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TECHNICAL REPORT NUMBER 44

WATER SUPPLY LAW

Prepared by

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April 2007

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April 13, 2007

STATEMENT OF THE EXECUTIVE DIRECTOR

In any sound planning and engineering effort, it is necessary to investigate the legal as well as the physical and economic factors affecting the problem under consideration. This is particularly true at this time in the area of water supply given the current consideration by the State Legistature of the ratification of the Great Lakes Basin Compact agreed upon by the governors of the eight Great Lakes States in Milwaukee on December 13, 2005. This compact has important implications for water supply planning in this Region given its intended regulation of the diversion of Lake Michigan water across the subcontinental divide traversing the Region. Moreover, there are changes in groundwater regulations being developed under 2003 Wisconsin Act 310 which established the Groundwater Advisory Committee charged with making recommendations for additional regulation applicable to groundwater management issues. In addition, the Federal government, the Great Lakes region, the State of Wisconsin, local units of government, private property owners, and the public in general, all have an interest in water supply within the Southeastern Wisconsin Region. If the legal constraints bearing upon the planning or engineering problems are ignored during plan formulation, serious obstacles may be encountered during plan implementation.

In recognition of the importance of the water supply law, the Commission's Regional Water Supply Planning Advisory Committee concluded that an inventory of the legal framework governing the planning, engineering, financing, operation, and maintenance of water supply systems within the Region would be a needed component of the regional water supply planning effort currently underway. The plan to be produced by that effort is intended to identify the best means of providing and protecting the sustainable sources of water supply for the seven-county Region. The components of the planning program are outlined in a document entitled Regional Water Supply Planning Program Prospectus.

The inventory of the legal framework governing water supply was prepared by Attorney Lawrie J. Kobza of the law firm Boardman, Suhr, Curry & Field, LLP, and the findings of that inventory are presented herein as SEWRPC Technical Report No. 44, Water Supply Law. This report is one of three which document the results of the regional water supply planning effort. Another technical report documents the results of an inventory of the state-of-the-art of water supply practice. The third report is a Commission planning report setting forth the regional water supply plan.

The water supply law report will serve as a legal framework for the development of alternative and recommended water supply plans under the regional water supply planning program. It is also intended to be a useful resource for officials, managers, and others involved in, or having interest in, water supply system management.

In using this report, it should be noted that water supply law is not a static entity, but is in a constant state of flux. The users of the report are, therefore, cautioned to consult with appropriate officials of State and Federal agencies, and practitioners of law regarding the effects of new laws and court actions in considering the findings and conclusions presented herein.

Respectfully Submitted,

hilig C- Evenson

Philip C. Evenson

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May 2, 2007

Mr. Philip C. Evenson, Executive Director Southeastern Wisconsin Regional Planning Commission PO Box 1607 Waukesha, WI 53187-1607

Dear Mr. Evenson:

I am pleased to submit to you this report, entitled, "Water Supply Law," prepared by us as one component of the Southeastern Wisconsin Regional Planning Commission's regional water supply planning work.

Southeastern Wisconsin currently faces many challenges in supplying water to its residents. An increasing cone of depression from groundwater pumping in the area, limitations on the ability to use Lake Michigan surface water for water supply, water quality issues, and the potential for conflicts between water uses, all represent water supply challenges for the area. As the Commission studies these challenges and develops a regional water supply plan that identifies the best means of providing and protecting the sustainable sources of water supply for the region, the Commission must do so within the context of applicable water supply law.

This report provides the Commission with an overview of water supply law. The report discusses those existing laws, regulations, policies, and common law doctrines that apply to water supply, and the potential changes in water supply law, particularly with regard to the Great Lakes Basin Compact and 2003 Wisconsin Act 310, Wisconsin's groundwater quantity law. It is intended that this report serve as a resource to the Commission as it identifies and evaluates potential challenges and viable alternatives to providing a sustainable water supply for the region.

It should be noted that while this report seeks to identify and discuss the different laws applicable to water supply, the law is constantly changing, and water supply law in particular may be undergoing changes as a result of the Great Lakes Basin Compact and 2003 Wisconsin Act 310. Therefore, users of this report are cautioned to consult with regulators and legal practioners regarding changes in the law after the date of this report.

Boardman, Suhr, Curry & Field LLP By All Lawrie J. Kobza

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INTRODUCTION

This Report identifies and analyzes water supply law applicable to the Southeastern Wisconsin Region, which consists of the counties of Kenosha, Milwaukee, Ozaukee, Racine, Walworth, Washington, and Waukesha. Lake Michigan is the largest source of water supply for the Southeastern Region. The shallow and deep aquifers underlying the Region are also significant sources of supply for the Region. This Report will focus on those statutes, regulations, policies, and case law most directly related to the continued and future use of these and other water supply sources in Southeastern Wisconsin. This Report will also examine the laws and regulations governing alternative methods of delivering water supply to users within the Region.

Conceptually, water supply law can be broken down into two broad categories: law applicable to the capture of water for water supply purposes; and law applicable to the distribution of water supply for use by customers. The first, and major, part of this Report addresses the law applicable to the capture of water. This is a complicated area as the Federal government, the states and provinces lying around the Great Lakes including the State of Wisconsin-identified as the Great Lakes Region-local counties and municipalities, private property owners, and the public in general, all have an interest in the capture of water within the Region. The Federal government has an interest in the use of surface water for navigation, and the use of both surface water and groundwater for commerce, as the term commerce is broadly defined. The Great Lakes Region has an interest in ensuring adequate and consistent protection of the Great Lakes. The State of Wisconsin has an interest in the use of surface water to ensure the protection of the public's interest in "public trust" waters, and the use of surface water and groundwater in a manner that protects the public health, safety and welfare of Wisconsin citizens. Counties and municipalities have an interest in the use of water in a manner that promotes the public health and welfare of its local citizens, and that promotes sound land use patterns. And, private property owners have an interest in having access to water supply that enables the use of their property to the full extent allowed by law.

The Federal government has entered into treaties and adopted legislation and regulations to protect Federal interests in the capture of water. In these areas where the Federal government has legally determined to act, Federal treaties, laws, and regulations are preeminent and controlling. Chapter 1 of this Report describes applicable treaties and Federal legislation.

In areas not completely preempted by the Federal government, state governments may act. States may act separately or jointly by agreement. Within the Great Lakes Region, the states have acted jointly by entering into compacts and other agreements to address water use issues. In the past, where states could not mutually resolve disputes regarding water use, they have sought resolution from the United States Supreme Court. Chapter 2 of this Report describes the applicable interstate compacts, agreements, and court cases.

The State of Wisconsin has also adopted its own legislation and regulations dealing with various aspects of water use, such as requirements applicable to surface water withdrawals, well installation, water quality, and authorization for public water supply facilities. State regulation

in these areas has been said to be of a statewide interest. Chapter 3 describes this State legislation and regulation.

Local governments have sought to adopt municipal ordinances to regulate water withdrawals within their communities. To date, these ordinances have been struck down as being preempted by state law. However, the Wisconsin Department of Justice has opined that applicable law has evolved so that such municipal ordinances may be upheld in future cases. This is an issue destined for further litigation. Chapter 4 describes the law applicable to municipal attempts to regulate in this area.

Chapter 5 of this Report describes Wisconsin common law applicable to water capture and use. While the capture of water may be legal under applicable statutes and regulations, such action may nevertheless intrude on the rights of other property owners or the public in general. This Chapter describes the rights of the general public to water under the public trust doctrine, and the rights of property owners to use the water on, adjacent to, or under their land. This Chapter also addresses how conflicts between uses may be balanced by the courts under the reasonable use doctrine, or the law of nuisance.

Chapter 6 of this Report describes the law applicable to the distribution of water supply for use by customers. This part of the Report deals primarily with the legal framework for the ownership, operation, and financing of water supply systems. Also addressed are options for intermunicipal organization, contracting and other arrangements for water supply services.

Chapter 7 provides a succinct summary of water law at all levels of government as it may influence the preparation of a regional water supply plan for Southeastern Wisconsin.

CHAPTER ONE

LAW APPLICABLE TO THE CAPTURE OF WATER: FEDERAL GOVERNMENT REGULATION

The Federal government's right to regulate water comes from three main sources: (1) its right to enter into treaties and international trade agreements; (2) its right to adopt legislation consistent with the United States Constitution; and (3) its right to approve compacts between States. Where the Federal government has acted, Federal law takes precedence.¹ Therefore, this Report begins with a discussion of Federal law.

The Federal government's right to enter into treaties and international trade agreements, and its right to enact legislation is described in this Chapter. The Federal government's action to approve compacts between States is described in Chapter 2.

A. TREATIES

A treaty is an agreement between the United States and a foreign nation covering issues of mutual concern. The agreement is made by the President and ratified by two-thirds of the Senate.² Once approved, a treaty is roughly the equivalent of a Federal statute, and is binding on both the Federal government and the individual states.³

1. Boundary Waters Treaty of 1909

In 1909, the United States and Canada signed the Boundary Waters Treaty which governs the use of "treaty boundary waters". Treaty boundary waters are those waters through which the international boundary between the United States and Canada passes. The international boundary runs through all the Great Lakes except Lake Michigan.

Article I of the Treaty provides that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce for the residents of both countries. Article I also provides that although Lake Michigan is not a treaty boundary waters, this same right of navigation shall extend to the waters of Lake Michigan.

Article III of the Treaty provides, with some exceptions, that the use, diversion, or obstruction of "boundary waters" must be approved by the International Joint Commission if water levels or flows on one side of the boundary are to be affected by actions on the other side of the boundary.

¹Gibbons v. Ogden, 22 U.S. 1, 211 (1824).

²U.S. Constitution art. II, §2.

³74 Am. Jur. 2d <u>Treaties</u> §4.

With respect to waters located completely within a signer's boundaries, Article II of the Treaty provides that the signer reserves the exclusive jurisdiction and control over their use and diversion. However, if that use or diversion results in an "injury" on the other side of the boundary, the injured party is to have the same legal remedies as if the injury took place in the country in which the use or diversion occurred.

The International Joint Commission (IJC) of Canada and the United States is created by the Treaty to help implement portions of the Treaty. The IJC has six members, three appointed from each party by the heads of the Federal governments.

Since Lake Michigan is not a boundary waters, the Boundary Waters Treaty of 1909 has limited applicability to water supply issues in Southeastern Wisconsin. Application of the Treaty would only be triggered if a withdrawal of water from Lake Michigan or other waters in Southeastern Wisconsin resulted in "injury" to a party in Canada. If that happened, the Canadian party would have the same remedies as a party who resides in the United States.

B. INTERNATIONAL TRADE AGREEMENTS

The United States Constitution grants Congress the power to regulate commerce with foreign nations.⁴ Under this power, the President of the United States, as the delegated representative of the Congress, may be the signatory to international trade agreements.⁵ Under this power, the United States has entered into the General Agreement on Tariffs and Trade of 1947 (GATT), and the North American Free Trade Agreement (NAFTA).⁶

GATT, as supplemented by the World Trade Organization (WTO) agreements, prevents out-right moratoriums on articles of commerce. Article XI, Paragraph 1, of GATT provides:

No prohibitions or other restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

The provisions of GATT, however, permit any party to adopt or enforce measures regulating the conservation of exhaustable natural resources, provided such measures are imposed on domestic

⁴U.S. Const. art., I, § 8.

⁵19 U.S.C. §§ 1351, 2112, 2902.

⁶19 U.S.C. §§ 2503, 3311.

production and consumption and not imposed as a means of arbitrary or unjustifiable discrimination between countries. Article XX of GATT provides that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

* * *

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption;

NAFTA Article 309 contains provisions similar to GATT Article XI which prevents signing parties from restricting or prohibiting the export of goods. The 1993 Joint Statement by the Governments of Canada, Mexico and the United States stated, however, that:

The NAFTA creates no rights to the natural water resources of any Party to the Agreement.

Unless water, in any form, has entered into commerce and become a good or product, it is not covered by the provisions of any trade agreement including the NAFTA. And nothing in the NAFTA would oblige any NAFTA Party to either exploit its water for commercial use, or to begin exporting its water in any form. Water in its natural state in lakes, rivers, reservoirs, aquifers, water basins and the like is not a good or product, is not traded, and therefore is not and never has been subject to the terms of any trade agreement.

Another provision of NAFTA which may impact water resources is Article 1102 which provides that a country who is a party to the agreement must treat investors from other signatory parties no less favorably than it treats its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Many articles have been written about whether and how these provisions of GATT and NAFTA affect water resources. Nevertheless, the questions regarding GATT's and NAFTA's application to and impact on water resources have yet to be resolved. These outstanding questions, however, affect the relationship between the countries which are parties to the agreements. These questions do not affect the United States' regulation of water within its own borders with regard to its own citizens. Federal law clearly provides that if there is a conflict between a United States statute and

a provision of any trade agreement, the Federal statute controls.⁷ This means that if there is a Federal statute regulating water use within the Great Lakes Basin, that statute would apply to users within the United States even if that statute conflicted with provisions of GATT or NAFTA. For that reason, GATT and NAFTA are unlikely to have a direct impact on water supply in Southeastern Wisconsin.

C. FEDERAL LEGISLATION

The United States Constitution provides at Article I, Section 8, that Congress has the power to "regulate commerce . . . among the several states." This clause, referred to as the Commerce Clause, is relied upon by the Federal government for authority to legislate and regulate on a wide variety of matters, regarding water.

Originally the Federal government's interest in the use of water was narrowly drawn and primarily focused on navigation. Over time, however, the sphere of the Federal government's interest in water has expanded to cover much more than navigation. Today, discussions about the Federal government's interest in water go to navigation and water resources that support navigable water, environmental protection, environmental resources that cross state boundaries, and products that are sold in commerce.

1. Rivers and Harbors Act

The first major piece of Federal legislation that affected Lake Michigan was the Rivers and Harbors Act, which was originally adopted in 1890 and revised in 1899. This Act prohibits any man-made obstruction to the navigable capacity of waters of the United States, or the building of any structures in any water of the United States, without the approval of the Army Corps of Engineers.⁸ Navigable waters of the United States are defined at 33 C.F.R. Section 329.4 as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce."

In 1925, the United States Supreme Court held in <u>Sanitary District of Chicago v. United States</u>,⁹ that the Sanitary District of Chicago violated the Rivers and Harbors Act when it diverted large amounts of water from Lake Michigan to a channel connecting to the Mississippi River. In reaching its conclusion, the Supreme Court recognized the United States' paramount authority to regulate commerce and to control the navigable waters within its jurisdiction. It then referred to the Rivers and Harbors Act which prohibited the creation of any obstruction to the navigable

⁸33 U.S.C. § 403.

⁹Sanitary District of Chicago v. United States, 266 U.S. 405 (1925).

⁷19 U.S.C. §§ 2504(a), 3312(a). See also <u>Algoma Steel Corp. v. United States</u>, 865 F.2d 240, 242 (Fed. Cir. 1989).

capacity of any waters of the United States, including Lake Michigan, not specifically authorized by Congress or its delegee. In this case, Congress' delegee had authorized the Sanitary District to divert up to 250,000 cubic feet of water per minute, but the Sanitary District was diverting more than this. The Supreme Court held that any diversion above the amount authorized by Congress' delegee constituted a violation of the Rivers and Harbors Act. This conclusion was based upon its determination that the large diversion at issue resulted in an obstruction to the navigable capacity of Lake Michigan.¹⁰

While in <u>Sanitary District of Chicago</u>, the Supreme Court agreed that the unauthorized diversion of water out of Lake Michigan was so great that it created an obstruction to the navigable capacity of Lake Michigan, it is questionable whether the same conclusion would be reached if the withdrawal of water was significantly smaller, or if the withdrawal of water was accompanied by the return of treated wastewater to the Lake. Under those fact situations, it may be difficult for the United States to prove that a diversion of water out of the Lake creates an obstruction to the navigable capacity of the Lake which must be permitted under the Rivers and Harbors Act.

The more typical application of the Rivers and Harbors Act today is to the construction, excavation, or deposition of materials in, over, or under waters of the United States, and to any work which would affect the course, location, condition, or capacity of those waters. No such work can take place before a permit is obtained from the Army Corps of Engineers pursuant to Section 10 of the Act.¹¹ The Army Corps grants permits pursuant to Section 10 for structures such as piers, wharfs, breakwaters, bulkheads, pipelines, and work such as dredging or disposal of dredged material, or excavation, or filling which affects navigable waters of the United States. The general regulations applicable to the Corps' permit review are found in 33 C.F.R. Part 320. In describing the Corps' permit authority, 33 C.F.R. Section 320.1(a) states:

Until 1968, the primary thrust of the Corps' regulatory program was the protection of navigation. As a result of several new laws and judicial decisions, the program has evolved to one involving the consideration of the full public interest by balancing the favorable impacts against the detrimental impacts. This is known as the "public interest review." The program is one which reflects the national concerns for both the protection and utilization of important resources.

In conducting the public interest review of a proposed permit application, the Corps is to evaluate the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. As described in 33 C.F.R. Section 320.4(a)(1):

Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become

¹⁰<u>Id</u>. at 427.

¹¹33 U.S.C. § 403.

relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and in general, the needs and welfare of the people.¹²

The specific weight given to each factor is determined by its importance and relevance to a particular proposal.¹³ No permit will be granted if the proposal is found to be contrary to the public interest.¹⁴

In Southeastern Wisconsin, a permit would be required under the Rivers and Harbors Act and the Corps' regulations, if a party desires to create an obstruction to the navigable capacity of Lake Michigan, or to build any structure in Lake Michigan. Constructing a new water intake pipeline in Lake Michigan would constitute the construction of a structure in Lake Michigan, and therefore would trigger the requirements of the Rivers and Harbors Act. The construction would require the issuance of a permit by the Army Corps of Engineers.

2. Clean Water Act

The Clean Water Act, originally passed in 1972, deals with surface water quality protection in the United States.¹⁵ The Act employs a variety of regulatory and nonregulatory tools to reduce direct pollutant discharges into waterways, finance municipal wastewater treatment facilities, and manage polluted runoff. These tools are employed to achieve the broader goal of improving and maintaining the chemical, physical, and biological integrity of the nation's waters so that they can support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the

¹²More discussion of these factors is contained in 33 C.F.R. §320.4(b) through (r).

¹³33 C.F.R. § 320.4(a)(3).

¹⁴33 C.F.R. § 320.4(a)(1).

¹⁵33 U.S.C. §§ 1251 et seq.

water.¹⁶ The tools authorized by the Clean Water Act include implementation of water quality standards, total maximum daily loads, an antidegradation policy, a permit program for point sources, the Section 319 program for nonpoint sources, the Section 404 program regulating filling of wetlands and other waters, and Section 401 state water quality certification. Specifics about these Clean Water Act programs, which focus on discharges to waters, as opposed to water supply,¹⁷ go beyond the scope of this Water Supply Law Report with a few exceptions.

First, it should be noted that the Section 404 program which regulates the filling of wetlands and other waters is administered in conjunction with the Rivers and Harbors Act described above.¹⁸ Although Section 404 is administered jointly by the Environmental Protection Agency (EPA) and the Army Corps of Engineers, the Corps handles the actual issuance of permits, and uses the same process described above with regard to permitting of work such as dredging or disposal of dredged material, or excavation, filling, or other modifications to the navigable waters of the United States.¹⁹ Work on the bed of Lake Michigan or any interconnected surface water could trigger the need for a Section 404 permit.

Second, recent case law under the Clean Water Act has raised questions regarding how far Federal regulation of waters can extend under the Commerce Clause. As noted later in this Report, the discussion in these cases may shed light on the courts' view of the extent of the Federal government's authority under the Water Resources Development Act.

The Clean Water Act applies to "navigable waters" which are defined as "waters of the United States."²⁰ Administrative regulations further define "waters of the United States" to apply to all interstate waters; intrastate waters used in interstate and/or foreign commerce; tributaries of interstate waters or intrastate waters used in interstate and/or foreign commerce; territorial seas at the cyclical high tide mark; and wetlands adjacent to all the waters listed above.²¹ While the definition in the administrative rule goes beyond what is traditionally considered "navigable waters", the United States Supreme Court agrees that the statutory term "navigable water" is to be interpreted more broadly than the term had been historically understood, and is to cover at least

¹⁶33 U.S.C. § 1251(a).

¹⁹33 C.F.R. § 323.6(a).

²⁰33 U.S.C. § 1362(7).

²¹33 C.F.R. § 328.3(a).

¹⁷The Clean Water Act does not deal with water quantity. 33 U.S.C. § 1251(g).

¹⁸33 U.S.C. § 1344; 33 C.F.R. § 323.1.

some waters that would not be deemed "navigable" under the traditional understanding of that term. $^{\rm 22}$

In <u>United States v. Riverside Bayview Homes, Inc.</u>,²³ the United States Supreme Court held that wetlands adjacent to navigable waters are covered by the Clean Water Act. Since that time, however, the United States Supreme Court has sharply disagreed over the extent of the Army Corps of Engineers' jurisdiction under the Clean Water Act. In <u>Solid Waste Agency of Northern</u> <u>Cook County v. United States Army Corps. of Engineers</u>,²⁴ the Supreme Court, in a 5 to 4 decision, held that isolated, intrastate wetlands were not covered by the Clean Water Act. The Corps had argued such wetlands were covered by the Clean Water Act because the wetlands were used by migratory birds which cross state lines. Five of the Supreme Court Justices held that the Corps' migratory bird rule was not supported by the statutory language of the Clean Water Act. The other four Justices would have approved the Corps' position.

In reaching its conclusion, the majority raised, but did not answer, the significant question of whether Congress has the power under the Commerce Clause of the United States Constitution to regulate isolated, intrastate wetlands. The majority noted that the States have traditional and primary power over land and water use, and that if Congress intended to extend its jurisdiction under the Commerce Clause and impinge on state authority, there should be a clear statement from Congress that it intended to do so. In the absence of such a statement, the majority argued, the statute should be interpreted in a way to avoid serious constitutional problems.²⁵ Accordingly, the majority interpreted the Clean Water Act in such a way to avoid this constitutional question, by limiting the Corps' jurisdiction over the isolated, intrastate wetlands.

In the recent case of <u>Rapanos v. United States</u>,²⁶ the United States Supreme Court was faced with the question of whether Clean Water Act jurisdiction extends to wetlands lying near ditches or man-made drains that eventually empty into traditional navigable waters. In this case, the majority of the Justices could not agree upon one viewpoint. Four Justices argued that such wetlands were not covered by the Clean Water Act. One Justice argued that it would depend upon whether the wetlands possessed a significant nexus to waters that are navigable. And, the other four Justices would have approved Clean Water Act jurisdiction over such wetlands. As a result of this difference of opinion, the Court sent the case back to the lower court for further proceedings so

²²<u>United States v. Riverside Bayview Homes, Inc</u>., 474 U.S. 121, 133, 106 S.Ct. 455 (1985).

²³<u>Id</u>. at 133-135.

²⁴Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 121 S. Ct. (2001).

²⁵<u>Id</u>. at 172-174.

²⁶<u>Rapanos v. United States</u>, U.S. , 126 S. Ct. 2208 (2006).

that the record could be sufficiently developed to allow a majority of the Court to determine whether Clean Water Act jurisdiction should be extended to cover the specific wetlands at issue in this case.

These recent cases indicate that the current United States Supreme Court is struggling with the question of how far to extend Federal jurisdiction under the Clean Water Act over intrastate waters and lands. Five Justices appear reluctant to extend such jurisdiction unless there is explicit statutory language authorizing such an extension, or there is a clearly stated Federal interest in the extension. Some of these Justices also raise the question of whether Congress would have the authority under the Commerce Clause to regulate certain intrastate waters at all. Four Justices appear willing to extend Federal jurisdiction to intrastate waters based in large part upon the view that waters, and the plants, animals and people who use them, are interconnected and have an impact on interstate commerce.

The same debate exists with regard to the question of whether the Clean Water Act extends to groundwater. The Seventh Circuit Court of Appeals determined that although groundwater may be hydrologically connected with surface waters, the language of the Clean Water Act and its regulations do not extend to groundwater.²⁷ Other courts have held, however, that groundwater which eventually finds it way into waters of the United States is subject to the Clean Water Act.²⁸

As will be discussed below, these divergent views could have an impact on how the courts would interpret the Water Resources Development Act.

3. Water Resources Development Acts

The Water Resources Development Acts are a series of acts under which Congress provides direction to the Army Corps of Engineers on the projects the Corps undertakes. Each Water Resources Development Act contains authorizations, deauthorizations and housekeeping provisions regarding Corps water resources development activities. The Water Resources Development Act of 1986 is considered the omnibus act and most of the general provisions in the later Acts either amend or add to its sections. However, all of the Water Resources Development Acts also amend other acts such as the Clean Water Act, the Marine Protection, Research and Sanctuaries Act, and the Water Resources Planning Act of 1965.

The Water Resources Development Act of 1986 included an amendment to the Water Resources Planning Act of 1965 to limit Great Lakes diversions. This amendment, codified at 42 U.S.C. Section 1962d-20 was further amended in 2000. The current language of 42 U.S.C. Section 1962d-20(d), hereinafter referred to as "WRDA", provides that:

²⁷Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994)

²⁸Idaho Rural Council v. Bosma, 143 F.Supp. 2d 1169, 1179-1180 (Idaho 2001).

No water shall be diverted or exported from any portion of the Great Lakes within the United States, or from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion or export is approved by the Governor of each of the Great Lake States.

The limit on diversions does not apply to any diversion of water from any of the Great Lakes which was authorized on or prior to November 17, 1986.²⁹ The terms "diversion" and "export" are not defined in the statute.

The Great Lakes States include the States of Illinois, Indiana, Michigan, Minnesota, Ohio, Pennsylvania, New York, and Wisconsin.³⁰ Under WRDA, all diversions are prohibited unless all eight Great Lakes Governors approve the diversion. If any one Governor from a Great Lakes State does not consent to a diversion or exporting, the diversion or exporting is disallowed.

In support of this legislation, Congress explicitly declared that (1) the Great Lakes are important to the eight Great Lakes States and the Canadian provinces because they provide water supply for domestic and industrial use, clean energy through hydropower production, an efficient transportation mode for moving products into and out of the Great Lakes region, and recreational uses for millions of United States and Canadian citizens; (2) the Great Lakes need to be carefully managed and protected to meet current and future needs within the Great Lakes basin and Canadian provinces; and (3) any new diversions of Great Lakes water for use outside of the Great Lakes basin will have significant economic and environmental impacts, adversely affecting the use of this resource by the Great Lakes States and Canadian provinces.³¹

Congress further declared that the purpose and policy of 42 U.S.C. Section 1962d-20 was to (1) take immediate action to protect the limited quantity of water available from the Great Lakes system for use by the Great Lakes States; (2) to encourage the Great Lakes States, in consultation with the Provinces of Ontario and Quebec, to develop and implement a mechanism that provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin; and (3) to prohibit any diversion of Great Lakes water by any State, Federal agency, or private entity for use outside the Great Lakes basin unless such diversion is approved by the Governor of each of the Great Lakes States.³²

- ²⁹42 U.S.C. § 1962d-20(f).
- ³⁰42 U.S.C. § 1962d-20(c).
- ³¹42 U.S.C. § 1962d-20(a).
- ³²42 U.S.C. § 1962d-20(b).

Since the enactment of WRDA, two interbasin diversions have been approved (or not objected to) by the Great Lakes Governors. In 1998, Akron, Ohio, which straddles the drainage divide between the Ohio River and Lake Erie, won approval to withdraw water from Lake Erie with a promise to return an equivalent amount to the Lake. Approval by some Governors and no objection by others was also given to a similar request by Pleasant Prairie, Wisconsin to divert water from Lake Michigan. The Governors reportedly consented or did not object to these diversions largely because the diversions were relatively small, hinged on a return of water equivalent to the amount diverted, and served immediate needs of local governments located fairly close to the boundaries of the basin.

Since its adoption, many questions have been raised about the interpretation and enforceability of WRDA. Four major questions regarding WRDA are particularly relevant to Southeastern Wisconsin. First, what is a diversion under WRDA? Second, does WRDA apply to groundwater? Third, is WRDA legally enforceable? And fourth, if WRDA is enforceable, who can enforce it? As will be seen in the following discussion, there are no definitive answers to these questions at this time.

a. Diversions under WRDA

While WRDA prohibits diversions unless approval of all Great Lakes Governors is received, WRDA does not define what a diversion is. There is also no case law which defines the term "diversion" under WRDA. The dictionary defines the term "diversion" as "the act or an instance of diverting from one course or use to another", or as "a turning aside".³³

WRDA's prohibition on diversions also does not contain any provision for reasonable use of water, or for de minimis diversions. Under the literal language of WRDA, the diversion of a teaspoon of water from the Great Lakes Basin without the eight Governors' approval would violate WRDA.

The Wisconsin Department of Natural Resources has taken the position in the past that water taken and used outside the Basin, but then returned to the Basin, is not a diversion subject to WRDA. In essence, the WDNR evaluates whether a diversion exists at the end of the proposed water use. If at the end of the proposed water use water is within the Basin, the WDNR has not considered that to be a diversion. Such a situation may exist where a municipality located within the Basin provides water to customers located outside the Basin, but then collects wastewater from those customers and returns it to the Basin. By adopting this interpretation, Wisconsin limited the number of withdrawals it believed were subject to WRDA approvals. While other Great Lakes States reportedly disagreed with Wisconsin's interpretation, none challenged it.

In a December 27, 2006 letter, however, the Wisconsin Attorney General disagreed with the WDNR's interpretation of the term "diversion". The Attorney General opined that the ordinary

³³Webster's Third New International Dictionary.

meaning of the term "diversion" is "the act or an instance of diverting from a course, activity, or use," and that whether a diversion exists is to be measured as of the first act taken regarding the water.³⁴ Under this interpretation, <u>all</u> withdrawals or transfers of water from a lake constitute a diversion because the withdrawal itself - even with return flow - results in the taking of water from its natural course. The Attorney General further opined, however, that although all withdrawals of water from the a lake would constitute a diversion, only diversions of water "for use outside the Great Lakes basin" are covered by WRDA. Therefore, any withdrawal of water for use outside of the Great Lakes basin would constitute a diversion covered by WRDA, regardless of return flow.³⁵

The impact of the Attorney General's December 27, 2006 letter is unclear. Adoption of the Attorney General's interpretation of the term "diversion" could potentially halt the ability of the WDNR to grant approvals for new withdrawals of Lake Michigan water with return flow. New Berlin has recently requested such approval from the WDNR, and this request could potentially be denied under the Attorney General's interpretation unless WRDA approval was received from the other Great Lakes Governors. On the other hand, if the Attorney General's interpretation of the term "diversion" is not adopted and the WDNR continues to adhere to its interpretation of what is a diversion under WRDA, the Attorney General suggests that could be detrimental to uniform and effective enforcement of WRDA and to interstate cooperation on Great Lakes matters.³⁶ As of the date of this Report, the WDNR has not publicly announced how it will address this issue.

One statutory limitation on WRDA's prohibition on diversions is that it does not apply to any diversion of water from any of the Great Lakes which was authorized on or prior to November 17, 1986.³⁷ The statute does not define what an authorized diversion is, or who must have granted the authorization. Likely, however, a diversion in Southeastern Wisconsin existing on November 17, 1986 would be exempt from WRDA if it met the requirements of Wisconsin law at that time.

³⁶<u>Id</u>. at 5.

³⁴December 27, 2006 Letter from Wisconsin Attorney General Peggy A. Lautenschlager to Senator Robert Wirch, page 7.

 $^{^{35}}$ Id. at 8. The Attorney General's informal opinion also indicates that only Akron, Ohio has an approved diversion under WRDA. With regard to the Lake Michigan water diversion to Pleasant Prairie, Wisconsin, the Attorney General states: "Although three Great Lakes governors did not approve of the Town of Pleasant Prairie's proposed diversion of Lake Michigan water in 1990 that required return flows to the lake, other governors did. . . Although the legality of the diversion has been questioned, there was never a concession that the diversion was not subject to WRDA." Id. at 11.

