



# Minnesota Center for Environmental Advocacy

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March 21, 2018

Adam Freihoefer  
Water Use Section Chief  
Wisconsin Department of Natural Resources  
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**VIA ELECTRONIC MAIL**

*Re: Great Lakes Water Diversion Application Submitted by the City of Racine*

Dear Mr. Freihoefer:

On January 26, 2018, the Wisconsin Department of Natural Resources (“DNR”) received a straddling community diversion application (the “Application”) from the City of Racine (the “City”).<sup>1</sup> The City seeks to divert up to an annual average 7 million gallons of water a day from Lake Michigan to supply water to the Village of Mount Pleasant.<sup>2</sup> On behalf of Minnesota Center for Environmental Advocacy and the below-signed organizations, we respectfully submit the following comments.

MCEA has a keen interest in straddling-community exceptions to the Great Lakes Compact. MCEA is a nonprofit organization that uses law, science, and research to protect Minnesota’s lakes and streams. Since its inception in 1974, MCEA has worked to protect Lake Superior and its watershed. MCEA’s work regarding Lake Superior includes ensuring compliance with the Clean Water Act, improving wetland policies, working with municipalities to update water-protection plans, and helping to stop the spread of invasive species.

Moreover, the undersigned organizations have been involved with the Great Lakes Compact from the beginning. The undersigned organizations assisted in the Great Lakes Compact’s drafting and ratification process, and have worked for years as coalition partners to defend the Great Lakes Compact and ensure compliance with its terms.<sup>3</sup>

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<sup>1</sup> Letter from Keith Haas, General Manager, Racine Water and Wastewater Utilities, to Adam Freihoefer, Water Use Section Chief, Wisconsin Department of Natural Resources (Jan. 26, 2018), *available at* <https://dnr.wi.gov/topic/WaterUse/documents/Racine/RacineDiversionApp20180126.pdf>.

<sup>2</sup> Ruekert & Mielke, Inc., *The City of Racine Application for Water Diversion 1* (2018) [hereinafter, “Appl.”].

<sup>3</sup> *See, e.g.*, Minn. Ctr. for Envtl. Advocacy, *Great Lakes*, <http://www.mncenter.org/great-lakes.html> (discussing MCEA’s work on the proposed Waukesha Water Diversion); Letter from Steve Morse, Executive Director, Minn. Envtl. P’ship, to Mark Dayton, Governor, State of

The Great Lakes Compact serves “to protect, conserve, restore, improve, and effectively manage the waters and water dependent natural resources of the basin” meaning “the Great Lakes and all streams, rivers, lakes, connecting channels, and other bodies of water, including tributary groundwater within the basin.”<sup>4</sup> The Great Lakes Compact’s central tenant is a ban on “[a]ll New or Increased Diversions are prohibited, except as provided in this Article.”<sup>5</sup> Only in a narrow set of circumstances are there exceptions from this general prohibition. One such exception is the straddling-community exception which provides:

A Proposal to transfer Water to an area within a Straddling Community but outside the Basin or outside the source Great Lake Watershed shall be excepted from the prohibition against Diversions and be managed and regulated by the Originating Party provided that, regardless of the volume of Water transferred, all the Water so transferred shall be used solely for Public Water Supply Purposes within the Straddling Community, and:

- a. All Water Withdrawn from the Basin shall be returned, either naturally or after use, to the Source Watershed less an allowance for Consumptive Use. No surface water or groundwater from outside the Basin may be used to satisfy any portion of this criterion except if it:
  - i. Is part of a water supply or wastewater treatment system that combines water from inside and outside of the Basin;
  - ii. Is treated to meet applicable water quality discharge standards and to prevent the introduction of invasive species into the Basin;
  - iii. Maximizes the portion of water returned to the Source Watershed as Basin Water and minimizes the surface water or groundwater from outside the Basin;
- b. If the Proposal results from a New or Increased Withdrawal of 100,000 gallons per day or greater average over any 90-day period, the Proposal shall also meet the Exception Standard; and,
- c. If the Proposal results in a New or Increased Consumptive Use of 5 million gallons per day or greater average over any 90-day period, the Proposal shall also undergo Regional Review.<sup>6</sup>

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Minnesota (Apr. 14, 2016) (letter of Minnesota conservation and environmental organizations expressing concern about Waukesha Water Diversion), *available at* <http://www.mepartnership.org/wp-content/uploads/2016/04/Letter-to-Governor-Dayton-on-Waukesha-diversion.pdf>.

<sup>4</sup> Wis. Stat. § 281.343(1)(e)(x), (1)(m)(b).

<sup>5</sup> Great Lakes—St. Lawrence River Basin Water Resources Compact § 4.8, Dec. 13, 2005 [hereinafter “Great Lakes Compact”].

<sup>6</sup> *Id.* § 4.9.1.

Here, the City through its Application seeks to take advantage of this narrow exception. To do so, the City must show its Application satisfies each requirement listed above.<sup>7</sup> The Application does not meet this standard.

