



August 2, 2012

The Honorable Tom Barrett
Mayor of Milwaukee
City Hall
200 East Wells Street
Milwaukee WI 53202

Alderman Willie L. Hines, Jr.
Common Council President
City Hall, Room 205
200 East Wells Street
Milwaukee, WI 53202

Subject: Your Letter of July 18, 2012

Dear Mayor Barrett and Alderman Hines:

Thank you for your letter regarding the City of Waukesha's application for a diversion of Great Lakes water. Your letter poses a series of questions related to the interaction of Wisconsin's water supply service area planning statute (s. 281.348, Wis. Stats.), the Great Lakes—St. Lawrence River Basin Water Resources Compact (s. 281.343, Wis. Stats.) and Wisconsin's Compact implementing statute (s. 281.346, Wis. Stats.). As you know, each of these statutory sections was adopted in 2007 Wisconsin Act 227—the legislation through which Wisconsin Legislature ratified the Great Lakes—St. Lawrence River Basin Water Resources Compact (Compact). I will respond to the questions posed in your letter, but I would first like to present some background related to water service area planning in Wisconsin as it relates to Compact development.

Water Service Area Planning and the Definition of a "Community within a Straddling County"

For more than 30 years, Wisconsin has used a system of local service area planning and boundary delineation to identify how public wastewater services will be developed and managed. With the Southeastern Wisconsin Regional Planning Commission (SEWRPC) acting as the local agency for the state's southeastern counties, this system has been effectively implemented resulting in regional wastewater system cost savings and the preservation of sensitive environmental features.

Given this history, Wisconsin urged the other Great Lakes States and Provinces to agree to incorporate this concept of service area planning into the language of the Compact and the Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement (Agreement). However, the use of local planning to direct regulatory decision-making was not a common element in all ten jurisdictional water management programs, and the Compact and Agreement as ratified by the jurisdictions do not specifically reference service area planning. Recognizing the need to protect Wisconsin's service area planning process and the regional entities that exist in our state, Wisconsin stressed that the Compact's definition of "community within a straddling county" must—in addition to including cities and towns—include the phrase "or equivalent thereof" to ensure that Wisconsin's system of regional service and regional management entities was protected and could be continued under the

Compact implementation.¹ Thus, for purposes of the City of Waukesha's diversion application, the Department interprets the delineated water supply service area as a "community in a straddling county" under the Compact.²

Throughout the debate over the Compact in the Wisconsin Legislature there was consensus on the need to promote sound long-range municipal planning and to maintain compatibility with existing regulatory provisions for public water resources management. As a result, Wisconsin's Compact implementing statutes created the authority to develop and implement a water supply service area planning program to mirror the sewer service area planning program. This approach has consistently demonstrated that sound regional planning helps produce cost-effective public systems, service delivery, and environmental protection. This history provides the context for my answers to your questions related to the water supply service area and water supply alternatives.

After alleging that the City of Waukesha's diversion application "speaks only of the city's lack of an adequate potable water supply" and "does not address the conditions of the water supply in the other municipalities" within the proposed water supply service area, you ask whether this would "inhibit Waukesha's diversion request from obtaining the unanimous approval of the Great Lakes states' governors." I do not agree with your characterization of the City of Waukesha's application as it pertains to evaluating whether the City has an adequate supply of potable water and its analysis of reasonable water supply alternatives. Wisconsin's Compact implementing statutes make clear that for purposes of evaluating an application for a diversion to a "community within a straddling county" against the Compact's diversion criteria, the area in question is to be the approved water supply service area, and any approvable diversion proposal must be consistent with an approved water supply service area plan.³ The City's application addresses the Compact criteria pertaining to the adequacy of potable water supplies and reasonable water supply alternatives for the entire water supply service area as delineated by SEWRPC. In addition, because the Department considers the delineated water supply service area to be the "community within a straddling county", the Department will analyze these criteria for the entire service area, and not based on jurisdictional boundaries. In fact, the Department is generally prohibited from limiting a water supply service area based on jurisdictional boundaries.⁴

Given this clear statutory link between the diversion application and the water supply service area, the Department will insist that the entity with which the City contracts for water must be willing to supply water to the entire service area. Specifically, the Department cannot allow a diversion application to proceed with a water supplier that categorically refuses to serve jurisdictions within the service area.

Regional systems for water delivery and management are commonly used throughout the Great Lakes basin. The Department has received no indication from other Great Lakes States or Provinces that a proposed diversion would be jeopardized by including a cost-effective proposal for a regional system for public water supply.

Water Supply Service Area Planning Administrative Rules and Plan Approval

Your letter also points out that a final version of a proposed administrative rule related to water supply service area planning has yet to be approved and you attempt to connect the lack of a final administrative rule with the fact that the Department has not approved the water supply service area as delineated by SEWRPC. Additionally,

¹ Wis. Stat. s. 281.343 (1e) (d) defines "Community within a straddling county" as "any incorporated city, town, or the equivalent thereof, that is located outside the basin but wholly within a county that lies partly within the basin and that is not a straddling community" (emphasis added.)

² The definition of "Community within a straddling county" in s. 281.346 (1) (d) does not include the phrase "or equivalent thereof," but it was not necessary because s. 281.346 specifically states that a diversion proposal must be consistent with an approved water supply service area plan under s. 281.348 that covers the public water supply system.

³ See Wis. Stat. s. 281.346 (4) (bg) 2 and Wis. Stat. s. 281.346 (4) (e) 1. em.

⁴ See Wis. Stat. s. 281.348 (3) (e).

you point out that the governing body of the Town of Waukesha has yet to approve the water supply service area plan, as is required by statute.

