



STAFF REPORT

DATE: March 13, 2018

DISCUSSION

ITEM #6

AGENDA ITEM: Water Permit Conditions from DNR

SUBMITTED BY: Kristina Handt, City Administrator

BACKGROUND:

On August 30, 2017, Judge Margaret Marrinan ruled in favor of the plaintiffs (White Bear Lake Restoration Association and White Bear Lake Homeowners Association) in their case against the DNR related to the lake levels of White Bear Lake. Her order included restrictions or led to conditions being placed on groundwater permits within a 5 mile radius of White Bear Lake. See map included in your packet. Also attached are the portions of the ruling that led to the four conditions being placed on the City's permit. They can be found on page 137 of the order sections 4 C) through F). The first condition (plan to convert to surface water) was placed on the permit in January while the last three conditions were added on March 1, 2018. A copy of the permit with the conditions highlighted in yellow is included in your packet.

ISSUE BEFORE COUNCIL:

Should the City appeal the conditions placed on the MN DNR Water Appropriations Permit?

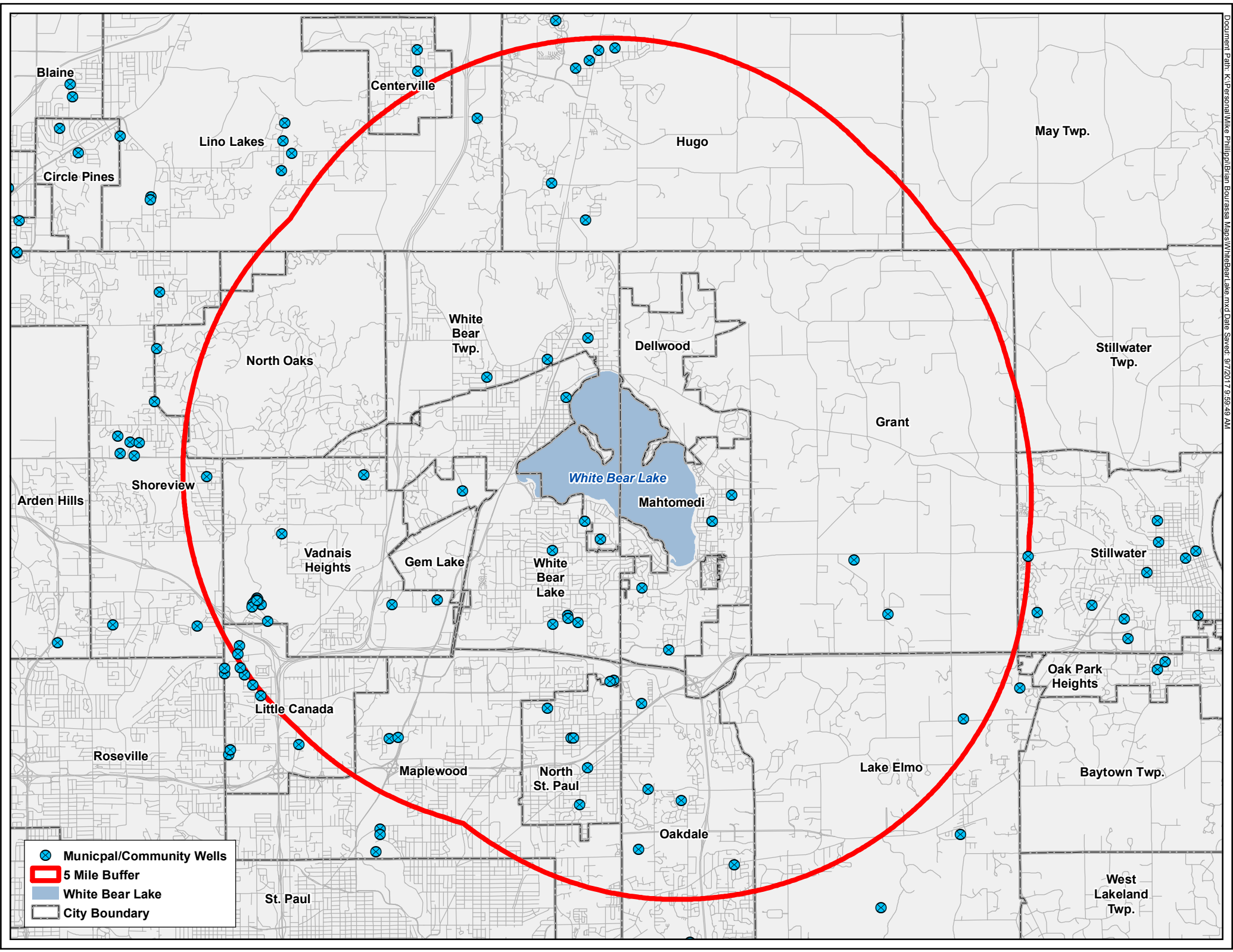
PROPOSAL DETAILS/ANALYSIS:

The City has 30 days to appeal the conditions placed on the permit. Staff is seeking council direction on whether or not an appeal should be filed for any of the last three items (residential irrigation ban, per capita water use plan and collaborative efforts). Given that the state is planning to appeal the district court judge's ruling and a stay is not in place, staff would recommend appealing the residential irrigation ban and per capita water use plan. These conditions are arbitrary and capricious as there has been no scientific evidence that placing these conditions on water systems within 5 miles of White Bear Lake will impact the lake levels.

Other cities in the 5 mile radius are likely to appeal as well. Staff would coordinate our efforts if Council wants to move forward with an appeal. At this time, my understanding is that the appeal can be initiated with a simple letter to the DNR. If directed, staff would bring back a letter to the March 20th meeting for approval.

ATTACHMENTS:

- Map of 5 mile radius around White Bear Lake
- Excerpt from 8/30/17 ruling
- Recently amended City of Lake Elmo Water Appropriations Permit



NOW THEREFORE, IT IS HEREBY ORDERED:

1. The Court declares that the DNR's current and planned permitting of high capacity groundwater appropriations and management of White Bear Lake and the Prairie du Chien-Jordan Aquifer violate:

A. MERA, by impairing both White Bear Lake and the Prairie du Chien Aquifer.

B. The Public Trust Doctrine, by:

- 1) Causing a continuing decline in the levels of both the Prairie du Chien Jordan Aquifer and of White Bear Lake that diminishes the size of the lake and its lakebed, and adversely impacts public uses of the lake; and
- 2) Failing to take remedial measures within its authority to protect White Bear Lake and the Prairie du Chien Aquifer, when it had knowledge that its actions in issuing and failing to manage high capacity groundwater pumping permits were adversely affecting the lake and aquifer.

2. The Court declares that by virtue of its violating the following statutes and rules, the DNR has violated MERA:

A. M.S. § 103G.211 (the draining of the lake resulting from the excessive pumping of the aquifer);

B) M.S. § 103G. 287, subd. 5 (issuance of permits for pumping without a determination that the amount of use is sustainable, particularly for future generations);

C) M.S. § 103G.287 and .285 (failing to set collective annual withdrawal limits from the lake; failing to require permittees to submit contingency plans for alternate water sources; failing to set a meaningful trigger for implementation of

action before the protected elevation is reached); and

D) M. Rule 6115.0670 (approval of groundwater appropriations without sufficient data to determine the effects of the appropriation allowed).

3. The DNR is prohibited from issuing appropriation permits for new groundwater wells, or increasing appropriation amounts in existing groundwater permits, within a 5-mile radius of White Bear Lake until it has **fully** complied with the requirements of the above statutes. To that end, it shall:

A) Review *all* existing groundwater appropriation permits within a 5-mile radius of White Bear Lake, analyzing them both individually, and cumulatively, to ensure compliance with the sustainability standard of M.S. §103G.287, subd. 5. The review will be completed within one year of the date of this order. The specific results of the analysis will be published in a public newspaper, in a form understandable to the general public.

B) In the event that any of the above permits do not comply with the sustainability standard set by statute, they will be reopened and down-sized within 6 months of failure to comply with the sustainability standard of M.S. § 103G.287, subd. 5.

C) Analyze the cumulative impact of these permits within the 5-mile radius of White Bear Lake to determine whether pumping at the maximum rates allowed by the permits is sustainable. The analysis will be completed within one year of the date of this order. The specific results will be published in a public newspaper, in a form understandable to the public.

4. For groundwater permits within a 5-mile radius of White Bear Lake, the DNR shall comply with all the applicable provisions of M.S. § 103G.285, including:

A) Setting a collective annual withdrawal limit for White Bear Lake;

B) Setting a trigger elevation of 923.5 feet for implementation of the protected elevation;

C) Preparing, enacting and enforcing a residential irrigation ban when the level of White Bear Lake is below 923.5 feet, to continue until the lake has reached an elevation of 924 feet. The preparation and enactment of this process will be completed within 6 months of this order.

D) Requiring that all existing permits include 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. The enactment of this requirement will be completed no later than 1 year from the date of this order.

