

# CITY OF WAUKESHA

WAUKESHA, WISCONSIN 53188



July 27, 2010

Matthew J. Frank, Secretary  
Wisconsin Department of Natural Resources  
101 S. Webster Street  
Box 7921  
Madison, WI 53707-7921

**RECEIVED**

**AUG 06 2010**

**DNR  
OFFICE OF THE  
SECRETARY**

Re: City of Waukesha Application for Great Lakes Water

Dear Secretary Frank:

I am writing you on behalf of the Waukesha Common Council in response to your June 8, 2010 letter to Mayor Jeff Scrima regarding the City's application for a diversion of Great Lakes water (the "Application"). At the direction of the Common Council, we respectfully request that all future correspondence with the City of Waukesha regarding this matter be sent to the City of Waukesha in care of Dan Duchniak, General Manager of the Waukesha Water Utility and to Mayor Jeff Scrima, as the point persons for communication and information relating to the Application.

On April 8, 2010, the City of Waukesha Common Council passed the attached resolution, with a veto-proof majority of 14 to 1, supporting the Application, as governed by the provisions of the Great Lakes Compact and state law, a certified copy of the Council's actions of April 8, 2010 is attached as Exhibit A. The official position of the City is established by the Common Council by following legislative processes established by state law. It is not determined or changed by the comments of an official who may disagree with the policy of the City. The action of the Council on April 8, 2010 represents the lawful and binding policy and continues to represent the official position of the City. See the City Attorney's letter concerning the corporate authority of the City dated July 22, 2010 attached as Exhibit B.

The Common Council of the City of Waukesha, which is comprised of publicly elected officials, along with the Water Utility Commission, continue to wholeheartedly support the submitted Application. Consequently, the Common Council asks that the DNR respect the City's legislative process and understand that, not unlike the relationship between the Wisconsin Legislature and the Governor, very few decisions are arrived at unanimously. Regardless of the public comments that surround this issue, the Waukesha Common Council has no desire to reconsider or reverse its previous action. The Common Council supports the City Water Utility Commission's decision to submit the Application and requests that the DNR continue its review of our City's lawful Application.

In your June 8 letter, you state that one of the Great Lakes Compact's key requirements for approving an application for a diversion is "demonstrating that there is no reasonable water supply alternative." The Application approved by the Waukesha Water Commission and the Waukesha Common Council specifically concludes that there is no reasonable alternative for the City's water supply. Further, the Application presents a detailed analysis of the water supply issues under the terms of 2007 Act 227, Wisconsin's implementation legislation for the Great

Lakes Compact. The Application demonstrates that no other reasonable alternative (including combinations of water supply alternatives) exists under the definitions provided by law and that the City is without adequate supplies of potable water that are environmentally and economically sustainable for the long term. No alternative or combination of alternatives is as protective of public health, as environmentally sustainable, as protective against environmental impacts, or as affordable as a Great Lakes supply.

Attached under Exhibit C is a Technical Memorandum prepared by CH2M Hill entitled "Review of Water Supply Alternatives" dated July 27, 2010. This Technical Memorandum provides a review of water supply alternatives including those raised by Mayor Scrima. This Technical Memorandum supports the City's Application.

In addition, the Wisconsin Court of Appeals issued an important decision which will affect ground water potable water supplies and high capacity irrigation wells. A summary of this case is provided in Exhibit D which discusses the implication of how this case could affect the City's current water supply and potential new groundwater sources, as well as how this ruling also supports the Application's conclusion that Great Lakes water is the only reasonable water supply alternative.

Your letter also questions whether the City is continuing to examine alternatives to Great Lakes water. The City has determined that there is no other reasonable alternative under the standards established by Act 227 and the Great Lakes Compact. Despite that determination, it is possible that our Application will be denied or litigated, or that negotiations with potential water suppliers will not be productive. In that case, the City will be required to pursue a different alternative, regardless of whether it is reasonable, in order to comply with the court-ordered June 30, 2018 deadline for final radium compliance and to address the City's water supply needs. In that case, the City's investigation of water supply sources other than a Great Lakes supply would be made to fulfill our obligations to our customers and meet the regulatory requirements (i.e. water quality, water quantity, system reliability, fire protection, etc.) that apply to the City as a result of owning and operating a public water system. Our citizens trust the City to advance the best long-term water supply alternative in a responsible manner. This responsibility includes developing a contingency plan in the event of an unsuccessful Application.

Regarding compliance with the Great Lakes Compact requirement that "return flow be as close as possible to the withdrawal source," the language of the Wisconsin Straddling Counties Exception Standard is: "The place at which the water is returned to the source watershed is as close as practicable to the place at which the water is withdrawn." 281.346(4)(f)(3m), Wis. Stats. (emphasis added). With the term "practicable" there are factors provided in the statute which include: economically feasible, environmentally sound and in the interest of public health. The return flow alternative provided in the Application was the alternative which best met these criteria. Also, the Waukesha Water Utility followed the direction provided by DNR staff at a meeting on December 4, 2009. DNR staff advised utility officials that the water supply and the return flow discharge aspects of the Application would be analyzed independently of one another and that the return flow analysis would be completed pursuant to Wisconsin Administrative Code chapter NR 110 and analyzed for cost-effectiveness. If this direction has changed since the time of our meeting, we request that we be informed so that we may amend our plan accordingly.

The letter also asks about the costs related to different potential suppliers of Lake Michigan water. The Water Utility Commission and Common Council are justifiably concerned about providing detailed information relating to the City's negotiating position with potential water suppliers. In the spirit of securing the most cost-effective Great Lakes solution, the City

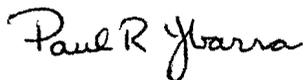
requested, and has received, letters of interest from three competing potential water suppliers. Per your request, the City will provide the estimated cost of connecting to each possible supplier as a prompt follow-up to this correspondence. Other alternatives would require additional infrastructure and are potentially more expensive, but negotiations with suppliers could reduce or eliminate those extra costs.

Finally, we apologize for the oversight regarding our payment for the review of the Application. As you know, the Waukesha Water Utility approved the payment at its water commission meeting on June 24, 2010 and payment was made to the DNR the following day. This payment has since been returned to the City by the DNR. Attached with this letter is payment for review of the Application.

On behalf of the City of Waukesha Common Council, we consider the Great Lakes Water Supply Application complete and request that the DNR proceed to perform its duties in accordance with the law and promptly review and process this Application. Please contact Daniel Duchniak at (262) 521-5272 ext. 518 and Mayor Jeff Scrima at 262-524-3700, if you have any comments, questions or need further information. We look forward to working with the DNR as the City's Application goes through the extensive and complete review process that is necessary to advance our Application.

Passed by the Common Council by a vote of 13 for and 1 against, said Council having authorized its signature by Common Council President Paul Ybarra this 27th day of July, 2010:

Sincerely,



City of Waukesha  
Common Council President  
Paul R. Ybarra

Enc.

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IN THE OFFICE OF THE CLERK OF THE CITY OF WAUKESHA, COUNTY OF WAUKESHA, STATE OF WISCONSIN

I, THOMAS E. NEILL, Clerk of the City of Waukesha, of the County of Waukesha, of the State of Wisconsin do hereby certify that the attached photocopy of an excerpt of the Minutes of the Common Council, pages 3 through 8, for the meeting held Tuesday, April 8, 2010 has been compared by me with the original on file in my office as Clerk of said City of Waukesha, and that the same are true and correct copies of the originals, as the same now remains on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said City of Waukesha, in said County and State this 26<sup>th</sup> day of July, 2010.

*Thomas E. Neill*

Thomas E. Neill, Clerk/Treasurer  
of the City of Waukesha,  
of the County of Waukesha,  
of the State of Wisconsin



**VI. New Business****A. Consideration of and possible action on Great Lakes Water Application**

Dan Duchniak, General Manager of the Waukesha Water Utility, gave an overview of the history of the water issue and the alternatives that have been studied.