³⁷42 U.S.C. § 1962d-20(f).

b. WRDA's Application to Groundwater

Another question that has arisen is whether WRDA applies to groundwater, so that the diversion of groundwater for use outside the Basin would be prohibited without the approval of the Great Lakes Governors. The language of WRDA applies to the diversion or export of "water" from "any tributary" of the Great Lakes "for use outside the basin." There are no reported judicial decisions that have interpreted this language of WRDA. The United States Army Corps of Engineers, however, has opined that WRDA pertains to surface water diversions only, and not to groundwater extraction.³⁸ In reaching this conclusion, the Corps relied upon its understanding of a "common meaning" of the terms "Great Lakes" and "tributaries" as referring to surface waters, and not groundwater. The Corps also noted the fact that groundwater is excluded from regulation under Section 404 of the Clean Water Act, which is also administered by the Corps and United States Environmental Protection Agency.

The Corps' conclusion that WRDA's prohibition on diversions does not apply to groundwater has been criticized by those who contend that the purpose of WRDA was to codify into Federal law the terms of the Great Lakes Charter.³⁹ In the Great Lakes Charter, the term "Great Lakes Waters" is explicitly defined as including "the Great Lakes and all streams, rivers, lakes, connecting channels, and other bodies of water, including tributary groundwater within the Great Lakes Basin."

The critics of the Corps' interpretation have also argued that the exclusion of groundwater from the application of WRDA is not scientifically sound because groundwater and surface water are hydrologically connected. They argue that the diversion of water from a groundwater source that communicates with a surface stream or lake has the ultimate effect of diverting surface water from the Great Lakes system. So, they argue, the diversion of groundwater from the Great Lakes Basin should also require the approval of the eight Great Lakes Governors under WRDA.

This disagreement over whether groundwater is covered by WRDA raises issues similar to those in the <u>Solid Waste Agency of Northern Cook County</u> and <u>Rapanos</u> cases discussed above. Regulation of groundwater has typically been considered to be a state power. The Federal government may intrude upon this state power to the extent legally allowed by the Commerce Clause. The question is whether the Federal government has determined to intrude upon this traditional state power over groundwater. In answering this question, one must look to the language of the statute and other indicia of Congressional intent. The explicit language of the statute would seem to support the argument that WRDA does not apply to groundwater. However, if the intent of WRDA was indeed to codify into Federal law the terms of the Great Lakes Charter, that would lend support to the argument that WRDA does apply to groundwater.

³⁸See August 8, 1997, letter from William Breyfogle, St. Paul District, Army Corps of Engineers, to Mr. Rodney Harrill, President of the Crandon Mining Company.

³⁹The Great Lakes Charter is discussed in Chapter 2.

In Southeastern Wisconsin, the absence of a final answer regarding WRDA's application to groundwater means two things. First, a groundwater withdrawal which takes water from the Great Lakes basin to another basin would likely not be subjected to WRDA, although arguments could be made to the contrary. Second, groundwater withdrawals which existed prior to November 17, 1986 will likely not be considered to be existing diversions grandfathered under WRDA, although again arguments to the contrary could be made until the issue is finally resolved.

c. Enforceability of WRDA

The most important question regarding WRDA is whether it is enforceable. Currently, WRDA is the only Federal legislative provision that explicitly prohibits a diversion from Lake Michigan. If WRDA was not enforceable, no Federal legislation would prohibit a diversion - unless the diversion was of such a size that it would impact navigation. While installation of a pipeline into Lake Michigan would trigger certain regulatory requirements, there would be no outright prohibition on the withdrawal of that water and its use outside the basin without permission.

Questions about the enforceability of WRDA have focused on several issues. First, can Congress delegate its authority to make decisions on the diversion of Great Lakes water to eight state Governors. Second, is the power to deny approval of a diversion by any one of the eight Great Lakes Governors a violation of the dormant Commerce Clause. Third, would a state's denial of permission under WRDA violate the due process clause of the United States Constitution. While these issues have been analyzed by many different legal experts, no consensus on the answers to these questions have been reached, and this Report does not seek to predict how a court would rule on these issues.

A few points relevant to these issues, however, should be made. First, in WRDA, Congress prohibited diversions or exports of water from the Great Lakes and its tributaries within the United States, for use outside the Great Lakes Basin, subject to two exceptions. The first exception is that a prohibited diversion or export can be allowed if the Governors of all the Great Lake States approve the diversion or export. The second exception is that diversions authorized before November 17, 1986 are allowed. While analysts often refer to the Governors having veto authority over diversions, technically that is inaccurate. Under WRDA, Congress prohibited the diversions and the Governors have the authority to essentially override Congress' prohibition and permit the diversion. Nothing in WRDA suggests that there is any obligation for a Governor to override the Federal prohibition, or even that any Governor should seek to override the Federal prohibition by granting approval for a diversion.

Second, the United States clearly has the power under the Commerce Clause to authorize and control the diversion of water from one navigable waterway to another in order to protect Federal interests. However, whether the United States has the authority to prohibit <u>all</u> diversions from the Great Lakes Basin, regardless of how small or how minimal the Federal interest, has received little legal analysis.

Third, a state's refusal to approve a diversion already prohibited by the Federal government is unlikely to violate the dormant Commerce Clause. Under the dormant Commerce Clause, Federal courts may invalidate state laws that either blatantly discriminate against interstate commerce or unreasonably burden interstate commerce in other ways. The purpose of the dormant Commerce Clause doctrine is to preserve Congress' authority over the free flow of interstate commerce under the Commerce Clause. Here, where Congress, not a state, has authorized a restraint by prohibiting diversions of Great Lakes water, there should be no dormant Commerce Clause problem. This was the conclusion reached in Intake Water Company v. Yellowstone River Compact Commission.⁴⁰ Congress approved the Yellowstone River Compact, which fixes the water usage of all waters of the Yellowstone River Basin. The Compact provided that "No waters shall be diverted from the Yellowstone River Basin without unanimous consent of all the signatory states." Intake Water Company claimed the Compact placed a constitutionally impermissible burden on interstate commerce by requiring unanimous consent of the signatory states for out-ofbasin transfers. The court concluded that the Compact was a Federal law, not state law, and therefore, by definition could not be a state law impermissibly interfering with commerce. As a Federal law, the Compact was immune from attack under the dormant Commerce Clause.

d. Parties Who Can Enforce WRDA

Another issue regarding WRDA is what happens if a party diverts Great Lakes water without first obtaining permission from the eight Great Lakes Governors. WRDA contains no language giving any party a right of action to enforce the diversion prohibition in WRDA.

In Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters,⁴¹ the court held that a private party is not authorized to take action under WRDA to halt an alleged diversion of Lake Michigan water. In that case, Great Spring Waters of America, Inc., sought and received licenses from the State of Michigan to allow pumping from two wells for the purposes of operating a water bottling plant. It was alleged that the pumping was likely to reduce the flow of waters to Lake Michigan, and at least some of the bottled water would be sold outside the Great Lakes Basin. A group of Indian tribes sued to enjoin the plant operation on the grounds that it violated WRDA. The court determined that the language and statutory scheme of WRDA provided neither an explicit, nor an implicit, right to members of the general public to enforce it.

The unanswered question is whether a Great Lakes state or the Federal government could bring an action to halt an alleged diversion of water from the Great Lakes. In <u>Little Traverse Bay Bands</u> of Odawa Indians v. Great Spring Waters, the court assumed that officers of the Federal government could bring a suit to enforce WRDA, but it also stated that "Federal enforcement

⁴⁰Intake Water Company v. Yellowstone River Compact Commission, 769 F.2d 568 (9th Cir. 1985).

⁴¹Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters, 203 F.Supp.2d 853, 865 (W.D. Mich. 2002).

might well be difficult especially in the absence of governing Federal standards and in the absence of a Congressional delegation of authority to an officer of the executive branch."⁴²

What this means is that if a party does divert water from the Great Lakes Basin without first obtaining approval under WRDA, the mechanism for challenging that party's actions is not clear. Before a state or the Federal government could successfully bring such a challenge, it would have to prove that it has the authority to bring the challenge. While this would be an additional hurdle for the Federal or state government to clear, one would expect the courts to find some mechanism to allow WRDA to be enforced. It would seem unusual for the Federal law to prohibit a diversion of Great Lakes water, but then allow a party to ignore that prohibition without any repercussions.

e. WRDA and Southeastern Wisconsin

WRDA' s ban on the diversion of water out of the Great Lakes Basin has a significant limiting impact on the ability of communities in Southeastern Wisconsin to use Lake Michigan water. While communities located within the Great Lakes Basin have ready access to Lake Michigan water, communities outside of the Great Lakes Basin can use Lake Michigan water only if: (i) its use does not constitute a "diversion", however that term is defined; (ii) its use was authorized prior to November 17, 1986; or (iii) all of the Governors of the Great Lakes States approve of the diversion. While a community may consider challenging the legality of WRDA, the success of such a challenge is questionable. Furthermore, even if a community successfully challenged the legality of WRDA, the community may still need the approval of the State of Wisconsin to divert water from Lake Michigan. Chapter 3 discusses state regulation of water withdrawals.

4. Safe Drinking Water Act

Federal regulation of water also includes the regulation of drinking water under the Safe Drinking Water Act.⁴³ The Safe Drinking Water Act, enacted in 1974 and amended in 1986 and 1996, significantly expanded Federal authority over drinking water by assigning the United States Environmental Protection Agency (EPA) the responsibility of setting national standards for levels of contamination in public drinking water systems. The goal of the standard setting process is to identify either a maximum contaminant level or a treatment standard for drinking water to prevent adverse health effects.⁴⁴

⁴²<u>Id</u>. at 864.

⁴³42 U.S.C. § 300f et seq.

⁴⁴42 U.S.C. § 300g-1.

All public water systems must comply with the Safe Drinking Water Act. A "public water system" is defined by the Safe Drinking Water Act as:

a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals. Such term includes (i) any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system, and (ii) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.⁴⁵

The State of Nebraska challenged the authority of Congress to regulate drinking water under the Safe Drinking Water Act arguing that the provision of drinking water was primarily an intrastate activity, and not an interstate activity subject to Federal legislation.⁴⁶ The Court disagreed holding that Congress has the authority to regulate water provided by water utilities under the Commerce Clause because a number of water utilities sell substantial volumes of drinking water across state lines.

In Wisconsin, the Wisconsin Department of Natural Resources (WDNR) has been delegated the authority to enforce the drinking water standards established by the EPA. Wisconsin's program for enforcing these Safe Drinking Water Act standards is found in Section 281.17(8) Wis. Stats. and NR Chapter 809, Wis. Admin. Code.

The Safe Drinking Water Act also regulates the injection of fluids into the ground through an injection well in order to ensure the protection of underground sources of drinking water.⁴⁷ A "well injection" is fluid placed into the ground through a bored, drilled or driven shaft or dug hole that is deeper than it is wide.⁴⁸ EPA has classified five different types of injection wells based upon the fluid that is being injected.⁴⁹ Of relevance to Southeastern Wisconsin are Class V wells which include, but are not limited to, aquifer recharge wells; cesspools; and septic system wells used to inject waste from multiple dwellings.⁵⁰ Class V wells have relatively few Federal regulatory

⁴⁵42 U.S.C. § 300f(4).

4742 U.S.C. §§ 300h - 300h-8.

⁴⁸40 C.F.R. § 146.3.

⁴⁹40 C.F.R. § 144.6.

⁵⁰40 C.F.R. § 144.81.

⁴⁶State of Nebraska v. E.P.A., 331 F.3d 995, 998 (D.C. Cir. 2003).

requirements, however, if such wells endanger drinking water sources, EPA has the authority on a case-by-case basis to impose additional requirements.⁵¹

In Wisconsin, the WDNR has been delegated the authority to enforce EPA's underground injection control program. Wisconsin's program is found in NR Chapter 815, Wis. Admin. Code, and will be discussed further in Chapter 3.

⁵¹40 C.F.R. § 144.12(c) and (d).

CHAPTER TWO

LAW APPLICABLE TO THE CAPTURE OF WATER: INTERSTATE ACTIONS

As States adjoining the Great Lakes, Illinois, Indiana, Michigan, Minnesota, Ohio, Pennsylvania, New York and Wisconsin all have a mutual interest in the use and management of Great Lakes water. However, as individual sovereign bodies, each state also has a competitive interest in promoting the interests of their own state. States are able to cooperate regarding water supply issues through the use of interstate compacts. Where cooperation fails, states may resort to the United States Supreme Court to resolve water usage disputes.

A. COMPACTS

Interstate compacts are binding agreements between two or more states.¹ By entering into an interstate compact, a state effectively surrenders its right to act independently on the issue covered by the compact, and the compact thereafter governs the relations of the parties with respect to the subject matter of the agreement. Once adopted, the provisions of the compact are superior to both prior and subsequent state law, and may only be amended, modified, or otherwise altered with the consent of all parties.²

According to Article I, Section 10 of the United States Constitution, Congress must approve any interstate compact. Despite this requirement, however, the United States Supreme Court has said that the requirement of Congressional consent applies only to those compacts or agreements "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."³ If a compact or agreement merely agrees to joint action on internal matters, such as the creation of a research agency that is purely advisory, no Congressional consent is required. Where Congressional approval is received, however, such approval transforms the interstate compact into Federal law under the Compact Clause.⁴

In giving consent, Congress is not required to accept a compact as presented. Congress may, if it chooses, impose limitations or conditions as a condition precedent to the acceptance of the

¹72 Am. Jur. 2d, States, etc. §10.

²<u>C.T. Hellmuth & Assocs., Inc., v. Washington Metropolitan Area Transit Authority</u>, 414 F. Supp. 408, 409 (D. Md. 1976).

³Virginia v. Tennessee, 148 U.S. 503, 519-520 (1893).

⁴Cuyler v. Adams, 449 U.S. 433, 440, 101 S. Ct. 703 (1981).

compact.⁵ Congress is fully within its authority to impose limitations on compacts. These Congressionally imposed conditions are deemed accepted once states who are parties to the compact accept and begin to act upon the compact.⁶

One question that exists regarding compacts is whether Congress can withdraw its consent to a compact once approval has been granted. This question has not been decided, but it was addressed, and ultimately avoided, by the Ninth Circuit Court of Appeals in <u>Tobin v. United States</u>.⁷ In that case, Congress approved a compact between the States of New York and New Jersey which created the Port of New York Authority. As part of its approval, Congress reserved the right "to alter, amend or repeal" its initial consent. The Port Authority, New York, and New Jersey all argued that Congress did not have the constitutional power to alter, amend or repeal its prior consent of that compact. The court refused to reach this question which it described as requiring serious constitutional adjudications, especially given the number and variety of interstate compacts in effect. The court did seem to acknowledge, however, that even if Congress would not, or should not alter, amend or repeal its prior consent, it could supervise and regulate activities undertaken by the interstate entity created by the contract in order to insure that the approved compact did not intrude upon more compelling Federal interests. In other words, <u>Tobin v. United States</u>, seems to suggest that approval of an interstate compact would not necessarily prohibit future Federal legislation covering activities similar to that undertaken by the states under a compact.

1. Great Lakes Basin Compact

The Great Lakes Basin Compact is a compact agreed to by the eight Great Lakes States and approved by Congress in 1968. The Compact provides for joint or cooperative state action to, among other things, (1) promote the orderly, integrated, and comprehensive development, use and conservation of the water resources of the Great Lakes Basin; and (2) advise in securing and maintaining a proper balance among industrial, commercial, agricultural, water supply, residential, recreational, and other legitimate uses of the water resources of the Basin.⁸

The Compact applies to the Great Lakes, Lake St. Clair, and the St. Lawrence River, together with any and all natural or manmade water interconnections between or among them, and all rivers, ponds, lakes, streams, and other watercourses which are tributary to, or which comprise part of

⁷<u>Tobin v. United States</u>, 306 F.2d 270, 273-274 (D.C. Cir. 1962).

⁸Great Lakes Basin Compact, Art. II.

⁵Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 281-282, 79 S. Ct. 785 (1959); Tobin v. United States, 306 F.2d 270, 272-273 (D.C. Cir. 1962).

⁶<u>Petty v. Tennessee-Missouri Bridge Comm'n</u>, 359 U.S. 275, 281-282, 79 S. Ct. 785 (1959).
any watershed draining into any of those lakes.⁹ Based upon this definition, the Compact would not apply to groundwater.

The Great Lakes Commission created by the Compact consists of three to five representatives from each of the eight Great Lakes States appointed in accordance with the process set up by each individual state, and associate members from each of the provinces of Ontario and Quebec appointed by the process set up by each province. The Great Lakes Commission has the power to recommend methods for the orderly, efficient, and balanced development, use and conservation of the water resources of the Basin, and uniform or other laws, ordinances, or regulations relating to the development, use and conservation of the Basin's water resources.¹⁰ As part of the Compact, each state agrees to consider the Commission's recommendation in respect to a variety of matters including the diversion of waters from and into the Basin.¹¹

To date, the Great Lakes Commission has not taken a lead role on policy matters related to the diversion of waters from and into the Great Lakes Basin.

B. REGIONAL AGREEMENTS OTHER THAN CONGRESSIONALLY APPROVED COMPACTS

1. Great Lakes Charter

In 1985, the Governors of the eight Great Lakes states and the Premiers of Ontario and Quebec signed the Great Lakes Charter. The Charter is a nonbinding, voluntary arrangement that provides that no major new or increased diversion or consumptive use of Great Lakes water resources will be approved without notice to and the request for consent from all affected states and provinces.¹² The Charter declares that, "It is the intent of the signatory States and Provinces that diversions of Basin water resources will not be allowed if individually or cumulatively they would have any significant adverse impacts on lake levels, in-basin uses, and the Great Lakes Ecosystem."¹³

In the Charter, the Governors and Premiers identified a number of findings to support their decision to enter into the Charter. These findings include: (1) that "[t]he waters of the Great Lakes Basin are interconnected and part of a single hydrologic system;" (2) that "[t]he multiple uses of these resources for municipal, industrial and agricultural water supply; mining; navigation; hydroelectric

⁹<u>Id</u>. at Art. III.

¹⁰<u>Id</u>. at Art. VI.

¹¹<u>Id</u>. at Art. VII.

¹²Great Lakes Charter, Principles for the Management of Great Lakes Water Resources, Principle IV.

¹³<u>Id</u>. at Principles for the Management of Great Lakes Water Resources, Principle III.

power and energy production; recreation; and the maintenance of fish and wildlife habitat and a balanced ecosystem are interdependent;" (3) that "without careful and prudent management, the future development of diversions and consumptive uses of the water resources of the Great Lakes Basin may have significant adverse impacts on the environment, economy, and welfare of the Great Lakes region;" and (4) that "[t]he most effective means of protecting, conserving, and managing the water resources of the Great Lakes is through the joint pursuit of unified and cooperative principles, policies and programs mutually agreed upon, enacted and adhered to by each and every Great Lakes State and Province."¹⁴

Under the terms of the Charter the signers voluntarily agree:

- To begin collecting data for every withdrawal of 100,000 gallons per day or greater;
- To regulate and manage every withdrawal which resulted in a diversion from the basin or a consumptive use of 2 million gallons per day average or more in any 30-day period;¹⁵ and
- To initiate a process of prior notice and consultation among all 10 parties to allow opportunities for review and comment whenever an individual jurisdiction is reviewing a proposal for a water diversion or loss which exceeded five million gallons per day in any 30-day period.¹⁶

A "diversion" is defined by the Charter as "a transfer of water from the Great Lakes Basin into another watershed, or from the watershed of one of the Great Lakes into that of another." "Consumptive use" is defined as "that portion of water withdrawn or withheld from the Great Lakes Basin and assumed to be lost or otherwise not returned to the Great Lakes Basin due to evaporation, incorporation into products, or other processes." And, "withdrawal" is defined as "the removal or taking of water from surface or groundwater."¹⁷

The only provision of the Charter that actually requires coordinated action is the agreement by the Governors and Premiers to not proceed with any new or increased diversion or consumptive use of Great Lakes water over five million gallons per day without notifying, consulting and seeking the consent of all affected Great Lakes states and provinces. It is important to note, however, that the Charter does not require that the consent of all Great Lakes states and provinces actually be

¹⁷<u>Id</u>. at Definitions.

¹⁴<u>Id</u>. at Findings.

¹⁵<u>Id</u>. at Progress Toward Implementation, ¶4.

¹⁶<u>Id</u>. at Implementation of Principles, Consultation Process.

obtained before the diversion or consumptive use would be approved. Consent must only be requested. 18

The State of Wisconsin has adopted legislation incorporating the provisions of the Great Lakes Charter into state law. These statutes are discussed in Chapter 3.

2. Great Lakes Charter Annex

The Great Lakes Charter Annex was adopted by the Great Lakes states and provinces on June 18, 2001 as a supplementary agreement to the Great Lakes Charter. The stated purpose of the Annex was to develop "an enhanced water management system that is simple, durable, efficient, retains and respects authority within the Basin, and most importantly, protects, conserves, restores, and improves the Waters and Water-Dependent Natural Resources of the Great Lakes Basin."¹⁹ Under the Annex, the Governors and Premiers agreed to develop, within three years from the point of adoption of the Annex, binding agreements and implementing legislation to protect, conserve, restore, improve and manage use of the Waters and Water-Dependent Natural Resources of the Great Lakes Basin.²⁰ The work done pursuant to the Great Lakes Charter Annex has resulted in the Great Lakes Annex Implementing Agreements which are next described.

C. GREAT LAKES ANNEX IMPLEMENTING AGREEMENTS

On December 13, 2005, the Great Lakes - St. Lawrence River Basin Water Resources Compact was signed by the eight Great Lakes State Governors. This Compact will be binding on all the eight Great Lakes States only after it is ratified through concurring legislation by the eight states and consented to by Congress. Also on December 13, 2005, the eight Great Lakes State Governors and the two Canadian Province Premiers signed the Great Lakes - St. Lawrence River Basin Sustainable Water Resources Agreement. This agreement is a voluntary nonbinding international agreement to cooperate on the same matters covered by the Compact. Both agreements are the outcome of the work undertaken in accordance with the Great Lakes Charter Annex.

The objective of these agreements is to establish an enforceable environmental standard for protecting the use of the "Waters and Water Dependent Natural Resources of the Great Lakes." The agreements have two major components. First, the agreements would prohibit all "diversions"

 $^{^{18}\}underline{Id}.$ at Implementation of Principles, Consultation Process.

¹⁹Great Lakes Charter Annex, Purpose.

²⁰<u>Id</u>. at Directives, Directive #1.

outside the Basin, with certain limited exceptions noted below.²¹ A "diversion" occurs whenever water is transferred from the Great Lakes Basin into another watershed by any means other than incorporation into a product.²² Second, the agreements require each signatory to manage and regulate new or increased withdrawals and consumptive uses in accordance with the agreements.²³ As the standards contained in the Compact and international agreement are substantially the same, further discussion about these standards will refer to the specific provisions contained in the Compact.

1. Withdrawals and Consumptive Uses

Within five years of the Compact's effective date (five years after Congress and the States approve the Compact), each state must establish a program to manage and regulate new or increased withdrawals and consumptive uses.²⁴ Water withdrawals from the Great Lakes Basin include all withdrawals from the Great Lakes and all streams, rivers, lakes, connecting channels, and other bodies of water, including tributary groundwater, within the Great Lakes Basin.²⁵ The areal extent of the Great Lakes Basin is defined by the Basin's surface water divide.²⁶ A "consumptive use" refers to that portion of the water withdrawn that is lost or otherwise not returned to the Basin due to evaporation, incorporation into products, or other processes.²⁷

States are to set threshold withdrawal and consumptive use levels for new or increased withdrawals and consumptive uses which will trigger state review and regulation process.²⁸ If a state fails to set a threshold level, a 100,000 gallons per day threshold level will apply for new or increased withdrawals and consumptive uses. Each state is also required to determine a baseline level for all existing withdrawals in order to determine when an increased withdrawal occurs. The baseline level for existing withdrawals is the approved withdrawal amount, or the capacity of an existing system presented in terms of withdrawal capacity, treatment capacity, or other capacity limiting

 23 <u>Id</u>. at Section 4.10.

 24 <u>Id</u>.

²⁶Id. at Section 4.12.

²¹Great Lakes-St. Lawrence River Basin Water Resources Compact, December 13, 2005, Sections 4.8 and 4.9.

²²Id. at Section 1.2, Definition of "Diversion".

²⁵Id. at Section 1.2, Definitions of "Withdrawal" and "Waters of the Basin".

²⁷Id. at Section 1.2, Definition of "Consumptive Use".

²⁸<u>Id</u>. at Section 4.10.

factor.²⁹ Existing capacity determinations are to be based upon either approval limits or the most restrictive capacity information.

The Compact provides that the regulatory program established by the state for new or increased withdrawals and consumptive uses of surface water or groundwater from within the Basin must at a minimum require compliance with the following criteria:³⁰

1. All the water withdrawn must be returned to the source watershed less an allowance for consumptive use.³¹ The source watershed is the watershed from which a withdrawal originates. A withdrawal from Lake Michigan or the Lake Michigan watershed, for example, must be returned to the Lake Michigan watershed. If the withdrawal is from a stream in the Lake Michigan watershed, the Compact requires the water be returned to the Lake Michigan watershed, with a preference (but not a requirement) for returning the water to the stream watershed from which it was withdrawn.³² The allowance for consumptive use is to be established by each individual state in conjunction with stakeholders. Consumptive use volumes are to be calculated using commonly accepted methods and based on a 90-day average.³³

2. The withdrawal or consumptive use will be implemented so as to ensure that the proposal will result in no significant individual or cumulative adverse impact to the quantity or quality of the waters and water dependent natural resources.³⁴

3. The withdrawal or consumptive use will be implemented so as to incorporate environmentally sound and economically feasible water conservation measures.³⁵ Environ-mentally sound and economically feasible water conservation measures are those measures for efficient water

²⁹<u>Id</u>. at Section 4.12.

³⁰<u>Id</u>. at Section 4.11.

 31 <u>Id</u>.

³²Id. at Section 1.2, Definition of ."Source Watershed"

³³"Frequently Asked Questions Annex 2001 Implementing Agreements," Council of Great Lakes Governors, January 2006, p. 2-3.

 34 <u>Id</u>. at Section 4.11.

³⁵<u>Id</u>.

use, for reducing water loss, and for reducing withdrawals, that are environmentally sound, reflect best practices, are technically feasible and available, are economically feasible and cost effective, and take the particular facilities and processes involved into consideration.³⁶

4. The withdrawal or consumptive use will be implemented so as to ensure compliance with all applicable laws and treaties.³⁷

5. The proposed use will be reasonable, based on a consideration of the following factors: (a) the efficiency of the proposed new use; (b) the efficient use of existing water supplies; (c) the balance between economic development, social development and environmental protection of the proposal and other existing and planned uses of the water; (d) the supply potential of the water source; (e) the probable degree and duration of adverse impacts to other water uses or to the quality and quantity of the water and water dependent natural resources of the Basin, and plans for mitigation thereof; and (f) any restoration proposed for the source watershed.³⁸

In addition, if the state is considering a proposal for a new or increased consumptive use greater than five million gallons per day, the state must provide notice and an opportunity to comment to the other states and provinces prior to making any decision with respect to the proposal. If comments are made, the state in which the proposal arose must respond to such comments.³⁹ However, specific consent from the other states is not required.

2. Diversions

The Compact would prohibit all new or increased diversions of surface water or groundwater from the Great Lakes Basin with three exceptions.⁴⁰ A "diversion" occurs when water is withdrawn from the Great Lakes Basin and transferred into another watershed by any means other than incorporation into a product.⁴¹ The three exceptions from the diversion prohibition are for straddling communities, intra-Basin transfers, and straddling counties.⁴²

³⁸<u>Id</u>.

³⁹<u>Id</u>. at Section 4.6.

 40 <u>Id</u>. at Sections 4.8 and 4.9.

⁴¹<u>Id</u>. at Section 1.2, Definition of "Diversion".

 42 <u>Id</u>. at Section 4.9.

³⁶<u>Id</u>. at Section 1.2, Definition of "Environmentally Sound and Economically Feasible Water Conservation Measures."

³⁷<u>Id</u>. at Section 4.11.

a. Diversion Exception for a Straddling Community

The first exception to the diversion prohibition is for straddling communities.⁴³ A straddling community is any incorporated municipality, or the equivalent thereof, located within one county, whose existing corporate boundaries (as of the effective date of the Compact) lie partly within and partly outside the Basin.⁴⁴ A straddling community may seek approval for a diversion provided (1) the water sought will be used only for public water supply purposes within the straddling community; and (2) all water withdrawn from the Basin is returned to the source watershed less an allowance for consumptive use.⁴⁵ Water used for public water supply is "water distributed to the public through a physically connected system . . . serving . . . largely residential customers that may also serve industrial, commercial, and other institutional operators." It does not include water drawn directly from the Basin and not through such a system.⁴⁶

In determining whether all water withdrawn from the Basin is returned to the source watershed, no water originating outside the Basin may be used to meet this return flow requirement unless: (a) it is part of a water supply or wastewater treatment system that combines water from inside and outside of the Basin; (b) it is treated to meet applicable water quality discharge standards and to prevent the introduction of invasive species into the Basin; and (c) it maximizes the portion of water returned to the source watershed as Basin water and minimizes the surface water or groundwater from outside the Basin.⁴⁷

The individual states have the authority to grant approval for a diversion for a straddling community. If the diversion is for less than 100,000 gallons per day, the proposed diversion must meet whatever standards a state has established. If the diversion is for 100,000 gallons per day or more, the diversion must meet the following standards established in the Compact.⁴⁸

1. The need for the water cannot reasonably be avoided through the efficient use and conservation of existing water supplies;⁴⁹

 43 <u>Id</u>.

- ⁴⁵<u>Id</u>. at Section 4.9, ¶1.
- ⁴⁶<u>Id</u>. at Section 1.2., Definition of "Public Water Supply Purposes."
- ⁴⁷<u>Id</u>. at Section 4.9, $\P(1)(a)$.
- ⁴⁸<u>Id</u>. at Section 4.9, $\P(1)(b)$.
- ⁴⁹<u>Id</u>. at Section 4.9, $\P(4)(a)$.

⁴⁴Id. at Section 1.2, Definition of "Straddling Community."

2. The withdrawal is to be limited to quantities that are considered reasonable for the purpose for which it is proposed; 50

3. The withdrawal will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quality and quantity of the waters and water dependent natural resources of the Basin with consideration given to the potential cumulative impacts of any precedent-setting consequences associated with the proposal;⁵¹

4. Environmentally sound and economically feasible water conservation measures are to be implemented to minimize water withdrawals and consumptive use; and^{52}

5. The withdrawal or consumptive use is to be implemented so as to ensure compliance with all applicable laws and treaties. 53

If the proposed diversion for a straddling community would result in a consumptive use of five million gallons per day or more, the proposal must also undergo regional review.⁵⁴ The Regional Body, which is comprised of representatives of the Great Lakes States and Provinces, is to be given notice of the diversion proposal and the information considered by the State. After public participation and a technical review, the Regional Body is to meet to consider the proposal and issue a Declaration of Finding as to whether, in its view, the proposal meets the decision-making standards. The State is to consider this Finding when making its decision whether to approve the diversion.⁵⁵ The Regional body is comprised of the Governors of the eight Great Lakes States and the Premiers of Ontario and Quebec or their designees.

b. Diversion Exception for an Intra-Basin Transfer

The second exception to the diversion prohibition is for intra-Basin transfers.⁵⁶ An intra-Basin transfer is defined as the transfer of water from the watershed of one of the Great Lakes into the

⁵¹<u>Id</u>. at Section 4.9, $\P(4)(d)$.

- 52 <u>Id</u>. at Section 4.9, ¶(4)(e).
- ⁵³<u>Id</u>. at Section 4.9, $\P(4)(f)$.
- ⁵⁴<u>Id</u>. at Section 4.9, $\P(1)(c)$.
- ⁵⁵<u>Id</u>. at Section 4.5, $\P(5)$.
- ⁵⁶<u>Id</u>. at Section 4.9, $\P(2)$.

⁵⁰<u>Id</u>. at Section 4.9, $\P(4)(b)$.

watershed of another Great Lake.⁵⁷ A state may authorize an intra-Basin transfer unless it would result in a consumptive use of five million gallons per day or more.

