

***Jefferson County Land & Water Conservation Committee Agenda  
"Working Together to Protect & Enhance the Environment"***

***Jefferson County Courthouse  
311 S Center Ave, Rm 112  
Jefferson, WI 53549-1701***

***Wednesday, August 17, 2016 @ 8:00 am***

***Committee Members: Matthew Foelker (Chair), Ed Morse (Vice Chair), Peter Hartz (Secretary), Gregg Patrick (Member), Laura Payne (Member), Frank Anfang (FSA Rep) and Margaret Burlingham (Public Member)***

1. Call to Order
2. Roll Call (Establish a Quorum)
3. Certification of Compliance with the Open Meetings Law
4. Approval of the August Agenda
5. Approval of the July 20, 2016 Meeting Minutes
6. Communications
  - Department of Agriculture, Trade & Consumer Protection (DATCP) August 2016 Report
7. Public Comment (members of the public who wish to address the Committee on specific agenda items must register their request at this time)
8. Natural Resources Conservation Service (NRCS) Report
9. Discussion on Permanent Shared Management of the Jefferson and Waukesha County Farm Service Agency (FSA)
10. Discussion on NR 151 Regulations - Joe Strupp
11. Discussion on High Capacity Wells
12. Discussion on Hoard's Dairyman Manure Pit
13. Discussion and Possible Action on Notices of Noncompliance - Farmland Preservation Program (FPP)
14. Discussion and Possible Action on Cancellations of Notices of Noncompliance - FPP
15. Review of the Monthly Financial Report (June)
16. Discussion on the 2017 Budget Request
17. Discussion and Possible Action on Purchase of Agriculture Conservation Easements (PACE) Applications
18. Discussion on Jefferson County Land & Water Conservation Report on Baseline Documentation for Easements - Cliff Haberman, Town of Waterloo
19. Discussion on Items for the Next Agenda
20. Next Scheduled Meeting:
  - September 21, 2016 @ 8:00 am in Room 112
21. Adjournment

A quorum of any Jefferson County Committee, Board, Commission or other body, including the Jefferson County Board of Supervisors, may be present at this meeting.

Individuals requiring special accommodations for attendance at this meeting should contact the County Administrator 24 hours prior to the meeting at (920) 674-7101 so appropriate arrangements can be made.

## Land & Water Conservation Committee Minutes July 20, 2016

### 1. Call to Order:

The monthly meeting was called to order by Matt Foelker at 8:00 am. Committee members Matthew Foelker (Chair), Ed Morse (Vice Chair), Peter Hartz (Secretary), Gregg Patrick (Member) (@ 8:10), Laura Payne (Member), Frank Anfang (FSA Rep), and Margaret Burlingham (Public Member) were present. Also in attendance were Mark Watkins, Director, Land & Water Conservation Department (LWCD); Kim Liakopoulos, LWCD; Patricia Cicero, LWCD; Nancy Lannert, LWCD; and Kathy Turner, Natural Resource Conservation Service (NRCS).

### 2. Roll Call (Establish a Quorum):

A quorum was established.

### 3. Certification of Compliance with the Open Meetings Law:

It was determined that the committee was in compliance with the Open Meetings Law.

### 4. Approval of the July Agenda:

The July agenda was reviewed by the committee members. No changes were proposed.

### 5. Approval of the June 15, 2016 Meeting Minutes:

Laura Payne made a motion to approve the June 15, 2016 meeting minutes as written, Pete Hartz seconded. Motion carried 6/0.

### 6. Communications:

- Department of Agriculture, Trade & Consumer Protection (DATCP) July 2016 Report. See attached.

### 7. Public Comment:

There were no comments.

### 8. Natural Resources Conservation Service (NRCS) Report:

Introduction of the new NRCS District Conservationist, Kathy Turner. Kathy Turner will be working a compressed schedule in Jefferson County. The Natural Resources Conservation Service (NRCS) report including CSP and CRP re-enrollments was presented.

### 9. Discussion and Possible Action on Operational Agreement between United States Department of Agriculture, NRCS, and Jefferson County Land & Water Conservation Committee:

The proposed Operational agreement was presented by Mark Watkins. See attached. After a brief discussion Frank Anfang made a motion to sign the Operational Agreement between United States Department of Agriculture, NRCS, and Jefferson County Land & Water Conservation Committee & Department, Pete Hartz seconded. Motion carried 6/0.

### 10. Discussion on Hoard's Dairyman Manure Pit:

Mark Watkins updated the committee on Hoard's Dairyman Manure pit. There isn't a repair plan in place and the pit remains idle. A new repair plan is anticipated for the site and will be presented when available.

### 11. Discussion and Possible action on the Jefferson County Potter's Field Landmark Designation:

The Jefferson County Historical Sites Commission spoke with Mark Watkins in regard to making Potter's Field a local landmark. Gregg Patrick made a motion to accept the recommendation to make Jefferson County

Potter's Field a local landmark through the Jefferson County Historical Sites Commission, Frank Anfang seconded. Motion carried 7/0. Ed Morse will convey the LWCC's position at the next Historic Sites Commission meeting.

**12. Discussion on Memorandum of Understanding Between the City of Oconomowoc and Jefferson County Land and Water Conservation Department and Committee:**

Patricia Cicero spoke to the committee about the memorandum. See attached. Ed Morse made a motion to accept the memorandum, Pete Hartz seconded. Motion carried 7/0.

**13. Discussion on Farmland Preservation Program (FPP) - Nancy Lannert:**

Nancy Lannert gave a report to the committee in regard to the Farmland Preservation Program. See attached.

