

Adjustment of Lake Levels: Minnesota Appellate Court Addresses Challenge to Minnesota Department of Natural Resources Permit



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The Court of Appeals of Minnesota (“Appellate Court”) addressed in a June 19th opinion a challenge to the issuance of a public-waters work permit (“Permit”) to lower the runout elevation between Hoffman Lake and West McDonald Lake. See *West McDonald Lake Association v. Minnesota Department of Natural Resources*, 2017 WL 2625563.

West McDonald Lake Association (“West”) appealed the Minnesota Department of Natural Resources’ (“MDNR”) (agency issuing the permit) granting of the permit.

Hoffman Lake and West McDonald Lake are Minnesota waterbodies described as adjacent to each other. They are separated by a narrow strip of land that is stated to act as an outlet when the water level in Lake exceeds the runout elevation.

MDNR has apparently undertaken various surveys and recorded water-level data on the lakes for many years. Besides water-level data, evaluations of the water quality of both lakes has been undertaken.

The Appellate Court notes that in 2013 a water-quality report was published indicating the water quality of both lakes satisfied state water-quality standards. However, the water quality of West McDonald Lake was deemed generally much higher than Hoffman Lake.

Referenced data from the 2013 report include:

- Hoffman Lake West McDonald Lake Total Phosphorus Mean 27 ug/L 11 ug/L Chlorophyll a Mean 8.6 ug/L 3.5 ug/L Secchi Depth Mean 9.1 ft 16 ft

The court notes total phosphorus mean measures the amount of nutrients in the lake, and chlorophyll a identifies algae concentration. Further, the Secchi depth mean is a measure of a lake’s transparency (i.e., how easily light can pass through a substance). Decreasing Secchi depth readings are noted to equate to decreases in the recreational suitability of a lake.

The outflow from Hoffman Lake to West McDonald Lake is stated to have been a source of concern and disagreement for many years. The Hoffman Lake Association (“HLA”) petitioned MDNR on October 15, 2015 to lower the runout elevation on Hoffman Lake’s outflow by two feet.

In response MDNR obtained lake-level and runoff-elevation data on Hoffman Lake and conducted a calculation and hydrologic analysis to identify a reasonable runout elevation. Using this data, MDNR informed HLA that it would “seek a permit to lower the runout elevation in response to the petition from

Hoffman Lake residents.” The West McDonald Lake Association opposed the permit and any reduction of the runout elevation at Hoffman Lake’s outflow.

MDNR applied to its Ecological and Water Resources division for a permit. The basis for its application for the permit was the fact that it is the landowner of the property where Hoffman Lake’s outflow is located. The agency stated that the purpose of the application was to:

Reduce high water conditions on Hoffman Lake. Hoffman Lake Residents have petitioned for lower water run out elevation to reduce flooding.

MDNR is stated to have included aerial maps illustrating the change in surface elevations of both lakes in the past. However, the agency did not reference the findings of the previously noted 2013 water-quality report. No comments were provided by various state or federal agencies which were given an opportunity to review the request.

MDNR issued itself the permit on August 18, 2016. The permit would lower the runout elevation of Hoffman Lake to elevation 1354.1 at the existing outlet. Further, the outlet channel bottom would be approximately four feet wide.

WMLA requested a stay of the permit and appealed this decision.

WMLA argued that MDNR:

1. failed to satisfy the criteria for granting the permit,
2. granted the permit solely for private interests, and
3. violated the Clean Water Act and state regulations by failing to obtain a National Pollution Discharge Elimination System (“NPDES”) permit.

The Appellate Court rejected WMLA’s contention that MDNR issued itself the permit solely to satisfy private interests (which is stated to be a violation of Minn. R. 6115.0220, subp. 3). The basis for rejection of this position was the court’s conclusion that MDNR also considered non-private interests in its application. Reference is made to the permit application’s addressing Hoffman Lake’s water level and runout elevation. The court stated that the record demonstrated that MDNR based its permit application on both private and non-private interests. As a result, it did not violate the previously cited Minnesota provision.