For intra-Basin transfers of less than 100,000 gallons per day, the proposed transfer must only meet whatever standards the state has established.⁵⁸ If the intra-Basin transfer is for 100,000 gallons per day or more, but less than five million gallons per day, the transfer must meet the following conditions.⁵⁹

1. There must be no feasible, cost effective and environmentally sound water supply alternative within the Great Lakes watershed to which the water will be transferred, including conservation of existing water supplies; 60

2. The need for water cannot reasonably be avoided through the efficient use and conservation of existing water supplies; 61

3. The withdrawal is to be limited to quantities that are considered reasonable for the purpose for which it is proposed; 62

4. The withdrawal will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quality and quantity of the waters and water dependent natural resources of the Basin with consideration given to the potential cumulative impacts of any precedent-setting consequences associated with the proposal;⁶³

5. Environmentally sound and economically feasible water conservation measures are to be implemented to minimize water withdrawals and consumptive use; and^{64}

⁵⁸<u>Id</u>. at Section 4.9, $\P(2)$.

⁵⁹<u>Id</u>.

⁶⁰<u>Id</u>. at Section 4.9, $\P(2)(b)(ii)$.

⁶¹<u>Id</u>. at Section 4.9, $\P(4)(a)$.

 62 <u>Id</u>. at Section 4.9, $\P(4)(b)$.

⁶³<u>Id</u>. at Section 4.9, $\P(4)(d)$.

⁶⁴<u>Id</u>. at Section 4.9, $\P(4)(e)$.

⁵⁷Id. at Section 1.2, Definition of "Intra-Basin Transfer."

6. The withdrawal or consumptive use is to be implemented so as to ensure compliance with all applicable laws and treaties. 65

The state considering the proposal must also provide notice to the other states and provinces prior to making any decision with respect to the proposal regarding an intra-Basin transfer.⁶⁶

If the proposal for an intra-Basin transfer would result in a new or increased consumptive use of five million gallons a day or greater over any 90-day period, the proposal must receive Regional Review.⁶⁷ The proposal must also be reviewed and approved by the Great Lakes - St. Lawrence River Basin Water Resources Council which consists of the Governors of the eight Great Lakes States.⁶⁸ The Premiers of Ontario and Quebec are not members of the Council. Council approval is given unless one or more Council Members votes to disapprove.⁶⁹

c. Diversion Exception for a Community Within a Straddling County

The third exception to the diversion prohibition is for communities within a straddling county.⁷⁰ A community within a straddling county is any incorporated municipality or the equivalent thereof that is located totally outside the Basin but wholly within a county that lies partly within the Basin.⁷¹

A community within a straddling county may seek approval for a diversion provided:

1. The water sought will be used only for public water supply purposes within a community located within a straddling county that is without adequate supplies of potable water;⁷²

- ⁶⁶<u>Id</u>. at Section 4.9, $\P(2)(b)(iii)$.
- ⁶⁷<u>Id</u>. at Section 4.9, $\P(2)(c)$.
- ⁶⁸<u>Id</u>. at Section 2.2 and Section 4.9, $\P(2)(c)$.
- ⁶⁹<u>Id</u>. at Section 4.9, $\P(2)(c)$.
- ⁷⁰<u>Id</u>. at Section 4.9, $\P(3)$.
- ⁷¹<u>Id</u>. at Section 1.2, Definition of "Community within a Straddling County".
- ⁷²<u>Id</u>. at Section 4.9, $\P(3)(a)$.

⁶⁵<u>Id</u>. at Section 4.9, $\P(4)(f)$.

2. There is no reasonable water supply alternative within the Basin in which the community is located, including conservation of existing water supplies; and⁷³

3. The proposal must meet the standards applicable to straddling communities.⁷⁴

A proposal for a diversion of any size by a community within a straddling county must receive approval from both the state concerned and the Great Lakes - St. Lawrence River Basin Water Resources Council.⁷⁵ The state must manage and regulate this diversion regardless of its size. The Council must review and approve the proposal. The proposal is approved by the Council unless one or more Council Members vote to disapprove.⁷⁶

The Compact provides that caution should be used in determining whether or not a proposal by a community within a straddling county meets the conditions for approval. The diversion should not be approved unless it can be shown that it will not endanger the integrity of the Basin ecosystem.⁷⁷ In addition, in considering the proposal, substantive consideration will be given to whether or not the proposal can provide sufficient scientifically based evidence that the existing water supply is derived from groundwater that is hydrologically interconnected to waters of the Basin.⁷⁸

d. No Additional Diversion for Illinois

The Compact specifically recognizes and accepts on a going forward basis the terms of the Chicago diversion approved by the United States Supreme Court decision in <u>Wisconsin v. Illinois</u>.⁷⁹ This case is discussed further in Section C of this Chapter. Because this diversion is already authorized for Illinois, Illinois is not allowed to request another diversion under the Compact.⁸⁰

⁷⁴<u>Id</u>. at Section 4.9, $\P(3)$.

⁷⁵<u>Id</u>.

⁷⁶<u>Id</u>. at Section 4.9, $\P(3)(g)$.

- ⁷⁷<u>Id</u>. at Section 4.9, $\P(3)(e)$.
- ⁷⁸<u>Id</u>. at Section 4.9, $\P(3)$.

⁷⁹<u>Wisconsin v. Illinois</u>, 388 U.S. 426 (1967).

⁸⁰<u>Id</u>. at Section 4.14.

⁷³<u>Id</u>. at Section 4.9, $\P(3)(d)$.

e. Diversions and Groundwater

In considering the impact of the Compact, it is important to keep in mind that the Compact applies not just to withdrawals, consumptive use and diversions of surface water, it also applies to withdrawals, consumptive use and diversions of groundwater.⁸¹ The Compact provides that the Great Lakes Basin surface water divide is to be used for managing and regulating new or increased withdrawals, consumptive use and diversions of surface water or groundwater.⁸² From the effective date of the Compact forward, a community seeking a new or increased withdrawal of groundwater from within the Great Lakes Basin must meet all the requirements discussed above. This includes returning all water withdrawn from the Basin back to the Basin. Failure to return the water to the Basin would constitute a prohibited diversion. This means that a community located within the Great Lakes Basin would not be allowed to install a new well within the Basin, if the community's wastewater would discharge to a location outside of the Basin.

3. Regional Body and Great Lakes-St. Lawrence River Basin Water Resources Council

Both the Regional Body⁸³ and the Great Lakes-St. Lawrence River Basin Water Resources Council have the authority to review proposals as discussed above. In addition, the Council is required to approve proposals for (i) intra-Basin transfers which would result in a new or increased consumptive use of five million gallons a day or more, and (ii) withdrawals for communities within a straddling county. The Council is given additional powers under the Compact. The most important power is that the Council may revise the decision-making standard applicable to the review and approval of withdrawals by the states or the Council.⁸⁴ This provision, therefore, could potentially allow for a change in the decision-making standard a state would have to apply to withdrawals without that change receiving legislative approval from the state.

4. Enforcement

Any person aggrieved by a Council or a state action may seek administrative review, then court review, of such action.⁸⁵ A person who seeks approval for a diversion and is denied, for example, may seek review of such action.

⁸²<u>Id</u>. at Section 4.12, ¶5.

⁸³<u>Id</u>. at Section 1.2, Definition of "Regional Body". The Regional Body is made up of representatives from the eight Great Lakes States and two Canadian provinces.

⁸⁴<u>Id</u>. at Section 3.1.

⁸⁵<u>Id</u>. at Section 7.3(1).

⁸¹Id. at Section 1.2, Definition of "Waters of the Basin".

In addition, any aggrieved person, a state or the Council may bring an action against any person who undertakes a withdrawal without first receiving the necessary approvals required by the Compact.⁸⁶ Before a private party can bring an action, the private party must first give the entity withdrawing the water, the state in which the withdrawal is occurring, and the Council sixty days prior notice of the noncompliance in order to give the state or the Council an opportunity to bring an enforcement action.⁸⁷ If the state or the Council does not bring an enforcement action, the private party may. Substantially prevailing litigants in such actions may recover costs and attorneys fees when the court determines this is appropriate.⁸⁸

5. Other Provisions

Under the Compact, the states are to obtain water use information from all withdrawals greater than 100,000 gallons per day, and all diversions of any amount.⁸⁹ The water use information should include the amount, capacity, location, sources and uses of withdrawals and an annual reporting of amounts withdrawn.

The Council is also to identify Basin-wide conservation and efficiency objectives based on the goals of improvement of Basin water and water dependent natural resources, ecosystem integrity, quantity retention, sustainability, efficient use and loss reduction.⁹⁰ The states are to implement voluntary or mandatory programs for all water users based on their own goals derived from these objectives, and to report annually to the Council on their progress. The Council is to revise their conservation and efficiency objectives every five years.

Another item worthy of note is that the Compact refers to waters of the Great Lakes Basin, which include both surface water and groundwater, as public trust waters.⁹¹ Under Wisconsin law as described in Chapter 5, groundwater is not a public trust water. If Wisconsin adopts the Compact, this raises the question of whether the public trust doctrine would then be deemed to extend to groundwater.

⁸⁷<u>Id</u>. at Section 7.3(3).

⁸⁸<u>Id</u>.

⁸⁹<u>Id</u>. at Section 4.1(3).

⁹⁰<u>Id</u>. at Section 4.2.

⁹¹<u>Id</u>. at Section 1.3(1)(a).

⁸⁶<u>Id</u>. at Sections 7.3(2) and (3).

6. Legal Effect of the Compact

Once the Compact is approved by the eight Great Lakes States and Congress, it has the effect of Federal law. The Compact would continue in force and be binding on all the states until the Compact is terminated.⁹² The Compact may only be terminated by a majority vote of the eight Great Lakes states.⁹³ Once the Compact is effective, a state would not be allowed to opt-out of the provisions of the Compact. This is in contrast to the international agreement which is a good faith agreement between the parties from which any party may withdraw by giving the other parties 12 months prior notice.⁹⁴

7. The Relationship Between the Compact and WRDA

At this time, WRDA remains in effect, and continues to prohibit all new diversions from the Great Lakes unless the eight Great Lakes Governors agree to allow such a diversion. For communities seeking approval of a diversion now, the same WRDA process applies. As noted earlier, the eight Great Lakes Governors have approved only two diversions under WRDA, and both of these diversions involved commitments to return the water to the Great Lakes Basin.

If the Compact is approved, WRDA - as an existing Federal law - would continue in effect unless Congress decided to repeal it. The Compact, however, would provide a standard and mechanism for the eight Great Lakes Governors to use in determining when to approve a diversion from the Great Lakes Basin. For straddling communities and intra-Basin diversions, the process for obtaining approval for a diversion would be simplified. For communities within straddling counties, the Compact provides guidance on what must be done in order to seek approval. However, the Compact still would allow any one of the eight Great Lakes Governors to deny approval for a diversion by a community within a straddling county, just as WRDA does now.

If the Compact is approved, groundwater withdrawals from the Great Lakes Basin would be covered by the provisions of the Compact as discussed above. In that event, the question of WRDA's applicability to groundwater would be less important.

Even before the Compact is approved by the eight Great Lakes States and Congress, the Compact may have an impact on how WRDA is applied in Wisconsin. As discussed earlier, WDNR has taken the position in the past that water taken and used outside the Basin, but then returned to the Basin, is not a diversion subject to WRDA. Under the Compact, however, water taken and used outside the Basin is clearly defined as a diversion, even if the water is returned to the Basin. While

 93 <u>Id</u>. at Section 8.7.

⁹⁴Great Lakes - St. Lawrence River Basin Sustainable Water Resources Agreement, dated December 15, 2005, Article 707.

 $^{^{92}}$ <u>Id</u>. at Section 9.4.

not required to do so, the WDNR could change its administrative interpretation of the term "diversion" under WRDA to be consistent with the Compact's definition of "diversion." If it does so, those users who relied upon the state's original interpretation could have difficulty obtaining state approvals for additional withdrawals until the Compact is effective.

C. SUPREME COURT DECISIONS BETWEEN STATES

In situations where States have been unable to reach agreement or resolve disputes between themselves regarding conflicting uses of water, they have taken their disputes to the United States Supreme Court. It is well accepted that the United States Supreme Court is the forum for the judicial settlement of disputes between states over the apportionment of the waters of interstate water bodies.⁹⁵ There is in particular, a long history of United States Supreme Court decisions addressing disputes between the states involving Lake Michigan.

In 1900, the State of Missouri brought a suit against the State of Illinois and the Sanitary District of Chicago to enjoin Illinois and Chicago from discharging sewage into an artificial channel constructed to flow into the Mississippi River.⁹⁶ The sewage had previously flowed into Lake Michigan. Missouri argued that the construction of the artificial channel and the discharge of sewage into the Mississippi River constituted a nuisance to the citizens of Missouri, and that the State of Missouri had the authority to bring a nuisance action against Illinois in the Supreme Court. The Supreme Court agreed, and allowed the case to proceed. Subsequently, in 1906, the Supreme Court held that while a state may have relief against another state to prevent it from discharging sewage through an artificial channel into, and thereby polluting the waters of, a river flowing through both states, the facts regarding such pollution must be fully proved, and since they were not in this case, the complaint would be dismissed without prejudice.⁹⁷ The Supreme Court also held that a drainage channel that diverted water from the Lake Michigan watershed into the Mississippi was not, in the absence of proof showing deleterious effects of such diverted water, an unlawful structure, the use of which should be enjoined at the request of another state.

In 1929, the States of Wisconsin, Minnesota, Pennsylvania and Ohio, sought to enjoin the State of Illinois from diverting Lake Michigan water through the sanitary canal into the Mississippi River watershed even though Illinois had a permit for the diversion from the Secretary of War.⁹⁸ Plaintiff States alleged that the diversion, by lowering the level of the lakes and waters connecting them, inflicted damage upon public and private riparian property in the plaintiff States and to their waterborne commerce. They also argued that the diversion permit from the Secretary of War was

95U.S. Const. art. III, §2.

⁹⁶<u>Missouri v. Illinois</u>, 180 U.S. 208 (1901).

⁹⁷<u>Missouri v. Illinios</u>, 200 U.S. 496 (1906).

⁹⁸<u>Wisconsin v. Illinois</u>, 278 U.S. 367 (1929).

unconstitutional in that it exceeded the power of Congress to regulate commerce, preferred the ports of one state over those of other states, deprived the plaintiffs and their citizens of property without due process of law, and invaded the sovereign rights of the plaintiffs as members of the Union. The Supreme Court held that the Secretary of War had the authority to issue a diversion permit to protect the navigability of the Chicago River Canal, but it did not have the authority to permit a diversion merely to aid Chicago in the disposal of its sewage. The Court ordered that the plaintiff states were entitled to have the diversion stopped by injunction, except for what was needed by the Chicago River to maintain navigability. In reaching its decision, the Court noted that while Congress in the exercise of its power may adopt any legislation having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end.⁹⁹

Although the diversion of water solely for sewage disposal purposes was held illegal, the Supreme Court held that the elimination or reduction of the diversion should be done over time rather than immediately in order to avoid, as much as possible, harm to Illinois and Chicago. The Court submitted the case to a special master for recommendations on an appropriate plan for restoration. The Supreme Court considered the special master's proposed plan for restoration in 1930.¹⁰⁰ The proposed plan required the Chicago diversion to be reduced by 1938 from 6,500 cubic feet per second plus domestic usage, to 1,500 cubic feet per second plus domestic usage. Plaintiff States argued that the domestic usage should not be diverted but should be returned to Lake Michigan. However, the Supreme Court rejected this argument because it concluded the amount of water lost was relatively small and did not arise to the level of being a nuisance to the plaintiff States.¹⁰¹

The Court did not set a specific amount of water allowed to be withdrawn for domestic usage. However, it did state that: "If the amount withdrawn should be excessive, it will be open to complaint."¹⁰² In 1967, the issue regarding the amount of water that could be diverted for domestic pumping—i.e., for public water supply—was addressed. The Supreme Court reviewed a special master's report and ordered that the State of Illinois and its municipalities be limited to diverting no more than 3,200 cubic feet per second of water from the Lake Michigan Basin to the Mississippi River Basin, regardless of whether such diversion is by way of domestic pumpage, sewage discharge, or stormwater runoff.¹⁰³ The State of Illinois was allowed to determine how to apportion this diversion among its municipalities, and other water users. The Supreme Court order also provided that Illinois may apply for an increased diversion in the future if additional water from

⁹⁹<u>Id</u>. at 415.

¹⁰⁰Wisconsin v. Illinois, 281 U.S. 179 (1930).

¹⁰¹<u>Id</u>. at 200.

 102 <u>Id</u>.

¹⁰³Wisconsin v. Illinois, 388 U.S. 426, 427 (1967).

Lake Michigan is needed for domestic use for the Northeastern Illinois Metropolitan Region, and the need for water cannot be met from the water resources available to the Region.¹⁰⁴

This recognized diversion of Lake Michigan water, referred to as the Chicago Diversion, continues today and as discussed above, is recognized as a permitted diversion in the Great Lakes - St. Lawrence River Basin Sustainable Water Resources Compact and the Great Lakes - St. Lawrence River Basin Water Resources Agreement.

These cases demonstrate that - with or without WRDA - disputes between states regarding conflicting water uses may be raised in the United States Supreme Court. If a claim by one state against another is based upon WRDA, it is unknown how a court would decide such a claim since no court has yet addressed this issue. If a claim, however, is based upon a violation of the Rivers and Harbors Act or nuisance, the Supreme Court would presumably follow the law as applied in the <u>Wisconsin v. Illinois</u> line of cases. Based upon those cases, one would expect the Supreme Court to allow limited diversions if: (1) the diversion did not negatively impact the navigability of Lake Michigan or any of the Great Lakes; (2) the diversion did not harm, or cause a nuisance to, any of the other Great Lakes States; and (3) the water was used for domestic usage. Whether water taken from Lake Michigan and used outside the Basin would ultimately be returned to Lake Michigan, instead of another watershed, would also be expected to be relevant to the issue of the harm from the diversion.

¹⁰⁴<u>Id</u>. at 429-430.

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CHAPTER THREE

LAW APPLICABLE TO THE CAPTURE OF WATER: STATE REGULATION

States have typically had primary control over the waters within their boundaries. States exercise their power over water through the adoption of state statutes and regulations, and through the establishment of common law. Chapter 3 deals with Wisconsin statutes and regulations applicable to water supply. Chapter 5 deals with common law water rights, such as riparian rights, the reasonable use doctrine, and the public trust doctrine.

A. GENERAL AUTHORITY STATUTES

The Wisconsin Legislature has defined waters of the State of Wisconsin to include those portions of Lake Michigan and Lake Superior within the boundaries of the state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within Wisconsin.¹

The Wisconsin Department of Natural Resources (WDNR) is designated as the central unit of State government responsible for the protection, maintenance, and improvement of the quality and management of waters of the State, ground and surface, public and private.² The WDNR is given the general supervision and control over the waters of the State.³ It is to carry out the planning, management and regulatory programs necessary for implementing Chapter 281 of the Wisconsin Statutes.⁴ This includes administering the state's Safe Drinking Water Act program.⁵ The WDNR also has the authority to establish minimum standards, rules and regulations for methods to be pursued in protecting and obtaining drinking water for human consumption.⁶

A municipality may provide water supply, or contract with another party to provide water supply, to its residents.⁷ A municipality or any entity that provides water supply to the public either

³§ 281.12(1), Wis. Stats.

⁴<u>Id</u>.

⁵§ 281.17(8), Wis. Stats.

⁶§ 280.11, Wis. Stats.

⁷§§ 66.0803, 66.0815, Wis. Stats.

¹§ 281.01(18), Wis. Stats.

²§ 281.11, Wis. Stats.

directly or indirectly is a public utility and is regulated by Chapter 196, Wisconsin Statutes.⁸ The Public Service Commission of Wisconsin has the authority for supervising and regulating all public utilities in the State.⁹ This includes providing authorization for new construction projects, and establishing water utility rates.¹⁰

B. WATER WITHDRAWAL STATUTES AND REGULATIONS

Water supply may be drawn from the groundwater or the surface water. Statutes applicable to water supply drawn from groundwater are found in Chapter 280, Section 281.34 and Section 281.35 Wisconsin Statutes. Statutes applicable to water supply drawn from surface water are found in Sections 30.18 and 281.35 of the Statutes. In addition, all construction done by public water supply systems, including the construction of wells or water intake facilities, is governed by the provisions of Sections 281.41 and 196.49 of the Statutes.

1. Groundwater

Almost all groundwater wells in Wisconsin, regardless of size, are to be constructed in accordance with WDNR regulations.¹¹ If a groundwater well has the capacity to pump in excess of 100,000 gallons a day, or will in combination with all the other wells on the same property have a capacity to pump more than 100,000 gallons a day, it must also be approved by the WDNR before it can be installed.¹² A well, which in combination with all other wells on the same property, has a capacity of over 100,000 gallons a day is referred to as a high capacity well.¹³

In reviewing the application for approval of a high capacity well, the WDNR is to consider whether the proposed well will: (1) adversely affect or reduce the availability of water to any public utility furnishing water to or for the public; (2) be located in a groundwater protection area and cause significant environmental impact; (3) have a significant environmental impact on a spring; or (4) result in a water loss of more than 95 percent of the amount of water withdrawn.¹⁴ The high

⁸§ 196.01(5)(a), Wis. Stats.

⁹§ 196.02(1), Wis. Stats.

¹⁰§§ 196.03, 196.20, 196.49, Wis. Stats.

¹¹NR Chapter 812, Wis. Admin. Code.

¹²§ 281.34(2), Wis. Stats.

¹³§ 281.34(1)(b), Wis. Stats.

¹⁴§ 281.34(5), Wis. Stats. Consumptive use is determined in accordance with NR § 142.04, Wis. Admin. Code.

capacity well approval statute does not require the WDNR to consider whether the proposed well will negatively impact an existing private well.¹⁵

If the WDNR determines that a proposed high capacity well may impair the water supply of a public utility, the WDNR may not approve the high capacity well unless it includes in the approval conditions which will ensure that the water supply of the public utility will not be impaired.¹⁶

If the proposed well is located in a groundwater protection area, the WDNR may not approve the high capacity well unless it includes in the approval any needed conditions to ensure that the high capacity well does not cause significant environmental impact within the groundwater protection area.¹⁷ A groundwater protection area is defined under Section 281.34(1)(a) of the Wisconsin Statutes, is an area within 1,200 feet of an outstanding resource water as identified under Section 281.15 of the Statutes, an exceptional resource water as identified under Section 281.15 of the Statutes, or a class I, class II, or class III trout stream, other than a class I, class II, or class III trout stream that is a farm drainage ditch with no prior stream history. One exception to this prohibition is that it does not apply to a proposed high capacity well for a public utility engaged in supplying water to or for the public, if the WDNR determines that there is no other reasonable alternative location for the well and is able to include in the approval, conditions as to location, depth, pumping capacity, rate of flow, and ultimate use, that ensure that the environmental impact of the well is balanced by the public benefit of the well related to public health and safety.¹⁸

If a proposed well is located near a spring, the WDNR may not approve the well unless it includes in the approval any needed conditions to ensure that the high capacity well does not cause significant environmental impact to the spring.¹⁹ A spring is defined under Section 281.34(1)(f) of the Statutes as an area of concentrated groundwater discharge occurring at the surface of the land that results in a flow of at least one cubic foot per second at least 80 percent of the time. Excepted from this prohibition is a proposed high capacity well for a public utility engaged in supplying water to or for the public, if the WDNR determines that there is no other reasonable alternative location for the well and the WDNR is able to include in the approval, conditions as to location,

¹⁵For discussion regarding impacts to private wells, see Section C of this Chapter and Chapter 6.

¹⁶§ 281.34(5)(a), Wis. Stats.

¹⁷§ 281.34(5)(b), Wis. Stats.

¹⁸§ 281.34(5)(b)2., Wis. Stats.

¹⁹§ 281.34(5)(d), Wis. Stats.

depth, pumping capacity, rate of flow, and ultimate use, that ensure that the environmental impact of the well is balanced by the public benefit of the well related to public health and safety.²⁰

If the proposed high capacity well would result in a water loss of more than 95 percent of the amount of water withdrawn, the WDNR may not approve the high capacity well unless it is able to include in the approval, conditions as to location, depth, pumping capacity, rate of flow, and ultimate use, that ensure that the high capacity well does not cause significant environmental impact.²¹ Water loss is defined to mean a loss of water from the basin from which it is withdrawn as a result of interbasin diversion or consumptive use or both.²²

The approval of a high capacity well will remain in effect unless the WDNR modifies or rescinds the approval because the high capacity well, or the use of the well, is not in conformance with standards or conditions applicable to the approval of the well.²³

In addition to this approval requirement, the Wisconsin Statutes requires that any person withdrawing an average of more than 100,000 gallons of water per day in any 30-day period—whether such withdrawal is from the surface water or the groundwater—must register the withdrawal with the WDNR.²⁴ The registration must indicate the source of the proposed or existing withdrawal, the location of any discharge or return flow, the location and nature of the proposed or existing water use, the actual or estimated average annual and monthly volumes and rates of withdrawal, and the actual or estimated average annual and monthly volumes and rates of water loss from the withdrawal. Subject to certain limited exceptions, each person who registers a withdrawal must also report the actual volume and rate of withdrawal and, if applicable, the volume and rate of water loss from the withdrawal to the WDNR at the times required by the WDNR.²⁵ A public utility who reports its water usage to the PSC is not required to report water withdrawal information to the WDNR.

There are also special permit requirements for the withdrawal of either groundwater or surface water that results in water loss averaging over 2,000,000 gallons per day.²⁶ This is discussed more fully below.

²⁰§ 281.34(5)(d)2., Wis. Stats.

²¹§ 281.34(5)(c), Wis. Stats.

²²§ 281.34(1)(g), Wis. Stats.

²³§ 281.34(7), Wis. Stats.

²⁴§ 281.35(3), Wis. Stats.

²⁵§ 281.35(3)(c), Wis. Stats.

²⁶§ 281.35(4), Wis. Stats.

2. Surface Water

Section 30.18 of the Wisconsin Statutes entitled, "Diversion of water from lakes and streams", addresses two types of surface water diversions: (1) a diversion from a stream for the purpose of agriculture, irrigation, or the maintenance or restoration of the normal level of a navigable lake or stream; and (2) a diversion from a lake or stream which would result in a water loss averaging 2,000,000 gallons per day in any 30-day period above the authorized base level of water loss.²⁷ The first type of diversion is applicable only to agriculture, irrigation, and water level maintenance. The second type of diversion is applicable to large surface water withdrawals with significant water loss. This type of diversion is further discussed below.

Under Section 30.18(2)(b) of the Wisconsin Statutes, a user seeking to divert water from a lake or stream which would result in a water loss averaging 2,000,000 gallons per day in any 30-day period above the user's authorized base level of water loss must obtain an individual permit from the WDNR. Water loss means a loss of water from the basin from which it is withdrawn as a result of interbasin withdrawal or consumptive use or both.²⁸ A users's authorized base level of water loss is the level established by the WDNR for the user in a prior approval, or if no level has been established, the highest average daily water loss over any 30-day period that was reported to the WDNR or the PSC.²⁹

In order to obtain a permit to divert water from a lake or stream which will result in an increased water loss averaging 2,000,000 gallons per day, an applicant must follow the procedures set forth in Section 30.18 of the Wisconsin Statutes which incorporate the requirements of Section 281.35 of the Statutes.³⁰ Upon receipt of a complete application, the WDNR is to follow the notice and hearing procedures under Section 30.208 (3) to (5), of the Statutes.³¹ In addition, the WDNR is to mail a copy of the notice of the application (i) to every person upon whose land any part of the canal or any other structure used for the diversion will be located, (ii) to the clerk of the next town downstream, and (iii) to the clerk of any village or city in which the lake or stream from which water is to be diverted is located and which is adjacent to any municipality in which the diversion will take place.³²

- ²⁹§ 281.35(1)(b), Wis. Stats.
- ³⁰§ 30.18(3)(b), Wis. Stats.
- ³¹§ 30.18(4), Wis. Stats.
- ³²§ 30.18(4)(a), Wis. Stats.

²⁷§ 30.18(2), Wis. Stats.; NR Chapter 142, Wis. Admin. Code.

²⁸§ 281.35(1)(L), Wis. Stats.

The WDNR is to approve an application for a diversion if the WDNR determines all the following criteria are met:³³

- No public water rights in navigable waters will be adversely affected;
- The proposed diversion will not conflict with any applicable plan for future uses of the waters of the state;
- The applicant's current water use, if any, and the applicant's proposed plans for withdrawal, transportation, development and use of water resources incorporate reasonable conservation practices;
- The proposed diversion will not have a significant adverse impact on the environment and ecosystem of the Great Lakes basin or the upper Mississippi River basin
- The proposed diversion and uses are consistent with the protection of public health, safety and welfare and will not be detrimental to the public interest;
- The proposed diversion will not have a significant detrimental effect on the quantity and quality of the waters of the state;
- If the proposed diversion will result in an interbasin diversion, that the requirements of Section 281.35(5)(d)7 are met.

If the permit is granted, the WDNR must specify on the permit the quantity of water that may be diverted, the times during which water may be diverted, the uses for which water may be diverted, the amount and quality of return flow required and the place of discharge, the requirements for reporting volumes and rates of withdrawal, and any other conditions, limitations and restrictions required by the WDNR.³⁴ The WDNR is to review each permit at least every five years, and it may at any time propose modifications of the approval or additional conditions, limitations or restrictions.³⁵ The permit can only be revoked by following the procedure set forth in Section 281.35(6)(d)-(f), of the Wisconsin Statutes.

It should be noted that surface water diversions for water supply purposes that do not result in a large water loss would not be covered by Section 30.18, of the Statutes. For public water systems, this activity would instead likely be regulated under the WDNR and PSC construction review authority under Sections 281.41 and 196.49, of the Statutes. These smaller diversions would also be required to comply with the registration requirement in Section 281.35(3), of the Statutes.

³⁵§§ 30.18(6)(d) and § 281.35(6)(b)-(f), Wis. Stats.

³³§ 30.18(5)(b); § 281.35(5)(d), Wis. Stats.

³⁴§§ 30.18(6) and 281.35(6)(a), Wis. Stats.

3. All Water Withdrawals Resulting in a Water Loss Averaging Over 2,000,000 Gallons Per Day

Under Section 281.35(4) of the Wisconsin Statutes, any withdrawal of water that results in a new or increased water loss of more than 2,000,000 gallons per day is subject to WDNR approval. For surface water withdrawals, the statutory requirements in Section 281.35, duplicate many of the requirements of Section 30.18 of the Statutes. For groundwater withdrawals, however, Section 281.35 adds new requirements to what was required by Section 281.34. Many of the requirements of Section 281.35 were adopted to specifically meet the requirements of the Great Lakes Charter.

Under Section 281.35(4)(b) of the Wisconsin Statutes a person must obtain WDNR approval before: (1) beginning a new withdrawal that will result in a water loss averaging more than 2,000,000 gallons per day in any 30-day period; or (2) increasing an existing withdrawal that will result in an increased water loss averaging more than 2,000,000 gallons per day.³⁶ A "water loss" means a loss of water from the basin from which it is withdrawn as a result of interbasin diversion or consumptive use or both.³⁷ If water is used outside the basin but is returned to the basin, it would not constitute a water loss.

An application for an approval under Section 281.35(4) of the Statutes is to contain a statement of and documentation for the information required by Section 281.35(5)(a). This includes information regarding the existing and proposed water use, the anticipated effects, if any, that the withdrawal will have on existing uses of water resources and related land uses, a description of other ways the applicant's need for water may be satisfied if the application is denied or modified, and a description of the conservation practices the applicant intends to follow.

If the application would result in a new or increased water loss to the Great Lakes basin averaging more than 5,000,000 gallons per day in any 30-day period, the WDNR is to notify each Great Lakes Governor and Premier of the application.³⁸ The WDNR is then to follow the regional consultation procedure established by the Great Lakes Charter. Under this process, the Great Lakes Governors and Premiers have the authority to comment on the application, but they do not have veto power over the application. Rather the WDNR is to consider comments received in making the WDNR's own decision on the application.³⁹

- ³⁸§ 281.35(5)(b), Wis. Stats.
- ³⁹<u>Id</u>.

