



March 1, 2016

Jon Allan, Director
Office of the Great Lakes
Michigan Department of Environmental Quality
P.O. Box 30473
Lansing, MI 48909-7973

Re: Application of Waukesha, Wisconsin to Divert Waters of the Great Lakes

Dear Mr. Allan:

The Michigan Environmental Council is a coalition of over 70 conservation, environmental and faith-based organizations located across the State of Michigan. Many of those groups spend considerable time and effort working to protect the water resources of the Great Lakes basin. The application by Waukesha is the first application for a diversion to a community within a straddling county. Therefore, the decision is critically important in defining both the conditions which must be met by a community under the Great Lakes – St. Lawrence River Basin Water Resources Compact (Compact) to justify a diversion, but also those steps a State must take in evaluating an application.

Before outlining our specific concerns, we would like to note that the State of Michigan has taken its responsibilities under the Compact seriously. We have appreciated the opportunities this administration has provided to stakeholders to be involved with both the design and oversight over the Michigan program to regulate large water users since adoption of the Compact. It is a program which has engaged large water users across the state and has resulted in denials of applications for new water in areas where resources are currently being fully utilized. We urge the administration to look carefully at Wisconsin's program as a whole, and their treatment of this application.

In this case, we think both the City of Waukesha has failed to meet its burden, and the State of Wisconsin has failed to require adequate analysis for this application to be approved pursuant to the compact. Specifically we find the following deficiencies in the application:

1. Waukesha Fails to Demonstrate its Need for the Amount of Water Requested

Standards: Under Section 4.9.4.b of the Compact, "The Exception **will be limited to quantities that are considered reasonable** for the purposes for which it is proposed."

Section 4.9.4.a “The need for **all or part** of the proposed Exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies”

Waukesha has the duty to implement all reasonable conservation programs and base any withdrawal request only for that amount of water which is justified. Waukesha is requesting 10.1 million gallons per day average and up to 16.7 million gallons per day maximum to meet projected demand at full build-out.

However, the National Wildlife Federation report authored in February of 2013 by Jim Nicholas, a scientist and retired director of the U.S. Geological Survey’s Michigan Water Science Center, shows that Waukesha’s forecasts of average-day demand and maximum-day demand are based on models that inflate the city’s need for water in the future and are inconsistent with historical trends. Waukesha’s per capita water use, average daily use and average maximum daily use have all been declining for about three decades. Between 2002 and 2014, the population of Waukesha grew by 8%, while its water use declined by 18%. In 2014, Waukesha’s actual use has declined to less than 6.6 million gallons per day.

Waukesha’s demand forecast for 2030, however, assumes a significant increase in per capita water use, despite planned implementation of conservation measures aimed at reducing water use. Approving a request for more water than is needed undermines any commitment to conserve water in the future. The separate issue of the expanded service areas will be addressed below. However, even including the proposed service area and expected population growth daily demand should remain below 7 million gallons a day given trends in water consumption.

Therefore, Waukesha has failed to demonstrate why the quantity of water requested is supported by trends in use data and thus fails to meet the condition set forth in 4.9.4.b. This is the first and arguably the most important portion of the application to get right. This failure also undermines the rest of the analysis on whether reasonable alternatives exist to the proposed withdrawal and therefore requires Waukesha and Wisconsin to evaluate feasible alternatives at a level of withdrawal which is supported by the data.

Wisconsin in its response to questions from the State of Michigan notes the initial approval would only be for 8.1 million gallons per day, and that Wisconsin then decides when and by how much they can increase their diversion. This is not the process set forth in the Compact. This scenario would remove the regional body as the ultimate decision makers as to whether communities added to the water supply service area had demonstrated a need for water, whether alternatives exists, and to whether adequate conservation methods were being employed.

2. The Permit would Divert Great Lakes Water to entities not authorized under the Compact

Standard: Section 4.9.3.a of the Compact, “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.”

"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.

The Waukesha application proposes that Great Lakes water be diverted to not only the City of Waukesha and small areas outside the city currently served by their public water supply system, but also to the city of Pewaukee and to the towns of Delafield, Genesee and Waukesha located within Waukesha County.

Under a Wisconsin statute (not part of the compact), Wisconsin and Waukesha argue that a “water supply service area” is the equivalent of an incorporated city or town for purposes of the compact. We disagree.