Ald. Cummings asked, with the first scenario, was the impact he referred to was to the residents to the Vernon area? Would their wells be at risk and would the Vernon Marsh be at risk with the first scenario?

Mr. Duchniak said there would be impacts to the aquifer or to the Vernon Marsh area. He said he didn't know how many wells would be impacted. He said that is where the contingency would come in. He said they would provide well guarantees to the residents under that scenario. He said there would be environmental impacts to the Vernon Marsh under any scenario that they go and develop wells in that area. He said they look to minimize those impacts.

Ald. Cummings asked, of the three scenarios, did the third one have the least impact?

Mr. Duchniak said when they developed their alternatives and their final costs, they looked at spreading the wells out to minimize the environmental impact.

Ald. Cummings asked if the shallow wells are already contaminated.

Mr. Duchniak said they have an iron and manganese treatment facility that they've constructed for wells 11 and 12 where they remove iron and manganese from the shallow wells. In the Lathers Well where they do their testing, arsenic was found in those wells. He said they'd have to provide arsenic removal as well.

Ald. Tortomasi asked if arsenic is a common well item that has to be treated in many wells.

Mr. Duchniak said there are a lot of arsenic treatment plants throughout the country. It's not unusual and it's treatable.

Ald. Francoeur said she spoke to a resident about a few issues. She said she noticed in the application that should they receive water from Lake Michigan, that it would not require a softening by an individual homeowner.

Mr. Duchniak said that is correct.

Ald. Francocur said a homeowner who is worried about the implication to them financially because of the increase in the Water Utility bill, at least initially will be able to subtract the amount of money that they may be spending today on water softener products and equipment.

Mr. Duchniak said that is correct. He said that would be a choice of the homeowner. He said sometimes homeowners are used to having really soft water and they want to maintain their water softener to maintain a really soft water quality. He said the people that currently live in the Great Lakes basin do not have water softeners.

Ald. Vitale said all they are doing tonight is filing a request to receive the water from Lake Michigan. He said they won't be determining where they are going to get the water or if they are going to get Lake Michigan water. They are just getting permission to do that if they wanted too.

Mr. Duchniak said that is correct.

Ald. Vitale asked, if things go ahead on this, are their existing wells going to be capped?

Mr. Duchniak said the proposal is that the existing deep aquifer wells would be capped and they would maintain the shallow aquifer wells as a redundant backup supply.

Ald. Vitale asked what if the pipe were to suffer a break and what if they were to have a fire and a million gallons were used? What would then do if this occurred and they had a break in the pipe? Where would the water come from?

Mr. Duchniak said the Waukesha Water Utility is blessed to have 18,000,000 gallons of storage in their system. He said they would also have their shallow wells as their redundant backup supply. He said in the event that would happen they have an emergency response plan that would be adjusted if they had the water supply developed, and they would develop emergency conservation measures or water restrictions in the event that there was catastrophic failure with the line. While they repaired that line, they would have the wells and the storage that exists within their system to be able to have the capacity to fight the fires.

Ald. Vitale asked if they could be penalized by the DNR, even though they get permission to take the water out of the lake, and not do it? He asked, what if a new type of treatment comes along in the future and they decide to take the water out of the deep aquifer and treat it?

Mr. Duchniak said they are not looking for that tonight. He said they are looking for approval to move forward and start the process. At the end of the process, the Common Council will have to decide whether they will move forward with the Great Lake option or the other option if it's available to them.

Ald. Duchniak said the water would be from one of the three suppliers that were identified.

Ald. Vitale asked about the Milwaukee water.

Mr. Duchniak said they would build a booster pump station that will pull the water from Milwaukee supply lines and pump it to the City of Waukesha.

Ald. Vitale said he thought there should be an inflation factor on this.

Mr. Duchniak said inflation factors are built into the annual operating costs.

Ald. Thieme said he fielded a lot of calls this week and one of the constant concerns is a faulty application.

Mr. Duchniak said they have a number of attorneys, including the City Attorney, that are going through the document and looking at the applicable laws and how they apply to the application. He said they are also going to be submitting the application to the DNR. He said the DNR won't open it up for public comment until they believe it's complete. He said the motion in front of them tonight has the understanding that there is going to be an iterative process. He said the DNR may request additional information from them. He said once the DNR looks at it and deems it as complete, they are the ones that are interpreting the law and interpreting whether it's complete and is moving forward. He said they met with the DNR and they provided them with guidance as to the layout of the application and the information that needs to be provided. He said if they submit the application tonight, their work is not done. It means they will be submitting the application and working with the DNR to get them to get it complete. Once the DNR has it as complete, the DNR will put it out for ninety day public comment. He said they have the DNR's assurances that they will work through them to get through that process, so the City can move through the process as quickly as possible. He said they are here tonight because of a court order that the DNR has put them under.

Ald. Ybarra asked about the Root River return route.

Mr. Duchniak said they looked at the Root River and Underwood Creek. There are a lot of similarities between the two. He said they had a lot more information available for Underwood Creek. He said they looked at the cost effective analysis that the DNR looks at for discharge permits and they focused on Underwood Creek because they had information available and it was the most cost effective alternative. He said they have information on the Root River and if the DNR requests them to get additional information on the Root River, they will do it as part of the process.

Ald. Ybarra asked if this gets approval today to submit, when would this come back in front of the Council for additional information?

Mr. Duchniak said they developed a very aggressive timeline in terms of their final compliance date. Their final compliance date is June 30, 2018. They looked at a five year period for construction and they looked at beginning that five year period in January of 2011. He said they have an eighteen month buffer built in. He said they looked at by January 2011 to come to the Common Council and have those final decisions made. He said time is of the essence here because they only have eighteen months at the end.

Ald. Ybarra said there's state ground water legislation being proposed, specifically a bill from Senator Miller and State Representative Black that would make it more difficult to develop shallow and deep well options. (State Senate Bill 620 and Assembly Bill 844)

Mr. Duchniak said there is some proposed legislation. He reminded the Council that they are in a groundwater management area. There are only two in the State. He said special conditions are put on them because of that. He said the Act they are proposing would repeal the groundwater management area, so they would not be in a groundwater management area, but the criteria that they have would put them right back into one. He said they looked at the confined aquifer groundwater management area and an unconfined aquifer groundwater management area. He said there would be a number of requirements in the proposed bill. He said they are looking at not only having sustainable withdrawal from the groundwater, but actually recovering to the point where they'd only have 150 feet of draw down. He said the DNR would project what they'd have to do to get to that 150 feet of draw down. He said they would put the onus on the County to develop a plan. The County would put together a committee and then form a plan on how to accomplish that. He said one key important element of the bill is that the DNR can go back retroactively and review your well permits and restrict them, or rescind them, and re-permit them. He said right now they have adequate capacity. He said if the DNR comes through and they say -- that 3.5 million gallon a day well that you have for Well No. 10, we are going to take that down to 1,000,000 gallons a day because that is all that's sustainable, they'd have to live within that 1,000,000 gallons a day and they'd have to develop additional well water supplies that are sustainable. He said there are a number of other things associated with the bill that are of concern and that would limit their ability to develop wells in the future. He said it may or may not pass. He said it's an indicator of things that are going to come. He said there is going to be more pressure on the groundwater and more pressure to preserve that groundwater.

Ald. Ybarra asked if today's vote means Lake Michigan water will be the only option they explore.

Mr. Duchniak replied no.

Ald. Ybarra asked if this locks them in to Lake Michigan water.

Mr. Duchniak replied no.

Ald. Ybarra said if they approve this today to continue discovery, and they get details and specific rates for water and construction costs, will it still come back to Council for a vote.

Mr. Duchniak replied yes.

Ald. Ybarra asked, if they don't like the details because they are too expensive, can they say no?

Mr. Duchniak replied yes.

Ald. Ybarra asked, if one community is making unrealistic requests, can they still say no?

