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*Please respond to: Metro Milwaukee Office  
Attorney William P. Scott  
Email: [wps@dewittross.com](mailto:wps@dewittross.com)*

June 1, 2007

**VIA HAND DELIVERED**

Clerk of Courts  
WALWORTH COUNTY COURTHOUSE  
1800 County Rd, NN  
Elkhorn, Wisconsin 53121

RE: *Lake Beulah Lake Management District, et al. v. State of Wisconsin DNR, et al.*

Dear Clerk:

Please find enclosed the original and six (6) copies of the Petition for Judicial Review with respect to the above-referenced matter. I have enclosed our firm's check in the amount of \$135.00 in payment of the filing fee.

By copy of this letter, a copy of the petition will be hand delivered and served on the Department of Natural Resources and the Village of East Troy.

Should you have any questions, please do not hesitate to contact my office.

Sincerely,

DEWITT ROSS & STEVENS, S.C.

  
William P. Scott

WPS:vjs  
Enclosures

cc: Judith Mills Ohm, Esq. (w/enclosures)  
Paul G. Kent, Esq. (w/enclosures)  
Dennis L. Fisher, Esq. (w/enclosures)

Lake Beulah Management District  
P.O. Box 71  
East Troy, WI 53120-0071,  
Petitioner/Plaintiff,

And

Lake Beulah Protective and  
Improvement Association  
330 Sterling Road  
Kenilworth, IL 60043,  
Co-Petitioner/Plaintiff,

Case No. \_\_\_\_\_  
Administrative

vs.

Scott Hassett, Secretary of  
State of Wisconsin Department of  
Natural Resources  
101 South Webster Street  
P.O. Box 7921  
Madison, WI 53120,  
Respondent-Defendant,

And

Village of East Troy  
2106 Church Street  
P.O. Box 166  
East Troy, WI 53121,  
Interested Party.

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**PETITION FOR JUDICIAL REVIEW**

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Petitioner, Lake Beulah Management District and Petitioner, Lake Beulah Protective and Improvement Association, collectively referred to hereafter as the "Petitioners," by their undersigned attorneys, DeWitt Ross & Stevens, S.C. and William P. Scott, and Meissner Tierney Fisher & Nichols, S.C. and William T. Stewart, pursuant to Wis. Stats. § 227.52, hereby petition the Court for judicial review of the Final Decision dated May 3, 2007 by the Wisconsin

Department of Natural Resources (“Department” or “DNR”) in the matter entitled Petition for Contested Case Hearing Regarding DNR Issuance of an “Approval of a Modification of the Water Facilities Plan and Specification Approval for a High Capacity Well to the Village of East Troy” dated March 16, 2007 (the “Approval”). In support of their Petition, Petitioners allege and state as follows:

1. Petitioner Lake District is the Lake Beulah Management District (the “Lake District”), a municipal corporation existing pursuant to Chapter 33 of the Wisconsin Statutes, with a mailing address of P.O. Box 71, East Troy, Wisconsin 53120-0071. The Lake District was created to protect and rehabilitate the waters of Lake Beulah (the “Lake”). The Lake District has the powers of both an inland lake improvement district and a sanitary district, as provided by the Wisconsin statutes and applicable law, including the power to undertake projects to protect the quality of the Lake and to plan, construct and maintain water and sewer systems as necessary for the promotion of the public health, comfort, convenience or welfare of the Lake District.

2. Petitioner Lake Association is the Lake Beulah Protective and Improvement Association (the “Lake Association”), a non-profit, unincorporated association whose purposes include the general improvement and protection of the Lake, and the streams and waters adjacent thereto, the buying and selling of real and personal property in connection therewith, and the promotion of the general improvement and safe enjoyment of the Lake, its streams and the natural resources and habitat thereof. The Lake Association has a mailing address of 330 Sterling Road, Kenilworth, Illinois 60043.

3. The Department is a Department of the State of Wisconsin, as that term is defined and used in Wis. Stats. Ch. 227. The Department is charged with the regulation of high capacity water wells under § 281.34, Wis. Stats., protection of the waters of the State including surface

waters, groundwater and wetlands under Wis. Stats. §§ 281.11, 281.12, 281.15 and Wis. Adm. Code §§ NR 103.03, 103.06 and 103.08, protection of the navigable waters under Wis. Stats. Ch. 30, and protection of the navigable waters in conformance with the Public Trust Doctrine as required by the Wisconsin Constitution, Article IX, Section 1, and as that Doctrine has been interpreted by the courts (the Public Trust duties of the Department require it to protect and preserve the navigable waters), conservation of fish and game under Wis. Stats. § 29.014, conservation of non-game species under Wis. Stats. § 29.039, and conservation of endangered and threatened species under Wis. Stats. § 29.064. The Department's offices are located at 101 South Webster Street, P.O. Box 7921, Madison, Wisconsin 53120.

### FACTS

4. Pursuant to Wis. Stats. § 281.17 (2001-02), the Village applied to the DNR on June 20, 2003, for a permit to construct a high capacity well (the "Application"). The maximum capacity for the proposed well is 1,440,000 gallons per day. The proposed well is located within ¼ mile of the southern end of Lake Beulah, an 834 acre navigable groundwater dependent body of water situated northeast of the Village.

5. At the time of the Application, Wis. Stats. § 281.17 provided as follows:

(1)(a) A well may not be constructed, installed, or operated to withdraw groundwater where the capacity and rate of withdrawal of all wells on one property is in excess of 100,000 gallons a day without first obtaining the approval of the department.

(b) The department shall withhold its approval or grant a limited approval under which it imposes such conditions as to location, depth, pumping capacity, rate of flow, and ultimate use that will ensure all of the following:

1. That the water supply of any public utility engaged in furnishing water to or for the public will not be impaired.

2. That the well meets the grounds for approval under § 281.35, if applicable.

6. The Application did not address the potential impact on the Lake from the proposed withdrawal of substantial amounts of groundwater. The DNR reviewed the Application, but it likewise did not undertake any analysis of whether the proposed high capacity well, to be installed in the same groundwater aquifer that connects with and provides groundwater to nearby Lake Beulah, might adversely impact the Lake or other environmental features properly protected by the Public Trust Doctrine. The DNR granted conditional approval of the Application on September 4, 2003.