Under Wisconsin law, water supply service areas are required to prepare plans for the service area. Wisconsin Statute section 281.348(3)(d)-(e) state:

(d) The department may not approve a plan under this subsection unless all of the following apply:

1. The plan provides for a water supply system that is approvable under this section and other applicable statutes and rules based on a cost-effectiveness analysis of regional and individual water supply and water conservation alternatives.
2. The plan will effectively utilize existing water supply storage and distribution facilities and wastewater infrastructure to the extent practicable.
3. The plan is consistent with any applicable comprehensive plans, as defined in s. [66.1001 \(1\) \(a\)](#).
4. The plan is consistent with any applicable approved areawide water quality management plans under s. [283.83](#).
5. Beginning on December 8, 2011, if the plan covers a public water supply system that withdraws water from the Great Lakes basin, the plan complies with any applicable requirements in s. [281.346 \(5e\)](#).

(e) The department shall specify in a plan under this section a water supply service area for each public water supply system making a withdrawal covered by the plan. **The department may not limit water supply service areas based on jurisdictional boundaries**, except as necessary to prevent waters of the Great Lakes basin from being transferred from a county that lies completely or partly within the Great Lakes basin into a county that lies entirely outside the Great Lakes basin.

The purpose of the exception to the ban on diversion was to make sure there was a process under which a determination could be made whether a “community” was meeting the conditions set forth in the Compact. Being a question of first impression, it is important to note which characteristics of a “community” makes them equivalent for purposes of the Great Lakes Compact. In this context, we see the following factors as most important:

- a common water distribution and collection system,
- borders that are relatively stable in nature, and
- police power jurisdiction over the entity applying for a diversion.

Critical to this decision of whether a “water supply service area” is equivalent to a “community” is the clarity by which the other factors can or cannot be applied to the entity.

A. Establishment of need and common water distribution and collection system

The compact requires “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 currently serves the City of Waukesha and limited areas in the Town of Waukesha and the City of Pewaukee (Application section 3.1). The City of Waukesha covers 16,014 acres, and the water supply service area expands that coverage to 32,209 or double the original boundaries of the city.

The application notes that 9760 acres within the water supply service area in 2000 was in agriculture, but that that number is expected to drop to 1285 acres by 2035, a reduction of over 8500 acres. The greatest anticipated changes in land use are the 19 percent increase in residential land use, 3 percent increase in industrial land use, and 26 percent decrease in agricultural and open lands (Waukesha application, section 3.2). Therefore, it appears that the bulk of the request is not to meet any current need, but to facilitate the conversion of agricultural lands to single family homes.

To date, none of the communities in this “extended service area” has demonstrated that it is without adequate supplies of safe drinking water. In fact, some officials in these areas have stated that they do not need water now or in the foreseeable future. While Wisconsin statutes may dictate that Waukesha include these areas as part of its application, the Compact is clear that **a need for water must exist in the “community” (or equivalent thereof) to be eligible for a diversion.**

In its response to question #3 from the State of Michigan, Wisconsin responded at this point as follows:

“The department did not make a determination about the adequacy of private water supply in areas not currently served by the Waukesha Water Utility, except in the case of certain areas of the Town of Genesee, which were added to the water supply service area upon recommendation by the department for public health reasons. Portions of the Town of Genesee have been designated as a special casing area by the department, which requires more stringent well construction for potable wells, since a survey of wells noted bacterial contamination in 38 percent of wells sampled (1970).”

If these areas are included as part of Waukesha’s diversion application, they must demonstrate that they meet all requirements of the Compact, including that they are without adequate supplies of potable water and that there is no reasonable water supply alternative, including conservation, before the application is approved. This is not the case for the Waukesha application.

B. Set borders

However, Wisconsin is now proposing that a “water supply service area” is the equivalent of a city or town. However, according to the definition in Wisconsin statute a “water supply service

area” could be the entire straddling county. And, according to the statute, Wisconsin has no legal ability to govern the size of the “water supply service area” (Wisc. Statute, Section 281.348(3)(e)). In this context, a “water supply service area” is not the equivalent of a city or town. If the “water supply service area” in this case included the remaining portions of the entire straddling county, it would not be the equivalent to a “community within a straddling county”.

The use of a water service supply area also raises other possible concerns moving forward. Most communities have borders which are relatively set (potential subject to change through an annexation or similar process). It is unclear under the compact, if a diversion is authorized, whether a “water supply service area” could add new communities or land area and request a new proposal to supply water to the expanded area. Importantly, the State of Wisconsin, according to statute has no authority over the scope of area covered by a water supply service area. The lack of state authority or control over the size of resulting entity makes water supply service areas very different from cities and towns as used in the Compact. As noted above, nothing in Wisconsin statute appears to prevent the water supply service area from encompassing the remainder of the straddling county.

