



**Before the
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of Department of Natural
Resources, Environmental Management Division,
Findings of Fact, Conclusions of Law, and
Diversion Approval

Case No. DNR-18-0006

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 26, 2018, the City of Racine, through the Racine Water Utility, (Applicant) applied to the Department of Natural Resources (Department) under Wis. Stat. § 281.346(4)(b) requesting approval to begin a diversion of 7 million gallons of water a day from Lake Michigan. On April 25, 2018, the Department issued a Diversion Approval (Approval) of the application to begin a diversion of Lake Michigan water to an area outside the Great Lakes Basin, pursuant to Wis. Stat. §§ 281.343(4n)(a) and 281.346(4)(c). On May 25, 2018, the League of Women Voters of Wisconsin, Milwaukee Riverkeeper, Minnesota Center for Environmental Advocacy, and River Alliance of Wisconsin submitted a petition for a contested case hearing to review the Approval, and on June 13, 2018, the Department granted the request for a hearing. On July 13, 2018, the Department requested that the Division of Hearings and Appeals (Division) conduct a contested case hearing based on Petitioners' request for a hearing under Wis. Admin. Code § NR 2.055.

Pursuant to due notice required in Wis. Admin. Code §§ NR 2.06, NR 2.08(5) and NR 2.12, a prehearing conference was held on September 12, 2018, and a status conference was held by telephone on November 8, 2018, at 4822 Madison Yards Way, Madison, Wisconsin, Brian Hayes, Administrative Law Judge, presided. Parties were recognized and the issue to be decided was determined. The parties agreed that this action should proceed through summary judgment briefing according to Wis. Admin. Code § HA 1.10(2); a scheduling order was issued that noticed the briefing schedule, the introduction of exhibits, and a list of stipulated findings of facts. Additional facts from the exhibits were highlighted through the briefing process.

In accordance with Wis. Stat. § 227.44(4)(b), Wis. Stat. § 227.46(1), Wis. Admin. Code § NR 2.08(5), and Wis. Admin. Code § NR 2.12, the PARTIES to this proceeding are:

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Issue to be Decided

Whether the Department's Diversion Approval violates Wis. Stat. §§ 281.343(4n)(a) and 281.346(4)(c) and Sections 4.3.3, 4.8, and 4.9.1 of the Compact with respect to the Department's interpretation of "public water supply purposes."

Stipulated Findings of Fact

1. The Racine Water Utility is a department of the City of Racine (Applicant).
2. The Racine Water Utility operates a system of collection, treatment, storage and distribution facilities that withdraws water from Lake Michigan, stores the water in water towers, treats the water at a treatment plant located on the shores of Lake Michigan, and distributes the treated water through pipes and booster stations to customers.
3. The Racine Water Utility provides Lake Michigan water directly to residential, industrial, commercial, and other institutional customers in the City of Racine, the Village of Elmwood Park, the Village of North Bay, the Village of Sturtevant, and portions of the Villages of Mount Pleasant (Village) and Somers on a retail basis. The Racine Water Utility also provides Lake Michigan water to the Village of Caledonia on a wholesale basis.
4. All of the customers that are currently served by the Racine Water Utility are located within the Great Lakes Basin. To date, the Racine Water Utility has not transferred any amount of Great Lakes water west of the subcontinental divide.
5. The Village lies partly within and partly outside the Great Lakes Basin and is wholly within a county (Racine County) that lies partly within the Great Lakes Basin.
6. As of February 8, 2018, the Racine Water Utility served water to 6,321 customer accounts in the portion of the Village that is inside the Great Lakes Basin, including 5,579 residential single-family customer accounts, 349 residential multi-family customer accounts, 353 commercial customer accounts, 33 industrial customer accounts and 7 public authority customer accounts.
7. The Racine Water Utility does not currently serve water to any customers in the portion of the Village that is outside of the Great Lakes Basin. The portion of the Village that is outside the Great Lakes Basin is currently served by private wells.
8. Prior to receiving the Applicant's application for a diversion to the Village, the Wisconsin Department of Natural Resources (Department) provided the Applicant with Joint Exs. 3 and 4, documents created by the Department regarding straddling community diversion application requirements.