E) *Immediately* amending *all* permits within the five mile radius of White Bear Lake to require that within one year of the date of this order, permittees submit a contingency plan in their water supply plans for conversion to total or partial supply from surface water sources. This contingency plan will include a schedule for funding design, construction and conversion to surface water supply. The Court notes that while the DNR has previously ignored the mandate of this statute, submission of these water supply conversion plans is required for the issuance of permits. Whether any conversion would occur shall be determined by the DNR and the affected communities.

F) Requiring that all groundwater permittees report annually to the DNR on collaborative efforts with other northeast metro communities to develop plans as described in (D), above.

5. The DNR shall issue no groundwater appropriation permits unless it has sufficient hydrologic data to understand the impact, whether cumulative or otherwise, of those groundwater appropriations on White Bear Lake and the Prairie du Chien-Jordan Aquifer.

6. The DNR shall work with the Metropolitan Council to evaluate current conservation goals and update them as needed.

7. The DNR shall require that water supply plans include measurable conservation goals and shall evaluate compliance with water conservation requirements on all permits

issued within the 5 mile radius of the lake. Should the individual community be out of compliance with those requirements, the DNR shall take appropriate action in downsizing that community's permit.

6. For each day that the DNR is out of compliance with this Order, it will be subject to a fine of \$1000 per day.

7. Costs are awarded Plaintiff and Plaintiff/Intervenor against Defendant DNR.

8. The Court retains jurisdiction over this action to monitor the DNR's compliance with the conditions imposed by this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

30 August 2017

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Margaret M. Marrinan', written over a horizontal line.

Margaret M. Marrinan

Judge of District Court

Memorandum

The last 12 months have been the wettest on record in Minnesota, a record that dates back to 1837. From August, 2016 to July, 2017, 40.72 inches of rain fell in the Twin Cities, well above the 30-year average for annual MSP rainfall of 31 inches (which is 20% wetter than the 1941-1970 rainfall average of 26 inches).⁵⁶⁸ The span of time between the start of this trial and the date of this Order runs from March 6, 2017 to August 30, 2017. In that period of time, 24.02 inches of rain fell in the Twin Cities, as

⁵⁶⁸ Paul Douglas, Minneapolis Tribune, August 16, 2017.

compared to the annual average rainfall of 19.33 inches.⁵⁶⁹ In January, 2017, the level of White Bear Lake was approximately 923 feet; in May, 2017, 923.8 feet; on August 24, 2017, 923.17 feet.⁵⁷⁰

None of this information appears in the body of the Court's Order because most of it occurred after the time of trial. It is included in this Memorandum simply to alert the reader that 1) the Court recognizes the large amounts of rain have fallen in the last several months; 2) the fact that 24 inches of rain has fallen in a 6 month period does not translate to an increase to the lake of that amount—or anything near it; and that 3) the findings of fact remain valid: that in the long term (years, decades) White Bear Lake levels are controlled mainly by groundwater fluctuations, and in the short term (monthly, seasonally) by precipitation and runoff.

30 August 2017

MMM ³

⁵⁶⁹ Weather Underground, August 29, 2017.

⁵⁷⁰ Minn. DNR website, August 29, 2017.

Amended

Water Appropriation Permit

Pursuant to Minnesota Statutes, Chapter 103G, and on the basis of statements and information contained in the permit application, letters, maps, and plans submitted by the applicant and other supporting data, all of which are made part hereof by reference, **PERMISSION IS HEREBY GRANTED** to the applicant to perform actions as authorized below. This permit supersedes the original permit and all previous amendments.

Project Name: N/A	County: Washington	Watershed: Lower St. Croix River	Resource: Groundwater
Purpose of Permit: Municipal/Public Water Supply		Authorized Action: Withdrawal of up to 260.0 million gallons of water per year for municipal/public water supply.	
Permittee: LAKE ELMO, CITY OF CONTACT: WELDON, ROB, (651) 747-3941 3800 LAVERNE AVE N LAKE ELMO, MN 55042 (651) 777-5510		Authorized Agent: N/A	
To Appropriate From: Well 1: 20.0 inches diameter, 805.0 feet depth, 500 gpm, unique number 208448 Point(s) of Taking UTM zone 15N, 509382m east, 4982596m north Section 13, T29N, R21W Well 2: 24.0 inches diameter, 285.0 feet depth, 750 gpm, unique number 603085 Point(s) of Taking UTM zone 15N, 510832m east, 4986116m north Section 6, T29N, R20W Well 4: 24.0 inches diameter, 290.0 feet depth, 1250 gpm, unique number 767874 Point(s) of Taking UTM zone 15N, 509470m east, 4985377m north SWSW of Section 1, T29N, R21W			
Issued Date: 03/01/2018	Effective Date: 03/01/2018	Expiration Date: Long-Term Appropriation	
Authorized Issuer: Joe Richter	Title: District Appropriations Hydrologist	Email Address: joe.richter@state.mn.us	Phone Number: 651-259-5877