**14. Discussion and Possible Action on Notices of Noncompliance - Farmland Preservation Program (FPP):**

Larry & Debra Braatz, John & Beverly Hachtel, Susan Halser, Halser Farm Enterprise, Inc, Helen, Charles & Thomas Jacobson, Donald & Kathleen Kleckner, Robert & Herta Laatsch, Richard & Marlene Schroedl, John Spangler, Luke Wiedenfeld, David Zoellick

Frank Anfang made a motion to accept the notices, Gregg Patrick seconded. Motion carried 7/0.

**15. Discussion and Possible Action on Cancellations of Notices of Noncompliance - FPP:**

There were no cancellations at this time.

**16. Review of the Monthly Financial Report (May):**

The most recent statement of revenues and expenditures (May) was distributed. See attached. Mark Watkins informed the committee that the 2017 Budget request is almost complete and will be brought to the August meeting for committee review.

**17. Discussion on Federal Reimbursement for the Wilke Easement:**

Mark Watkins - LWCD received Federal Reimbursement for the Wilke easement. The Wilke easement is now complete. Monitoring of the easement will be ongoing.

**18. Discussion and Possible Action on Purchase of Agriculture Conservation Easements (PACE) Applications - Cliff Haberman, Town of Waterloo:**

Mark Watkins - Cliff Haberman's easement is on track. NRCS has a few minor changes to the deed language and Gerry Kokkonen is working with them to get Haberman's easement language finalized. Closing of the easement to follow.

**19. Discussion on Jefferson County Land & Water Conservation Report on Baseline Documentation for Easements:**

Mark Watkins - All easements are meeting standards. LWCD will continue to monitor.

**20. Discussion on Items for the Next Agenda:**

Possible agenda items include: #8, #10, #14 - 16, #18 - 20, NR 151, High Capacity Wells

**21. Next Scheduled Meeting:**

- August 17, 2016 @ 8:00 in Room 112

**22. Adjournment**

Frank Anfang made a motion to adjourn at 9:30 am, Gregg Patrick seconded. Motion carried 7/0.

**DATCP REPORT**August 2016

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**Soil and Water Resource Management Grants**

- DATCP presented the 2017 preliminary allocation plan to the Land and Water Conservation Board at its August 2<sup>nd</sup> meeting. DATCP proposes to allocate \$8,739,100 for county staffing grants, \$5,353,000 for Bond and Nutrient Management cost-sharing grants, including the \$350,000 for the Bond Reserve, and \$780,800 in cooperator grants.

**Producer-Led Watershed Protection Grants**

- A webinar was held on Wednesday, August 3<sup>rd</sup> to cover updates to the Request for Proposals (RFP) and thoroughly review proposal requirements for the Producer-Led Watershed Protection Grants for Fiscal Year 2017 funding. A recording of the webinar and further details can be found on the DATCP website<sup>1</sup>.
- Applications are being accepted for Producer-Led Watershed Protection Grants. Applications are due September 1st. More information and application materials can be found on the DATCP website.
- DATCP continues to work on the permanent rule for the program, which will be ATPC 52.

**Conservation Reserve Enhancement Program**

- DATCP continues to offer CREP training for counties that covers CREP basics, county CREP responsibilities, and available tools. Trainings can be held locally and are a good opportunity for all partner agencies (LCD, FSC, NRCS, and DATCP) to convene and review CREP in their area. Contact [Brian.Loeffelholz@wisconsin.gov](mailto:Brian.Loeffelholz@wisconsin.gov).
- A reminder that Brian Loeffelholz is the point of contact until further notice for 15 year agreement applications, cost share payments, buyouts and other items previously handled by Kris Modaff who recently retired. Susan Mockert is also assisting with the management of CREP 15 year agreement applications and payments.
- DATCP now requests that all new CREP 15 year agreements and applications be submitted electronically via a secure FTP site. A user name and password is required. Please give Brian Loeffelholz a call to receive the password.
- The CREP webpages containing the most recent CREP forms and materials are available on the agency's updated website. The 3 primary pages; "Main"<sup>2</sup>, "For Landowners"<sup>3</sup>, and "For Counties"<sup>4</sup>.

**Nutrient Management**

- Wisconsin Nutrient Management Implementation Work Groups are scheduled for Aug. 25, 25, 30, Sept. 1, and 13 in Richland Center, Jefferson, Oshkosh, Eau Claire, and Antigo, respectively. The agenda covers the new SnapMaps software that links directly to the restriction maps and fills the Snap Field Screen automatically, review of revised NM checklist for the 2015 590 standard, and information on UW-Extension yield potential designations, and NRCS soil erosion calculations, and the impacts to NM planning. The sessions last from 9:30 to 12:30 and are free. CUEs will be available.

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<sup>1</sup> [https://datcp.wi.gov/Pages/Programs\\_Services/ProducerLedProjects.aspx](https://datcp.wi.gov/Pages/Programs_Services/ProducerLedProjects.aspx)

<sup>2</sup> [https://datcp.wi.gov/Pages/Programs\\_Services/CREP.aspx](https://datcp.wi.gov/Pages/Programs_Services/CREP.aspx)

<sup>3</sup> [https://datcp.wi.gov/Pages/Programs\\_Services/CREPLandowners.aspx](https://datcp.wi.gov/Pages/Programs_Services/CREPLandowners.aspx)

<sup>4</sup> [https://datcp.wi.gov/Pages/Programs\\_Services/CREPCounties.aspx](https://datcp.wi.gov/Pages/Programs_Services/CREPCounties.aspx)

### **Farmland Preservation**

- On August 2<sup>nd</sup> staff met with representatives from towns in Vernon and Monroe counties to discuss implementing farmland preservation zoning in towns where no previous zoning existed.