Mr. Duchniak replied yes.

Ald. Pieper referred to the costs of the various alternatives. He wanted to confirm that the cost of treatment for the non Lake Michigan Water is included in the annual operation costs.

Mr. Duchniak replied yes.

Ald. Pieper said he's getting a lot of questions about what do we know about these other communities that are interested in selling us water if Lake Michigan is the option that they choose. He said they should begin some type of educational process for the public to better educate the Council and the public about the three utilities who have proposed that they would be interested in selling them water, the history of those utilities, the quality of water, some background on how they treat water, and problems they've had and how they've been rectified.

Mr. Duchniak said he'd be happy to provide that information.

Ald. Furrer asked about the meeting in Wauwatosa.

Mr. Duchniak said there was a lot of participation at the meeting. He said they wanted to find out about the project and how they would be impacted. He said they were most concerned about what would happen under flooding conditions. He said they explained to them that their proposal is they would monitor the flow in Underwood Creek and in those streams. He said the

fourth alternative was Great Lakes and groundwater supply. He said there's a requirement in the compact to minimize auto basin water. He said they wouldn't be able to meet that requirement if they were going to utilize Great Lakes supply and a groundwater supply. That was included in the application.

Ald. Furrer said they picked Wauwatosa because it's a likely avenue of our return flow, which is required under the Compact.

Mr. Duchniak said there were some concerns about the wastewater effluent (the treated wastewater) coming through their community.

Ald. Furrer asked what if their cost estimate turned out to be skewed and it turned out that the \$164,000,000 was the local treatment of their resources in Waukesha, and just outside their borders, and the higher estimates were to the Lake Michigan option?

Mr. Duchniak said, as an environmental engineer, if the cost estimates were reversed and the lower option was the groundwater option, in looking out for the best interest of long-term sustainable water supply for the City of Waukesha, he would be recommending that they still look at the Great Lakes Option as their long-term viable source because it is sustainable. He said his concern would be he doesn't want to pay for it twice.

Ald. Furrer said 18,000,000 gallons a day are upper end. He questioned if year 2035 was the estimate. He asked how that was arrived at.

Mr. Duchniak said they use 2050 as out there in the future for the ultimate population, but it could be out there further. He said while they ask for 10.9 million gallons average day, in 18.5 million gallons max day, it's important to realize that when ultimately, if they get an approval, the DNR is going to look at a twenty year planning period. He said part of their application is a water supply facility plan and a wastewater facility plan. He said the with the water supply facility plan, they will look at a twenty year planning period. He said even though they have an approval, that would give them 10.9 million gallons a day on an average day and 18.5 million gallons a day on a max day, they will look at the twenty year planning period and will say "Waukesha, for the next 20 years, you only need 9.1 mgd and 13 mgd". They'll say "Come back in 20 years and we'll revisit it and we'll see where we go from there". He said the number came from the projections they had for the ultimate population of that service area. Then they took the gallons per capita per day and did the math and they incorporated conservation. He said even though they have that number, it's important to remember that the DNR is going to look at that over a twenty year planning period and have the approvals based off of that.

Ald. Furrer said if a Utility agrees to supply them water, we draw it, they supply it. He questioned if they would get last service if they should decide or need to pay for above that estimate.

Mr. Duchniak said when they come to the Common Council, they would look to negotiate terms for a contract on a volume and a price, and whatever direction the Common Council gives them. With regards to volume, he said they'd look to negotiate volume for their max day. He said they have the luxury in Waukesha of having the storage available. He said they look at that peak demand that you will take and the volume that's going through that pipe at any given minute. He said many times, they restrict that volume on peak hour totals. He said if they have a fire and something catastrophic happens, they have that storage available. They have that same storage available if there's a peaking event (drought where there's a lot of watering going on and then there's a fire) where rather than having to pull that volume from Milwaukee, Oak Creek, or Racine, we would be able to pull that volume from our storage.

Ald. Furrer said he thinks there's some cynicism about the upper end limit that Fox Head Brewer is going to open back up and start trucks rolling with Waukesha water in them. He asked if that is something he is aware of.

Mr. Duchniak said that is another adjustment they made in the document. He said when they look at the projections and conservation, and what their ultimate peak day would be, they also looked at the economic conditions they are under right now. They looked at the loss of industry, and what happens if that industry comes back. He said they didn't want to put the City in the position where they could not accept an employer because they didn't have the volume. He said when they looked at what their projections would be, they were a little bit more conservative because they have an average day and a max day and conservation. He said they know there will be additional conservation. He said they've seen industry drop out. He said they tried to balance that out by using a longer period of time in doing their projections and looking at what that industrial growth would be, so when they make their request for water, they wouldn't be

prohibited from entertaining a business opening up that would use more water.

City Administrator, Lori Curtis Luther, said there is no known high water use industry or other that the Council is aware of that is looking to receive water as a part of this.

Ald. Cummings asked if they should be concerned about the bill in Madison.

Mr. Duchniak said they have been monitoring the progress of that bill. He said their Water Association is monitoring the legislation.

Ald. Cummings said in the future, she'd like to see it reported to the Council as far as where they stand on the bill. She asked if there is science and technology available that addresses the treatment and removal of drugs.

Mr. Duchniak said they have been able to detect pharmaceuticals in Great Lakes water and also in shallow water. He said pharmaceuticals have been detected in shallow water from the Wastewater Treatment effluent to septic systems providing water to there. One of the best defenses they have against pharmaceuticals is ozone.

Ald. Cummings said Wisconsin is along a fault line. She asked if the fault line plays a factor.

Mr. Duchniak said he does not know.

Ald. Cummings said if they lay out all this pipe and there is a problem, that might impact their return flow.

Mr. Duchniak said they design for that.

Ald. Vitale asked how much is left in the aquifer after the 600 feet that they've already used.

Mr. Duchniak said they have wells that are as deep as 1,800 to 2,000 feet. He said they draw water around 800 feet deep.

Ald. Vitale said if they were to go with Lake Michigan water through one of the communities that would mean that whatever is left would be available for other communities.

Mr. Duchniak said yes, however he must remember that other communities are dealing with the radium issue. He said around 33,000,000 gallons/day are pulled from the deep aquifer. He said the City pulls around 6.8 million gallons/day.

Ald. Vitale asked what Mr. Duchniak meant when he said they are returning treated water. He asked if the water they treat now goes back to the Fox River.

Mr. Duchniak replied yes. He said they would be looking for that water that goes through their Wastewater Treatment Plant, instead of going back to the Fox River, it would go back to Underwood Creek or to a tributary to the Great Lakes.

Ald. Vitale asked about the hardness of the water.

Mr. Duchniak said under the scenario where they received Great Lakes Water, you would not be required to have a water softener.

Ald. Vitale asked Mr. Duchniak to explain why they don't have to worry about cryptosporidium.

Mr. Duchniak said they have the person on their consulting team that led the effort to resolve the issue for the City of Milwaukee. He said he was the one that was instrumental in designing the system that took care of the cryptosporidium that Milwaukee implemented. Milwaukee has an ozone system. He said regulations are more stringent now, which make water utilities more accountable and make them put in second barriers and look at other contaminants.

**Motion** – Ald. Tortomasi moved, second of Ald. Bull to approve submission of the draft Great Lakes Water Application to the State of Wisconsin Department of Natural Resources, as provided under 2007 Act 227 of the Great Lakes Compact Implementation Law, subject to non-substantive or organizational changes, with the understanding that modification or additional information may also be required an anticipated part of the application process.

