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May 17, 2006

PRIVILEGED AND CONFIDENTIAL

Ms. Amy Kasper
Chief Legal Counsel
Office of the Governor
PO Box 7863
Madison WI 53707

RE: Waukesha Water Utility and Use of Great Lakes Water

Dear Ms. Kasper:

As you know, Godfrey & Kahn, S.C. represents the Waukesha Water Utility in connection with negotiations between the state of Wisconsin and Waukesha Water Utility regarding the utility's proposed use of Lake Michigan surface water as a source for drinking and other uses of water in the City of Waukesha. The purpose of these negotiations is to explore a resolution of this dispute as a means to avoid litigation in this matter.


In connection with the negotiations, on March 28, 2006 we provided you with a statement supporting the position of Waukesha Water Utility that its request for use of the Lake Michigan surface water is consistent with the terms of the December 13, 2005 Annex agreement and the Water Resources Development Act. Attached to this letter is a supplemental statement by Waukesha Water Utility regarding the applicability of the Water Resource Development Act to groundwater withdrawals.

Because both the March 28th submittal and the supplemental information provided with this letter were submitted as part of the settlement negotiations, we believe that the information contained in each submittal is protected from disclosure under the Open Record Law's balancing tests that applies to the records of this type.

In any event, we would be willing to meet with appropriate representatives of the Governor's office and the Department of Natural Resources to discuss this matter further at your convenience. Best regards.

Very truly yours,

GODFREY & KAHN, S.C.


for Arthur J. Harrington

AJH/alm
Enclosure

cc: Dan Duchniak – Waukesha Water Utility
Curt Meitz – City Attorney, City of Waukesha

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SUPPLEMENTAL STATEMENT BY WAUKESHA WATER UTILITY
REGARDING THE APPLICABILITY OF WRDA
TO GROUNDWATER WITHDRAWALS

Submitted this 17th day of May 2006
Arthur J. Harrington
John L. Clancy
Godfrey & Kahn, S.C.
780 North Water Street
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414-273-3500

Attorneys for Waukesha Water Utility

This is a follow-up to the “Statement by Waukesha Water Utility Supporting Its Position That Its Request For Lake Michigan Surface Water Is Authorized By The Proposed Annex 2001 Agreement And WRDA,” dated March 22, 2006 (“WWU’s Statement”). WWU’s Statement notes that Waukesha Water Utility’s (“WWU”) proposal to replace its withdrawal of tributary groundwater from the deep aquifer to the Great Lakes tributary with equal capacity of surface water from Lake Michigan (hereinafter the “Proposed Action”), is consistent with both the Water Resources Development Act (“WRDA”) and the Annex Agreement. Since the original WWU Statement was submitted, some questions have been raised regarding whether, under WRDA, tributary groundwater is considered a part of the Great Lakes basin and therefore whether WWU’s present use of groundwater and discharge to the Fox River constitutes an existing authorized diversion under that statute.

WRDA exempts diversions from the Great Lakes which were authorized on or before November 17, 1986.¹ As discussed in more detail in WWU’s Statement, the statutory language in WRDA indicates that the Great Lakes and Great Lakes basin include tributary groundwater.² In addition, the state of Michigan has repeatedly stated its position that WRDA includes tributary groundwater as a part of the Great Lakes basin.³

Likewise, as noted in WWU’s statement, WWU understands that the Governors of the Great Lakes states have agreed to apply the Annex Agreement as their guiding lens for WRDA decisions.⁴ The Annex Agreement expressly defines the Great Lakes basin to include tributary groundwater.⁵

Moreover, even without the implementation of the Annex Agreement, the Great Lakes Charter documents make clear that groundwater is to be considered as part of the Great Lakes Basin for WRDA purposes. For example, the Great Lakes Charter Annex: A Supplementary Agreement to the Great Lakes Charter, June 18, 2001 (the “Charter Annex”) states at Directive #4 that “[p]ending finalization of the [Annex] agreement[s]. . . , the Governors of the Great Lakes states will notify and consult with the Premiers of Ontario and Quebec on all proposals subject to the U.S. Water Resources Development Act. . . , utilizing the prior notice and consultation

¹ 42 U.S.C. §1962(d)-20(f).

² See WWU’s Statement at Section II.b. (WRDA’s stated purpose is not limited to the protection of surface water, but extends to the protection of the Great Lakes basin, generally. Further, towards this end, Congress commissioned a comprehensive study of the Great Lakes groundwater *in addition to* a study of Great Lakes surface water).

³ Id. at Section II.b. (Then Governor Engler stated, “the Great Lakes Compact, Great Lakes Charter and Congress’ ratification of the Great Lakes Commission... are indicative of the understanding that Great Lakes waters include tributary groundwater.” Likewise, then Attorney General and now Governor Granholm stated “groundwater hydrologically connected to the Great Lakes and their tributaries is covered by WRDA.”).

⁴ Id. at Section II.b.

⁵ Id. at Section I.a. (The Annex defines “Waters of the Basin” as “the Great Lakes and all streams, rivers, lakes and connecting channels and other bodies of water including *tributary groundwater*, within the Basin.” Annex §1.2 (Emphasis added)).

process established in the Charter.” See Attachment A (Charter Annex). Previously, the Great Lakes States Governors and Premiers issued a resolution in February 1987, resolving that “the governors of the Great Lakes states utilize the prior notice and consultation process for the purpose of implementation of Section 1109, PL 99-662 [i.e., WRDA].” See Attachment B (1987 Resolution).