### **Drainage Districts**

- Beginning September 1st, drainage boards will have three months to hold a hearing on their annual reports. Covering the period from September 1, 2015 to August 31, 2016, the annual report provides the results of annual and storm-related inspections and tracks all work performed in each district over the past year. These annual meetings offer a snapshot of ongoing drainage maintenance and planning for next year's maintenance activities. Contact your county drainage board if you would like to attend their annual meeting this fall.

### **Other**

- DATCP has been invited to submit a final proposal for a Regional Conservation Partnership Program project within the AEAs in Lafayette County. The project proposes to address water quality issues within the project area through increased conservation practices and participation in farmland preservation. The project relies upon strong partnerships to increase outreach about conservation needs and opportunities in the area. The final proposal is due September 19.

Jefferson County  
Land & Water Conservation Totals

Date Ran 7/21/2016  
Period 6  
Year 2016

| Business Unit              | Description                   | Current Period<br>Actual | Current Period<br>Budget | YTD<br>Actual | YTD<br>Budget | Prorated<br>Variance | Total<br>Budget | Annual<br>Remaining | Percentage<br>Of Budget |
|----------------------------|-------------------------------|--------------------------|--------------------------|---------------|---------------|----------------------|-----------------|---------------------|-------------------------|
| 7001 Land & Water          | Revenue                       | (115,801.75)             | (47,196.08)              | (288,118.69)  | (283,176.50)  | (4,942.19)           | (566,353.00)    | (278,234.31)        | 50.87%                  |
|                            | Expenditures                  | 47,250.55                | 47,196.08                | 279,658.93    | 283,176.50    | (3,517.57)           | 566,353.00      | 286,694.07          | 49.38%                  |
|                            | Other Sources                 | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Total                         | (68,551.20)              | (0.00)                   | (8,459.76)    | -             | (8,459.76)           | -               | 8,459.76            | 0.00%                   |
| 7002 Wild Life Crop        | Revenue                       | (2,549.68)               | (1,666.67)               | (2,824.68)    | (10,000.00)   | 7,175.32             | (20,000.00)     | (17,175.32)         | 14.12%                  |
|                            | Expenditures                  | -                        | 1,666.67                 | 2,824.68      | 10,000.00     | (7,175.32)           | 20,000.00       | 17,175.32           | 14.12%                  |
|                            | Other Sources                 | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Total                         | (2,549.68)               | -                        | -             | -             | -                    | -               | -                   | 0.00%                   |
| 7007 Nutrient Manage       | Revenue                       | -                        | (20.83)                  | (150.00)      | (125.00)      | (25.00)              | (250.00)        | (100.00)            | 0.60                    |
|                            | Expenditures                  | -                        | 20.83                    | 60.08         | 125.00        | (64.92)              | 250.00          | 189.92              | 0.24                    |
|                            | Other Sources                 | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Total                         | -                        | -                        | (89.92)       | -             | (89.92)              | -               | 89.92               | -                       |
| 7008 County Cost Share     | Revenue                       | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Expenditures                  | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Other Sources                 | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Total                         | -                        | -                        | -             | -             | -                    | -               | -                   | 0.00%                   |
| 7009 Hope Lake             | Revenue                       | -                        | -                        | (1,853.90)    | -             | (1,853.90)           | -               | 1,853.90            | #DIV/0!                 |
|                            | Expenditures                  | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Other Sources                 | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Total                         | -                        | -                        | (1,853.90)    | -             | (1,853.90)           | -               | 1,853.90            | 0.00%                   |
| 7010 Resources             | Revenue                       | -                        | (4,083.33)               | (6,727.00)    | (24,500.00)   | 17,773.00            | (49,000.00)     | (42,273.00)         | 13.73%                  |
|                            | Expenditures                  | 18,620.00                | 4,083.33                 | 25,347.00     | 24,500.00     | 847.00               | 49,000.00       | 23,653.00           | 51.73%                  |
|                            | Other Sources                 | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Total                         | 18,620.00                | 0.00                     | 18,620.00     | -             | 18,620.00            | -               | (18,620.00)         | 0.00%                   |
| 7011 Non Metallic          | Revenue                       | 1,426.25                 | (40.42)                  | 8,557.50      | (242.50)      | 8,800.00             | (485.00)        | (9,042.50)          | -1764.43%               |
|                            | Expenditures                  | 0.48                     | 40.42                    | 25.62         | 242.50        | (216.88)             | 485.00          | 459.38              | 5.28%                   |
|                            | Other Sources                 | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Total                         | 1,426.73                 | (0.00)                   | 8,583.12      | -             | 8,583.12             | -               | (8,583.12)          | 0.00%                   |
| 7012 Mud Lake              | Revenue                       | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Expenditures                  | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Other Sources                 | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Total                         | -                        | -                        | -             | -             | -                    | -               | -                   | -                       |
| 7013 Rome Ponds            | Revenue                       | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Expenditures                  | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Other Sources                 | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Total                         | -                        | -                        | -             | -             | -                    | -               | -                   | 0.00%                   |
| 7014 Gypsy Moth Program    | Revenue                       | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Expenditures                  | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Other Sources                 | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Total                         | -                        | -                        | -             | -             | -                    | -               | -                   | 0.00%                   |
| 7016 Southern Area         | Revenue                       | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Expenditures                  | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Other Sources                 | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Total                         | -                        | -                        | -             | -             | -                    | -               | -                   | 0.00%                   |
| 7019 Farmland Preservation | Revenue                       | (97,579.35)              | (26,362.50)              | (97,953.56)   | (158,175.00)  | 60,221.44            | (316,350.00)    | (218,396.44)        | 0.31                    |
|                            | Expenditures                  | 51.65                    | 44,907.33                | 150,366.63    | 269,443.99    | (119,077.36)         | 538,887.98      | 388,521.35          | 0.28                    |
|                            | Other Sources                 | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Total                         | (97,527.70)              | 18,544.83                | 52,413.07     | 111,268.99    | (58,855.92)          | 222,537.98      | 170,124.91          | -                       |
| 7020 County Farm           | Revenue                       | 8,684.83                 | (122.50)                 | (735.02)      | (735.00)      | (0.02)               | (1,470.00)      | (734.98)            | 50.00%                  |
|                            | Expenditures                  | 146.75                   | 122.50                   | 379.99        | 735.00        | (355.01)             | 1,470.00        | 1,090.01            | 25.85%                  |
|                            | Other Sources                 | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Total                         | 8,831.58                 | -                        | (355.03)      | -             | (355.03)             | -               | 355.03              | 0.00%                   |
| Total All Business Units   | Revenue                       | (205,819.70)             | (79,492.33)              | (389,805.35)  | (476,954.00)  | 87,148.65            | (953,908.00)    | (564,102.65)        | #DIV/0!                 |
|                            | Expenditures                  | 66,069.43                | 98,037.17                | 458,662.93    | 588,222.99    | (129,560.06)         | 1,176,445.98    | 717,783.05          | #DIV/0!                 |
|                            | Other Sources                 | -                        | -                        | -             | -             | -                    | -               | -                   | #DIV/0!                 |
|                            | Grand Total Land Conservation | (139,750.27)             | 18,544.83                | 68,857.58     | 111,268.99    | (42,411.41)          | 222,537.98      | 153,680.40          | #DIV/0!                 |

