



Minnesota Center for Environmental Advocacy

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November 4, 2011

Tom Landwehr
Commissioner
Minnesota Department of Natural Resources
500 Lafayette Road
St. Paul, MN 55155

VIA HAND DELIVERY

Re: Proposed Special Water Appropriation Permit No. 2012-XXX to Lutsen Mountains Corporation

Dear Commissioner Landwehr:

These comments are submitted on behalf of the undersigned organizations and our thousands of members. We object to the Minnesota Department of Natural Resource's ("DNR's") proposal to issue a special water appropriation permit to Lutsen Mountains Corporation ("the Corporation") for water withdrawals from the Poplar River when the flow is below 15 cubic feet per second ("cfs").

The permit would violate several state and federal laws. We urge you not to issue it as proposed. Although these comments are directed at the current proposal to allow withdrawals below 15 cfs, as set out below, our review of the Corporation's water management identified additional areas of concern. Issues of noncompliance with existing laws should be resolved before moving forward with any further consideration of the appropriations permits.

Thank you for the opportunity to comment on this important matter. Please let us know if you have questions about any of the issues raised in these comments. We look forward to working with the DNR and the Corporation on a resolution that will ensure compliance with existing laws and will protect Minnesota's natural resources.

I. BACKGROUND

A. Appropriation History.

The Corporation began appropriating water from the Poplar River, a public water and designated trout stream which flows through the property, in 1964. Exh. 1.¹

¹ Exhibits are attached to this comment letter.

Minnesota law has prohibited water appropriations from designated trout streams since June 1977, except for temporary appropriations, which are limited to a two-year duration. Minn. Stat. § 103G.285, subd. 5. However, the DNR allowed the Corporation to continue historic water withdrawals from the Poplar River when it amended its permit in 1986. Exh. 1.

The 1986 permit allowed the Corporation to take up to 12.6 million gallons per year from the Poplar River. *Id.* The maximum rate at which water could be withdrawn was approximately 4 cfs.

Prior to 2001, the Corporation appears to have complied with the permitted limit of 12.6 million gallons per year. However, in 2001 and thereafter, the Corporation consistently withdrew more water than allowed under the appropriation permit. In 2001 surface water withdrawals directly from this trout stream jumped to 60 million gallons in 2001. Exh. 2. By 2009 and 2010, the Corporation was withdrawing more than 100 million gallons per year, and nearly 10 times the authorized amount. *Id.* All withdrawals above the 12.6 million gallons per year were in violation of the Corporation's permit and illegal.

B. 2011 Special Legislation Allowing Appropriation.

After a decade of violating its appropriations permit, the Corporation in 2011 sought a special exemption to the state law prohibiting appropriations from trout streams in the Legislature. In response, the Legislature enacted special legislation directing the DNR to issue a permit for an increased appropriation for a limited period (5 years) and with limitations for low flow conditions.

The Minnesota Legislature, acting pursuant to Minn. Stat. § 103G.265, approved a withdrawal of up to 150 million gallons per year from the Poplar River for snowmaking and mandated that the permit be issued “without any additional administrative process.” 2011 Minn. L. ch. 107 § 101. The Legislature also mandated, however, that the withdrawal be suspended when the Poplar River falls below 15 cfs:

The permit authorized under this section shall be suspended if the flow of the Poplar River falls below 15 cubic feet per second for more than five consecutive days. The permit authorized under this section shall be reinstated when the flow of the Poplar River resumes to 15 cubic feet per second or greater.

Id.

As directed, the DNR issued the permit with the condition that “appropriation shall cease at any time the flow in the Poplar River falls below 15 cfs for five consecutive days...” Exh. 3. (Permit No. 64-0846, ¶ 8). The Corporation's Co-President signed a contingency statement on behalf of the Corporation stating in part: “I agree to suspend my appropriation and withstand the results of no appropriation from the [Poplar River] should I be directed to do so by the Department of Natural Resources.” *Id.*

C. Wintertime Water Withdrawals Are Destructive and Inconsistent With DNR Fisheries Goals and Objectives.²

Lake Superior tributary streams along the North Shore are almost entirely dependent upon surface waters, and lack any significant amounts of cold, stable groundwater. Consequently the period of low, cold winter flows and extremely cold air temperatures is critical to the survival of trout and steelhead populations.