Thus, the Great Lakes States Governors have agreed to utilize the Charter process to implement WRDA. The Great Lakes Charter and the Charter Annex, like the Annex Agreement, make clear that the Great Lakes Basin includes tributary groundwater. The Great Lakes Charter defines “Great Lakes Basin water resources” to mean “the Great Lakes and all streams, rivers, lakes, connecting channels, and other bodies of water, *including tributary groundwater*, within the Great Lakes Basin.” (Emphasis added). See Attachment C (The Great Lakes Charter). In the Charter Annex, the Governors reiterated that “Waters of the Great Lakes Basin (also termed in the Great Lakes Charter as ‘Water Resources of the Great Lakes Basin’) means the Great Lakes and all streams, rivers, lakes, connecting channels, and other bodies of water, *including tributary groundwater*, within the Great Lakes Basin.” (Emphasis added).⁶ Likewise, the Great Lakes Charter states that “withdrawal” means the removal or taking of water from surface or *groundwater*. (Emphasis added).⁷ Thus, the Great Lakes Governors have made clear through both The Great Lakes Charter and Charter Annex that under WRDA, tributary groundwater is considered part of the Great Lakes Basin.

For all of these reasons, the Great Lakes Basin under WRDA includes tributary groundwater. Accordingly, WWU’s current use of the deep aquifer groundwater and its discharge to the Fox River, both of which were authorized prior to the enactment of WRDA in 1986, constitute a previously authorized diversion from the Great Lakes basin under WRDA.

Since providing the Governor’s office with its earlier position statement, WWU has been made aware of a directly analogous matter that supports WRDA’s inclusion of tributary groundwater as a part of the Great Lakes basin. This directly analogous matter also supports WWU’s position that its use of tributary groundwater and discharge outside of the Great Lakes basin constitute a previously authorized diversion allowing WWU to switch to Great Lakes surface water without approvals under WRDA.

This directly analogous matter involves the Town of Dyer, in northwestern Indiana. Historically, Dyer had used Great Lakes basin groundwater and discharged its treated wastewater to the Little Calumet River, which flows outside of the Great Lakes basin. However, in 1995 Indiana authorized Dyer to switch its municipal water supply from basin groundwater to Lake Michigan surface water and to continue to discharge its treated wastewater outside of the Great Lakes basin without any approvals from other Great Lakes states Governors under WRDA.

⁶ See Attachment A.

⁷ See Attachment C.

As is shown in the attached map, the Town of Dyer and its wastewater treatment plant are located outside of the surface water divide for the Great Lakes basin.⁸ Dyer's wastewater treatment plant discharges treated wastewater to the Little Calumet River in the Illinois River basin. This system flows from Indiana to the state of Illinois, and the system is a part of the Mississippi River basin.⁹ This fact is confirmed in a 1994 report where the state of Indiana recognized that "little if any, of the stream flow entering the state of Illinois from the [Lake Michigan] Region enters Lake Michigan. Instead, the water travels through the Mississippi River basin and into the Gulf of Mexico."¹⁰

Installation of the Town's three groundwater wells, which pump Great Lakes basin groundwater, was completed on October 22, 1959, March 22, 1976, and October 25, 1986 respectively.¹¹ Thus, all of Dyer's groundwater wells were installed prior to the enactment of WRDA, which occurred on November 17, 1986. Because of this, Dyer's use of these wells and discharge to the Little Calumet River constitute an existing authorized diversion under WRDA.

When Dyer switched from tributary groundwater to Lake Michigan surface water in 1995, WRDA was clearly in force, and any *new* diversion of Great Lakes water for use outside of the Great Lakes basin would have required the approval of each Great Lakes state's governor. However, Indiana sought no such approvals, and no approvals were obtained for Dyer's switch to Lake Michigan surface water. This indicates that Indiana, as well as the other Great Lakes states, did not consider Dyer's switch from basin groundwater to basin surface water and continued diversion to the Mississippi River basin a new diversion, but the continuation of an *existing* authorized diversion.

As was the case with Dyer, WWU's withdrawal of tributary groundwater and discharge to the Mississippi River basin constitute an existing authorized diversion of Great Lakes water. Accordingly, WWU's Proposed Action, like Dyer's switch from tributary groundwater to Lake Michigan surface water, is not a new diversion subject to WRDA. Therefore, approval of the Great Lakes Governor's under WRDA is not required.

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⁸ See Attachment D (surface water divide map).

⁹ According to data presented on EPA's web site, the Dyer wastewater treatment plant discharges to United States Geological Survey Hydro Basin Code ("HBC") 07120003, which consists of the Illinois River basin above the confluence of and including the Fox River basin. See http://water.usgs.gov/GIS/huc_name.html#Region07. The Illinois River basin is part of the Mississippi River basin, not the Great Lakes basin. See <http://water.usgs.gov/GIS/regions.html> (with map of United States showing codes beginning with "07" as being in the Upper Mississippi River Basin).

¹⁰ See Attachment E ("Water Resource Availability in Lake Michigan Region, Indiana-Executive Summary," Indiana Department of Natural Resources Division of Water (1994)).

¹¹ See Attachment F (copies of Indiana Department of Natural Resources Records of Water Wells).