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153 ½ East Front Street
Suite 203 C
Traverse City, MI 49684

231.944.1568

flowforwater.org

August 28, 2015

Ms. Ashley Hoekstra
Wisconsin Department of Natural Resources
Bureau of Drinking Water and Groundwater
BOX 7921
Madison, Wisconsin 53707-7921

Re: Waukesha Water Diversion Application under Great Lakes Compact, Section 4.9, and Wisconsin Statutes, Wis. Stat. 281.346(4)(e)(1), Wis. Stats. 281.343, 281.346, and Common Law Public Trust Doctrine

Dear Ms. Hoekstra and Wisconsin Department of Natural Resources:

FLOW (For Love of Water), a Great Lakes law and policy center, submits the following comments to assist you and the Department in evaluating and making a decision on the above-referenced matter. FLOW thanks Wisconsin DNR for its comprehensive review of this matter, including its technical reports and studies.

The purpose of these comments is to address the legal and policy principles that apply to the Waukesha application, and to ensure the standards of the Great Lakes Compact, common law, and other laws are stringently applied. Any relaxation of these standards and laws could jeopardize the Compact diversion ban and threaten the waters of the Great Lakes in Wisconsin and Michigan. There is increasing competition for global, national, and regional water sources, exacerbated by drought, climate change effects, and demands for food, energy, shelter, and development by increasing population and consumption. Wisconsin, as other states who are in the Basin and part of the regional body governing diversions under the Compact, must exercise utmost caution in reviewing and applying these legal standards and principles to the Waukesha application. A failure to do so will open the door to improper expectations or claims by interests outside the basin, triggering commerce clause and trade law challenges and claims that could undercut the strength of the diversion ban.

Overview

FLOW submits that:

(1) the evaluation under Wisconsin law and the Compact must be interpreted and applied based on the background principles of the common law of water and the public trust doctrine, because it is undisputed that the source of the water is Lake Michigan (and its tributary water); and

(2) the legal standards and principles of the Compact must be interpreted and applied stringently, because any deviation or even unintentional relaxation of the standards will undermine the diversion ban and other mechanisms of the Compact; this is important because relaxed or variant interpretation will render the diversion ban and Compact less effective and increase the potential for takings, commerce clause, and North American Free Trade Agreement claims for Great Lakes water and/or investment claims for damages.¹

Specific Comments:

FLOW specifically submits the following comments:

1. The Waukesha Application is Subject to and Must Comply with Background Principles of the Public Trust Doctrine and Water Law.

Lake Michigan, like all navigable waters, is owned and held in public trust by the states of Wisconsin and Michigan, as trustees, for the citizens of these respective states, as legal beneficiaries, for the protection of fishing, boating, swimming, bathing, navigation, and other forms of water related recreation.² The Compact also recognizes this public trust, finding that “The waters of the basin are precious public natural resources shared and

¹NAFTA Chapter 11 Investor-State Disputes (to October 1, 2010), Scott Sinclair, Trade and Investment Research Project, Canadian Centre for Policy Alternatives/Centre Canadien de Politiques Alternatives; *Table of Foreign Investor-State Cases and Claims under NAFTA and Other U.S. Trade Laws*, Public Citizen, April 2015; AbitibiBowater Inc., p. 19; The Toronto Star. “Ottawa pays Abitibi \$130M to settle claim.” (August 25, 2010); Kathryn Leger. “AbitibiBowater wins NAFTA case vs. Ottawa.” THE GAZETTE (MONTREAL), (August 27, 2010); M.A. Salman, *International Trade Law Disputes: New Breed of Claims, Claimants, and Settlement Institutions*, International Water Resources Association, 31 Water International pp. 2-11 (March 2006), with David Johnson, *Water and Exports under NAFTA, Law and Government Division*, 8 March 1999, PRB 99-5E <<http://publications.gc.ca/collections/Collection-R/LoPBdP/BP/prb995-e.htm>>, who lays out the government position and arguments about water as a “good” or “product” under international trade laws, including NAFTA.