Prior to 2002, young-of-the-year and juvenile rainbow trout and brook trout were sampled in the lower reaches of the Poplar River below the fish barrier.³ Similarly, young-of-the-year and juvenile brook trout and a variety of other species have also historically been present in the lower reaches of the Poplar River above the barrier throughout the reach of stream that runs through the Lutsen Resort. The lower Poplar River is a known site where “coaster” brook trout spawn in fall and their eggs incubate in the stream during the winter months.

Fish residing in the rivers such as the Poplar River already have a difficult time surviving winter stream conditions. The effect of winter conditions on fish communities is well established in numerous studies.⁴ Brown et al. 2011 provides a good summary of winter condition on fish:

During winter, fish are particularly vulnerable to numerous threats to their survival. Protecting or creating suitable winter habitat in temperate climates is critical because fish spend a large part of the year in these habitats.

Water withdrawal in winter reduces the wetted perimeter of the stream, reduces pool depth, changes velocities, and increases the formation of anchor ice and frazil ice. These conditions directly result in reduced habitat quantity, quality, and diversity which will cause increased mortality of fish, fish eggs, and aquatic invertebrates in habitats downstream of the water withdrawal.

² References in this section are in DNR’s possession but additional copies can be made available upon request.

³ Minnesota Dept. of Natural Resources. Section of Fisheries. Stream Population Assessment, Poplar River. Grand Marais Fisheries Office. (1983, 1990, 1991, 1992, 1995, 1998, 2002); Minnesota Dept. of Natural Resources. Section of Fisheries. Stream Survey, Poplar River. Grand Marais Fisheries Office. (1989).

⁴ R.S. Brown, W. A. Hubert & S. F. Daly. A Primer on Winter, Ice, and Fish: What Fisheries Biologists Should Know about Winter Ice Processes. *Fisheries* 36:1 pg 8-26. (2011); D.A. Scruton, K.D. Clarke, F.A. Bowdring & C.J. Pennell. Winter Habitat Availability for Salmonids in Newfoundland Streams: A Comparison Between Stream Orders and Habitat Type. Pages 425–439 in S. Ismail, ed. *Proceedings of the 9th workshop on river ice*. Canadian Geophysical Union, Fredericton, New Brunswick (1997); R.S. Brown, S.S. Stanislowski & W.C. Mackay. Effects of Frazil Ice on Fish. *Proceedings of the Workshop on Environmental Aspects of River Ice*. T.D. Prowse editor. National Hydrology Research Institute, Saskatoon, Saskatchewan. (1993); Chisholm, W. A. Hubert, & T. A. Wesche. *Winter Stream Conditions and Use of Habitat by Brook Trout in High-Elevation Wyoming Streams* (1987).

DNR fisheries has investigated and established that winter stream conditions are important and can limit fish survival.⁵ DNR has even developed a winter severity index for tributary streams to Lake Superior given the observed relationship between low catch rates and winter severity (including streams freezing to the bottom).

The Poplar River also provides a productive and popular wild steelhead fishery in the lower reach. While steelhead are spring spawners and thus their eggs not at risk from the Corporation's withdrawals, low flow conditions in the winter limit the survival of juvenile steelhead. A complete winter "freeze out" would wipe out a couple year classes of wild steelhead.

DNR fisheries has also established clear fisheries management goals that apply to the Poplar River. This permit is in direct conflict with the following goals:

1. 2006 Fisheries Management Plan for the Minnesota Waters of Lake Superior.⁶
The long term goal is to protect the Lake Superior ecosystem, restore its watershed, and manage for a diverse, stable, self-sustaining fish community that provides recreational, commercial, and tribal fishing opportunities. The Overall Habitat Goal is to protect, restore and enhance the quantity and quality of fisheries habitat in the Minnesota waters of Lake Superior. Habitat objectives include: 1) Identify and prioritize areas of degraded habitat in Lake Superior tributary watersheds, and work with appropriate agencies and citizens to restore its capacity to produce fish, and 4) Protect, restore, and enhance riparian areas in the Lake Superior Basin.
2. 2003 Rainbow trout management plan for the Minnesota Waters of Lake Superior.⁷
The long-term goal of the RTMP is to rehabilitate steelhead stocks using Minnesota strain fish to achieve a level that will allow limited angler harvest, largely supported by naturally reproducing populations. (MN DNR Fisheries, Special Publication 157. Don Schreiner.)
3. 2004 DNR Fisheries Poplar River Management Plan.⁸
4. Long Range Goal: Lower reach – Maintain a wild Lake Superior–strain steelhead fishery capable of producing catch rates of at least 0.05 adult fish per angler hour. Upper reach– Maintain a minimum brook trout population density of 150 age 1+ fish per mile.