9. On January 26, 2018, the Applicant applied to the Department for approval to begin a diversion of Great Lakes water to the portion of the Village that lies outside the Great Lakes Basin (diversion area). The application is Joint Ex. 5.
10. The diversion area is part of an Electronics and Information Technology Manufacturing (EITM) Zone that, in September 2017, the State Legislature authorized the state to create.
11. In the application, the Applicant requested approval to divert up to 7,000,000 gallons of water per day (7 mgd) to meet forecasted demands for water resulting from expected development in the Village along the Interstate-94 (I-94) corridor.
12. The projected customers of the Racine Water Utility within the diversion area are industrial and commercial customers. The Applicant's application contains a table projecting the water demand forecast for the diversion area at full build out in 2050. The table projects a volume of 5.8 mgd for use by the Foxconn Technology Group (Foxconn) in the diversion area. The table projects 1.2 mgd for use by other industrial and commercial customers in the diversion area.
13. The Applicant's application does not identify any residential customers in the diversion area that will be served by the Racine Water Utility.
14. On January 31, 2018, the Department issued a public notice describing the application from the Applicant. The notice provided information on the public comment period and the hearing that the Department planned to hold on the proposed diversion. The notice is Joint Ex. 6.
15. The Department prepared a document entitled "DNR's Racine Diversion Application Fact Sheet," dated February 2018, which was posted on the Department's Racine Diversion web page, <https://dnr.wi.gov/topic/WaterUse/Racine/>. The fact sheet is Joint Ex. 7.
16. The Department held a public hearing on March 7, 2018, at the SC Johnson iMET Center, 2320 Renaissance Boulevard, Sturtevant, Wisconsin, to give interested persons an opportunity to comment on the diversion application. Prior to the public comment portion of the hearing, the Department held an informational meeting and question and answer session.
17. The Department received approximately 780 written comments (email/mailed postcards, letters, written comments at hearing) from individuals and groups during the public comment period. (The comments are available on the Racine Diversion web page <https://dnr.wi.gov/topic/WaterUse/Racine/>.)
18. Oral comments were received at the public hearing on March 7, 2018, in Sturtevant. Of the 243 people who registered at the hearings, 54 provided oral testimony. (A tape of the oral comments is available on the Racine Diversion web page <https://dnr.wi.gov/topic/WaterUse/documents/Racine/RacineDivPublicHearing.WMA.>)
19. The Applicant provided the Department with supplemental information during the Department's review process. Information on the Applicant's reported water utility volumes

from 1995 through 2016, dated January 30, 2018, is Joint Ex. 8. Information regarding the Racine Water Utility customer accounts by class in the Village, dated February 15, 2018, is Joint Ex. 9. Reports on the Applicant's water withdrawals in 2017 are in Joint Ex. 10. Information on the Applicant's consumptive use forecast for diversion area customers other than Foxconn is Joint Ex. 11.

20. Foxconn provided supplemental information to the Department in response to questions regarding Foxconn's conservation and efficiency plans and consumptive use projections. Foxconn's response to the Department's questions, dated April 24, 2018, is Joint Ex. 12.

21. As part of the Department's evaluation of the diversion application and response to comments, the Department reviewed data from the Public Service Commission for 2016, calculated the percentage of metered connections by customer class for Wisconsin municipal water suppliers that withdraw water from Lake Michigan, and created Table 1 in Joint Ex. 24.

22. As part of the Department's evaluation of the diversion application, the Department evaluated the Applicant's approved and actual water withdrawal amounts. The Applicant has a water use permit dated December 8, 2011, with an approved water withdrawal amount of 60,010,000 gallons per day. The Racine Water Utility withdrew an average of 17,144,688 gallons per day in 2017.

23. During the comment period, Petitioners submitted written comments. The comments received from Petitioners during the comment period are Joint Exs. 13, 14, 15, 16, 17, and 18.

24. The Department prepared a summary of comments during the public comment period and the Department's response to comments. The Department's summary of comments and response to comments is Joint Ex. 24.