²Wis. Const., Art IX, Sec. 1; Wis. Stat. Ann. Secs. 30.01.01 et seq.; *Hilton ex rel. Homeowners v Department of Natural Res.*, 717 NW 2d 166, 173; *Muench v. Pub. Service Comm’n*, 261 Wis. 492, 109 NW 2d 271 (1952); *State v Pub. Service Comm’n*, 81 NW 2d 71 (Wis. 1957); *Lake Beulah Mgmt. Dist. V Department of Natural Res.*, 799 NW 2d 73, 76 (Wis. 2011); Mich. Const. Art. 4, Sec. 52, MCL 324.32501 et seq.; MEPA, MCL 324.1703, 1705; *Obrecht v National Gypsum Co.*, 105 NW 2d 143 (Mich 1960).

held in trust by the states.”³ Moreover, the Compact specifically preserves common law principles, like riparian water law and the public trust doctrine,⁴ and must comply with all other federal and state laws and the Compact to the extent the Compact is more stringent.⁵

Under the public trust doctrine, generally no water or bottomlands can be alienated or transferred unless for a public purpose related to the use, enjoyment or improvement of the public trust,⁶ and if there is a valid public purpose, where there is no material or measurable impairment.⁷

The transfer or diversion of public trust Lake Michigan water is prohibited unless authorized by state law.⁸ Moreover, any such authorization must fall within the two narrow exceptions noted above, namely a valid public trust purpose or public purpose related to the use and enjoyment of public trust waters in question, and no material interference or impairment.⁹ Approvals of diversions or transfers of water from a watershed must consider the impacts and legal precedent effect on the integrity of the public trust waters, including improper relaxation of the public trust purpose requirement.¹⁰ Without express authorization and specific factual findings that these narrow exceptions and criteria have been met, an application for authorization to transfer public trust waters, such as the Waukesha application, should not be lawfully approved. Specifically, the applicant must establish that the diversion of water outside the Great Lakes serves a public purpose related to the use and enjoyment of Lake Michigan and the Great Lakes basin.¹¹

There are four basic public trust questions that must be answered before the Waukesha application can be approved. First, has Wisconsin passed a statute that expressly authorizes the diversion of public trust waters containing public trust standards out of the Lake Michigan basin? Second, as noted above, is the diversion’s purpose related to use

³Great Lakes Compact, Sec. 1.3(1(a), P. L. No. 110-342, 122 Stat. 3739 , at 3742. (2008) (herein “Compact”).

⁴Compact, Wis. Stat. 281.343(8)2.

⁵Compact, Wis. Stat. 281.343(8)4, 281.343(9)(c); Melissa K. Scanlan, *Realizing the Promise of the Great Lakes Compact: A Policy Analysis for State Implementation*, 8 Vt. J. Envtl. L. 39 (2006).

⁶*Illinois Steel Co. v Biolot*, 109 Wis. 418, 426, *Muench, supra*, 261 Wis. at 499.

⁷*Illinois Central R Rd v Illinois*, 146 U.S. 387 (1892); *City of Madison v State*, 1 Wisc.2d. 252, 843 NW 2d 674 (1957); *Muench v. Pub. Service Comm’n, supra*, note 2.

⁸*Id.*, Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 Mich L. Rev 471 (1970).

⁹*Id.*, *Illinois Central Railroad v Illinois*. A transfer or use for a primarily private purpose is not authorized and void. *Priewe v Wisconsin State Land*, 93 Wis. 534, 67 NW 918 (1896); so to is a transfer or use of public trust land or waters for a public purpose that is not related to access to or enjoyment of public trust waters for recognized public trust rights and uses. *Meunch, City of Madison, supra*;

¹⁰*Madison v State, supra*; *Lake Beulah Mgmt. District, supra*; *Obrecht v National Gypsum Co., supra*, note 2; *People v Broedell*, 112 NW 2d 517 (Mich 1961).

¹¹*Madison v State; Muench, supra*.

and enjoyment of Lake Michigan and the Great Lakes? That is, is the diversion of 10.1 to 16 million gallons a day for a public water supply in towns located in the Mississippi River basin within the scope of public purpose under public trust law? Third, is there a public necessity for the diversion of public trust water for a public water supply in another continental river basin? Fourth, are there specific findings based on a factual record that comply with these standards? If any of these are not established, then the application as presented should be denied as contrary to the public trust in the waters of the Great Lakes.

