



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

May 3, 2018

Great Lakes-St. Lawrence River Water Resources Regional Body and Water Resources Council
c/o Conference of Great Lakes and St. Lawrence Governors and Premiers
20 N. Wacker Drive, Suite 2700
Chicago, Illinois 60606

VIA EMAIL:

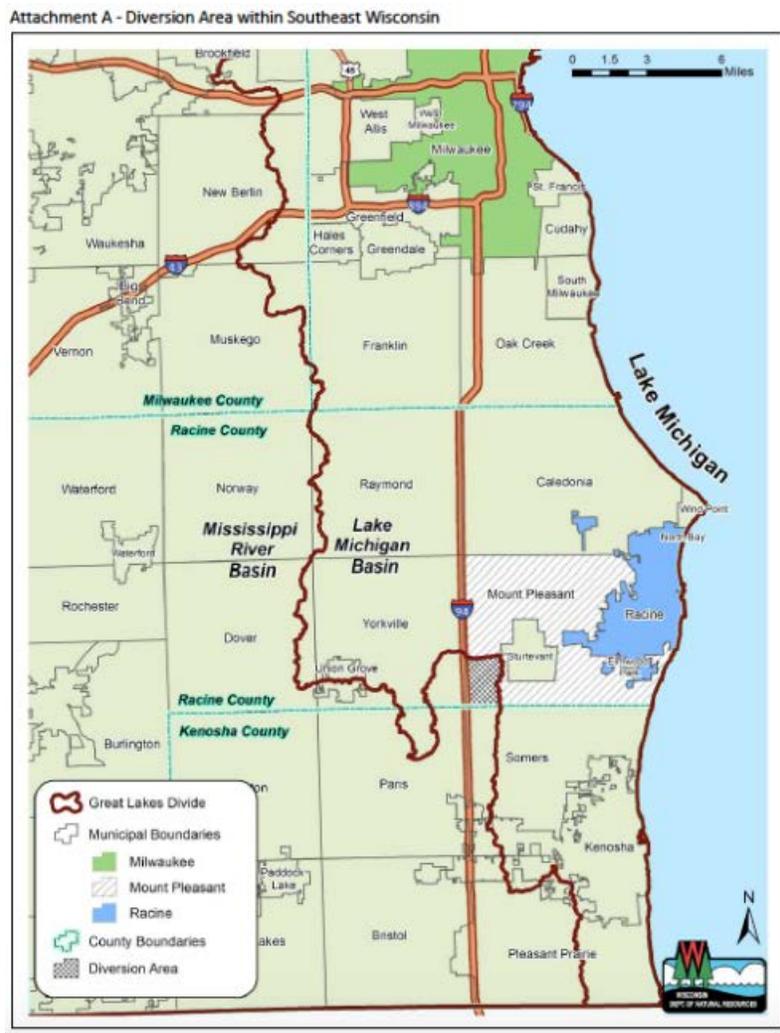
RE: COMMENTS ON THE RACINE/FOXCONN WATER DIVERSION “STRADDLING COMMUNITY” APPLICATION UNDER GREAT LAKES COMPACT, SECTION 4.9.1, AND WISCONSIN STATUTES, WIS. STAT. 281.346(4) (E) (1), WIS. STATS. 281.343, 281.346, AND COMMON LAW PUBLIC TRUST AND RIPARIAN DOCTRINES

Dear Great Lakes-St. Lawrence River Water Resources Water Resources Council and Regional Body:

FLOW (“For Love of Water”) – Great Lakes law and policy center – submits these comments to the Compact Council and Regional Body to urge these government bodies to conduct a review of the Wisconsin DNR approval of the Racine-to-Foxconn diversion referenced above. After evaluating the application, appendices, the Wisconsin Department of Natural Resources (“DNR”) decision, and other related documents, FLOW has serious concerns about the lawfulness of the State of Wisconsin DNR conclusion that the Racine proposal qualifies for the Section 4.9.1 and the nearly identical Wisconsin “straddling community” exception for a diversion of 7 million gallons per day for a new customer – primarily the Foxconn project – and facility in an area outside the basin. An overly broad interpretation of the “straddling community” exception as applied to the transfer of water for Foxconn will undermine the diversion ban, a critical common concern for all parties interested in the protection of the waters of the Great Lakes basin.

