



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

**COMMENTS TO THE GREAT LAKES COMPACT COUNCIL AND  
REGIONAL BODY**

**WAUKESHA'S PROPOSED EXEMPTION TO THE GREAT LAKES  
COMPACT DIVERSION BAN: A TIME FOR UTMOST CAUTION**

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Ask any ship captain or sailor along the shores of the Great Lakes, and they will tell you how important it is to follow the rules of navigation, including honoring those lighthouse beacons and green and red channel buoys. In short, boat captains must exercise utmost caution at all times. The same is true for the eight governors of the Great Lakes States under the Great Lakes Compact, which has a narrow exemption to the supposedly iron-clad ban on diversions out of the Basin. The Compact's provision at issue exempts communities located in Counties that straddle the basin divide. It should also be remembered that the waters of the Great Lakes Basin are held in trust under both the Compact and the common law; what this means is that the governments as trustees have a high, solemn duty to protect the integrity of these waters, ecosystems, and public uses dependent on them.

The City of Waukesha and its water service area sits entirely outside of the Basin; its proposal to divert water is allowed only because of the Compact's exemption to the diversion ban, and a set of strict principles that like navigational beacons or buoys are intended to keep the Compact from collapsing on a reef of potentially bad and rocky precedents. When the final decision is made on June 21 or later on Waukesha's proposed average of 8.1 million gallons a day (mgd), the Council and Regional Body must first and foremost concentrate on the paramount responsibility toward the waters of the Great Lakes Basin, the strength of the Compact, and the interests of citizens as beneficiaries of this public trust. Like ship captains, the Council and Regional Body must exercise utmost caution, and steer the Compact away from any reefs, even if it means further tightening the parameters of a proposed exemption like Waukesha.

On June, 21, 2016, the Great Lakes Compact Council and Regional Body are faced with an important decision on whether Waukesha, Wisconsin – a city located entirely outside of the basin near Milwaukee—can legally divert 8.1 million gallons a day from Lake Michigan. Given the Compact's diversion ban and limited exemption for straddling communities, this decision is not just about the needs of Waukesha, but the precedential effect it will set for future demands for Great Lakes water in light of climate change impacts, increased competition, and greater worldwide water scarcity. By navigating within the strict standards of the Compact, the Council and Regional Body can reach the right decision. To do this, the following standards and further modifications of Waukesha's proposal must be kept in mind:

### **Straddling Community or County**

To qualify for an exemption to the Compact's diversion ban, a community's water system has to straddle the Basin surface drainage boundary or sit in a county that straddles the basin. If it does not, it cannot divert water from the Great Lakes. A community in a straddling county can request an exemption but only if they demonstrate a clear public need, no alternative, no significant

cumulative environmental impacts, and provide at its cost fully transparent monitoring, inspection, enforcement, and strong conservation measures.

### **Public Need**

On June 11, 2016, the Council proposed reducing Waukesha's original proposal from 10.1 mgd to an *average* of 8.1 mgd, or about 19 percent less, because approximately 2 mgd of the water would have served the future growth needs to the year 2050 in communities outside Waukesha's territory and existing public water system that currently draws groundwater from the Mississippi Basin. However, the future growth and build-out 2050 goal of Waukesha raises a basic question of whether Waukesha's proposal serves current public needs or its goals several decades in the future. This problem is compounded by the fact that the 8.1 mgd is an *average*; it can go much higher during at any given time. Can the straddling community exemption turn on such a loose application of public need? The Council and Regional Body should (1) cap the diversion at the 8.1 mgd, averaged over a 30-day period, in order to avoid large swings in diversions and discharge of return treated waste water into the waters of the basin, and (2) impose a condition that requires reevaluation of the public need and other factors every five (5) years to ensure that Waukesha does not look to the Great Lakes as its only source of water before and after 2050. The exemption for straddling communities was not intended to "subsidize" the growth and development of communities and water use outside the Basin.