Wisconsin and the other states, and citizens, must exercise utmost “caution” as the Compact demands, to make sure the integrity of the public trust and Great Lakes and tributary waters is not compromised. In this second decade of the 21st century, it is more evident than ever that the Great Lakes face unprecedented geopolitical and systemic threats – climate change, extreme weather, fluctuations in flows and levels, phosphorous-loading and algal blooms, invasive species such as quagga mussels and Asian carp, persistent plastics and toxins. Ultimately the fierce competition for water threatens diversions of water from the Great Lakes basin. In the next 15 years, a U.N. report warns the world could suffer a 40 percent shortfall in water by 2030 unless countries dramatically change their use of the resource.¹² Just this year, 2015 marked the first time water crises claimed the top spot in the World Economic Forum’s 10th global risk report. As the U.S. Department of Energy recently observed: “We cannot assume the future is like the past in terms of climate, technology, and the evolving decision landscape.”

Since the 2004 and 2000 Great Lakes Reports, private investor claims under NAFTA and other trade laws have more than tripled.¹³ While the legal policy and approach behind the diversion ban and consumptive use regulations is generally sound and defensible, the increase and success of a few of these private investor claims for money damages for discrimination or expropriation of water use rights create uncertainty, confusion, an concern.¹⁴

The public trust doctrine and principles in the Great Lakes should not be, indeed cannot be, bent to fit every demand for water, especially for demands outside or beyond the basin or public trust in the Great Lakes.

¹² The United Nations World Water Development Report. *Water For a Sustainable World*. 2015 <http://unesdoc.unesco.org/images/0023/002318/231823E.pdf>

¹³ See *NAFTA Chapter 11 Investor-State Disputes (to October 1, 2010)*, Scott Sinclair, Trade and Investment Research Project, Canadian Centre for Policy Alternatives/Centre Canadien de Politiques Alternatives; *Table of Foreign Investor-State Cases and Claims under NAFTA and Other U.S. ‘Trade Laws,’* Public Citizen, April 2015.

¹⁴ U.S. Department of Energy. *The Water-Energy Nexus: Challenges and Opportunities*. (June 2014) <http://energy.gov/sites/prod/files/2014/07/f17/Water%20Energy%20Nexus%20Full%20Report%20July%202014.pdf>; see also http://waterinthewest.stanford.edu/sites/default/files/Water-Energy_Lit_Review.pdf

2. The Exceptions and Decision Making Standards for Diversions to “Straddling Communities” or “Straddling Counties” Must Be Strictly Interpreted and Applied.

The Compact demands the parties to exercise utmost caution in determining whether or not the proposal meets the criteria and conditions for the so-called “straddling” exceptions. This means that strict attention must be paid to not only the plain meaning of the wording of the exceptions, but to the effects of an interpretation and application given to the exceptions and their standards. This also means that careful analysis and comparison is required between the wording and meaning of the standards in the Compact and the wording of similar laws in Wisconsin. Adherence to the Compact exceptions override state law or regulations that are less stringent.

As noted in the previous section of these comments, the increased demand, water scarcity, extreme weather, and effects of climate change have created a water crisis that will increase pressure for the waters of the Great Lakes Basin. The dormant commerce clause in the federal constitution warrants careful analysis in the application of the diversion ban and its exceptions in the Compact. NAFTA and international trade law claims can leverage water out of a basin or watershed through government challenges or private investor claims – discrimination or damages to reasonable expectations based on land and property law, diversions or consumptive uses allowed without material factual relationship to protection of exhaustible water resources and protection of the environment within the basin.

a. Definitions and Standards for “Straddling Community” and “Straddling County” Exceptions

The Compact provides:

*Straddling Communities.*¹⁵ A proposal to transfer water to an area within a straddling community but outside the basin or outside the source watershed shall be excepted [provided that] all of the water so transferred shall be used solely for public water supply purposes within the straddling community.

1.a. Is part of a water supply or wastewater treatment system that combines water from inside and outside the basin.

Wisconsin law provides:

*Straddling Communities.*¹⁶ The department may approve a proposal under par. (b) [for a diversion] to an area within a straddling community but outside the Great Lakes Basin or outside the source watershed if the water

¹⁵Compact, Wis. Stat. 281.343(4n)(a).

¹⁶Wis. Stat. 281.346(4)(a),©.

diverted will be used solely for public water supply purposes in the straddling community...

