

*Clean Wisconsin • Midwest Environmental Advocates
Milwaukee Riverkeeper • River Alliance of Wisconsin
Sixteenth Street Community Health Center
Waukesha County Environmental Action League
Wisconsin Wildlife Federation*

Secretary Matt Frank
Wisconsin Department of Natural Resources
101 S. Webster Street
Madison, Wisconsin 53707-7921

April 12, 2010

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Dear Secretary Frank, Mr. Ebersberger and Mr. Pardee,

We are writing both to follow-up on our March 1, 2010 meeting with Secretary Matt Frank, Eric Ebersberger, Dave Seibert, Dino Tsois and Christy Rogers with the Department of Natural Resources, and to respond to the Department's February 5, 2010 request for public comments concerning the environmental analysis public scoping process relating to the City of Waukesha's proposed Water Diversion Application under the Great Lakes Compact.

We understand from the Department's February 5, 2010 notification and our subsequent March 1, 2010 discussion, that an important, preliminary part of the Department's Environmental Impact Statement (EIS) process for the proposed City of Waukesha Water Diversion application will involve a "scoping" of the analysis, that is, a determination of the significant issues to be analyzed in depth as part of the prospective environmental analysis.

We agree with, and remain encouraged by, the statement made by Secretary Frank in recognition of the Department's pivotal, independent decision-making role that Wisconsin's DNR is taking on: "If done right, we'll have a robust EIS, with high standards, that will set the precedent for the Region." Secretary Frank further stated that what is being sought by the Department is "a transparent process that errs on the side of being as open as possible." Given the importance of this commitment to the EIS process overall, it will be important at this early juncture for the Department to formulate a clear, staged public notification and hearing process to ensure that the public's access to reasonably *complete* information is recognized and that DNR resources are best utilized. We believe that official public hearings—as opposed to "open house sessions"—should be held in the communities that will be affected by the sale of water, by the route of pipelines, and by the discharge of waste

water into their area waterways, At a minimum, these would include Waukesha, Wauwatosa and Milwaukee.

As communicated to you on numerous prior occasions including, most recently, the March 1st meeting, we strongly recommend that the Department hold public comment periods and hearings on *both* (i) the completeness of the application and (ii) whether the application meets the standards of the Compact. Without this phased, two-part process, both the public and the Department will lack any assurance that the application being reviewed will not be substantially changed, for example, into another version that substitutes one water supplier for another (e.g. City of Oak Creek or Racine for City of Milwaukee). With this process in place, the application's evaluation can proceed with the requisite degree of certainty called for under the Compact pertaining to a "complete" record for review at the regional level.

Accordingly, at the same time that the Department is proceeding with scoping work for its prospective EIS, we ask that the Department proactively incorporate the following procedural steps into the public participation process it will be responsible for once Waukesha's application is submitted:

- (a) Upon receipt of the application, the Department should open a 30 day public comment period focused *on the completeness* of the application, including consideration of such questions as:
 - Must the route of the water supply, return flow and discharge points be clearly defined within the application for a diversion prior to the application's submission?
 - Must a firm Agreement with all appropriate conditions be in place between the community seeking a diversion and all communities who may be recipients of return flow waters as part of the applicant community's application for a diversion?
 - Must a firm Agreement be in place between the water supplier and applicant community seeking the diversion as part of the application?
 - Must the application identify and include all necessary permits as one comprehensive package?
 - Must all water conservation measures required to meet the Compact provisions be identified, adopted and/or enforceable prior to the application's submission?

- (b) After consideration of the application and public comments, the Department would determine if the application is complete; if so, the Department would issue a letter of completeness.

- (c) The Department should proceed thereafter with opening a 30-day public comment period, focused on the *merits of the application* itself.

In addition, as further acknowledged by the Department in our meeting, the underlying purpose of an EIS is to facilitate a side-by-side environmental and economic analysis of each

reasonable water supply alternative and return flow alternative under consideration. For the general public, it will be important to have the alternatives developed in a format that facilitates easy comparison. It will not be sufficient or conducive to an open public review process merely to assert that other alternatives have been considered and dismissed, without explanation and justification, or to provide links to previous and older studies, without accurate summaries and analyses.