7. The Lake District and the Lake Association separately petitioned the Walworth County Circuit Court for review of the ALJ's June 11, 2004 Ruling and June 16, 2004 Amended Ruling on Motion for Summary Disposition dismissing the Petitioners' objections to the well. The trial court entered judgment on July 15, 2005 in favor of the Village. The Lake District and the Lake Association appealed that decision in Case Nos. 2005AP002230 and 2005AP002231 (the "Appeal").

8. In an August 3, 2005 letter, the Village informed the DNR that the September 4, 2003 initial well approval required construction to commence by September 4, 2005. Since construction had not begun, the Village informed the DNR that it was "*requesting a modification of the existing permit to extend the date for two years to allow the appeals to be completed.*"

9. The August 3, 2005 request discussed the subsequent change in the well permit statute. The Village asserted there was no need for a new permit application or new analysis:

the groundwater law has been renumbered and additional criteria have been added for high capacity wells in certain locations...Wis. Stats. §§ 281.34(4) and (5)(b)-(e) require an environmental review and additional standards for wells in a groundwater protection area, wells that create a water loss of more than 95 percent, wells that impact springs, or wells that exceed 2,000,000 gallons per day. None of those conditions are present here. *As a result, the same standard that applied in the original review is still applicable to this well...Since neither the*

*relevant law nor facts have changed since our last application, we do not believe any additional analysis is required to allow the extension of the well approval.*

10. On September 6, 2005, the DNR granted the Village's request for an *extension* of the Approval. The DNR stated that it had considered the request for the extension under the new statute, Wis. Stats. § 281.34(4) and (5), and it was granting the request under the new statute.

11. However, in the Appeal, the DNR and the Village asserted that the Appeal was moot, relying on the DNR's explicit *extension*, dated September 6, 2005 of the Village's well permit, because the Approval had lapsed and the September 5, 2005 extension was actually a new approval and not, contrary to the letter itself, an extension of the Approval. This new argument was contrary to the Village's request for an extension of its permit and DNR's grant of "an extension of the original approval..."

12. On March 3, 2006, Petitioners filed a Petition for Judicial Review of the September 6, 2005 permit issued by the Department in Walworth County as Case No. 06CV172. The parties stayed the action on the Petition pending the Appeal of the September 4, 2003 Approval.

13. On March 16, 2007, the Department issued a "Modification of the Water Facilities Plan and Specification Approval" permitting the Village to move Well No. 7 approximately 12 feet (see **Exhibit A**).

14. On April 13, 2007, Petitioner's filed with the Department a Petition for Contested Case Hearing on the March 16, 2007 modification (see **Exhibit B**).

15. On or about May 3, 2007, the Department mailed its final decision for Petition for Contested Case Hearing Regarding DNR Issuance of an Approval of a Modification of the Water Facilities Plan and Specification Approval for a High Capacity Well to the Village of East Troy ("Final Decision"). A true and complete copy of the Final Decision is attached as **Exhibit C**.

The DNR, in the Final Decision, granted a contested case hearing on only a limited subset of the issues upon which Petitioners sought a contested case hearing.

16. By letter dated May 25, 2007, the Lake District asked the Court to remove the stay on Walworth County Case No. 06CV172.

#### **VENUE**

17. Pursuant to Wis. Stats. § 227.53(1)(a)(3), Walworth County is the proper venue for this proceeding because the Village of East Troy Well No. 7 (“Well No. 7”), covered by the Approval, is located in Walworth County.

#### **RIGHT TO JUDICIAL REVIEW UNDER WIS. STATS. § 227.52**

18. The Final Decision is improper, does not protect the environment or the waters of the state, and is inconsistent with the DNR’s obligations under the Wisconsin Statutes and the Public Trust Doctrine. Petitioners have petitioned for and are entitled to a full hearing of the issues upon which hearing has been sought. The DNR has given no justification for its denial as required by Wis. Stats. § 227.42(2).

19. Petitioners allege that the DNR’s Approval constitutes a new approval, according to precedent and prior position of the DNR, for which environmental impact assessment analysis is required pursuant to Wis. Stats. §§ 1.11 and 281, Wis. Adm. Code NR 103.08, and the DNR’s obligations under the Public Trust Doctrine, but there is no evidence in the record to show that such analysis was performed.

20. Petitioners allege that the Department, in granting a new approval or modification of prior approval, may not rely on the granting of a prior approval for a high capacity well to satisfy the requirement to the perform environmental impact study without first demonstrating

such study fully complies with all requirements and issues presented by the full scope of the project subject to the new approval at the time the new approval is granted.

21. Petitioners allege that any satisfaction of the Department's obligation to perform environmental impact analysis arising under Wis. Stats. § 281.34 is insufficient to meet the Department's similar, but independent, obligations arising under Wis. Stats. § 1.11, the Public Trust Doctrine and Wis. Adm. Code NR 103.

22. The Final Decision should be set aside, modified and/or remanded on the following grounds:

- A. The Department ignored or erroneously interpreted and misapplied relevant provisions of state law including Wis. Stats. §§ 1.11, 281.11, 281.12, 281.5, 281.34, and Wis. Adm. Code §§ NR 103.03, 103.06, 103.08 and Wisconsin Constitution Article IX, Section 1, as the latter has been interpreted by the Wisconsin Supreme Court.
- B. In particular, the Final Decision should be set aside, modified, or remanded because the Final Decision is:
  - i. Inconsistent with the requirements of Wis. Stats. § 1.11 because the Department [undertook insufficient environmental review or] has no evidence in the record to show that it undertook sufficient environmental review to determine that the Approval or the cumulative effect of the Approval taken together with related underlying Approval, was not a major state action.
  - ii. Inconsistent with the requirements of Wis. Stats. § 1.11 because the Department has not "to the fullest extent possible" interpreted and administered policies and regulations in accordance with the policies set forth in Ch. 274, Laws of 1971, section 1, as required by Wis. Stats. § 1.11(1).
  - iii. Inconsistent with the requirements of Wis. Stats. § 281.11 because the actions and omissions of the Department in approving Well No. 7 without evidence in the record of appropriate environmental impact review and analysis are contrary to state policy because they do not "protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private."

