

*Clean Wisconsin • Midwest Environmental Advocates
Milwaukee Riverkeeper • Waukesha County Environmental Action League
Wisconsin Wildlife Federation*

Mr. Eric Ebersberger
Wisconsin Department of Natural Resources
101 S. Webster St. Madison, WI 53703
VIA EMAIL (sent to DNRWaukeshaDiversionApp@wisconsin.gov)

December 2, 2013

Re: The Compact Implementation Coalition's comments on Waukesha's Diversion Application

Dear Mr. Ebersberger,

The undersigned organizations, collectively representing tens of thousands of Wisconsinites, thank you for the opportunity to comment on Waukesha's revised application for a diversion of Great Lakes water under the Great Lakes Compact. Collectively, we have a long history of working on this issue. From ensuring the adoption and implementation of a strong Great Lakes Compact to aiding the Department in the promulgation of administrative rules to implement the Compact, we have consistently advocated for the strongest protections available for the resource, in keeping with the spirit and the letter of the Compact.

Waukesha's application is historic. As the first ever application of its kind, it will set a precedent for similar future requests under the Compact. Because the Great Lakes are an invaluable local, national, and global natural resource, Waukesha's precedent-setting application deserves the highest degree of scrutiny for meeting the standards established in the Compact. Unfortunately, the Compact Implementation Coalition believes that Waukesha's diversion application does not meet several key standards set forth in the Compact, codified in Wis. Stat. §281.343-346, and therefore is not approvable.

Waukesha's revised application is substantially similar to an application that was submitted to the Department in 2010 and updated at the Department's request in the ensuing years. Over the past three years, our organizations have repeatedly expressed our concerns with Waukesha's proposal, both formally and informally, to Department staff. To the extent that the revised application contains the same or substantially similar information, plans, requests, or proposals for the Department to consider, these comments are meant to reference and build off of our past comments. With regard to the general proposal as described by Waukesha and their underlying assumptions and data, our position is unchanged with the submission of the revised application: we oppose approval of the application as submitted.

Waukesha has applied for a diversion of Great Lakes water as a community within a straddling county under Wis. Stat. §281.346(4). Six critical areas in which Waukesha's revised application fails to meet the approval criteria under Wis. Stat. §281.346(4) are:

- I. Waukesha has not considered all reasonable alternatives.
- II. The application fails to define a "community within a straddling county" that meets the need requirements established under the Compact and under Wisconsin law.

*Clean Wisconsin • Midwest Environmental Advocates
Milwaukee Riverkeeper • Waukesha County Environmental Action League
Wisconsin Wildlife Federation*

- III. The application fails to show that Waukesha has offset the need for the diversion to the greatest extent possible by maximizing the use of existing water resources and minimizing additional need through water conservation and efficiency measures.
- IV. The application's proposed approach to diverting water from and returning it to Lake Michigan fails 1. to minimize the amount of water from outside the Great Lakes basin that would be returned to the source watershed and 2. to return an amount of water to the basin equal to the amount withdrawn (less an allowance for consumptive use).
- V. The application fails to show that the returned water will be treated to meet applicable permit requirements under s. 283.31.
- VI. The application fails to show that there will be no significant adverse environmental impacts to the waters of the state resulting from the new or increased withdrawal.

The Wisconsin Department of Natural Resources has a duty to ensure that the criteria set forth in Wis. Stat. §281.346 are met to the letter of the law before approving the application. The Great Lakes Compact and Wisconsin law both make clear that the exception under which Waukesha applies for a diversion is only to be used in extraordinary circumstances: "Caution should be used in determining whether or not the proposal meets the conditions for this exception." Wis. Stat. §281.343(4n)(c)e. The Department can expect that an approval of the application will be reviewed with the highest level of scrutiny by interested stakeholders at the state, regional, national, and international level, in addition to review by the regional body. As such, the Department's review should ensure that any decision on the application is defensible and based on sound science. We submit that the current application will not pass that level of scrutiny.

I. Waukesha has not considered all reasonable alternatives.

The Great Lakes Compact's standard is clear. In order for a community within a straddling county to qualify for a diversion of Great Lakes Water, the basic threshold question that they must prove is that there is "no reasonable water supply alternative" for the community. Wis. Stat. § 281.346(4)(e)1.d. Waukesha has failed to show that there is no reasonable water supply alternative.

