant method, [tool], or information to implement measures so that groundwater appropriations do not negatively impact the surface waters," as those words are used in Minn. Stat. § 103G.287.[183]

184. Condition 3 is a reasonable and lawful method of protecting the level of White Bear Lake and sustainable use of the Prairie du Chien and Jordan aquifers.[184]

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[178] Tr. Vol. 9 at 138-40 (Griffin).
[179] Elmo Ex. 10; Tr. Vol. 7 at 150 (Grochalla); Tr. Vol. 7 at 213, 218-19, 241 (Goebel); Tr. Vol. 9 at 142, 197-98 (Griffin).
[180] Tr. Vol. 4, at 104, 117-19 (Grubb); Tr. Vol. 9 at 197 (Griffin); *see also* Tr. Vol. 10 at 28-29, 205 (Moeckel); RAHA Ex. 264 at ¶¶ 331-33.
[181] Minn. Stat. § 103G.287, subd. 2.
[182] *See* Tr. Vol. 3 at 50 (Champion); Tr. Vol. 10 at 28-29 (Moeckel).
[183] Minn. Stat. § 103G.287, subd. 2.
[184] Findings 182 and 183 *supra.*

185. Condition 3 is a reasonable, necessary and lawful condition on access to future groundwater supplies. It is "necessary for the safety and welfare of the people of the state" as those words are used in Minn. Stat. § 103G.315, subd. 6(b).[185]

XIV. Condition Number 4 – Reporting on Efforts to Reduce Water Usage

186. New Condition 4 obliges the permit holder to:

> Annually submit a report to DNR detailing [the permit holder's] collaborative efforts with northeast metro communities to develop plans to phase down per capita residential water use to 75 gallons per day and total per capita water use to 90 gallons per day.[186]

187. Hugo challenged imposition of Condition 4.[187]

188. As noted above, the DNR's authority to issue groundwater appropriation permits is limited by the functional requirement of "sustainability" in the water supply.[188]

189. Condition 4 obliges reports that are needed to assure the sustainability of the water supply and the DNR's compliance with state law.[189]

190. Additionally, the DNR is legally entitled to condition water appropriation permits on receipt of "information to implement measures so that groundwater appropriations do not negatively impact the surface waters."[190]

191. Condition 4 is a reasonable, necessary and lawful condition on access to future groundwater supplies.[191]

192. The reporting required by Condition 4 is "necessary for the safety and welfare of the people of the state" as those words are used in Minn. Stat. § 103G.315, subd. 6(b).[192]

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 103G.315, subd. 7(b) (2022), and Minn. R. 6115.0750, subp. 5(c) (2023).

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[185] *Id.*; Minn. Stat. § 103G.315, subd. 6(b).
[186] *See e.g.,* WBL Ex. 3 at 4.
[187] Vol. 6 at 241 (Bear).
[188] Minn. Stat. § 103G.287, subd. 5 (2022) (emphasis added).
[189] *See id*.
[190] Minn. Stat. § 103G.287, subd. 2 (2022).
[191] Findings 188-90 *supra*.
[192] *See* Minn. Stat. § 103G.315, subd. 6(b).

2. Pursuant to Minn. Stat. § 14.57(a) (2022), the DNR Commissioner has delegated the authority to make "the final decision in the case" to the undersigned Administrative Law Judge.[193]

3. The Department has complied with all substantive and procedural requirements of law and rule.

4. Final agency decisions on the appellant municipalities' water appropriation permits may not violate constitutional provisions, exceed the agency's statutory jurisdiction, follow from an unlawful procedure, be affected by other error of law, be unsupported by substantial evidence in the hearing record, or be arbitrary and capricious.[194]

5. Because the Department amended the cities' water appropriation permits, it is the "party proposing that certain action be taken," as those words are used in Minn. R. 1400.7300, subp. 5 (2023). It has the burden of proving the reasonableness and lawfulness of the new conditions.

