



# Minnesota Center for Environmental Advocacy

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March 14, 2016

**VIA ELECTRONIC MAIL**

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

**Re: Comments on the Waukesha Diversion Request**

I am writing on behalf of the Minnesota Center for Environmental Advocacy (MCEA) to provide comments to assist you in evaluating the Waukesha Diversion (Diversion) proposal. MCEA is a Minnesota-based non-profit environmental organization, the legal and scientific voice protecting and preserving Minnesota's wildlife, natural resources, and the health of its people.

MCEA is interested in and concerned with the proposed Diversion and we appreciate the opportunity to comment. We believe that a strong Great Lakes –St. Lawrence River Basin Water Resources Compact (Compact) is critical to a healthy future for the Great Lakes. Waukesha has historically demonstrated a concerning lack of water stewardship and has proposed an ill-conceived fix that subverts the Compact's thoughtfully developed standards for exceptions to its ban on diversions. Therefore, we are writing to urge our Governor - Governor Dayton - and the entire Compact Council (Council) to preserve the integrity of the Compact by rejecting Waukesha's request.

**Waukesha's demonstrated a lack of water stewardship is troubling**

For decades the Waukesha Water Utility has refused to comply with drinking water requirements related to radium. Their history of disregard for radium issues dates back to their refusal to comply with a 1987 settlement agreement with the Wisconsin DNR over exceedences of state standards for radium in drinking water<sup>1</sup>. In 2000, Waukesha tried to sue the United States Environmental Protection Agency (EPA) to block updates to radium rules. Waukesha charged, among other things, that the EPA used flawed science in determining the dangers of radium. The U.S. District Court of Appeals for the District of Columbia disagreed, turning down the communities' challenge<sup>2</sup>. Finally in 2009, Waukesha paid \$55,000 to settle a state lawsuit over its drinking water violations. The

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<sup>1</sup> DNR v. City of Waukesha 184 Wis. 2d 178 (1994)

<sup>2</sup> City of Waukesha v. U.S. Environmental Protection Agency - See more at: <http://caselaw.findlaw.com/us-dc-circuit/1213184.html#sthash.1UajnISK.dpuf>

settlement put the city on a strict monitoring and reporting program that forces it to become compliant with radium standards by 2018<sup>3</sup>.

Building on this challenging history, Waukesha has put forth a request that avoids seriously addressing a sustainable drinking water future for the area. The request enables continued annexation and growth, despite the upward pressure this will place on drinking water demand. To support the near-doubling of water demand that the Waukesha Water Utility believes will accompany their hopes for big growth, their search zeroed in on Lake Michigan. Meanwhile, more than 45 communities in Wisconsin alone have similar radium problems and are successfully managing demand and treating their water supply to provide clean, healthy drinking water to their residents, without any Great Lakes diversions<sup>4</sup>.

In their request, the Waukesha Water Utility has put their interests ahead of water resource management. Fortunately, however, under the compact, eight states, two provinces, the U.S. Congress and President Bush adopted strict standards for exceptions to the ban on diversion. They put the protection, conservation, restoration, improvement and effective management of the Waters and Water Dependent Natural Resources of the Basin first – before the agenda of any single water utility<sup>5</sup>. We are relying on the Council to uphold the strong provisions in the Compact to protect the Great Lakes.

### **Waukesha’s Diversion would weaken protections for the Great Lakes**

Waukesha has requested an unnecessary diversion that would benefit the Waukesha Water Utility at the expense of the broader Great Lakes region. It is up to the Council to keep avoidable diversions from eroding the strong protections that the Compact offers. The Council must remain faithful to the Compact’s strict limitations on diversions, using caution in determining whether or not the proposal meets the conditions for this exception<sup>6</sup>. The Council’s adherence to the Compact’s cautionary principle and the Council’s strict interpretation and application of the compact’s standards is critical, because any compromise or relaxation will undermine the Compact’s ban on diversions, opening the door for more unnecessary diversions in the future. With a population of nearly 9 million living outside the basin, but within straddling counties, the potential implications of relaxed restrictions on diversion in straddling counties are significant.