³⁶§ 281.35(4), Wis. Stats.; NR Chapter 142, Wis. Admin. Code.

³⁷§ 281.35(1)(L), Wis. Stats.

In determining whether to approve the application, the WDNR is to determine that:⁴⁰

- No public water rights in navigable waters will be adversely affected;
- The proposed withdrawal will not conflict with any applicable plan for future uses of the waters of the state;
- The applicant's current water use, if any, and the applicant's proposed plans for withdrawal, transportation, development and use of water resources incorporate reasonable conservation practices;
- The proposed withdrawal will not have a significant adverse impact on the environment and ecosystem of the Great Lakes basin or the upper Mississippi River basin;
- The proposed withdrawal and uses are consistent with the protection of public health, safety and welfare and will not be detrimental to the public interest;
- The proposed withdrawal will not have a significant detrimental effect on the quantity and quality of the waters of the state;
- If the proposed withdrawal will result in an interbasin diversion, that (a) each state or province to which the water will be diverted has developed and is implementing a plan to manage and conserve its own water quantity resources, and that further development of its water resources is impracticable or would have a substantial adverse economic, social or environmental impact; that (b) granting the application will not impair the ability of the Great Lakes basin or upper Mississippi River basin to meet its own water needs; that (c) the interbasin diversion alone, or in combination with other water losses, will not have a significant adverse impact on lake levels, water use, the environment or the ecosystem of the Great Lakes basin or upper Mississippi River basin; and that (d) the proposed withdrawal is consistent with all applicable Federal, regional and interstate water resources plans.

An application may be approved, denied, or approved with conditions. An approval must specify the items listed in Section 281.35(6)(a) of the Wisconsin Statutes, including the authorized base level of water loss from the withdrawal, the uses for which water may be withdrawn, the amount and quality of return flow required and the place of discharge, and any restrictions necessary to protect the environment and the public health, safety and welfare and to ensure the conservation and proper management of the waters of the state.

The WDNR is to review each approval at least once every five years.⁴¹ The WDNR may at any time propose modifications of the approval or additional conditions, limitations or restrictions determined to be necessary to ensure continued compliance with the Statutes. It may also, if necessary, revoke the approval.

⁴⁰§ 281.35(5)(d), Wis. Stats.

⁴¹§ 281.35(6)(b) - (d), Wis. Stats.

4. Great Lakes Withdrawals

An important provision applicable to Great Lakes withdrawals is set forth in Section 30.21 of the Wisconsin Statutes. This statute authorizes a public utility to construct, maintain and operate water intake pipes and other water supply facilities on the bed of Lake Michigan, Lake Superior or waters in the Great Lakes basin, upon compliance with applicable federal regulations and subject to Wisconsin Public Service Commission regulation, if the public utility is permitted to do so by a municipality located on Lake Michigan, Lake Superior or waters in the Great Lakes basin. Concurrently with the construction of the water withdrawal facilities, the community must construct sewage treatment and disposal works adequate to treat completely all sewage of the municipality. Any community located within 50 miles of Lake Michigan or Lake Superior is deemed under this Statute to be situated on such waters, and shall have the authority to acquire and own or lease sufficient real estate, not to exceed 50 miles beyond the corporate limits of such municipality, for the purpose of constructing, maintaining and operating water supply and transmission facilities necessary or convenient for securing an adequate supply of water suitable for the purposes of such municipality or utility.

The predecessor of this statute was adopted in 1929 as Section 30.087 of the Wisconsin Statutes.⁴² The language was similar to today's Section 30.21 with three main differences: (1) the statute only applied to municipalities located next to Lake Michigan or Lake Superior (there was no reference to waters in the Great Lakes Basin); (2) there was no presumption that any city, village or town within 50 miles of Lake Michigan or Lake Superior would be deemed to be situated on such waters for purposes of the statute; and (3) there was no requirement that the city, town or village construct sewage treatment and disposal works adequate to treat completely all sewage of the municipality. In 1963, the statute was amended to extend the application of the statute to municipalities located next to waters in the Great Lakes Basin, and require that the city, town or village construct sewage treatment and disposal works adequate to treat completely all sewage of the municipality and to provide for the return of the effluent to the Great Lakes Basin.⁴³ In 1964, the statute was amended to include a presumption that any city, village or town within 50 miles of Lake Michigan, Lake Superior, or a water within the Great Lakes Basin would be deemed to be situated on such waters for purposes of the statute.⁴⁴ In 1985, the statute was amended to delete the requirement that effluent to the Great Lakes Basin.⁴⁵

There are no published court cases interpreting the provisions of this statute.

⁴²Laws of 1929, Chapter 310.

⁴³Laws of 1963 Chapter 444.

⁴⁴Laws of 1963 Chapter 501.

⁴⁵1985 Wisconsin Act 60

C. PUBLIC WATER SUPPLY CONSTRUCTION STATUTES AND REGULATIONS

Construction done by public water supply systems is overseen by the WDNR pursuant to Section 281.41 and the PSC by Section 196.49 of the Wisconsin Statutes. These sections provide the WDNR and PSC broad authority to review aspects of public water supply system construction that may go beyond what specific statutes, like the water withdrawals Statutes described above, provide.

Section 281.41, of the Wisconsin Statutes, provides that every entity owning a water supply plant or water system must obtain approval of plans for any proposed system, plant or extension from the WDNR, before proceeding with construction of such facilities. The WDNR may approve, approve conditionally, or reject the plans. The Statutes do not set forth the standards the WDNR is to apply in determining whether to approve the plans. Furthermore, nothing in this Statute specifies the limits on the conditions that may be attached to plan approval. Administrative regulations applicable to plan approval are set forth in NR Chapter 108, and NR Sections 811.12 to 811.15 of the Wisconsin Administrative Code. Administrative regulations applicable to the development of groundwater wells and surface water intakes by public water systems are set forth in NR Sections 811.16 to 811.27, of the Code.

With regard to well sites, NR Section 811.13(b) of the Wisconsin Administrative Code, requires the preparation of a well site investigation report. The report is to include information on test wells, water quality, pumping conditions, and drawdown effects on other nearby wells or the environment.⁴⁶ This is in contrast to Section 281.34(5) of the Wisconsin Statutes, which limits the WDNR's review of a proposed high capacity well to determining whether a proposed well adversely affects a public water utility supply well, is located in a groundwater protection area, has a significant environmental impact on a spring, or will result in a water loss of more than 95 percent of the amount of water systems, and its apparent right to reject or condition plans for a proposed high capacity public water well that would otherwise meet the conditions of Section 281.34(5), of the Statutes has never been challenged.

The PSC has the authority to review and approve construction projects by public water utilities pursuant to Section 196.49(2) of the Wisconsin Statutes. In PSC Section 184.03(2) of the Wisconsin Administrative Code, the projects requiring PSC review include: (a) the construction of new wells and other sources of water supply; (b) pumping stations, purification or treatment facilities, water storage reservoir facilities, any utility buildings, or additions to or replacement of these facilities having a cost in excess of \$100,000 per project or 25 percent of existing investment, whichever is smaller; or (c) projects where a utility was intending to install facilities outside its service area in an area that could also be served by another public utility. An application for construction approval must provide the information required by PSC Section 184.04(1) of the

⁴⁶NR § 811.13(4)(j)L, Wis. Admin. Code.

Code, including information on the proposed project, the effect of the project on cost, quality and reliability of service, a brief description and analysis of the alternatives to the project, and a designation of utilities and other persons materially affected by the project. Upon receipt of the application, the PSC may simply accept the information for filing and allow the construction to proceed, or it may review the information and determine whether public convenience and necessity require the project.⁴⁷ The PSC may refuse to certify a project if it appears that the completion of the project will do any of the following: (1) substantially impair the efficiency of the service of the public utility; (2) provide facilities unreasonably in excess of the probable future requirements; or (3) when placed in operation, add to the cost of service without proportionately increasing the value or available quantity of service.⁴⁸

The PSC authority to review a project to determine whether public convenience and necessity requires the project is very broad. Under this review authority, the courts have said that the PSC may examine "public convenience and necessity" from the perspective of the public in general.⁴⁹ In a water utility context, this may include examining a construction proposal from the view of parties that may be affected by the proposed construction. It could also arguably include examining the land use impacts of a construction proposal. While to date the PSC has not considered the land use implications of its construction decisions, its broad authority under the "public convenience and necessity" standard could be used to justify such review in the future.

In reviewing a request by the City of Wisconsin Rapids to build a new municipal well, the PSC issued an approval to construct the new well subject to conditions intended to limit the alleged negative impacts from the proposed well.⁵⁰ The PSC required the City to construct and operate its water system so detrimental impacts to groundwater quantity and quality were avoided or minimized. The City was required to develop a water conservation plan describing actions the City would take to conserve water. The City was also required to develop a plan to mitigate any adverse impacts from the new municipal well on existing private well owners that did occur. The plan had to include an identification of the private wells covered by the mitigation plan, a method for determining compensation for the reasonable ongoing costs of operating, maintaining and placement of any additional equipment required by the private well owner; and a procedure for reviewing and resolving claims. The PSC did not extend the mitigation plan requirement to owners of new wells built after the City's well was installed, because the newcomers started with the knowledge of the

⁴⁷PSC § 184.05, Wis. Admin. Code

⁴⁸§ 196.49(3)(b), Wis. Stats.

⁴⁹<u>Wis. Power & Light v Public Service Comm'n</u>, 148 Wis. 2d 881, 891-892, 437 N.W.2d 888 (Ct. App. 1989).

⁵⁰Application of the Wisconsin Rapids Waterworks and Lighting Commission, as a Water Public Utility, for Authority to Construct a New Well in the Neighboring Town of Grand Rapids, Wood County, PSC Docket 6700-CW-100, Final Decision dated May 12, 1989. existing situation, and they would have to plan and install any well under the conditions existing at the time. The PSC's order in that case did not address impacts to surface water, although given the PSC's broad authority, this likely could have been required.

Based upon the WDNR and PSC broad authority to review and approve the construction of public water supply facilities, and in particular wells and surface water intake facilities, communities in Southeastern Wisconsin should expect that proposals for new water withdrawals will be closely reviewed. Such review may include an examination of the potential impact the new withdrawal could have on neighboring property owners, nearby surface water, and the environment in general. Concerns regarding these issues could be reflected in the WDNR or PSC decision on the approval or nonapproval of the new facilities, and conditions intended to mitigate these issues could also be included in any approval.

D. GROUNDWATER MANAGEMENT STATUTES AND REGULATIONS

1. Groundwater Quality

Groundwater quality is regulated by Chapter 160, of the Wisconsin Statutes. Chapter 160 establishes a process for setting numerical standards for the protection of public health and welfare to be achieved in groundwater regulatory programs. The numerical standards are set forth in NR Chapter 140 of the Wisconsin Administrative Code.

In order to protect groundwater quality, injection of any substance into the ground that would violate the provisions of Chapter 160, of the Wisconsin Statutes, or that would result in endangerment of an underground drinking water source is prohibited.⁵¹ If an injection of a substance would not violate Chapter 160, it may be allowed in certain limited circumstances.⁵²

The disposal of storm water runoff directly into groundwater is prohibited.⁵³ However, construction or use of a subsurface fluid distribution system for dispersal of stormwater runoff into unsaturated material overlying the uppermost underground source of drinking water is allowed if it is done in a manner that complies with the groundwater standards, complies with the requirements of the State plumbing code, and does not result in the endangerment of an underground source of drinking water.⁵⁴

⁵¹NR § 815.09, Wis. Admin. Code.

⁵²NR § 812.05 and NR § 815.07 Wis. Admin. Code.

⁵³NR § 815.11(5), Wis. Admin. Code.

⁵⁴<u>Id</u>.

Similarly, the injection of wastewater directly into groundwater is prohibited.⁵⁵ However, the discharge of liquid wastewaters from a publicly owned treatment works, or privately owned domestic wastewater treatment works, to a subsurface fluid distribution system or other land disposal system may be allowed subject to the provisions of NR Chapter 206 of the Wisconsin Administrative Code.⁵⁶

Some private sewage systems are not required to meet all groundwater standards established under Chapter 160.⁵⁷ A private sewage system is defined as a sewage treatment and disposal system serving a single structure with a septic tank and soil absorption field located on the same parcel as the structure, or an alternative sewage system approved by the Wisconsin Department of Commerce (DComm), which may include a system serving more than one structure.⁵⁸ DComm does not require the private onsite wastewater treatment systems (POWTS) that it regulates to comply with the groundwater standards for nitrate or the groundwater preventative action limits for chloride.⁵⁹

Large POTWS, however, are regulated by both DComm and the WDNR⁶⁰ and although DComm will not require such systems to comply with all groundwater standards, the WDNR will.⁶¹ A POTWS is classified as large if its design capacity exceeds 12,000 gallons per day (gpd).⁶² The methods for determining whether this 12,000 gpd threshold has been triggered are set forth in the Wisconsin Administrative Code.⁶³

⁵⁵NR § 206.07(2)(d), Wis. Admin. Code.

⁵⁶NR § 815.11(3), Wis. Admin. Code.

⁵⁷§ 160.255, Wis. Stats.

⁵⁸§145.01(12), Wis. Stats.

⁵⁹Comm § 83.03(4), Wis. Admin. Code.

⁶⁰Memorandum of Understanding Between the Department of Commerce and the Department of Natural Resources Regarding the Regulation of Onsite Sewage Systems, dated December 16, 1999, page 3.

⁶¹NR § 206.07(1)(c), Wis. Admin. Code.

⁶²NR § 200.03(3)(d), Wis. Admin. Code.

⁶³NR § 200.03(4) & (5), and Comm § 83.22(2)(b)6.a-g, Wis. Admin. Code., Wis. Admin. Code.

Similarly, any size POWTS that receives a mixture of domestic and industrial, or non-domestic wastewater, is subject to a joint DNR/DComm review process⁶⁴ and will be required by the WDNR to meet groundwater standards.⁶⁵ "Non-domestic wastewater" means the type of wastewater that does not originate solely from humans and domestic activities such as sanitary, bath, laundry, dishwashing, garbage disposal and the cleaning of domestic areas or utensils.⁶⁶

The joint WDNR/DComm review process is described in the Memorandum of Understanding Between the Department of Commerce and the Department of Natural Resources Regarding the Regulation of Onsite Sewage Systems, dated December 16, 1999. In general, if a POWTS is subject to WDNR review, the system will be reviewed for compliance with groundwater regulations. The WDNR plan review process requires the submittal of information by the applicant regarding the location of the proposed system relative to property boundaries, any existing water supply wells, and other wastewater systems.⁶⁷ Information on soils, depth to groundwater and bedrock, and groundwater characteristics is also to be provided. A primary emphasis of the plan review will be to ensure that proposed treatment systems will employ technology capable of removing nitrogen to the extent technically and economically feasible.⁶⁸ As part of the plan review, the WDNR will check information available from the Wisconsin Source Water Assessment Program database which covers the public water systems in the state. Source water assessments include: (a) identification of land areas that contribute to public drinking water supply wells; (b) an inventory of significant potential sources of contamination within the area; and (c) a pollutant susceptibility determination for public water supply wells, accounting for geology, well construction, monitoring results. and potential pollutant sources.⁶⁹ On a case specific basis, the WDNR may deny a permit for a land disposal system if the WDNR determines the proposed wastewater system will result in damage to groundwater or surface water quality or adversely impact the protection of public health or welfare.⁷⁰

⁶⁶NR § 206.03(7), Wis. Admin. Code.

⁶⁷WDNR Fact Sheet/Briefing Memo, "General Permit to Discharge Domestic Wastewater To Groundwater via a Subsurface Soil Absorption System WPDES Permit No. WI-0062901-1", dated September, 2004.

⁶⁸<u>Id</u>.

⁶⁹<u>Id</u>.

 70 <u>Id</u>.

⁶⁴Memorandum of Understanding Between the Department of Commerce and the Department of Natural Resources Regarding the Regulation of Onsite Sewage Systems, dated December 16, 1999, page 6.

⁶⁵NR § 206.07(1)(c), Wis. Admin. Code.

2. Aquifer Storage and Recovery

The Wisconsin Statutes and attendant regulations allow the injection of water treated to drinking water standards into the aquifer for storage and future use for water supply purposes provided certain requirements are met.⁷¹ This process, called aquifer storage recovery, is regulated by the WDNR under NR Sections 811.87 to 811.93 of the Wisconsin Administrative Code.

Only a municipal water system may construct an aquifer storage recovery (ASR) well or operate an ASR system.⁷² WDNR approval is required prior to the construction of any ASR well or the conversion of any previously constructed well for use as an ASR well.⁷³ Only treated drinking water may be placed underground through an ASR system well.⁷⁴ The water placed underground may extend no further than 1,200 feet from that ASR well.⁷⁵

An ASR pilot study must be conducted by the municipality prior to the operation of the ASR system. The pilot study requirements are set forth in NR Section 811.91 of the Wisconsin Administrative Code. The WDNR must review and evaluate the results of the pilot study, and grant the municipality approval to operate the ASR system.⁷⁶

All water that is retrieved through an ASR system must comply with drinking water standards, and must be treated to provide a disinfectant residual prior to recovery into the municipality's distribution system.⁷⁷

- ⁷²NR § 811.87(4), Wis. Admin. Code.
- ⁷³NR § 811.87(2), Wis. Admin. Code.
- ⁷⁴NR § 811.87(3), Wis. Admin. Code.
- ⁷⁵NR § 811.87(5), Wis. Admin. Code.
- ⁷⁶NR § 811.93, Wis. Admin. Code.
- ⁷⁷NR § 811.88(2), Wis. Admin. Code.

⁷¹§ 160.257, Wis. Stats.

3. Wellhead Protection Plan

In order to protect groundwater for water supply purposes, a community that is installing a new well must develop a wellhead protection plan for the well. The plan must include the items listed in NR Section 811.16(5) of the Code. The plan must identify the recharge area for the proposed well and the existing potential contamination sources within a one-half mile radius of the proposed well. Most importantly, the plan must include a management plan for addressing the potential contamination sources through such tools as local ordinances, zoning requirements, monitoring program, and other local initiatives.

4. Groundwater Quantity Management

As noted earlier in this Chapter, the State of Wisconsin has a number of state approval requirements for the withdrawal of water. These requirements, however, do not provide a mechanism for dealing with existing groundwater problems. Two newer Statutes attempt to begin to address this issue.

First, Section 281.34(8)(d) of the Statutes authorizes the WDNR to administer a program to mitigate the effects of wells constructed before May 7, 2004, that are located in groundwater protection areas. A groundwater protection area is defined under Section 281.34(1)(a), as an area within 1,200 feet of an outstanding resource water as identified under Section 281.15, an exceptional resource water as identified under Section 281.15, or a class I, class II, or class III trout stream, other than a class I, class II, or class III trout stream that is a farm drainage ditch with no prior stream history. Mitigation may include abandonment of existing wells and replacement of wells, if necessary, and other management strategies.⁷⁸ In order to require mitigation, however, the WDNR must provide funding for the full cost of the mitigation, unless the well is to be abandoned because of public health issues.⁷⁹

Second, Section 281.34(9)(a), of the Wisconsin Statutes, authorizes the WDNR to designate 2 groundwater management areas by rule. These are to include the areas around Waukesha and Brown Counties where the groundwater potentiometric surface since development has declined by 150 feet or more.⁸⁰ The Statute provides that the WDNR is to include within the groundwater management areas all of each city, village, and town which has part or all of its jurisdiction within the area of the 150-foot decline.⁸¹

⁷⁸§ 281.34(8)(d), Wis. Stats.

⁷⁹<u>Id</u>.

⁸⁰<u>Id</u>.

⁸¹<u>Id</u>.

The WDNR is in the process of developing administrative rules to designate the two groundwater management areas, called the Southeast Wisconsin Groundwater Management Area and the Northeast Wisconsin Groundwater Management Area.⁸² The proposed Southeast Wisconsin Groundwater Management Area would include all of Kenosha County, Milwaukee County, Ozaukee County, Racine County, Waukesha County, and parts of Walworth and Washington Counties. The parts of Walworth County included in the groundwater management area include "the U.S. Public Land Survey townships of East Troy, Spring Prairie, Lyons, Bloomfield, Linn and Geneva, with the exception of the village of Williams Bay and the city of Elkhorn, and including the portion of the U.S. Public Land Survey township of Troy that includes part of the Village of East Troy."⁸³ All of Washington County is included with the exception of the U.S. Public Land Survey Township of Wayne and Kewaskum.⁸⁴

The Statutes provide the WDNR is to assist local governmental units and regional planning commissions by providing advice, incentives and funding for research and planning related to groundwater management in the groundwater management areas.⁸⁵

2003 Wisconsin Act 310 establishes a Groundwater Advisory Committee charged with making recommendations for additional legislation or regulations applicable to groundwater management areas.⁸⁶ In addition, the Committee is to make recommendations on: (i) legislation and administrative rules to address other areas of the state that could have problems in the future; (ii) a coordinated strategy for addressing groundwater management issues by local governments; and (iii) the factors to be considered by the WDNR in determining whether a high capacity well causes significant environmental impact to a surface water.⁸⁷ The Committee is to complete its other work related to groundwater management areas by December 31, 2006, and is to complete its other work by December 31, 2007.⁸⁸

⁸²Proposed NR Chapter 820, Wis. Admin. Code.

⁸³Proposed NR § 820.20(1)(f), Wis. Admin. Code.

⁸⁴Proposed NR § 820.20, Wis. Admin. Code.

⁸⁵§ 281.34(9)(b), Wis. Stats.

⁸⁶2003 Wisconsin Act 310, Section 15.

⁸⁷<u>Id</u>.

⁸⁸Id.

E. OTHER STATUTES AND REGULATIONS APPLICABLE TO PUBLIC WATER SUPPLY SYSTEMS

Other Wisconsin Statutes and attendant regulations govern the operation of public water supply systems. NR Chapter 809 of the Wisconsin Administrative Code provides for the establishment and conduct of a Safe Drinking Water Act program. It establishes the minimum standards and procedures for the protection of public health, safety and welfare in obtaining safe drinking water. NR Chapter 811 of the Code, sets forth requirements for the general operation, design and construction of community water systems. NR Chapter 812 of the Code sets forth the construction and installation standards for wells, other than community water system wells.

Chapter 196 of the Wisconsin Statutes, sets forth the laws applicable to the regulation of public utilities. This chapter regulates all aspects of public utility operations, including rate setting. PSC Chapter 185 of the Wisconsin Administrative Code, specifically sets forth the standards for water public utility service for all public water utilities.

F. FUTURE STATUTES AND REGULATIONS

This Chapter has described current State Statues and attendant regulations applicable to water supply in general, and water withdrawals in particular. It is important to recognize, however, that Wisconsin law is in a state of flux. In December 2005 the Governor signed the Great Lakes - St. Lawrence River Basin Sustainable Water Resources Agreement, and the Great Lakes - St. Lawrence River Basin Water Resources Compact, and has committed to seek legislation incorporating the Compact provisions into Wisconsin law. If this occurs, Wisconsin law will change to reflect the Compact provisions described in Chapter 2.

In addition, 2003 Wisconsin Act 310 created groundwater management areas and directed that the Groundwater Advisory Committee provide recommendations on further legislation and regulations to address the management of groundwater in the two designated groundwater management areas - one of which covers Southeastern Wisconsin.⁸⁹ The Committee is also to identify whether there are other areas of the State in which the withdrawal of groundwater over the long term will adversely effect the availability of water for use or adversely affect water quality due to the affects of drawdown of the groundwater so there is a need for a coordinated response to address the effects on groundwater availability or quality. These recommendations are expected to lead to further legislation and regulations regarding groundwater management in the groundwater management areas, and this would have a direct impact on Southeastern Wisconsin.

⁸⁹<u>Id</u>.
CHAPTER FOUR

LAW APPLICABLE TO THE CAPTURE OF WATER: MUNICIPAL REGULATION

Under the Wisconsin Statutes, municipalities have the power to act for the government and good order of the municipality, for its commercial benefit, and for the health, safety and welfare of the public.¹ A municipality may carry out its powers by any necessary and convenient means including by regulation. This grant of power is broad, and confers upon a municipality "all the powers that the legislature could by any possibility confer upon it."²

Municipal power, however, may be withheld or withdrawn by the legislature. Municipal power has been held to be withheld, or withdrawn, if municipal action would logically conflict with State legislation, if it would defeat the purpose of State legislation, or if it would go against the spirit of State legislation.³ Despite this limitation, municipalities are allowed to enact ordinances in the same field and on the same subject covered by State legislation where such ordinances do not conflict with, but rather complement, the State legislation.⁴

Municipalities take a wide variety of actions with regard to water supply. Municipalities own and operate public water systems for the benefit of their citizens. They also take action to protect their public water supply through the adoption of wellhead, or source water protection programs, which include the adoption of zoning and other ordinances.⁵ In some situations, municipalities seek to adopt regulations limiting the ability of a neighboring community to build water supply facilities within its borders.

Issues regarding a municipality's exercise of authority regarding water supply are addressed in this Chapter. First, does a municipality have the authority to build water supply facilities outside its municipal boundaries? Second, does a municipality have the authority to annex noncontiguous property for water supply purposes? Third, does a municipality have the authority to restrict or place conditions on another municipality building water supply facilities within the first municipality's boundaries? Fourth, can a municipality prohibit private parties from constructing private wells within the municipality's boundaries?

¹§§ 61.34(1), 62.11(5), Wis. Stats.

²<u>Hack v. Mineral Point</u>, 203 Wis. 215, 219, 233 N.W.82, 84 (1931).

³<u>Anchor Savings & Loan Ass'n v. Madison Equal Opportunities Comm'n</u>, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984); <u>DeRosso Landfill Co. v. City of Oak Creek</u>, 200 Wis. 2d 642, 651-652, 547 N.W.2d 770 (1996).

⁴Johnston v. City of Sheboygan, 30 Wis. 2d 179, 184, 140 N.W.2d 247 (1966).

⁵NR § 811.16, Wis. Admin. Code.

A. MUNICIPAL AUTHORITY TO BUILD WATER SUPPLY FACILITIES OUTSIDE MUNICIPAL BOUNDARIES

A municipal public utility has the authority to construct, acquire, or lease any plant, equipment, or land, whether located inside or outside of the municipality's borders, for furnishing water to the municipality and its inhabitants.⁶ There is no requirement that all of a municipal public utility's facilities be located within the municipalities it is serving.

A municipal public utility also has the right to install pipeline facilities within public rights-of-way whether within or outside the municipality's borders, provided certain conditions are met. Section 86.16, of the Wisconsin Statutes, provides that utility facilities may be located in public rights-of-way provided written consent from the controlling authority is obtained. For state trunk highways, written consent must be obtained from the Wisconsin Department of Transportation. For county and municipal highways, written consent must be obtained from the local authorities with jurisdiction over those highways. While consent is required to use the rights-of-way, an authority is entitled to deny permission only if denial is necessary to prevent the proposed facilities from causing an unreasonable obstruction to traffic on a public highway.⁷ A local government cannot use its authority under Section 86.16 as a bargaining chip to force a utility to provide services that the utility would not otherwise provide under its normal procedures and policies.⁸ If written consent is request has been on file with the Wisconsin Department of Transportation or local authority for 20 days and no action has been taken, the utility may appeal the request to the Wisconsin Division of Hearings and Appeals whose decision on the request will be final.⁹

Two cases discuss the appropriate standard to be applied in determining whether to grant consent under Section 86.16 of the Statutes. In <u>City of Appleton v. Transportation Comm'n</u>, 116 Wis. 2d 352, 342 N.W.2d 68 (Ct.App. 1983), the court approved the decision of the Wisconsin Transportation Commission, which conditioned approval under Section 86.16 of the Wisconsin Statutes on connecting the town residents whose property abutted the proposed sewer line to the sewer. The court held that the Commission's order was rationally related to preventing unreasonable highway obstruction because the evidence before the Commission indicated that the town residents whose property would abut the proposed sewer would be required by county ordinance to be connected with a sewer or be prohibited from obtaining building permits for any

⁶§ 66.0803(1)(a), Wis. Stats.

⁸<u>Id</u>.

⁷Town of Barton v. Div. Of Hearings, 2002 WI App 169, ¶ 17, 278 Wis. 2d 388, 692 N.W.2d 304.

⁹§ 86.16(5), Wis. Stats.

major change to their dwelling.¹⁰ In addition, the court said that State law requires residences on land abutting streets containing public sewers be connected to the sewer. Finally, the court found that the Commission could have reasonably concluded that, were the City to install a sewer and prohibit access by abutting town land owners, the town might be compelled to install a parallel system to permit its citizens to comply with legal requirements, and construction to install a second sewer would cause an unreasonable obstruction of the highway.¹¹

In the more recent case of <u>Town of Barton v. Division of Hearings</u>,¹² the Wisconsin Division of Hearings and Appeals rejected the Town's demand that as a condition of approval the City of West Bend permit Town residents abutting the City's proposed sewer to immediately connect to the sewer. The Division of Hearings and Appeals held such action was not needed to prevent an unreasonable obstruction to traffic within the Town. The Division of Hearings and Appeals ordered the Town to grant the City permission to construct and maintain a sewer within the public rights-of-way of the Town, but ordered the City to construct laterals up to the property lines of the abutting properties in order to eliminate the need for future construction.

Another statute, Section 196.58(7) of the Wisconsin Statutes, provides that a municipal water utility may locate utility facilities in the public rights-of-way of an adjacent municipality if written consent from that adjacent municipality is obtained. That Statute provides that a municipality operating a water system may seek to install mains, transmission lines, pipes or service connections in a neighboring community in order to serve consumers located in the first municipality, if it is necessary or economically prudent for the municipality to install mains, transmission lines, pipes or service connections through or under a public street, highway, or public thoroughfare located within the boundaries of the adjacent municipality. The first municipality is to seek approval from the legislative body of the adjacent municipality. The governing body of the adjacent municipality is to act on the petition within 15 days after the petition is filed. If the adjacent municipality fails to act within the 15-day period, the petition is deemed approved. If the adjacent municipality rejects the petition, the municipality may make application to the PSC for authority to install facilities within the boundaries of the adjacent municipality. If the PSC determines that it is necessary or economically prudent that the municipality seeking approval make the installations within the boundaries of the adjacent municipality, the PSC may issue an order authorizing the municipality to proceed to make the installation.

A third statute, Section 60.52 of the Wisconsin Statutes, provides that if a city or village adjoining a town seeks to construct and maintain sewer or water facilities in the adjoining town, and seeks to serve customers within that adjoining town, the city or village must first obtain the approval of

¹⁰<u>City of Appleton v. Transportation Comm'n</u>, 116 Wis. 2d 352, 359, 342 N.W.2d 68 (Ct. App. 1983).

¹¹<u>Id</u>.

¹²Town of Barton v. Division of Hearings, 2002 WI App 169, 278 Wis. 2d 388, 249 N.W.2d 543.

the town board. This Statute does not apply to the situation where facilities are constructed in an adjoining town, but service will not be extended to any part of the town.¹³

In situations where utility facilities are installed in existing public rights-of-way, the utility need not obtain any separate property rights to install the utility facilities in the rights-of-way. However, if utility facilities are to be constructed in other areas, a municipality must obtain the property right to build those facilities in those other areas. A municipality may obtain these property rights through negotiation and purchase, or condemnation. The Wisconsin Statutes specifically authorize a municipality to acquire property outside its borders by condemnation using the procedures set forth in Sections 32.05 or 32.06 of the Statutes. A utility is not required to seek approval of the local government prior to condemnation.¹⁴

B. MUNICIPAL AUTHORITY TO ANNEX NONCONTIGUOUS PROPERTY FOR WATER SUPPLY PURPOSES

A city or village may annex territory it owns that lies near but not necessarily contiguous to its corporate boundaries by adopting an annexation ordinance in accordance with Section 66.0223 of Wisconsin Statutes.¹⁵ This could occur, for example, in situations where a municipality owns a well site outside of its municipal borders which it seeks to annex to the municipality. The property annexed must be located in the same county as some or all of the city or village unless the town from which the property is annexed and the county agree to the annexation.¹⁶ A city or village may not annex property in a manner contrary to a cooperative plan between neighboring municipalities developed in accordance with Section 66.0307 of Wisconsin Statutes.