6. The Appellant Cities had the burden of establishing that it was not possible of complying with a condition imposed upon their water appropriation permit, or that the condition was otherwise unlawful.[195]

7. The Northeast Metro Lakes Groundwater model is the best available tool "for evaluating hydrology and impacts of pumping [on] White Bear Lake."[196]

8. The DNR's expert, Mr. Champion, thoroughly rebutted each of the concerns raised by the Appellant Cities' expert, Mr. Bauer, as to the accuracy of the model's results.[197]

9. It was reasonable for the DNR to reply upon the forecasts, estimates and projections from the Northeast Metro Lakes Groundwater model when making findings and amending the water appropriation permits of the Appellant Cities.[198]

10. Maintaining the Protective Elevation of White Bear Lake is reasonably necessary for the safety and welfare of the people of Minnesota.[199]

11. None of the Appellant Cities established that it was not possible to comply with conditions 1, 3 or 4.

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[193] See Lino Ex. 2.
[194] *See* Minn. Stat § 14.57(a) (2022).
[195] *See Minnesota Pub. Interest Research Group v. White Bear Rod & Gun Club,* 257 N.W.2d 762, 781-82 (Minn. 1977) (defendant landowner had the burden of establishing the affirmative defense that "there was no feasible and prudent alternative" to its use of natural resources).
[196] Tr. Vol. 3 at 28, 29-30 (Champion).
[197] *See* Tr. Vol. 3 at 61-75 (Champion).
[198] Tr. Vol. 3 at 21-22 (Champion).
[199] *See* Tr. Vol. 10 at 296-98 (Doneen).

12. Permit conditions 1, 3, and 4 support compliance with the collective annual withdrawal limits for White Bear Lake and help maintain the Lake's Protective Elevation.

13. Permit conditions 1, 3, and 4, are reasonable measures to protect groundwater supplies for future generations.[200]

14. Permit conditions 1, 3, and 4 are reasonably necessary for the safety and welfare of the people of Minnesota.[201]

15. The terms of government-issued permits must treat similarly situated persons and entities in the same manner.[202]

16. An arbitrary condition is not reasonably necessary for the "safety and welfare of the people of the state," as those words are used in Minn. Stat. § 103G.315, subd. 6(b).[203]

17. The hearing record establishes that Condition 2 only burdens some irrigators within a city, while leaving other similar uses wholly unregulated.

18. The hearing record does not establish that irrigation of green spaces on commercial or public properties is more of a public good, or less harmful to the levels of White Bear Lake, than residential irrigation in those same communities.

19. The hearing record does not establish that residential irrigation in New Brighton, Shoreview or Woodbury is more of a public good, or less harmful to the levels of White Bear Lake, than residential irrigation in the appellant communities.

20. The Commissioner of DNR has powers to regulate the uses of groundwater by permit-holding cities in the Northeast metro.

21. The Commissioner's powers to regulate uses of groundwater by permit-holding cities in the Northeast metro, are independent of the District Court's order[204] and are not limited to the approaches set forth by the District Court.

22. Condition 2 is so under-inclusive in its scope that the DNR "entirely failed to consider an important aspect" of reducing impacts to White Bear Lake.[205]

23. The under-inclusivity of Condition 2 is so "implausible that [it] cannot be explained by a difference in view."[206]

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[200] Tr. Vol. 5 at 133 (Grubb).
[201] *Id*.
[202] *See Northwestern College v. City of Arden Hills*, 281 N.W. 2d 865 (Minn. 1979).
[203] Minn. Stat. § 103G.315, subd. 6(b); Tr. Vol. 10 at 300 (Doneen).
[204] *See WBL-Dist, supra*.
[205] *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. And Gas Utilities,* 768 N.W.2d 112, 118 (Minn. 2009) (an agency ruling "is arbitrary and capricious if the agency … entirely failed to consider an important aspect of the issue ….") (citing cases).
[206] *Id.* (an agency ruling "is arbitrary and capricious if the agency … made a decision that is implausible that cannot be explained by a difference in view").

24. The doubts raised by the Appellant Cities as to the enforceability of a residential irrigation ban outside of a permit holder's municipal boundaries, were not rebutted by the Department.

25. DNR did not bear its burden of showing that the irrigation ban is reasonably necessary for the safety and welfare of the people of the state.

26. The Appellant Cities did establish that permit condition 2 is not reasonably necessary for the safety and welfare of the people of Minnesota.

Based upon the foregoing conclusions of law, and for the reasons stated in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

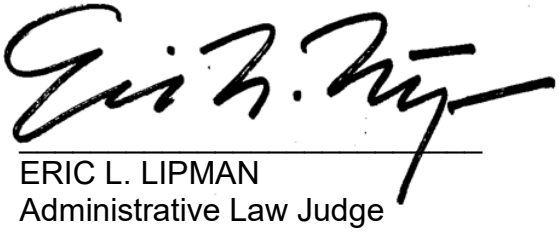
The Administrative Law Judge:

1. **DENIES** the cities' challenges to permit Conditions 1, 3 and 4.