Ald. Tortomasi said the application has changed greatly from the original draft. He said there are now twenty-eight more items in it and eleven more exhibits. The motion says there may be more. He said the first cost estimate the Council got was February 24, 2009 in the amount of \$174,000,000 for Great Lakes Water. He said they had estimates on five other options that ranged up to \$470,000,000. The first primary draft application was presented to the Council on October 12, 2009. He said the fourth water supply option was added to the application that wasn't in there previously. The comments of citizens and the Common Council were taken into consideration and they have been addressed in the application. An explanation of the population projections for 2035 has been added in more detail. Graphics were revised, making technical information more readily understandable. He said they talked about sewage treatment. He said they are not putting sewage into the Underwood Creek. They are putting treated water from their Wastewater Treatment Plant, the same water that goes in the Fox River. Over 1,000,000 people drink Milwaukee water every day and it's been rated as one of the best water quality in the United States. He said the document has been put together with assistance from the DNR. It has been revised after the DNR looked at the preliminary draft and made suggestions. There may be more revisions. He said to not move the application forward would be a disservice to the citizens. It is not a commitment, but a process in the exploratory field of determining what is the best water source.

Ald. Radish thanked Mr. Duchniak for his hard work regarding this issue.

Ald. Bull said she's supporting this because she doesn't want to build an expensive infrastructure twice. She said they want to have adequate supply so they only build the pipeline once. She said they've been told you cannot conserve your way out of this. She said they are going to need this source of water. She said there is water in the aquifer, but it's not a very good quality. It costs a lot of money to get it up to the surface.

**Substitute Motion** – Ald. Payne moved, second of Ald. Cummings to amend to place the item on hold until the May 18<sup>th</sup> Common Council Meeting.

Ald. Payne said he didn't have a problem with the application or the process they've done to get this far. He said he's asking for this because at the next Common Council Meeting, they'll have three new alderpersons and a new mayor. He said the new alderpersons will have input and will vote on this for the next three years. He said they should have a say regarding the application. He said they should be given the opportunity to meet with staff and be brought up to date and to go over the document.

Ald. Francoeur, Pieper, Furrer, Ybarra, Radish, Vitale, Waldenberger & Lichtie spoke against the substitute motion.

**Voting on substitute motion defeated** by majority roll call vote (Aye – Ald. Cummings & Payne).

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Ald. Francoeur said she's comfortable with the wording of the motion. She said it affirms their need to explore a solution, and at the same time gives them the flexibility they need in acting through a first of a kind process.

Ald. Pieper said they've all had an opportunity to really dive into this agreement. He's spoken to constituents and staff. He said it's simply a step in the process of reviewing one of four alternatives. He said he's comfortable with the document and the process.

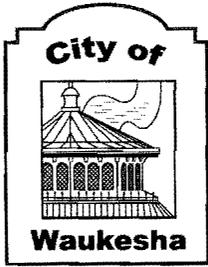
Ald. Cummings said she's gotten her questions answered regarding the draft application. She said she's prepared to take a vote tonight.

Ald. Vitale said he would support it because this gives them another option to work with.

**Voting on motion** carried by majority roll call vote (Nay – Ald. Payne).

- B. **A motion will be made to convene in closed session pursuant to sec. 19.85(1)(g), Wis. Stats., for the purpose of conferring with legal counsel concerning worker's compensation litigation (*Dalhoe v. City of Waukesha and McGavock v. City of Waukesha*).**

**Motion** – Ald. Radish moved, second of Ald. Tortomasi and unanimous roll call vote to convene in closed session pursuant to sec. 19.85(1)(g), Wis. Stats., for the purpose of conferring with legal counsel concerning worker's compensation litigation. Time: 10:00 p.m.



## OFFICE OF THE CITY ATTORNEY

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ANNE MARIE ISELIN  
ASSISTANT CITY ATTORNEY

# MEMORANDUM

TO: Lori Luther, City Administrator  
FROM: Curt R. Meitz, City Attorney  
RE: Council procedure  
DATE: July 22, 2010

You have requested this office to explain the corporate authority of a mayor-council form of government under Wisconsin law.

Chapter 62 of the Wisconsin Statutes describes the basic structure of the mayor-council form of city government. The corporate authority with the City is vested in the Common Council, which consists of the mayor and alderpersons. The mayor presides at meetings of the Council, can vote in the case of a tie, and has the veto power over most actions of the Common Council, subject to the members overriding the veto by a two-thirds vote.

Generally speaking, the Council has the power to act for the government and good order of the city, for its commercial benefit, and for the health, safety and welfare of the public. The State confers upon the Common Council the management and control of city property, finances, highways, navigable waters, and the public service. See sec. 62.11(5), Wis. Stats.

The mayor may, from time to time, provide the Council with information and recommend measures as the mayor may deem advantageous to the City. See sec. 62.09(8)(b), Wis. Stats. However, it is only the Common Council, by formally taking action, which establishes the direction and policy of the City. No one person, including the mayor, has the authority to unilaterally change the policy of the City once formally adopted by the Common Council.

CRM/sp



## Review of Water Supply Alternatives

PREPARED FOR: Waukesha Water Utility  
PREPARED BY: CH2M HILL<sup>1</sup>  
DATE: July 26, 2010

### Purpose

The City of Waukesha is applying for Great lakes water in accordance with the Great Lakes-St. Lawrence River Basin Water Resources Compact (Compact) and the Wisconsin Compact implementing statute (§ 281.346 and 281.348, Wis. Stats.). The *Application for Lake Michigan Water Supply* (May 2010) submitted by the City of Waukesha provides detailed information and analysis of water supply alternatives. This memorandum summarizes facts from the Application and presents supplemental information and analysis on a Waukesha water supply alternative using a combination of water sources.

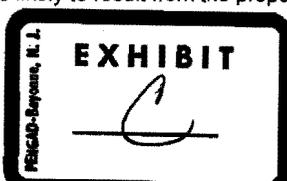
### Previous Water Supply Studies

Water resources in the Waukesha area have been studied extensively over the past several decades by the United States Geological Survey (USGS), Wisconsin Department of Natural Resources (WDNR), Southeastern Wisconsin Regional Planning Commission (SEWRPC), universities, engineers, scientists and planners.

In 2002, the Waukesha Water Utility completed a study with CH2M HILL and Ruckert & Mielke on future water supply. This study objectively evaluated a broad range of water supply alternatives to identify the most sustainable source of high quality drinking water for the long-term future. All the alternatives were evaluated openly by a broad spectrum of experts and stakeholders using applicable and appropriate criteria including reliability, regulatory impacts, legal implications, schedule and cost. There were no fore-gone conclusions during the analysis. Several water supply alternatives did not provide an adequate<sup>2</sup> supply of sustainable, high quality water and were not recommended. The study recommended further investigation of two water supplies - Lake Michigan and the shallow aquifer near Waukesha. At the time of the study, the Compact was not yet written and requirements for obtaining Lake Michigan water were not defined. Similarly, the environmental and legal impacts of pumping shallow groundwater near Waukesha were not defined. The study stated that "the current water supply situation is not critical", meaning that a new water supply did not have to be implemented immediately and

<sup>1</sup> CH2M HILL is an international engineering consulting company with over 23,000 employees in 175 offices covering 70 countries. With over \$6 billion in revenue, they were rated as the number 1 firm in Water Supply and Treatment by Engineering News Record in 2009. CH2M HILL has completed thousands of water supply and treatment studies in dozens of countries around the world. CH2M HILL was one of only 99 companies globally selected by an independent organization ([www.ethisphere.com](http://www.ethisphere.com)) for advancements in best practices in business ethics and corporate social responsibility.

<sup>2</sup> Economically and environmentally sustainable to meet reasonable water supply demands in quantity and quality, is protective of public health, is available at a reasonable cost, and does not have adverse environmental impacts greater than those likely to result from the proposed diversion.



Waukesha had time to determine requirements for a Lake Michigan supply and investigate environmental and legal aspects of developing a shallow aquifer supply. The following sentence in the Study stated "However, now is a prudent time to take proactive action and plan for the future." Since completion of the Future Water Supply report in 2002, requirements for a Lake Michigan water supply have been defined by the Compact, new laws have been implemented to further protect groundwater supplies in Wisconsin, a number of legal cases involving pumping groundwater for public water supply have been decided and the potential environmental impacts of using shallow groundwater have been further investigated and documented in Waukesha's Application for Lake Michigan Water. These regulatory, legal and scientific developments were used to objectively compare the water supply alternatives in the *Application for Lake Michigan Water Supply*.