This permit is granted **subject to** the following **CONDITIONS**:

LIMITATIONS: (a) Any violation of the terms and provisions of this permit and any appropriation of the waters of the state in excess of that authorized hereon shall constitute a violation of Minnesota Statutes, Chapter 103G. (b) This permit shall

CONDITIONS *(Continued from previous page)*

not be construed as establishing any priority of appropriation of waters of the state. (c) This permit is permissive only. No liability shall be imposed upon or incurred by the State of Minnesota or any of its employees, on account of the granting hereof or on account of any damage to any person or property resulting from any act or omission of the Permittee relating to any matter hereunder. This permit shall not be construed as estopping or limiting any legal claims or right of action of any person other than the state against the Permittee, for any damage or injury resulting from any such act or omission, or as estopping or limiting any legal claim or right of action of the state against the Permittee, for violation of or failure to comply with the provisions of the permit or applicable provisions of law. (d) In all cases where the doing by the Permittee of anything authorized by this permit shall involve the taking, using, or damaging of any property, rights or interests of any other person or persons, or of any publicly owned lands or improvements thereon or interests therein, the Permittee, before proceeding therewith, shall obtain the written consent of all persons, agencies, or authorities concerned, and shall acquire all property, rights, and interests necessary therefore. (e) This permit shall not release the Permittee from any other permit requirements or liability or obligation imposed by Minnesota Statutes, Federal Law, or local ordinances relating thereto and shall remain in force subject to all conditions and limitations now or hereafter imposed by law. (f) Unless explicitly specified, this permit does not authorize any alterations of the beds or banks of any public (protected) waters or wetlands. A separate permit must be obtained from the Department of Natural Resources prior to any such alteration.

FLOW METER: The Permittee shall equip each installation for appropriating or using water with a flow meter, unless another method of measuring the quantity of water appropriated to within ten (10) percent of actual amount withdrawn is approved by the Department.

WATER USE REPORTING: Monthly records of the amount of water appropriated or used shall be recorded for each installation. Such readings and the total amount of water appropriated or used shall be reported annually to the Director of DNR Ecological and Water Resources, on or before February 15 of the following year, via the MNDNR Permitting and Reporting System (MPARS) at www.mndnr.gov/mpars/signin. Any processing fee required by law or rule shall be submitted with the records whether or not any water was appropriated during the year. Failure to report shall be sufficient cause for terminating the permit 30 days following written notice.

MODIFICATION: The Permittee must notify the Commissioner in writing of any proposed changes to the existing permit. This permit shall not be modified without first obtaining the written permission from the Commissioner.

TRANSFER OR ASSIGNMENT: Any transfer or assignment of rights, or sale of property involved hereunder shall be reported within 90 days thereafter to the Director of DNR Ecological and Water Resources. Such notice shall be made by the transferee (i.e., new owner) and shall state the intention to continue the appropriation as stated in the permit. This permit shall not be transferred or assigned except with the written consent of the Commissioner.

COMMISSIONER'S AUTHORITY: (a) The Commissioner may inspect any installation utilized for the appropriation or use of water. The Permittee shall grant access to the site at all reasonable times and shall supply such information concerning such installation as the Commissioner may require. (b) The Commissioner may, as he/she deems necessary, require the Permittee to install gages and/or observation wells to monitor the impact of the Permittee's appropriation on the water resource and require the Permittee to pay necessary costs of installation and maintenance. (c) The Commissioner may restrict, suspend, amend, or cancel this permit in accordance with applicable laws and rules for any cause for the protection of public interests, or for violation of the provisions of this permit.

PUBLIC RECORD: All data, facts, plans, maps, applications, annual water use reports, and any additional information submitted as part of this permit, and this permit itself are part of the public record and are available for public inspection at the offices of DNR Ecological and Water Resources. The information contained therein may be used by the Division as it deems necessary. The submission of false data, statements, reports, or any such additional information, at any time shall be deemed as just grounds for revocation of this permit.

MONITORING REQUIREMENTS: Minnesota Statutes 103G.282 authorizes the Department of Natural Resources to require permittees to install and maintain monitoring equipment to evaluate water resource impacts from permitted appropriations. You may be required to modify or install automated measuring devices and keep records for each installation. The frequency of measurements and other requirements will be based on quantity of water appropriated, source of water, potential connections to other water resources, nature of concern, and other relevant factors.