The courts have not addressed the issue of how "near" territory must be to the municipality in order to be annexed under Section 66.0223. The courts have also not addressed whether municipalities may annex other non-municipally owned lands to non-contiguous, municipally-owned lands which were annexed under Section 66.0223.

Section 66.0223(1) requires that the city's or village's use of the non-contiguous property owned and annexed by the municipality not be contrary to any town or county zoning regulation.¹⁷ This limitation requires compliance only with valid town or county zoning regulations. Section D of this Report discussed the issue of the validity of a municipal ordinance which seeks to restrict the construction of a well or other water supply facilities within a municipality.

¹⁴<u>Id</u>. at ¶13.

¹⁵§ 66.0223(1), Wis. Stats.

¹⁶§ 66.0223(2), Wis. Stats.

¹⁷§ 66.0223(2), Wis. Stats.

¹³Danielson v. City of Sun Prairie, 2000 WI App 227, 239 Wis. 2d 178, 619 N.W.2d 108.

The limitation that the city's or village's use of the non-contiguous property owned and annexed by the municipality not be contrary to any town or county zoning regulation raises the question of whether the municipality's use of the property need only be consistent with town or county zoning regulation at the time of the annexation, or whether the municipality's continued use of the property must remain consistent with town or county zoning regulation. Although no case directly addresses this question, <u>Town of Madison v. City of Madison¹⁸</u> suggests that the use of property annexed under Section 66.0223 would remain restricted to those uses consistent with town or county zoning regulation.

Once the property is annexed by the city or village, it is subject to city or village regulation provided that the zoning of the annexed non-contiguous property is consistent with town or county zoning. In addition, the city or village may seek to exercise its extraterritorial zoning over property adjacent to the annexed property.¹⁹ The extraterritorial zoning jurisdiction of 1st to 3rd class cities extends over unincorporated property within three miles beyond corporate limits. The limit for 4th class cities and villages is 1-1/2 miles beyond corporate limits.

The city or village seeking to exercise extraterritorial zoning jurisdiction may adopt an interim extraterritorial zoning ordinance that freezes existing town or county zoning, or if there is no town or county zoning, freezes uses in the area during the period in which the extraterritorial ordinance is being prepared.²⁰ The interim extraterritorial zoning ordinance is valid for two years after its enactment and may be extended for another year if the joint extraterritorial zoning committee made up of city or village representatives and town representatives agrees.²¹ In order to permanently exercise extraterritorial zoning powers, an extraterritorial zoning ordinance for the area must be developed and approved by the joint extraterritorial zoning committee and the city council or village will have no extraterritorial zoning authority after the expiration of the interim zoning ordinance.

C. MUNICIPAL ZONING AUTHORITY RELATED TO GROUNDWATER

Wisconsin statutes authorize cities, villages, towns and counties to adopt zoning ordinances. The city's zoning authority is found in Section 62.23(7) of Wisconsin statutes. Under this authority, a city may regulate and restrict by ordinance the height, number of stories and size of buildings and other structures, and the location and use of buildings, structures and land among other things.

 21 <u>Id</u>.

²²§ 62.23(7a), Wis. Stats.

¹⁸Town of Madison v. City of Madison, 12 Wis.2d 100, 104-105, 106, N.W.2d 264 (1960)

¹⁹§ 62.23(7a), Wis. Stats.

²⁰§ 62.23(7a)(b), Wis. Stats.

City ordinances are to be made in accordance with a comprehensive plan and designed to, among other things, encourage the protection of groundwater resources, and to facilitate the adequate provision of water, sewerage, and other public requirements. This statute also applies to villages²³ and any town which has passed a resolution to exercise village powers.²⁴

A town not authorized to exercise village powers may enact a zoning ordinance unless the county in which it is located has already enacted county zoning. Under Section 60.61 of the Wisconsin statutes, a town is authorized to adopt ordinances to, among other things, regulate the location and size of structures and encourage the protection of groundwater resources.

A county's planning and zoning authority is found in Section 59.69 of the Wisconsin statutes. Under that authority, the county is authorized to plan for the physical development and zoning of territory within the county to accomplish a variety of public purposes including the encouragement of planned and orderly land use development, the protection of groundwater resources, the preservation of wetlands, and the conservation of soil, water and forest resources.

In addition to general zoning authority, Section 236.45 of Wisconsin statutes authorizes any municipality, town or county to adopt subdivision ordinances. Ordinances are to promote the public health, safety and general welfare of the community, including facilitating the adequate provision for water and sewerage.

The ability of a public inland lake protection and rehabilitation district to adopt ordinances, however, is questionable. Section 33.29(1)(c) of the Wisconsin Statutes provides that the board of commissioners of an inland lake district is responsible for contacting and attempting to secure the cooperation of officials of units of general purpose government in the area for the purpose of enacting ordinances deemed necessary by the board as furthering the objectives of the district. This suggests that the general purpose governments and not the inland lake district is authorized to adopt ordinances.

D. MUNICIPAL AUTHORITY TO RESTRICT THE CONSTRUCTION OF ANOTHER MUNICIPALITY'S WELL WITHIN THE FIRST MUNICIPALITY

Although municipalities have extensive authority to regulate, this authority to regulate may be withdrawn by the State, and the courts have held that the legislature has acted to withdraw a municipality's ability to regulate the installation and use of high capacity wells within it borders. In Fond du Lac v. Empire,²⁵ the Town of Empire adopted a series of ordinances requiring a permit from the Town Board before a party could drill a water well greater than six inches in diameter. The City of Fond du Lac purchased a tract within the Town in order to drill twelve inch wells to

²³§ 61.35, Wis. Stats.

²⁴§ 60.22(3), Wis. Stats.

²⁵Fond du Lac v. Empire, 273 Wis. 333, 77 N.W.2d 699 (1956).

augment its water supply and then brought a declaratory judgment action challenging the Town ordinances. The Town claimed that its ordinances were validly adopted to protect the area's water supply. The court noted the existence of Section 144.03 of the Wisconsin Statutes (1953), which granted the State Board of Health "general supervision and control over the waters of the state" and which also declared that "the public health, comfort, welfare and safety requires the regulation by the State of the use of subterranean waters of the State in the manner provided in this Section."²⁶ The court held that the legislative determination that water resources management required statewide regulation and control was entitled to "great weight" and that the primacy of statewide interests made the Town ordinances invalid.²⁷ The court acknowledged that the tapping of the water basin by the City was a matter of local concern to the Town. However, it found that where a matter affects the interests of local residents as well as the interests of the people in other areas of the State, the test to be applied in resolving the matter is that of paramount interest, and the interest of the people generally is paramount to that of the residents of the town.²⁸ The court also found that the Statute which authorizes municipalities to acquire, own, and operate a source of water supply and necessary transmission facilities beyond its corporate limits is also a general law of the State, which would conflict with the Town ordinances, providing a second reason for holding the Town ordinances invalid.²⁹

The court reached a similar conclusion in the <u>Town of Grand Rapids v. Water Works and Lighting</u> <u>Comm'n</u>.³⁰ In that case, the City of Wisconsin Rapids sought to build a water supply well in the Town of Grand Rapids. The Town adopted a zoning ordinance barring the proposed well. The court struck down the ordinance concluding that the Town lacked the authority to prohibit the construction and operation of the utility well. The court held that the Town did not have the authority to regulate the removal and use of groundwater without specific statutory authority because groundwater is a matter of statewide concern. The court also held that the WDNR and the PSC have the express authority to regulate water supply and public utilities, and that these grants of power are comprehensive and clearly preempt local authority.

The Wisconsin Attorney General, however, has recently opined that the preemption principles and holdings in Fond du Lac v. Empire are outdated, and that a court would no longer follow the Fond

²⁷Fond du Lac v. Empire, 273 Wis. at 338.

²⁸<u>Id</u>. at 338-339.

²⁹<u>Id</u>. at 341.

²⁶Compare §§ 281.11 and 281.12, Wis. Stats., which today grant WDNR this authority.

³⁰Town of Grand Rapids v. Water Works & Lighting Comm'n ., Case No. 90-1714 (Ct. App., Dist. IV, decided May 29, 1991).

<u>du Lac v. Empire</u> case.³¹ As a result, under the Attorney General's preemption analysis, a town could have the authority to adopt an ordinance which could limit the ability of a party to install a well in the town.

In reaching this conclusion, the Attorney General analyzed the ordinance adopted by the Town of Richfield, Washington County at issue in the opinion under the four part test for determining whether a local ordinance has been preempted by the State: (1) has the legislature expressly withdrawn the power of legislation; (2) does the local legislation logically conflict with State legislation; (3) does the local legislation defeat the purpose of State legislation; and (4) does the local legislation violate the spirit of State legislation. The Attorney General then concluded that under that analysis the Town of Richfield's ordinance would not be preempted by the State. The Attorney General's conclusion was based upon the view that the State has not comprehensively regulated in the area of groundwater quantity, and that therefore local regulation in this area would not conflict with State regulation.³²

The Attorney General's conclusion is based in large part on an interpretation of Chapter 280 of the Wisconsin Statutes, which the Attorney General characterizes as regulating the quality of groundwater that may be used for human consumption as or after it is extracted. The opinion states:

While the statute authorizes DNR to regulate wells in order to protect the *quality* of groundwater that may be withdrawn and used *for human consumption*, the statute does not expressly mention groundwater quantity or its conservation as a purpose of the statute, nor does it provide for express or specific authorization for DNR to protect groundwater supply quantities through its well-construction regulatory activities. In short, the statute is a statute for protecting the quality of water destined for human consumption, not a statute for protecting the quantity of groundwater.³³

The Attorney General acknowledged that Sections 281.34 and 281.35 of the Wisconsin Statutes, as opposed to Chapter 280, do contain regulatory requirements that require the WDNR to approve high capacity wells that pump more than 100,000 gallons per day. However, the Attorney General

³³<u>Id</u>. at 23.

³¹8/28/2006 Memo from Assistant Attorney General Thomas Dawson to Attorney General Peggy Lautenschlager, regarding State Preemption of Town of Richfield Groundwater Protection Ordinance at 34.

³²<u>Id</u>. at 23, 30.

concluded that these Statutes are not so comprehensive as to suggest an intent by the legislature to adopt a complete and all-encompassing plan to protect groundwater supplies.³⁴

In light of this interpretation of Chapter 280, and Sections 281.34 and 281.35 of the Wisconsin Statutes, the Attorney General concluded that local regulation over groundwater supplies would complement, and not conflict with, State regulation. The opinion states:

The local regulation of land uses to protect groundwater supplies does not block, impede, interfere with, or make impossible achievement of the purposes of Chapter 280 or DNR's regulation of water supply wells in order to protect the *quality* of groundwater that may be used *for human consumption* as or after it is extracted.

The [town's] ... local regulatory scheme protects groundwater supplies in aquifers against over-consumption; the State scheme in Chapter 280 protects the quality of the water for human consumption only when it is withdrawn. The local and State enactments do not closely share similar purposes, are not directly related, and do not interfere with each other. A local zoning, land use, or building restriction would not interfere with or prevent DNR from performing its functions or meeting the statutory requirements under Chapter 280. Rather, the two appear to complement each other. Local zoning and land use restrictions to protect groundwater supplies designate areas and activities appropriate to that goal. The State regulation of the location and construction of wells within those locally designated areas assures protection of water quality when it is withdrawn. As with so many other activities, local regulation and State regulation complement each other to meet both local and State objectives.³⁵

The Attorney General acknowledges that under this opinion, a town could deny a party a groundwater protection permit, and thereby prevent a person from taking water from the aquifer.³⁶ However, the Attorney General concludes that it is appropriate for local regulation to determine whether and how much of the groundwater may be tapped; while the State law regulates how it may be tapped.³⁷ To conclude otherwise, the Attorney General states would be to interfere with the municipal right to regulate land use.³⁸

³⁴Id. at 33.
³⁵Id. at 27.
³⁶Id. at 28.
³⁷Id.
³⁸Id. at 30.

Despite the Attorney General's opinion that the court's holding in <u>Fond du Lac v. Empire</u> is outdated, it must be acknowledged that the case is still good law and was followed by the Court of Appeals in 1991 in <u>Town of Grand Rapids v. Water Work and Lighting Comm'n</u>.³⁹ In fact, the court in <u>Town of Grand Rapids v. Water Works and Lighting Comm'n</u> specifically rejected a number of the arguments that the Attorney General now makes in the Richfield opinion. First, the court held that the Town's power to issue zoning regulations designed "to encourage the protection of groundwater resources" is not the power to control the location of City wells within the Town. The power to "encourage", the court held, is weaker than the power to "control".⁴⁰

We are satisfied that the legislature made a conscious choice to limit the authority municipalities could exercise over groundwater, by granting only the indirect power "to encourage" rather than the direct power "to control." As a result, when the legislature granted towns the power "to encourage" groundwater conservation, towns received a limited empowerment excluding the right to outlaw city-built wells on city-owned property located within town boundaries.⁴¹

Second, the <u>Grand Rapids</u> court held that even if the Town did have some power to regulate, the WDNR's and PSC's express authority to regulate in this area would supersede local regulation. According to the court, "[t]hese grants of power to the PSC and DNR are comprehensive, clearly preempting local authority, directly inconsistent with the local law."⁴² Finally, the court rejected the Town's argument that the State Statutes deal with the quality of the water, not its quantity, and therefore do not limit town action directed to quantity issues. The court stated that the broad terms used in the Statutes demonstrate that it is concerned with more than just the quality of water. "[T]he legislature sought to empower the PSC and DNR to regulate anything pertaining to public utilities and groundwater that could adversely affect the public interest in its groundwater resources. Like the quality of groundwater, the quantity of groundwater a public utility removes is also something that falls within this broad grant of administrative power."⁴³

Given the conflicting analysis demonstrated by the courts and the Wisconsin Attorney General, this issue seems destined for further litigation. In this litigation, the fact that the WDNR and PSC have extensive authority over public utility construction under Sections 281.41 and 196.49 of the Wisconsin Statutes will likely prove important. As discussed in Chapter 3, the WDNR and PSC have broad authority to review all aspects of public water supply system construction. Before

⁴⁰<u>Id</u>. at 4.

⁴¹Id.

⁴²<u>Id</u>. at 6.

⁴³<u>Id</u>. at 6-7.

³⁹<u>Town of Grand Rapids v. Water Works & Lighting Comm'n</u>., Case No. 90-1714 (Ct. App., Dist. IV, decided May 29, 1991).

approving the construction of a new public utility well or water source, the PSC is to examine a proposed project from the view of parties that may be affected by it to determine whether public convenience and necessity require the project.⁴⁴ The information which is required by the WDNR for new community high-capacity wells includes an engineering report which may be required to include information on the anticipated drawdown effects from the proposed public water system well on other nearby wells and the environment before approving the construction of a new well.⁴⁵ This requirement for community wells does not apply to the WDNR review of proposed noncommunity high-capacity wells, under which the permitting requirements are limited to consideration of the impact on other community high-capacity wells, large springs, and certain designated streams as discussed in Chapter Three. If after this review, the PSC and WDNR approve a new public utility well, it would seem unlikely that a court would allow a local government's ordinance to prevent or obstruct that project. While this is possible, the courts would need to recognize a substantial change in the law in order for such local action to be upheld.

E. MUNICIPAL ORDINANCES LIMITING PRIVATE WELLS

The general rule, as stated in <u>Fond du Lac v. Empire</u>,⁴⁶ is that except where specifically authorized, local regulation of groundwater is preempted by State law. Consistent with this, Section 59.70(6) of the Wisconsin Statutes specifically prohibits municipalities, other than specifically authorized counties, from enforcing ordinances that regulate matters covered by Chapter 280 of the Wisconsin Statutes. Chapter 280 is the statutory chapter which gives the WDNR general supervision and control over all methods of obtaining groundwater for human consumption, general supervision and control of the construction and reconstruction of wells, and the authority to do and perform any act deemed necessary for the safeguarding of public health.⁴⁷ There are, however, at least two exceptions to this preemption: (i) private well abandonment ordinances under NR Section 811.10 of the Wisconsin Administrative Code, and (ii) mandatory connection ordinances under Section 281.45 of the Statutes.

Under NR Section 811.10 of the Wisconsin Administrative Code, a municipality with a municipal water system is required to adopt an ordinance requiring the abandonment of all unused, unsafe or noncomplying private wells once a municipal water system is available. Abandonment is required to prevent the well from acting as a vertical channel for groundwater contamination or as a source of unsafe water from illegal cross-connections with the public water system. Implementation is to be by local ordinance or water utility rule. While the ordinance or rule is to require the abandonment of all unused, unsafe, or noncomplying private wells located on the premises served by the municipal system, it is also to include a permit system which allows the retention of private,

⁴⁴PSC Chapter 184, Wis. Admin. Code.

⁴⁵NR § 811.13(4)(j)1L, Wis. Admin. Code.

⁴⁶Fond du Lac v. Empire, 273 Wis. 333, 77 N.W.2d 699 (1956).

⁴⁷§ 280.11(1), Wis. Stats.

safe wells currently in use, "with the limitation that the owner shall demonstrate a need for continued current use."

Under Section 281.45 of the Wisconsin Statutes, a municipality may adopt an ordinance requiring a building used for human habitation and located adjacent to a water main to be connected to the municipal water system. The rationale for this Statute is to assure the preservation of public health, comfort and safety. While on its face, Section 281.45 only applies to "buildings used for human habitation," a 1933 Attorney General opinion broadly construed the term to cover "all places where human beings abide either in dwelling houses or in business places, so that they have or need toilets or water for human consumption The phrase 'human habitation' is used in its broadest sense and is not limited strictly to homes and dwelling places."⁴⁸ Thus under this interpretation a municipality may require any building, commercial as well as residential, where any water is used for toilets or human consumption, to be connected to the municipal water system.

While Section 281.45 of the Wisconsin Statutes clearly authorizes a municipality to adopt an ordinance requiring a building inhabited by humans and located adjacent to a water main to be connected to the municipal water system, questions have arisen regarding whether Section 281.45, authorizes the municipality to require the use of the water system. It has been WDNR staff's and PSC staff's opinion in the past that Section 281.45, only requires that property be connected to the municipal water system. It has been their opinion that property is not required by the Statute to "use" the municipal system. In other words, if property is connected to both a municipal water system and a private well, the property owner can choose to use the private well and not the municipal water. An argument, however, can be made for the contrary position.

A question has also been raised as to whether a municipality would have the authority to prevent the installation of a private well within its borders. As discussed earlier in this Chapter, under current case law as set forth in <u>Fond du Lac v. Empire</u>,⁴⁹ a municipality would not have the authority to adopt an ordinance to prevent the installation of a private well in its borders. Such action would also seem to be preempted by Section 59.70(7)(e) of the Wisconsin Statutes, which expressly preempts local ordinances dealing with private well construction; Section 281.34, which authorizes the WDNR to approve the installation of high capacity wells; and Section 281.11, which recognizes the WDNR as "the central unit of State government to protect, maintain and improve the quality and management of the waters of the State, ground and surface, public and private." Nevertheless, as set forth by the Wisconsin Attorney General in the Richfield Opinion,⁵⁰ arguments do exist for the proposition that municipalities may adopt groundwater protection ordinances. Such ordinances might limit the installation of private wells within the municipality.

⁴⁸22 Wis. Atty. Gen. Op. 923, 926 (1933).

⁴⁹Fond du Lac v. Empire, 273 Wis. 333, 77 N.W.2d 699 (1956).

⁵⁰8/28/2006 Memo from Assistant Attorney General Thomas Dawson to Attorney General Peggy Lautenschlager, regarding State Preemption of Town of Richfield Groundwater Protection Ordinance.

Allowing new private wells to be installed in the municipality on one hand, and authorizing municipalities to adopt well abandonment and mandatory connection ordinances on the other, may seem to be contradictory. However, it is important to recognize that the municipality's authority to adopt a well abandonment ordinance under NR Section 811.10 of the Wisconsin Administrative Code is limited to requiring the abandonment of all unused, unsafe or noncomplying private wells. The administrative code does not authorize a municipality to require the abandonment of safe, compliant wells that are in use. Similarly, the municipality's authority under Section 281.45 of the Statutes has been interpreted to allow a municipality to require that all buildings used for human habitation be connected to the municipal water system. This Statute does not explicitly authorize a municipality to require that all residents use only municipal water.

While municipal power is broad, it cannot extend to areas comprehensively regulated by the State unless it is specifically authorized to do so. To date Wisconsin courts have found that the management of groundwater and the installation of groundwater wells is an area of statewide importance and regulation, and municipal authority in this area is currently limited. However, this is an issue expected to see further litigation in the future.

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CHAPTER FIVE

LAW APPLICABLE TO THE CAPTURE OF WATER: WISCONSIN COMMON LAW

While many Federal and State statutes and regulations now address and regulate the capture and use of water, that was not always the case. Originally the regulation and use of water was governed primarily by common law doctrines recognized and enforced by the courts. Common law recognizes the rights of property owners and the public to have access to water. It recognizes the balancing that must occur to protect these different rights, and it addresses how disputes over conflicting uses of water are to be resolved. Where statutes and regulations do not address an issue, parties must look to common law to determine their respective rights and obligations.

This Chapter will address the public's rights in water as recognized by the public trust doctrine and the State's police power. It will also address individual property owners' rights in water as recognized by riparian and general property law, and how they are limited by the reasonable use rule and the public trust doctrine. This Chapter concludes with a discussion of the use of nuisance claims as one way common law resolves conflicts over competing water uses.

A. THE PUBLIC'S RIGHTS IN WATER

1. The Public's Rights in Navigable Water Under the Public Trust Doctrine

In Wisconsin, navigable water is held by the State in trust for the public.¹ This proposition, known as the public trust doctrine, originates from the formation of the United States.² After the Revolutionary War, the original thirteen colonies became independent sovereign states and each had the right to make their own rules of law pertaining to the rights of the public and riparian landowners in the waters of the state. After the War, but before the adoption of the United States Constitution, there was discussion about what to do with the territory lying west of the colonies (the Northwest Territory). Virginia claimed rights to this territory. After much discussion, Virginia agreed to cede this territory to the new nation on two conditions. One was that the states to be formed out of the Northwest Territory were to be sovereign and independent states having the same rights of sovereignty as the original states. Second was that the streams flowing into the Mississippi and St. Lawrence Rivers and the carrying places between were to be forever free public highways.³ These conditions were agreed to.

This meant that each state formed out of the Northwest Territory was entitled to make its own rules concerning the rights which the public and the riparian landowners had in the waters of the state.

 $^{3}\underline{Id}.$

¹Wis. Const. art. IX, §1.

²<u>Muench v. Public Service Comm'n</u>, 261 Wis. 492, 499, 53 N.W.2d 514 (1952).

Wisconsin is such a state. Furthermore, if the waters were navigable, then they were to be free public highways. The Northwest Ordinance specifically provided that:

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 said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.⁴

Nothing in the Northwest Ordinance defined navigable waters, and therefore, each state was left to adopt its own definition of what constitutes navigable waters.

A similar provision was included in the Wisconsin Constitution. Article IX, Section 1 of the Wisconsin Constitution provides:

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, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

In accordance with these sections of the Wisconsin Constitution and Northwest Ordinance, the State of Wisconsin has a public duty to preserve and protect navigable waters within the State for public use. This is referred to as the State's public trust obligation.

Since the State's public trust obligation applies to navigable waters, the definition of navigability is important. Originally, waters were considered navigable in Wisconsin if logs or rafts of lumber could float down a stream.⁵ This is because the public trust doctrine was originally designed to protect commercial navigation.⁶ Today, however, the doctrine has been expanded to safeguard the public's use of navigable waters for recreational and nonpecuniary purposes, such as water quality, fishing and hunting, swimming, enjoyment of natural scenic beauty, and other recreational enjoyment on water or ice.⁷ In accordance with this expansion of the public trust doctrine, a stream is now considered navigable if it is capable of floating a small recreational cance during recurring

⁶Gillen v. City of Neenah, 219 Wis. 2d 806, 820, 580 N.W.2d 628 (1998).

⁷State v. Trudeau, 139 Wis. 2d 91, 104, 408 N.W.2d 337 (1987)

⁴Northwest Ordinance of 1787 art. IV.

⁵<u>Willow River Club v. Wade</u>, 100 Wis. 86, 101, 76 N.W. 273 (1898).

periods of high water, such as spring floods.⁸ Once a water is determined to be navigable, the Public Trust doctrine applies to that water, and the Trust extends over all connected areas, whether navigable or not, until the ordinary high water mark is reached.⁹

The State's public trust obligations prohibit the State from surrendering, giving away, or alienating the State's interest in navigable water to another. This was demonstrated early on in the case of <u>Priewe v. Wisconsin State Land & Improvement Co</u>,¹⁰ where the court overturned the legislature's adoption of a special act which conveyed to a private individual title to the lands underlying two lakes. The legislation also authorized the individual to drain the lakes, reportedly to preserve the public health and well-being of communities adjacent to the lakes. In striking down the legislation, the court stated:

Leaving out of view the pretense that the draining of the lake was for the purpose of promoting the public health, not a shadow of legal authority exists to justify the acts complained of. The legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purposes.¹¹

However, while the State cannot surrender, give away, or alienate the State's interest in navigable water to another, it can allow limited incursions into navigable waters where the public interest will be served.¹² Under this authority, State legislation granting the right to use the bed of navigable waters for harbors, parks, and a convention center have been upheld.¹³ Under this authority, the legislature has also authorized riparian owners to place certain structures or deposit certain materials in navigable water provided the structure or deposit does not: (a) result in significant

⁹State v. Trudeau, 139 Wis. 2d 91, 103 (1987).

¹⁰<u>Priewe v. Wisconsin State Land & Improvement Co</u>, 103 Wis. 537, 549, 79 N.W. 780 (1899).

¹¹<u>Id</u>.

¹²<u>Hilton v. Department of Natural Resources</u>, 2006 WI 84, ¶19, 277 Wis. 2d 151, 691 N.W.2d 353; <u>Hixon v. Public Service Comm'n</u>, 32 Wis. 2d 608, 618, 146 N.W.2d 577 (1966).

¹³ <u>City of Milwaukee v. State</u>, 193 Wis. 423, 214 N.W. 820 (1927); <u>State v. Public Service</u> <u>Comm'n</u>, 275 Wis. 112, 117, 81 N.W.2d 71 (1957); <u>City of Madison v. State</u>, 1 Wis. 2d 252, 83 N.W.2d 674 (1957).

⁸<u>Muench v. Public Service Comm'n</u>, 261 Wis. 492, 506, 53 N.W.2d 514 (1952); <u>DeGayner & Co. v. Department of Natural Resources</u>, 70 Wis. 2d 936, 944-945, 236 N.W.2d 217 (1975); <u>State v. Public Service Comm'n</u>, 275 Wis. 112, 118, 81 N.W.2d 71 (1957).

adverse impacts to the public rights and interests; (b) result in environmental pollution; or (c) cause material injury to the riparian rights of any riparian owner.¹⁴

The public trust doctrine has been used by the State to bring an action against a private party for violating the laws adopted pursuant to the public trust or for violating common law which protects the public trust. As stated in <u>State v. Deetz</u>,¹⁵ "[t]he state has the usual powers of a trustee. A trustee, by virtue of such position, has standing to take legal action on behalf of the trust where some grievance recognized by the law gives rise to a cause of action." In <u>Deetz</u>, therefore, the court held that the State's interest under the public trust doctrine allowed the State to proceed with a public nuisance claim against a party who allowed stormwater runoff from a construction site to run into a lake.¹⁶

The public trust doctrine has also been used by citizens and the State itself to limit or rescind actions taken by the State or State agencies alleged to be contrary to the public trust.¹⁷ In Muench v. Public Service Comm'n,¹⁸ for example, the court held that the State could not delegate to county boards the power to approve the construction of dams on navigable waters because the delegation permitted the public's rights in navigable water to be seriously impaired or destroyed through action of a county board, and State agency action is rendered powerless to intervene and protect these public rights. In another case, Gillen v. City of Neenah,¹⁹ the court allowed a citizen to bring an action against a private party for violation of the public trust even though the WDNR had determined not to bring such an action. In Gillen, two private companies partially operated on land which included the bed of navigable waters. The WDNR asserted the use was impermissible under the public trust doctrine, but nevertheless because of the historical use of the area, the WDNR entered into an agreement with the two private companies agreeing that it would not pursue enforcement under the public trust doctrine, provided the companies met other requirements. Private citizens objected, and brought a suit challenging the use of the navigable waters for a private purpose. The question before the court was whether the public trust doctrine enabled a citizen to directly sue a private party whom the citizen believed was inadequately regulated by the WDNR. The defendants argued that the WDNR has exclusive authority to decide when a public trust violation has occurred and that after it decides to allow a project to proceed, all persons are barred from challenging the disputed project. The court disagreed, noting that the public trust doctrine "establishes standing for the state, or any person suing in the name of the state for the

¹⁴§ 30.12, Wis. Stats.

¹⁵State v. Deetz, 66 Wis. 2d 1, 12, 224 N.W.2d 407 (1974).

¹⁶<u>Id</u>.

¹⁷<u>Id</u>. at 11.

¹⁸ <u>Muench v. Public Service Comm'n</u>, 261 Wis. 492, 515m, 53 N.W.2d 514 (1952).

¹⁹ <u>Gillen v. City of Neenah</u>, 219 Wis. 2d 806, 580 N.W.2d 628 (1998).

purpose of vindicating the public trust, to assert a cause of action recognized by the existing law of Wisconsin."²⁰ Since Section 30.294 of the Wisconsin Statutes provides that: "every violation of this chapter is declared to be a public nuisance and may be prohibited by injunction and may be abated by legal action brought by *any person*", the court held that a private citizen had standing to sue the party who violated the public trust doctrine even though the WDNR determined not to bring suit.²¹

To date, Wisconsin courts have not addressed the question of the relationship between the public trust doctrine and a municipality's withdrawal of water for water supply purposes. If that question is raised in the future, a court will likely look at whether the WDNR's approval of a municipal water system's withdrawal is an unconstitutional encroachment on the public trust. In that analysis, public benefits from the different uses of water would be considered and balanced, and it is expected that in most cases, the withdrawal of water for water supply purposes would be viewed as a significant public benefit. A court will also likely look at whether the municipal water system's withdrawal constitutes an actionable public nuisance because of its impact on the public trust. A public nuisance claim could be brought by either the State or an individual citizen. A discussion of the potential use of nuisance claims against municipal water systems is discussed later in this Chapter.

2. Public Interest in Groundwater

In Wisconsin, no court case has extended the public trust doctrine to groundwater. Extending the public trust doctrine to groundwater would mean that the State would have the same duties with respect to groundwater that it currently has with respect to navigable waters. The State would be prohibited from surrendering or otherwise allowing impairments to the public's interest in groundwater, although it could allow limited incursions into the waters to serve the public's interests of an adjacent property owner provided the public's interests were not harmed. The State does not currently exercise these duties. In addition, application of the public trust doctrine to groundwater would allow private parties to bring an action against a property owner for using the groundwater - even if use of the groundwater is permitted by the State.²²

Although no court has extended the public trust doctrine to groundwater, the State of Wisconsin has adopted statutes which recognize the State's interest in groundwater. Wisconsin statutes define "waters of the state" as including groundwater²³, and further designate the WDNR as the "central unit of state government to protect, maintain and improve the quality and management of the waters

²¹<u>Id</u>. at 832.

²²<u>Gillen v. City of Neenah</u>, 219 Wis. 2d 806, 580 N.W.2d 628 (1998).

²³§ 281.01(18), Wis. Stats.

²⁰<u>Id</u>. at 828.

of the state, ground and surface."²⁴ The State's interest comes from its authority to use its police power to act for the public's health, safety and welfare. The State's expressed interest in groundwater—although not part of the public trust—provides a clear vehicle for protecting the public's interests in groundwater through State Statutes and regulations. In addition, this language may provide support for public nuisance claims against parties who are alleged to be injuring the groundwater. These public nuisance claims are discussed later in this Chapter.