**SUPREME COURT OF WISCONSIN**

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CASE No. : 2009AP2021

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COMPLETE TITLE:

Lake Beulah Management District,  
Plaintiff-Appellant-Petitioner,

v.

Village of East Troy,  
Defendant-Respondent.

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REVIEW OF A DECISION OF THE COURT OF APPEALS

2010 WI App 127

Reported at: 329 Wis.2d 641, 791 N.W. 2d 385  
(Ct. App. 2010 - Published)

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OPINION FILED: July 6, 2011

SUBMITTED ON BRIEFS:

ORAL ARGUMENT: April 13, 2011

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SOURCE OF APPEAL:

COURT: CIRCUIT COURT  
COUNTY: WALWORTH COUNTY  
JUDGE: ROBERT J. KENNEDY

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JUSTICES:

CONCURRED:

DISSENTED:

NOT PARTICIPATING:

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ATTORNEYS:

For the plaintiff-appellant-petitioner there were briefs and oral argument by *Dean P. Laing*, and *O'Neil, Cannon, Hollman, DeJong & Laing S.C.*

For the defendant-respondent there was a brief and oral argument by *Paul G. Kent*, *Barbara A. Neider* and *Stafford Rosenbaum LLP*.

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2009AP2021  
(L.C. No. 2008CV915)

STATE OF WISCONSIN

:

IN SUPREME COURT

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Lake Beulah Management District,

Plaintiff-Appellant-Petitioner,

v.

Village of East Troy,

Defendant-Respondent.

**FILED**

**JUL 6, 2011**

A. John Voelker  
Acting Clerk of Supreme  
Court

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REVIEW of a decision of the Court of Appeals. *Affirmed.*

¶1 N. PATRICK CROOKS, J. This is a review of a published decision of the court of appeals<sup>1</sup> concluding that Lake Beulah Management District's (LBMD) ordinance, purporting to regulate and require permits for certain wells that withdraw water from the area around Lake Beulah, was invalid as preempted by the legislature's grant of authority to the Department of Natural Resources (DNR) to regulate high capacity wells. LBMD brought a declaratory judgment action seeking to enforce the

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<sup>1</sup> Lake Beulah Mgmt. Dist. v. Vill. of E. Troy, 2010 WI App 127, 329 Wis. 2d 641, 791 N.W.2d 385.



ordinance in regard to a high capacity municipal well, Well No. 7, for which the Village of East Troy (the Village) had obtained a permit from the DNR. The Village moved the circuit court for summary judgment, asserting, as relevant to our review, that the ordinance was invalid as preempted by state law. The circuit court granted the Village's motion for summary judgment and the court of appeals affirmed.

¶2 We conclude that the ordinance is invalid because it conflicts with, defeats the purpose of, and violates the spirit of the legislature's delegation of authority to the DNR to regulate high capacity wells in Wis. Stat. § 281.11 and § 281.12 (2007-08)<sup>2</sup> and its creation of a comprehensive permitting framework for high capacity wells in Wis. Stat. § 281.34 and § 281.35. Thus, the ordinance is preempted by state law.

¶3 Therefore, we affirm the decision of the court of appeals.

#### I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

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<sup>2</sup> All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise indicated.

¶4 The ordinance, while applicable to any diversion of surface water out of the Lake Beulah Hydrologic Basin,<sup>3</sup> was adopted primarily in response to the Village of East Troy's plans to construct a high capacity municipal well, Well No. 7. Initially, LBMD unsuccessfully petitioned for judicial review of the DNR's decision to issue the 2003 permit for Well No. 7.<sup>4</sup> While continuing with its appeal of that decision and a challenge to the DNR's subsequent 2005 permit for Well No. 7, LBMD chose to pursue other methods to ensure that Well No. 7 did not impact Lake Beulah.