- iv. Inconsistent with the requirements of Wis. Stats. § 281.12 because the actions and omissions of the Department as the state Department with general supervision and control over the waters of the state are inconsistent with the policy objectives of Wis. Stats. § 281.11 to have DNR implement a “comprehensive program...for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private.”
  - v. Inconsistent with the requirements of Wis. Stats. § 281.15 because the water quality standards promulgated as Wis. Adm. Code NR 103 were promulgated pursuant to Wis. Stats. § 281.15, which requires the Department to interpret the rules to protect “the general public interest,” as in protecting the public rights in the navigable waters of the Lake for the benefit of present and future generations, and not the specific interest of the Village of East Troy in making determinations and approvals regarding Well No. 7. Additionally, the DNR’s construction of its duties under the Wisconsin Constitution, statutes, administrative codes and trust doctrine are inconsistent with the policy objectives of Wis. Stats. §§ 281.11 and 281.15 when in fact Wis. Stats. § 281.11 requires the Department’s construction and actions to “be liberally construed in favor of the policy objectives set forth in this subchapter.”
- C. This Court should set aside the Department action because the Department has erroneously interpreted a provision of law and the correct interpretation compels a particular action.
- i. The Department ignored or erroneously interpreted and misapplied relevant case law. In particular, the Final Decision is inconsistent with the requirements of that case law because it treats the Approval as a mere modification, when in fact precedent and DNR policy dictate that such modification is actually a new approval which requires full environmental review. This Court must act to prevent the DNR from relying upon a prior approval for the requisite environmental review without affirmatively demonstrating that any environmental review performed for such prior approval fully meets the requirements of the full, combined scope of all related approvals at the time of issuance of the most recent modification or approval. This latter point is especially important because there is no evidence in the record to indicate the DNR ever undertook adequate prior environmental review.
- D. This Court should reverse and remand the case to the Department if it finds that the Department’s exercise of discretion is outside the range of

discretion delegated to the Department by law or is inconsistent with any Department policy or prior Department practice, if deviation there from is not explained to the satisfaction of the Court by the Department or is otherwise in violation of a constitutional or statutory provision.

- i. In this matter, the Department has exceeded the scope of its discretion and violated the Wisconsin Constitution and prior Department practice involving treatment of modifications as new approvals by not performing full environmental review of the combined scope of all related approvals and modifications pertaining to Well No. 7. There is no evidence in record that moving Well No. 7 or allowing Well No. 7 to be located at the location allowed by the Approval will *not* have an unacceptable adverse impact on the environment, nearby wells, nearby wetlands, springs, navigable waters, waters of the state, threatened or endangered species or a public utility engaged in furnishing water for the public, such as the District is doing under its powers as a town sanitary district.
- ii. Wis. Stats. § 1.11(1) requires the DNR “to use all practicable means...to improve and coordinate plans, functions, programs and resources to the end that the state may “...fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; [and]...obtain the widest range of “beneficial uses of the environment while attempting to minimize degradation, risk to health or safety or other undesirable or other intended consequences....”
  - (a) The legislative intent of the act that created Wis. Stats. § 1.11, Ch. 274, Laws of 1971 is “...to declare a policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment...and to enrich the understanding of the important ecological systems and natural resources” (1971 Assembly Bill 875; creating Ch. 274, Laws of 1971; published April 28, 1972).
  - (b) Given the legislative intent behind Wis. Stats. § 1.11, it is inconceivable that the DNR, which Wis. Stats. § 281.11 names as the Department with primary responsibility for conservation and protection of the waters of the state and improvement of the quality and management of the waters of the state, would interpret its responsibilities and obligations to avoid any opportunity to fully investigate the environmental impact of an action that is threatening the navigable waters and the Public Trust values lying therein with regard to scenery, fishing wildlife, plants, recreation

and other public rights that may yet develop as future generations compete for their rights to this important resources of the state. The Public Trust duties of the DNR require that it take every opportunity to uphold the Trust.

23. The Final Decision is an administrative decision adversely affecting Petitioners' substantial interests, as defined in Wis. Stats. § 227.52., and as such is subject to judicial review under Chapter 227. Petitioners' interest in the Final Decision is based on the Lake District's specific standing and substantial interest arising from its holding of statutory delegated responsibility from the Wisconsin Legislature which includes protection of the Lake. The Lake District believes the Lake will be injured in fact or threatened with injury if Well No. 7 is to be operated at the Department's approved location. The Lake District and its electors are riparian owners of property along the shores of the Lake, with a reasonable investment-backed expectation that the Department will protect the Public Trust in the navigable waters, including the Lake, against groundwater withdrawals that are harmful to the Lake by, at minimum, performing a thorough environmental review as required by statutes, Wis. Adm. Code NR 103.08, and as required as a fiduciary obligation of the active trust which is delegated to the Department by the legislature under Wis. Stats. §§ 281 and 30. The Department should be stopped from issuing modification to prior approvals that were granted upon insufficient environmental review.

24. The Department's obligation under the Public Trust Doctrine involves an active duty to affirmatively protect the navigable waters of the Lake. That active duty prevents the Department from narrowly focusing its attention only on a portion of the proposed activity in making a determination on whether to grant a modified approval. The cumulative impact of the entire proposed activity must be reviewed anew with each new approval or modification of Approval that is granted by the Department.

25. The Lake District has specific standing and a substantial interest in this matter because:

- A. it holds a statutory delegation of responsibility which includes the protection of the Lake, which the Lake District believes will be injured in fact or threatened with injury if the Department's Approval dated March 16, 2007 permits the Village's Well No. 7 to be located in its current location at the site of monitoring well MW-1 in the previously approved specifications;
- B. Well No.7 will intercept and remove groundwater that would otherwise sustain the Lake, thus causing harm to Lake Beulah contrary to the goals and values of the Lake Association;
- C. the Approval makes it possible for Well No. 7 to be located where it will intercept and divert the groundwater out of the Lake drainage basin before such groundwater can discharge into and sustain the Lake;
- D. the Approval makes it possible for Well No. 7 to be located where it will damage the sensitive wetlands at and adjacent to the Lake and adversely alter the physical properties of the Lake by adversely changing the temperature of the Lake or portions thereof and adversely affecting water quality of the Lake and causing and perpetuating the cumulative adverse impacts to the Lake and its biota which will result from those changes;
- E. the Approval makes it possible for Well No. 7 to be located where it will encourage an adverse change in species of biota inhabiting the Lake thus increasing the work load of the Lake District in cutting weeds;

- F. the Approval makes it possible for Well No. 7 to be located where it will harm the use and enjoyment of the Lake by the Electors of the Lake District and the Members of the Lake Association;
- G. the Approval makes it possible for Well No. 7 to be located where it will reduce property values of the Lake District and its Electors and the property values of the Members of the Lake Association and the value of the tax base upon which the Lake District depends to carry out its statutory duties;
- H. the Approval makes it possible for Well No. 7 to be located where it will subject the Lake District to claims for failure to uphold its legal duty to protect the Lake; and
- I. the Approval makes it possible for Well No. 7 to be located where it will reduce the groundwater available to supply the wells of the Lake District's Electors and impair the ability of the Lake District to provide to its Electors a single enterprise water system or any part or combination thereof.

