

Minnesota Department of Natural Resources

500 Lafayette Road · Saint Paul, Minnesota · 55155-4037

Office of the Commissioner

651-259-5555



November 10, 2011

Lutsen Mountains Corporation
Thomas Rider
P.O. Box 129
Lutsen, Minnesota 55612

RE: COMMISSIONER'S ORDER; Limited Permit #2012-0303, Poplar River, Cook County

Dear Mr. Rider:

The Department of Natural Resources (DNR) has reviewed your application to appropriate water from the Poplar River for snowmaking when flows are below the 15 cubic feet per second (cfs) flow rate established in Laws of Minnesota, 2011, Chapter 107, Section 101. The DNR has made the following FINDINGS OF FACT AND ORDER on the matter:

FINDINGS OF FACT

1. Lutsen Mountain Corporation (LMC) received a permit (#1964-0846) on August 16, 2011 as required by Minnesota Statutes, Section 103G.265, Subd. 3 (2011) to appropriate up to 150 million gallons per year from the Poplar River at a rate not to exceed 3500 gallons per minute (roughly 8 cubic feet per second). The law and permit also require LMC to be suspended from appropriating water from the river when flow rates drop below 15 cfs (cubic feet per second) for five consecutive days.
2. Flows of the Poplar River have fallen as low as 7 cfs this September, and have varied from 13 to 16 cfs since mid-October. Permit #1964-0846 is suspended as long as the river flow rates stay below 15 cfs. Unless significant rainfall is received in the area before freeze-up, flow rates will fall below the 15 cfs limit as soon as LMC starts appropriating water for snowmaking.
3. LMC has indicated that it will go bankrupt if it is not able to make snow in the early winter, resulting in a loss of jobs and significant impact on the local community's economy. Further, mild fall temperatures have delayed the start of snowmaking this year, so if snowmaking is cut off after December, as was suggested by some providing public comment, Lutsen may not be able to recover from what is anticipated to be a slow start to the skiing season.
4. The same drought conditions that are affecting LMC are also likely to severely impact trout in that section of the river, especially if the river experiences a complete freeze to the river bottom or has severe conditions due to an abundance of anchor ice both of which are likely under the present situation. These conditions may occur whether LMC appropriates water or not. Nevertheless, the additional appropriation by LMC may make impacts even worse.
5. The best long-term solution is for LMC to draw water from Lake Superior, rather than the Poplar River. This is because Lake Superior has no low flow protection level, and it is unlikely that LMC's appropriations from Lake Superior would ever need to be restricted.

6. The DNR received and reviewed over 600 comments received from the general public and various organizations relative to this proposed permit. Several categories of concerns have been expressed in those comments, including a) the economic impact of not approving the application; b) the impact of the proposed appropriation on aquatic life, particularly trout, in the stream; c) the history of LMC's efforts (or lack thereof) in finding an alternative to the Poplar River; d) the duration of the proposed appropriation; and e) various legal concerns about the proposal. A summary of those comments and DNR findings follow:

- a) **Economic Impact:** LMC has stated, and many commenters have agreed that the issuance of this permit is essential to its business and the economy of Cook County. LMC has also stated, and many commenters have agreed, that the impact on recreational fishing will be temporary and relatively minor. Other commenters have stated that a public resource should not be damaged for private benefit. The DNR finds that LMC's business is important to the local economy, as is recreational fishing, but that the overall adverse economic impact will be greater if the permit application is denied.
- b) **Aquatic Life Impact:** Some commenters stated that LMC's appropriation will result in the destruction of a viable brook trout population in 2.5 miles of river. Others, including LMC have stated that the trout population is relatively small and insignificant when compared to other north shore streams. The DNR finds that damage to the trout population may occur with or without the additional pumping this winter because of severe drought conditions. Further, because of these conditions there are few trout in the affected part of the river. Lastly, while LMC's appropriation may make the impacts on aquatic life worse, the aquatic life in the stream should recover quickly and naturally. Because of the above, the DNR also finds that any impairment that may occur will not materially adversely affect the environment.
- c) **Alternative Water Source:** Many commenters (both those supporting and opposing the proposed permit) stated that LMC should develop another water supply, and that appropriating directly from Lake Superior is the obvious choice for such a supply. LMC has supplied information indicating that developing a Lake Superior supply will be expensive (\$3.6 million estimate by LMC) and complicated (need for easements) and take time to complete. Some commenters suggested that LMC made choices to expend its financial resources on expanding ski operations and should have directed its resources toward a better water source years ago. The DNR finds that the Poplar River is not a sustainable water supply for LMC operations and it must develop another water supply source and has incorporated such condition into the proposed permit. **Duration of Permit:** Minnesota Statutes, Section 103G.265, Subd. 3 (2011) states that the term of the existing permit (1964-0846) can be for no more than 5 years. The permit issued on August 16, 2011 states that it will expire on October 5, 2016. Many commenters stated that the proposed permit should be limited in time. A few commenters suggested that LMC's appropriation be limited to only one season and to specific months. The DNR finds that the proposed permit (2012-0303) should be limited in duration and has incorporated such condition into the proposed permit.
- d) **Legal Issues:** Some commenters brought up issues related to whether the DNR has the authority to issue this permit. The DNR has reviewed relevant state law and finds that it has the legal authority to issue this permit. Further, the DNR finds that a discretionary Environmental Assessment Worksheet is not required because there is no potential for significant environmental effects because of the current condition of the resource in the affected reach due to naturally severe drought conditions, the affected reach of the river has low numbers of trout and that trout populations, if impacted, would likely naturally recover quickly.

7. LMC owns property along over one mile of the Poplar River in Sections 20 and 28 of Township 60 North – Range 3 West, and has the right to apply for this permit pursuant to Minnesota Rules, part 6115.0660, Subpart 2.

ORDER

- A. The Commissioner does hereby waive a public hearing hereon pursuant to Minnesota Statutes, Section 103G.311, Subdivision 4.
- B. The Commissioner does hereby temporarily waive all limitations and requirements of Minnesota Statutes, Section 103G.285, Subdivisions 2 and 5, as provided in Subdivision 1. The Commissioner utilizes this authority due to the unique circumstances caused by the severe drought conditions that are occurring in northeastern Minnesota in the fall of 2011, and the potential economic impact to the local community that would be caused by total suspension of an appropriation by LMC during the start of this snowmaking season, the likelihood that the severe drought conditions will cause some trout mortality whether or not LMC temporarily appropriates water, the fact that there are expected to be very limited trout populations in the affected area, and that even if trout populations are impacted this season, they would be likely to naturally recover quickly.
- C. The Commissioner hereby issues the attached limited permit that will have a term of one snowmaking season, with the possibility for extension for two more seasons. A new permit application will need to be submitted if conditions require appropriation below the 15 cfs level at the start of the 2015 snowmaking season and LMC will need to prove that an acceptable alternative water supply is nearly ready for implementation before such a permit would be issued.
- D. The attached permit will allow LMC to pump out of the river at a rate of 4 cfs when flows fall below 15 cfs, and all pumping will cease when flows fall below 5 cfs. Furthermore, the permit will allow LMC to gradually increase its pumping rate when flows increase to 20 cfs. When flows exceed 23 cfs for five days, this permit will expire and the permit 1964-0846, would be reinstated to allow the 8 cfs pumping rate.
- E. The attached permit will not be valid unless or until the permittee signs a statement (Attachment A) indicating the permittee's agreement to withstand any losses that might occur if flows fall below 5 cfs, LMC's understanding and agreement that this permit will not be reinstated after April 30, 2014, and indicating LMC's commitment to have another source of water available for their operations by no later than the Fall of 2016. This permit will be valid only when that signed statement is received by the Department.