25. The Department's Findings of Fact, Conclusions of Law, and Diversion Approval (Approval) was issued April 25, 2018. The Approval is Joint Ex. 1.

26. The Department informed the Compact Council and the Regional Body of the Applicant's application on January 29, 2018.

27. The written comments provided to the Department from the states of New York, Michigan, and Pennsylvania are Joint Exs. 19, 20, 21, and 22.

28. The Department responded to comments in a letter to the New York Department of Environmental Conservation, dated April 25, 2018. The letter is Joint Ex. 23.

29. The Department responded to comments and questions in a letter to the Regional Body dated May 16, 2018. The letter is Joint Ex. 2.

Applicable Law and Standard of Review

The Department has approved a water diversion from the Applicant to provide water from Lake Michigan of the Great Lakes Basin (Basin) to the Village. This permission is challenged by Petitioners, asserting that Wis. Stat. §§ 281.343(4n)(a) and 281.346(4)(c) and Sections 4.3.3, 4.8, and 4.9.1 of the Great Lakes – St. Lawrence River Basin Water Resources Compact (Compact) prohibit the approval. Specifically, Petitioners argue that the Department incorrectly interpreted the meaning of “public water supply purposes” in Wisconsin Statutes and the Compact and that the application should be denied.

As is evident by the nature of the issue, this case is one of statutory interpretation¹. The standard of review was determined when the parties agreed that the matter was to be decided by summary judgment under Wis. Admin. Code § HA 1.01(2). Section HA 1.10(2) provides that the summary judgment procedure as provided in Wis. Stats. § 802.08 shall be available to the parties upon approval by the division or the administrative law judge. Wisconsin Stats. § 802.08(2) provides, in relevant part, the following:

The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Further, Wis. Stat. § 802.08(6) provides that if it appears “that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor.”

Generally, when both parties file cross-motions for summary judgment, it is the equivalent of a stipulation of facts permitting the case to be decided solely on the legal issues presented. *See BMO Harris Bank, N.A. v. European Motor Works*, 2016 WI App 91, ¶15, 372 Wis. 2d 656, 889 N.W.2d 165.

As to the applicable law, the focus here is on the meaning of the Wisconsin Statutes that govern the approval of the application, not the Compact that led to the promulgation of the statutes. The Wisconsin Legislature codified the Compact in Wis. Stat. § 281.343 and then implemented it in Wis. Stat. § 281.346. The utility of the Compact and its language here is to inform what lawmakers intended when they codified “public water supply purposes” in Wisconsin Statutes. There are three reasons to focus on the statute and not the Compact.

First, the Department used its statutory authority to approve the application in Wis. Stat. § 281.346(4)(b) and granted a hearing to Petitioners with its authority found in Wis. Stat. § 281.93(2). These are the triggers that the Department used to approve the application and refer the matter to the Division for a contested case hearing. The application must be analyzed on

¹ As the Wisconsin Supreme Court recently reminded, “statutory interpretation is a question of law which courts decide *de novo*,” citing *Harnischfeger v. LIRC*, 196 Wis. 2d 650, 659, 539 N.W.2d 98 (1995) in *Tetra Tec EC, Inc., and Lower Fox River Remediation LLC v. Wisconsin Department of Revenue*, 2018 WI 75, ¶ 12, 382 Wis. 2d 496, 914 N.W.2d 21.

those terms. The Compact's provisions are useful to understand what led to the promulgation of the statutes, but the Compact itself was not used to grant the application or the hearing. Petitioners primarily use the Compact language to add force to its arguments as the language is largely identical.

Secondly, this is not a case interpreting the Compact. It is a challenge to the interpretation of the statutes that were drafted to implement the Compact and not a challenge to the Compact as a contract. The Petitioners are third parties - they are not signatories to the Compact. They are authorized to request a hearing under Wis. Stat. § 281.93(2) which are the provisions allowing "other persons" to seek review. There is a process for signatories to challenge an application for a diversion and there are statutory considerations that were followed. Wis. Stat. § 281.343(4h)(a)(6). There is a process to address questions of Compact signatories and that was followed in this matter. The Department followed the process for noticing the other states and provinces of the request for diversion. None of the Petitioners are signatories to the Compact.