¶5 On December 11, 2006, LBMD adopted an ordinance that prohibits the diversion of water from the Lake Beulah Hydrologic

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<sup>3</sup> The ordinance defines the Lake Beulah Hydrologic Basin as "the geographic region or territory whose boundaries include all of the Lake Beulah Surface Water Drainage Basin and all of the Lake Beulah Groundwater Basin." The Lake Beulah Surface Water Drainage Basin includes "[t]he geographic region or territory whose boundaries include all those lands and waters on which water deposited at the ground surface would, if prevented from infiltrating into the soil, flow by gravity to a point where it would enter into Lake Beulah." The Lake Beulah Groundwater Basin includes "[t]he three dimensional region whose boundaries encompass that portion of the aquifer known variously as the shallow, unconsolidated, or sand and gravel aquifer, within which the groundwater, if it were unaffected by pumping or other artificial inducement, would flow into, beneath or within the Lake Beulah Surface Water Drainage Basin."

<sup>4</sup> For a detailed history of LBMD's legal challenges to the DNR's permits for Well No. 7, see our decision in the related case reviewing the DNR's decision to issue the 2005 permit for Well No. 7, Lake Beulah Management District v. Department of Natural Resources (DNR), 2011 WI 54, ¶¶8-21, \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.2d \_\_\_, and the court of appeals decision in this case, Lake Beulah Management District v. Village of East Troy, 329 Wis. 2d 641, ¶¶2-3.

Basin without a permit from LBMD.<sup>5</sup> To obtain a permit pursuant to the ordinance, the applicant is required to explain the purpose of the proposed diversion and "include a thorough environmental study" emphasizing the potential impact of the diversion on Lake Beulah and its surrounding environment, including the groundwater aquifer.<sup>6</sup> The ordinance further

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<sup>5</sup> The ordinance provides that the following are prohibited acts:

It shall be unlawful and prohibited by this Ordinance for any person or entity to do any of the following unless such acts are authorized in advance by and performed in conformance with a valid permit issued by the District pursuant to this Ordinance:

A. Divert or transfer surface water out of the Lake Beulah Surface Water Drainage Basin.

B. Divert, transfer, or induce the diversion or transfer of groundwater out of the Lake Beulah Groundwater Basin.

E. Withdraw groundwater from within the Lake Beulah Groundwater Basin and then divert or transfer said water out of the Lake Beulah Groundwater Basin.

<sup>6</sup> The portion of the ordinance describing the permit process provides in relevant part:

No use or action may be initiated, undertaken or continued that would be in violation of this Ordinance except in accordance with a permit issued by the District. A request for a permit for such use or action must be submitted to the Board of Commissioners for approval. The petition, together with any documents or records that support the petition, must clearly state the grounds upon which the petitioner requests the permit including, at minimum, a concise statement of the purpose of the request, the annual volume of water to which the request applies and the number of years the petitioner seeks for the approval or permit to remain in effect. In addition, said

provides that a permit may not be granted "if the net effect would be adverse to Lake Beulah or the public health, comfort, convenience, and welfare of the District." Additionally, the ordinance does not allow LBMD to grant a permit for a diversion "unless a volume of water equal to at least 95% of the water actually diverted or transferred is returned to the Hydrologic Basin" in a manner that mitigates adverse effects.

¶6 The Village began constructing Well No. 7 in 2006 after receiving the 2005 permit from the DNR. The Village has been operating Well No. 7 since August 1, 2008.

¶7 The parties do not dispute that Well No. 7 is within the Lake Beulah Hydrologic Basin as that term is defined in the ordinance. However, shortly after LBMD enacted the ordinance, the Village informed LBMD that the Village believed that LBMD lacked the legal authority to promulgate the ordinance and, in

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petition must include a thorough environmental study of the proposed use or action with emphasis on the potential impacts of such use or action on the following: Lake Beulah; groundwater and surface water contributing to Lake Beulah; wetlands adjacent to Lake Beulah or any surface water tributary to Lake Beulah; private wells in the District; and groundwater supplying any private well in the District. Petitioner may request an opportunity to testify and present evidence at a hearing conducted by the Board of Commissioners. The permit shall be granted only upon the majority decision of the Board of Commissioners based upon the [prescribed] procedure[s].

any event, according to Wis. Stat. § 33.22(4),<sup>7</sup> LBMD could not exercise its powers in an incorporated municipality such as the Village without the municipality's consent.

¶8 Given the Village's position, on July 22, 2008, LBMD sought a declaratory judgment in the Walworth County Circuit Court providing that the ordinance was valid and enforceable as to the Village. The Village moved for summary judgment arguing that, under Wis. Stat. § 33.22, LBMD lacked the authority to enact an ordinance regulating the Village and also lacked the authority to exercise its powers extraterritorially. Further, the Village argued that the ordinance was preempted by state law. The Walworth County Circuit Court, the Honorable Robert J. Kennedy presiding, granted the Village's motion for summary judgment and declared the ordinance "void and unenforceable in that it conflicts with state law," and also "invalid as applied to the Village."

¶9 LBMD appealed, and the court of appeals affirmed on the basis that the ordinance is preempted by state law. The court of appeals noted that the legislature granted the DNR broad authority to regulate waters of the state in Wis. Stat.

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<sup>7</sup> Wisconsin Stat. § 33.22(4) provides in relevant part: "Districts shall not exercise the town sanitary district powers authorized under sub. (3) within the boundaries of an incorporated municipality unless the governing body of the municipality consents."