26. We ask the Court to set aside the approval dated September 6, 2005 because there is no evidence that the Department conducted any environmental impact analysis of the location of the approved well that the Department is now trying to rely on in stating that the "Modification" dated March 16, 2007 will not have an adverse impact prior to issuing the Approval. The statutes, administrative code, and Public Trust Doctrine compel the DNR to first make environmental impact studies prior to granting any high capacity well approval for a well in the location of the approved well, and because the DNR has erroneously made a conclusion of

law that the "Modification" is not a new approval, when the correct interpretation of law is governed by precedent established by the DNR in an appellate court holding that modifications are new approvals.

27. We also ask the Court to compel the DNR to perform the full review of the underlying approval dated September 6, 2005, including review required by Wis. Stats. § 1.11, because there is no evidence in the record that moving the well or allowing a well to be located in the location allowed by the Approval will not have an unacceptable adverse impact on the environment, nearby wells, wetlands, springs, and the Lake as a whole.


**WHEREFORE**, Petitioners, Lake Beulah Management District and Lake Beulah Protective and Improvement Association respectfully requests that the Court:

- A. Set aside, modify and/or remand the Final Decision; and
- B. Award such other and further relief as the Court deems appropriate.

Dated this 1st day of June 2007.

Respectfully submitted,

LAKE BEULAH MANAGEMENT DISTRICT

BY: 

William P. Scott, State Bar No.: 1003685

DEWITT ROSS & STEVENS S.C.

13935 Bishop's Drive, Suite 300

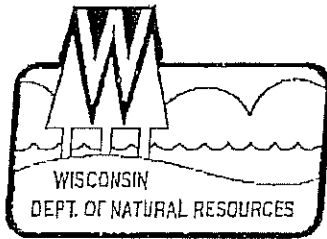
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LAKE BEULAH PROTECTIVE AND IMPROVEMENT  
ASSOCIATION

BY: William T. Stewart *WTS*  
William T. Stewart, State Bar No.: 1023839  
Meissner Tierney Fisher & Nichols, S.C.  
111 East Kilbourn Avenue – 19<sup>th</sup> Floor  
Milwaukee, WI 53202-6622



## State of Wisconsin | DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor  
 Scott Hassett, Secretary  
 Gloria L. McCutcheon, Regional Director

Southeast Region Headquarters  
 2300 N. Dr. Martin Luther King, Jr. Drive  
 Milwaukee, Wisconsin 53212-3128  
 Telephone 414-263-8500  
 FAX 414-263-8483  
 TTY 414-263-8713

March 16, 2007

MS JUDY WETER, CLERK  
 VILLAGE OF EAST TROY  
 PO BOX 166  
 EAST TROY WI 53120-0166

Project Number: W-2003-0665C  
 PWSID#: 26501233  
 DNR Region: SOUTHEAST  
 County: WALWORTH

SUBJECT: MODIFICATION OF THE WATER FACILITIES PLAN AND SPECIFICATION APPROVAL.

Dear Ms. Weter:

The Wisconsin Department of Natural Resources, Division of Water, Bureau of Drinking Water and Groundwater, is conditionally approving a modification for the following project. The project review included review of an engineering report or information of sufficient detail to meet the requirements of NR 811.13(3).

Water system name: Village of East Troy Water Utility  
 Date received: 2/22/07; lot line adjustments drawing 3/8/09/07  
 Professional Engineer: Kelly L. Zylstra - Crispell Snyder, Inc.  
 Regional DNR Contact: Thaninir Ratarasam - Waukesha Service Center  
 Project description: Location of Well No. 7

The location of Well No. 7 is being moved from the test well site to the monitoring well (MW-1) site. The distance between the test well site and MW-1 site is approximately 12 feet.

Based upon the information contained in the submittal, no changes have been made with regards to the specifications for the construction of Well No. 7. All of the NR 811.16(4)(d) setbacks will be maintained at the new location for Well No. 7. The property lines will be adjusted as shown on the drawing submitted on March 8, 2007. All sanitary sewer line within 200 feet of the new Well No. 7 site will be modified to comply with water main piping standards.

The proposed modification will not affect the anticipated pumping capacity of Well No. 7.

Variances being issued to Chapter NR 811, Wis. Adm. Code: None

Approval conditions related to Chapter NR 811, Wis. Adm. Code:

1. All approval conditions, stated in the Department's original letter, dated September 4, 2003, and subsequent modification, dated May 25, 2006, remain in effect.
2. Well No. 7 shall be located on property owned by the Village of East Troy Water Utility.
3. Well No. 7 shall be located a minimum of 50 feet from any property boundary.

Approval conditions related to other Department requirements: None

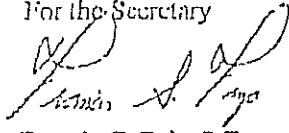
MS. JUDY WETER - 03/16/2007

PAGE 2

Appeal rights: The project was reviewed in accordance with s. 281.41, Statutes for compliance with Chapters NR 108 and NR 811 Wis. Adm. Code and is hereby approved in accordance with s. 281.41, Statutes subject to the conditions listed above. If you believe you have a right to appeal this decision, you may file a written request for a contested case hearing pursuant to s. 227.42, Wis. Stats., or file for judicial review under s. 227.52 and 227.53, Statutes. You have 30 days after this approval is mailed to file your written request for hearing or file and serve your petition for judicial review. Your request for hearing or petition for judicial review must name the Secretary of the Department as respondent. This notice is provided pursuant to s. 227.48, Statutes.