The court next considered whether MDNR satisfied criteria required to grant itself a permit.

To obtain a permit for the proposed project MDNR was stated to have been required to satisfy certain criteria which include:

1. the project will involve a minimum of encroachment, change, or damage to the environment, including but not limited to fish and wildlife habitat,
2. adverse effects on the physical or biological character of the waters are subject to feasible and practical measures to mitigate the effects,
3. the proposed project is consistent with applicable floodplain, shoreland, and wild and scenic rivers management standards and ordinances for the waters involved,
4. the proposed project is consistent with water and related land management plans and programs of local and regional governments, provided such plans and programs are consistent with state plans and programs, and
5. the construction or reconstruction of a water-level-control structure is for an approved purpose.

The Appellate Court concluded that MDNR’s determination that the project involved a minimum of encroachment, change, or damage to the environment was unsupported by substantial evidence in the record and arbitrary and capricious. It was noted that MDNR based its belief that it had satisfied this first criteria on a statement from the Minnesota Pollution Control Agency (“MPCA”). The court found that

MDNR could rely on a comment from another state agency. However, the court believed that MPCA's comment was based only on a cursory review. Also, the court stated that to the extent that MDNR based its decision on such cursory review (by another agency) an inadequate basis existed for the agency's determination.

As to the second criterion, WMLA argued that MDNR could not credibly claim that the proposed project would not adversely affect the characters of the waters. The organization argued that the record contained no analysis of whether the proposed project would have any effect on the physical or biological character of the water.

The Appellate Court agreed that because MDNR based its recommendation on an analysis of water quantity as opposed to quality it agreed. It again cited the MPCA's comment as providing an inadequate basis for an MDNR determination. The court did not review the other criterion because MDNR is required to satisfy them all.

WMLA also contended that MDNR violated both state regulations and the federal Clean Water Act by issuing a permit to lower the runoff elevation on the outflow from Hoffman Lake to West McDonald Lake without first obtaining an NPDES permit. MDNR responded that the federal water-transfer rule exempted it from the requirement to obtain an NPDES permit. The basis for this argument was the fact that the water transfer from Hoffman Lake to West McDonald Lake was not subject to an intervening use. The Appellate Court noted that whether the federal water-transfer rule applies in Minnesota was a matter of first impression.

The Court notes the United States Environmental Protection Agency ("EPA") had promulgated a federal water-transfer rule that exempted water transfers from the NPDES permit requirement. citing 40 C.F.R. § 122.3(i). A water transfer is defined by the rule as an:

. . . activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.

The Appellate Court noted that Minnesota has an approved NPDES program. As a result, the MPCA administers the Minnesota NPDES program in accordance with the Clean Water Act, along with the relevant regulations.

The Appellate Court concluded that the water-transfer rule only applies to the EPA-administered NPDES program. As a result, it deemed the rule inapplicable in a state-administered NPDES program unless the state's NPDES program also exempts it. It states that the list of exemptions from the NPDES permit requirement adopted by MPCA includes every EPA exemption except the water-transfer rule. Since the exemption is not incorporated by reference in the state-administered NPDES program, it was held not to apply in Minnesota.

The Appellate Court reviewed various Minnesota state-administered NPDES programmatic terms or phrases such as "point source", "addition of any pollutant to surface waters of the state", "pollutant", and "other waste."

This review was undertaken to determine whether the state rules would require the acquisition of an NPDES permit. The court stated:

. . . We assume, without deciding, that phosphorous, chlorophyll a, and other suspended solids (measured by Secchi disk transparency) satisfy the statutory definition of "other wastes" because the DNR did not argue otherwise. Because the proposed project will discharge additional pollutants from Hoffman Lake to West McDonald Lake, we conclude that lowering the runoff elevation of the outflow from Hoffman Lake to West McDonald Lake requires an NPDES permit.

This meant that MDNR's determination that an NPDES permit is not required violates state regulations.

The Appellate Court reversed the MDNR's decision to grant itself the permit.

[A copy of the opinion can be downloaded here.](#)