LBMD was originally a sanitary district encompassing the area around Lake Beulah, and in 1995 the Town of East Troy converted the sanitary district into a lake district, LBMD, pursuant to Wis. Stat. § 33.235(1m).

chs. 280 and 281. Lake Beulah Mgmt. Dist. v. Vill. of E. Troy, 2010 WI App 127, ¶¶12-13, 329 Wis. 2d 641, 791 N.W.2d 385. The legislature explicitly stated that its goal was "to create a 'comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state.'" Id., ¶13 (quoting Wis. Stat. § 281.11). The court of appeals applied the test for preemption set forth in DeRosso Landfill Co., Inc. v. City of Oak Creek, 200 Wis. 2d 642, 651-52, 547 N.W.2d 770 (1996), and concluded that "the Ordinance logically conflicts with, defeats the purpose of, and violates the spirit of the legislature's delegation of authority to the DNR," and thus is preempted. Lake Beulah Mgmt. Dist. v. Vill. of E. Troy, 329 Wis. 2d 641, ¶17.

¶10 LBMD petitioned this court for review, which we granted. We review whether the ordinance is preempted by state law.<sup>8</sup>

## II. ANALYSIS

¶11 "The question of whether a statute preempts a municipal ordinance raises a question of law which we review independently, benefitting from the analyses of the circuit court and the court of appeals." DeRosso, 200 Wis. 2d at 652.

¶12 LBMD's argument regarding preemption is related to the Village's argument in a related case before this court regarding

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<sup>8</sup> The parties also address LBMD's authority to enact the ordinance and enforce it as to the Village. Because we conclude that the ordinance is preempted by state law, we do not address the arguments regarding LBMD's authority.

LBMD's challenge to the 2005 permit for Well No. 7. See Lake Beulah Mgmt. Dist. v. Dep't of Natural Res. (DNR), 2011 WI 54, \_\_ Wis. 2d \_\_, \_\_ N.W.2d \_\_. In that case, the Village argued that where no formal environmental review or findings are required, the DNR lacked the authority to consider the impact of a proposed high capacity well for which a permit is required under Wis. Stat. § 281.34(2). Id., ¶28. In this case, LBMD argues that if the DNR does not have the authority to consider the impact of a proposed well on Lake Beulah, then the ordinance cannot conflict with the DNR's regulatory authority for high capacity wells in Wis. Stat. ch. 281. Significantly, LBMD conceded in its briefs, and at oral argument, that if the DNR does have the authority to consider the impact of a proposed high capacity well on waters of the state such as Lake Beulah, then the ordinance conflicts with the state statute providing such authority, Wis. Stat. ch. 281.

¶13 The Village argues that the statutory framework directing the DNR to regulate and issue permits for high capacity wells precludes conflicting local regulation. The Village asserts that the ordinance's permitting framework, which imposes requirements on wells authorized by the statute and the DNR, conflicts with and contravenes the statute. For example, the Village notes that, according to its interpretation of the statute, the permitting framework requires environmental review only for three specific categories of wells with a capacity of between 100,000 and 2,000,000 gallons per day (gpd), and wells with a capacity of over 2,000,000 gpd, and the ordinance

purports to require environmental review for wells when that is not required by the statute. The Village further argues that the 2005 permit for Well No. 7 provides a specific example of the ordinance's conflict with the statute because, while the DNR authorized Well No. 7, the ordinance purports to require an additional permit and would also prohibit the well as it currently operates because the Village does not return the water to Lake Beulah.

¶14 We addressed the question of the DNR's authority and duty to consider the potential harm to waters of the state when evaluating an application for a proposed high capacity well in a related case in which LBMD challenged the DNR's decision to issue the 2005 permit for Well No. 7. Lake Beulah Mgmt. Dist. v. DNR, \_\_ Wis. 2d \_\_, ¶¶1-5. In that case, we held that "the DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state." Id., ¶3 (footnote omitted). Given our holding in Lake Beulah Management District v. DNR, and despite LBMD's concession noted herein that its ordinance, based on our holding, conflicts with and is preempted by Wis. Stat. ch. 281, we feel it is appropriate to examine independently the issue. Is the ordinance preempted by the legislature's grant of authority to the DNR to regulate wells and manage and protect waters of the state pursuant to Wis. Stat. ch. 281?

¶15 Local regulation is preempted by state law when "(1) the legislature has expressly withdrawn the power of municipalities to act; (2) it logically conflicts with state



legislation; (3) it defeats the purpose of state legislation; or (4) it violates the spirit of state legislation." DeRosso, 200 Wis. 2d at 651-52 (footnotes omitted). Examining the ordinance in light of the legislature's delegation of authority to the DNR to regulate wells, we conclude that it is preempted based on the second, third, and fourth prongs of the DeRosso test.

¶16 The ordinance logically conflicts with the legislature's framework directing the DNR to regulate high capacity wells and also granting the DNR the authority to manage waters of the state. The legislature has chosen the DNR to "serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private." Wis. Stat. § 281.11. The legislature has further provided that the purpose of Wis. Stat. ch. 281 is "to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state." Id. The framework for the comprehensive program within which the DNR regulates high capacity wells is set forth in Wis. Stat. § 281.34 and § 281.35.

¶17 This case provides an example of how the ordinance runs counter to the state statute. The DNR has issued a permit to the Village to operate Well No. 7 pursuant to Wis. Stat. § 281.34(2). The ordinance purports to require an additional permit from LBMD, which would require the submission of information in addition to what the Village was required to submit to the DNR, and would actually prohibit Well No. 7 from

operating as it currently does, because the Village does not return the water to the Lake Beulah Hydrologic Basin.