After 5 years of study, SEWRPC drafted *A Regional Water Supply Plan for Southeastern Wisconsin* in 2008. This comprehensive study considered the body of scientific information available to evaluate water supply alternatives for Southeastern Wisconsin. The study concluded that the Lake Michigan water supply alternative for the City of Waukesha was the best alternative considering long term sustainability, protection of public health, economic and efficient systems and minimizing adverse environmental impacts to groundwater and surface water resources in the region. This conclusion was reviewed, and gained concurrence from 32 experts with a variety of interests and perspectives in the region.

### **Application for Lake Michigan Water Supply**

The *Application for Lake Michigan Water Supply* summarized previous studies on water resources near the City of Waukesha, and evaluated water supply alternatives in more detail, specifically for a City of Waukesha water supply. The Compact requires that a community within a straddling county (i.e. City of Waukesha) applying for a diversion must have no *reasonable* water supply alternative within the basin in which the community is located (Article 4, Section 4.9.3.d). Reasonable water supply alternative is defined as "a water supply alternative that is similar in cost to, and as environmentally sustainable and protective of public health as the proposed new or increased diversion and that does not have greater adverse environmental impacts than the proposed new or increased diversion" (Wis. Stat. § 281.346(1)(ps)).

The major conclusions from Waukesha's Application on water supplies are as follows:

- **Deep Aquifer – Within City of Waukesha.** The deep aquifer is being mined. Water is being withdrawn faster than it can be replenished. The evidence of this situation is the extensive drawdown of the aquifer. Groundwater modeling demonstrates that the extensive drawdown of the deep aquifer adversely impacts other water resources and ecosystems by diverting water toward deep aquifer pumping centers. Continued or expanded use of the deep aquifer is not sustainable. The Wisconsin Legislature has designated Waukesha County as a groundwater management area due to concerns about adverse environmental impacts of the current deep aquifer drawdown (2003 Wisconsin Act 310). One hundred fifty feet of drawdown is the trigger for a groundwater management area and Waukesha has over 600 feet of drawdown. WDNR will not allow Waukesha or any other Wisconsin community to completely deplete the aquifer, and could curtail its use now. Deep aquifer groundwater also exceeds radium

regulations and water quality deteriorates with depth. The deep aquifer is also susceptible to contamination. Several of Waukesha's deep wells are not in use today due to contamination. The deep aquifer is not as environmentally sustainable nor protective of public health as a Lake Michigan supply. Therefore, it is not a reasonable long-term source of drinking water.

- **Shallow Aquifer South of the City of Waukesha.** The shallow aquifer near Waukesha is providing a small portion of the City's current water supply. Groundwater modeling indicates continued and expanded pumping of the shallow aquifer near the City of Waukesha will cause significant groundwater drawdown and environmental harm to wetlands and cold water trout streams. WDNR considers these factors when deciding whether or not to permit new wells (2003 Wisconsin Act 310). The shallow aquifer is not in the Waukesha City limits, making wellhead protection for public health difficult and subjecting the City of Waukesha to lawsuits over environmental harm and adverse impacts to private and municipal wells or surface water bodies. Other similar lawsuits have already arisen in Wisconsin. The shallow aquifer is also more susceptible to contamination than the deep aquifer or Lake Michigan, and not as protective of public health. The shallow aquifer is not a reasonable or reliable long-term source of drinking water.
- **Deep Unconfined Aquifer West of the City of Waukesha.** The deep unconfined aquifer west of Waukesha has similar environmental, public health and legal concerns as the shallow aquifer. However, because it is even farther from the Waukesha City limits the environmental and legal issues, as well as construction and operation/ maintenance costs, will be greater. This alternative was ranked low during the Future Water Supply study because of adverse environmental impacts, impacts to other water users, potential lawsuits and high costs. Since that time, the concerns over environmental impacts and lawsuits have become much greater due to new groundwater laws and lawsuits filed in court over groundwater pumping.
- **Surface Water - Quarries North of the City of Waukesha.** Potential surface water supplies north of the City of Waukesha include three active stone quarries (Payne and Dolan, Vulcan Materials Co. and Halquist Stone Co. quarries). The Payne and Dolan quarry was reported to provide about 2 million gallons per day (mgd) of water in the 2002 Future Water Supply report. However, recent pumping information indicates that only about 0.7 mgd is now available from this quarry. Less water would be available from all quarries during a drought since some of the water comes from rainfall. These quarries are owned and operated by private companies and not planned for future drinking water use. Even if Waukesha were able to purchase the quarries or obtain use of their water, there are significant water quality and public health concerns. Quarry operations use a number of drinking water contaminants such as fuels and solvents that contaminate groundwater. There are numerous potential contamination sources near the quarries that could risk public health. Also, urban runoff (stormwater) has the potential for carrying contaminants into the quarries. Supplementing quarry water with water directly from the Fox River may increase the quantity of water available, but the water quality, public health and regulatory concerns increase. Storing river water in a quarry would cause stagnation and adverse water quality impacts such as algae growth, lack of oxygen and release of undesirable compounds such as iron, manganese and hydrogen sulfide that

can cause “rotten egg” odors in the water. In addition, there are regulatory and environmental issues with injecting surface water into a groundwater source. To potentially develop this water supply source, the permitting process would be extensive because there are no other drinking water quarry supplies in the State. The concerns, unknowns and risks associated with this source make it an unreasonable water supply.

- **Surface Water - Fox River Alluvium South of the City of Waukesha.** Another surface water supply near the City of Waukesha is the Fox River alluvium (an aquifer near the Fox River where wells can extract both Fox River and groundwater). The Fox River alluvium is part of the shallow aquifer and pumping this source has similar adverse environmental impacts, public health contamination and legal concerns described previously. This water source was modeled and evaluated in the Application, along with the shallow aquifer. Water could also be obtained directly from the Fox River. This water supply is limited during drought periods (see Future Water Supply study), and a high percentage of the flow would be wastewater plant discharge. This causes both water quantity and water quality concerns. There are no drinking water supplies from the Fox River in the State, and approval from WDNR would be required. Using the Fox River as a drinking water source could also increase the wastewater treatment requirements and costs for all the wastewater plants that discharge into the Fox River. The surface water supplies near the City of Waukesha (Quarries and Fox River) are not reliable or protective of public health, and using them can cause more adverse environmental impacts than a Lake Michigan supply. They are not reasonable water supply alternatives.
- **Great Lakes Water.** A Lake Michigan water supply provides Waukesha with the most reliable, sustainable source of high quality drinking water, and the least adverse environmental impacts. Lake Michigan water would be recycled back to it’s source, making it fully sustainable, drought proof and reliable for the foreseeable future. By not having to rely on deep or shallow aquifers, quarries or the Fox River, the environmental, public health and legal issues associated with those supplies are eliminated. Furthermore, a Lake Michigan supply provides a positive environmental impact by restoring natural groundwater flows toward, rather than away from the Great Lakes basin. Compared to the other water supply alternatives, Lake Michigan is the only reasonable water supply.
- **Increased Water Conservation.** Water conservation is a key water supply component. Waukesha leads the State in water conservation implementation and has already reduced its water demand significantly. Water conservation will continue into the future and is projected to save another 1mgd. These savings in water use have already been factored into the future water demand projections in the Application. Although conservation helps reduce the amount of water required, additional water is still required to safely meet both current and future water demands.
- **Rainwater Infiltration.** Land can be modified to attempt to increase rainwater infiltration and supplement shallow aquifers. SEWRPC evaluated this in the Regional Water Supply Plan. Modifying over 265 acres over the entire Waukesha county would only increase infiltration by about 1.4 mgd. Although this may be part of a larger scale

water management program, it would be costly, difficult to implement and not provide significant water for a municipal water supply.