⁵ Lake Superior Fisheries Office. Results of Operating the Juvenile Fish Trap on the Knife River 1997-2006. (2006); Lake Superior Fisheries Office. Rainbow trout management summary for the waters of Lake Superior in 2003. (2003); T. L. Close, D.A. Bedford, S.E. Colvin, & C.S. Anderson. The Role of Low Flow Habitat and Interspecific Competition in Limiting Anadromous Parr Abundance in North Shore Streams. MN DNR Fisheries Investigational Report 398. (1998); T. L. Close & C. S. Anderson. Factors limiting juvenile steelhead survival in stream tributary to Minnesota waters of Lake Superior. MN DNR Fisheries Investigation Report 462. (1997).

⁶ D. R. Schreiner, J.J. Ostazeski, T. N. Halpern & S.A. Geving. Fisheries Management Plan for the Minnesota Waters of Lake Superior. MN DNR Fisheries Special Publication 163. (2006).

⁷ D.R. Schreiner. Rainbow Trout Management Plan for the Minnesota Waters of Lake Superior. MN DNR Fisheries Special Publication 157. (2003).

⁸ Minnesota Dept. of Natural Resources. Section of Fisheries. Poplar River Management Plan. Grand Marais Fisheries Office. (2004).

D. Lutsen Mountain Corporation's Investment And Expansion.

The Corporation, over the last decade, made decisions to invest significantly in expansions without planning for or investing in an alternative source of water for desired snowmaking.

According to press reports, after investing \$11 million of their own funds in the purchase and upgrade of skiing facilities in Wisconsin, the Corporation's owners in 2004 announced a multi-million dollar expansion at the Lutsen Mountain facility on the North Shore. Nelson, Wayne, "Lutsen Owners Embark on Ambitious Ski Area Transformation," **BusinessNorth.com** (November 26, 2004) (available at <http://www.businessnorth.com/viewarticle.asp?articleid=939>).

Meanwhile, the Corporation increased its illegal appropriation from the Poplar River year to year for snowmaking purposes. Exh. 2. Absent from the announced investments was any indication that the Corporation was planning for, and investing in, a sustainable source of water for its snowmaking operation.

The Corporation has had over a decade to develop and implement a sustainable plan for securing an alternative water supply for snowmaking. But it appears not to have made any substantial investment in finding a solution. The proposed special appropriation essentially asks the DNR, on behalf of all Minnesotans, to sacrifice a shared public resource for the benefit of a private corporation.

II. MINNESOTA'S WATER APPROPRIATION LAWS DO NOT AUTHORIZE THE PROPOSED PERMIT.

A. The DNR Does Not Have The Authority To Waive Low Flow Restrictions Mandated By The Legislature Under Minn. Stat. § 103G.265.

The DNR is without authority to grant the proposed permit because the Corporation's request to make withdrawals from the Poplar River when the flow falls below 15 cfs is in direct conflict with the restrictions placed on such withdrawals by the 2011 legislation. Those restrictions are not subject to the "just cause" exception DNR cites in support of the proposed permit.

The Corporation's existing permit allowing for the appropriation of up to 150 million gallons per year from the Poplar River for snowmaking was authorized by the Minnesota Legislature acting pursuant to Minn. Stat. § 103G.265. 2011 Minn L. ch 107 § 101. The Legislature's approval, however, was explicitly conditioned on the withdrawal being suspended when flow in the Poplar River falls below 15 cfs:

The permit authorized under this section shall be suspended if the flow of the Poplar River falls below 15 cubic feet per second for more than five consecutive days. The permit authorized under this section shall be reinstated when the flow of the Poplar River resumes to 15 cubic feet per second or greater.

Id.

