



March 14, 2016

Great Lakes –St. Lawrence Regional Body and Compact Council
Waukesha Diversion Comments
c/o Conference of Great Lakes and St. Lawrence Governors and Premiers
20 N. Wacker Drive, Suite 2700
Chicago, Illinois 60606

Dear Regional Body/Compact Council Members:

On behalf of the undersigned Waterkeepers of the Great Lakes, we are writing to submit public comments concerning the City of Waukesha's proposed Great Lakes Water Diversion Application under the Great Lakes – St. Lawrence River Basin Water Resources Compact (Compact).

The Great Lakes are one of the natural wonders of the world, holding almost 20% of the world's surface freshwater and approximately 95% of the fresh surface water supply of the United States. The Great Lakes provide us with fishable, swimmable, and drinkable waters that define our communities, form the basis of our economy, and provide us with a high quality of life. Although the Great Lakes are vast, they are not infinite—only one percent of the water in the Great Lakes is renewed by rainfall and snowmelt every year. If we take out more than this 1%, we threaten the long term viability of this resource.

While Waukesha may be only asking for a small percentage of water, this first application for a Great Lakes diversion under the Compact, which was adopted in 2008, will set a precedent for all future diversions—diversions that have the potential to cumulatively impact our Great Lakes. While some may claim that we are holding Waukesha to an extremely high bar, it's important that we hold Waukesha's diversion application to meeting the intent, eligibility criteria, and high standards under the Compact for an exception to the ban on water diversions.

The intent of the Great Lakes Compact is to keep Great Lakes water in the Great Lakes. The primary tenant around which the Compact was written is an explicit ban on diversions. The Compact provides for a diversion only in very limited circumstances and only when specific criteria are strictly met. These limited exceptions allow for communities straddling the continental divide and communities in a county straddling the divide to apply for a diversion. A

community seeking Great Lakes water needs to demonstrate that they have NO reasonable water supply alternatives and have exhausted all other options. While the City of Waukesha lies geographically in a straddling county and is eligible to apply for an exception to the ban on diversions under the Compact, the City of Waukesha and the expanded service area has not met the exception standard requirements under the Compact. Due to the many deficiencies in the City's application, the Great Lakes Regional Body and Compact Council should deny this current diversion request.

The main deficiencies with Waukesha's proposed diversion include that: 1) Waukesha's return flow proposal does not protect and sustain the physical, chemical, and biological integrity of the receiving water, and Waukesha has not demonstrated that cumulative impacts will not be significant; 2) Waukesha is not asking for a reasonable amount of water; 3) Waukesha has failed to demonstrate that they have NO reasonable water supply alternative; 4) Waukesha is seeking to divert Great Lakes water to communities that have not expressed a need or demonstrated water conservation measures; and 5) Waukesha is proposing to divert Great Lakes water to an expanded water supply service area that does not meet the definition of "community in need." For these reasons, explained in more detail below, Waukesha has not met the requirements for an exception from the ban on diversions.

1) Waukesha's return flow proposal does not protect and sustain the physical, chemical, and biological integrity of the receiving water

As Waterkeepers, we all work together toward achieving our collective goals of clean water and healthy communities. Waukesha's proposed water diversion from the Great Lakes woefully fails to protect the water quality of the receiving water stream, whereby Waukesha's treated wastewater would be returned to Lake Michigan. Wisconsin's implementing rules for the Great Lakes Compact require that water being returned through a receiving water must "protect and sustain the physical, chemical, and biological integrity of the receiving water." In addition, under Section 4.9.4d of the Compact, communities seeking an exception to the ban on diversion must show: "The Exception will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Basin with consideration given to the potential Cumulative Impacts of any precedent-setting consequences associated with the Proposal."

As it stands, Waukesha's proposed return flow to the river will not protect and sustain the physical, chemical, and biological integrity of the river, and it will have an adverse impact to the quality of Great Lakes Basin waters and water dependent natural resources, as well as potential cumulative adverse impacts. In the Wisconsin technical review for this application, it states that both EPA and DNR both agree that the new discharge could result in "significant lowering of water quality" for some of Waukesha's discharged pollutants in the return flow. Additionally, the Root River is impaired for phosphorus and total suspended solids at the discharge point, so Waukesha needs to show its discharge will not result in backsliding of water quality and harm significant improvements already made in the Root River Watershed. It has not done this.