## Community Water Supply Planning Requirements

Community water supplies are planned for the long-term (50 years or more) and must use reliable, sustainable water sources. Failing to invest in water supply infrastructure that serves a community for the long term results in paying for water supply development twice – the second investment coming due when water sources are depleted or cannot be accessed due to regulations or lawsuits. Water supply planners and designers must also comply with codes written by WDNR and other governing bodies. One such code requires a water supply to meet maximum day water demands 100 percent of the time with the largest well or pump out of service (NR 811). This protects against inevitable equipment failure and provides the needed water for drinking, businesses, and fire protection. Waukesha and every water utility have experienced equipment failures that have limited water production capacity. Not planning for an equipment failure or assuming that water demands will be met 95 percent of the time is not in compliance with codes and not responsible water system planning. Such a plan would not be approved by WDNR and therefore could not be implemented.

A main principal of public drinking water supply is to obtain the water supply source with the highest quality and most reliability. If the highest quality water supply does not have adequate quantity, the next highest quality water supply source is obtained. Using multiple sources of water is possible when necessary, but increases costs along with operational and maintenance complexity. In general, water utilities rarely have more than two primary water supply sources. Impacts to the environment can increase if unsustainable sources are used, and public health protection can decrease if lower quality water sources are used.

## Multiple Water Supply Sources

This alternative looks at combining water supply sources from continued use of the deep aquifer in the City of Waukesha (30 percent of average day demand), and other sources outside Waukesha including quarry water (25 percent), shallow aquifer and Fox River (25 percent) and the unconfined deep aquifer west of Waukesha (20 percent). This alternative also assumes that it is possible to reduce future average day water demand by 2 mgd through aggressive conservation efforts.

The sustainability, environmental impact, and public health issues with these water sources were discussed previously and detailed in the Application. Although adverse environmental impacts would be reduced if less water is drawn from each source, they would not be eliminated. Lawsuits based on environmental harm have been filed for water withdrawals much less than what Waukesha requires (i.e. *Lake Beulah Mgmt. Dist. v. Dep't of Nat. Res.*, No. 2008AP3170, 2010 WL 2383903, at ¶ 39 (Wis. Ct. App. June 16, 2010). The City of Waukesha's proposed expansion of their current shallow aquifer supply is already drawing opposition.

The cost of obtaining and treating water from five sources (deep aquifer, shallow aquifer, Fox River alluvium, quarries, west unconfined aquifer) is compared to the other water supply alternatives in Table 1, using the same cost criteria as the Application. This multiple water supply alternative would have a capital cost about 75 percent more than the Lake

Michigan alternative. In addition, operational complexity and operation/maintenance costs would be greatly increased because Waukesha would have to obtain and treat different water qualities and blend them to provide a consistent water quality to customers.

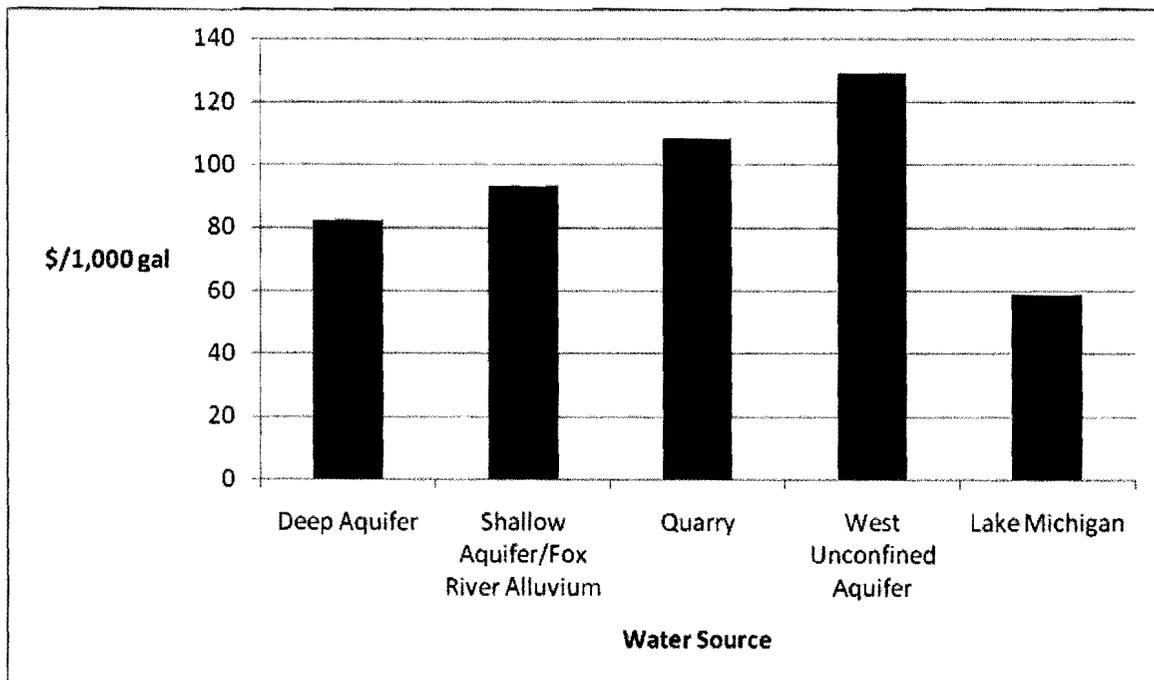
**TABLE 1**  
Water Supply Alternative Cost Estimates

Water Supply Alternative	Capital Cost <sup>a</sup> (\$ million)	Annual Operation/Maintenance Cost (\$ million)	20 yr. Present Worth Cost (\$ million, 6%)	50 yr. Present Worth Cost (\$ million, 6%)
Deep and shallow aquifers	189	7.2	272	302
Shallow aquifer and Fox River alluvium	184	7.4	269	301
Lake Michigan and Shallow Aquifer	238	7.5	324	356
Lake Michigan with return flow to Underwood creek	164	6.2	235	262
Deep, shallow aquifers, Fox River, quarries	286	7.6	373	406

<sup>a</sup>Includes direct construction cost, contractor administrative costs (insurance, bonds, supervision etc), 25% contingency, and costs for permitting, legal, engineering, administrative.

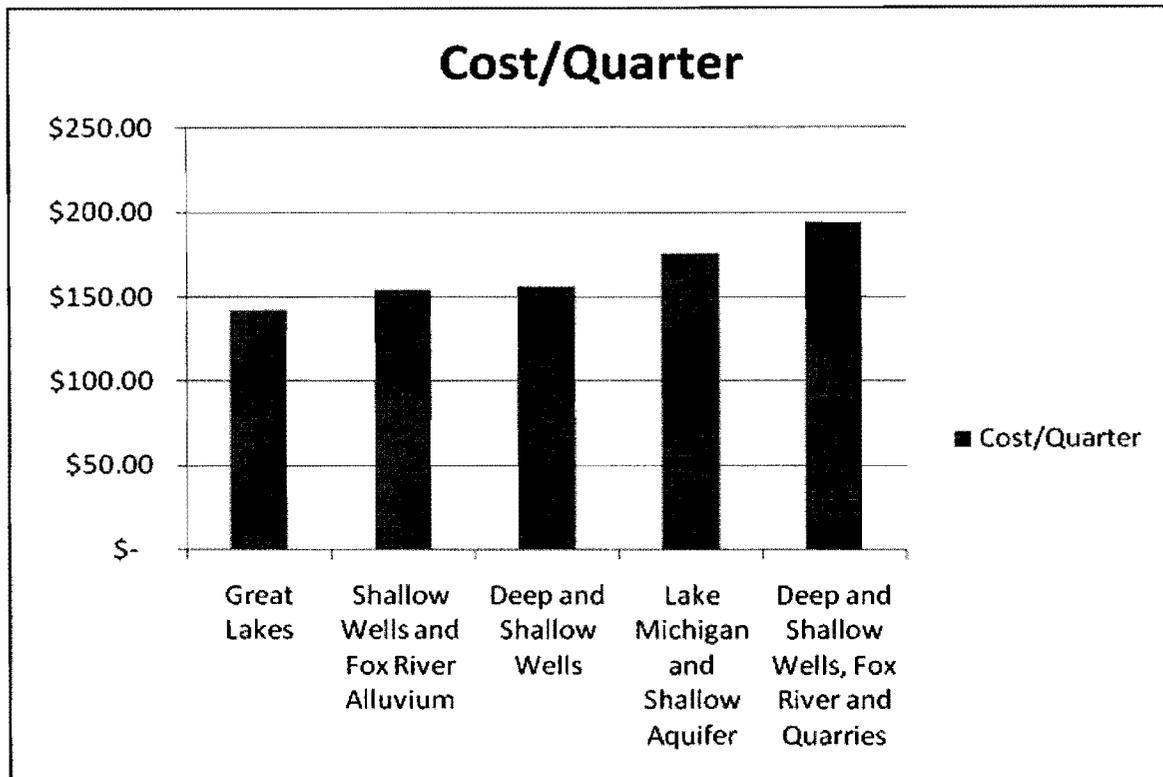
Figure 1 shows the cost per thousand gallons of water from each of the water supply sources in the multiple source alternative, and compares it to Lake Michigan costs. Lake Michigan is clearly the most economical water supply source.