* * *

2.a. The returned water will be from a water supply or wastewater treatment system that combines water from inside and outside the basin.

The Compact provides:

*Straddling Counties.*¹⁷ 1. A proposal to transfer water to a community within a straddling county that would be considered a diversion under this compact shall be excepted from the prohibition against diversions if it satisfies all of the following conditions:

a. The water will be used solely for the public water supply purposes of the community within the straddling county that is without adequate supplies of potable water.

* * *

d. There is no reasonable water supply alternative within the basin in which the community is located, including conservation...

e. Caution shall be used in determining whether or not the proposal meets the conditions for the exception. The exception shall not be authorized unless it can be shown that it will not endanger the integrity of the basin ecosystem.

Wisconsin law provides:

*Straddling Counties.*¹⁸ The department may approve a proposal under par. (b) for [a diversion] if the water diverted will be used solely for public water supply purposes in a community within a straddling county or, if a community is partly in a straddling county and partly within a county that lies entirely outside the Great Lakes basin, the water diverted will be used solely for public water supply purposes in the portion of the community that is within the straddling county...

a. The community is without adequate supply of potable water.

b. The proposal meets the exception standard under par. f.

* * *

d. There is no reasonable water supply alternative within the watershed in which the community is located.

* * *

(f)1. The need cannot reasonably be avoided through efficient use and conservation of existing water supplies.

¹⁷Compact, Wis. Stat. 281.343(4n)©.

¹⁸Wis. Stat. 281.346(4)(e)(f).

- (f)2. The diversion is limited to the quantities that are reasonable for the purposes for which the diversion is proposed [water supply].

Note also, that for all application for an exception to the diversion ban the department shall use as appropriate the current or planned service area.¹⁹

The exception for “straddling communities” is strictly for public water supply “within” or “in” “the straddling community.” The proposed diversion to Waukesha is not for the city, which is the community within the straddling county, but the entire public water supply service area. The City of Waukesha is not itself a “straddling community.” It is not “the” community, it is not even “a” community, but a large geographical area entirely out of the Great Lakes Basin.²⁰ Moreover, not even the public water supply service area straddles the Great Lakes Basin divide.²¹ Only a relatively small portion of the eastern part of Waukesha County straddles the basin divide.

A look at Figure 15 of the WDNR Draft Technical Report shows that the area includes most all of southeast Waukesha County, one third of the lower northeast, and parts of northwest and southwest areas of the county. Any area within this service area may request water from Waukesha as part of the service area.²² The towns and rural areas are included because of Wisconsin law,²³ and not the language of the exception in the Compact.

To get around the conflict with the definition of the exception, Wisconsin DNR states that “the department considers the delineated water supply service area to be a “community with a straddling county.”²⁴ The Compact defines a “community within a straddling county” as “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 that is not as straddling community.”²⁵ Wisconsin defines “community within a straddling county” 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 basin.”²⁶ The Waukesha application does not fall within the “straddling communities” exception.

The question then is whether the application fits the “straddling counties” exception as a “community within a straddling county.” A “community” is limited by Wisconsin law to a “city, village, or town.” A “community” under the Compact is limited to any “incorporated city, town, or the equivalent thereof.” The “community” in the application for the “straddling counties” exception is the “public water supply service area”

¹⁹*Id.*, 281.346(4)(bg).2.

²⁰Fig. 10, Wis. DNR Draft Technical Report, June 2015, p. 47.

²¹*Id.*

²²*Id.*, p. 45-46.

²³Wis. Stat. 281.348(3).

²⁴Draft Technical Report, p. 44.

²⁵Compact, Wis. Stat. 281.343(1e)(d).

²⁶Wis. Stat. 281.346(1)(d).

consisting of several incorporated units of local government – city and towns– and a wide rural area that is represented as part of the towns. However, the Waukesha water utility public water service area is not an incorporated city, town, or village, or the “equivalent thereof.”

Under the Compact, “caution” is required to protect the integrity of the Great Lakes and its ecosystem. This means when in doubt over meaning, the Compact straddling “exceptions” and definitions related to them, should be strictly or narrowly construed. Moreover, for a “community within a straddling county” to qualify, there must be a showing that the “community” “is without adequate supplies of potable water.” With respect to the city and towns or other areas within the public water service area, alleged to be the “community,” there is no showing that the entire area is without adequate supplies of potable water. Even assuming for sake of argument that the city in this case is without adequate potable water, which is not entirely the case, the “community” in this case as defined by the Wisconsin DNR is not in the same circumstance, and the situation of the city cannot be used to bootstrap the remainder of the areas as a “community within a county.”