Careful management and protection of Great Lakes water is critical to securing sustainable jobs and economy inside the basin. To this end, the parties and all citizens of the Great Lakes must remain vigilant against unwanted or unanticipated consequences from an improper use of the “straddling community” exception to achieve ends not authorized or contemplated by the Great Lakes Compact (“Compact”). The “straddling communities” exception is intended to allow *existing* incorporated areas whose boundaries and public water supply systems straddle the basin divide to increase transfers or diversions of water outside of the basin within the straddling community. The City of Racine and its public water supply system, however, are located *inside* the basin; the Racine public water supply system does not straddle the basin divide. The Village of Mt.

Pleasant is simply a *customer* of Racine’s water utility system; Mt. Pleasant straddles the basin, but it does not have a water supply system or authority at all. Racine’s proposal is for a completely *new* diversion that serves a *new* Racine water utility customer—Foxconn—outside the basin. This means any number of private developments outside the basin will adopt cities or towns that cross the basin divide in order to tap cities like Racine that are inside the basin to serve their private ends. Recognizing the looming global water crisis (with demand forecasting to outstrip water sources or supplies by more than 30 percent by 2050) and assuming moderate growth with increased demand for water outside the basin, it becomes readily apparent that water diversions outside the basin could well reach one-half to one billion gallons a day. There are scores of incorporated areas along the basin divide that could take advantage of Wisconsin’s expanded use of the “straddling community” exception to accommodate similar Foxconn’s private industrial development and operations. For this reason, the Racine-to-Foxconn diversion must receive the highest degree of scrutiny, and if it is discovered that the application of this exception violates or is not consistent with the Compact, then the Council, Regional Body, and parties or citizens must correct the error before it is too late.



THE PARTIES JOINT COMMITMENT TO COMPLY WITH COMPACT TO ASSURE UNIFIED AND CONSISTENT PRINCIPLES

The protection of the integrity of the Great Lakes is the “overarching principle” for the Compact.¹ The Compact demands “joint pursuit of unified and cooperative principles.”² The purpose of the Compact is “to provide for the joint exercise of such sovereignty by the Council in the common interests of the people of the region.”³ The Council is under obligation to review and modify or implement consistent water management policy and standards to assure the intent and common interests of the Compact are met and protected.⁴ Generally, proposals, including the threshold question of whether a proposal falls within the scope of an exception, like the scope for a “straddling community,” should not be approved if inconsistent with the meaning and intent of the Compact.⁵ 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 interpretations will render the diversion ban and Compact less effective and increase the potential for takings, commerce clause, and North American Free Trade Agreement (“NAFTA”) claims for Great Lakes water and/or investment claims for damages.⁶

THE CITY OF RACINE’S PROPOSAL IS A NEW DIVERSION OUTSIDE THE BASIN, OR AN ALTERATION OF AN EXISTING WITHDRAWAL SO THAT IT BECOMES A DIVERSION.

It is undisputed that the City of Racine’s public water supply does not straddle the basin divide. It is undisputed, therefore, that the proposed extension of its water system over the divide is a transfer or diversion of water outside the basin. It is also undisputed that the City of Racine will alter the use and purpose of its existing withdrawal of water to serve a new area outside the basin, so that it will become a diversion.

THE COMPACT PROHIBITS ANY NEW OR INCREASED DIVERSION.

¹ Compact, Sec. 4.5.d.

² Compact, Sec. 1.3.1.f.

³ Id., Sec. 3.1

⁴ Id. Sec. 3.4.

⁵ Id., e.g. Sec. 4.3.3 and 4.3.4.

⁶ *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; AbitibiBowater Inc., p. 19; The Toronto Star. “Ottawa pays Abitibi \$130M to settle claim.” (August 25, 2010); Kathryn Leger. “Abitibi Bowater 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-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.

Section 4.8 provides that “[A]ll new or increased diversions are prohibited, except as provided for in this Article.” If a proposal does not fall squarely within the intended scope of an exception, like the “straddling community” exception, it is prohibited.