We offer the following “Scoping Comments” responsive to the Department’s “initial list of topics to be addressed in the EIS” released to the public on February 5, 2010—which we categorized by Compact requirements for ease of consideration and in keeping with NR 150.22 parameters regarding probable environmental impacts [see Appendix excerpt]:

(1) No Reasonable Water Supply Alternative:

Under the Compact, the City of Waukesha must demonstrate that “there is no reasonable water supply alternative in the basin in which [Waukesha] is located, including conservation of existing supplies” and that “the need for the proposed diversion cannot be reasonably avoided through efficient use and conservation of existing water supplies.” These provisions require that the following questions be evaluated within the EIS Analysis:

- (a) What other groundwater and surface water alternatives, or combination thereof, are available to the City of Waukesha, including but not limited to:
 - the unconfined deep aquifer to the west;
 - river groundwater inducement;
 - additional shallow aquifer wellfields;
 - enhanced conservation;
 - expanded utilization of radium treatment technology/systems.
- (b) What are the important factors used to determine whether or not Waukesha has a reasonable alternative water supply?
- (c) What time duration will be operative? Specifically, for how many years must an alternative water supply be deemed sustainable in the evaluation of “no reasonable alternative water supply”? At the point of current discussions, it appears that several different timelines are being considered. For example, Waukesha at times refers to a SEWRPC draft Water Service Area plan that uses a timeline of 2028 for projected water and land use. Yet, Waukesha also relies on SEWRPC’s Water Supply Study, which uses SEWRPC’s current Land Use Plan of 2035 for projected land use and populations. Waukesha, at the same time, indicates that the amount of water that it will request for a diversion is based on a fully built-out land use scenario of 2050 or later.

(2) Reasonableness of Requested Diversion Amount:

Under the Compact's Exception Standard, "the amount of water diverted will be limited to quantities that are considered reasonable for the purposes for which it is proposed." These provisions require that the following questions be evaluated within the EIS Analysis:

- (a) Does the requested diversion amount reflect Waukesha's current public health needs or, rather, encompass substantial additional lands beyond the City's current water supply area based on growth projections?
- (b) What basis is there for a nearly 100% increase in daily demand in view of the known decline in the City of Waukesha's industrial usage over the past two decades coupled with the City's publicized water conservation savings?
- (c) Can and should Waukesha seek a smaller diversion amount at this point in time?

(3) Return Flow Alternatives:

Under the Compact and Act 227's Exception Standard, "an amount of water equal to the amount diverted, less an allowance for consumptive use, will be returned to the watershed from which it was withdrawn." Further, under Wisconsin Act 227, if the water is returned through a stream tributary to Lake Michigan or Lake Superior, "the physical, chemical, and biological integrity of the stream must be protected and sustained... considering the state of the receiving water before the proposal is implemented, and both high and low flow conditions and potential adverse impacts due to changes in temperature and nutrient loadings caused by this return flow."

Notwithstanding Waukesha's primary focus to date on Underwood Creek as its preferred alternative, the Department's prospective EIS must include a thorough analysis of the available return flow alternatives and their respective environmental and economic impacts. Equally important, the EIS must ensure that any return flow alternative will be protective of the "physical, chemical and biological integrity of the receiving waters" in conformance with Act 227 statutory direction and all existing laws and regulations. To meet these requirements, the Department's EIS Analysis must address the following:

- What impact would Waukesha's wastewater discharge into Underwood Creek have in terms of fecal coliform or bacteria levels in Underwood Creek and the Menomonee River? For example, it is our understanding that Waukesha's discharge of fecal coliform throughout most of the year is at a level 9 times higher than MMSD maximum discharge limits set for contractors (900 cfu/100 ml versus 100 cfu/100 ml) and 20-30 times higher than the actual monthly effluent concentrations achieved by MMSD and its contractors historically.
- How will increased discharge of bacteria affect Underwood Creek's already elevated bacteria levels (i.e. the creek's proposed listing as an impaired water for bacteria on the section 303d list)? Can the Department require year-round UV treatment to reduce bacterial loading to this stream?