**Figure 1 - Cost of Water Sources**



The impact on residential water rates from the water supply alternatives is shown in Figure 2. Again, Lake Michigan is the most economical water supply alternative. The multiple water source alternative is the most expensive.

Figure 2 – Residential Water Rate Impacts of Water Supply Alternatives



Using these multiple water supply sources provide less public health protection because the supplies are exposed to a number of contaminants over a wider area. Adverse impacts to the environment from using this water are still present, and Waukesha is still exposed to legal challenges due to continuing or increased adverse environmental impacts for using water outside their City limits (all these sources are outside Waukesha City limits except the deep aquifer). Even the deep aquifer wells in the City of Waukesha are subject to groundwater management area regulations and their use could be curtailed in the future. A comparison of this multiple water supply alternative to the other alternatives, using the same criteria evaluated in the Application (Table 2). The multiple water source alternative is the lowest ranked alternative. This water supply alternative, individually or in combination, is not a reasonable water supply alternatives in terms of adverse environmental impact, public health, sustainability and cost.

**TABLE 2**  
Comparison of Water Supply Alternatives

Water Supply Alternative	Environmental Impact	Long-Term Sustainability	Public Health	Implementability
Deep and shallow aquifers	●	●	⊙	●
Shallow aquifer and Fox River alluvium	●	●	⊙	●
Lake Michigan, deep and shallow aquifers	●	⊙	⊙	●
Lake Michigan	○	○	⊙	⊙
Deep, shallow aquifers, Fox River, quarries	●	●	●	●

○ No negative impact  
⊙ Minor negative impact

⊙ Moderate negative impact  
● Significant negative impact

## Conclusions

A detailed and scientific analysis of Waukesha's water supply alternatives, using criteria required by the Great Lakes Compact, applicable Wisconsin laws and national drinking water standards demonstrates that a Lake Michigan water supply is the only reasonable water supply alternative for the City of Waukesha (Wis. Stat. § 281.346(1)(ps)). It provides the most reliable, economically and environmentally sustainable long-term water supply to meet the reasonable demands for a safe potable water supply for the City of Waukesha. A Great Lakes water supply protects the environmental integrity of the Great Lakes basin ecosystem. A Lake Michigan water supply will result in termination of deep aquifer pumping which will restore the natural flow regime of the groundwater towards the Lake Michigan Basin instead of away from it. This will materially reduce the negative environmental impacts of using groundwater and improve the Great Lakes groundwater and surface water-related ecosystems.

This analysis also demonstrates that there is no reasonable water supply alternative to a Lake Michigan supply within the basin in which Waukesha is located. The groundwater, surface water and quarry water supply options near Waukesha have much greater negative environmental impacts than using Lake Michigan, are not sustainable long-term and are not as protective of public health.

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**EFFECT of LAKE BEULAH MANAGEMENT DISTRICT CASE  
on CITY OF WAUKESHA APPLICATION for GREAT LAKES WATER**

On June 16, 2010, the Wisconsin Court of Appeals issued a decision regarding the interplay between the public trust doctrine and the regulation of high capacity wells, especially when citizens or conservancy organizations perceive that a proposed well may have an adverse environmental affect on nearby navigable waters. *Lake Beulah Mgmt. Dist. v. Dep't of Nat. Res.*, No. 2008AP3170, 2010 WL 2383903, at ¶ 39 (Wis. Ct. App. June 16, 2010). Based on the public trust doctrine, the court concluded that the Wisconsin Department of Natural Resources (the "DNR") has a duty to consider information regarding a municipal water supply well's adverse environmental impact on wetlands and navigable surface waters. *Lake Beulah*, 2010 WL 2383903, at ¶ 1.

The Public Trust Doctrine. According to Wisconsin's public trust doctrine, the State holds its navigable waters in trust for the public. This ancient doctrine dates back to at least 530 A.D. and the Roman Empire's Institutes of Justinian, which proclaimed "[b]y the law of nature these things are common to all mankind – the air, running water, the sea, and consequently the shores of the sea." The doctrine was later incorporated into the Magna Carta (1215), the Northwest Ordinance (1787), and the Wisconsin Constitution (1848):

The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost, or duty therefor.<sup>1</sup>

Though the term "navigable waters" was not defined in either the Northwest Ordinance or the Wisconsin Constitution, courts have progressively interpreted "navigable waters" to include and the public trust doctrine to protect: streams of sufficient capacity to float logs to market, even when such capacity is not continuous (commerce)<sup>2</sup>; streams capable of floating any boat, skiff, or canoe of the shallowest draft used for recreational purposes (recreation)<sup>3</sup>; waters that

<sup>1</sup> Wisconsin Constitution, Sec. 1, art. IX.

<sup>2</sup> *Olson v. Merrill*, 42 Wis. 203, 212 (1877).

<sup>3</sup> *Diana Shooting Club v. Husting*, 156 Wis. 261, (1914).



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contribute to the public's right to enjoy natural scenic beauty<sup>4</sup>; the public's right to clean waters<sup>5</sup>; shoreland (because it has a special relationship with navigable waters)<sup>6</sup>; streams where artificial conditions created navigability and such conditions have existed for a period of time<sup>7</sup>; and, public, artificial waters that are directly and inseparably connected with natural, navigable waters.<sup>8</sup>

Despite these expansions of the doctrine's protections, reported cases previously have not applied the public trust doctrine to groundwater. Presumably, the navigability concept underlying the public trust doctrine may have prevented the Wisconsin Supreme Court and the Wisconsin Court of Appeals from applying the doctrine to groundwater, which is not navigable. However, increasing understanding of hydraulic continuity (*i.e.*, the interrelatedness of ground and surface waters) has spawned increasing calls for the doctrine to be applied to groundwater. The Wisconsin Court of Appeals has done just that in the *Lake Beulah* case.

The Lake Beulah Case. In 2003, the Village of East Troy (the "Village" or "East Troy") decided to add a fourth well ("Well # 7") to its municipal water supply to eliminate deficiencies and provide for future growth. The Village chose a site for the well about 1400 feet from the shores of Lake Beulah. After reviewing data and reports included in East Troy's application for the high capacity well, the DNR issued a permit, valid for two years, concluding that "[i]t is not believed that the proposed well will have an adverse effect on any nearby wells owned by another water utility" and the well "would avoid any serious disruption of groundwater discharge to Lake Beulah." 2010 WL 2383903, at ¶ 4.