B. PROPERTY OWNERS' RIPARIAN RIGHTS AND THE REASONABLE USE RULE

Riparian owners are those who own the land on the bank of a body of water.²⁵ A person or entity that is a riparian owner is accorded certain rights based upon ownership of shoreline property.²⁶ These rights include the right to use the shoreline and have access to the waters, the right to reasonable use of the waters for domestic, agricultural and recreational purposes, and the right to construct a pier or similar structure.²⁷

Riparians do not have an absolute right to the water adjacent to their property. Rather the owners of lands that adjoin a body of water have rights to co-share in the use of the water, so long as each riparian is "reasonable" in his or her use.²⁸ The relative nature of a riparian's right in water was described in <u>Fox River Flour & Paper Co. v. Kelley</u>.²⁹

This case involves questions relating to riparian rights; and it may be well, at the outset, to refer to some elementary doctrine which defines or states what these rights are. In <u>Head v. Amoskeag Mfg. Co.</u>, 113 U.S. 9-23, Mr. Justice Gray says: "The right to the use of running water is <u>publici juris</u> and common to all the proprietors of the bed and bands of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him."

²⁴§ 281.11, Wis. Stats.

²⁵<u>ABKA Ltd. Partnership v. Department of Natural Resources</u>, 2002 WI 106, ¶57, 255 Wis. 2d 486, 512, 648 N.W.2d 854.

²⁶Sea View Estates Beach Club, Inc. v. Department of Natural Resources, 223 Wis. 2d 138, 157, 588 N.W.2d 667 (Ct. App. 1998).

²⁷<u>ABKA Ltd. Partnership v. Department of Natural Resources</u>, 2002 WI 106, ¶57.

²⁸ 39 Wis. Atty Gen. Op. 564, 566 (1950).

²⁹ Fox River Flour & Paper Co. v. Kelley, 70 Wis. 287, 293, 35 N.W. 744 (1887).

More recently, in <u>Sterlingworth Condominium Ass'n v. Department of Natural Resources</u>,³⁰ the court described the relative nature of riparian rights as follows:

[E]very right which a riparian owner acquires, as such, to the waters by his land, is restricted to that which is a reasonable use, and these terms are to be measured and determined by the extent and capacity of the [lake], the uses to which it has been put, and the rights that other riparian owners on the same [lake] also have.

In order to determine whether a riparian's use is reasonable, a fact-specific determination must be made which looks at not just the riparian's use of water, but also the rights of other users.³¹ While not specifically adopted by the Wisconsin courts, the Restatement (Second) of Torts Section 850A provides guidance on making a reasonable use determination.³² Restatement (Second) of Torts Section 850A provides:

The determination of the reasonableness of a use of water depends upon a consideration of the interests of the riparian proprietor making the use, of any riparian proprietor harmed by it and of society as a whole. Factors that affect the determination include the following:

- (a) The purpose of the use,
- (b) the suitability of the use to the watercourse or lake,
- (c) the economic value of the use,
- (d) the social value of the use,
- (e) the extent and amount of the harm it causes,

(f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other,

(g) the practicality of adjusting the quantity of water used by each proprietor,

(h) the protection of existing values of water uses, land, investments and enterprises, and

(i) the justice of requiring the user causing harm to bear the loss.

Restatement (Second) of Torts Section 850A, comment (c), indicates that domestic use of water is typically given a preference over other water uses. The domestic use of water includes water use for drinking, cooking, bathing, laundry, sanitation and other household purposes of the riparian

³¹<u>Hilton v. Department of Natural Resources</u>, 2006 WI 84, ¶40, 277 Wis. 2d 151, 691 N.W.2d 353.

³²Restatement (Second) of Torts is adopted, promulgated, and published by The American Law Institute. Its statements of the law are regularly relied upon and adopted by courts throughout the United States.

³⁰ <u>Sterlingworth Condominium Ass'n v. Department of Natural Resources</u>, 205 Wis. 2d 710, 731, 556 N.W.2d 791 (Ct. App. 1996), quoting <u>Apfelbacher v. State</u>, 167 Wis. 233, 239, 167 N.W. 244, 245 (1918).

owner and his or her family. However, the comment also indicates that this preference for domestic use does not extend to withdrawals by a municipality that supplies the domestic needs of inhabitants of a city or other service areas. According to the comment, "[t]hese large public and commercial users receive no preference and are subject to liability if the taking of their supplies unreasonably causes harm to the reasonable use of riparians."

A riparian's right to use water is also limited by the public's rights in water. The rights of riparian owners are qualified, subordinate, and subject to the paramount interest of the State and the paramount rights of the public in navigable waters.³³ The job of protecting the public's rights in navigable waters and balancing those rights against the interests of riparian owners has been delegated to the WDNR.³⁴ In undertaking this balancing—usually done through a permitting process—the WDNR has a substantial amount of discretion in determining how to balance the interests of the public and the interests of riparian owners. Factors the WDNR has considered in evaluating what is an appropriate balance between public and private interests include environmental impact, impact on natural scenic beauty, historic uses, safety, and the absence of a statutory permit.³⁵

Riparian rights may also be limited if the State grants a permit or license to a nonriparian to use the waters of the state. Restatement (Second) of Torts Section 856(3) provides that a riparian proprietor may be subject to liability if its use of water causes harm to a nonriparian exercising a right created by governmental authority, permit or license to use public or private water. In discussing Restatement (Second) of Torts Section 856(3), comment e, provides:

A proprietor may not exercise his riparian rights to water so as to interfere with other types of water rights created by statute, charter or permit issued by government agencies.

* * *

State-created rights may take several other forms. Even for private waters, a state may exercise its police power by controlling the initiation and conduct of riparian and nonriparian uses of water. Many states have enacted city charters or general statutes that create water rights by authorizing municipalities, public districts and public service water companies to take water for public supply, subject to payment of compensation if riparian rights or uses of water are taken or impaired. . . . Several state statutes require any person to obtain a permit from a regulatory agency before initiating a use and regulate the time and quantity of the permitted

³⁴<u>Hilton v. Department of Natural Resources</u>, 2006 WI 84, ¶¶19-20, 277 Wis. 2d 151, 691 N.W.2d 353.

³⁵<u>R. W. Docks & Slips v. State</u>, 2001 WI 73, 244 Wis. 2d 497, 628 N.W.2d 781.

³³<u>R. W. Docks & Slips v. State</u>, 2001 WI 73, ¶21, 244 Wis. 2d 497, 628 N.W.2d 781.

withdrawals. These permits and licenses are generally issued only if no substantial harm is done to existing uses made in the exercise of riparian rights. Some of the statutes are not explicit on whether a nonriparian may obtain a permit from the administrative agency. Some clearly contemplate permits to nonriparian users who have been issued permits and riparian users who have been issued permits and riparian users who have been issued permits and riparian users, under this Subsection, all water rights created by these statutes, charters, permits or licenses are entitled to protection.

Although Restatement (Second) of Torts Section 856(3) has not been adopted in Wisconsin, the comments regarding this Section are consistent with Wisconsin Statutes dealing with the permitting of water withdrawals for water utility purposes. It should be noted, however, that a permitted nonriparian user may not negatively impact a prior riparian use. Restatement (Second) of Torts Section 857(3), comment (c) provides that:

A right to take or use public or private waters obtained by governmental authority, permit or license is a private right, even though it may be exercised for a public purpose, and the holder has no preference over other private rights and cannot take water away from or otherwise cause substantial harm to a riparian proprietor making a use of the water. If the right is for a public purpose such as municipal water supply, it is often accompanied by a power to condemn those private rights that are inconsistent with it. If the power to condemn has not been exercised, a riparian proprietor whose preexisting use is unreasonably harmed is entitled to compensation.

Most municipalities operating public water systems in Southeastern Wisconsin which withdraw surface water will be riparian owners. They will also likely have State approvals for the withdrawal of surface water. The State approvals will reflect the State's determination of what is an appropriate balance between the municipality's interest in withdrawing water for water supply purposes and the public's interest in the waters. Before granting an approval, the State may also consider how a municipality's withdrawal of water will affect the rights of other riparian owners.

Wisconsin courts have not yet addressed the issue of what happens if a municipality's withdrawal of surface water for water supply purposes harms another riparian owner. However, given the rule of reasonable use as expressed by the Restatement (Second) of Torts, a municipality should expect that if its use of water harms the prior use of another riparian owner, the municipality will be liable to that riparian owner for damages caused by the municipality's use.

C. PROPERTY OWNER'S RIGHTS IN GROUNDWATER AND THE REASONABLE USE RULE

The right to capture groundwater located underneath real property is part of a property owner's bundle of rights. This right was recognized in <u>Huber v. Merkel</u>,³⁶ where the court indicated that waters belong to the realty in which they are found. However, "[w]hether this right [to use groundwater] results from an absolute ownership of the water itself, . . . or from a mere right to use and divert the water while percolating through the soil, is a question of no materiality in the present discussion. In either event, it is a property right, arising out of his ownership of the land, and is protected by the common law as such."³⁷

Prior to 1974, the courts allowed property owners to use groundwater in any way they saw fit, even if the use of the groundwater purposely harmed other property owners. In <u>Huber v. Merkel</u>, the court held that a landowner had no claim against a neighbor who let his artesian well run, even though such action may have harmed the other wells in the area.³⁸ The court further found that there was no cause of action even if the well owner's action was malicious. Later in <u>Menne v.</u> <u>Fond du Lac</u>,³⁹ the court held, relying upon <u>Huber v. Merkel</u>, that the City of Fond du Lac could not be prohibited from drilling additional municipal wells on property it owned, even if the wells caused an impact on neighboring properties.

In 1974, however, the court rejected its prior reasoning and adopted the reasonable use rule for groundwater. In <u>State v. Michels Pipeline Construction, Inc.</u>,⁴⁰ Michels Pipeline Construction contracted with the Milwaukee Metropolitan Sewerage Commission to install a sewer. To install the sewer, Michels was required to dewater the soil. This dewatering allegedly lowered the groundwater table from which area residents drew water from private wells. Some residents complained that they were caused great hardship by the drying up of wells, decreasing capacity and water quality in others, and by the cracking of foundations, basement walls and driveways, due to subsidence of the soil. The State brought an action asking Michels to be ordered to conduct construction so as not to create a nuisance and to take action to address the hardship and adverse effect imposed upon State citizens. Michels argued that there could be no nuisance cause of action under Wisconsin law as it then existed. The court determined to overturn existing Wisconsin case

³⁶ <u>Huber v. Merkel</u>, 117 Wis. 355, 366, 94 N.W. 354 (1903).

³⁷<u>Id</u>. at 363.

³⁸<u>Id</u>.

³⁹<u>Menne v. Fond du Lac</u>, 273 Wis. 341, 346, 77 N.W.2d 703 (1956).

⁴⁰State v. Michels Pipeline Construction, Inc., 63 Wis. 2d 278, 217 N.W.2d 339 (1974).

law and adopt the rule of reasonable use in its place.⁴¹ In doing so, the court stated: "It makes very little sense to make an arbitrary distinction between the rules to be applied to water on the basis of where it happens to be found. There is little justification for property rights in ground water to be considered absolute while rights in surface streams are subject to a doctrine of reasonable use."⁴²

The form of the reasonable use rule adopted by <u>State v. Michels Pipeline</u> was that put forth in the draft of Restatement (Second) of Torts Section 858A.⁴³ That proposed section as quoted in <u>State v. Michels Pipeline</u>, provides as follows.

Sec. 858A. Non-liability for use of ground water - exceptions.

A possessor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless

(a) The withdrawal of water causes unreasonable harm through lowering the water table or reducing artesian pressure,

(b) The ground water forms an underground stream, in which case the rules stated in sec. 850A to 857 are applicable,

(c) The withdrawal of water has a direct and substantial effect upon the water of a watercourse or lake, in which case the rules stated in secs. 850A to 857 are applicable.⁴⁴

When this proposed section was finalized, it was numbered as Restatement (Second) of Torts Section 858. It is substantially the same as, but not identical to what was quoted in <u>State v. Michels</u> <u>Pipeline</u>.

This version of the reasonable use rule gives more or less unrestricted freedom to the possessor of overlying land to develop and use groundwater.⁴⁵ A landowner has the right to use groundwater beneath the land provided that use does not cause unreasonable harm. In the event a landowner's

⁴²<u>Id</u>. at 292.

⁴³<u>Id</u>. at 302-303.

⁴⁴<u>Id</u>.

⁴⁵Restatement (Second) of Torts § 858, comment (b).

⁴¹<u>Id</u>. at 298, 301-302.

use does cause unreasonable harm, the rule does not prohibit the use, but rather requires the landowner causing the unreasonable harm to bear the costs caused by his or her use.⁴⁶

The rule does not define what is an "unreasonable harm," and it is expected that what is an unreasonable harm will vary with the circumstances.⁴⁷ In general, Restatement (Second) of Torts Section 858, comment (f) notes, "[i]t is usually reasonable to give equal treatment to persons similarly situated and to subject each to similar burdens." As the comment further states, "If the first farmer to sink an irrigation well finds his facility is inadequate when other farmers irrigate their lands, he has not been unreasonably harmed by them if he is forced to deepen his well to the same level as theirs and pay the same pumping costs when the water level drops."⁴⁸

However, if water is withdrawn in very large quantities for purposes not common to the locality, the comment indicates that such use would likely be deemed to be unreasonable.⁴⁹ In this way, protection would be given to owners of small wells harmed by large withdrawals by others. Under this scenario, public water suppliers would be expected to be responsible to those affected by a municipal well.⁵⁰ Damages could include costs such as the cost of deepening prior wells, installing pumps, and paying increased pumping.⁵¹

The reasonable use rule adopted in <u>State v. Michels Pipeline</u> assumes that there will be sufficient groundwater for all desired uses.⁵² In <u>State v. Michels Pipeline</u>, the court even indicated that water conditions within Wisconsin were not limited so as to require the adoption of a rule which could result in the apportionment of underground water. However, increasing demands for groundwater, and further knowledge about declining groundwater levels, may require that the courts revisit this issue in the future.

D. USE OF NUISANCE LAW TO ADDRESS CONFLICTING USES OF WATER

Enforcement of the reasonable use rule will often be accomplished through the use of nuisance claims. Nuisance claims may be public or private.

⁴⁶Restatement (Second) of Torts § 858, comment (e).

⁴⁷Restatement (Second) of Torts § 858, comment (f).

⁴⁸<u>Id</u>.

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Restatement (Second) of Torts § 858, comment (e).

⁵⁰Restatement (Second) of Torts § 858, comment (f), illustration 1.

⁵¹State v. Michels Pipeline Construction, Inc., 63 Wis. 2d at 303.

⁵²<u>Id</u>.

1. Public Nuisance

A public nuisance is a condition, or activity, which substantially or unduly interferes with the use of a public place, or with the activities of an entire community.⁵³ Wisconsin's definition of a public nuisance is consistent with the definition of a public nuisance in the Restatement (Second) of Torts Section 821B.

(1) A public nuisance is an unreasonable interference with a right common to the general public.

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

A public nuisance may arise in one of three ways: (1) it may arise from the violation of a statute, ordinance or administrative regulation; (2) it may be created; or (3) it may be maintained. An example of the first way a public nuisance may arise is under Section 30.294 of the Wisconsin Statutes, which explicitly provides that "[e]very violation of this chapter is declared to be a public nuisance and may be prohibited by injunction and may be abated by legal action brought by any person." Under this Statute, failure to comply with the permit requirements under Chapter 30, Wisconsin's Navigable Water Law constitutes a public nuisance because if a defendant takes action without obtaining a necessary Chapter 30 permit, the public's interest in navigable water would have been unreasonably intruded upon.

The second way a public nuisance may arise was discussed in <u>City of Milwaukee v. NL Industries</u>, <u>Inc</u>.⁵⁴ In that case, lead paint manufacturers were alleged to have caused a public nuisance by manufacturing and selling paint which caused public health problems. The court held that in order to state a claim for liability for "creating" a public nuisance, a plaintiff must show the existence of

⁵⁴<u>City of Milwaukee v. NL Industries, Inc</u>., 2005 WI App 7, 278 Wis. 2d 313, 691 N.W.2d 888.

⁵³Physicians Plus v. Midwest Mutual Insurance Co., 2002 WI 80, ¶21, 254 Wis. 2d 77, 646 N.W.2d 777.

the public nuisance itself; proof that the defendant's conduct was a substantial cause of the existence of the public nuisance; and that the nuisance was a substantial factor in causing injury to the public.⁵⁵ Even if these elements are proven, however, the court may determine not to impose liability for public policy reasons.

The third way a public nuisance may arise was discussed in <u>Physicians Plus v. Midwest Mutual</u> <u>Insurance Co</u>.⁵⁶ In that case, the court dealt with a claim that a public nuisance was "maintained" because the defendants failed to remove branches from a tree that were blocking sight lines along a highway. The court held that liability for maintaining a public nuisance is based on the following elements: the existence of the public nuisance itself; actual or constructive notice of the public nuisance; and that the failure to abate the public nuisance is a cause of the plaintiff's injuries.⁵⁷ If these elements are proven, the court will also look at public policy considerations before determining to impose liability.

In determining whether a public nuisance exists—i.e. whether a condition or activity substantially or unduly interferes with the use of a public place or with the activities of an entire community— the number of people affected is not determinative. Rather a nuisance is public if injury or annoyance affects a public place, the people of some local neighborhood, or such part of the public as come in contact with it.⁵⁸ In determining whether a condition or activity "substantially or unduly" interferes with a public place or with the activities of the community, the court will consider many factors, including, among others, the nature of the activity, the reasonableness of the use of the property, the location of the activity, and the degree or character of the injury inflicted or right impinged upon.⁵⁹

A public nuisance cause of action may be brought against a party if that party's use of surface water or groundwater substantially or unduly interferes with the use of a public place or the activities of a community. In determining whether a party's use of surface water or groundwater substantially or unduly interferes with the rights of the public or a community, a court will likely look to the reasonable use rule discussed earlier in this Chapter.⁶⁰

⁵⁵<u>Id</u>. at ¶12.

⁵⁶Physicians Plus v. Midwest Mutual Insurance Co., 2002 WI 80, 254 Wis. 2d 77, 646 N.W.2d 777.

⁵⁷<u>Id</u>. at ¶2.

⁵⁸State v. Quality Egg Farm, Inc., 104 Wis. 2d 506, 515, 311 N.W.2d 650 (1981); <u>State v. Michels Pipeline Construction, Inc</u>., 63 Wis. 2d 278, 287, 217 N.W.2d 339 (1974).

⁵⁹State v. Quality Egg Farm, Inc., 104 Wis. 2d 506, 520-521, 311 N.W.2d 650 (1981).

⁶⁰State v. Michels Pipeline Construction, Inc., 63 Wis. 2d 278, 217 N.W.2d 339 (1974).

The fact that an activity may be permitted or otherwise lawful, does not exempt it from the law of nuisance.⁶¹ Thus, even if an activity conforms to all applicable laws, and even if the activity is not negligent, the activity may cause a public nuisance. This may be particularly relevant to public water systems who operate in accordance with WDNR and PSC regulations, but may nevertheless cause an impact on others' rights in water. As stated in Jost v. Dairyland Power Cooperative:⁶²

To contend that a public utility, in the pursuit of its praiseworthy and legitimate enterprise, can, in effect, deprive others of the full use of their property without compensation, poses a theory unknown to the law of Wisconsin, and in our opinion would constitute the taking of property without due process of law.

A public nuisance action may be brought by any party injured by the nuisance.⁶³ The remedy for a public nuisance may be either an injunction to abate the nuisance, or damages to the parties who has suffered harm of a kind different from that suffered by other members of the public.⁶⁴ If a claim is brought against a municipal water utility for creating a public nuisance, enjoining the activity, especially if it has been permitted by the WDNR and PSC, may be unlikely in most cases.⁶⁵ However, a court could order that damages be paid to the individuals harmed by the public nuisance.

2. Private Nuisance

A private nuisance involves some invasion of a private party's interest in the private use and enjoyment of the benefits of his or her land.⁶⁶ This interest is broadly defined to include any disturbance of the property owner's enjoyment of property.⁶⁷ It is designed to meet a wide variety of possible invasions and to be adaptable to changing social values and conditions.

The courts have stated that private nuisance actions recognize that an owner of land does not have an absolute or unlimited right to use his or her land in a way which injures the rights of others.

⁶²Jost v. Dairyland Power Cooperative, 45 Wis. 2d 164, 177, 172 N.W.2d 647 (1969).

⁶³§§ 30.294 and 823.01, Wis. Stats.

⁶⁴Restatement (Second) of Torts §821C(1).

⁶⁵Restatement (Second) of Torts §850A, comment (m).

⁶⁶Prah v. Maretti, 108 Wis. 2d 223, 230-231, 321 N.W.2d 182 (1982).

⁶⁷<u>Vogel v. Grant-LaFayette Electric Cooperative</u>, 201 Wis. 2d 416, 423, 548 N.W.2d 829 (1996).

⁶¹State v. Quality Egg Farm, 104 Wis. 2d at 516; <u>State v. Michels Pipeline Construction</u>, <u>Inc</u>., 63 Wis. 2d at 297; <u>Jost v. Dairyland Power Cooperative</u>, 45 Wis. 2d 164, 173, 172 N.W.2d 647 (1969).

The rights of neighboring landowners are relative; the uses by one must not unreasonably impact the uses or enjoyment of the other.⁶⁸

Wisconsin courts have adopted the analysis for private nuisance set forth in Restatement (Second) of Torts Section 822.⁶⁹ It provides that:

One is subject to liability for private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

(a) intentional and unreasonable, or

(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

When a nuisance is alleged to fall under the first category of intentional conduct, the actor must know that the activity or condition is causing harm to another's interest in the use and enjoyment of land.⁷⁰ The Restatement (Second) of Torts Section 825 defines intentional invasion as follows:

An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor

- (a) acts for the purpose of causing it, or
- (b) knows that it is resulting or is substantially certain to result from his conduct.

Comment (c) to Restatement (Second) of Torts Section 825 explains:

To be "intentional," an invasion of another's interest in the use and enjoyment of land, or of the public right, need not be inspired by malice or ill will on the actor's part toward the other. An invasion so inspired is intentional, but so is an invasion that the actor knowingly causes in the pursuit of a laudable enterprise without any desire to cause harm. It is the knowledge that the actor has at the time he acts or fails to act that determines whether the invasion resulting from his conduct is intentional or unintentional.

⁶⁸<u>Id</u>.

⁶⁹Crest Chevrolet v. Willemsen, 129 Wis. 2d 129, 138, 384 N.W.2d 692 (1986).

⁷⁰<u>Vogel v. Grant-LaFayette Electric Cooperative</u>, 201 Wis. 2d 416, 430-432, 548 N.W.2d 829 (1996).

Comment (d) to Restatement (Second) of Torts Section 825 further explains when unintentional invasions may become intentional invasions.

Continuing or recurrent invasions. Most of the litigation over private nuisances involves situations in which there are continuing or recurrent invasions resulting from continuing or recurrent conduct . . . In these cases the first invasion resulting from the actor's conduct may be either intentional or unintentional; but when the conduct is continued after the actor knows that the invasion is resulting from it, further invasions are intentional.

Based upon Restatement (Second) of Torts Section 825, comment (d), a private nuisance claim against a municipal water utility for interference with a property owner's right to capture and use water would generally be expected to be categorized as an intentional interference. If use of water for municipal supply causes an invasion, it would likely be a continuing invasion which would over time become an intentional invasion.⁷¹ The unreasonableness of an intentional invasion is to be determined using the factors set forth in Restatement (Second) of Torts Section 826. That section provides:

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

(a) the gravity of the harm outweighs the utility of the actor's conduct, or

(b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

It should be noted that an intentional invasion may be unreasonable if either Restatement (Second) of Torts Section 826(a) or (b) is met. Subsection (a) requires a comparison between the actor's conduct and the property owner's interest. If the utility of the actor's conduct outweighs the property owner's interest, there is no liability under subsection (a). Subsection (b), however, does not require this comparison. Under subsection (b), liability may be imposed if serious harm is caused, and the actor can pay for the harm without making the continuation of the conduct infeasible.⁷²

A municipal water utility's use of water for water supply purposes would have high social utility, and would likely do well in any comparison under Restatement (Second) of Torts Section 826(a).

⁷¹Compare <u>Metropolitan Sewerage District v. City of Milwaukee</u>, 2005 WI 8, ¶39, 277 Wis. 2d 635, 691 N.W.2d 658, where the court held that because there was no evidence that the City had knowledge of a leaky water main, there is no claim that the City intentionally created a nuisance.

⁷²Crest Chevrolet v. Willemsen, 129 Wis. 2d 129, 140, 384 N.W.2d 692 (1986).

However, even if that were the case, Restatement (Second) of Torts Section 826(b) would impose private nuisance liability, if serious harm is caused by the activity, and the municipality could pay for the harm without making the continuation of the conduct infeasible. Based upon this standard, a municipality should expect in most cases to have to pay for any serious harm to private property owners caused by the municipal water utility. The factors involved in determining the seriousness of the harm caused by the conduct under Section 827(b) are set out in the Restatement (Second) of Torts Section 827.⁷³

3. Nuisance Remedies

A prevailing plaintiff in a public nuisance or private nuisance action may be entitled to damages, abatement and/or injunction. Remedies are available only to those to whom the nuisance causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose.⁷⁴ Significant harm means harm of importance, involving more than slight inconvenience or petty annoyance. In the case of a public nuisance, the harm must also be of a kind different from that suffered by other members of the public exercising public rights.⁷⁵

Although an injunction is an available remedy for a nuisance, it will not necessarily be issued in some cases. As stated in Restatement (Second) of Torts Section 821B, comment (i):

There are numerous differences between an action for tort damages and an action for an injunction or abatement, and precedents for the two are by no means interchangeable. In determining whether to award damages, the court's task is to decide whether it is unreasonable to engage in the conduct without paying for the harm done. Although a general activity may have great utility it may still be unreasonable to inflict the harm without compensating for it. In an action for injunction the question is whether the activity itself is so unreasonable that it must be stopped. It may be reasonable to continue an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying.

In determining whether an injunction should be issued, a court may consider (a) the nature of the interest to be protected; (b) the relative adequacy to the plaintiff of injunction and of other remedies; (c) any unreasonable delay by the plaintiff in bringing suit; (d) any related misconduct on the part of the plaintiff; (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied; (f) the interests of third persons and of the public; and (g)

⁷³<u>Id</u>.

⁷⁴Restatement (Second) of Torts § 821F.

⁷⁵Restatement (Second) of Torts § 821F, comment (c).

the practicability of framing and enforcing the order or judgment.⁷⁶ In cases involving water supply, the factors of relative hardship and the interests of the public would likely tip the scales against an injunction prohibiting a new water supply. However, no Wisconsin case specifically addresses this issue.

⁷⁶Restatement (Second) of Torts § 936.

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CHAPTER SIX

LAW APPLICABLE TO THE OWNERSHIP, OPERATION AND FINANCING OF WATER SUPPLY SYSTEMS

Residents of Southeastern Wisconsin receive water supply services from either public water systems or private wells. A public water system may be owned or operated by a governmental body, a corporation, individual, or association. There is no requirement that a public water system be owned or operated by any particular type of entity.

An entity that provides water to the public is a public utility under Wisconsin law.¹ The only requirement to be a water public utility is that the entity must own, operate, manage or control all or any part of a plant or equipment for the production, transmission, delivery or furnishing of water either directly or indirectly to or for the public.²

In Wisconsin, most water systems that provide water to the public are owned and operated by municipalities. Municipalities have the authority to own and operate water systems pursuant to Section 66.0803 of the Wisconsin Statutes. Municipalities have typically provided public water service as a service to their residents. Decisions on how to provide such service have usually been made by the municipality acting alone and looking at its own individual situation.

Impacts from water supply decisions, however, may not be contained within a municipality's political boundaries. When water is plentiful, one community's use of water may not have an impact on others. However, as water supplies become more limited, one community's use of water may affect another's. For that reason, the need to coordinate water supply development is important. Regional water supply cooperation can be accomplished in many different ways depending upon the objectives of the parties wishing to cooperate.

A. WHOLESALE/RETAIL WATER SERVICE CONTRACTS

A common form of regional water supply cooperation is an agreement for one municipality to provide either retail or wholesale water supply service to another. A municipal water system provides retail water service to another community when it provides water directly to the residents of that other community. The municipal water system bills the residents directly for the water service provided. A municipal water system provides wholesale water service to another community when it provides water up to the other community's borders, and the other community then distributes the water to its residents. In that case, the municipal water system concerned bills the other community for the amount of water supplied. The City of Milwaukee, for example, has

¹§ 196.01(5), Wis. Stats.

contracted to provide retail water service to some communities and wholesale water service to others.³ Similarly, Kenosha, Oak Creek, and Racine all have water supply agreements with other municipalities.

These agreements to provide retail or wholesale water supply services from one municipality to another constitute, in effect, a type of regional water supply. However, these agreements do not necessarily promote regional decision-making. The supplying community retains the right to make the decisions on how water will be provided, subject to regulation by the PSC. The PSC has jurisdiction to supervise and regulate public utilities.⁴ The PSC has taken the position that the rates a public utility charges to provide wholesale water to another community are subject to PSC approval.

PSC jurisdiction over a public utility in its provision of retail or wholesale service to another community has several important repercussions on that public utility. First, once a public utility begins to provide service to an area, the public utility must continue to provide service to that area.⁵ This is the concept of "once served, never denied." What this means is that the public utility cannot at a later date determine to halt service to a customer, even if the contract under which the public utility originally provided service expired.⁶

Second, the rates that the public utility charges its wholesale or retail customers are approved by the PSC and are typically based upon the cost of providing service to those customers.⁷ What this means is that the public utility supplying water is limited in the amount that it can charge its wholesale or retail customers, and the customers receiving water can be assured that rates will be reviewed and approved by the PSC.

⁴§ 196.02(1), Wis. Stats. The PSC does not have jurisdiction over agreements between municipalities which do not impact the public utility or utility rates, rules or practices applicable to the public.

⁵<u>Milwaukee v. Public Service Comm'n</u>, 268 Wis. 116, 120, 66 N.W.2d 716 (1954)

⁶City of Milwaukee v. City of West Allis, 217 Wis. 614, 620, 258 N.W. 851 (1935).

⁷§§ 196.03, 196.20 and 196.37, Wis. Stats.

³The Milwaukee Water Works provides retail service to all or part of the Cities of Greenfield, Franklin, Milwaukee, and St. Francis; and the Village of Hales Corners. It provides wholesale service to all or part of the Cities of New Berlin, Wauwatosa, and West Allis; and the Villages of Brown Deer, Greendale, Shorewood, Butler and Menomonee Falls, and WE Energies-Water Services serving the City of Mequon and the Village of Thiensville. The City of West Milwaukee has a unique arrangement with the City of Milwaukee Water Works as it receives billing services from the Milwaukee Water Works and maintains its own distribution system.
PSC rate-setting may impact the willingness of public utilities to enter into new wholesale or retail water service contracts. For water utilities with existing excess capacity in their facilities, receiving cost of service rates for water from this existing capacity may be sufficient incentive to enter into new contracts. However, if a water utility must build additional capacity to serve new customers, receiving cost of service rates may not be a sufficient incentive to expand the utility to serve new customers outside of its municipal borders.

In two recent cases involving the City of Green Bay and the City of Manitowoc, the PSC recognized the need to provide an incentive for public water systems to provide water to new customers outside of their municipal borders, and the PSC approved contractually negotiated water rates which included an incentive for the community supplying the water.⁸ However, in these decisions, the PSC made clear that the contractually negotiated water rate would be allowed for a limited time only, and that in the future the PSC would establish the water rates.

The Green Bay and Manitowoc cases represent situations where the public utility had not yet obtained an obligation to serve particular outside customers, where additional facilities would need to be constructed to serve the new outside customers, and where the public utilities required an incentive to agree to provide this water service. It was under those circumstances that the PSC approved contractually negotiated water rates, with the caveat that the PSC would be setting rates in the future. However, once the obligation to serve has been triggered, the public utility has no further negotiating leverage, and public utilities should expect that the PSC will follow its standard precedent for establishing water rates.

Third, if new water supply facilities must be built to serve new customers, under PSC rate-setting, the water rates of existing customers may increase. Under current rate-setting, all water utility customers typically share the cost of all water utility facilities under the PSC's average cost concept.⁹ Therefore if new facilities are built to extend service to outside customers, the cost of those new facilities are likely to be shared by both existing and new customers.