- How will Waukesha's wastewater flow impact algal growth in Underwood Creek and the Menomonee River?
- How would Waukesha's wastewater flow meet expected new phosphorus limits for rivers and streams in Wisconsin?
- What wastewater treatment and disinfection measures have been committed to by Waukesha? Specifically, with respect to fecal coliform levels? Phosphorus?
- What impacts might increased flows of Waukesha wastewater in Underwood Creek have on creek restoration efforts underway now by MMSD, the city of Wauwatosa, and others?
- What data and assumptions will be used to evaluate Underwood Creek's capacity to absorb Waukesha's return flow? How will "extreme runoff events" of the kind seen in the past two years be taken into account?
- What effluent limits would Waukesha need to meet to discharge to a restored Underwood Creek that fully meets the "fishable and "swimmable" goals of the federal Clean Water Act?
- What effluent limits does Waukesha currently meet by comparison? And how is the Department going to alter these effluent limits given the change in receiving water and Underwood Creek's proposed listing as impaired for bacteria?
- How and what entity will be responsible for monitoring the effects of Waukesha's return flow effluent on downstream waterways? What provisions will be made to allow for adaptive management?
- Will Waukesha be required to meet state standards for mercury and chloride if it discharges to Underwood Creek versus the variances for these two pollutants that Waukesha is currently granted?
- MMSD has spent approximately \$150,000,000 on flood management on the Milwaukee County Grounds and downstream areas of Wauwatosa and Milwaukee to prevent flooding along the Menomonee River. Although MMSD already has acquired and demolished dozens of flood prone homes along the Menomonee River, there are still flood-prone structures downstream that future MMSD projects may address or that the Cities of Wauwatosa and Milwaukee will have to address. How will the increased return flow to Underwood Creek protect or affect those past and future investments?
- What are the environmental and economic benefits and costs of Waukesha returning its wastewater through alternatives other than Underwood Creek, such as the MMSD system, Lake Michigan directly, or the Root River?

- Are there options for distributing return flow to a receiving water in a more natural and controlled fashion, using wetlands or mitigating local impacts by discharging to several different locations?
- What are the total projected costs of Waukesha's diversion proposal? How can these costs be broken down in terms of construction, equipment, energy and remediation costs?
- What is the cost comparison of available return flow alternatives?
- Do cost calculations account for increased levels of wastewater treatment, as required to protect waterways proposed for return flow?
- What is the **cost comparison** of the diversion versus no diversion alternatives? Importantly, are these cost comparisons detailed enough to provide sufficient value to any cost effectiveness analysis given that each estimate contains a *\$25 million contingency*, i.e. "swing" either way, for unknowns?

(4) Water Conservation:

Under the Compact and Act 227's Exception Standard, the applicant must demonstrate that "the need for the diversion cannot be reasonably avoided through the efficient use and conservation of existing water supplies" and must commit to "environmentally sound and economically feasible water conservation measures." These provisions raise the following questions for evaluation within the Department's EIS Analysis:

- What water savings documented from the start of Waukesha's water conservation program can be tied directly to the City's conservation measures as distinct from, for example, an increase in precipitation or declining industrial users?
- How does I & I water factor into the City's conservation program?
- What monitoring or enforcement measures will be implemented to assure achievement of projected conservation goals?
- If Waukesha proposes to implement water conservation measures to meet the requirements of Act 227 and, at the same time, also seeks to add additional lands to be served by a water diversion, how does the City propose to ensure that water conservation measures are enforced outside its current City boundaries?
- What additional conservation measures have been rejected and on what basis?