2. **GRANTS** the cities' appeal of Condition 2.

3. **DIRECTS** the Department to promptly furnish a copy of this Order to the District Court in *White Bear Lake Restoration Ass'n v. Minnesota Dep't of Natural Resources*, No. 62-CV-13-2414 (Dist. Ct. Ramsey Cnty).

Dated: May 16, 2024



ERIC L. LIPMAN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.57 (2022), and the Commissioner's Order of May 25, 2021, this Order is the final agency decision in this case. Any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63-.69 (2022).

MEMORANDUM

During the evidentiary hearings, the parties sharply divided on three legal questions; specifically: (a) which parties bore the burden of proof; (b) the reasonableness of imposing a residential irrigation ban only on some of the cities that appropriate water from the Prairie du Chien and Jordan aquifers; and (c) the range of the Commissioner's powers to protect groundwater supplies in Minnesota.

While each of these issues is addressed in the findings of fact and conclusions of law above, some additional exposition on these questions is useful and follows below.

I. Legal Analysis

A. The Burden of Proof

The Department argues that because it assesses all amendments to water appropriation permits as if those changes were submitted as part of a new permit application,[207] the cities bear "the burden of proof" in a challenge to new permit conditions.

The Administrative Law disagrees. The Department's internal methods of processing permit amendments does not control the burden of proof.

Because the Department is the "party proposing that certain action be taken" – namely, that appropriating groundwater be subject to new and tighter restrictions – DNR has the burden of proving the reasonableness and lawfulness of those conditions.[208]

It is also true that as to the claims that the new conditions cannot be satisfied by anyone, and are otherwise unlawful, the cities have the burden of proof on these matters. Each of the latter set of claims is in the nature of an affirmative defense against the imposition of new conditions. Accordingly, the responsibility to establish those defenses falls to the permit-holding cities.[209]

Minn. Stat. § 103G.315, subd. 6(a) (2022), does not point to a different conclusion. This statute carries forward the general rule that the party who *applies* for a government license, privilege, or benefit has the burden of proving an entitlement to the requested relief.[210] The statute reads:

> *In permit applications*, the *applicant has the burden of proving* that the proposed project is reasonable, practical, and will adequately protect public safety and promote the public welfare.[211]

Yet, the cities in this case did not "apply" for the permit conditions that are at issue here. To the contrary, they each appealed the imposition of the new conditions, asserting that one or more of the changes was unlawful.

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[207] *See* DNR's Initial Post-Hearing Brief, at 13.

[208] Minn. R. 1400.7300, subp. 5 (2023) ("The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard).

[209] *Id.* ("A party asserting an affirmative defense shall have the burden of proving the existence of the defense by a preponderance of the evidence"); *Minnesota Pub. Interest Research Group v. White Bear Rod & Gun Club,* 257 N.W.2d 781-82.

[210] *See generally In Application of City of White Bear Lake,* 247 N.W.2d 901, 904 (Minn. 1976) ("In this state, the burden of proof generally rests on the one who seeks to show he is entitled to the benefits of a statutory provision"); *accord In Re License Application of Children's Minnesota,* OAH Docket No. 71-0913-35344, 2018 WL 5298584, at *5 (Minn. Off. Admin. Hrgs. 2018); *In Re Application of Freeborn Wind Energy, LLC,* OAH Docket No. 80-2500-34633, 2018 WL 3586935, at *41 (Minn.Off.Admin.Hrgs. 2018).

[211] Minn. Stat. § 103G.315, subd. 6(a) (emphasis added).

Accordingly, the better description of the Appellant Cities is "current permit holders," and not "applicants." Each of the cities has existing rights – namely, an authorization to appropriate groundwater, that is subject to modification by the Department[212] after "notice and opportunity for hearing."[213]

The underlying regulations confirm this reading of Minn. Stat. § 103G.315, subd. 6(a). Minn. R. 6115.0750, subp. 5(A) (2023), states:

> *Requests for amendments* shall be reviewed as if they were for a new application, subject to provisions of parts 6115.0600 to 6115.0800.[214]

Again, as noted above, none of the permit amendments were "requested" by the appellant cities.