Thirdly, there is a constitutional consideration when interpreting a statute. Statutes enacted by the legislature carry a heavy presumption of constitutionality. *LeClair v. Nat. Res. Bd.*, 168 Wis. 2d 227, 236, 483 N.W.2d 278, 282 (Wis. Ct. App. 1992). The statutes enacted to codify the Compact declare that they do not change the application of the Public Trust Doctrine found in Wisconsin's Constitution. *See* Wis. Stat. § 281.343(1). ("Nothing in this section may be interpreted to change the application of the public trust doctrine.") Wisconsin's Public Trust Doctrine, found in Article IX, Section 1 of Wisconsin's Constitution, declares that the State maintains concurrent jurisdiction over its waters, from the St. Lawrence to the Mississippi. Interpreting statutes that implement the Compact cannot conflict with the State's Public Trust Doctrine so as not to trigger concerns over federal preemption. There is nothing here to indicate that Wisconsin's legislative muscle was pulled from its constitutional bone but limiting or redefining the word "public" in the application of the Compact on Wisconsin's jurisdiction over its water could provoke a constitutional analysis.²

Discussion

The Applicant has requested a diversion of water from Lake Michigan. Specifically, it requests approval of an increased 7 million gallon per day diversion to meet the Village's expected need to supply a legislatively created Electronics and Information Technology Manufacturing (EITM) Zone along the I-94 corridor in Southeast Wisconsin. *See* Wis. Stat. § 238.396(1m). The EITM Zone is wholly within the Village and wholly outside the Basin. It will include industrial and commercial users; there will be no residential customers in the EITM Zone. (Stipulated Facts 11, 12 and 13.)

The intent of the Compact is to prohibit diversions unless the application falls into specific exceptions and conditions. The prohibition is found in Wis. Stat. § 281.346(4)(a). All

² That analysis is beyond the scope and authority of this administrative review granted under Wis. Admin. Code § NR 2.055.

diversions require an application to the Department. Wis. Stat. § 281.346(4)(b)(1). Both the authorizing and implementing statutes provide additional regulatory requirements.

The first regulatory requirement that the statute places on a diversion is the nature of the Applicant. Only public water utilities are qualified applicants. By statute, an applicant must operate a public water supply system that would receive water from the diversion. Wis. Stat. § 281.346(4)(b)(2). This renders the statutory terms by which a diversion may be approved to that of a public water utility statute. Any private water system does not qualify and is precluded from applying for a diversion.

The Applicant is a public water system or utility as defined under Wis. Stat. § 196.01(5), Wis. Admin Code § NR 809.04(67) and Wis. Admin Code § NR 811.02(56). It operates a system of collection, treatment, storage and distribution facilities that stores the water in water towers, treats the water at a treatment plant and distributes the treated water through pipes and booster stations to customers. (Stipulated Fact 2.) As a public water system, the Applicant must submit to a regulatory overlay to impose standards and practices to ensure public health and safe drinking water. The Compact and statute prohibit a private diversion from the Basin to the EITM Zone; every diversion must be operated by the public water utility and included in the utility's public water system. In this way, any diversion is through the regulated system to better monitor and improve water quality for the systems' customers.

Secondly, the diversion must be for a straddling community as political jurisdictions within the Basin are not coterminous. A straddling community is defined as "any incorporated city, town or the equivalent thereof, wholly within any county that lies partly or completely within the basin, whose corporate boundary existing as of the effective date of this compact is partly within the basin." Wis. Stat. § 281.343(1e)(t). The Village is both a straddling community and an incorporated village wholly within Racine County. (Stipulated Fact 5.) Moreover, the Village has been a straddling community since the inception of the Compact and is the only jurisdiction that will consume the diverted water.