One set of alternatives that Waukesha has not considered are those based on diverting a smaller amount of water than requested in their application. For example, they did not conduct analyses of the amount of water needed to supply only its *current* service area in future scenarios including aggressive conservation and/or peak demand reduction practices. Sources of water supply for these alternatives could include the current mix of deep and shallow-aquifer wells, the addition of new shallow wells or quarry water, or a wholesale switch to a small number of riverbank inducement wells, to name only a few.

Until Waukesha has evaluated these and potentially other alternatives available to it and shown that those alternatives are not "reasonable" under the standards set forth under the Compact, Waukesha has not adequately demonstrated that there is "no reasonable water supply alternative" as required under Wis. Stat. §281.346(4)(e)1.d.

II. The application fails to define a “community within a straddling county” that meets the need requirements established under the Compact and under Wisconsin law.

Waukesha has applied for a diversion as a “community within a straddling county” as provided under Wis. Stat. §281.346(1)(d) and (4). A “community within a straddling county” is defined in the statute as “any city, village, or town that is not a straddling community and that is located outside the Great Lakes basin but wholly within a county that lies partly within the Great Lakes basin.” There is no dispute that the City of Waukesha meets this definition because it is a “city, village or town.” However, the application seeks to include an entire proposed (and as-yet unapproved) water supply service area for Waukesha’s Water Utility as part of the diversion request. This unapproved planned service area includes portions of four additional communities within a straddling county, none of which can meet the exception standard under s. 281.346(4)(f).

The Compact does contemplate the idea that more than one community may receive water under a single diversion application under Wis. Stat. §281.346(4). However, as the statute states, “[i]f the proposal is to provide a public water supply within more than one city, village or town... any portion of the proposal that provides a public water supply within a community described in par. (e)1. (intro) is subject to par.(e).” Wis. Stat. §281.346(4)(bg)2.

Thus, each of the five communities that are applying for the diversion under consideration must establish that it meets the requirements of Wis. Stat. §281.346(4)(e). The communities included in Waukesha’s application have made no such showing. It is not clear whether the other communities implicated in this application are applying for a straddling community diversion along with the City of Waukesha. Thus, the portion of the diversion request pertaining to those communities must be denied.

III. The application fails to show that Waukesha has offset the need for the diversion to the greatest extent possible by maximizing the use of existing water resources and minimizing additional need through water conservation and efficiency measures.

In order for Waukesha to receive an approval for its diversion application, it must prove that the need for the proposed diversion “cannot reasonably be avoided through the efficient use and conservation of existing water supplies.” Wis. Stat. §281.346(4)(f)1. This requirement is further defined by Wis. Admin. Code NR 852, which requires Waukesha to complete certain mandatory and required water conservation and efficiency measures, and then to identify additional measures that are “cost-effective or environmentally sound and economically feasible” and implement them before applying for a diversion. NR 852.06(1).

While Waukesha’s application clearly states its conservation plan and goals, it does not establish:

1. Whether the conservation plan comports with industry best practices;
2. Exactly how much additional water Waukesha needs to solve its immediate radium contamination problem;
3. Exactly how much water the utility could save on an annual basis if its current conservation plan were implemented more aggressively;

4. Exactly how much water the utility could save on a per year basis if it adopted the most aggressive conservation program, which could yield “saved” water as a reasonable source of water supply going forward and must be evaluated in that way.

In order for Waukesha to prove that it cannot reasonably avoid the need for a diversion through conservation, it must show data to support its assertion, not merely state that it cannot be done. The undersigned request that the Department take a close look at Waukesha’s proposal and verify all of the assumptions regarding Waukesha’s analysis of future use and need and achievable savings through conservation, in addition to considering whether Waukesha has failed to consider reasonable water supply alternatives that would entail aggressive investment in water savings to help meet both the radium requirements and future water needs for the City.

IV. The application’s proposed approach to diverting water from and returning it to Lake Michigan fails 1. to minimize the amount of water from outside the Great Lakes basin that would be returned to the source watershed and 2. to return an amount of water to the basin equal to the amount withdrawn (less an allowance for consumptive use).