DNR now seeks to issue a permit waiving this legislatively imposed condition for “just cause.” According to the explanation on its website, the DNR proposes to allow for withdrawals below the 15 cfs suspension threshold mandated by the Minnesota Legislature under what is described as “a separate provision of Minnesota statutes.” Exh. 5 (retrieved October 26, 2011, from http://www.dnr.state.mn.us/input/issues/poplar_river/index.html). DNR has not, however, pointed to any legal authority for its proposal.

The “just cause” provision in Minnesota’s water appropriation law, Minn. Stat. § 103G.285, subd. 1, does not authorize waiver of legislation enacted by the Minnesota Legislature pursuant to Minn. Stat. § 103G.265. Minnesota Statutes Section 103G.285, subdivision 1, states that “[t]he commissioner may waive a limitation or requirement *in subdivisions 2 to 6 for just cause.*” (Emphasis supplied.) The requirements enacted by the Legislature pursuant to Section 103G.265 are not among the requirements that the DNR commissioner has authority to waive administratively. See Minn. Stat. § 103G.285, subd. 2 – 6.

Moreover, we find no other authority under which DNR could waive, through administrative action, a specific restriction on an appropriation that was enacted by the Legislature. The DNR’s authority is limited to those powers given it by the Legislature. *In re Hubbard*, 778 N.W. 2d 313, 318 (Minn. 2010) (“Administrative agencies are creatures of statute and they have only those powers given to them by the legislature.”)

The DNR has no authority to grant the proposed permit. It is contrary to the explicit language of 2011 Minn. L. ch. 107, § 101 which was adopted by the Legislature and requires suspension of withdrawals from the Poplar River when the flow is below 15 cfs. The proposed permit therefore cannot be issued.

B. Even If DNR Had Authority Under Section 103G.285 To Waive The 2011 Legislation, The Corporation Has Not Met Its Burden To Demonstrate “Just Cause.”

The “just cause” waiver, even if it applied, would only be triggered if “the applicant provides sufficient evidence to show just cause why [the challenged] provision would not be reasonable, practical, or in the public interest.” Minn. R. 6115.0670, subp. 4. Here, the Corporation has not demonstrated that the limitation of 15 cfs on its withdrawals from the Poplar River is not reasonable, practical, or in the public interest.

As an initial matter, there is scant indication in the public record that the Corporation provided any evidence to the DNR that the 15 cfs limitation is not “reasonable, practical, or in the public interest.” DNR’s written explanation cites “the potential economic impacts to the local community, the low numbers of trout present in the affected reach of river, and the likelihood that some trout mortality will occur, whether [the Corporation] temporarily appropriates water or not” as the basis for its “just cause” decision. Exh. 5. But the Rule requires “sufficient evidence” from the applicant, and it remains unclear what evidence the Corporation supplied and on what evidence DNR is relying.

In any case, the Corporation cannot demonstrate that the 15 cfs limitation the Legislature placed on its appropriation from a North Shore trout stream is not “reasonable, practical, or in the public interest.”

First, the Corporation has not shown that a 15 cfs limitation is unreasonable or impractical. The Legislature placed this restriction on the appropriation in order to protect the minimal flow needed to prevent extreme damage to the affected reaches of the Poplar River, a trout stream. DNR testified to the Legislature that the 15 cfs represented *less* than the minimum “protected flow” that is usually used for appropriations permits, and that it had concerns about allowing a withdrawal to below the protection level.

Moreover, the Corporation’s co-president, less than one month ago, signed a “contingency statement” agreeing to “suspend my appropriation and withstand the results” if low flow conditions necessitated the permit suspension. Clearly, the Corporation cannot now assert that the 15 cfs limitation is not reasonable or practical.

Second, the Corporation has not demonstrated that the 15 cfs limitation is not in the public interest. Allowing a private corporation based on its private economic interests to damage a public resource is contrary to general intent of the Legislature and the express purpose of the state’s laws that protect shared natural resources. “The legislature intends to favor the public interest as against any private interest.” Minn. Stat. s 645.17(5); *see also* Minn. Stat. § 116D.01 (policy of state to “promote efforts that will prevent or eliminate damage to the environment”). The Corporation’s apparent suggestion that its private interest in snowmaking is of such great public import that public resources owned by and entrusted to all Minnesotans must yield to its perceived needs, at a minimum, merits a great deal of scrutiny.