¶18 For the same reason, the ordinance frustrates the legislature's purpose in creating a comprehensive regulatory scheme under the DNR. As we have explained in a similar context, if a local ordinance prohibits what the DNR has authorized pursuant to the statutes, its rules, and its role as manager of water resources, that ordinance is preempted because it frustrates the purpose of the state law. Wis. Env'tl. Decade, Inc. v. Dep't of Natural Res., 85 Wis. 2d 518, 535-36, 271 N.W.2d 69 (1978) ("Allowing the City of Madison to prevent treatment which the DNR has authorized, and thereby frustrate the [DNR's] program of water resource management, defeats clear legislative purpose to establish the [DNR] as 'the central unit of state government' with 'general supervision and control over the waters of the state.'").

¶19 The permitting scheme that the ordinance imposes in addition to the comprehensive permitting scheme in Wis. Stat. § 281.34 and § 281.35 does not merely provide additional requirements, but as this case demonstrates, may prohibit the operation of a high capacity well that is authorized by the DNR under the statute. Where the legislature has "adopted a complex and comprehensive statutory structure," an ordinance that runs counter to that structure violates the spirit of the legislation and is preempted. DeRosso, 200 Wis. 2d at 652 n.8 (quoting Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984)).

III. CONCLUSION

¶20 We conclude that the ordinance is invalid because it conflicts with, defeats the purpose of, and violates the spirit of the legislature's delegation of authority to the DNR to regulate high capacity wells in Wis. Stat. § 281.11 and § 281.12 and its creation of a comprehensive permitting framework for high capacity wells in Wis. Stat. § 281.34 and § 281.35. Thus, the ordinance is preempted by state law.

¶21 Therefore, we affirm the decision of the court of appeals.

*By the Court.*—The decision of the court of appeals is affirmed.

# **Wisconsin Water Law in the 21st Century**

**Understanding Water Rights and Regulations**

**Paul G. Kent**

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involve a state trunk highway, consent of the Department of Transportation is required.<sup>172</sup>

A separate provision applies to extension of services to unincorporated areas (towns). A city or village can construct extensions of water or sewer systems within a town, with town approval.<sup>173</sup> However, approval of the town is not required if the sewer or water extension through town lands does not provide service for town residents.<sup>174</sup> Another alternative, if town approval cannot be obtained, is to consider annexing the land into the city or village.<sup>175</sup>

The second scenario involving utility facilities outside of municipal boundaries is where a neighboring municipality is seeking service from the municipality with the utility. Municipalities can provide water services to surrounding communities by contract.<sup>176</sup> As noted above, wholesale contracts require PSC approval. Alternatively, municipalities could form a joint utility commission with one or more surrounding communities.<sup>177</sup>

While service outside of municipal boundaries is possible, it should be noted that a city, village or town is not *required* to extend service to adjoining municipalities and may limit the provision of utility service in unincorporated areas.<sup>178</sup> A city or village can also condition the provision of service upon annexation.<sup>179</sup>

**Combined Utilities.** Municipalities can form a combined sewer and water utility.<sup>180</sup> However, these are not common because the combined utility is subject to PSC rate review when normally a sewer utility rates are not subject to PSC review.<sup>181</sup>

#### 6.04c(2) Joint Water Authority

Municipalities can also form joint local water authorities and sell water to its constituent municipalities, which then sell water to their residents.<sup>182</sup> Water authorities are public corporations that have the duties, privileges, immunities,

172. Wis. Stat. § 86.16. See *City of Appleton v. Transp. Comm'n*, 116 Wis. 2d 352, 342 N.W.2d 68 (Ct. App., 1983); and *Town of Barton v. Div. of Hearings & Appeals*, 2002 WI App 169, 256 Wis. 2d 628, 649 N.W.2d 293.

173. Wis. Stat. § 60.52.

174. *Dannelson v. City of Sun Prairie*, 2000 WI App 227, 239 Wis. 2d 178, 619 N.W.2d 108.

175. Wis. Stat. § 66.0223.

176. These arrangements can be intergovernmental agreements under Wis. Stat. § 66.0301 or contracts.

177. Wis. Stat. § 66.0301 allows communities to pursue jointly what they have the power to do individually.

178. Wis. Stat. § 66.0813.

179. See *Town of Hollie v. City of Chippewa Falls*, 105 Wis. 2d 533, 314 N.W.2d 321 (1982), where the

rights, liabilities and disabilities of a public body but do not have taxing power.<sup>183</sup> Authorities can include any local government unit including special purpose districts and tribes as well as general purpose local governments.<sup>184</sup> They have very broad powers including the powers to construct water projects, the power of eminent domain, the ability to contract debt, employ personnel, and enter contracts.<sup>185</sup>

Water authorities are not public utilities for purposes of rate review by the PSC.<sup>186</sup> However, projects for which bonds are issued are subject to review by the PSC for a determination of public convenience and necessity.<sup>187</sup>

#### 6.04c(3) Town Sanitary Districts and Municipal Water Districts

Town sanitary districts are typically thought of as providing certain sewer services, but they may also provide water services. A sanitary district is a separate entity from the town board.<sup>188</sup> A sanitary district may be created by the town board or by order of the DNR.<sup>189</sup> The district may project, plan, construct and maintain a water, solid waste collection and sewerage system.<sup>190</sup> A sanitary district has the authority to enact ordinances within the district and to finance its projects.<sup>191</sup>

A town, village or city could in theory also form municipal water districts through an election process.<sup>192</sup> Such districts can buy property, build and operate facilities, issue revenue bonds, provide water directly to customers among other things. However, to date, no municipal water districts have been created under this provision.