Pursuant to Minnesota Statutes, Section 103G.311, Subdivisions 5 and 6, the applicant, the managers of the watershed district, the board of supervisors of the soil and water conservation district or the mayor of the municipality may demand a hearing on the Order provided the demand for hearing and the bond required by Subdivision 6 is filed with the Commissioner within 30 days. No bond or security is required of a public authority which demands a hearing. The statutes further provide that if no demand for hearing is made or if a hearing is demanded but no bond is filed as required by Subdivision 6, the Order shall become final at the expiration of 30 days after mailed notice thereof. Thereafter the validity of the findings of Fact and Order can no longer be challenged in the courts.

Subdivisions 6 and 7 require that an applicant filing a demand for a public hearing execute and file a corporate surety bond or equivalent security (a check is allowable) to the State of Minnesota. The amount to be filed is \$500.00 as set by the Commissioner. The bond or security shall be conditioned for the payment of certain costs and expenses of the public hearing if the Order is affirmed without material modification; however, the applicant's liability is limited to \$750.00. The \$750.00 limit does not apply when a public hearing is demanded by a public authority which is not the applicant. Bond forms will be supplied at your request.

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As conditions this fall have proven, the Poplar River is not a long-term sustainable source of water for your company. Please continue to work with our field staff in searching for an alternative water supply. If you have any questions or need additional assistance, please continue to work with Bob Leibfried in our Grand Rapids Office.

Sincerely,



Tom Landwehr
Commissioner

Enclosures

cc: Kerrie Fabius, Cook County SWCD
Craig Engwall, Regional Director
Steve Hirsch, Director
Dirk Peterson, Fisheries Chief
Bob Leibfried, EWR Regional Manager
Tim Goeman, Fisheries Regional Manager
Steve Persons, Area Fisheries Manager
Dale Homuth, EWR Manager
Mike Peloquin, Assist. Regional Manager
Tom Hovey, Water Appropriation Program
Cliff Bentley, Area Hydrologist
Central Office SWUDS



LIMITED
Non-Irrigation – Surface Water
WATER APPROPRIATION
PERMIT

PERMIT NUMBER 2012-0303
COUNTY Cook (16)

IN THE MATTER OF THE APPLICATION FOR APPROPRIATION OF WATERS OF THE STATE, PERMISSION IS HEREBY GRANTED TO:

PERMITTEE Lutsen Mountains Corporation	Authorized Agent Thomas Rider				
Address P.O. Box 129, Lutsen, MN Phone: (218) 882-7281 x 1201 E-mail: tom@lutsen.com					
To appropriate from: The Poplar River Point of Taking: 2 pump sites Pumps 1 and 2 - NW¼ SE¼ SW¼ Section 21, Township 60N, Range 3W. (UTM: 671,363 (easting) & 5,281,255 (northing)) Pump 3 - SE¼ SW¼ NW¼ Section 28, Township 60N, Range 3W. (UTM: 671,338 (easting) & 5,280,162 (northing))					
Purpose: Snow making for Lutsen Mountains ski area. This temporary permit may be used <u>only</u> when flows of the Poplar River fall below 15 cubic feet per second.					
Use Code: 273 - Snow and Ice Making THIS PERMIT EXPIRES ON APRIL 30,2012, AND MAY NOT BE RENEWED BEYOND APRIL 30, 2014					
Property owned: E1/2 Section 20, S1/2 Section 21, W1/2 Section 28, E1/2 Section 29, Township 60N, Range 3W. Riparian Acreage: 380 acres Watershed: Lake Superior, North (1)					
Authorized Signature 	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;">Title</td> <td style="width: 50%;">Date</td> </tr> <tr> <td style="text-align: center;">Commissioner</td> <td style="text-align: center;">November 10, 2011</td> </tr> </table>	Title	Date	Commissioner	November 10, 2011
Title	Date				
Commissioner	November 10, 2011				

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

1. QUANTITY:

The Permittee is authorized to appropriate water at a rate not to exceed **4 cubic feet per second (1800 g.p.m.)**, **however, see Condition # 8.**

The total amount of water appropriated shall not exceed * acre-feet or **150** million gallons per year, when combined with Permit Number 1964-0846.