Legally, per the Clean Water Act, there should be no “new or increased discharge” into an impaired waterway of a pollutant of concern, and it’s unclear how this discharge will be permitted lacking a TMDL or TMDL-like analysis. EPA has stated in letters to the Wisconsin Department of Natural Resources (DNR) that it could go along with an approach put forth by DNR whereby Waukesha would discharge phosphorus, for example, in quantities “well below” our state water quality standard for phosphorus of 0.075 mg/L. It’s unclear whether this is a legal approach under the Clean Water Act, whether discharging phosphorus “well below” the existing water quality standard in a range of 0.039-0.06 mg/L is technically attainable by Waukesha, or whether this increase in loading would cause or contribute to the existing impairment. Waukesha is also not meeting existing water quality standards for temperature, chloride or mercury, which is a concern that there could be a significant adverse impact to waters and water dependent resources of the Basin, including the Root River. Lastly, Waukesha’s treated wastewater would make up about 80-90% of the flow of the Root River (using a 7Q10 flow approach) during low flow months such as August, making the Root River an effluent dominated stream. This could pose risks to public health, as well as set a concerning precedent for future diversions.

Another concerning precedent is that the City of Racine has received very little consideration as the municipality on the “receiving” side of this Great Lakes diversion. Racine and the undersigned are concerned that any costs from adverse effects from return flow or for monitoring of effects would be solely borne by Racine, which is one of the poorest counties in Wisconsin (compared to Waukesha County, which is one of the richest counties in Wisconsin and ranked in the top 75 wealthiest counties in the US).

2) Waukesha is not asking for a reasonable amount of water

The City of Waukesha currently uses about 6 million gallons per day (MGD), but they are requesting an average of 10.1 MGD with a maximum capacity of 16.7 MGD. Under Section 4.9.4.b of the Compact, when a community is seeking an exception to a ban on diversions: “The Exception will be limited to quantities that are considered reasonable for the purposes for which it is proposed.” Waukesha has not demonstrated why it is requesting over double (and nearly triple) their current water demand to meet their projected demand nor justified why that amount is necessary at build out.

More to the point, Waukesha is claiming that they need water to supply a State-approved water supply service area that is 40% larger than their existing service area. They state that this water would not fuel sprawl, because almost 85% of this area would not be developable due to wetlands and primary environmental corridors (that the Southeastern Wisconsin Regional Planning Commission recommends to be conserved). However, Waukesha’s own application states that inclusion of portions of four neighboring communities in Waukesha’s application will allow industrial land use to double from 3% to 6%, residential land use to increase by more than two thirds from 28% to 47%, and open land to decline from 30% to 4% with the conversion of remaining agricultural and open lands to developed uses. The intent of the Compact is to

provide a safe drinking water supply for communities having no other option, not to use Great Lake water to facilitate development.

Further, this water request is not consistent with local trends or demand forecasts. Industrial water sales in the City of Waukesha have declined by more than 50% between 1999 and 2013, and industrial water use is the largest class of water user. Waukesha's per capita water use or demand is declining and has been declining for about three decades. Even allowing for some increase in population growth, water use trends are still declining throughout most of southeast Wisconsin and the U.S. However, Waukesha's demand forecast for 2050 assumes a significant increase in per capita water use, despite water conservation measures that are being planned to meet Compact water conservation requirements. Requesting such a large increase in water volume despite declining water demand trends is completely unsubstantiated. If the increase in water is due to the increase in projected water supply service area and resultant increase in development, then this is a violation of the Great Lakes Compact.

3) Waukesha has failed to demonstrate that they do not have a reasonable water supply alternative

The "Non-Diversion Solution," a July 2015 report and a March 2016 addendum created by two independent engineering firms, concluded that Waukesha has a feasible water supply alternative. Under Section 4.9.3.d of the Compact, an applicant for a Great Lakes water diversion must demonstrate that: "There is no reasonable water supply alternative within the basin in which the community is located, including conservation of existing water supplies." According to the Non-Diversion Solution study, Waukesha can use its existing deep and shallow well system by adding treatment technology to address radium contamination. The report concluded that Waukesha's existing water supplies are enough to provide clean and safe water to its residents now and in the future if the current system and infrastructure is maintained and improved.

Treating existing water supplies would be about 50% of the cost of a Great Lakes diversion, would protect public health, and minimize environmental impacts. Over 40 other communities in Wisconsin already treat for radium, and instead of spending millions on a diversion application, have silently done the work to provide clean water to their residents. Waukesha recently claimed that if they only had a radium problem, they would not be asking for a diversion, claiming they also have salt and arsenic problems. They have also claimed that using shallow wells is not feasible as it would damage over 900 acres in wetlands, although they fail to mention that their shallow well alternative involved putting in nearly two dozen wells in and around sensitive trout streams and the Vernon Marsh, which is not being advocated by anyone. They never really examined an alternative that would induce Fox River water, clean and treat that water, and return it upstream. In short, the non-preferred alternatives were designed to fail. WDNR took the position that they could only look at Waukesha's alternatives put forth in their application, and could not design or force consideration of new alternatives, which we believe is false. In sum, Waukesha has another reasonable water supply alternative, and as such, they do not meet Compact requirements.