(5) No Significant Adverse Individual or Cumulative Impacts:

The Compact and Act 227 Exception Standard require that “the diversion will result in no significant individual or cumulative adverse impacts to the quantity or quality of the water of the Great Lakes basin or related natural resources.” Given this requirement, the Department’s EIS Analysis must evaluate the individual and cumulative impacts of the Waukesha diversion in the context of other current or prospective environmental impacts including, for example, the Wisconsin Department of Transportation’s publicized plan to increase run-off to Honey Creek and Underwood Creek by 33% as part of the Zoo Interchange reconstruction proposal. These projects, alone and together, will be certain to create individual and cumulative effects, such as increased risk of flooding of homes along Underwood Creek, that will need to be analyzed and addressed in keeping with the Compact and as part of the Department’s EIS.

(6) Compliance with Applicable Laws:

The Great Lakes Compact and Act 227’s Exception Standard provide that a “diversion will be in compliance with all applicable local, state, and federal laws and interstate and international agreements.” As such, the Department’s EIS Analysis must examine Waukesha’s diversion and proposed return flow alternative under recent Clean Water Act decisions, given that Waukesha’s proposed return flow will be a new discharge to Underwood Creek—a waterway already on the state and federal impaired waters list for bacteria. In consideration of NR 150.22(2)(d) and NEPA guidance, the Department’s EIS also should include an examination of socioeconomic impacts. Moreover, to the extent that Waukesha will be pursuing or receiving federal monies for this Great Lakes diversion project, EPA policies and Title VI of the Civil Rights Act will require future examination of environmental justice requirements, of the type and scope identified in the socioeconomic impact analysis currently underway as part of SEWRPC’s ongoing Water Supply Study.

In closing, we appreciate your consideration of the afore-stated process recommendations and scoping comments relating to the Department’s initial list of topics to be addressed in its EIS analysis. Further, given that Waukesha’s final application may be different from earlier drafts, is our understanding that the Department will continue to accept comments on scoping for a period of time after the final application is, in fact, submitted. We value the Department’s commitment to a robust, open and transparent EIS process that will set high standards and serve as useful precedent for the Great Lakes Region. We look forward to the Department’s ensuing EIS process as an integral step toward a successful Great Lakes Compact implementation.

Very truly yours,

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Milwaukee Riverkeeper

Steve Schmuki
Waukesha County Environmental Action
League

Denny Caneff
River Alliance of Wisconsin

George Meyer
Wisconsin Wildlife Federation

Melissa Malott
Clean Wisconsin

Additional organizations supporting these comments:

National Wildlife Federation
Michigan Environmental Council
Clean Water-Michigan
Tip of the Mitt-Michigan
Ohio Environmental Council
Concerned Citizens for the Environment-New York

cc: Todd Ambs, Department of Natural Resources
Governor Jim Doyle
Mayor Larry Nelson, City of Waukesha
Mayor-elect Jim Scrima, City of Waukesha
Mayor Tom Barrett, City of Milwaukee
Alderman Willie Hines, City of Milwaukee Common Council President
Alderman Robert Bauman, City of Milwaukee Common Council
Alderman, Michael Murphy, City of Milwaukee Common Council
Preston Cole, City of Milwaukee
Dan Duchniak, Waukesha Water Utility
Bob Biebel, Southeastern Wisconsin Regional Planning Commission

Appendix: Wisconsin Chapter 150.22

NR 150.22 Preparation and content of the EA or EIS.

(1) GENERAL. (a) The environmental analysis shall be prepared by the department or under s. NR 150.20 (2) (f).

1. Any part of an environmental analysis may be prepared by an applicant or by the applicant's consultant following the department's evaluation of the environmental issues and acceptance of responsibility for its scope and content. The names of the department's employees or its consultants responsible for the evaluation shall be included in the list of preparers in the environmental analysis.

Note: It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the department.

2. The department's review and verification under this subsection shall be consistent with that required under s. NR 150.25

(3).

(b) The environmental analysis shall be an analytical document that enables environmental and economic factors to be considered in the development of a proposed action.