The Department held hearings on the proposed water supply service area planning rule (ch. NR 854) and received many thoughtful comments. The Department continues to consider modifications to the proposed NR 854 before offering a version of the rule for final adoption. However, the fact that a final version of NR 854 has yet to be adopted has no connection to the fact that the Department has not yet approved the City of Waukesha's proposed water supply service area. The Department can implement the provisions of the applicable statute without a final version of the rule.

The Department continues to review the City's proposed water supply service area plan as part of our technical review of the City's diversion application. Among many other requirements, the City must demonstrate that the governing body of the Town of Waukesha has approved the water supply service area plan before the Department would be in a position to approve the plan. The Department allowed the City to submit its proposed water supply service area plan while the City continued to discuss the plan with the Town of Waukesha. However, the Department has made it clear to the City that the Town's governing body must act on the plan before the Department would approve a final water supply service area and plan.

The requirement that the City of Waukesha prepare a water supply service area plan was triggered by the City's diversion application. The Department has not yet approved the City's proposed water supply service area plan, and the City is currently operating under its existing water supply area.

You have also asked whether it is possible to amend a water supply service area plan, and if so, by whom and by what process such amendment would take place. A water supply service area plan may be amended. The Department's interpretation is that the amendment process would be similar to the process for amending areawide water quality management plans. Amendment requests would need to be approved by the Department and could originate from regional planning commissions, designated areawide water quality planning agencies, or from the governing bodies of cities, villages or towns whose public water supply is addressed by the plan. The Department would review the request by following the criteria in s. 281.348, Stats. The Department's analysis would include a check for consistency with an approved areawide water quality management plan—specifically including the designated sewer service area.

Department Coordination with the PSC and Expansion Within the Service Area

Your letter notes the statutory authorities of a municipality operating a water utility and of the Public Service Commission of Wisconsin (PSC) under Chapters 66 and 196 of the Wisconsin Statutes respectively. The Department acknowledges that, pursuant to section 66.0813 (3), Wis. Stats., Milwaukee may enter into an agreement with another municipality to provide water service to all or part of that municipality. The Department also recognizes the PSC's jurisdiction under Chapter 196, Wis. Stats., to regulate public utilities, and specifically the PSC's jurisdiction over utility service extensions. The Department is coordinating its review of the Waukesha diversion application with the PSC and will continue to do so.

Also, the Department acknowledges that, once a water supply service area is delineated under Ch. 281.348, Wis. Stats., whether public water service is extended within the delineated service area, and the pace at which public water service is extended within the service area, is primarily up to the jurisdictions within the service area and the PSC. However, the Department is charged with administering the statutory water supply service area planning process. Further, as explained above, the water supply service area planning process is incorporated into the straddling county diversion application process. Consequently, to give due meaning to the water supply service area planning process and its role in diversion application processing under Wisconsin's Compact implementing statute, the Department's interpretation of the relevant statutes is that the Department cannot forward for consideration by the other Great Lakes States and Provinces a diversion application with a water supplier that categorically refuses to serve jurisdictions within the service area. This does not mean, however, that the

Department will insist that public water service *must* be extended to all parts of the larger water supply service area. Although being included within the larger water supply service area would make those parts of the towns eligible for Great Lakes water under the diversion proposal, it does not mandate that they receive Great Lakes water. Whether the portions of the towns included in the designated water supply service area may someday receive water from the Waukesha water utility is largely up to the towns, the City of Waukesha, and the PSC.

Water Conservation Plan

You have also asked whether conservation plans are required for each of the municipalities within the water supply service area. The City's water conservation and efficiency plan—which the Department is currently reviewing—must comply with the provisions of ch. NR 852 of the Wisconsin Administrative Code. The City of Waukesha could enter into an agreement with each municipality within the water supply service area providing that each municipality would be required to implement the conservation and efficiency measures specified in the City's water conservation and efficiency plan as a condition of receiving Great Lakes water. In short, all areas within the water supply service area being served with Great Lakes water would be required to implement the water conservation and efficiency measures in the approved plan. It is not necessary for each municipality to complete its own water conservation plan.

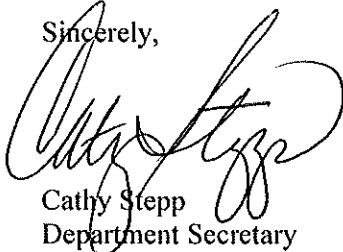
Wastewater Facilities Plan

Finally you have asked “[w]hy wasn't a facilities plan for the service area build-out and return flow options included in the diversion request?”, and “Will that raise a red flag with the other states?” In fact Waukesha did submit a facility amendment for additional phosphorus removal and for increased capacity for ultraviolet disinfection facilities. In addition, a screening level analysis was done to determine if other choices for wastewater treatment merited further investigation. These other options were subsequently ruled out on the basis of cost and implementation hurdles. A full facility plan was not needed as Waukesha is not seeking to add capacity to its existing treatment facilities. The current design flow is not changing as a result of the diversion request. The Department has received no indication from other Great Lakes States or Provinces that would lead us to believe that the wastewater facility planning related to the City's diversion request is problematic.

I appreciate your interest in working to resolve the water supply issues facing Waukesha County residents.

If you have additional questions or concerns, please contact Eric Ebersberger, DNR Water Use Section Chief at (608) 266-1722.

Sincerely,



Cathy Stepp
Department Secretary

Cc: John Schulze, PSC Administrator
Dan Duchniak, Waukesha Water Utility
Angie Van Scyoc, Town of Waukesha
Ken Johnson, Water Division Administrator
Eric Ebersberger, Water Use Section Chief