The requested diversion seeks to provide a source of water for the area of the Village that is not in the Basin; 92 percent of the Village is in the Basin and around 8 percent is outside the Basin. The Applicant currently services over 6,321 customer accounts within the Village of which 5,928 are residential – around 93 percent of the customer base. (Stipulated Fact 6.) The Applicant services 33,969 customer accounts in total and 30,375 of these customers are residential, which is approximately 89 percent of the customer base. (Ex. 200, at 036) In other words, the Village is a bit more residential than the Applicant's current customer base that includes the customers in the Village that are in the Basin.

The area to be served is outside the Basin in the southwest portion of Racine County and is currently serviced by private wells. (Stipulated Fact 7.) The diversion will only serve the area of the Village within Racine County and outside the Basin.

The Compact authorizes the diversion exception for straddling communities, and that requirement is codified in the implementing statute. Specifically, Wis. Stat. § 281.346(4)(c) mandates the following:

The department may approve a proposal . . . to begin a diversion . . . to an area within a straddling community but outside the Great Lakes basin or outside the source watershed if the water diverted will be used solely for public water supply purposes in the straddling community.

The authorizing statute, Wis. Stat. § 281.343(4n)(a), amplifies further:

A proposal to transfer water to an area within a straddling community but outside the basin or outside the source Great Lake watershed shall be excepted from the prohibition against diversions and be managed and regulated by the originating party provided that regardless of the volume of water transferred, all of the water so transferred shall be used solely for public water supply purposes within the straddling community.

Based on the language in both the authorizing and implementing statutes, diverted water can be transferred to an area in a straddling community outside the Basin if the water is used within the entire straddling community. These statutes require the use of the water within the straddling community; it cannot be exported out.

In addition, a diversion request must be folded under the amount that the Applicant is permitted to withdraw from the Basin as a public water system. On December 8, 2011, the Applicant received its Basin withdrawal permit and baseline withdrawal amount under Wis. Stat. §§ 281.346(5)(c), (4)(e), and (4)(g). The Applicant received a withdrawal permit of more than 60 million gallons of water per day. In 2017, the Applicant reported withdrawing a little over 17 million gallons a day and is seeking a 7 million gallons a day diversion for the portion of the Village outside the Basin. (Stipulated Fact 22.) The Applicant has sufficient room under its permitted withdrawal amount; the Applicant's excess capacity is due in part to decreased water needs for industrial customers. The Applicant's industrial water use decreased by 47 percent between 1995 and 2016 due to the decline in manufacturing. (Exhibit 5, pg. 8, ¶1.)

Finally, the public water utility must also certify that an amount of water equal to the amount diverted for the straddling community will be returned to the Basin, minus an allowance for consumptive use. Additional qualifications on returning water to the Basin from outside the Basin are also implemented to reduce the introduction of invasive species into the Basin. Wis. Stat. §§ 281.346(4)(c)(1) and (2). By requiring that water from the Basin be returned to the Basin, a limit is placed on the effect to the Basin of the diversion.

At this point, the Department approved the application from the Racine Water Utility as it was a qualified applicant, seeking a diversion under its withdrawal limit for a straddling community it wished to service.

Petitioners objected and sought the contested case hearing wanting the Department to deny the diversion request by the Applicant prompting this appeal. Petitioners believe the application for a diversion to provide water to an industrial customer violates the statutory intent of the Compact that allows diversions to be "used solely for public water supply purposes in the

straddling community.” Wis. Stat. § 281.346(4)(c). Wis. Stat. § 281.343(4n)(a) has similar wording.

The Petitioners assert that because the Applicant seeks to service primarily an economic development project with industrial customers outside the Basin but in a straddling community with its requested diversion, it violates the directive in the statutory exemption for straddling communities requiring the diversion be for “public water supply purposes.”

Wisconsin Stat. § 281.343(1)(pm) defines “public water supply purposes” as “water distributed to the public through a physically connected system of treatment, storage, and distribution facilities serving a group of largely residential customers that may also serve industrial, commercial, and other institutional operators.”