(c) An environmental analysis is not a document of justification. Furthermore, disclosure of adverse environmental effects does not necessarily require that a proposed action be denied or terminated.

(d) An environmental analysis shall be written in plain language and should use appropriate graphics to aid decision-makers and the public. Where appropriate, an environmental analysis may be combined with other required environmental or planning documents.

(e) The environmental analysis shall include information which is important to evaluating reasonably foreseeable significant

adverse impacts on the human environment, unless the information cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known. When evaluating reasonably foreseeable, significant adverse effects and there is incomplete or unavailable information that is relevant to a reasoned choice among alternatives, the environmental analysis shall:

1. State that such information is incomplete or unavailable.
2. Describe the relevance of such information.
3. Summarize credible scientific evidence which is relevant to the evaluation.
4. Evaluate adverse impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

(f) The department may determine that the development of an EA under ss. NR 150.21 and 150.22 for a proposal satisfies the EIS development requirements under ss. NR 150.21 and 150.22. This environmental analysis may be distributed for review as the EIS under sub. (3), and serve as the EIS for the public hearing and decision under ss. NR 150.23 and 150.24.

(2) CONTENTS OF AN EA OR EIS. The environmental analysis shall emphasize significant environmental issues. An environmental analysis shall substantially follow the regulations issued by the president's council on environmental quality, 40 CFR 1500-1508, for EIS's and shall provide an analysis of the environmental and economic implications of a proposed action contemplated by the department. While the format may vary, the environmental analysis shall include:

- (a) A summary of the process used to identify major issues and the issues identified for detailed analysis. An EA shall evaluate whether the proposed action is, or is not, a major action and whether the EIS process is required under s. 1.11, Stats., and this chapter. In making this evaluation, the department shall consider:
1. The extent of short-term and long-term environmental effects including secondary effects; particularly to geographically scarce resources such as historic or cultural resources, scenic and recreational resources, prime farmlands, threatened or endangered species or ecologically critical areas.
 2. The extent of cumulative effects of repeated actions of the same type, or related actions or other activities occurring locally that can be reasonably anticipated and that would compound impacts.
 3. The degree of risk or uncertainty in predicting environmental effects or effectively controlling potential environmental impacts including those relating to public health or safety.
 4. The degree in which the action may establish a precedent for future actions or foreclose future options. This includes consistency with plans or policy of local, state or federal government.
 5. The degree of controversy over the effects on the quality of the human environment.

(b) A description of the purpose of the proposal and an evaluation of the need for the proposal.

(c) A description of the proposal and of the affected environment, including the project location, type of facility, time schedules, maps and diagrams deemed relevant, and other pertinent information which will adequately allow an assessment of the potential environmental impact by commenting agencies and the public. The environmental analysis should describe, where appropriate, proposed preventive and mitigating measures.

(d) An evaluation of the probable environmental consequences of the proposal. An evaluation will be made of the positive and negative effects of the proposed action as it relates to the physical, biological and socioeconomic environment. The discussion shall include adverse environmental effects which cannot be avoided should the proposal be implemented, the economic advantages and disadvantages, the relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved. The evaluation shall include impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason. Where condemnation authority will be sought by the department or project sponsor under ch. 32, Stats., the evaluation shall conform to rules, or guidelines of the department of agriculture, trade, and consumer protection for the evaluation of agricultural impacts. Secondary as well as primary consequences to the environment will be included wherever possible. This section shall also include an evaluation of the archeological, architectural and historical significance of the site and structures and of the visual impacts of the proposed action. An analysis shall also be made of the energy impacts of the proposed action.

(e) An evaluation of alternatives to the proposal, including a rigorous exploration and objective evaluation of the environmental impacts of all reasonable alternatives, particularly those that might avoid all or some of the adverse environmental effects of the proposed action.

(f) A description and evaluation of required state or federal approvals. Where an environmental analysis is prepared on a proposal involving multiple state or federal regulatory actions, it will address each of the approvals and indicate the conformance or nonconformance of the project with applicable statutes, rules, and regulations. Local zoning actions shall also be addressed if appropriate.