The Lake Beulah Management District (the "LBMD") petitioned for a contested case hearing on the permit, alleging that the DNR failed to comply with its responsibility to protect navigable waters, groundwater, and the environment and that the DNR should independently consider environmental effects before granting the permit. *Id.* at ¶ 5. The DNR eventually granted a contested case hearing on the issue of whether it should have considered any potentially adverse effects "to the waters" when it granted conditional approval of the plans and specifications for Well #7. *Id.* at ¶¶ 5-6. The Village responded with a summary disposition motion, arguing that the DNR lacked statutory authority to consider environmental effects, because Well #7 was not located where statutes specifically

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<sup>4</sup> *Muench v. PSC*, 261 Wis. 492, 512, 53 N.W. 2d 514 (1952).

<sup>5</sup> *Reuter v. DNR*, 43 Wis. 2d 272, 168 N.W.2d 514 (1969).

<sup>6</sup> *Just v. Marinette County*, 201 N.W.2d 761, 768-69 (Wis. 1972).

<sup>7</sup> *DeGayner & Co. v. DNR*, 70 Wis. 2d 936 (1975).

<sup>8</sup> *Klingeisen v. DNR*, 163 Wis. 2d 921 (Ct. App. 1991).

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mandate environmental review prior to permit approval. *Id.* The ALJ granted the Village's motion, finding that the statute's requirement for the DNR to consider certain impacts excluded consideration of other factors. *Id.* at ¶ 7.

When the LBMD (and the Lake Beulah Protective and Improvement Association, collectively referred to as "LBMD") filed a petition for review of the 2003 permit, the DNR changed its previously held position on the matter and argued that the DNR has authority to consider the public trust doctrine in its analysis of high capacity well approvals and that it could condition or limit such an approval where operation of a well negatively impacts public rights in navigable waters.<sup>9</sup> Nevertheless, the circuit court dismissed the LBMD's petition and affirmed the ALJ's decision.

The LBMD then moved for reconsideration and filed the affidavit of a geologist who stated that Well #7 "would cause adverse environmental impacts to the wetland and navigable surface waters of Lake Beulah." *Id.* at ¶ 9. The circuit court denied LBMD's motion for reconsideration, and the Court of Appeals dismissed LBMD's appeal on the grounds that the 2003 permit expired and the DNR had already issued another permit (2005) for Well #7. *Id.* at ¶ 10.

Next, the LBMD filed a petition for review of the 2005 permit, restating many of its previously expressed concerns about the 2003 permit, including that the well would adversely affect the quantity of water available to maintain Lake Beulah's water level and that the DNR had failed to consider Well #7's effect on Lake Beulah. *Id.* at ¶ 12. The circuit court held that: the DNR had a right to consider the public trust doctrine to determine whether any high capacity well would negatively impact the waters of the State; the DNR should consider information solidly indicating that the waters of the state would be "significantly harmed" or "adverse[ly] affect[ed]"; and, "an absolute dearth of any proof" meant that the DNR did not fail to protect the waters of the state. Thus, the circuit court denied the petition, and the LBMD appealed. *Id.*

The Court of Appeals began its analysis by addressing the DNR's duty to investigate public trust doctrine concerns with regard to "middling wells" in light of the existence of two statutes that provide a broad, general grant of authority to the DNR and two statutes that create specific rules for high capacity wells. *Id.* at ¶ 17. The court interpreted the general statutes as expressly delegating regulatory authority to the DNR necessary to fulfill its mandatory duty "to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private" regardless of their lack of mention of "wells" and

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<sup>9</sup> Nevertheless, the DNR still believed that it had no duty to consider environmental impacts in this matter, because no one presented any evidence that operation of Well #7 would adversely impact Lake Beulah.

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explained that "wells have everything to do with waters of the state – they withdraw groundwater, one type of water which comprises the definition of waters of the state – therefore, the DNR necessarily has authority over them." *Id.* at ¶ 19. Moreover, because "the public trust doctrine is . . . an important and integral part of this state's constitution" and the legislature explicitly commanded that DNR authority be liberally construed in favor of protecting, maintaining and improving waters of the state, there must be some evidence that the legislature intended specific statutes to "render nugatory" the more general statutes (which bestowed upon DNR the general duty to manage the public trust). *Id.* at ¶ 25-26.

We therefore conclude that, just because the legislature was silent about the DNR's role with regard to some of the middling wells, this does not mean that the legislature meant to abrogate the DNR's authority to intercede where the public trust doctrine is affected . . . the DNR has the authority to become involved whenever it sees a public trust doctrine problem.

*Id.* at ¶ 27. Thus, the mandate that the DNR complete a formal environmental review for only certain wells does not prohibit or rescind the DNR's authority to review middling wells under Wisconsin Statutes sections 281.11 and 281.12: "the DNR's mission must be to protect waters of the state from potential threats caused by unsustainable levels of groundwater being withdrawn by a well, whatever type of well that may be." *Id.* at ¶ 28. Consequently, the court rejected the Village's contention that the DNR had no authority to act in the case.<sup>10</sup>

The court then left it to the DNR to determine the type and quantum of evidence that should prompt it to further investigate a well's adverse environmental impacts but noted that scientific evidence suggesting an adverse effect on waters of the state should be enough to warrant further investigation. *Id.* at 31.<sup>11</sup>

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<sup>10</sup> The court noted that the public trust doctrine does not have any self-executing language authorizing the DNR to do anything, rather, the statutes provide the DNR's authorization; therefore, there is no requirement that the DNR fully examine every well to determine if the public trust doctrine is affected. *Id.* at ¶ 30. However, the court clarified that it was neither suggesting that the DNR can ignore common law interpreting agency authority nor that the public trust doctrine has no bearing on interpretation of DNR's statutory authority. *Id.* at n.13.

<sup>11</sup> Though the court also rejected a contention that the DNR always has an affirmative obligation to consider a well's effect on the waters of the state regardless of whether the DNR is presented with any information suggesting that the well might have a negative effect" and the DNR's "public trust duty arises only when it has evidence suggesting that waters of the state may be affected by a well", *Id.* at ¶ 29, the court noted that "'scientific evidence' suggesting an adverse affect to waters of the state should be enough to warrant further, independent investigation." *Id.* at ¶ 31. Because the court held that the DNR misused its discretion to determine the comprehensiveness of an investigation, it reversed and remanded for further proceedings.

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On July 19, 2010, East Troy appealed the decision, asking the Wisconsin Supreme Court to clarify the scope of the DNR's authority to regulate high-capacity water wells. East Troy's counsel believes that the Court of Appeals' ruling gives the DNR "a breathtaking expansion of authority."

Implications for the Application. This decision could have a significant impact on the City of Waukesha's (the "City") ability to supply water to its citizens. Although the City's Application for Great Lakes Water (the "Application") concludes that a lake water supply is the only reasonable option available to the City, a vocal minority of commentators continue to lobby for other sources (individual or combined), such as: (i) using existing deep wells which draw radium-tainted water from a sandstone aquifer; (ii) installing more wells tapping into a shallow aquifer (including a few wells close to the bank of the Fox River that could pull water from the river); and (iii) drawing from one or more quarries which currently discharge water directly into the Fox River.

If the City abandons its pursuit of Lake Michigan water for any one or combination of these alternatives, and scientific information regarding its impact on water is provided to the DNR, the *Lake Beulah* case requires the DNR to consider whether the pumping of deep aquifer or shallow aquifer well(s) or the pumping of groundwater from quarries "would cause adverse environmental impacts to [nearby] wetland[s] and surface waters." *Id.* at 39. In the likely case that the answer is in the affirmative, the City could be required by WDNR to curtail or reduce its use of such a source, leaving the City in the precarious position of having an inadequate water supply. Based on the holding in the *Lake Beulah* case and the application of the Public Trust Doctrine to the facts of the City's current potable water supply sources and potable water supply alternatives available to the City, the City of Waukesha is without adequate supplies of potable water.