Wis. Stat. §§281.346(4)(e)1.c and 281.346(4)(f)3 are critical requirements that minimize the potential environmental impacts and risks associated with a diversion, on both the Great Lakes basin and the adjacent basin, to which a diversion is proposed. These require having as close to 100% of the water returned to the Great Lakes basin originate in the Great Lakes, and having a volume as close as possible to 85% of the water withdrawn returned to that basin (assuming Waukesha’s claimed 15% consumptive use). Waukesha’s preferred return flow management plan does not meet either of these requirements, and Waukesha has failed to demonstrate an alternative return flow management plan that would meet them.

One action that must be undertaken to meet these requirements is that Waukesha would have to take steps to address the high levels of infiltration and inflow (I/I) in its water supply and sanitary sewer systems. Partly as a result of this I/I, the return flow management alternative that comes closest to meeting the requirements of §281.346(4)(e)1.c would have a return flow made up of 10-15% “out-of-basin water,” despite estimates of waste-water-only customers (the non-I/I contribution of out-of-basin water) at only 1.4 – 1.6%. Similarly, the return flow management alternative that comes closest to meeting §281.346(4)(f)3 would return an amount of water corresponding to 94-100% of the water withdrawn, where the required return rate would be 85% based on Waukesha’s assumed 15% consumptive use.

Far from identifying a return flow management alternative that would meet statutory requirements, Waukesha proposes to use a return flow management plan that features 24-44% of return flow originating from outside of the Great Lakes basin, and a return amount of 112-152% of the volume withdrawn on average.

V. The application fails to show that the returned water will be treated to meet applicable permit requirements under s. 283.31.

The Compact requires that if water will be returned to the source watershed through a stream tributary to one of the Great Lakes, the physical, chemical, and biological integrity of the receiving water under subd. 3. must be protected and sustained as required under Wis. Stats. §§ 30.12, 281.15 and 283.31, considering the state of the receiving water before the proposal is implemented and considering both low and high flow conditions and potential adverse impacts due to changes in temperature and nutrient loadings. Wis. Stat. § 281.346(4)4s. Waukesha’s application proposes to discharge effluent into the Root River, which is listed on the Department’s current and pending 303(d) lists as impaired for both Phosphorus and Total Suspended Solids. In order to discharge in to an impaired waterway, the permittee must show that the discharge will improve water quality. Wis. Admin. Code NR 217.13(8)(b) In addition, Waukesha must show that its discharge would meet relevant Great Lakes Basin water quality standards for all pollutants. The Department must conduct a thorough analysis as a part of the Environmental Impact Statement to show that Waukesha’s discharge can meet the standards set forth in Wis. Stats. §§ 30.12, 281.15 and 283.31.

VI. The application fails to show that there will be no significant adverse environmental impacts to the waters of the state resulting from the new or increased withdrawal.

Wis. Stat. §281.346(f)5 and §281.346(6)(b) require that a proposed diversion will “result in no significant adverse individual impacts or cumulative impacts to the quantity or quality of the waters of the Great Lakes basin or to water dependent natural resources, including cumulative impacts that might result due to any precedent-setting aspects of the proposed diversion, based upon a determination that the proposed diversion will not have any significant adverse impacts on the sustainable management of the waters of the Great Lakes Basin.” In addition to an analysis of the impacts to the Great Lakes Basin and its tributary waters, the Department must include in its environmental impact statement an analysis of the impacts to the Fox River basin that would result from the proposed diversion.

For the foregoing reasons and those our coalition has communicated to the Department in the past, the undersigned organizations believe that Waukesha’s diversion application cannot be approved as submitted. We encourage Department staff to contact us should they wish to discuss these or any past comments submitted by the Coalition on this matter. Thank you for your consideration of our input and for providing this written comment opportunity for all stakeholders and interested members of the public.

Sincerely,

Mark Redsten, Clean Wisconsin

Jodi Habush Sinykin, Midwest Environmental
Advocates

Cheryl Nenn, Milwaukee Riverkeeper

Laurie Longtine, Waukesha County
Environmental Action League

George Meyer, Wisconsin Wildlife Federation