STATE OF WISCONSIN  
DEPARTMENT OF NATURAL RESOURCES

For the Secretary



Francis G. Fuja, P.E.  
Plan Review Engineer  
Telephone No. 414-263-8749

cc: Kelly Zylstra -- Crispell Snyder, Inc., Lake Geneva Office  
Thaninr Raturasarn -- SER Waukesha Service Center  
Judy Ohm -- LS/5  
Lee Boushon -- DG/2  
Fuja - DG Reviewer at SER Milwaukee  
Paul G. Kent -- Anderson & Kent, S.C., 1 N. Pinckney St. Suite 200, Madison, WI 53703  
Dennis L. Fisher -- Meissner, Tierney, Fisher & Nichols, 111 E. Kilbourn Ave., 19<sup>th</sup> Floor,  
Milwaukee, WI 53202-6622  
David V. Menny -- DeWitt, Ross & Stevens, 13935 Bishop's Drive, Brookfield, WI 53005  
Peter Pencht - PSC

**STATE OF WISCONSIN  
DEPARTMENT OF NATURAL RESOURCES**

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In the Matter of the Department's March 16, 2007  
"Modification of the Water System Facilities  
Plan and Specification Approval" for the proposed  
the Village of East Troy, Wisconsin, Municipal No. 7

**Lake Beulah Management District,**  
c/o David Skotarzak  
P.O. Box 71  
East Troy, WI 53120-0071

And

**Lake Beulah Protective and Improvement Association**  
c/o Meissner Tierney Fisher & Nichols, S.C.  
111 East Kilbourne Ave. - 19<sup>th</sup> Floor  
Milwaukee, WI 53202-6622

Petitioners,

v.

**Scott Hassett, Secretary of the State of Wisconsin**  
**Department of Natural Resources**  
101 South Webster Street  
P.O. Box 7921  
Madison WI 53120,

Respondent,

And

**Village of East Troy**  
c/o Paul Kent, Attorney  
2106 Church Street  
P.O. Box 166  
East Troy, WI 53121

Interested Party.

---

**PETITION FOR CONTESTED CASE HEARING**

---

**Now Comes** the Lake Beulah Management District (the "Lake District"), by its attorneys, DeWitt Ross & Stevens S.C., and the Lake Beulah Protective and Improvement Association ("Lake Association"), by its attorneys, William T. Stuart and Meisner, Tierney, Fisher & Nichols, S.C., with a Petition for Contested Case Hearing pursuant to Wisconsin Statutes § 227.42, and request that a hearing be held as a contested case under Section 227.42, Wis. Stat. as further set forth below.

**IDENTIFICATION AND NATURE OF THE PETITIONERS**

1. Petitioner Lake District is the Lake Beulah Management District (the "Lake District"), a municipal corporation existing pursuant to Chapter 33 of the Wisconsin Statutes, with a mailing address of P.O. Box 71, East Troy, Wisconsin 53120-0071. The Lake District exists at the pleasure of its Electors for the express purpose of carrying out a program of lake protection and rehabilitation with respect to the waters of Lake Beulah (the "Lake"). The Lake District has the powers of both an inland lake improvement district and a sanitary district, as provided by the statutes and applicable law, including undertaking projects to protect the quality of the Lake and planning, constructing and maintaining water and sewer systems as necessary for the promotion of the public health, comfort, convenience or welfare of the Lake District.

2. Petitioner Lake Association is a nonprofit unincorporated association whose purposes include the general improvement and protection of Lake Beulah, and

the streams and waters adjacent thereto, the buying and selling of real and personal property in connection therewith, and the promotion and taking of action tending to the general improvement and safe enjoyment of the Lake, its streams and the natural resources and habitat thereof. The Lake Association has a mailing address of 1019 Rooster Run, Middleton, Wisconsin 53562-3872.

**AGENCY ACTION OR INACTION WHICH IS BASIS FOR THIS  
REQUEST FOR HEARING**

3. The agency action or inaction which is the basis for the request of hearing is as follows:

a. On March 16, 2007 the Department issued a "Modification of the Water Facilities Plan and Specification Approval" pertaining to the Village of East Troy Well No. 7 (the "Approval") (attached hereto as Exhibit "A"). That is the action which is the basis of this request for contested case hearing. The Approval allows Well No. 7 to be constructed at a location where it will injure the Petitioner's substantial interests, injure the public rights in the navigable waters of the State in violation of the Public Trust doctrine, injure the shoreland wetland located nearby at the shore of Lakes Beulah in violation of NR 103.08, Wis. Admin. Code, all as further set forth in this Petition.

b. When the Department issued the Approval it did so without performing mandatory duties required of the Department before taking such actions, including: failure to review final plans and specifications under NR

108.04(3), Wis. Admin. Code showing the well at the new location; failure to ensure the location criteria were met as prescribed by § NR 811.16(4), Wis. Admin. Code; failure to perform the work required under §§ NR 103.06(1)(b) and NR 103.08, Wis. Admin. Code; and failure to affirmatively carry out its duties as Trustee under the Public Trust doctrine with respect to the navigable waters of Lake Beulah and water of the state. This is the inaction which is the basis of this request for contested case hearing.

**SUBSTANTIAL INTEREST INJURED OR THREATENED WITH INJURY BY  
AGENCY ACTION OR INACTION**

4. The issuance of the March 16, 2007 modification of the Water System Facilities Plan and Specifications Approval (the "Approval") by the Department threatens injury to the Lake, the Lake District and its Electors, and the Lake Association and its Members. The Substantial interests of the Petitioners and their Electors and Members that are injured in fact or threatened with injury by the Approval include all of the following:

a) The Lake District has specific standing and a substantial interest in this matter because it holds a statutory delegation of responsibility which includes the protection of the Lake, which the Lake District believes will be injured in fact or threatened with injury if the Department's Approval dated March 16, 2007 permits the Village of East Troy Well No. 7 to be located in its current location at the site of monitoring well MW-1 in the previously approved specifications.

b) The Lake Association has a substantial interest in this matter because Well #7 will intercept and remove groundwater that would otherwise sustain Lake Beulah, thus causing harm to Lake Beulah contrary to the goals and values of the Lake Association.

c) The Approval makes it possible for Well No. 7 to be located where it will intercept and divert the groundwater out of the Lake drainage basin before such groundwater can discharge into and sustain the Lake;

d) The Approval makes it possible for Well No. 7 to be located where it will damage the sensitive wetlands at and adjacent to the Lake and adversely alter the physical properties of the Lake by adversely changing the temperature of the Lake or portions thereof and adversely affecting water quality of the Lake and causing and perpetuating the cumulative adverse impacts to the Lake and its biota which will result from those changes;

e) The Approval makes it possible for Well No. 7 to be located where it will encourage an adverse change in species of biota inhabiting the Lake thus increasing the work load of the Lake District in cutting weeds.

f) The Approval makes it possible for Well No. 7 to be located where it will harm the use and enjoyment of the Lake by the Electors of the Lake District and the Members of the Lake Association;

g) The Approval makes it possible for Well No. 7 to be located where it will reduce property values of the Lake District and its Electors and the property

values of the Members of the Lake Association and the value of the tax base upon which the Lake District depends to carry out its statutory duties;

h) The Approval makes it possible for Well No. 7 to be located where it will subject the Lake District to claims for failure to uphold its legal duty to protect the Lake.