Neither DNR nor the Corporation has provided evidence of the actual likely impact the 15 cfs limitation will have on the Corporation’s ability to make snow, the likely condition of ski runs with the limitation in place, or the effect that potentially poorer snow conditions will have on the ski resort, let alone the North Shore economy as a whole.

It is clear from historical water appropriation records that the resort functioned successfully for many years *without* the 100-million-gallon-plus appropriation from the Poplar River. Without specific evidence to the contrary, the DNR cannot assume that one season with snow conditions similar to those of a decade ago will damage the entire North Shore economy. Indeed, given the many other winter recreational offerings – cross-country skiing, dog-sledding, winter camping, snow shoeing, snowmobiling, ice fishing – it is possible that some local businesses may actually *benefit* from poorer conditions on the ski hill when North Shore tourists seek other recreational opportunities.

Finally, it is worth noting that DNR’s proposed decision and permit set a dangerous precedent for the protection of public resources. If “potential economic impacts” becomes the standard to justify exceptions to long-standing protections afforded our lakes and streams, our environmental protection laws will become meaningless. Environmental protections – like the restriction on trout stream appropriations and the 15 cfs limitation – are necessary precisely because, without

them, powerful private interests can consume public resources at no expense. Without strict limitations, the true costs of private enterprises like a ski resorts are externalized, increasing private profit but at the expense of public resources. It is contrary to the DNR's mission to endorse such a skewed view of the "public interest."

Moreover, the Corporation's current predicament was self-created. It has been aware for over a decade that its business plan involves an illegal appropriation from the Poplar River in excess of its permit. It likewise has been aware that the Poplar River is a designated trout stream and that an increased appropriation would not be consistent with Minnesota law. Despite this, the Corporation invested millions in development and expansion but made no apparent efforts to secure water for snowmaking from a different source such as, for example, Lake Superior. It invested in its own private interests, on the apparent assumption that the costs of decimating a public resource could be externalized. It is bad public policy for a state agency to reward or encourage such decision-making.

In sum, the DNR has no authority to waive the 2011 legislation placing a 15 cfs limitation on withdrawals from the Poplar River for "just cause" under Minnesota Statutes Section 103G.285. But even if it did, the Corporation has not demonstrated that the protection it seeks to have waived is not "reasonable, practical or in the public interest."

III. THE DNR'S PROPOSED ACTION FAILS TO PROTECT EXISTING AND DESIGNATED USES OF THE POPLAR RIVER AND THEREFORE VIOLATES THE CLEAN WATER ACT.

Our review of the Corporation's water management practices unearthed other issues of noncompliance related to the proposed water appropriation. The Corporation appears to be discharging pollutants absent a National Pollutant Discharge Elimination System ("NPDES") permit in violation of the Clean Water Act. As a result, the Minnesota Pollution Control Agency has not conducted the requisite anti-degradation review of the Corporation's activities. Compliance with the Clean Water Act must precede any further consideration of appropriations by the Corporation from the Poplar River.

A. Water Appropriated For Snowmaking Is Being Discharged Absent An NPDES Permit And In Violation Of The Clean Water Act.⁹

The Corporation is discharging pollutants from a point source and is therefore subject to NPDES. The water it appropriates from the Poplar River is later discharged, laden with sediment, back into the Poplar River from man-made conveyances. These include its clear-cut ski hills, which create run-off channels, as well as pipes and containers installed to direct runoff. Snow making guns, the creation of ski slopes leading to discrete runoff channels, and the installation of conduit to channel snowmelt are all point sources as defined in the Clean Water Act. 33 U.S.C. § 1362 (point source means "any discernible, confined and discrete conveyance, including but not

⁹ We have been unable to locate any NPDES permit for the discharge of snowmaking water to the Poplar River. We requested and received from the MPCA all NPDES permits applicable to Lutsen Mountains Corporation and none covers the snowmaking discharge. If there is such a permit we have been unable to locate it.

limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, . . . from which pollutants are or may be discharged.”)

Likewise, there is no question that pollutants are discharged from these point sources. The March 24, 2008 Poplar River Turbidity Assessment notes that the ski hills are the single largest source of sediment contributing to the impairment of the Poplar River. Exh. 4. (RTI Int’l et al., *Poplar River Turbidity Assessment* (March 24, 2008, prepared for U.S. EPA), pp. 35 – 37.) Obviously, the addition of artificially made snow (which is not precipitation and is not stormwater runoff) contributes to increased runoff and increased pollutant delivery to the Poplar River. Moreover, if the Corporation uses chemical additives in the snowmaking process, the guns through which the snow is blown are also point sources “from which pollutants are or may be discharged.”