After reviewing both the actual language and context of the statute, the provenance of Petitioners’ interpretation is unmarked.³ As to the actual language in Wis. Stat. § 281.346(4)(c), the diverted water is to be used **within the straddling community**. The statute does not direct that the diverted water go specifically to the area outside the Basin. The statute envisions the diverted water going through a “system . . . of largely residential customers” to the whole straddling community. The definition does not conceive that the water transferred outside the Basin, or on the nature of the use of the water, is material to the application. The focus is on the water transferred to within the whole straddling community through a system serving multiple types of customers.

The Applicant operates a physically connected system of treatment, storage, and distribution facilities. (Stipulated Fact 2.) The Village, a straddling community, is a portion of the system operated by the Applicant. The portion of the Village not in the Basin seeks to benefit from the Applicant’s system. As noted, the Village is currently 93 percent residential based on its customer base. The Applicant’s customer base is 89 percent residential. In both instances, the customer base of the public water utility prior to the proposed diversion and after will be largely residential. It will also serve industrial, commercial and institutional customers in the system. The proposed diversion does not change the largely residential character of either Applicant’s service area or, more prescriptively, the Village’s service area.

Petitioners repeatedly cite the definition of public water supply purposes as serving largely residential customers. (Pet. Brief, pgs. 20 and 21 and Pet. Reply Brief, pg.7.) The actual words of the definition note that the intent is to serve a group of largely residential customers **that may also serve industrial, commercial, and other institutional operators**. By truncating and failing to address the last ten words in the definition, Petitioners fail to see that the statute’s intent is to allow a system serving many kinds of customers as a public water supply purpose. As a matter of word choice in the statute, the words “largely residential” do not transform to “solely residential” by truncating the clause that allows for the Applicant to serve its industrial, commercial and institutional customers.

³ See *State ex. rel. Kalal v. Circuit Court*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110, where the Wisconsin Supreme Court explains the use of extrinsic (context) or intrinsic (word usage) factors to interpret a statute.

Tellingly, the use of the term “customers” as a metric used in the definition is important in a couple of ways. First, the definition places primacy on customers and not the volume of water. The statutory language notes that “regardless of the volume of water transferred, all of the water so transferred shall be used solely for public water supply purposes.” Wis. Stat. § 281.343(4n)(a). Based on this, the volume of water diverted is immaterial to the approval of a diversion. The important criterion for a diversion is that it be done for public supply purposes through a physically connected system serving largely residential customers. The volume of water diverted is accounted for more holistically in the baseline withdrawal amount under which the Applicant must adhere.

Further, by calling the users “customers,” the public water purpose definition signals that service is provided for a fee and the product is a system of regulated water to help provide for safe drinking water and the public health. The Applicant provides service to the Village on a “retail basis.” (Stipulated Fact 3.) Petitioners propose several dictionary meanings of “public” (Pet. Brief pgs. 20 and 21) but ignore the amplification that is in the definition. Based on the definition, the public is a group of different kinds of customers that pay for and receive a benefit of the regulated, physically connected system.

The Petitioners’ interpretation also requires a leap from the context of the statutes that regulate the water utility. The context of the statutes, knitted together, is to regulate public water utilities to promote the system of water delivery and waste removal to straddling communities.

As noted above in Wis. Stat. § 196.01(5), Wis. Admin Code § NR 809.04(67) and Wis. Admin Code § NR 811.02(56), the Applicant is a public water system; it services residential, industrial, commercial and other institutional customers in the City of Racine and other communities within the Basin in Racine County. It is a public water utility in both definition and character as it services multiple types of customers.

The Petitioners assert that the public utility has requested to do something “un-public.” It reads a private purpose into the public water utility’s request to seek additional customers in the straddling community that it serves and extend its system accordingly. The utility is created to service various types of customers, including industrial and commercial customers. The regulatory structure is to provide an exception for a diversion for public water utilities seeking to serve their communities. The public water utility’s behavior here is consistent with its character.

The value of the public water utility is in who it serves (any residential, commercial or industrial customers), and in what it provides (a connected system of clean water delivery and wastewater processing to further community interests, including economic development). The universality of its service and the benefits it offers are furthered by a reading that allows the public utility to serve the whole village. It benefits the public. This statutory construction protects the Basin by allowing a diversion (and return) of water that is processed through a regulated utility. Under the regulatory limit that requires a return of any diverted water to use in the straddling community, the diverted water cannot be “exported” further outside the Basin; this limit promotes the ability of the public water utility to further its public character, its universality, and provide a water system to the whole straddling community.