With this in mind, a comparison of Waukesha’s proposal to the Compact’s very specific provisions for diversion exceptions reveals unacceptable gaps. We are particularly focused on the conditions in Section 4.9 of the Compact that limit exceptions to the ban on diversions to:

- **a community in a straddling county**<sup>7</sup> that is otherwise
- **without an adequate supply of potable water**<sup>8</sup>,
- **has no reasonable water supply alternative**<sup>9</sup>, and for which

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<sup>3</sup> <https://www.doj.state.wi.us/news-releases/city-waukesha-settles-second-state-lawsuit-over-drinking-water-violations>

<sup>4</sup> Milwaukee Public Radio, July 18, 2015. Weighing the Impacts of Waukesha’s Lake Michigan Water Diversion Plan. <http://wuwfm.com/post/weighing-impacts-waukesha-s-lake-michigan-water-diversion-plan#stream/0>

<sup>5</sup> Compact, Article 1, Section 1.3, Item 2(e)

<sup>6</sup> Compact, Article 4, Section 9.3, Item (d)

<sup>7</sup> Compact, Article 4, Section 9.3

<sup>8</sup> Compact, Article 4, Section 9.3, Item (a)

<sup>9</sup> Compact, Article 4, Section 9.3, Item (d)

- all or part of the exception cannot reasonably be avoided through efficiency and conservation<sup>10</sup>.

The Waukesha diversion request fails on all four fronts.

**First, Waukesha’s request is not for “a community” in a straddling county.**

Waukesha is requesting water for a planned future “water supply service area”. Neither the Compact nor Wisconsin law regards a water supply service area as a “community” eligible for a diversion<sup>11</sup>. Opening up the exception to an artificially broad definition of “community” could set a dangerous precedent for expansive requests in the future.

We urge the Council to reject Waukesha’s request and ensure that diversion exceptions are limited to the scope of communities – local municipalities - that the Compact was intended to cover<sup>12</sup>.

**Second, existing potable water supplies are not inadequate.**

Waukesha’s 10.1 million gallon per day request is founded on the assumption that the Waukesha’s existing water sources and infrastructure options are inadequate for expanded future water use. But, Waukesha’s forecasts are based on models that inflate future water use<sup>13</sup>. Waukesha’s modeling assumes that per person water use *increases* going forward when, in fact, conservation, efficiency and technology improvements should *decrease* the amount of water each person in Waukesha needs in the future, improving the long term viability of Waukesha’s local water options.

Furthermore, the 10.1 million gallon per day request includes an extended service area that does not have a demonstrated need. Parts of the City of Pewaukee, the Town of Delafield, and the Town of Genesee are included in the proposed diversion, despite the adequacy of their current and future water supply options.

We urge the council to reject the Waukesha’s request and ensure that diversion exceptions are limited – as the Compact requires - to those that are necessary to meet demonstrated need.

**Third, reasonable supply alternatives exist.**

Supplying water to Waukesha, regardless of the source will cost money and cause resource impacts. Whether costs and impacts are “reasonable” is a matter of context. Waukesha and the Wisconsin DNR evaluated and dismissed a number of treatment and new shallow well options to meet Waukesha’s expanded future demand. This is because Wisconsin DNR’s alternatives analysis relied on Wisconsin’s own definition of “reasonable,” with local costs and impacts as the

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<sup>10</sup> Compact, Article 4, Section 9.4, Item (a)

<sup>11</sup> Compact, Article 1, Section 1.2; Wisconsin Statute § 281.346(1)(d),

<sup>12</sup> The term was meant to include only local municipalities, whether a state or province called them towns, cities, villages, townships, boroughs, or something else. Hearing before the DNR on City of Waukesha’s Diversion Application (Aug. 17, 2015) (statement of Todd Ambs)