**INJURY TO PETITIONERS DIFFERS IN KIND OR DEGREE FROM  
INJURY TO GENERAL PUBLIC**

5. The Lake District and the Electors of the Lake District own fee simple title to real estate bordering the Lake, and thus the Lake District and such Electors possess both property rights to the land bordering on and impacted by the Lake and riparian rights in the waters, shore and bed of the Lake, and those rights are different in kind and degree than rights of the general public.

6. Unlike the general public, the Lake District has a legal duty to protect the Lake for which it may be held accountable. The Lake District is charged with protecting and rehabilitating the Lake to protect the Lake and the Lake District's and the Electors' substantial interests in and use and enjoyment of their property, their riparian property, their riparian rights and the quality of the Lake. Unlike the general public, the Lake District must contest the Department's injurious action or omission to carry-out its legal duty to protect the Lake. Therefore the Department's acts and omissions, which actually impair or threaten to impair the quality of the Lake, pose an injury to the Lake District which differs in kind or degree from the injury to the general public.

7. Because the Lake District draws its revenues from the Electors based on the value of their riparian property, and because the value of the Electors' riparian property would decrease if the Lake is injured, the Lake District's injury suffered as a result of the Department's action in the Approval of Well No. 7 is different in kind or degree to the injury suffered by the general public.

8. Groundwater flows from the southwest and discharges into the Lake with sufficient groundwater quality and quantity to support and sustain the present condition of the Lake. The location of Well No. 7 allowed by the Approval is near the area of the greatest groundwater flow into the Lake and therefore threatens to significantly harm the Lake by intercepting and substantially and materially reducing the natural and customary water supply to the Lake. Any harm to the Lake caused by the location of Well No. 7 will harm the Petitioner's interests differently in kind or degree than the harm that would result to the general public, as further explained in this Petition.

9. The Lake supports a shoreland wetland that the Department has classified as a Sensitive Area. That wetland serves important functions that preserve and improve the water quality of the Lake and any impairment of the wetland will cause or threaten injury to the Lake which will result in injury to the Petitioners that is different in kind and degree from injury to the general public as explained elsewhere in this Petition. The water table elevation in a monitoring well located at the wetland was observed to decrease during the test pumping of Well No. 7, but the Department has never performed its mandatory duties under Wisconsin Administrative Codes Sections NR

103.06(1)(b) or 103.08 with respect to water quality as related to initially approving Well No. 7 or any modification thereof.

10. Petitioners have a substantial interest in the matter for the reasons that the Lake has as its major source of water the groundwater that naturally discharges to the Lake, the most concentrated area and discharge being at the southwest end of the Lake, precisely where the Approval will allow Well No. 7 to be located so as to intercept substantial amounts of groundwater that is necessary to sustain the Lake. Any significant change in the volume, temperature or location of the groundwater discharging to the Lake will adversely affect the Lake by altering its physical properties including, without limitation, temperature and water chemistry, which in turn will adversely affect the aesthetic qualities of the Lake, and/or the use and enjoyment of the Lake by the riparian electors, and the ability of the Lake to support the plants, aquatic and other life forms known to live there. Changes in groundwater flow caused by the location of Well No. 7 will adversely affect the property values of the Electors and the tax base of the Lake District, thus making it more difficult for the Lake District to raise funds to accomplish its statutory authority and corporate purposes.

11. The Electors of the Lake District are aggrieved by the DNR's issuance of the Approval in a manner different in kind and degree from that of the general public because the electors own fee simple title to property on the shore of the Lake and other real property near the Lake, and their use and enjoyment of their property and the Lake will be adversely impacted and their property will be diminished in value if the Lake is

adversely impacted by physical changes caused by withdrawal of groundwater from the well approved by the DNR.

12. The threatened injuries to the Petitioners are different in degree from injury to the general public. The electors of the Lake District are riparian landowners. Riparian ownership includes rights in the navigable waters and waters of the state not common to the general public, such as the right to construct a pier.

13. The Lake District's injury as a result of the Approval is different in kind or degree from injury suffered by the general public because the physical condition of the Lake bears a direct relationship to the property values of the Electors and any decrease in property values will adversely impact the tax base of the Lake District and the Lake District's ability to carry out its statutory purpose, which is the maintenance and improvement of the Lake.

14. It is a power and duty of the Lake District to plan, maintain and provide water supply for its Electors, and the proposed well will adversely impact that water supply and the District's ability to maintain a water supply, render several of the Electors' wells unusable or significantly impaired, and compromise the District's ability to maintain and provide its Electors with a water supply.

#### **LEGISLATIVE INTENT TO PROTECT PETITIONERS' INTERESTS**

15. There is no basis for finding the legislature did not intend to protect the interest of the Petitioner's.

16. One basis for a finding that there is no evidence of legislative intent that the interest is not to be protected is that there is ample evidence that the interest is to be

protected. Specifically, Wisconsin Statutes § 1.11, § 281.11 and Wisconsin Administrative Code section NR 103.01, all set forth purposes which have not been served by the Department's action in awarding the Approval. Those statutes and regulations provide that all agencies of the State shall "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;" (Wis. Stat. § 1.11(2)(e)). They also provide that the Department "shall serve as a 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). Finally, the intent of NR 103 to protect wetlands and water quality are clear and were not served by the Department's granting of the Approval.