Lastly, assigning to the DNR the burden of proving the reasonableness and lawfulness of permit amendments accords with the legislative history of Minn. Stat. § 103G.315. This statute was enacted in 1990 – a full five years after the contested case procedures were in place.[215] The legislature provided that challenges to the terms of water appropriation permits would be resolved under the ordinary contested case rules.[216] Presumably, if the Legislature wanted to change the familiar rule on the burden of proof, away from an agency that was "proposing that [a] certain action be taken,"[217] the statute would have provided for this result.[218]

The DNR has the burden of providing that the amendments that it made to the water appropriation permits are reasonable, practical, protect public safety, and promote the public welfare.

B. The Reasonableness of Condition 2

Under Minnesota law, an agency decision is arbitrary and capricious if it:

> (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it

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[212] Minn. Stat. § 103G.315, subd. 11 (a)(2) (2022) ("Except as otherwise expressly provided by law, a permit issued by the commissioner under this chapter is subject to .... (2) further conditions on the term of the permit or its cancellation as the commissioner may prescribe and amend and reissue the permit ...."); Minn. R. 6115.0750, subp. 2 ("Long-term permits will remain in effect subject to applicable permit provisions and conditions of the permit, the law, and [Minn. R. ch. 6115]").

[213] Minn. R. 6115.0750, subp. 5(C) (2023) ("All amendments and modifications are made after notice and opportunity for hearing").

[214] Minn. R. 6115.0750, subp. 5(A) (emphasis added).

[215] *Compare* 1990 Minn. Laws, ch 391, art 7, § 37 with 9 *State Register* 2227, 2292 (April 5, 1985).

[216] *See* 1990 Minn. Laws, ch 391, art 7, § 36 ("A hearing must be conducted as a contested case hearing under chapter 14") (now codified as Minn. Stat. § 103G.311, subd. 1 (2022)).

[217] Minn. R. 1400.7500, subp. 5 (2023) ("The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard").

[218] *See generally* Minn. Stat. § 645.16(5) (2022) ("When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters ... the former law, if any, including other laws upon the same or similar subjects").

could not be explained as a difference in view or the result of the agency's expertise.[219]

When promulgating Condition 2 to the cities' water appropriation permit, the DNR failed to consider important aspects of the groundwater shortages and offered a rationale for residential irrigation bans that ran counter to its own modeling results.

i. Important Aspects of the Water Shortage Problem

The hearing record makes clear that as of late 2017, the DNR was aware that the cities of Shoreview and Woodbury had a greater influence on aquifer and lake levels than the cities of Hugo, Lino Lakes and Lake Elmo.[220] Yet, notwithstanding this insight, only the latter group of cities had its permits amended. If the purpose of residential irrigation bans is to reduce the volume of groundwater pumped for non-essential uses, leaving the irrigation practices of the greater influencers unregulated fails to consider an important aspect of the problem.

Similarly, the DNR's imposition of irrigation bans only upon residential properties, while leaving undisturbed the irrigation practices of neighboring commercial and publicly owned properties, also fails to consider an important aspect of the problem.[221]

ii. The Evidence in Support of a Residential Irrigation Ban

As noted above, before issuing new Condition 2, the Department determined that "[b]ased on the scientific evidence … implementation of a residential irrigation ban is unlikely to have a meaningful positive effect on the elevation of White Bear Lake."[222]

Imposition of a multi-city, multi-year prohibition on watering lawns, that the DNR regards as unlikely to have a meaningful positive effect on the elevation of White Bear Lake, follows from an explanation that runs counter to "the scientific evidence."[223]

C. The Range and Depth of the Commissioner's Regulatory Powers

With respect to any shortcomings in the structuring of Condition 2, the Associations argue that they can be repaired by the District Court. They argue:

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[219] *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. and Gas Utilities,* 768 N.W.2d at 118.

[220] *See* DNR Ex. 3, Attachment B-1, Figure 8-8; Tr. Vol. 3 at 228 (Champion); *see also* Tr. Vol 3 at 230 (DNR's stage impact analysis included the effect of groundwater pumping by all of the city appellants and four additional cities); Tr. Vol. 4 at 131 (Grubb) (Wells that are 5 miles (or more) have a negative effect on the aquifer by reducing the aquifer's water pressure).