#### 6.04d Municipal Regulatory Authority Over Water Supply

##### 6.04d(1) Municipal Ordinances and Preemption

The authority of local governments to enact ordinances regulating wells and groundwater withdrawal is limited in several respects. First, there is an express preemption provision that limits local authority. Counties have been given authority to enact a well construction or pump installation ordinance in strict conformity with Wis. Stat. ch. 280. As noted above, Chapter 280 gives the DNR

183. Wis. Stat. § 66.0823(6).

184. Wis. Stat. § 66.0823(3).

185. Wis. Stat. § 66.0823(5).

186. Wis. Stat. § 196.01(5)(b)5.

broad powers to regulate well construction, among other powers.<sup>193</sup> Municipalities other than counties are expressly preempted from enacting such ordinances. Wis. Stat. § 59.70(6)(e) provides as follows:<sup>194</sup>

*Other municipalities.* No municipality may enact or enforce an ordinance regulating matters covered by ch. 280 or by department rules under ch. 280.

This does not, however, prevent municipalities from enacting ordinances required or authorized by the statutes or DNR regulations as noted below.

Second, courts have rejected attempts by towns and special purpose districts to regulate or restrict municipal wells from neighboring municipalities when those wells have been authorized by the DNR.<sup>195</sup> The courts have held that such ordinances conflict with the provisions of State law giving DNR authority to regulate wells.

#### 6.04d(2) Local Zoning, Wellhead Protection and Source Water Assessment

Not all local authority has been preempted. Local governments do have the authority to protect groundwater resources through planning and zoning activities.<sup>196</sup> These activities can take the form of general zoning restrictions or restrictions to protect municipal wells including wellhead protection zones.<sup>197</sup>

**Wellhead Protection.** In Wisconsin, the wellhead protection program is a collection of voluntary and mandatory initiatives.<sup>198</sup> The DNR requires that the owner of any municipal well submit a wellhead protection plan for approval before the

193. Wis. Stat. § 280.11 enumerates the DNR's powers and states in part that the DNR, "shall have general supervision and control of all methods of obtaining groundwater for human consumption including sanitary conditions surrounding the same, the construction or reconstruction of wells and generally to prescribe, amend, modify or repeal any rule or regulation theretofore prescribed and shall do and perform any act deemed necessary for the safeguarding of public health."

194. Similar language is found in DNR rules at Wis. Admin. Code § NR 845.03.

195. In *City of Fond du Lac v. Town of Empire*, 273 Wis. 2d 341, the attempt of the Town of Empire to prohibit wells larger than 6 inches was rejected because it conflicted with the comprehensive regulatory authority the Legislature granted the State Board of Health. More recently, in *Lake Bendah Mgmt. Dist. v. Vill. of East Troy*, 2011 WI 55, ¶16, 335 Wis. 2d 92, 799 N.W. 2d 787, the Supreme Court again found that a lake district ordinance designed to prohibit a proposed village well, was preempted because, "[t]he ordinance logically conflicts with the legislature's framework directing the DNR to regulate high capacity wells and also granting the DNR the authority to manage waters of the state."

196. This includes cities, Wis. Stat. § 62.23(7)(c); towns, Wis. Stat. § 60.61(2)(g); and counties, Wis. Stat. § 59.69(1). The Dane County Lakes and Watershed Commission also has express

well is placed into service.<sup>199</sup> Among other things, the owner must identify the exchange area and zones of influence of the well, groundwater flow direction, and potential contaminant sources and must establish a wellhead protection area. The DNR and other agencies also require that certain activities such as sewers, landfills, lagoons, waste disposal sites, pesticide mixing and loading and other activities maintain setbacks from public water supply wells.<sup>200</sup> A wellhead protection plan is also required for new municipal water systems prior to being placed into service.<sup>201</sup>

DNR also encourages local governments to establish wellhead protection zones for existing public water supplies. To facilitate this process, the DNR continues to assist with the following activities: delineating wellhead protection areas for all public water supply wells, investigating potential contaminant sources within such areas, providing educational and technical assistance to municipalities, and developing management approaches to protect designated areas.<sup>202</sup>

**Connection and Cross Connection Ordinances.** Municipalities seeking to create a *new* community water system or make improvements to existing systems must have ordinances that prohibit cross connection of private and public water systems. Among other things, this may require abandonment of private wells when a community water system is available.<sup>203</sup>

Apart from this requirement, the DNR requires that municipalities implement a program for the regulation of wells which are not part of the municipal system but are located on premises that are served by the municipal system.<sup>204</sup> This rule does not mandate abandonment of existing wells, but does require that the municipality implement a permit system to regulate such wells. A municipal permit under this provision must be renewable every five years to ensure that operation is in compliance with NR 812. Among other things, the permit requires an evaluation by a licensed well driller and a prohibition on cross connections.

A separate statutory section authorizes municipalities to require a person to connect with a municipal system if the system provides service adjacent to the property.<sup>205</sup>

199. Wis. Admin. Code § NR 811.12(6). The DNR wellhead protection program plan was approved by the U. S. Environmental Protection Agency in 1993. The plan requires that a wellhead protection plan be developed for any municipal well proposed after May 1, 1992. See <http://dnr.wi.gov/topic/DrinkingWater/WellheadProtection/programSummary.html>.

200. For a complete listing of these regulations, see DNR, *State of Wisconsin Wellhead Protection*