



Protecting the Common Waters of the Great Lakes Basin
Through Public Trust Solutions

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Waukesha's Request to Divert Great Lakes Water Fails to Demonstrate Need or Meet Standards of Compact and Public Trust Law

FLOW Calls on Regional Body and Michigan Uphold Diversion Ban, to Reject Application

TRAVERSE CITY, MI – Failing to meet strict standards or demonstrate a public need, a Wisconsin city's precedent-setting request to divert as much as 16 million gallons a day of Lake Michigan water outside the basin that drains back into the Great Lakes should be rejected by the Michigan Gov. Rick Snyder and the governors of all eight Great Lakes states, according to comments filed today by FLOW (For Love of Water), a Great Lakes law and policy center based in Traverse City.

Permitting the city of Waukesha to remove Lake Michigan water could jeopardize the Great Lakes Compact, an agreement signed by all eight states and enacted into state and federal law in 2008 that bans nearly all diversions to safeguard and protect the integrity of the waters of the Great Lakes basin, FLOW said in comments submitted on the final day of Michigan's public comment period on the diversion application.

"There is no surplus of water in the Great Lakes Basin to divert, and climate change and other factors have already pushed water levels and algal blooms to the limits," **said Jim Olson, President of FLOW and a renowned water rights attorney.** "Based on our review and analysis, one problem with the request is that several communities outside the Basin in Waukesha County already have adequate water and don't need it. The other problem is that the amount of water that would be diverted is based on indefinite and uncertain assumptions that at the end of the day are to support a build-out of sprawl and development in 2050."

"The law is also clear, given the recognized public trust limitations on diversions and sale of water from the Great Lakes, that there must be a public purpose and need that enhances or is related to the protection of the public trust waters and uses in the Basin," **said Olson.** "Waukesha's application fails to satisfy the law."

According to the Compact, this first-ever application for an exception to the diversion ban can proceed only with approval by all eight Great Lakes states, with input from the two neighboring Canadian provinces. Any state may veto the request. The governors have until March 14 to review the city of Waukesha's application and will vote on May 23 in Chicago whether to approve or deny it at a meeting of the Great Lakes—St. Lawrence River Basin Water Resources Council.

Waukesha is under a State of Wisconsin court order to address unacceptable levels of radium, a naturally occurring radioactive element and carcinogen, in its current groundwater supply of drinking water. Because Waukesha is located in a county that straddles the Great Lakes Basin, it may apply for an exception to divert water under the Great Lakes Compact.

According to FLOW's comments, the city of Waukesha's application submitted January 7, 2016, to divert 10 to

16 million gallons of water a day from Lake Michigan near Milwaukee to several Waukesha County communities that are located outside the Great Lake Basin, is deficient because it:

1. **Fails to meet the Great Lakes Compact’s “straddling counties” standard** that allows a *community* outside the Great Lakes Basin to apply for a diversion if located in a county straddling the Basin. The proposed diversion to Waukesha is not just for the city or its current water supply, which is the “community within the straddling county.” Rather it is for a proposed public water supply based on the 2002 planning document for a sewage district service area. The city of Waukesha makes up only about one-half of the “service area,” which includes almost all of southeast Waukesha County, one third of the lower northeast, and parts of the northwest and southwest areas of the county. Any location within this service area may request water from Waukesha. The towns and rural areas are included because of Wisconsin law, and do not comply with the narrower language of the exception in the Compact. For example, the “public water supply service area” or “public sewer plan service area” managing or ownership entities are *not* a “community” such as a municipality or its “equivalent,” and, therefore, the water will not be used solely by the “community” within a straddling county, as the Compact requires.
2. **Fails to demonstrate a present public need, while wrongly taking into account future growth.** There is no *current* plan for a public water supply system or demonstrated present need or showing of inadequate potable water in several towns and rural areas that have been added to the proposal. The service area submitted for the proposed exception in this case is based on a 14-year-old plan for a *sewage* waste system, and an 8-year-old water quality management plan for the sewage waste system. The sewage plan is based on Southeast Wisconsin Regional Planning Commission documents, which in turn are premised on future development or build-out by 2050. If Lake Michigan waters are diverted out of the Basin to spur future growth and development, other communities or others outside the Basin will demand equal treatment, imperiling the Great Lakes ecosystem. Moreover, as described above, the service area is based on an old sewage system service area plan, not water; and the sewage plan is speculative because it has not been funded or implemented.

“Under the Compact, there can be no exception to the diversion ban unless the communities truly straddle the boundary, lack adequate water, and demonstrate a clear current need,” **said FLOW Executive Director Liz Kirkwood, an environmental attorney.** “There is nothing current about plans to build and grow communities 30 years from now.”
3. **Fails to show that there are no reasonable alternatives to diverting Great Lakes water.** The Compact requires the city of Waukesha as the applicant to show that “there is no reasonable water supply alternative” to the diversion from Lake Michigan. Reasonable water supply alternatives, however, *do* exist for Waukesha’s proposed service area, even with the assumed full build-out. Generally all of the alternatives would provide treated potable water within an acceptable range of costs, safety and health regulations and impacts, especially taking into account local adjustments to minimize hydrological effects on wetlands and streams – without a loss or diversion of waters out of the Great Lakes Basin or negative precedence for future requests for diversions or challenges to the diversion ban itself.
4. **Fails to satisfy substantial limitations imposed by public trust and riparian law,** which have significant implications for future transfers, diversions or the sale of water in the Great Lakes Basin.

FLOW’s comments submitted to MDEQ and the Regional Body on the application by the city of Waukesha to divert Great Lakes water are available for download at www.FLOWforWater.org.