THE APPLICANT CITY OF RACINE IS AN IN-BASIN CITY WITH AN IN-BASIN PUBLIC WATER SUPPLY THAT SERVES CUSTOMERS IN THE VILLAGE OF MT. PLEASANT IN AN AREA INSIDE THE BASIN.

Section 4.9.1 of the Compact provides:

*Straddling Communities.*⁷ 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.*⁸

Wisconsin Statutes § 281.346(4)(a) and (c) states:

Straddling communities. 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 diverted *will be used solely for public water supply purposes in the straddling community . . .*⁹

As acknowledged by the City of Racine in its application,

All of Racine’s current water customers are located within the Great Lakes basin. Mount Pleasant recently requested that Racine provide water to the portion of its community that lies outside the Great Lakes basin.¹⁰

The Exception for “straddling communities” is *solely* for public water supply “within” or “in” “the straddling community.” A customer area in an incorporated town like Mt. Pleasant is *not* a public water supply of Mt. Pleasant, and therefore Mt. Pleasant without its own public water supply system does not qualify as a “straddling community.” To interpret the exception otherwise, is to allow a city inside the basin to divert water to a new customer in an area outside the basin by merely assuming the identity of an existing community whose corporate limits straddle the basin divide. This does not serve the public water supply of Mt. Pleasant; it serves the customer and newly diverted water on the part of Applicant City of Racine.

In approving the first “straddling community” proposal for New Berlin, Wisconsin’s DNR relied on the fact that New Berlin as a “straddling community” would use the

⁷ Compact, Wis. Stat. 281.343(4n)(a).

⁸ Compact, Sec. 4.9.1. (emphasis added).

⁹ Wis. Stat. 281.346(4)(a), (c) (emphasis added).

¹⁰ Racine Application, Exec. Summary, p. 1;

diversion of water to address a radium problem with its groundwater source that served the city's public water supply; Wisconsin DNR thus found the diversion was "solely for public water supply" of the city.¹¹ While the Waukesha application involved the interpretation of the "community in a straddling county" exception to the diversion ban, both Wisconsin, other parties, and finally the Regional Body and Compact Council pointed to a similar requirement. The parties proposed express amendments and the Compact Council found that the diversion to Waukesha was "solely for the public water supply purpose,"¹² but only after clarifying and amending its decision to establish that the "public water supply of a straddling community" served or was connected to or served unincorporated areas.¹³

In summary, the standard "will be or shall be used solely for public water supply purposes" found in both Sections 4.9.1 and 4.9.3.a. of the Compact (adopted by Wisconsin law) has been interpreted to mean the public water supply of the straddling community, and not a straddling community without a public water supply or a water supply to be diverted outside the basin by an in-basin community like Racine.

THE APPLICANT RACINE AND WISCONSIN DNR DID NOT COMPLY WITH THE DEFINITION OF "PUBLIC WATER SUPPLY PURPOSES" TO MEET THE "SOLELY FOR PUBLIC WATER SUPPLY PURPOSES," BECAUSE THE PROPOSAL DOES NOT SERVE "A GROUP OF LARGELY RESIDENTIAL CUSTOMERS THAT MAY ALSO SERVE INDUSTRIAL, COMMERCIAL, AND [OTHERS]."

The Compact defines "Public Water Supply Purposes" to mean a "physically connected system... *servng a group of largely residential customers* that may also serve industrial commercial, and other institutional operators."¹⁴

As noted above, the Compact "straddling community" exception applies provides that "all *the water so transferred* shall be used solely for Public Water Supply Purposes *within* the Straddling Community." Similarly, Wisconsin's provision adopting the Compact requires that "*the water diverted* will be used solely for public water supply purposes *in* the straddling community."

From the plain language of the compact and Wisconsin's adopted compact straddling community exception, the determination of whether the sole purpose of serving the Public Water Supply is met turns on the specific qualification that residential or other users in the community are the ones to be served by "the water so transferred" or "the water diverted."

¹¹ Findings of Fact and Conclusions of Law, p. 4, May 21, 2009.