[221] *See generally* DNR Ex. 7 (the Department's transient water model assessed the impacts of wells within 7 miles of White Bear Lake that were authorized to withdraw 100 million gallons of water per and wells within 10 miles of WBL and authorize pumping 1 billion gallons of water or more); Tr. Vol. 10 at 37-38 (Moeckel) (a five-mile radius from White Bear Lake is an "imperfect" and "arbitrary" delineation of impacts from groundwater pumping).

[222] *See e.g.,* Vadnais Ex. 14 at 1 (emphasis added).

[223] *Id*. *See also* Tr. Vol. 10 at 19 (Moeckel) (the five-mile "zone of influence" radius is "imperfect" and does not include some of the major influencers on lake levels).

> [t]he district court *can order* DNR to expand the geographic scope of permits subject to the irrigation ban or per capita water use restrictions, or to reduce permitted capacity on an annual basis to comply with the statutory limit on surface water appropriation from White Bear Lake to preserve its Protective Elevation.[224]

The suggestion that the duty to amend water appropriation permits appropriately falls to the District Court, misstates the Commissioner's duties and powers. It is the Commissioner of Natural Resources who is charged with faithfully executing the laws[225] – including the conditioning of uses and appropriation of groundwater "as appear reasonably necessary for the safety and welfare of the people of the state."[226]

The DNR's duty to craft appropriate, and well-supported permit conditions, is independent of the District Court. The Department does not need permission from the state courts to amend the water appropriation permits of cities lying more than five miles from White Bear Lake, or to craft conditions that apply even-handedly to all irrigators who water lawns. Further, the DNR does not need to choose between fulfilling the requirements of the District Court's order and crafting irrigation restrictions that are supported by the record. It can do both simultaneously. If extra steps – beyond the terms of the District Court order – are needed to improve the efficacy and even-handedness of permit conditions, they should be undertaken by the Department.

Neither is it sufficient for the Associations to maintain that other, better permit conditions could be issued in the future,[227] to rescue a condition like the residential irrigation ban. The Minnesota Court of Appeals rejected a similar argument in *Dead Lake Association, Inc. v. Otter Tail County*.[228] That case involved disputes over a planned development of new residential housing and a marina on the shore of Dead Lake. Otter Tail County maintained that it did not need to specially address potential environmental impacts of increased boat traffic on the lake, because the County could, in the future, restrict that traffic. The appellate panel rejected this argument, explaining that the County's regulatory response:

> [ran] counter to the evidence in deferring this issue to its own authority to impose boating restrictions on the lake at some point in the future without complete information. Accordingly, it was arbitrary and capricious for the county to rely on some nebulous "ongoing regulatory authority" in the form of its own ability to enact restrictions that did not yet exist at the time of the negative declaration when the effects of the increased boat usage had not yet been adequately addressed. In this respect, the proposed mitigation measure that the county and DNR "have the ability to mitigate the environmental effects of boating through their ongoing regulatory authority"

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[224] Associations' Initial Post-Hearing Brief at 25 (emphasis added).
[225] *See* Minn. Const. Art. V, § 3.
[226] Minn. Stat. § 103G.315, subd. 6(b).
[227] Associations' Initial Post-Hearing Brief at 25.
[228] *Dead Lake Ass'n, Inc. v. Otter Tail Cnty.*, A04-717, 2005 WL 221773 (Minn. Ct. App. 2005) (unpublished).

was inadequate as nothing "more than mere vague statements of good intentions…."[229]

As it was in *Dead Lake Association*, neither the Associations nor the Department should be permitted to rely upon "ongoing regulatory authority," and the potential for permit amendments that do not exist today, to support the reasonableness of Condition 2.

Lastly, because the Minnesota Legislature tasked the Commissioner of DNR to manage state water resources, and to adjust uses and appropriations of groundwater to resolve competing demands, the Department, and not the Administrative Law Judge, should draft appropriate permit conditions.

D. The Impact of Not Including Major Influencers in Conversion Planning, Phase Down Efforts, or Reports on Collaborations

A key critique of setting aside Condition 2 as being fatally under-inclusive, while sustaining the application of new Conditions 1, 2 and 3, is that it does not appear to apply the requirement for regulatory even-handedness … even-handedly. One might ask: In order to avoid issuing permit amendments that are "arbitrary," must the DNR require all major influencers (including New Brighton, Shoreview and Woodbury) to undertake conversion planning, phase down conservation efforts and additional reporting?