To read an “un-public” purpose into the Applicant’s intent is to read an absurdity into the law. The Applicant services many kinds of customers, most of whom are private and many of whom are nonresidential. If the Compact and its enabling statutes had intended to have a public water utility serve its residential, commercial, industrial and institutional customers within the Basin and only residential customers with diverted water outside the Basin, it would have said something very different. It would have directed the diverted water go to the area outside the Basin and restrict its customers to solely residential users. This would signal that the Applicant would have to change its customer service character. There is nothing in the words or context of the statute that would indicate that.

To deny the application would have deleterious consequences. Under the Petitioners’ reading of the statute, the Applicant has three options. First, it can do nothing and have residents of the Village outside the Basin remain off the Applicant’s public water system on well water. Secondly, the Applicant can accept the denial of its application and contort the area’s land use plan to allow for only residential development outside the Basin along the I-94 highway. Thirdly, the Village or the Applicant can create a separate water system for the area outside the Basin without diverted Basin water to provide the benefits of a system serving a variety of customers.

The first two options undermine the land use planning and development of the area in the Village outside the Basin. There have been development plans for the area that precede the creation of the EITM Zone. Assigning the area of the Village outside the Basin to well water was not the long-term goal. The third option requires the Village to lose the benefits of a consolidated utility service. These benefits include the Applicant’s scale, expertise, and financing. The third option envisions the Village being serviced by two separate systems of pipes, wastewater treatment, holding ponds and rate setting with different water supplies. This will influence land use and property value in the Village differently. To divide the Village on its public water system is to divide the Village. Notably, the Applicant had plans to consolidate and unite the Village’s water supply prior to the creation of the EITM Zone. There is nothing in the record to indicate that two systems, one from the Basin and one from outside, were contemplated as the Village sought development.

Petitioners fear an open floodgate of diversion requests. It should be noted that there are relatively few straddling communities, around 7 percent of the total jurisdictions, in Wisconsin.⁴ Fewer systems still that can withdraw an amount under its baseline and also meet the statutory requirements to return the water to the Basin minus consumption. This type of diversion is a limited occurrence in Wisconsin and is brought about by the unique nature of the Applicant with room under its baseline withdrawal with a straddling community close enough warrant the extension of service.

The Compact created and Wisconsin enacted an exception to the prohibition on diversions so that straddling communities could enjoy the community benefit of a common water system under certain regulatory restrictions. Those conditions were met here on the facts in this

⁴ Exhibit 209 is a 2006 Legislative Council memo written listing the communities. The maps indicate that most of the straddling communities lie well outside the feasibility of connecting to a public utility that currently diverts water from the Basin.

record. Taken together, the words and the context of the statutes allow the Applicant to build its system consistent with its character to serve its customers to provide a public benefit for the whole of the straddling community.

The Department has justified its approval of the application offered by the Applicant. Based on the language of Wis. Stat. § 281.343(4n)(a) on qualified diversions for straddling communities, the Applicant, the Racine Water Utility, has proven that it will use the 7 million gallons a day diversion for public water supply purposes as defined in Wis. Stat. § 281.343(1)(pm). It will provide the physically connected system of treatment, storage and distribution facilities and will continue to be a largely residential utility after aggregating the portion of the Village outside the Basin. Further, the Applicant will confine the diverted water solely to the straddling community.

ORDER

WHEREFORE, IT IS HEREBY ORDERED THAT the decision of the Wisconsin Department of Natural Resources to approve a diversion from the Great Lakes Basin is AFFIRMED.

Dated at Madison, Wisconsin, on June 7, 2019.

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By: _____


Brian K. Hayes
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party aggrieved by a decision of the hearing examiner may commence an action in circuit court to review that decision. Wis. Stat. § 281.36(3q)(h)2.
2. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
4. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.