First, the City cannot show that it is the proper party to submit the Application. Under the Great Lakes Compact, an “Applicant” is a person or entity “who is *required* to submit a Proposal.”<sup>8</sup> The person or entity *required* to submit a Proposal to divert water outside the basin under the straddling-community exception is *the straddling community*. Under Wisconsin law, a “straddling community” entitled to apply for the exception means “any city, village, or town that . . . is partly within the Great Lakes basin or partly within the watersheds of the Great Lakes and that is wholly within any county that lies partly or completely within the Great Lakes basin.”<sup>9</sup>

Here, the City is not *required* to make the Proposal because it is not a “straddling community.” As it readily admits, the City lies fully within the Great Lakes basin and “all of [its] current water customers are located within the Great Lakes Basin.”<sup>10</sup> Thus, it is not *required* to make a Proposal under the straddling-community exception. Instead, it is the Village of Mount Pleasant that “straddles the divide between the Great Lakes basin and the Mississippi River basin.”<sup>11</sup> and, as the “straddling community” is *required* to make a Proposal to divert water for its needs. Here, the Village of Mount Pleasant has not made a Proposal under the Great Lakes Compact for a diversion using the straddling-communities exception. Therefore, the Application is procedurally flawed, and DNR should deny the Application.

Second, even if the City is allowed to submit the Application, the City failed to show the water transferred under the proposed diversion would “be used solely for Public Water Supply Purposes within the Straddling Community.”<sup>12</sup> The Compact defines “Public Water Supply Purposes” to mean “water distributed to the public through a physically connected system of treatment, storage and distribution facilities *servicing a group of largely residential customers* that may also serve industrial, commercial, and other institutional operators.”<sup>13</sup>

Here, the City intends to transfer the water outside the basin to *solely* serve industrial and commercial customers. Reviewing Table D-1 in the Application, the City plans to use 5.8 mgd for the Foxconn facility and the remaining 1.2 mgd to supply *commercial* and

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<sup>7</sup> Appl. at 5.

<sup>8</sup> Great Lakes Compact § 1.2 (emphasis added).

<sup>9</sup> Wis. Stat. § 281.346(1)(t).

<sup>10</sup> Appl. at 2.

<sup>11</sup> *Id.* at 1, 3.

<sup>12</sup> Great Lakes Compact § 4.9.1.

<sup>13</sup> *Id.* § 1.2.

*industrial* customers.<sup>14</sup> The City does not propose to use *any* of the diverted water to serve residential customers.

**Table D-1**  
2050 Forecast Diversion Volume by Land Use

Land Use	Forecast Basis	Water Use Coefficient	Average Day Volume (mgd)
Industrial - Foxconn	Design Volume	Design Volume	5.8
Commercial and Industrial	1,077 acres	1,100 gallons per acre per day	1.2
Total			7.0

The City attempts to circumvent this inadequacy in the Application pointing to its entire customer base.<sup>15</sup> The City indicates that its “retail customer base is largely residential” and, therefore, its “regional water system satisfies the . . . requirement that the diverted water be provided to the diversion area ‘solely for public water supply purposes.’”<sup>16</sup> But the City admits that “all of [its] current water customers are located within the Great Lakes basin.”<sup>17</sup> Thus, the proposed diversion does not *in any way* serve the residential customer base. The proposed diversion only serves commercial and industrial customers.

The Great Lakes Compact intended the straddling community exception to provide a *narrow* avenue for specific communities that straddle the basin line to access water for “Public Water Supply Purposes.” The Application does not show the Proposal falls within this narrow exception and, for that reason, DNR should deny the Application.

Finally, if DNR grants the Application, it should be noted that the Application includes a portion of the diversion based upon an estimated water use upon full buildout. The estimate assumes future commercial/industrial development will use water at a rate of 1,100 gallons/acre/day for a total of 1.2 mgd.<sup>18</sup> Furthermore, the consumptive use for that apportionment is estimated to be 12% or 0.1 mgd.<sup>19</sup> If future proposed

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<sup>14</sup> Appl. at 17.

<sup>15</sup> The City appears to have sent follow-up correspondence to DNR arguing that its proposal meets the definition of “Public Water Supply Purposes” because it supplies water to the Village of Mount Pleasant for residential purposes. *See* Memorandum from Andrew Behn, Ruckert Mielke, to Adam Feihoefer, Wisconsin Dep’t of Nat. Res. (Feb. 15, 2018), *available at* <https://dnr.wi.gov/topic/WaterUse/documents/Racine/RacineWaterUtilityMemo.pdf>. But DNR must look only at the area within the straddling community when making its decision – not at customers the City serves that are already within the basin.

<sup>16</sup> Appl. at 16.

<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Id.* at 19.

<sup>19</sup> *Id.* at 20-21.

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commercial/industrial developments result in consumptive uses exceeding these speculative estimates, the Village of Mount Pleasant should not be allowed to request another separate straddling-community exemption. Instead, the cumulative effect of future developments and this Application must be considered in evaluating the appropriateness of the straddling-community exemption in the Great Lakes Compact.<sup>20</sup>

We appreciate your consideration of the points raised in these comments. Please feel free to contact us with any questions or concerns.

Sincerely,

/s/

Darrell Gerber  
Policy Analyst  
MN Center for Environmental Advocacy

/s/

Elise Larson  
Staff Attorney  
MN Center for Environmental Advocacy

/s/

Steve Morse  
Executive Director  
Minnesota Environmental Partnership

/s/

John P. Lenczewski  
Executive Director  
Minnesota Trout Unlimited

/s/

Deanna White  
State Director  
Clean Water Action Minnesota

/s/

Lori Andresen  
President  
Save Our Sky Blue Waters

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<sup>20</sup> Great Lakes Compact § 4.9.1.