The critique is not without force. It is inarguable that the conservation-related conditions on water appropriation permits should follow from the hydrology of the aquifers – and not a set of "imperfect" radial lines on a map.[230]

Yet, it is also true that the test of the lawfulness for new permit conditions is not whether the DNR crafted the "best possible" conditions under the circumstances. The law only requires that the new conditions be ones that a *reasonable* regulator could choose.[231]

And there are sufficient reasons to apply Conditions 1, 3, and 4 to the Appellant Cities. Conservation planning and reporting, as directed by the Commissioner, are part of the obligations that are assumed by every large appropriator of groundwater before any pumping occurs.[232] Further, as the results of the transient model make plain, proximity to White Bear Lake is a key driver of the "stage impacts" to lake levels from groundwater pumping.[233] A reasonable regulator might choose to begin with the cities that are closest to White Bear Lake before moving out to address issues presented by

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[229] *Id.*, slip op. at *6 (citations omitted).
[230] Tr. Vol. 10 at 37-38 (Moeckel) (a five-mile radius from White Bear Lake is an "imperfect" and "arbitrary" delineation of impacts from groundwater pumping).
[231] *Soo Line R.R. v. Minn. Dep't of Transp.,* 304 N.W.2d 301, 306 (Minn. 1981) (An agency's factual findings are properly supported by the evidence when the record contains "relevant evidence [that] a reasonable mind might accept as adequate to support a conclusion"); *In re Friedenson,* 574 N.W.2d 463, 467 (Minn. Ct. App. 1998) (When the record leaves room for two opinions on the matter, an agency's decision is not arbitrary and capricious).
[232] *See* Minn. Stat. §§ 103G.287, subds. 2, 3; 103G.315, subds. 6(b), 11; Minn. R. 6115.0740.
[233] *See* Tr. Vol. 3 at 18, 54 (Champion); DNR Ex. 3, Attachment B-1 at ES 1-2.

more remote locales.[234] Lastly, and most importantly, new Conditions 1, 3, and 4 apply to everyone in such cities, equally.[235] Unlike under Condition 2, the cities as a whole are obliged to plan, conserve and report.

Would it be better if all major influencers were required to plan, conserve and report – just like the appellant cities? Of course. But the failure to include New Brighton, Shoreview and Woodbury in this round of water regulations is not so under-inclusive and irrational as to render the entire set of permit amendments unlawful.

All of which brings us to the key lesson of the hearing record: The longer-term solution to the overuse of local groundwater supplies and lower levels of White Bear Lake, is to convert cities in the Northeast metro to surface water sources – as quickly as practicable. These conversions will not be simple or inexpensive; but they are necessary.

A just solution to our shared dilemmas will require hard work and cooperation by all the parties involved – including the Minnesota Legislature, the DNR, the Metropolitan Council, and nearby permit holders.[236] A combined effort provides the best chance for results that are quick and fair.

E. L. L.

[234] *Bloomquist v. Comm'r of Nat. Res,* 704 N.W.2d 184, 189 (Minn. Ct. App. 2005) ("conclusions are not arbitrary and capricious as long as a rational connection exists between the facts found and the choice made") (citing *Blue Cross Blue Shield of Minn.,* 624 N.W.2d 264, 277 (Minn. 2001)).

[235] *Compare with N.W. Residence, Inc. v. City of Brooklyn Ctr.,* 352 N.W.2d 764, 773 (Minn. Ct. App. 1984) (the City of Brooklyn Park was not "permitted to establish special standards for the operation of residential facilities for the mentally ill," that did not apply to other "land uses in the community").

[236] *See WBL-Dist,* slip op. at *19 ("We are beginning to understand the unintended consequences of our past choices as they factor into some natural limits of some of our resources that have always been there.... Everyone is part of the problem and needs to become part of the solution"); *see also WBL I,* 928 N.W.2d at 357 ("From December 2014 to August 2016, the parties agreed to stay the district-court case while they jointly supported a request to the legislature to fund construction of systems to convert the domestic water supply in certain communities in the northeast metropolitan area from groundwater to surface-water sources. The district court lifted the stay after the legislature declined to fund the surface-water conversion").