In order to ensure that new customers pay for new facilities needed to serve them, some communities have imposed special assessments or impact fees on these new customers. However,

⁸Joint Petition for the City of Green Bay, WI and the Village of Ashwaubenon, WI for a Declaratory Ruling and Related Approvals Necessary in Relation to the Wholesale Water Service Agreement, PSC Docket No. 05-DR-104, Final Decision dated December 22, 2004; Application of Central Brown County Water Authority for Authority to Construct Water Supply and Transmission Facilities and to Issue Bonds, and Approval of the Water Purchase and Sale Agreement with Manitowoc Public Utilities, PSC Docket No. 05-CW-101, Final Decision dated May 9, 2005.

⁹Investigation of the Complaint Filed by American Mobile Home Communities Concerning Sewer Rates of the Town of Lisbon Sanitary District No. 1, PSC Docket No. 9300-SI-102, Final Decision dated March 11, 2005.

a municipality may only impose special assessments or impact fees within its municipal borders.¹⁰ New customers outside a supplying municipality' s borders cannot be required to pay special assessments or impact fees, unless the municipality receiving service has agreed to impose special assessments or impact fees.¹¹ If there is no agreement, collecting special assessments or impact fees within the supplying municipality's borders only would result in lowering the rates for all other customers, including the new customers located outside the supplying municipality's borders. This means that new customers within the supplying municipality would pay more to obtain water than new customers located outside the supplying municipality's borders. This may create a disadvantage for the supplying municipality in attracting new growth.

Overall, PSC jurisdiction over retail and wholesale water agreements has not, to date, encouraged regional water supply. The "once served, never denied" rule makes a municipality's decision to extend service to a new area a momentous, irreversible decision. Its requirement that water rates be based upon cost of service, takes away some of a municipality's incentive to serve as a regional water supplier and provide water outside its boundaries. And, its determination that the cost of new facilities needed to serve new users should typically be borne by all water users, may result in a financial disincentive for a municipality to serve as a regional water supplier because existing customers' rates may increase in order to serve new customers.

B. INTERMUNICIPAL AGREEMENTS UNDER SECTION 66.0301, OF THE WISCONSIN STATUTES.

Another option for regional water supply is for local governments to enter into an intermunicipal agreement under Section 66.0301 of the Wisconsin Statutes. Under an intergovernmental agreement, local governments¹² may agree to do jointly what each member could otherwise do separately.¹³ Since a local government can provide water supply, an intergovernmental agreement would allow a group of local governments to join together to provide water supply. Under such an agreement, one municipality could agree to provide wholesale or retail water supply to another, as discussed above, or an agreement could be used to provide for the creation of a totally new entity that would provide water. The North Shore Water Commission, for example, is a commission created by intergovernmental agreement between three different communities—the City of Glendale, and the Villages of Fox Point and Whitefish Bay—to provide water supply to their communities.

If water service is to be provided, an intermunicipal agreement should provide a plan for the furnishing of that service. This plan may include the creation of a separate commission to oversee

- ¹²§ 66.0301(1), Wis. Stats.
- ¹³§ 66.0301(2), Wis. Stats.

¹⁰§§ 66.0617 & 66.0701, Wis. Stats.

¹¹§ 66.0707, Wis. Stats.

and administer the provision of the service.¹⁴ Groups of local governments in Southeastern Wisconsin can, therefore, if they choose, agree to create separate commissions to manage and administer water supply for the communities concerned.

A commission created by an intergovernmental agreement should be granted significant authority to meet its responsibilities by its enabling agreement. It should be able to finance the acquisition, development, construction and equipment of land, buildings and facilities for regional projects, like water supply projects. These projects may be financed by revenue bonds issued by the commission, or as an alternative, municipalities participating in an intergovernmental agreement may jointly or separately finance the projects, or an agreed share of the projects.¹⁵ A commission created by an intergovernmental agreement, however, does not have the ability to tax.

One of the limitations of an intergovernmental agreement is that if the parties to the agreement have varying powers or duties under the law, each party may act under the agreement only to the extent of its lawful powers and duties.¹⁶ This means that an intergovernmental commission, as an entity, would only have the powers of its least powerful member. This may have a limiting effect in some situations if different types of local governments are parties to the intergovernmental agreement. However, this should not have a limiting effect with regard to the imposition of service fees for the provision of water supply. Since towns, villages, cities, and sanitary districts all have the ability to impose water service fees.¹⁷

C. JOINT LOCAL WATER AUTHORITY

Another option for regional water supply is for local governments to form a joint local water authority by contract pursuant to Section 66.0823 of the Wisconsin Statutes. As described below, a joint local water authority is an entity made up of individual municipalities or Indian tribes or bands.¹⁸ The authority sells wholesale water to the individual municipalities, and the individual municipalities then sell water to their own customers. An authority is a political body of the State and has public powers separate from the member parties, but it does not have taxing power.¹⁹

¹⁶§ 66.0301(2), Wis. Stats.

¹⁷§§ 66.0809(1) and 60.70(5)(e), Wis. Stats.

- ¹⁸§ 66.0823(3), Wis. Stats.
- ¹⁹§ 66.0823(6), Wis. Stats.

¹⁴§ 66.0301(2)-(4), Wis. Stats.

¹⁵§ 66.0301(4), Wis. Stats.

The joint local water authority legislation was adopted in 1997 to facilitate the creation of the Central Brown County Water Authority in Brown County.²⁰ Special legislation was sought for this entity for several reasons. First, its members were made up of cities, villages, and towns and there was concern about the extent of the towns' powers to act under Section 66.0301 of the Wisconsin Statutes. Second, there was an interest in having more explicit bonding authority for the new entity.²¹ And third, explicit legislation was sought to allow the new entity and its members to enter into "take-or-pay" contracts to provide security for the bonds to be issued.²² Take-or-pay contracts would require a municipal member to pay for a certain minimum amount of water even if that member did not actually take that amount of water from the authority.

Under Section 66.0823(3) of the Wisconsin Statutes, any local governmental unit may contract with one or more local governmental units or Federally recognized Indian tribes or bands to establish a joint local water authority to jointly produce, treat, store, distribute, purchase or sell water for the benefit of the contracting parties. A local governmental unit means any city, village, town, county, town sanitary district, water utility district, or a public inland lake protection and rehabilitation district that has town sanitary district powers.²³ The joint local water authority formed by the contracting parties is to be managed by a board of directors which includes representatives from all the parties. How the board operates is to be established by the contract between the parties.²⁴

A joint local water authority has broad authority.²⁵ It can plan, build and operate water supply facilities, or it can contract with another entity for water supply. In order to obtain water supply, it may incur debts, liabilities or obligations including the borrowing of money and the issuance of bonds.²⁶ Bonds issued by the authority constitute debt of the authority but not debt of the contracting parties. The authority's bonds are payable only out of funds or properties of the authority. However, the authority may not issue bonds for the construction of a project unless the PSC certifies that public convenience and necessity require the project.²⁷ The PSC may refuse to certify a project if it appears that the completion of the project will substantially impair the efficiency of the service of a contracting party's public utility; provide facilities unreasonably in

²⁰1997 Wisconsin Act 184.

²¹§ 66.00823(9) - (13), Wis. Stats.

²²§ 66.0823(7)(c), Wis. Stats.

- ²³§ 66.0823(2)(e), Wis. Stats.
- ²⁴§ 66.0823(4), Wis. Stats.
- ²⁵§ 66.0823(5), Wis. Stats.

²⁶§ 66.0823(9), Wis. Stats.

²⁷§ 66.0823(8), Wis. Stats.

excess of the probable future requirements; or when placed in operation, add to the cost of service without proportionately increasing the value or available quantity of service.

In order to facilitate the provision of water supply, the authority may acquire property by purchase, lease or condemnation.²⁸ It may install facilities within any state, county or municipal street, road or alley, or any public highway.²⁹ In building facilities, the authority is required to comply with all local ordinances and permit conditions, provided such ordinances or conditions are reasonable. If the authority's board of directors determines that an ordinance or permit condition imposes unreasonable requirements, costs or delays on the authority's ability to carry out its responsibilities, the authority's board of directors may pass a resolution specifying the ordinance or permit condition, indicating why it is unreasonable and how the authority intends to deviate from the ordinance or permit condition.³⁰ If the determination of the authority either is not challenged as described in Section 66.0823(15) of the Statutes, or is upheld, the authority may deviate from the ordinance or permit condition in the manner specified in the resolution.

The joint local water authority is expected to enter into water purchase and sale agreements with its contracting parties.³¹ Under these agreements, the authority will sell wholesale water to its contracting parties, but it cannot sell retail water.³² The promises contained in these water purchase and sale agreements provide the security for any bonds issued by the authority. To that end, these purchase agreements may include provisions (i) requiring the purchaser to make sufficient payments to enable the authority to meet its payments, (ii) to pay for water regardless of whether water is delivered to the purchaser or not, and (iii) to pay the obligations of any contracting party who defaults.³³ These types of provisions strengthen the security provided by the water purchase and sale agreements, and make it easier for the authority to sell bonds to finance its water projects.

The joint local water authority establishes rates for the water service it provides.³⁴ Since a joint local water authority is a wholesale water supplier only and does not provide water to the public, a joint local water authority is not a public utility regulated by the PSC.³⁵ The contracting parties,

- ²⁸§ 66.0823(5)(e), Wis. Stats.
- ²⁹§ 66.0823(5)(h), Wis. Stats.
- ³⁰§ 66.0823(15), Wis. Stats.
- ³¹§ 66.0823(7)(c), Wis. Stats.
- ³²§ 66.0823(5)(d), Wis. Stats.
- ³³§ 66.0823(7)(c), Wis. Stats.
- ³⁴§ 66.0823(5)(j), Wis. Stats.
- ³⁵§ 196.01(5)(a)5., Wis. Stats.

however, who receive water from the joint local water authority, will continue to supply water to their residents, and therefore would continue to be public utilities regulated by the PSC.

There are two primary benefits to a joint local water authority. First, the authority has all the powers set forth in Section 66.0823 of the Wisconsin Statutes. It is not limited to the powers of its least powerful member as a commission created by an intergovernmental agreement would be. Second, a joint local water authority has stronger financing powers than a commission created by an intergovernmental agreement.³⁶ In situations where these benefits are important, the creation of a joint local water authority is a good mechanism for the provision of regional water supply.

D. MUNICIPAL WATER DISTRICTS

Another option for regional water supply is a municipal water district. Section 198.22 of the Wisconsin Statutes, authorizes the creation of municipal water districts. However, no municipal water districts have to date been created under this statute.

To create a municipal water district, an election first must be held on whether such a district should be created.³⁷ The election process is set forth in Sections 198.04 and 198.06 of the Statutes. If a district is created, a board of directors is established for the district in accordance with Section 198.22(4). The statute provides that each municipal member shall have one director on the board, although the directors' votes are to be weighted based on water consumption.³⁸ This means that directors that represent municipalities with large water consumption will have more voting power than directors of municipalities with smaller consumptions. The board of directors constitutes the legislative body of the district and determines all policy questions.³⁹

The district may contract for the furnishing or delivery of water service. It can build facilities;⁴⁰ lay facilities within public highways, streets or ways; acquire property for the district through negotiation or condemnation;⁴¹ issue revenue bonds;⁴² and "do such other acts as shall be necessary

- ³⁸§ 198.22(4a), Wis. Stats.
- ³⁹§ 198.145, Wis. Stats.
- ⁴⁰§ 198.22(6), Wis. Stats.
- ⁴¹§ 198.14(11), Wis. Stats.
- ⁴²§ 198.14(10), Wis. Stats.

³⁶§ 66.0823(7)(c), (9)-(13), Wis. Stats.

³⁷§ 198.22(3), Wis. Stats.

and proper" to exercise its powers.⁴³ While these board powers are appealing, the fact that a municipal water district may be initially created only upon an election makes this a difficult Statute to use to facilitate regional water supply.

E. CONTRACT OPERATIONS

Regional water supply could potentially be accomplished by municipalities contracting with a single third-party water system operator. Under this scenario, each municipality would likely enter into a separate contract with the third-party operator. The third-party could be a municipal entity, in which case an intergovernmental agreement would likely be used, or it could be a private party.

Contracts for water supply services may take many different forms. The owner of a water system may contract for discrete services such as laboratory testing or meter reading, or it may contract for a third-party to operate the entire water system. Regardless of the service contracted for, the contract should identify the services to be provided and the level of service expected. In addition, contracts for third-party operations should include provisions dealing with such things as:

- The level of qualifications and training of personnel working on the water utility
- The type and quality of materials to be used at the utility
- Representations and warranties regarding the service to be provided
- Remedies in the event of inadequate service
- The allocation of decision-making responsibility between the owner of the system and the third-party operator.

One of the major issues that arises with regard to contract operations is the effect of such a move on bargaining unit employees of the water system. If the water system owner operates the system with its own employees who are members of a bargaining unit, there will likely be issues involving the union if that owner seeks to utilize contract employees for work that had previously been performed by bargaining unit employees. Depending upon the specific circumstances of the change, the owner may be required to negotiate with the union with respect to such a change, the failure of which could give rise to an unfair labor practice charge or grievance. This is an issue which must be carefully considered in making any change.⁴⁴

⁴³§ 198.14(1), Wis. Stats.

⁴⁴<u>Unified School District No. 1 of Racine County v. WERC</u>, 81 Wis 2d 89, 259 N.W.2d 724 (1977).

F. TRANSFER OF UTILITY SYSTEM OR ASSETS

Another alternative for a cooperative regional approach to water supply is the joint ownership or operation of regional facilities. One option for the joint ownership of regional facilities is for a regional entity, such as a joint local water authority, or an intergovernmental commission, to build and pay for new facilities to serve the regional entity. Another option would be for a regional entity to jointly manage existing facilities for regional use, and perhaps supplement those facilities with new facilities where needed.

One way to accomplish this second option is for the ownership or management of existing facilities to be transferred to the new regional entity. If all members of the new regional entity transfer facilities to the new entity of approximately the same relative value, the members may agree that no compensation for the transferred facilities need be paid to any member. However, if the relative value of facilities transferred by members to the new regional entity varies significantly, the municipality transferring the more valuable assets would likely expect some compensation or consideration for those facilities.

If the transfer of utility assets involves the sale or lease of the entire utility, Section 66.0817 of the Wisconsin Statutes, provides that a community must follow a five-step process. First, the municipality must enter into a preliminary agreement with a purchaser. Second, the preliminary agreement must be adopted at a regular meeting of the governing body (e.g., Common Council). Third, the PSC must review the agreement for reasonableness, and determine either to approve it, modify it, or not approve it. This action by the PSC is to determine "whether the interest of the municipality and its residents will be best served by the sale," and if it so determines, the PSC is to fix the price and other terms. Fourth, if the agreement is approved by the PSC, the agreement is to be submitted to a referendum of the citizens, with the sale to be completed within one-year of approval. Fifth and finally, there are special considerations which must be taken into account to protect municipal bond holders in the case of a sale.

Because of the referendum requirement, it may be difficult for a community to sell or lease its entire public utility. Therefore, more likely options for regional cooperation are that a municipality enters into an agreement with a third-party to operate the municipality's system, or that a regional body provides water supply service for the region, while each community retains responsibility for water distribution within the community.

If regional cooperation will involve transferring an operating unit or system—but not the entire utility—to a new regional entity or a third-party, PSC approval will still be required.⁴⁵ The public utility is to apply for PSC approval by providing a concise statement of the proposed action, the reasons for the action and any other information required by the PSC.⁴⁶ The PSC is required to consider the application and hold a public hearing if necessary. If the PSC finds that the proposed

⁴⁵§ 196.80(1m)(e), Wis. Stats.

⁴⁶§ 196.80(3), Wis. Stats.

action is consistent with the public interest, it must give its consent and its approval in writing. In reaching its determination the PSC must take into consideration the reasonable value of the property and assets to be sold or transferred.⁴⁷ No referendum is required.

There is no one established standard for determining what is the reasonable value of utility assets. For rate-making purposes, the PSC typically only allows a municipality to include in rate base the value of plant used in service, as determined on a historical cost less depreciation basis. However, this valuation method is not the only reasonable way to measure the value of property to be sold or transferred. The valuation of utility assets in a sales context was described in <u>Oshkosh Water</u> Works Co. v. Railroad Comm'n:⁴⁸

In the proper valuation of a public utility for condemnation or sale purposes certain main elements usually present in every case may legitimately be considered. These are the present value of its physical property; the present and prospective reasonable earnings of its business; the going value thereof; and the amount of money presently needed to put the plant in good condition. . . . In determining the value of the physical property due regard should be had to the original cost thereof; the reproduction cost; the amount of depreciation; and the amount of obsolescence. The going value of a utility is that part of its value due to its having an existing established business.

These different methods of valuing utility assets can result in very different values. Therefore, a negotiated price for utility assets usually does not result from the selection of one valuation method over another, but rather from a determination of what one party will pay and what the other will take for the assets at issue. This individualized negotiation is manageable when dealing with few parties, but becomes more difficult to accomplish when dealing with many parties with a variety of views and interests.

G. SUMMARY

There is no one model for achieving regional cooperation in providing water supply. The type of arrangement that will work best will depend upon what the parties involved are trying to accomplish. Once the parties' objectives are determined, a model—which could be configured of parts of different models—can be molded to fit that situation.

⁴⁷See for example, Joint Application for Approvals Related to Wisconsin Power and Light Company's Sale of its Beloit Area Water Utility Assets to the City of Beloit, PSC Docket No. 05-BS-122, Final Decision dated September 19, 2003.

⁴⁸Oshkosh Water Works Co. v. Railroad Comm'n, 161 Wis. 122, 127, 152 N.W. 859 (1915).

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CHAPTER SEVEN

SUMMARY OF WATER SUPPLY LAW AS APPLIED TO SOUTHEASTERN WISCONSIN

This Chapter provides a succinct summary of the most relevant provisions of water supply law at all levels of government that may influence the preparation of the regional water supply plan for Southeastern Wisconsin. This summary addresses water law applicable to the withdrawal and use of surface water and groundwater for water supply, and relevant law applicable to the operation of public water systems and the promotion of regional water supply cooperation. While this summary focuses on existing law, the summary also discusses a number of significant proposed changes to water law and how those changes could affect the provision of water supply in Southeastern Wisconsin.

A. SURFACE WATER

1. Current State Statutes and Regulations

In most circumstances, a public utility will be allowed to build water supply facilities to withdraw water from Lake Michigan unless the withdrawal results in a large water loss, or results in a diversion of Great Lakes water outside the Great Lakes Basin. Section 30.21, of the Wisconsin Statutes, authorizes a public utility to construct, maintain and operate water intake pipes and other water supply facilities on the bed of Lake Michigan, upon compliance with applicable federal regulations and subject to Wisconsin Public Service Commission (PSC) regulation, provided a municipality located on Lake Michigan permits the public utility to install and operate such facilities. Any community located within 50 miles of Lake Michigan is deemed to be situated on Lake Michigan for purposes of this statute. Concurrently with the construction of the water withdrawal facilities, the community must construct sewage treatment and disposal facilities adequate to completely treat all the municipality's sewage.

Construction of public water supply facilities is overseen by the WDNR pursuant to Section 281.41, and by the PSC pursuant to Section 196.49 of the Wisconsin Statutes. These sections provide the WDNR and PSC broad authority to review aspects of public water supply system construction. Section 281.41, of the Wisconsin Statutes, provides that every entity owning a water supply plant or water system must obtain approval of plans for any proposed system, plant or extension from the WDNR, before proceeding with construction of such facilities. The Statutes do not set forth the standards the WDNR is to apply in determining whether to approve the plans, and do not specify the limits on the conditions that may be attached to plan approval.

The PSC has the authority to review and approve construction projects by public water utilities pursuant to Section 196.49(2) of the Wisconsin Statutes. In PSC Section 184.03(2) of the Wisconsin Administrative Code, the projects requiring PSC review include but are not limited to the construction of new sources of water supply such as intakes. The PSC has the authority to review a project to determine whether public convenience and necessity requires the project. Under

this broad review authority, the courts have said that the PSC may examine "public convenience and necessity" from the perspective of the public in general.⁴⁹ In a water utility context, this could include examining a construction proposal from the view of parties that may be affected by the proposed construction.

If the surface water withdrawal will result in a large water loss, additional requirements apply. A "water loss" means a loss of water from the basin from which it is withdrawn as a result of interbasin diversion or consumptive use or both.⁵⁰ If water is taken from the basin and then returned to the basin, it would not constitute a water loss under these statutes. Surface water withdrawals for water supply purposes typically do not result in a large water loss.

Under Section 30.18(2)(b) of the Wisconsin Statutes, a user seeking to divert water from a lake or stream which would result in a water loss averaging 2,000,000 gallons per day in any 30-day period must obtain an individual permit from the WDNR. Similarly, under Section 281.35(4) of the Wisconsin Statutes, any withdrawal of water that results in a new or increased water loss of more than 2,000,000 gallons per day is subject to WDNR approval. Section 281.35(5)(b), of the Wisconsin Statutes applies if the application would result in a new or increased water loss to the Great Lakes Basin averaging more than 5,000,000 gallons per day in any 30-day period. In that case, the WDNR is to notify each Great Lakes Governor and Premier of the application and follow the regional consultation procedure established by the Great Lakes Charter. The WDNR is to consider comments received from the Great Lakes Governors and Premiers in making its decision on the application.

If the surface water withdrawal would result in a diversion of water from the Lake Michigan Basin, federal law provides that the diversion would be prohibited unless it is first approved by the Governors of the eight Great Lakes states.⁵¹ The Water Resources Planning Act of 1965 ("WRDA"), codified at 42 U.S.C. Section 1962d-20 specifically provides that:

No water shall be diverted or exported from any portion of the Great Lakes within the United States, or from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion or export is approved by the Governor of each of the Great Lake States.

⁵¹The Great Lakes States include the States of Illinois, Indiana, Michigan, Minnesota, Ohio, Pennsylvania, New York, and Wisconsin; 42 U.S.C. § 1962d-20(c).

⁴⁹<u>Wis. Power & Light v Public Service Comm'n</u>, 148 Wis. 2d 881, 891-892, 437 N.W.2d 888 (Ct. App. 1989).

⁵⁰§ 281.35(1)(L), Wis. Stats.

This limit on diversions does not apply to any diversion of water from any of the Great Lakes which was authorized on or prior to November 17, 1986.⁵²

While WRDA prohibits diversions unless approval of all Great Lakes Governors is received, WRDA does not define what a diversion is. There is also no case law which defines the term "diversion" under WRDA. The Wisconsin Department of Natural Resources (WDNR) has taken the position in the past that water taken and used outside the Basin, but then returned to the Basin, is not a diversion subject to WRDA. Such a situation may exist where a municipality located within the Basin provides water to customers located outside the Basin, but then collects wastewater from those customers and returns it to the Basin. In a recent December 27, 2006 letter, however, the Wisconsin Attorney General disagreed with the WDNR's interpretation of the term "diversion," and opined that all withdrawals of water from a lake constitute a diversion because the withdrawal itself - even with return flow - results in the taking of water from a lake would constitute a diversion, only diversions of water "for use outside the Great Lakes basin" are covered by WRDA. Therefore, under the Attorney General's opinion any withdrawal of water from Lake Michigan which is taken for use outside of the Great Lakes Basin would constitute a diversion covered by WRDA, regardless of return flow.⁵⁴

The impact of the Attorney General's December 27, 2006 letter is unclear. Adoption of the Attorney General's interpretation of the term "diversion" by the WDNR could potentially halt the WDNR's grant of approvals for new withdrawals of Lake Michigan water with return flow. New Berlin has recently requested such approval from the WDNR, and this request could potentially be denied under the Attorney General's interpretation unless WRDA approval was received from the other Great Lakes Governors. As of the date of this Report, the WDNR has not publicly announced how it will address this issue.

Despite this uncertainty, WRDA's ban on the diversion of water out of the Great Lakes Basin has a significant limiting impact on the ability of communities in Southeastern Wisconsin to use Lake Michigan water. While communities located within the Great Lakes Basin have ready access to Lake Michigan water, communities outside of the Great Lakes Basin can use Lake Michigan water

⁵²42 U.S.C. § 1962d-20(f).

⁵³December 27, 2006 Letter from Wisconsin Attorney General Peggy A. Lautenschlager to Senator Robert Wirch, page 7.

 54 Id. at 8. The Attorney General's informal opinion also indicates that only Akron, Ohio has an approved diversion under WRDA. With regard to the Lake Michigan water diversion to Pleasant Prairie, Wisconsin, the Attorney General states: "Although three Great Lakes governors did not approve of the Town of Pleasant Prairie's proposed diversion of Lake Michigan water in 1990 that required return flows to the lake, other governors did. . . Although the legality of the diversion has been questioned, there was never a concession that the diversion was not subject to WRDA." Id. at 11.

only if: (i) its use does not constitute a "diversion", however that term is defined; (ii) its use was authorized prior to November 17, 1986; or (iii) all of the Governors of the Great Lakes States approve of the diversion.

2. Potential Future Statutes and Regulations Applicable to Withdrawal and Use of Surface Water for Water Supply

On December 13, 2005, Governors of the eight Great Lakes States signed the Great Lakes - St. Lawrence River Basin Water Resources Compact. If this Compact is ratified by the legislatures of all the eight Great Lakes States and consented to by Congress it would expand the regulations applicable to the use of Great Lakes Basin water.

Under the Compact, all "diversions" outside the Great Lakes Basin would be prohibited with three limited exceptions.⁵⁵ A "diversion" is defined to occur whenever water is transferred from the Great Lakes Basin into another watershed by any means other than incorporation into a product.⁵⁶ The three exceptions from the diversion prohibition are for straddling communities, communities within straddling counties, and intra-Basin transfers.⁵⁷

The straddling community exception would allow any incorporated municipality (or the equivalent) whose existing corporate boundaries lie partly within and partly outside the Basin, to seek approval for a diversion from the State provided the water sought is used only for public water supply purposes within the straddling community and all water withdrawn from the Basin will be returned to the source watershed less an allowance for consumptive use.⁵⁸ In order to receive State approval of a diversion of over 100,000 gallons per day, the straddling community must show (a) the need for the water cannot reasonably be avoided through the efficient use and conservation of existing water supplies; (b) the withdrawal is limited to quantities considered reasonable for the purpose; (c) the withdrawal will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the waters and water dependent natural resources of the Basin with consideration given to the potential cumulative impacts of any precedent-setting consequences associated with the proposal; and (d) environmentally sound and economically feasible water

 57 <u>Id</u>. at Section 4.9.

⁵⁸<u>Id</u>. at Section 4.9, ¶1.

⁵⁵Great Lakes-St. Lawrence River Basin Water Resources Compact, December 13, 2005, Sections 4.8 and 4.9.

⁵⁶<u>Id</u>. at Section 1.2, Definition of "Diversion".

conservation measures are to be implemented.⁵⁹ If the proposed diversion for a straddling community would result in a consumptive use of five million gallons per day or more, the proposal must also undergo the regional review process set forth in the Compact and the State must consider the finding of that regional review process when deciding whether to approve the diversion.⁶⁰

The community within a straddling county exception to the prohibition on diversions would allow a community within a straddling county to seek approval for a diversion from the eight Great Lakes Governors provided the water sought will be used only for public water supply purposes within the straddling community and all water withdrawn from the Basin will be returned to the source watershed less an allowance for consumptive use.⁶¹ A community within a straddling county is defined as any incorporated municipality or the equivalent thereof that is located totally outside the Basin but wholly within a county that lies partly within the Basin.⁶² In order to obtain approval from the eight Great Lakes Governors, the community within a straddling county must show that (a) the water sought will be used only for public water supply purposes within a community located within a straddling county that is without adequate supplies of potable water; (b) there is no reasonable water supply alternative within the Basin in which the community is located, including conservation of existing water supplies; and (c) the proposal meets the standards applicable to straddling communities.⁶³ Approval of a diversion of any size is granted only if all the eight Great Lakes Governors approve the application.⁶⁴ The Compact further urges caution in the granting of a diversion request by a community within a straddling county, and advises that a diversion should not be approved unless it can be shown that it will not endanger the integrity of the Basin ecosystem.65

The intra-basin transfer exception to the prohibition on diversions provides that the State may authorize an intra-Basin transfer unless it would result in a consumptive use of five million gallons per day or more.⁶⁶ An intra-Basin transfer is defined as the transfer of water from the watershed

⁵⁹<u>Id</u>. at Section 4.9, $\P(4)$.

- ⁶⁰<u>Id</u>. at Section 4.5, $\P\P(1)(c)$ and (5).
- ⁶¹<u>Id</u>. at Section 4.9, ¶3.
- ⁶²Id. at Section 1.2, Definition of "Community within a Straddling County".
- ⁶³<u>Id</u>. at Section 4.9, $\P(3)$.
- ⁶⁴<u>Id</u>. at Section 4.9, $\P(3)(g)$.
- ⁶⁵<u>Id</u>. at Section 4.9, $\P(3)(e)$.
- ⁶⁶<u>Id</u>. at Section 4.9, ¶(2).

of one of the Great Lakes into the watershed of another Great Lake.⁶⁷ If the intra-Basin transfer is for 100,000 gallons per day or more, but less than five million gallons per day, the transfer must meet the standards applicable to straddling communities, and in addition there must be no feasible, cost effective and environmentally sound water supply alternative within the Great Lakes watershed to which the water will be transferred.⁶⁸ If the proposal for an intra-Basin transfer would result in a new or increased consumptive use of five million gallons a day or greater over any 90-day period, the proposal must receive the approval of all the eight Great Lakes Governors.⁶⁹

The second major requirement of the Compact is that each state must manage and regulate new or increased withdrawals and consumptive uses (not just diversions) of Great Lakes water within its state.⁷⁰ This would apply to both surface water and groundwater. Each state would be required to determine a baseline level for all its existing withdrawals in order to determine when an increased withdrawal occurs.⁷¹ Each state would also set a threshold withdrawal and consumptive use level above which new or increased withdrawals and consumptive uses would trigger state review under the Compact.⁷² Under the state review required by the Compact, new or increased withdrawals and consumptive uses of surface water or groundwater would, at a minimum, be required to be implemented to: (a) return all water withdrawn to the source watershed less an allowance for consumptive use; (b) result in no significant individual or cumulative adverse impact to the waters and water dependent natural resources; (c) incorporate environmentally sound and economically feasible water conservation measures; and (e) be reasonable and efficient.⁷³ If the state was considering a proposal for a new or increased consumptive use greater than five million gallons per day, the state would also be required to provide notice and an opportunity to comment to the other states and provinces.⁷⁴

A chart which shows current regulations applicable to surface water withdrawals and the changes proposed under the Compact follows:

- ⁶⁹<u>Id</u>. at Section 4.9, $\P(2)(c)$.
- ⁷⁰<u>Id</u>. at Section 4.10.
- ⁷¹<u>Id</u>. at Section 4.12, ¶2.
- ⁷²<u>Id</u>. at Section 4.10.
- ⁷³<u>Id</u>. at Section 4.11.
- ⁷⁴<u>Id</u>. at Section 4.6.

⁶⁷Id. at Section 1.2, Definition of "Intra-Basin Transfer."

⁶⁸<u>Id</u>. at Section 4.9, $\P(2)(b)(ii)$.

TYPE OF WATER WITHDRAWAL	Under 100,000 gpd	Over 100,000 gpd & less than 5 mgd consumptive use	Over 5 mgd consumptive use
Surface water withdrawal in Basin; water stays in Basin	Current Requirements		
	DNR/PSC review for public water systems	DNR/PSC construction review for public water systems	DNR/PSC construction review for public water systems
		DNR approval of water loss over 2 mgd	Regional notification required for water loss over 5 mgd
	Proposed Compact Requirements		
	State to decide whether to regulate	State approves in accordance with Compact standards	State approves in accordance with Compact standards; Great Lakes States & Provinces given an opportunity to review and comment
	Current Requirements		
Surface water withdrawal in Basin; water leaves Basin, but return flow comes back	DNR/PSC review for public water systems	DNR/PSC construction review for public water systems	DNR/PSC construction review for public water systems
	WKDA potentially applies	DNR approval of water loss over 2 mgd	Regional notification required for water loss over 5 mgd
		WRDA potentially applies	WRDA potentially applies
	Proposed Compact Requirements		
	Prohibited, except for	Prohibited, except for	Prohibited, except for
	Straddling Community for public water supply use. State must approve according to Compact standards.	Straddling Community for public water supply use. State must approve according to Compact standards.	Straddling Community for public water supply use. State must approve according to Compact standards.
	Community within a Straddling County for public water supply use. Unanimous approval by all 8 Great Lakes Governors required.	Community within a Straddling County for public water supply use. Unanimous approval by all 8 Great Lakes Governors required.	Community within a Straddling County for public water supply use. Unanimous approval by all 8 Great Lakes Governors required.