(g) Any other related analysis required under another rule, statute or federal regulation or law which does not conflict with the purpose of the environmental analysis.

(3) PUBLIC REVIEW. (a) *Generally availability of the EA or*

EIS. Copies of the environmental analysis shall be provided to any individual or group requesting a copy. A charge may be assessed to cover reproduction and handling costs. If the EA was prepared after the distribution of the news release or legal notice under s. NR 150.21 (1) (b) or otherwise not available during the period provided for the department to accept public comments under s. NR 150.21 (1) (a) 6., a minimum of 2 weeks, from the date the EA was sent to those who responded within the notice deadline, shall be allowed for the receipt of comments.

(b) *EIS distribution.* Copies of the EIS shall be distributed as follows:

1. The governor's office.
2. State, federal, and local governmental agencies having special expertise, interest or jurisdiction.
3. Regional and county planning agencies located within the proposed project or action area.
4. Offices of the department located in the vicinity of the proposed project or action area and the department's central office in Madison.
5. Libraries:
 - a. For proposed actions affecting a local area; the nearest library. In addition, the county clerk or town clerk will be requested to make the document available in the county courthouse, city hall or town hall.
 - b. For projects of regional importance; public libraries with a geographic distribution which provides public access without undue travel.
 - c. Projects having statewide significance; public libraries providing reasonable access by the individuals that would be potentially affected by the proposed action.
6. The applicant (for activities requiring approval).

(c) *Notice of availability of the EIS.* An announcement sheet giving a brief description of the proposed action, description of the administrative procedures to be followed, the date by which comments on the EIS are to be submitted to the department, and location where copies of the EIS are available for review will be distributed to all entities listed under subds. 1. to 4. The availability of the EIS may be announced through a notice of public hearing.

1. All local and regional units of government which have jurisdiction over the area that may be affected by the proposed action or reasonable alternatives to the proposed action. A request will be made to post the announcement sheet at the places normally used for public notice.
2. Local and regional news media in the area affected.
3. Groups, clubs, committees, or individuals which have demonstrated an interest and have requested receipt of this type of information.
4. All participants in the scoping process not covered in subds. 1. to 3.

(d) *Period of time for comment on the EIS.* 1. A period of not

less than 45 days and not more than 90 days from the date the EIS is mailed, depending on the length and complexity of the EIS, shall be allowed for receipt of comments from state and federal agencies and the public except as provided in s. 293.43 (3) (c), Stats.

2. If other statutory time limits for department action conflict with the comment and review procedure set out in this subsection, the procedure may be adjusted so long as agency and public input is assured.

3. A reasonable request for extension beyond the initial review period, may be granted by the department for the review of the EIS, unless otherwise provided by law. The initial period for comments plus any extensions shall not exceed 90 days, unless otherwise provided by law.

4. If the department revises and recirculates an EIS under sub. (4), each version of the EIS shall be distributed in the same manner as the EIS under s. NR 150.22 (3), except the period of time to comment on a subsequent version of an EIS may be reduced to 30 days.

(e) *Summary of comments.* The department shall prepare a summary of comments received from the public or any other state, federal or local agency or tribal government on the proposed action or the department's environmental analysis. The summary may also summarize comments received at a hearing under s. NR 150.23, and contain the department's response to comments.

(4) SPECIAL EIS REVIEW PROCEDURES. Before reaching a decision under s. NR 150.24, the department may revise and redistribute an EIS or a portion of an EIS if it determines any of the following:

(a) Draft and final versions of an EIS are necessary to satisfy the requirements of a cooperating or lead agency to avoid separate agency EISs,

(b) The department's response to substantial public comments should be accomplished by revising and recirculating the EIS,

(c) The EIS and all comments received on it did not adequately address important environmental effects, reasonable major alternatives, or was otherwise inadequate, or

(d) Draft and final versions of an EIS are necessary to aid compliance with s. 1.11, Stats.