#### **DISPUTE OF MATERIAL FACT**

17. The Petitioners believe that the Department of Natural Resources has failed to perform any environmental analysis to comply with law which applies to this project including, without limitation, Wisconsin Administrative Code § NR 103.08, which is an integral part of the Department's responsibility to protect water quality of the navigable waters, groundwater, wetlands and protect the environment as a whole. Compliance with NR 103.08 is required by NR 103.06(1)(b) for permits and approvals under Chapter 281, Wis. Stats. The Lake has significant wetlands present along its shores. Those wetlands serve to protect the water quality of the Lake. A monitoring well located at those wetlands showed a decline in water table elevation during the pump test for Well No. 7. Therefore, the impact of allowing Well No. 7 to be located as

provided in the Approval upon those wetlands must be evaluated under NR 103.08, Wis. Admin. Code but the Department has failed to perform this evaluation.

~~It is a dispute of material fact that the Approval allows the Well No. 7 “to be moved” to the site of monitoring well MW 1, because Well No. 7 was already constructed in place, at that location, unlawfully, prior to issuance of the Approval on March 16, 2007. It is a dispute of material fact that Well No. 7, when it was constructed, was constructed in accordance with the well approval then in effect. It is a dispute of material fact that Well No. 7 when it was constructed, was constructed near the center of the lot or parcel, as required by Wisconsin Administrative Code Section NR 811.16(4). It is a dispute of material fact that Well No. 7, when it was constructed was constructed in excess of 200 feet from a sewer main as required by NR 811.16(4)(d)(2), Wis. Admin. Code. There is a dispute of material fact, whether the Well, when constructed was as allowed in the Approval, will be situated so as to be adequately separated from potential sources of contamination, including sanitary sewer mains, sanitary sewer manholes or lift stations, as required in NR 811.16 (4), Wis. Admin. Code.~~

18. ~~There is a dispute of material fact over whether the request for modification upon which the Approval is based was factual, since the well was already constructed prior to issuance of the Approval.~~

19. There is a dispute of material fact over whether the applicant for the Approval held a valid well approval at the time it sought modification leading to the March 16, 2007 Approval, thus, there is a dispute of material fact over whether the applicant is eligible to receive the Department’s further approval without full

investigation and process including, without limitation, full investigation of environmental impacts of the well in accordance with Chapter 281, Wis. Stats, the Department's affirmative duties under the Public Trust Doctrine and NR 103, Wis. Admin. Code.

20. DNR has an affirmative duty under the Public Trust doctrine to investigate the impacts of its actions in approving a high capacity well upon the navigable waters of the State of Wisconsin. There is a dispute of material fact over whether the Department has ever investigated the adverse impacts of East Troy Well #7 upon the navigable waters of Lake Beulah or the sensitive Shoreland-Wetland which is also a navigable water of the State and of which investigation is also required under NR 103.08, Wis. Stats. Admin. Code.

21. There is a dispute of material fact as to whether the Department is capable of upholding the duties of Trustee of the public rights in the navigable waters of the State, or whether a new Trustee should be appointed such as, the State Geologist or the Wisconsin Geological and Natural History Survey.

#### **RIGHT TO HEARING**

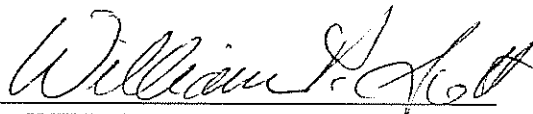
Petitioners' right to request a Contested Case hearing is set forth on page 2 of the Modification of the Water Facilities Plan and Specification Approval dated March 16, 2007, and in Wisconsin Statute Section 227.42.

**WHEREFORE**, the above-named Petitioners hereby request, pursuant to the Notice of the Petitioner's right to request a Contested Case hearing set forth on page 2 of the Modification

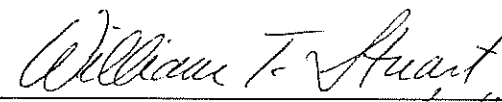
of the Water Facilities Plan and Specification Approval dated March 16, 2007, and in Wisconsin Statute Section 227.42, that a contested case hearing be scheduled.

Respectfully submitted this 13th day of April, 2007.

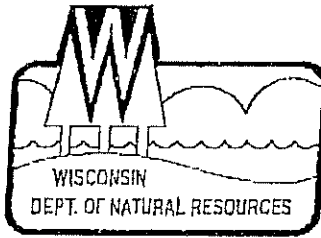
**LAKE BEULAH MANAGEMENT DISTRICT**

By:   
WILLIAM P. SCOTT  
(State Bar No. 01003685)

**LAKE BEULAH PROTECTIVE AND  
IMPROVEMENT ASSOCIATION**

By:  *by W.T.S.*  
WILLIAM T. STUART  
(State Bar No. 1023839)

cc: Village of East Troy, c/o Paul Kent, Esq/  
Attorney for Village of East Troy  
Wisconsin DNR, c/o Attorney Judy Ohm – LS/5  
David Skotarzak, Lake Beulah Management District



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor  
 Scott Hasselt, Secretary  
 Gloria L. McCutcheon, Regional Director

Southeast Region Headquarters  
 2300 N. Dr. Martin Luther King, Jr. Drive  
 Milwaukee, Wisconsin 53212-3128  
 Telephone 414-263-8500  
 FAX 414-263-8483  
 TTY 414-263-8713

March 16, 2007

MS JUDY WETER, CLERK  
 VILLAGE OF EAST TROY  
 PO BOX 166  
 EAST TROY WI 53120-0166

Project Number: W-2003-0665C  
 PWSID#: 26501233  
 DNR Region: SOUTHEAST  
 County: WAUWORTH

SUBJECT: MODIFICATION OF THE WATER FACILITIES PLAN AND SPECIFICATION APPROVAL.

Dear Ms. Weter:

The Wisconsin Department of Natural Resources, Division of Water, Bureau of Drinking Water and Groundwater, is conditionally approving a modification for the following project. The project review included review of an engineering report or information of sufficient detail to meet the requirements of NR 811.13(3).

Water system name: Village of East Troy Water Utility  
 Date received: 2/22/07; lot line adjustments drawing 3/8/09/07  
 Professional Engineer: Kelly L. Zylstra - Crispell Snyder, Inc.  
 Regional DNR Contact: Thaninr Ratarasam - Waukesha Service Center  
 Project description: Location of Well No. 7

The location of Well No. 7 is being moved from the test well site to the monitoring well (MW-1) site. The distance between the test well site and MW-1 site is approximately 12 feet.

