

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of Amendments to Various Water Appropriation Permits **FIFTH PREHEARING ORDER**

This consolidated matter came before Administrative Law Judge Eric L. Lipman on August 17, 2021, for an oral argument on the petitions for intervention from the White Bear Lake Rehabilitation Association and the White Bear Lake Homeowners Association.

Stacey W. Person and Colin P. O'Donovan, Assistant Attorneys General, appeared on behalf of the Minnesota Department of Natural Resources (Department).

H. Alan Kantrud, H.A. Kantrud, P.A., appeared on behalf of the Dellwood Country Club, the Indian Hills Golf Club and the White Bear Yacht Club.

Gary A. Van Cleve, Larkin Hoffman Daly & Lindgren, Ltd., appeared on behalf of the H.B. Fuller Company.

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

James J. Thomson and Michelle E. Weinberg, Kennedy & Graven, Chartered, appeared on behalf of the City of Lake Elmo.

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

David L. Sienko, Cassandra J. Bautista and Bridget McCauley Nason, LeVander, Gillen & Miller, P.A., appeared on behalf of the City of Mahtomedi.

Jared D. Shepherd and Leah C. Koch, Campbell Knutson, P.A., appeared on behalf of the City of North St. Paul.

James J. Thomson and Michelle E. Weinberg, Kennedy & Graven, Chartered, appeared on behalf of the City of Oakdale.

Lisa L. Veith, Senior Assistant City Attorney, appeared on behalf of Saint Paul Regional Water Services.

David L. Sienko and Korine L. Land, LeVander, Gillen & Miller, P.A., appeared on behalf of the City of Stillwater.

Caroline Bell Beckman and Mark F. Gaughan, Erickson, Bell, Beckman, & Quinn, P.A., appeared on behalf of the City of Vadnais Heights.

Monte A. Mills and Faris A. Rashid, Greene Espel, PLLP, appeared on behalf of the City of White Bear Lake.

Chad D. Lemmons, Kelly & Lemmons, P.A., appeared on behalf of White Bear Township.

Gregory R. Merz, Lathrop GPM, appeared on behalf of Whirlpool Corporation.

Richard D. Dworek, Chief Environmental and Real Estate Counsel, Arconic, Inc., appeared on behalf of Reynolds Metals Company.

Michael R. Drysdale, Dorsey & Whitney, LLP, and Karl A. Karg, Latham & Watkins, LLP, appeared on behalf of Saputo Dairy Foods USA, LLC.

Richard B. Allyn and Shira T. Shapiro, Robins Kaplan, LLP, appeared on behalf of the White Bear Lake Rehabilitation Association (Rehabilitation Association).

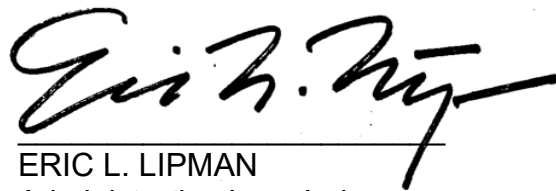
Byron R. Starns, Stinson, LLP, appeared on behalf of the White Bear Lake Homeowners Association (Homeowners Association).

Based upon the contents of the hearing record,

IT IS HEREBY ORDERED:

1. The Homeowners Association's petition is **GRANTED**.
2. The Restoration Association's petition is **GRANTED**.

Dated: September 27, 2021


ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

Factual Background

1. The Hydrology of White Bear Lake and Nearby Watersheds

White Bear Lake is a large lake lying within Ramsey and Washington Counties. It is a closed-basin lake, meaning that it has no major natural surface water inlets or outlets, such as rivers or streams. The lake depends on groundwater and precipitation

for water. Because of this, and its relatively small watershed, there have been significant fluctuations in the water level of White Bear Lake over time.¹

Two bedrock aquifers, commonly referenced together as the Prairie du Chien-Jordan aquifer, are located below the lake. The lake and the aquifer are hydrologically connected, and the lake's water levels are affected by groundwater pumping, among other factors.²

Multiple high-capacity groundwater wells surround White Bear Lake, providing domestic water supply to area communities. Before extracting groundwater for municipal use, cities must first obtain a water appropriation permit from the Department. The Department has authorized the pumping of groundwater from the aquifer through groundwater appropriation permits. The Department is responsible for issuing and amending groundwater appropriation permits; ensuring that permittees comply with the terms of those permits; and taking remedial action whenever permitted activities negatively impact a natural resource.³

2. The State Court Litigation

In April of 2013, the Restoration Association filed suit against the Department in the District Court for Ramsey County. It sought declaratory and injunctive relief relating to the groundwater appropriation permits issued by the Department. The complaint alleged that the Department had mismanaged the permit appropriation process. Specifically, the Restoration Association claimed that the Department had issued too many groundwater appropriation permits and that the pumping from high-capacity wells near the lake had resulted in harmful declines in lake-water elevations.⁴