The Clean Water Act prohibits point source discharges absent an NPDES permit. 33 U.S.C. §§ 1311(a), 1342. The DNR’s permitting appropriation of water from the Poplar River for snowmaking is enabling what appears to be an unlawful discharge of pollutants into the Poplar River absent an NPDES permit. This issue should be resolved before any further appropriation is approved.

B. The Proposed Permit Violates Anti-Degradation.

As a delegated state under the Clean Water Act, Minnesota is required to establish water quality standards that meet or exceed minimum requirements of the federal Act. 40 C.F.R. 131 Subp. B. The state’s water quality standards must include three elements: (1) the designated uses of the state’s waterbodies, 40 C.F.R. § 131.10; (2) water quality criteria that will protect designated uses, 40 C.F.R. § 131.11; and (3) an anti-degradation policy, 40 C.F.R. § 131.12.

Minnesota has classified its waters based on use designations that are found to be in the public interest. Minn. Stat. § 115.44, subd. 2; Minn. R. 7050.0140, subp. 1. The State has designated the Poplar River for, among other uses, “aquatic life and recreation.” See Minn. R. 7050.0470. The State defines this use designation as follows: “Aquatic life and recreation includes all waters of the state that support or may support fish, other aquatic life, bathing, boating, or other recreational purposes and for which quality control is or may be necessary to protect aquatic or terrestrial life or their habitats or the public health, safety, or welfare.” Minn. R. 7050.0140, subp. 3.

The anti-degradation policy required by the Clean Water Act does not allow for activities that would violate or eliminate existing and designated uses of any Minnesota waterbodies. Indeed, for all waters, the federal act requires Minnesota to have an anti-degradation policy in place that, at a minimum, will maintain and protect “existing instream water uses and the level of water quality necessary to protect the existing uses.” 40 C.F.R. § 131.12(a)(1).

Minnesota has such a policy, and it prohibits granting the Corporation’s request to withdraw water from the Poplar River for snowmaking when the flow is below 15 cfs. Under Minnesota’s anti-degradation rule (referred to as “nondegradation”), “existing beneficial uses and the water

quality necessary to protect the existing uses must be maintained and protected from point and nonpoint sources of pollution.” Minn. R. 7050.0185, subp. 1. The Corporation’s snowmaking activities result in point and nonpoint source pollution and Minnesota’s anti-degradation standard applies to these activities.

The Corporation’s request to withdraw water from the Poplar River for snowmaking during drought conditions does not protect and maintain the designated “aquatic life and recreational” uses of the River. To the contrary, DNR’s own assessments show that at the low winter flows allowed by the proposed permit, the aquatic life, including spawning trout populations, could be severely impaired if not extirpated in the lower stretch of the River affected by the Corporation’s appropriation.

DNR cannot issue the proposed permit because it violates the State’s water quality standards applicable to the Poplar River. Both state and federal law mandate the maintenance and protection of the River’s designated uses. The MPCA has applied its anti-degradation rule when issuing NPDES permits. Because the Corporation has failed to acquire an NPDES permit for discharges associated with its snowmaking, it has apparently escaped anti-degradation review. This does not excuse the DNR from ensuring that its appropriation permits meet minimum requirements of the state’s water quality standards. This issue, like the NPDES permitting issue, must be resolved prior to any further appropriation.

C. The Existing Permit Is Void Because It Requires Compliance With Discharge Requirements.

The Corporation’s failure to secure an NPDES permit for the discharge of pollutants resulting from its snowmaking voids the existing appropriation permit dated August 16, 2011. That permit requires the permittee to be in compliance with regulations governing discharges. Specifically, it states:

DISCHARGE AUTHORIZATION:

This permit is valid only in conjunction with all required discharge authorizations.
Exh. 3 (Permit No. 64-0846, ¶ 11).

Because the Corporation does not currently have the necessary discharge authorization from the MPCA, the existing appropriation permit is invalid.