This lack of control over borders also raises questions over the ability of state to analyze whether the water supply service area, “will effectively utilize existing water supply storage and distribution facilities and wastewater infrastructure to the extent practicable,” as required by the statute. In this context, the lack of control over borders undermines the requirement in the statute to analyze all prudent and feasible alternatives.

C. Police powers jurisdiction over the “community”

Standard: Section 4.9.3.c of the Compact requires “The Proposal shall be subject to management and regulation by the Originating Party, regardless of its size;”

The City of Waukesha does not have the ability to “regulate” other communities located within the water service supply area. The City of Waukesha in this instance is a planning agency, and as operator of a public water supply system which enters into a “contractual” relationship with other cities and towns. It is not the equivalent of the authority to regulate users within the system.

3. Waukesha has failed to demonstrate that “there is no reasonable water supply alternative” to meet its water needs

Standard: Section 4.9.3.d of the Compact, an applicant for a 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.”

Feasibility analysis must match need established

As noted above, critical to the determination of feasible alternatives is the proper determination of the quantity necessary to meet reasonable amounts necessary to meet the purposes allowed. The application by Waukesha request significantly more water than necessary to meet the needs of those people currently served by their public water supply system. Cost analysis done on supplying water at levels arguably twice as much as needed by the City of Waukesha undermines its usefulness.

A. City of Milwaukee as a potential source

When asked by the State of Michigan whether Waukesha could have been served by the City of Milwaukee, Wisconsin responded as follows:

23. What alternative considerations have been given or inquires made to the City of Milwaukee to potentially utilize their water supply and/or their treatment of wastewater as the return flow?

Answer: The Applicant held some negotiations with the Milwaukee Water Utility regarding water supply. The Applicant also met with the Milwaukee Metropolitan Sewage District regarding return flow options. Due to cost and feasibility, the Applicant did not pursue a return flow to MMSD.

The simple answer that “negotiations” were held is not sufficient. The potential alternative requires significantly more explanation of why it was not considered a feasible alternative to meeting the needs of the current service area, including detailed costs estimates.

The Wisconsin statute governing water supply service areas clearly states “2. The plan will effectively utilize existing water supply storage and distribution facilities and wastewater infrastructure to the extent practicable.” The City of Waukesha could have been connected to the City of Milwaukee using significantly less infrastructure than the current proposal. The State of Wisconsin cannot hide behind a state law that prohibits it from dictating which jurisdictions are covered by a “water supply service area” as a reason or excuse for not implementing the Great Lakes Compact. If the City of Milwaukee serving the City of Waukesha is a viable alternative source of water it must be explored. We recognize the source is the same, however, the risks and potential impacts to the Great Lakes may be different. For example:

- Could have the use and potential impacts to the Root River as a return flow mechanism have been avoided?
- Does the expanded scope of the proposed water supply service area increase the chances of co-mingling of water sources and increase the chance of the introduction of invasive species?

B. Combination of options

As noted above, the treatment options were not fully explored at the lower use amount for which Waukesha has demonstrated a “need”. This option should not only be explored independently,

but in conjunction with supply from the City of Milwaukee. Augmenting some water supply from the City of Milwaukee could significantly reduce pumping from the aquifer could result in a change of water quality and drop in radium levels which would also drop their treatment costs. Failure to evaluate this alternative in the application is not consistent with the Compact.

4. Conclusions

In closing, we respectfully request that Governor Snyder vote “no” to this application on the grounds that it does not meet the requirements of the Compact. We think the application:

- Failed to justify the quantity of water requested
- Would authorize a diversion of water not authorized under the Compact
- Failed to demonstrate that there was no reasonable alternative to the diversion, in whole or in part.

We also see no scenarios under which the use of conditions upon this application can ensure compliance with the Great Lakes compact. Our concerns with the treatment of the application by the State of Wisconsin and its failure to fully evaluate potential options should be clearly communicated.

Our comments should not be viewed as a lack of concern for the public safety of the residents of Waukesha. They deserve clean water. However, the City of Waukesha has a choice. They can comply with the conditions set forth in the Great Lakes Compact and fully explore the options that have been suggested to them and submit a revised application. Or, they can pursue treatment of their current water supplies so that its meets drinking water standards.

We appreciate your consideration of our comments. We applaud the Michigan Department of Environmental Quality’s efforts in hosting an independent public review process to ensure that Michigander’s have the opportunity to have their voices heard on this precedent setting decision.

Sincerely,



James Clift, Policy Director
Michigan Environmental Council