4) Waukesha is seeking to divert Great Lakes water to communities that have not expressed a need or demonstrated water conservation measures

Under Section 4.9.3.a of the Compact, communities seeking a water diversion need to show that: “The Water shall be used solely for the Public Water Supply Purposes of the Community within a Straddling County that is without adequate supplies of potable water.” The city’s application proposes that Great Lakes water be diverted to an expanded service area that includes portions of four other communities including the towns of Waukesha and Delafield, Pewaukee, and Genesee. These communities have not indicated a need or desire to tap into the City of Waukesha for water services, and several have stated they do not need water now or in the foreseeable future. In addition, these towns have not expressed any desire to combine governments or to become incorporated into the City of Waukesha. While Wisconsin statutes may dictate that sanitary sewer and drinking water sewer systems should ideally be equivalent, Wisconsin has not finished the rule-making regarding “water supply service areas” as part of their Great Lakes Compact implementation rules. In addition, even if State law required these areas to coincide, the Compact is a Federal law that supersedes State law. The Compact states that all areas included in a diversion application demonstrate they are without adequate supplies of potable water and can show similarly to Waukesha that they have no reasonable water supply alternative, including implementing all water conservation measures, before receiving a diversion. These communities cannot demonstrate conservation because they are currently all on wells and have no records on water use or programs for promoting water conservation.

5) Waukesha is proposing to divert Great Lakes water to an expanded water supply service area that does not meet the definition of “community in need”

Under Section 1.2 (definitions), the Compact defines an eligible community within a straddling county seeking an exception to diversion by clarifying that a “Community within a Straddling County means any incorporated city, town or the equivalent thereof, that is located outside the Basin but wholly within a County that lies partly within the Basin and that is not a Straddling Community.” After widespread concern has been expressed at the regional level and at the recent hearing in front of the Regional Body and Compact Council in Waukesha on February 18, 2016 relating to Waukesha’s proposal to significantly expand their water supply service area, Waukesha has come back with an argument that their expanded service area meets the Compact requirements of being the “equivalent thereof” of a community in need. WDNR has also bolstered this claim in their formal “Comments and Responses [to the] Technical Review [for the] Waukesha Great Lakes Water Diversion (January 2016)” stating:

“The department views the delineated service area as “the equivalent thereof” and therefore a “community within a straddling county” under the Agreement/Compact. Secondly, the Agreement/Compact “exception standard” for proposed diversions requires that “the exception ... be implemented so as to ensure that it is in compliance with all applicable municipal, state, and federal laws” Wisconsin law, to promote

sound environmental planning and protection, requires that the Applicant's water supply service area be consistent with its area wide water quality management plan, specifically the communities approved sewer service area."

There are several things wrong with this statement. The phrase the "equivalent thereof" should not include water supply service areas. So doing would set a precedent that allows for nonpolitical subdivisions to apply for or receive a diversion, which is problematic. It would chip away at the spirit and intent of the law and open up the Compact to ineligible applicants. The intent of including "equivalent thereof" is meant to encompass other types of local government that are not "a city or town," such as a village or Canadian equivalent. In addition, the Compact states that any exception to the ban on diversions needs to meet all applicable municipal, state, and Federal laws. This encompasses laws regulating permits for these types of projects at multiple levels of government, including federal discharge permits. Approving a diversion under circumstances like this where not all laws have been complied with, creates a "back door" whereby a State could pass a law to alter interpretation or implementation of the Federal Compact law in order to achieve a diversion. Indeed, here in this case, determining that a community seeking a diversion can dramatically increase its water supply service area flies in the face of the intent and purpose of the Compact. This could create a dangerous precedent.

In closing, we appreciate your consideration of these comments and all the hard work of the Regional Body and Compact Council in passing the Great Lakes Compact to protect our shared waters. Now is the time to act to ensure we are upholding the high bar of the Great Lakes Compact and ensuring that Waukesha's proposed diversion meets the standards in the law for an exception to the ban on diversions. We respectfully request that the Regional Body and Compact Council veto this application in its current form for failure to adhere to Compact standards. If you have specific questions about our comments, please contact Cheryl Nenn at cheryl_nenn@milwaukeekeeper.org. Best of luck in your deliberations over this historic and precedent setting Great Lakes water diversion proposal.

Sincerely,

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U.S. Great Lakes Representative

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