The District Court declared that the Department, through its actions and inaction in relation to groundwater-appropriation permits in the Eastern Metro, had violated the Minnesota Environmental Rights Act (MERA), multiple provisions of the state's water law, and the common-law public-trust doctrine. The District Court ordered injunctive relief that included requiring the Department to review and amend all groundwater appropriation permits within a five-mile radius of White Bear Lake. These injunctions affected the groundwater permits not only of the intervenors, but also of municipalities that were not parties to the state court litigation.⁵

On appeal, a panel of the court of appeals held that because the suit involved challenges to permits granted by the Department, the suit could only be brought under Minn. Stat. § 116B.10 (2020) – not the provision relied upon by the associations, Minn. Stat. § 116B.03 (2020). On the public-trust-doctrine claim, the panel held that the

¹ *White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res.*, 928 N.W.2d 351, 355 (Minn. Ct. App. 2019) (*White Bear Lake I*), *aff'd in part and rev'd in part*, 946 N.W.2d 373 (Minn. 2020).

² *Id.* at 355-56.

³ *Id.* at 356.

⁴ *Id.*

⁵ *Id.* at 357-58.

doctrine did not extend so far as to impose a duty on the Department to manage the groundwater and the surface water level of the lake.⁶

The Minnesota Supreme Court granted review, reversed the decision of the panel in part, and remanded the matter to the appellate court for consideration of issues that were raised on appeal but that were not decided by the panel during the first appeal.⁷

Following the remand, the appeals court panel affirmed the judgment of the District Court with regard to the remaining issues remanded to the panel, but required an amendment to a portion of the injunctions to make clear that the water appropriation permit holders had the right to a contested case hearing prior to the imposition of any permit amendments.⁸

3. The Filings in this Matter

On May 20, 2021, the Rehabilitation Association and the Homeowners Association requested intervention as parties in the above-captioned matters. From the seventeen contested matters, seven parties objected to the May 20, 2021, petition.

On June 4, 2021, the Rehabilitation Association and the Homeowners Association supplemented their earlier request by making a claim to intervention under Minnesota's Environmental Rights Act (MERA) – citing Minn. Stat. § 116B.09 (2020).

On August 6, 2021, four parties submitted objections to this claim.

The Department does not object to the intervention petitions of either the Rehabilitation Association or the Homeowners Association.

Analysis

The intervention rule of the Office of Administrative Hearings provides in relevant part:

Any person not named in the notice of hearing who desires to intervene in a contested case as a party shall submit a timely written petition to intervene to the judge and shall serve the petition upon all existing parties and the agency.... The petition shall show how the petitioner's legal rights, duties, or privileges may be determined or affected by the contested case; shall show how the petitioner may be directly affected by the outcome or that petitioner's participation is authorized by statute, rule, or court decision; shall set forth the grounds and purposes for

⁶ *Id.* at 357-58

⁷ *White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res.*, 946 N.W.2d 373, 387 (Minn. 2020) (*White Bear Lake II*)

⁸ *White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res.*, A18-0750, 2020 WL 7690268, slip op. at *1 (Minn. Ct. App. 2020) (unpublished) (*White Bear Lake III*).

which intervention is sought; and shall indicate petitioner's statutory right to intervene if one should exist.⁹

Both associations maintain that they satisfy the intervention rule because permit amendments might follow from the various contested cases, affecting their distinct economic and aesthetic interests. The Administrative Law Judge agrees.

The permit holders and the members of the two associations are linked by the hydrology of a shared aquifer. What benefits accrue to the water appropriators under their permits may well impact the “legal rights, duties, or privileges” enjoyed by the associations,¹⁰ and their individual members, as to this same water. Moreover, to the extent that there is a legislative expectation that the Department will be “held accountable for ... ongoing conduct in managing groundwater appropriation,”¹¹ that accountability cannot devolve to the permittees alone.¹² The associations have established their rights to intervene under Minn. R. 1400.6200 (2021).

The Administrative Law Judge does not reach the question of whether MERA also requires granting of the petitions for intervention. The procedural rule fully answers the question presented that is here, making interpretation of the statutory provisions unnecessary.

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⁹ Minn. R. 1400.6200, subp. 1.

¹⁰ *Id.*; *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (“Even in the absence of injury to itself, an association may have standing solely as the representative of its members . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction”).

¹¹ *White Bear Lake II*, 946 N.W.2d at 380.

¹² *In the Matter of the Denial of Certification of the Variance Granted To Robert W. Hubbard By the City of Lakeland*, OAH 3-2000-17810-2, 2007 WL 1600535, at *3 (Minn. Off. Admin. Hrgs. 2007) (intervention under rule 1400.6600 was appropriate where petitioners established that they had “a particular interest in protecting the environmental character of the St. Croix River Valley” and intended “to challenge the propriety” of determinations made by the Department); *In the Matter of Limited Permit No. 99-1094 to William C. Young*, OAH 12-2000-12817-2, 2000 WL 35498864, at *1 (Minn. Off. Admin. Hrgs. 2000) (Intervention by the Cass County Environmental Services Department was appropriate where the County's enforcement interests were distinct from the Department).