<sup>13</sup> Nicholas, 2013. “An Analysis of the City of Waukesha’s Diversion Application.” Available URL: <https://www.nwf.org/pdf/Great-Lakes/GLRC-Waukesha-Analysis-3-27-2013.pdf>

primary driver for rejecting options that could better protect the integrity of the Great Lakes<sup>14</sup>. This approach to the alternatives analysis is problematic for the Council's purposes because Wisconsin's definition of "reasonable" fails to address decision-making in the broad, regional context that the Council must consider. The compact requires that the Council review proposals with the protection of the integrity of the Great Lakes –St. Lawrence River Basin Ecosystem as the overarching principle – a concept that is absent from the alternatives review Waukesha's has submitted to the Council.

Independent engineering studies prove that methods used across Wisconsin and other states to address the kinds of challenges Waukesha faces are viable for Waukesha as well. Thoughtful management of water demand, pragmatic placement of new infrastructure, and use of proven mixing and treatment methods can address the need for safe drinking water as well as stewardship of Great Lakes resources<sup>15</sup>.

We urge the council to reject Waukesha's request and to ensure that the consideration of "reasonable" alternatives is rooted in the integrity of the Great Lakes –St. Lawrence River Basin Ecosystem and considers costs and benefits, precedent setting actions, and long term cumulative impacts to the Great Lakes –St. Lawrence River Basin Ecosystem.

**Fourth, all or part of the exception can reasonably be avoided through efficiency and conservation**

As noted above, Waukesha's request relies on demand projections that fail to logically account for the expected effects of conservation, efficiency, and technology improvements. Furthermore, Waukesha's request does not account for conservation in the extended service area at all. In the future, conservation measures should moderate the water needs of Pewaukee, Delafield and Genesee. According to the DNR this was acknowledged in a memo from the City of Waukesha to DNR in October 2015, indicating that the towns in the extended service area will commit to compliance with water conservation plans<sup>16</sup>. But, no corresponding adjustment has been made in Waukesha's request.

We urge the council to reject the Waukesha's request and ensure that diversion exceptions are limited to those that cannot be addressed through efficiency and conservation.

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<sup>14</sup> Wis. Stat. § 281.346(1)(ps)

<sup>15</sup> July, 2015. GZA GeoEnvironmental, Inc. Non-Diversion Report to Clean Wisconsin. Available URL: [http://static1.squarespace.com/static/55845d9de4b0b4466f1267b9/t/55b26a8de4b0f414ae482ea3/1437756045901/Non-Diversion+Alternative+Report\\_City+of+Waukesha+Water+Supply\\_Full.pdf](http://static1.squarespace.com/static/55845d9de4b0b4466f1267b9/t/55b26a8de4b0f414ae482ea3/1437756045901/Non-Diversion+Alternative+Report_City+of+Waukesha+Water+Supply_Full.pdf); February, 2016. Addendum to the Non-Diversion Report to Clean Wisconsin. Available URL: <http://static1.squarespace.com/static/55845d9de4b0b4466f1267b9/t/56ded50a20c6470c194f7ab3/1457444107276/FINAL+154335.02+Response+to+Comments+2-29-16.pdf>

<sup>16</sup> Wisconsin DNR, 2016. Comments and Responses Draft Technical Review Waukesha Great Lakes Water Diversion. Available URL: [ftp://dnrftp01.wi.gov/geodata/water\\_division/waukesha\\_diversion/dnr\\_review/WDNR\\_TechnicalReview\\_ResponsetoComments.pdf](ftp://dnrftp01.wi.gov/geodata/water_division/waukesha_diversion/dnr_review/WDNR_TechnicalReview_ResponsetoComments.pdf)

We appreciate the opportunity to share MCEA's input and would like thank the Council for their role in representing the goals and requirements of the Compact and protecting the valuable waters of the Great Lakes.

Sincerely,

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