TYPE OF WATER WITHDRAWAL	Under 100,000 gpd	Over 100,000 gpd & less than 5 mgd consumptive use	Over 5 mgd consumptive use
	Current Requirements		
Surface water withdrawal in Basin; water leaves Basin and does not come back	DNR/PSC review for public water systems WRDA prohibits without 8 Great Lakes Governors approval	DNR/PSC construction review for public water systems DNR approval of water loss over 2 mgd WRDA prohibits without 8 Great Lakes Governors approval	DNR/PSC construction review for public water systems Regional notification required for water loss over 5 mgd WRDA prohibits without 8 Great Lakes Governors approval
	Proposed Compact Requirements		
	Prohibited	Prohibited	Prohibited
	Current Requirements		
Surface water withdrawal outside the Basin	DNR/PSC review for public water systems	DNR/PSC construction review for public water systems DNR approval of water loss over 2 mgd	DNR/PSC construction review for public water systems Regional notification required for water loss over 5 mgd
	Proposed Compact Requirements		
	Compact not applicable	Compact not applicable	Compact not applicable

3. Impacts Related to Withdrawal of Surface Water

While a withdrawal of surface water must meet all applicable laws and regulations, compliance with these laws and regulations does not mean that the withdrawal will have no impact on the environment or the rights of others. Other riparian owners and the general public also have the right to use the surface water. If a surface water withdrawal harms their interests, they may have a common law nuisance cause of action against the person or entity making the surface water withdrawal.

If a party's use of surface water substantially or unduly interferes with the use of a public place or the activities of a community, a "public nuisance" claim may be brought against that party.⁷⁵ The public has rights to use surface water under the public trust doctrine.⁷⁶ As a result, the rights of riparian owners who seek to withdraw surface water are subordinate and subject to the paramount interest of the State and the public in these waters.⁷⁷ In determining whether a party's use of surface water substantially or unduly interferes with the rights of the public or a community, a court will likely look at whether the conduct involves a significant interference with public health, safety, comfort or convenience; whether the conduct is prescribed by statute, ordinance or administrative regulation; or whether the party knows has a significant effect upon the public right.⁷⁸ Although not specifically noted in the Restatement, another factor a court might consider is the impact on the environment.

If a party's use of surface water causes serious harm or substantially or unduly interferes with the private property interests of other riparian owners, a "private nuisance" claim may be brought against that party.⁷⁹ A riparian owner is limited in the amount of surface water it can withdraw by the rights of other riparian owners to co-share in the use of the surface water.⁸⁰ While each riparian owner has a right to use the surface water adjacent to the owner's property, that use cannot unreasonably interfere with the use of the surface water by other riparian owners. A party will be responsible for creating a private nuisance if gravity of the harm outweighs the utility of the party's conduct, or the harm caused by its surface water withdrawal is serious and the financial

⁷⁶Wis. Const. art.IX, § 1.

⁷⁷<u>R. W. Docks & Slips v. State</u>, 2001 WI 73, ¶21, 244 Wis. 2d 497, 628 N.W.2d 781.

⁷⁸Restatement (Second) of Torts § 821B.

⁷⁹Prah v. Maretti, 108 Wis. 2d 223, 230-231, 321 N.W.2d 182 (1982).

⁸⁰Sterlingworth Condominium Ass'n v. Department of Natural Resources, 205 Wis. 2d 710, 731, 556 N.W.2d 791 (Ct. App. 1996).

⁷⁵State v. Quality Egg Farm, Inc., 104 Wis. 2d 506, 515, 311 N.W.2d 650 (1981).

burden of compensating for this and similar harm to others would not make the continuation of the conduct infeasible.⁸¹

A nuisance action may be brought by any party injured by the nuisance.⁸² The fact that a water withdrawal may be permitted by the WDNR or PSC, does not exempt it from liability under the law of nuisance.⁸³ The remedy for a nuisance may be either an injunction to halt the nuisance, or damages to the parties who have suffered harm of a kind different from that suffered by the general public.⁸⁴ If a claim is brought against a municipal water utility for creating a nuisance, enjoining the activity, especially if it has been permitted by the WDNR and PSC, would be unlikely in most cases.⁸⁵ However, a court could order that damages be paid to the individuals harmed by the nuisance.

B. GROUNDWATER

1. Current State Statutes and Regulations

Wisconsin law requires groundwater wells, regardless of size, to be constructed in accordance with WDNR regulations.⁸⁶ If a groundwater well has the capacity to pump in excess of 100,000 gallons a day, or will in combination with all other wells on the same property have a capacity to pump more than 100,000 gallons a day, it is referred to as a high capacity well⁸⁷ and it must also be approved by the WDNR before it can be installed.⁸⁸

In reviewing a high capacity well application, the WDNR is to consider whether the proposed well will: (1) adversely affect or reduce the availability of water to a public utility; (2) be located in a groundwater protection area and cause significant environmental impact; (3) have a significant environmental impact on a spring; or (4) result in a water loss of more than 95 percent of the

- ⁸⁵Restatement (Second) of Torts §850A, comment (m).
- ⁸⁶NR Chapter 812, Wis. Admin. Code.
- ⁸⁷§ 281.34(1)(b), Wis. Stats.
- ⁸⁸§ 281.34(2), Wis. Stats.

⁸¹Restatement (Second) of Torts § 826.

⁸²§§ 30.294 and 823.01, Wis. Stats.

⁸³Jost v. Dairyland Power Cooperative, 45 Wis. 2d 164, 177, 172 N.W.2d 647 (1969).

⁸⁴Restatement (Second) of Torts §821C(1).

amount of water withdrawn.⁸⁹ Under this statute, the WDNR is not required to consider whether the proposed well will negatively impact an existing private well.

If the proposed high capacity well is located in a "groundwater protection area", the WDNR may not approve the well unless it includes in the approval any needed conditions to ensure that the well does not cause significant environmental impact within the groundwater protection area.⁹⁰ A groundwater protection area as defined under Section 281.34(1)(a) of the Wisconsin Statutes is an area within 1,200 feet of an outstanding resource water as identified under Section 281.15 of the Statutes, an exceptional resource water as identified under Section 281.15 of the Statutes, or a class I, class II, or class III trout stream.

If a proposed high capacity well is located near a "spring", the WDNR may not approve the well unless it includes in the approval any needed conditions to ensure that the well does not cause significant environmental impact to the spring.⁹¹ A spring is defined under Section 281.34(1)(f) of the Statutes as an area of concentrated groundwater discharge occurring at the surface of the land that results in a flow of at least one cubic foot per second at least 80 percent of the time. These limitations for high capacity wells located in a groundwater protection area or near a spring do not apply to a proposed high capacity well for a public utility engaged in supplying water to or for the public, if the WDNR determines that there is no other reasonable alternative location for the well.⁹²

If the proposed high capacity well would result in a water loss of more than 95 percent of the amount of water withdrawn, the WDNR may not approve the high capacity well unless it is able to include in the approval any needed conditions to ensure that the high capacity well does not cause significant environmental impact.⁹³ Water loss is defined to mean a loss of water from the basin from which it is withdrawn as a result of interbasin diversion or consumptive use or both.⁹⁴

A high capacity well approval will remain in effect unless the WDNR modifies or rescinds the approval because the high capacity well, or the use of the well, is not in conformance with standards or conditions applicable to the well approval.⁹⁵

⁹⁰§ 281.34(5)(b), Wis. Stats.

⁹¹§ 281.34(5)(d), Wis. Stats.

⁹²§ 281.34(5)(b)2. and (d)2., Wis. Stats.

⁹³§ 281.34(5)(c), Wis. Stats.

⁹⁴§ 281.34(1)(g), Wis. Stats.

⁹⁵§ 281.34(7), Wis. Stats.

⁸⁹§ 281.34(5), Wis. Stats. Consumptive use is determined in accordance with NR § 142.04, Wis. Admin. Code.

The construction of public water supply facilities is overseen by the WDNR pursuant to Section 281.41 and by the PSC by Section 196.49 of the Wisconsin Statutes as discussed earlier. These statutes provide the WDNR and PSC broad authority to review many aspects of public water supply system construction. With regard to well sites in particular, NR Section 811.13(b) of the Wisconsin Administrative Code requires the preparation of a well site investigation report which is to include information on test wells, water quality, pumping conditions, and drawdown effects on other nearby wells or the environment.⁹⁶

WDNR regulations also require that a community installing a new well must develop a wellhead protection plan in order to protect the groundwater for water supply purposes.⁹⁷ The plan must identify the recharge area for the proposed well and the existing potential contamination sources within a one-half mile radius of the proposed well. Most importantly, the plan must include a management plan for addressing the potential contamination sources through such tools as local ordinances, zoning requirements, monitoring program, and other local initiatives.

As with surface water, there are special permit requirements for the withdrawal of groundwater that will result in high water loss. Under Section 281.35(4) of the Wisconsin Statutes, any withdrawal of water that results in a new or increased water loss of more than 2,000,000 gallons per day is subject to WDNR approval. Section 281.35(5)(b), of the Wisconsin Statutes applies if the application would result in a new or increased water loss to the Great Lakes basin averaging more than 5,000,000 gallons per day in any 30-day period.

In contrast to surface water, the federal Water Resources Development Act (WRDA)⁹⁸ has never been held to apply to groundwater. While some have argued that WRDA should apply to groundwater, the United States Army Corps of Engineers has opined that WRDA pertains to surface water diversions only, and not to groundwater extraction.⁹⁹

2. Potential Future Statutes and Regulations Applicable to Withdrawal and Use of Groundwater for Water Supply

2003 Wisconsin Act 310 includes provisions which encourage future legislation and regulation to address existing groundwater withdrawals that result in problems. Section 281.34(8)(d), of the Statutes authorizes the WDNR to develop a program to mitigate the effects of groundwater wells constructed before May 7, 2004, that are located near vulnerable water bodies (i.e. groundwater protection areas). Although the WDNR has not yet adopted a mitigation program, a mitigation

⁹⁸42 U.S.C. § 1962d-20(c).

⁹⁹See August 8, 1997, letter from William Breyfogle, St. Paul District, Army Corps of Engineers, to Mr. Rodney Harrill, President of the Crandon Mining Company.

⁹⁶NR § 811.13(4)(j)L, Wis. Admin. Code.

⁹⁷NR § 811.16(5), of the Code.

program could include the abandonment of existing wells, replacement of wells, or other management strategies.¹⁰⁰ In order for the WDNR to require mitigation, however, the WDNR would have to provide full funding for the cost of the mitigation, unless the well is required to be abandoned because of public health issues.

In addition, Section 281.34(9)(a) of the Wisconsin Statutes, takes the first step towards requiring regional groundwater management in areas with regional groundwater problems. The statute authorizes the WDNR to designate 2 groundwater management areas by rule where the groundwater potentiometric surface since development has declined by 150 feet or more. One of the groundwater management areas to be designated is centered around Waukesha County, and the other is centered around Brown County. The proposed groundwater management area centered on Waukesha County is called the Southeast Wisconsin Groundwater Management Area and is proposed to include all of Kenosha County, Milwaukee County, Ozaukee County, Racine County, Waukesha County, and parts of Walworth and Washington Counties. The parts of Walworth County included in the groundwater management area include "the U.S. Public Land Survey townships of East Troy, Spring Prairie, Lyons, Bloomfield, Linn and Geneva, with the exception of the village of Williams Bay and the city of Elkhorn, and including the portion of the U.S. Public Land Survey township of Troy that includes part of the Village of East Troy."¹⁰¹ All of Washington County is included with the exception of the "U.S. Public Land Survey Township of Wayne and Kewaskum." The Statutes provide the WDNR is to assist local governmental units and regional planning commissions in the groundwater management areas by providing advice. incentives and funding for research and planning related to groundwater management.¹⁰²

Additional statutes and regulations regarding groundwater management areas are still to be developed. 2003 Wisconsin Act 310 established a Groundwater Advisory Committee charged with making recommendations for additional legislation or regulations applicable to groundwater management areas.¹⁰³ In addition, the Committee is to make recommendations on: (i) legislation and administrative rules to address other areas of the state that could have problems in the future; (ii) a coordinated strategy for addressing groundwater management issues by local governments; and (iii) the factors to be considered by the WDNR in determining whether a high capacity well causes significant environmental impact to a surface water.¹⁰⁴ The Committee was directed to complete its work related to groundwater management areas by December 31, 2006, and to complete its other work by December 31, 2007.

¹⁰⁰§ 281.34(8)(d), Wis. Stats.

¹⁰¹Proposed NR § 820.20(1)(f), Wis. Admin. Code.

¹⁰²§ 281.34(9)(b), Wis. Stats.

¹⁰³2003 Wisconsin Act 310, Section 15.

 104 <u>Id</u>.

In addition to these new statutes, if the Great Lakes Water Resources Compact is adopted in Wisconsin, it would impose new requirements on groundwater withdrawals within the Great Lakes Basin. Since the withdrawal of groundwater within the Great Lakes Basin is considered to be the same as the withdrawal of surface water from the Basin for purposes of the Compact, the requirements of the Great Lakes Water Resources Compact discussed above also apply here. A chart comparing the Compact to current law follows:

TYPE OF WATER WITHDRAWAL	Under 100,000 gpd	Over 100,000 gpd & less than 5 mgd consumptive use	Over 5 mgd consumptive use
Groundwater withdrawal in Basin; water stays in Basin	Current Requirements		
	DNR/PSC review for public water systems	DNR approval for high cap wells	DNR approval for high cap wells
		DNR/PSC construction review for public water systems	DNR/PSC construction review for public water systems
		DNR approval of water loss over 2 mgd	Regional notification required for water loss over 5 mgd
	Proposed Compact Requirements		
	State to decide whether to regulate	State approves in accordance with Compact standards	State approves in accordance with Compact standards; Great Lakes States & Provinces given an opportunity to review and comment
	Current Requirements		
Groundwater withdrawal in Basin; water leaves Basin, but return flow comes back	DNR/PSC review for public water systems	DNR approval for high cap wells	DNR approval for high cap wells
		DNR/PSC construction review for public water systems	DNR/PSC construction review for public water systems
		DNR approval of water loss over 2 mgd	Regional notification required for water loss over 5 mgd
	Proposed Compact Requirements		
	Prohibited, except for	Prohibited, except for	Prohibited, except for
	Straddling Community for public water supply uses. State approves according to Compact standards.	Straddling Community for public water supply uses. State approves according to Compact standards.	Straddling Community for public water supply uses. State approves according to Compact standards.
	Community within a Straddling County for public water supply use. Unanimous approval by all 8 Great Lakes Governors required.	Community within a Straddling County for public water supply use. Unanimous approval by all 8 Great Lakes Governors required.	Community within a Straddling County for public water supply use. Unanimous approval by all 8 Great Lakes Governors required.

TYPE OF WATER WITHDRAWAL	Under 100,000 gpd	Over 100,000 gpd & less than 5 mgd consumptive use	Over 5 mgd consumptive use
Groundwater withdrawal in Basin; water leaves Basin and does not come back	Current Requirements		
	DNR/PSC review for public water systems	DNR approval for high cap wells	DNR approval for high cap wells
		DNR/PSC construction review for public water systems	DNR/PSC construction review for public water systems
		DNR approval of water loss over 2 mgd	Regional notification required for water loss over 5 mgd
	Proposed Compact Requirements		
	Prohibited	Prohibited	Prohibited
Groundwater withdrawal outside the Basin	Current Requirements		
	DNR/PSC review for public water systems	DNR approval for high cap wells	DNR approval for high cap wells
		DNR/PSC construction review for public water systems	DNR/PSC construction review for public water systems
		DNR approval of water loss over 2 mgd	Regional notification required for water loss over 5 mgd
	Proposed Compact Requirements		
	Compact not applicable	Compact not applicable	Compact not applicable

3. Statutes and Regulations Applicable to Artificial Recharge to Maintain Groundwater Levels

The artificial recharge of groundwater is regulated by Wisconsin law. The overarching regulation is found in Chapter 160, of the Wisconsin Statutes. Chapter 160 establishes a process for setting numerical groundwater standards to protect public health and welfare. The numerical standards are set forth in NR Chapter 140 of the Wisconsin Administrative Code. Chapter 160 of the Statutes also requires that all regulatory agencies ensure that its rules will obtain compliance with applicable groundwater standards.¹⁰⁵

Consistent with Chapter 160 of the Wisconsin Statutes, the injection of any substance into the ground that would violate the provisions of Chapter 160 or that would result in endangerment of an underground drinking water source is prohibited.¹⁰⁶ For this reason, the disposal of storm water runoff directly into groundwater is prohibited.¹⁰⁷ However, construction or use of a subsurface fluid distribution system for dispersal of stormwater runoff into unsaturated material overlying the uppermost underground source of drinking water is allowed if it is done in a manner that complies with the groundwater standards, complies with the requirements of the State plumbing code, and does not result in the endangerment of an underground source of drinking water.¹⁰⁸ Similarly, the injection of wastewater directly into groundwater is prohibited,¹⁰⁹ although the discharge of liquid wastewaters from a publicly owned treatment works, or privately owned domestic wastewater treatment works, to a subsurface fluid distribution system or other land disposal system may be allowed subject to the provisions of NR Chapter 206 of the Wisconsin Administrative Code.¹¹⁰

Notwithstanding the prohibition in Chapter 160, Chapter 160 does recognize some exceptions to the requirement that all state rules comply with applicable groundwater standards. One exception is for some private sewage systems. Section 160.255 of Wisconsin Statutes provides that a private sewage system (POWTS) regulated solely by the Wisconsin Department of Commerce (DComm) is not required to comply with the groundwater standard for nitrate or the groundwater preventative action limit for chloride.¹¹¹ This exception, however, does not apply to a large POTWS which is

- ¹⁰⁶NR § 815.09, Wis. Admin. Code.
- ¹⁰⁷NR § 815.11(5), Wis. Admin. Code.
- 108 <u>Id</u>.

¹⁰⁹NR § 206.07(2)(d), Wis. Admin. Code.

¹¹⁰NR § 815.11(3), Wis. Admin. Code.

¹¹¹§ 145.01(12), Wis. Stats; Comm § 83.03(4), Wis. Admin. Code.

¹⁰⁵§ 160.19, Wis. Stats.

regulated by both DComm and the WDNR¹¹² because although DComm will not require such systems to comply with all groundwater standards, the WDNR will.¹¹³ A system will be classified as a large POWTS if its design capacity exceeds 12,000 gallons per day (gpd).¹¹⁴ The methods for determining whether this 12,000 gpd threshold has been triggered are set forth in the Wisconsin Administrative Code.¹¹⁵

Another exception is for aquifer storage and recovery systems under Section 160.257 of Wisconsin Statutes. Under Wisconsin Statutes and attendant regulations, the injection of water treated to drinking water standards into the aquifer for storage and future use for water supply purposes is allowed provided certain requirements are met.¹¹⁶ Only a municipal water system is allowed to construct an aquifer storage recovery (ASR) well or operate an ASR system. Only treated drinking water may be placed underground through an ASR system well, and water placed underground may extend out no further than 1,200 feet from that ASR well. All water that is retrieved through an ASR system must comply with drinking water standards, and must be treated to provide a disinfectant residual prior to recovery into the municipality's distribution system.

4. Potential Causes of Action Related to Withdrawal of Groundwater

A groundwater withdrawal may meet all applicable laws and regulations, but may still have an impact on the environment or the rights of others. Property owners have the right to use the groundwater under their property, and if a groundwater withdrawal by another harms their interests, they may have a common law nuisance claim against the person or entity making the groundwater withdrawal.

The Wisconsin Supreme Court adopted the reasonable use rule for groundwater set forth in the draft of Restatement (Second) of Torts Section 858A in <u>State v. Michels Pipeline</u>.¹¹⁷ The rule adopted provides as follows:

¹¹⁶§ 160.257, Wis. Stats.; NR § § 811.87 to 811.93, Wis. Admin. Code.

¹¹⁷State v. Michels Pipeline Construction, Inc., 63 Wis. 2d 278, 302-303, 217 N.W.2d 339 (1974).

¹¹²Memorandum of Understanding Between the Department of Commerce and the Department of Natural Resources Regarding the Regulation of Onsite Sewage Systems, dated December 16, 1999, page 3.

¹¹³NR § 206.07(1)(c), Wis. Admin. Code.

¹¹⁴NR § 200.03(3)(d), Wis. Admin. Code.

¹¹⁵NR § 200.03(4) & (5), and Comm § 83.22(2)(b)6.a-g, Wis. Admin. Code., Wis. Admin. Code.

Sec. 858A. Non-liability for use of ground water - exceptions.

A possessor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless

(a) The withdrawal of water causes unreasonable harm through lowering the water table or reducing artesian pressure,

(b) The ground water forms an underground stream, in which case the rules stated in sec. 850A to 857 are applicable,

(c) The withdrawal of water has a direct and substantial effect upon the water of a watercourse or lake, in which case the rules stated in secs. 850A to 857 are applicable.¹¹⁸

This version of the reasonable use rule gives more or less unrestricted freedom to the possessor of overlying land to develop and use groundwater.¹¹⁹ A landowner has the right to use groundwater beneath the land provided that use does not cause unreasonable harm. In the event a landowner's use does cause unreasonable harm, the rule does not prohibit the use, but rather requires the landowner causing the unreasonable harm to bear the costs caused by his or her use.¹²⁰ Costs would be recovered through a nuisance action against the landowner causing the unreasonable harm.

The rule does not define what is an "unreasonable harm," and it is expected that what is an unreasonable harm will vary with the circumstances.¹²¹ However, water withdrawn in very large quantities for purposes not common to the locality may be determined to be unreasonable,¹²² and as a result, public water suppliers would be expected to be responsible to those affected by a municipal well.¹²³ Damages could include costs such as the cost of deepening prior wells, installing pumps, and paying increased pumping.¹²⁴

¹¹⁸<u>Id</u>.

¹²⁴State v. Michels Pipeline Construction, Inc., 63 Wis. 2d at 303.

¹¹⁹Restatement (Second) of Torts § 858, comment (b).

¹²⁰Restatement (Second) of Torts § 858, comment (e).

¹²¹Restatement (Second) of Torts § 858, comment (f).

¹²²Restatement (Second) of Torts § 858, comment (e).

¹²³Restatement (Second) of Torts § 858, comment (f), illustration 1.

One question that has been asked is whether the public trust doctrine applies to groundwater in Wisconsin. To date, there is no reported case in which a Wisconsin court has extended the public trust doctrine to groundwater. However, this would not prevent a member of the public from bringing a nuisance action against an entity that withdraws groundwater if that party can prove that the groundwater withdrawal has substantially or unduly interfered with the use of a public place or the activities of a community.¹²⁵ If this showing can be made, a public nuisance cause of action may be brought against the party who withdrew the groundwater. The remedy for such a nuisance may be either an injunction to halt the nuisance, or damages to the parties who have suffered harm of a kind different from that suffered by the general public.¹²⁶

C. WATER SYSTEM LOGISTICS

1. Municipal Authority

A municipal public utility has the authority to construct, own and operate water utility property and facilities both inside the municipality's borders and outside the municipality's borders.¹²⁷ There is no requirement that all of a municipal public utility's facilities be located within the municipalities it is serving. A municipality may obtain needed property rights through negotiation and purchase, or condemnation. The Wisconsin Statutes specifically authorize a municipality to acquire property outside its borders by condemnation using the procedures set forth in Sections 32.05 or 32.06 of the Statutes. A utility is not required to seek approval of the local government prior to condemnation.

If a city or village owns water utility property outside but near its municipal borders, the city or village may annex that territory in accordance with Section 66.0223 of Wisconsin Statutes. The city's or village's use of that non-contiguous property, however, must be consistent with any valid town or county zoning regulation.¹²⁸ While town or county zoning controls for that property, the city or village may seek to exercise its extraterritorial zoning over property adjacent to the annexed property.¹²⁹

In situations where one municipality seeks to install water supply facilities in another municipality, the municipality in which the facilities are to be located may seek to adopt ordinances to regulate, limit or prohibit the installation of those facilities within its borders. Local ordinances, however, to prevent the installation of municipal water supply wells have been struck down by the courts in

¹²⁹§ 62.23(7a), Wis. Stats.

¹²⁵State v. Quality Egg Farm, Inc., 104 Wis. 2d 506, 515, 311 N.W.2d 650 (1981).

¹²⁶Restatement (Second) of Torts §821C(1).

¹²⁷§ 66.0803(1)(a), Wis. Stats.

¹²⁸§ 66.0223(2), Wis. Stats.

the past as being preempted by State law.¹³⁰ Although municipalities have extensive authority to regulate for the health, safety and welfare of their citizens, this authority to regulate may be withdrawn by the State, and the courts have held that the legislature has acted to withdraw a municipality's ability to regulate the installation and use of high capacity wells within it borders.

The Wisconsin Attorney General, however, has recently opined that a town has the authority to adopt a groundwater protection ordinance.¹³¹ Such an ordinance might limit the ability of a party to install a well in the town. The Attorney General opined that the preemption principles and holdings in prior case law are outdated, and that a court would no longer follow these cases.¹³² Given the conflicting analysis demonstrated by the courts and the Wisconsin Attorney General regarding a municipality's authority to adopt ordinances limiting the installation of wells within its borders, this issue seems destined for further litigation. In this litigation, the fact that the WDNR and PSC have extensive authority over public utility construction under Sections 281.41 and 196.49 of the Wisconsin Statutes may prove important to a decision on this issue.

2. Options for Regional Water Supply Cooperation

Residents of Southeastern Wisconsin receive water supply services from either public water systems or private wells. A public water system may be owned or operated by a governmental body, a corporation, individual, or association. In Wisconsin, most water systems that provide water to the public are owned and operated by municipalities.

Regional water supply cooperation can be accomplished in many different ways depending upon the objectives of the parties wishing to cooperate. A common form of regional water supply cooperation is an agreement for one municipality to provide either retail or wholesale water supply service to another. The City of Milwaukee, for example, has contracted to provide retail water service to some communities and wholesale water service to others.¹³³ Similarly, Kenosha, Oak

¹³²<u>Id</u>. at 34.

¹³³The Milwaukee Water Works provides retail service to all or part of the Cities of Greenfield, Franklin, Milwaukee, and St. Francis; and the Village of Hales Corners. It provides wholesale service to all or part of the Cities of New Berlin, Wauwatosa, and West Allis; and the Villages of Brown Deer, Greendale, Shorewood, Butler and Menomonee Falls, and WE Energies-Water Services serving the City of Mequon and the Village of Thiensville. The City of West Milwaukee has a unique arrangement with the City of Milwaukee Water Works as it receives billing services from the Milwaukee Water Works and maintains its own distribution system.

¹³⁰Fond du Lac v. Empire, 273 Wis. 333, 77 N.W.2d 699 (1956); <u>Town of Grand Rapids v.</u> Water Works & Lighting Comm'n., Case No. 90-1714 (Ct. App., Dist. IV, decided May 29, 1991).

¹³¹8/28/2006 Memo from Assistant Attorney General Thomas Dawson to Attorney General Peggy Lautenschlager, regarding State Preemption of Town of Richfield Groundwater Protection Ordinance.

Creek, and Racine all have water supply agreements with other municipalities. Although these agreements facilitate the provision of regional water supply, they do not necessarily promote regional decision-making as the supplying community retains the right to make the decisions on how water will be provided, subject to regulation by the PSC.

Another option for regional water supply is for local governments to enter into an intermunicipal agreement under Section 66.0301 of the Wisconsin Statutes. Under an intergovernmental agreement, local governments may agree to do jointly what each member could otherwise do separately. Since a local government can provide water supply, an intergovernmental agreement would allow a group of local governments to join together to provide water supply. Under such an agreement, one municipality could agree to provide wholesale or retail water supply to another, as discussed above, or an agreement could be used to provide for the creation of a totally new entity that would provide water. The North Shore Water Commission, for example, is a commission created by intergovernmental agreement between three different communities-the City of Glendale, and the Villages of Fox Point and Whitefish Bay-to provide water supply to their communities. If water service is to be provided, an intermunicipal agreement should provide a plan for the furnishing of that service. This plan may include the creation of a separate commission to oversee and administer the provision of the service. Groups of local governments in Southeastern Wisconsin could, if they choose, agree to create separate commissions to manage and administer water supply for the communities concerned. A commission created by an intergovernmental agreement may be granted significant authority to meet its responsibilities by its enabling agreement, although it would not have the ability to tax.

Another option for regional water supply is for local governments to form a joint local water authority by contract pursuant to Section 66.0823, of the Wisconsin Statutes. A joint local water authority is an entity made up of individual municipalities or Indian tribes or bands. The authority sells wholesale water to the individual municipalities, and the individual municipalities then sell water to their own customers. An authority is a political body of the State and has public powers separate from the member parties, but it does not have taxing power. A joint local water authority has broad authority. It can plan, build and operate water supply facilities, or it can contract with another entity for water supply. In order to obtain water supply, it may incur debts, liabilities or obligations including the borrowing of money and the issuance of bonds. There are two primary benefits to a joint local water authority. First, the authority has all the powers set forth in Section 66.0823 of the Wisconsin Statutes. It is not limited to the powers of its least powerful member as a commission created by an intergovernmental agreement would be. Second, a joint local water authority has stronger financing powers than a commission created by an intergovernmental agreement. In situations where these benefits are important, the creation of a joint local water authority is a good mechanism for the provision of regional water supply.

Another way to accomplish regional water supply is for several municipalities to contract with a single third-party water system operator. Under this scenario, each municipality would enter into a separate contract with the third-party operator. The third-party could be a municipal entity, in which case an intergovernmental agreement would likely be used, or it could be a private party. Contracts for water supply services may take many different forms. The owner of a water system may contract for discrete services such as laboratory testing or meter reading, or it may contract for a third-party to operate the entire water system.

Another alternative for a cooperative regional approach to water supply is the joint ownership or operation of regional facilities. One option for the joint ownership of regional facilities is for a regional entity, such as a joint local water authority, or an intergovernmental commission, to build and pay for new facilities to serve the regional entity. Another option would be for a regional entity to jointly manage existing facilities for regional use, and perhaps supplement those facilities with new facilities where needed. One way to accomplish this second option is for the ownership or management of existing facilities to be transferred to the new regional entity. If the transfer of utility assets involves the sale or lease of the entire utility, Section 66.0817 of the Wisconsin Statutes requires PSC review and approval, and the passage of a referendum by the selling community. If regional cooperation will involve transferring an operating unit or system—but not the entire utility—to a new regional entity or a third-party, PSC approval will still be required, but no referendum is required.¹³⁴

These different models provide different methods for achieving regional cooperation in providing water supply. The type of arrangement that will work best will depend upon what the parties involved are trying to accomplish. Once the parties' objectives are determined, a model—which could be configured of parts of different models—can be molded to fit that situation.

D. CONCLUSION

The communities of Southeastern Wisconsin face a variety of challenges as they seek to supply water to their residents. Challenges include an increasing cone of depression from groundwater pumping in the area, limitations on the ability to use Lake Michigan surface water for water supply, water quality issues, and the potential for conflicts between water uses. This Report discusses those existing laws, regulations, policies, and common law doctrines that must be considered in addressing these challenges. This Report also sets forth potential changes in the law regarding water supply, particularly with regard to the Great Lakes Water Resources Compact and the State's groundwater quantity law.

As the communities of Southeastern Wisconsin examine how to address these challenges, they may consider a variety of different legal structures or tools that would allow them to make water supply decisions on a regional basis. Which structure will work best will depend upon the communities' objectives, and their willingness to work on a regional, cooperative basis.

¹³⁴§ 196.80(1m)(e), Wis. Stats.