Based upon the information contained in the submittal, no changes have been made with regards to the specifications for the construction of Well No. 7. All of the NR 811.16(4)(d) setbacks will be maintained at the new location for Well No. 7. The property lines will be adjusted as shown on the drawing submitted on March 8, 2007. All sanitary sewer line within 200 feet of the new Well No. 7 site will be modified to comply with water main piping standards.

The proposed modification will not affect the anticipated pumping capacity of Well No. 7.

Variances being issued to Chapter NR 811, Wis. Adm. Code: None

Approval conditions related to Chapter NR 811, Wis. Adm. Code:

1. All approval conditions, stated in the Department's original letter, dated September 4, 2003, and subsequent modification, dated May 25, 2006, remain in effect.
2. Well No. 7 shall be located on property owned by the Village of East Troy Water Utility.
3. Well No. 7 shall be located a minimum of 50 feet from any property boundary.

Approval conditions related to other Department requirements: None

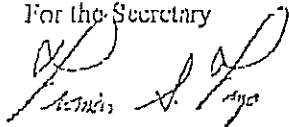
MS. JUDY WETER - 03/16/2007

PAGE 2

**Appeal rights:** The project was reviewed in accordance with s. 281.41, Statutes for compliance with Chapters NR 108 and NR 811 Wis. Adm. Code and is hereby approved in accordance with s. 281.41, Statutes subject to the conditions listed above. If you believe you have a right to appeal this decision, you may file a written request for a contested case hearing pursuant to s. 227.42, Wis. Stats., or file for judicial review under s. 227.52 and 227.53, Statutes. You have 30 days after this approval is mailed to file your written request for hearing or file and serve your petition for judicial review. Your request for hearing or petition for judicial review must name the Secretary of the Department as respondent. This notice is provided pursuant to s. 227.43, Statutes.

STATE OF WISCONSIN  
DEPARTMENT OF NATURAL RESOURCES

For the Secretary

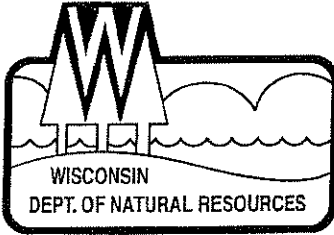


Francis G. Fuja, P.E.

Plan Review Engineer

Telephone No. 414-263-8749

cc: Kelly Zylstra - Crispell Snyder, Inc., Lake Geneva Office  
Thanintr Ratarasarn - SFR Waukesha Service Center  
Judy Ohm - LS/5  
Lee Boushon - DG/2  
Puja - DG Reviewer at SFR Milwaukee  
Paul G. Kent - Anderson & Kent, S.C., 1 N. Pinckney St. Suite 200, Madison, WI 53703  
Dennis L. Fisher - Meissner, Tierney, Fisher & Nichols, 111 E. Kilbourn Ave., 19<sup>th</sup> Floor,  
Milwaukee, WI 53202-6622  
David V. Meany - DeWitt, Ross & Stevens, 13935 Bishop's Drive, Brookfield, WI 53005  
Peter Pencht - PSC



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor  
Scott Hassett, Secretary

101 S. Webster St.  
Box 7921  
Madison, Wisconsin 53707-7921  
Telephone 608-266-2621  
FAX 608-267-3579  
TTY Access via relay - 711

May 3, 2007

William P. Scott  
DeWitt Ross & Stevens  
13935 Bishop's Drive  
Suite 300  
Brookfield, WI 53005-6605

SENT VIA FAX AND U.S. MAIL

RE: Petition for a Contested Case Hearing Regarding DNR Issuance of an Approval of a Modification of the Water Facilities Plan and Specification Approval for a High Capacity Well to the Village of East Troy

Dear Mr. Scott:

The Department of Natural Resources ("DNR") issued an approval of a modification to the Village of East Troy ("Village") regarding the location of Village Well No. 7 on March 16, 2007, allowing Well No. 7 to be moved approximately 12 feet, from the test well site to the monitoring well site. On April 13, 2007, you filed a Petition for Contested Case Hearing on behalf of the Lake Beulah Management District ("LBMD") and Lake Beulah Protective and Improvement Association ("LBPIA") regarding that approval. DNR hereby grants your request for a contested case hearing. The issues you raised for which a contested case hearing is granted are as follows:

1. Whether it was appropriate for DNR to conditionally approve a modification of the Village of East Troy's Water Facilities Plan and Specification Approval for a High Capacity Well to change the location of Well No. 7 without using the environmental review process under s. 1.11, Wis. Stats., to the extent that any requirement to use that process applies only to the change in location of Well No. 7.
2. Whether all of the s. NR 811.16(4)(d), Wis. Adm. Code, requirements for separation distances from potential sources of contamination were complied with, given that the location of Well No. 7 was changed.

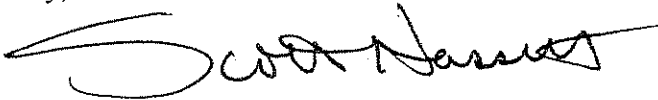
As to any other issues raised in the Petition, your request is denied. In particular, I would like to emphasize that DNR is not granting a contested case hearing to allow the Petitioners to challenge the provisions of the DNR approval issued to the Village on September 6, 2005. A contested case hearing was not requested on the 2005 approval and, in accordance with the exhaustion of remedies doctrine long at the core of administrative law, the Petitioners' challenge of the 2007 approval does not open up any aspects of the 2005 approval. See *Thiensville Village v. DNR*, 130 Wis. 2d 276, 281 (Ct. App. 1986).

**EXHIBIT C**

## NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that the Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed. For judicial review of a decision pursuant to sections 227.52 and 227.53, Wis. Stats., you must file your petition with the appropriate circuit court and serve the petition on the Department within the prescribed time period. Such a petition for judicial review must name the Department of Natural Resources as the respondent.

Sincerely,



Scott Hassett  
Secretary

- c: William T. Stuart, Attorney for LPBIA (via FAX and U.S. Mail)
- Village of East Troy, c/o Judy Weter, Clerk (via U.S. Mail)
- Paul Kent, Attorney for Village of East Troy (via FAX and U.S. Mail)
- Francis Fuja—SER (via inter-departmental mail)
- Jill Jonas—DG/2 (via inter-departmental mail)
- Lee Boushon—DG/2 (via inter-departmental mail)
- Judy Ohm—LS/5 (via inter-departmental mail)