IV. THE PROPOSED WITHDRAWAL VIOLATES THE GREAT LAKES – ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT.

Minnesota is a party to the Great Lakes – St. Lawrence River Basin Water Resources Compact (“the Compact”), an agreement among Great Lakes states and provinces which was ratified by Congress in December 2008. The Compact sets minimum standards for withdrawal, consumption, and diversion of waters in the basin. All party states are legally obligated to meet these basic requirements. Minn. Stat. § 103G.801, Art. 4, Sect. 4.3(1) (“each party . . . shall manage and regulate new or increased withdrawals . . . in accordance with this compact.”)

Under the Compact, Minnesota has committed to a “decision-making standard” for regulating the withdrawal of basin waters. Minn. Stat. § 103G.801, Art. 4, Sect. 4.11. (A “withdrawal” is “taking of water from surface water or groundwater.” Minn. Stat. § 103G.801, Art. 1, Sect. 1.2.) The standard requires party states to implement water withdrawals “so as to ensure that the proposal will result in no significant individual or cumulative adverse impacts to the quantity or quality of the waters and water dependent natural resources . . .” Minn. Stat. § 103G.801, Art. 4, Sect. 4.11(2). Water dependent natural resources are defined to mean “the interacting components of land, water and living organisms affected by the waters of the basin.” Minn. Stat. § 103G.801, Art. 1, Sect. 1.210.

The Corporation’s request for a special appropriation permit for withdrawal from the Poplar River, a basin water, violates the Compact because it would “result in . . . significant . . . adverse impacts to the quantity or quality of the waters and water dependent natural resources” of the Poplar River. (Indeed, even the existing appropriations permit, Permit No. 64-0846, which allows a draw down of the River to 15 cubic feet per second may run afoul of this standard.)

The proposal to draw the River down to lower than 15 cfs, DNR admits, could result in complete elimination of trout from affected reaches of the River, clearly a significant adverse impact to water dependent resources. The permit can not be shown to comply with the Compact’s decision making standard and therefore cannot be issued.

V. THE PROPOSED PERMIT AS WRITTEN VIOLATES THE MINNESOTA ENVIRONMENTAL RIGHTS ACT.

The Minnesota Environmental Rights Act (“MERA”) prohibits conduct that results in the “pollution, impairment or destruction” of Minnesota’s protectable natural resources. Minn. Stat. § 116B.01 *et seq.*; *State by Schaller v. County of Blue Earth*, 563 N.W.2d 260, 264 (Minn. 1997). MERA applies equally to private conduct and the conduct and decisions of government agencies and actors. In this case, DNR would be liable to suit under MERA if it issued the proposed permit.

First, the Poplar River and its fisheries are “protectable natural resources.” MERA defines natural resources to include “. . . all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources.” Minn. Stat. § 116B.02, subd. 4. As noted earlier,

¹⁰ Whether the standard articulated in the Compact becomes effective immediately or only 5 years after enactment appears, at first glance, ambiguous. However, the ambiguity is resolved by considering Article 4 of the Compact as a whole. The Article requires each state to have in place “a program for the management and regulation” of withdrawals within 5 years of the effective date of the Compact. Sect. 4.10. The section entitled “Applicability,” in contrast, makes clear that “new and increased” withdrawals are to be defined by the Compact’s effective date. Section 4.12(2)(requiring states to establish baseline of existing withdrawals at time of Compact effective date). Because the standard applies to all “new” or “increased” withdrawals and any proposed withdrawal not authorized in December 2008 is “new” or “increased,” the standard would apply regardless whether the state had established a “program.” Likewise, common sense suggests that the drafters intended for the standard to apply upon ratification even while providing time for parties to develop regulatory programs – otherwise, parties would have an incentive to increase withdrawals and consumption in anticipation of the future deadline, a result contrary to the purpose of grandfathering in existing withdrawals.

trout streams and the water quality of North Shore streams and Lake Superior are recognized throughout Minnesota's laws as worthy of heightened protection.

Second, the DNR's proposed permit "is likely to cause pollution, impairment or destruction" of this resource. Pollution, impairment or destruction of a natural resource includes "any conduct which materially adversely affects or is likely to materially adversely affect the environment." Minn. Stat. § 116B.02, subd. 5. There is no question that evidence exists demonstrating that the proposed appropriation below 15 cfs is likely to materially adversely affect the Poplar River and its protected trout populations.