### **Showing of No Alternatives**

Generally an alternative exists if it is feasible and reasonably prudent. The burden rests with the straddling community. In this present case, Waukesha currently meets its daily needs of 6 mgd from groundwater within the Mississippi Basin. A court ordered the city to treat its groundwater or find another water source because of unacceptable levels of radium contamination. In the last 15 years, groundwater tables in the region outside the basin have been steadily rising. Given this dynamic situation and the fact that Waukesha can either treat its water or divert its water from Lake Michigan, Waukesha has alternatives that do not require 8.1 mgd or more at times from Lake Michigan. Just because one alternative is more expensive than another is not enough to reject an alternative; the cost must be *prohibitive* or logistics *seriously difficult*. If the alternative standard is not strictly applied, others in the future will justify requests for water under the same circumstances. Waukesha's court-ordered water supply fix possibly provides a distinction; however, is it enough where the problem could be addressed by various alternatives that while perhaps not the preferred alternative, are feasible and not extremely difficult? The upcoming June 21 record must show that Waukesha's alternatives to use or treat groundwater within the Mississippi Basin or to supplement water from Lake Michigan are both cost prohibitive and

severely difficult. Any weaker standards will signal others outside the Great Lakes Basin that the door is ajar and available for their water needs and demands.

### **Monitoring Conservation, Diversion, and Return Flows**

Waukesha's recent modification does not sufficiently describe critical details on how Waukesha's proposal, if properly approved, would be monitored, transparent, and enforced. And these are essential to the Council and Regional Body's review on June 21. For example, the parameters for monitoring inflows from Lake Michigan, water use, return wastewater discharge, flows and levels of the Root River, and other key hydrological elements and effects are not specified. It is also not clear who can and will enforce or who will pay for it. Waukesha's proposal should not be approved without adding clear, transparent, and enforceable measures and conditions to assure that the standards and limits of the diversion are not violated. Without clear guidance, the diversion could become slippery slope that overtime could become a basis for other communities to argue a lack of overall concern in protecting the Compact's ban on diversions.

### **Waste Water Return Flow to Root River and Lake Michigan**

The Compact mandates a determination that there will be no significant impacts from an exemption for a straddling community diversion to the environment, including cumulative impacts. The record of the proposal to date emphasizes consideration of the impacts of the proposed diversion, but does little to support a finding that there will be no significant effects or impacts from the average of 8.1 mgd discharge of treated wastewater to the Root River that flows to Racine, Wisconsin and into Lake Michigan. Currently, wastewater from Waukesha's sewage wastewater is returned to water courses within the Mississippi Basin, with no effects on the waters of the Great Lakes. The return flow requirement, which is a necessary condition to any diversion of Great Lakes water to a straddling community, could significantly increase flows and levels of the Root River and downstream communities like Racine.

Racine and the river and ecosystem are part of the waters of the Basin protected by the Compact as the Great Lakes themselves. A straddling community proposal like Waukesha's must determine that there will be no significant direct and cumulative environmental impacts from return flows into waters of the Basin. The Compact covers all "waters of the Basin." A smaller river or community, or land and adjacent ecosystems cannot be ignored or sacrificed any more than the Great Lakes. Waukesha's proposal therefore should not be approved until it has been shown that the return treated waste water will not adversely and significantly affect and impact the river, its ecosystem, and downstream communities like

Racine. The Council and Regional Body should set a high bar for what must be shown to satisfy the impact standard; as described above, this should also include stringent baseline study, monitoring, accountability, and enforcement.

The Great Lakes Compact Council and Regional Body must exercise utmost caution in interpreting and applying the standards for any community to obtain approval of a diversion within the narrow straddling community exemption to the diversion ban. Based on the Compact and common law principles, the Great Lakes and Basin waters are held by the states in trust. As trustees, the states have a solemn duty to protect these waters and their private and public use and enjoyment. This means that each standard in the Compact must be cautiously applied so that there is no room for misinterpretation or unintended bad precedent in the future that would weaken the Compact. Just like ship captains, when it comes to the Great Lakes, there is no room for error.