2. 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 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.

(over, please)

3. PERMITTEE'S RESPONSIBILITIES:

(a) 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 (DNR).

(b) REPORTS.

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 DNR, on or before February 15 of the following year, upon forms supplied by the DNR. 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.

(c) 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 Waters. 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.

(d) 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.

4. 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.

5. 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 the DNR. The information contained therein may be used by the DNR 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.

6. INTAKE SCREENING AND EROSION CONTROL:

All pump intakes must be screened to prevent fish from being drawn into the system. The permittee shall implement adequate soil and water conservation measures in order to protect water quality and prevent erosion and sedimentation.

7. SUSPENSION:

This permit will be suspended automatically and immediately, when flows rates in the Poplar River fall below 5 cubic feet per second (cfs) based on the most recent flow reading from the cooperative streamflow gage site #01063003. Appropriation will be automatically and immediately reinstated when flow rates exceed 9 cfs. When flows in the Poplar River rise to 20 cfs, the appropriation rate may be increased to 5 cfs. When flow rise to 21 cfs, the rate is increased to 6 cfs. When flows rise to 22 cfs, the rate is increased to 7 cfs. When flows rise above 23 cfs for 5 days, this permit is superseded by Permit Number 1964-0846 which allows an appropriation rate not to exceed 8 cfs.

8. EXTENSION OF THIS PERMIT:

This permit is not valid unless or until ATTACHMENT A is signed by the permittee and received by the DNR. This permit must not be extended past April 30, 2014. Should there be just cause for a similar appropriation after that date, a new permit will be required.

9. 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, saving devices, and water storage.

10. STREAM FLOW MONITORING:

Winter streamflow data for the Poplar River will be generated by the MNDNR/MPCA cooperative streamflow gage site #01063003 for the purpose of monitoring flow in the river for suspension/reinstatement thresholds according to permit condition #7, above. The permittee shall be responsible for monitoring this site at least once per day while appropriating water, and shall immediately comply with condition #7 when the reading is less than 5 cfs. The site can be monitored at: http://www.dnr.state.mn.us/waters/csg/site_report.html?mode=get_site_report&site=01063003

cc: Kerrie Fabius, Cook County SWCD
Craig Engwall, Regional Director
Steve Hirsch, Director
Dirk Peterson, Fisheries Chief
Bob Leibfried, EWR Regional Manager
Tim Goeman, Fisheries Regional Manager
Steve Persons, Area Fisheries Manager
Dale Homuth, EWR Manager
Mike Peloquin, Assist. Regional Manager
Tom Hovey, Water Appropriation Program
Cliff Bentley, Area Hydrologist
Central Office SWUDS

ATTACHMENT A
LIMITED PERMIT NUMBER 2012-0303

**CONTINGENCY STATEMENT AND COMMITMENT
TO FIND ANOTHER WATER SOURCE**

Minnesota Statutes, Section 103G.285, Subdivision 6 requires all surface water appropriators to have a contingency plan that addresses what other water sources the permittee will use if their appropriation is restricted during low water conditions. The statute also provides that the permittee might agree to withstand the results of not being able to appropriate water, as an alternative.

I hereby understand that under the terms of Permit 2012-0303, when the flow rate of the Poplar River falls below 5.0 cubic feet per second, as shown on the publicly available gage reading site, I must immediately cease the appropriation authorized by this permit, and will withstand the results of not being able to appropriate water during that period.

I hereby further agree that Lutsen Mountain Corporation (LMC) will find an alternative water supply, so that all appropriations from the Poplar River will stop before the fall of 2016. LMC agrees to have completely or substantially installed an alternative water supply by the spring of 2014 and understands that this permit will not be extended beyond the spring of 2014. I agree to keep DNR staff informed on LMC's efforts to find an alternative water source.

Authorized Signature: _____ Date: _____

Title: _____

Mail to: DNR, Ecological and Water Resources, 1201 East Highway 2, Grand Rapids, MN 55744