Other counties or states outside the Great Lakes basin could point to the broad, sweeping application of the Compact to serve present and future communities in a straddling county, undercutting the finding that the waters of the basin are exhaustible, threatened resources, which they are from all of the myriad threats. In turn, this would send the diversion ban down a slippery slope that could weaken it.

b. Public Need

As a general rule, an applicant can use its “current or planned” water service area “as appropriate.” Waukesha did not consider current demand as compared to a planned water service area. It appears Waukesha’s water and sewer district did this to justify and pay for the cost of the Lake Michigan diversion out of the basin into the county by adding outlying towns and areas to its planned service area. Then the district used a 20-year demand study based on full build out of this service area, even though there is no current demand for such growth, and the planned demand is arrived at through assumptions about maximum growth without regard to whether these towns or areas currently need the service, or will request it in the future.

Accordingly, no current public need for the proposed 10.1 MGD is established. Moreover, the need is admittedly speculative regarding future development and growth. In addition, the Draft Technical Report does not adequately document actual water sources and supplies in these towns or areas, or whether there is a current or even planned need to shut-down current water supply wells or systems. That the towns projected future growth is needed to justify Waukesha’s proposed diversion does not support a finding that the towns have a public need for the diversion. As a result, the applicant has not demonstrated a public need for the 10.1 MGD diversion from Lake Michigan. The City of Waukesha may have a public need, but that does not mean there is a public need for the other towns.

Utmost caution is required, as noted above, to assure integrity of the waters of the basin. This includes confining exceptions to the exact calculated public need, not an assumed “full build out” or future growth.²⁷ If waters of Lake Michigan are diverted out of the basin for use in areas where there is no demonstrated need, only future development and growth assumptions, then other areas outside of the basin can rely on the same approach. If they are denied water from the basin, they could claim precedent or challenge the diversion ban, because the water is being used outside the basin to promote growth and development. It can also be argued that diverting water for growth outside the basin concedes that there is no substantial public need, or that the waters of the basin are not exhaustible. Out of basin interests may be able to demand water from the basin through discrimination, commerce clause, and NAFTA claims. This in turn endangers the integrity of the basin waters and ecosystem.

c. No Reasonable Alternative

There are reasonable alternatives for water supply to Waukesha and even the service area, even with the assumed full build out. They may not be the best alternatives, but 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.

The applicant has the burden of demonstrating “no reasonable alternative.” The important question is what does this phrase mean. Under standard alternatives assessment laws in environmental, wetland, or public parkland matters, a project is prohibited unless it is clearly shown that there is no other suitable or practicable alternative.²⁸ This is based on the idea that any diversion or loss of these natural resources constitutes an unacceptable adverse impact or harm. Accordingly, the primary impact issue is whether an alternative will adversely or unreasonably impact the Great Lakes. Necessarily none of the alternatives to the Lake Michigan diversion in this matter will affect the Great Lakes that are protected by the diversion ban of the Compact. By analogy, to protect present and future uses of wetland, the Wisconsin DNR considers, inter alia, practicable alternatives to the proposed property use which will not adversely affect wetlands or create significant adverse environmental consequences.²⁹

Similarly, the Compact standard protects the Great Lakes from diversions, including straddling exceptions, by demanding a showing that “there is no reasonable water supply

²⁷This also ignores other local choices or growth plans within a town or community, which in turn involves land use plans or measures that conserve not increase demand for water.

²⁸Wisc. Adm. Code, Sec. NR 103.08 et seq.; Clean Water Act, Section 33 USC 1344; 40 CFR 404(b)(1). Wetlands cannot be filled unless it is clearly demonstrated there is no practicable alternatives and the other alternatives have not significant or major impacts. In other words, wetlands are not to be filled, because the law has determined that the loss of wetlands is a serious harm. A similar analysis and approach is suggested under the “no reasonable alternative” standard of the Compact.