Third, MERA's affirmative defense for situations in which "prudent and feasible" alternatives do not exist is not available here. There *are* alternatives to the proposed appropriation, including reduced snowmaking and alternative sources of water. Moreover, MERA explicitly prohibits an affirmative defense based on economic considerations alone. Minn. Stat. § 116B.04.

The proposed permit allows for pollution, impairment or destruction of Minnesota's natural resources and would subject the DNR to liability under MERA.

VI. DNR CANNOT ISSUE THE PROPOSED PERMIT WITHOUT FIRST CONDUCTING ENVIRONMENTAL REVIEW.

The Minnesota Environmental Policy Act (MEPA) states that "[w]here there is the potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed environmental impact statement." Minn. Stat. § 116D.04, subd. 2a. The Environmental Quality Board has adopted rules pursuant to MEPA advising project proponents and local and state governments when "discretionary" and "mandatory" environmental review is required and what projects may be exempt. Minn. R. 4410.0100 et seq.

The Corporation's proposal to withdraw up to 150 million gallons from the Poplar River for snowmaking, even when the flow in the River is below 15 cfs, is not exempt from environmental review. *See* Minn. R. 4410.0460. To the contrary, the proposal is exactly the type of activity that must be preceded by environmental review so that the consequences and significant impacts to Minnesota's natural resources are known before it is permitted.

The EQB rules mandate that the DNR order an EAW if it finds a project has the potential for significant environmental effects: "An EAW *shall* be prepared . . . when a governmental unit . . . determines that, because of the nature or location of a proposed project, the project may have the potential for significant environmental effects." Minn. R. 4410.1000, subp. 3 (emphasis supplied).

Here, the potential for significant effects is clear:

- Appropriations from trout streams are, generally, prohibited by state law because of the adverse impacts that diminished flows can have on trout fisheries. Minn. Stat. § 103G.285, subd. 5.

- The Legislature, in making an exception to this general rule, set a specific suspension threshold of 15 cfs as a minimum protection for the Poplar River and its fisheries.
- Brook trout spawn in late fall and therefore low flows during winter months, when the Corporation plans to make snow, is particularly harmful to their survival.
- The DNR admits that “at very low flows, it is possible that the Poplar River would freeze to the bottom, severely damaging the native trout population.” Exh. 7.
- The DNR further acknowledges, “When stream flow is already low, appropriating water will reduce flows even further, reducing the chances that trout would be able to survive the winter.” *Id.*
- The DNR notes that in some situations, “when some remnant population has survived the winter,” it can take three to five years from trout populations to recover. *Id.*

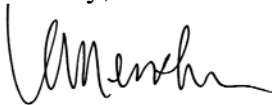
DNR is aware and has determined that the proposed withdrawals below 15 cfs have the potential for significant environmental effects. Under the EQB rules, therefore, “an EAW shall be prepared.” DNR does not have the discretion to ignore plain evidence and its own expertise and reports – to do so would be arbitrary and capricious.¹¹

VII. CONCLUSION

We respectfully submit that the proposed water appropriation permit cannot be issued consistent with multiple state and federal laws. The law provides authority for DNR to act only where such authority is granted by the Legislature; likewise, multiple environmental laws mandate the maintenance of basic water quality standards and the protection of significant natural resources. They do not permit private corporate interests to trump the public interest in the State’s shared resources.

We look forward to working with the DNR and Lutsen Mountains Corporation to ensure that the Corporation comes into compliance with existing federal requirements, and to find suitable solutions to the Corporation’s appropriation request that will not violate state and federal laws.

Sincerely,



Kevin Reuther
Legal Director

¹¹ Again, the Legislature did not authorize a withdrawal below 15 cfs. Thus, although the special legislation waived other requirements, including environmental review, for Permit No. 64-0846, it did not do so for the current proposal.

Tom Landwehr
November 4, 2011
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Comments endorsed by the following organizations:

Minnesota Trout Unlimited
/s/John Lenczewski
Executive Director

Northeastern Minnesotans for Wilderness
/s/Bradley Sagen
Chair

Save Lake Superior Association
/s/LeRoger Lind
President

Anglers for Habitat
/s/Lance Ness
President

Audubon Minnesota
/s/Don Arnosti
Policy Director

Minnesota Conservation Federation
/s/Gary Botzek
Director

cc: Commissioner Paul Aasen, MPCA