



MEG MUNICIPAL DRINKING WATER
A Division of the Municipal Environmental Group

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Senator Neal Kedzie, Chair
Wisconsin Legislative Council Special Committee on
Great Lakes Water Resources Compact
N7661 Highway 12
Elkhorn, WI 53121

Dear Senator Kedzie:

The Municipal Environmental Group - Drinking Water Division (MEG-Water), an organization of municipal drinking water systems, would like to raise two issues regarding the proposed legislation with the Committee. First, MEG-Water is concerned that the proposed compact legislation would fundamentally change Wisconsin law and for the first time apply the public trust doctrine to groundwater. Second, MEG-Water urges the State to set the existing baseline withdrawal amount for municipal water utilities at the approved capacity of the municipal water system's largest water utility component.

Applicability of Public Trust Doctrine to Groundwater

In Wisconsin, the public trust doctrine has not been applied to groundwater. Rather, the State of Wisconsin has regulated groundwater under its police power which allows it to act for the public's health, safety and welfare. Under this legal structure, a propertyowner has the right to withdraw groundwater subject to state regulation and applicable common law (i.e. the reasonable use rule).

The proposed compact legislation, however, would change the legal structure applicable to the use of groundwater from a system where a propertyowner has the right to withdraw groundwater subject to applicable regulation and law, to a system where a propertyowner does not have the right to withdraw groundwater unless specifically authorized by the State to do so. This change would occur with the adoption of the language contained at page 9, lines 18-19 of the draft legislation, which provides that: "The waters of the basin are precious public natural resources shared and held in trust by the states."

While this sentence may seem inconsequential at first glance, others believe this sentence along with the rest of the compact, extends the public trust doctrine to groundwater. Midwest

Environmental Advocates in its document entitled "Realizing the Promise of the Great Lakes Compact", which was distributed at the Committee's October 4, 2006 meeting, states at page 5, that:

The Public Trust Doctrine is the legal framework that establishes a trust in the public water commons. Historically, it describes a relationship whereby the State is the trustee of all navigable waters with a duty to manage those waters for the public benefit. A few states have expanded this doctrine to include waters that directly impact navigable waters. Consistent with the evolution of scientific understanding of the interconnectedness of surface and groundwater, *the Great Lakes Charter and the Compact have extended the Public Trust Doctrine to all waters, including non-navigable surface water and tributary groundwater.*

Recognizing the legal existence of the Great Lakes as a public trust could help protect the lakes from global and local pressures. If water is a public trust held by the government for the public benefit, then private ownership of water for primarily a private purpose is precluded and water will need to be managed within the Basin in a way that upholds the public interest and protects the water commons. (emphasis added)

Extending the public trust doctrine to groundwater would mean that the State would have the same duties with respect to groundwater that it currently has with respect to navigable waters. The State would be prohibited from surrendering or otherwise allowing impairments to the public's interest in groundwater, although it could allow limited incursions into the waters to serve the public's interest, or to serve the interests of an adjacent propertyowner provided the public's interests were not harmed. While this may seem reasonable at first glance, it is important to recognize that this change would place an affirmative duty on the State to prohibit use of the groundwater unless the State explicitly authorizes the use of the groundwater. This is a 180 degree change from current law which assumes a propertyowner can use the groundwater, unless the State explicitly says "no". This change would place affirmative duties on the State that the State does not currently exercise.

In addition, application of the public trust doctrine to groundwater would allow private parties to bring an action against a propertyowner for using the groundwater - even if use of the groundwater is permitted by the State. With regard to navigable waters, the public trust doctrine has already been used by citizens to limit or rescind actions taken by the State or state agencies alleged to be contrary to the public trust. Gillen v. City of Neenah, 219 Wis. 2d 806, 580 N.W.2d 628 (1998).

A thoughtful discussion of whether the public trust doctrine should be expanded to cover groundwater in Wisconsin may well be appropriate. However, MEG-Water strongly urges that this important decision not be made at this time by adoption of broad "findings" language under the compact language. We would ask that the language contained at page 9, line 18-19 of the draft legislation be revised to read that: "The waters of the basin are precious public natural resources shared by the states," and that the reference to the waters being held in trust be deleted.

Establishment of Baseline for Municipal Water Systems

Under the proposed compact, each state is required to determine a baseline level for all existing withdrawals. The proposed legislation includes this requirement at page 33, lines 21-24 through page 34, lines 1-10. According to the draft, the State is to develop a baseline level for existing withdrawals which may be either (1) an existing approved withdrawal amount, or (2) the capacity of an existing system presented in terms of withdrawal capacity, treatment capacity, distribution capacity, or other capacity limiting factor, with existing capacity determinations based upon either approval limits or the most restrictive capacity information.

MEG-Water asks that for municipal water systems the baseline level for existing withdrawals be defined as the approved design capacity of the largest component of the utility's existing facilities. Since construction of municipal water system facilities is overseen and approved by the WDNR pursuant to § 281.41, Wis. Stats., and the PSC by § 196.49, Wis. Stats., setting the baseline level for municipal water systems at the approved design capacity of the largest water system component would be consistent with the proposed statutory provision that allows baseline determinations to be based upon "approval limits."

MEG-Water believes such an approach is necessary to protect a municipality's existing investment in its water system. Municipal water systems plan, design, build and finance their facilities to allow for incremental growth. Certain components, like membrane filtration systems, are sized based upon current use because it is relatively easy to increase the size of those facilities as future demand increases. Other components, like intakes or transmission facilities, are typically oversized when they are initially installed because the incremental cost of the oversizing is substantially less than the cost of enlarging the facilities in the future. However, these facilities are built and financed with the expectation that over time, the rest of the municipality's water system will be expanded so that the constructed capacity of the oversized facilities can be utilized.

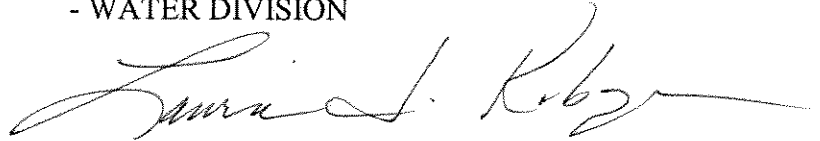
Since the community has planned for, received approval for, built, and invested in these facilities with the contemplation of expected future growth and additional revenues to pay for the facilities, it is important that the municipal water system be able to expand to its approved

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planned capacity. By setting the baseline at the approved capacity of the municipal water system's largest water utility component, the State can ensure that the municipality's investment in the larger facilities that it built and financed - with the approval of the WDNR and PSC - will be protected.

Thank you for your consideration of these comments.

MUNICIPAL ENVIRONMENTAL GROUP
- WATER DIVISION

A handwritten signature in black ink, appearing to read "Lawrie J. Kobza", with a long horizontal flourish extending to the right.

Lawrie J. Kobza, Legal Counsel

cc: John Stolzenberg, Legislative Council (via e-mail & U.S. Mail)
(To be distributed to all committee members by John Stolzenberg)
Rachel Letzing, Legislative Council
MEG-Water Members (via e-mail)

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