²⁹See Wis. Adm.Code § NR 103.08(3)(b). If these criteria are not satisfied, the DNR must find that the requirements of Wis. Adm.Code ch. NR 103 have not been satisfied.

alternative” to the diversion from Lake Michigan. However, Wisconsin changed the standard by adding a definition of “reasonable water supply alternative” to mean “a water supply alternative that is similar in cost to, and as environmentally sustainable and protective of public health as, the proposed new or increased diversion and that does not have greater adverse environmental impacts than the proposed new or increased diversion.”³⁰

This does not change the burden under the Compact to demonstrate “no reasonable alternative” to the diversion of 10.1 MGD of Lake Michigan water. A plain reading of the meaning of the alternatives standard in the Compact does not contain this language. Rather it demands a showing that no other reasonable alternative exists. The Wisconsin definition changed and weakened the Compact standard into a comparative factors test to choose a “reasonable water supply alternative” for a water service area.

As noted above, all of the other non- Lake Michigan diversion alternatives would deliver potable water at comparatively similar costs without a loss or diversion of waters out of the Great Lakes Basin. While these other alternatives have varying degrees of risks of adverse environmental impacts, they all avoid any impact or diversion and loss of water to the Great Lakes. Applying the broader Wisconsin balancing test does not comply with the intended meaning of the “no reasonable alternative” standard in the Compact, because it changes the “no alternative” focus from protecting the loss or diversion of the Great Lakes to a comparative analysis of adverse impacts, costs, and benefits between all of the alternatives. Applying this definition turned the customary “no alternatives” analysis in the Compact on end.

An exception to the ban on diversion and loss of water from the basin is authorized only if the applicant demonstrates “no reasonable alternative.” Based on the Draft Technical Report’s several alternatives, coupled with conservation and timed on an as-public-need basis, this has not been established. If anything, all of the other alternatives avoid any adverse impact or loss of Great Lakes waters to another basin and while they have adverse impacts, none are shown to be unreasonable in light of the fact they will not cause diversion of Great Lakes waters into the Mississippi River basin.³¹

Summary

The Applicant Waukesha applies for a straddling county exception to the diversion ban. An exception is allowed only if the standards and conditions in the Compact have been met.

Water of the Great Lakes is public and subject to the public trust doctrine, under common law, Wisconsin Constitution, and the Compact. Public trust standards have not been applied to the proposed project, particularly the questions of whether the purpose,

³⁰Wis. Stat. s.281.346(1)(ps).

³¹This is not to say that the “public need,” “without adequate water,” or “no reasonable alternative” standards could not be met if the application involved only the City of Waukesha’s current and near-term needs.

although public, is based on a true necessity and that is related to enjoyment of the public trust in the Great Lakes Basin.

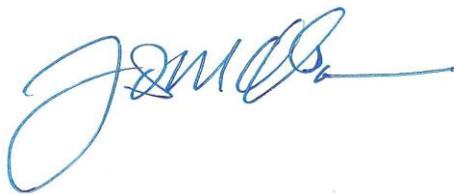
Strict compliance with the Compact standards is required. It has not been demonstrated on the current application that there is a real public need; future growth and development outside the basin do not constitute true public need to justify diversion out of the basin. It has not been demonstrated on the basis of application that there is no reasonable alternative within the intended meaning of the Compact. Reasonable alternatives that do not involve diversion of 10 MGD of Lake Michigan, the focus of the Compact diversion ban, are reasonable and do not overall have significant adverse impacts that justifies the diversion. It has not been shown that all towns and communities within the county are without adequate potable water.

Finally, the intended meaning of the “straddling counties” exception does not define “community within a county” that partly straddles the basin as a municipal water and sewer district. It is not an incorporated city or town, and the towns that are in the district are separate and distinct incorporated communities.

Because of the world-wide water crisis, regional water droughts and extreme weather, climate change, and demand for Great Lakes water within the basin, the Waukesha application must be reviewed with utmost caution. If done without strict vigilance and construction or interpretation of the intent and application of the “straddling” exceptions to the diversion ban, the diversion ban and integrity of the waters of the basin and its ecosystem will be weakened and endangered.

Thank you for the effort on the part of Wisconsin DNR in reviewing the Waukesha Application and for the opportunity to provide these comments. Please include them in the record of decision in this matter.

Sincerely yours,



James M. Olson
President and Policy Advisor
FLOW (For Love of Water)