¹² Compact, Sec. 4.9.3.a; compare to identical language in Sec. 4.1.

¹³ "Draft Decision," with amendments, June 15, 2016; "Final Decision," June 21, 2016, No. 2016-1, Sec. II, Findings, paragraph 2., p. 3 ("The applicant [City of Waukesha] owns the Waukesha Water Utility, a public water supply system, and the applicant has requested use of the water for Public Water Supply Purposes). Wisconsin provided similar amendments and information. See e.g letter and relate materials from Shaili Pfeiffer, Wisc. DNR, to Peter Johnson, Great Lakes Governors and Premiers, June 15, 2016.

¹⁴ Compact, Sec. 1.2, p. 3 (emphasis added).

The City of Racine and Wisconsin DNR did not follow these plain and explicit directives. Rather, Racine used its gross water utility system-wide data to show that its in-basin system overall serves 30,425 residential customers, 848 multi-family residential customers, about 3,000 business, commercial, and 302 industrial users.¹⁵ These numbers clearly demonstrate the Racine public water supply system services mostly residential customers, but the numbers have absolutely nothing to do with the breakdown of residential, commercial, or industrial users to be served by “the water diverted” or “the water so transferred.” The water diverted or transferred here is the 7 million gallons per day covered by the Racine application. The undisputed finding of fact here is this: If the analysis is limited to that required by law, the primary customers served are commercial and industrial—the Foxconn industrial and plant project, and not residential users. Indeed, the Wisconsin legislature has conferred eminent domain powers for the Foxconn project, which will be exercised to remove residential and other users within or required for completion of the project.

In summary, the Racine proposal should not have been approved under the Compact and Wisconsin law because (a) the proposal does not “solely serve a public water supply purpose” of the straddling community; (b) the public water supply as to the water diverted or to be transferred or diverted does not “serve largely residential users;” and (c) Racine does not qualify under the straddling community definition.

SUMMARY AND RECOMMENDED ACTION

While jobs and the economy are important to Wisconsin and all of the parties, communities, tribal communities, and citizens of the Great Lakes region, the Compact and law of all of the compact states and provinces make it abundantly clear that the protection of the integrity of quantity and quality of the Great Lakes is paramount. The diversion ban adopted by all eight states and the federal government sets the standard for this protection. Any exception to the diversion ban must fully meet the specific criteria or standards, or it cannot be approved regardless how attractive it is. A project that does not comply with the Compact or a state’s own law for the exception to the ban does not qualify and must be rejected. The Great Lakes and public trust in the Great Lakes imposed on the states, Council, and Regional body cannot be subordinated or sacrificed by justifications, lax findings of factual information, or loosely interpreted requirements to meet the exception by Wisconsin or any other state or party to the Compact. All parties to the Compact must fully comply with the Compact’s standards. Any interpretation that falls short or opens the door to factual circumstances that do not adhere to the strict standards and requirements to qualify for the “straddling community” exception must be rejected.

The Council and Regional Body have broad authority to bring actions, exercise rights as aggrieved parties, or exercise powers of review for consistency, compliance, uniformity based on a joint commitment to protect the integrity of the Great Lakes; this means

¹⁵ Fig. C-1, Appendix C, Racine Application.

upholding the diversion ban and interpreting and applying the exceptions to the ban as written. The Racine in-basin community proposed diversion for primarily industrial use by an industrial customer in Mt. Pleasant, but outside the basin, does not qualify for the straddling community exception.

The Council and Regional Body and affected or aggrieved parties should demand an investigation, review, and determination of whether or not the Racine proposal and final determination by the Wisconsin DNR fall within, meet and/or comply with the “straddling community” exception standard. The Wisconsin DNR’s decision should be immediately set aside, and reopened for further evaluation, review and decision to assure consistency and prevent the undermining of the Compact’s diversion ban.

In addition, party states and other interested communities and persons who are protected by the Compact and the public trust in the Great Lakes and waters of the basin, should demand a full review for such compliance, including administrative or legal action where appropriate.

FLOW expresses its appreciation for the opportunity to present the foregoing analysis and recommendations. Should you have any questions, please let us know by contacting us at the FLOW office.

Sincerely yours,



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