DROUGHT PLANNING: In accordance with M.S. 103G.293, all permits must be consistent with the drought response plan detailed in the Statewide Drought Plan at http://files.dnr.state.mn.us/natural_resources/climate/drought/drought_plan_matrix.pdf.

CONDITIONS *(Continued from previous page)*

WELL SEALING: The permittee shall notify the Minnesota Department of Health prior to sealing, removing, covering, plugging or filling the well(s) from which the authorized appropriation was made. The well(s) must be sealed by a licensed well driller and in accordance with the procedures required under Minnesota Statutes 103I and Minnesota Rules 4725 as administered by the Minnesota Department of Health.

WATER USE CONFLICT: If notified by the DNR that a water use conflict is suspected and probable from your appropriation, based on confirmation of a formal well interference complaint or a preliminary hydrologic assessment, all appropriation authorized by this permit must cease immediately until the interference is resolved. The permittee may be required to obtain additional data to support the technical analysis, such as domestic well information within a radius of one and one-half miles of the production well. The permittee and impacted party may engage in a negotiated settlement process and there may be modifications made to this permit in support of conflict resolution.

WATER CONSERVATION: All practical and feasible water conservation methods and practices must be employed to promote sound water management and use the least amount of water necessary, such as reuse and recycling water, water-saving devices, and water storage.

DISCHARGE AUTHORIZATION: This permit is valid only in conjunction with all required discharge authorizations from local, state, or federal government units.

MT. SIMON-HINCKLEY AQUIFER: Water appropriations from the Mt. Simon Hinckley aquifer are limited to domestic water uses for general household purposes for human needs such as cooking, cleaning, drinking, washing, and waste disposal. Use of water from the aquifer for commercial, industrial, and nonessential purposes, including lawn watering, golf course irrigation, and vehicle washing are prohibited by Minnesota Statutes. Increases in authorized volumes from the Mt. Simon Hinckley aquifer will not be allowed in the future unless appropriate water conservation measures are implemented and feasible and practical alternatives to the Mt. Simon Hinckley aquifer are found to not exist after substantial effort has been made to search for such alternatives.

GROUNDWATER MONITORING REQUIREMENT: All new wells must have an access port that allows measuring of water levels. The permittee must measure the water levels in all production wells and/or one or more approved groundwater level monitoring well(s) per the guidelines specified in the monitoring details attachment, which is hereby made a part of this permit. Failure to submit monitoring data as specified in the attachment may result in termination of this permit.

RAMSEY COUNTY DISTRICT COURT ORDER: 62-CV-13-2414 – PLAN TO CONVERT TO SURFACE WATER

SOURCE: A revised Water Supply Plan must be submitted to the DNR, by August 29, 2018, that includes a contingency plan to fully or partially convert the source water that is authorized under this permit 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. Whether any conversion would occur shall be determined by the DNR and the holder of this permit.

RAMSEY COUNTY DISTRICT COURT ORDER: 62-CV-13-2414 – RESIDENTIAL IRRIGATION BAN: 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 (MSL 1912), to continue until notified by the DNR that the lake level has reached an elevation of 924 feet (MSL 1912). By April 30, 2018, send the DNR your approved ordinance or other enforceable mechanism for implementing an irrigation ban consistent with this permit condition. The current lake levels of White Bear Lake may be viewed on the MN DNR website: (http://www.dnr.state.mn.us/waters/csg/site_report.html?mode=get_site_report&site=82016700).

RAMSEY COUNTY DISTRICT COURT ORDER: 62-CV-13-2414 – PER CAPITA WATER USE PLAN: By August 29, 2018 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.

RAMSEY COUNTY DISTRICT COURT ORDER: 62-CV-13-2414 – REPORT ON COLLABORATIVE EFFORTS: Annual reporting to the DNR is required on your 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. Annual reports are due on March 31st of each year, beginning in 2019.

cc: Jeanne Daniels, EWR District Manager
SEH Inc - St. Paul, Agent
Focus Engineering, Inc., Agent
Wolohan, Brendan, Contact; SEH Inc - St. Paul
Isakson, Chad, Contact; Focus Engineering, Inc.
Griffin, Jack, Contact; Focus Engineering, Inc.
Michael Welling, County, Washington
Stephanie Souter, County, Washington
Jessica Collin-Pilarski, County, Washington
John Hanson, Watershed District, VALLEY BRANCH WD
Jay Riggs, SWCD, Washington Conservation District
Kristina Handt, City, Lake Elmo