

**Hoekstra, Ashley N - DNR**

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**From:** Jacqueline Wilson <jacqueline@cela.ca>  
**Sent:** Friday, August 28, 2015 2:10 PM  
**To:** DNR Waukesha Diversion App  
**Cc:** Nancy Goucher; Ted Cheskey; Peter Day  
**Subject:** Comments on draft Technical Review and draft Environmental Impact Statement re: City of Waukesha diversion proposal  
**Attachments:** CELA, Environmental Defence, Nature Canada and CFUW Submissions on the City of Waukesha proposal for a diversion.pdf

Ms. Hoekstra:

Please find attached the comments of the Canadian Environmental Law Association, Environmental Defence, Nature Canada and the Canadian Federation of University Women: Ontario Council with regards to the draft Environmental Impact Statement and draft Technical Review of the City of Waukesha's proposal to divert water from Lake Michigan.

Thank you,  
Jacqueline

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August 28, 2015

**VIA EMAIL**

Ashley Hoekstra  
DNR Bureau of Drinking Water and Groundwater  
Box 7921  
Madison, WI 53707-7921  
DNRWaukeshaDiversionApp@wisconsin.gov

Dear Ms. Hoekstra:

**RE: City of Waukesha Water Diversion application**

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These comments on the Wisconsin Department of Natural Resources' ("DNR") draft Technical Review dated June 2015 and draft Environmental Impact Statement dated June 2015 are submitted by four Canadian organizations with longstanding expertise and interest in preserving our shared Great Lakes resources. We seek to ensure that the *Great Lakes–St. Lawrence River Basin Water Resources Compact* ("Compact") and the *Great Lakes–St. Lawrence River Basin Water Resources Agreement* ("Agreement") are given a robust interpretation so that they serve their intended purpose to prohibit unnecessary diversions from the Great Lakes.

The City of Waukesha's proposal for a diversion with return flow should be rejected because it does not meet the requirements of section 4.9 of the Compact. The conservation goals of the Compact would be severely undermined if this proposal for a diversion was accepted.

**Paragraph 4.9(4)(d) of the Compact requires that precedent-setting consequences be considered**

The DNR has not considered the precedent-setting consequences associated with the City of Waukesha's water diversion proposal under paragraph 4.9(4)(d) of the Compact.<sup>1</sup>

This is the first proposal for a diversion under the Compact and will set the tone for interpretation of the Compact going forward. Section 4.9 of the Compact must be strictly interpreted or it will fail to deliver on its promise to allow only those diversions that are truly necessary.

The acceptance of a diversion in this case would undermine the effectiveness of the Compact prohibitions on water diversions because a reasonable, healthy water supply alternative is available. As demonstrated by the GZA GeoEnvironmental, Inc. report *Non-Diversion*

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<sup>1</sup> *Great Lakes–St. Lawrence River Basin Water Resources Compact* dated December 13, 2005 ("Compact"), paragraph 4.9(4)(d); *Great Lakes–St. Lawrence River Basin Water Resources Agreement* dated December 13, 2005 ("Agreement"), article 201(4)(d)

*Alternative Using Existing Water Supply with Treatment* dated July 9, 2015, deep and shallow water wells can provide clean and healthy water to the City of Waukesha's residents. The DNR found that deep and shallow aquifer alternatives meet all public health criteria.<sup>2</sup> Those alternatives are used to provide water to other Wisconsin communities<sup>3</sup> and the gradual reduction in groundwater pumping over the last 15 years has resulted in a rebound of the deep confined aquifer by approximately 100 feet.<sup>4</sup> Acceptance of this proposal would undermine the requirements of the Compact and make it more difficult to defend the diversion criteria in the future if other straddling communities, who also do not truly need Great Lakes water, apply.

More generally, the precedential impact of this proposal vis-à-vis trade law must be carefully analyzed. The acceptance of any proposal that does not strictly adhere to the Compact standard regarding diversions could further jeopardize the Great Lakes. The International Joint Commission concluded that trade obligations do not prevent Canada and the United States from taking measures to protect their water resources and preserve the integrity of the Great Lakes, but only provided that there is no discrimination by decision-makers against persons from other countries in their application, and so long as water management policies are clearly articulated and consistently implemented so that undue expectations are not created.<sup>5</sup>

### **Analyses of important environmental impacts should not be deferred**

The Compact requires that the applicant demonstrate that it meets all of the requirements of section 4.9 of Compact for its proposal to be accepted. There is a requirement for caution.<sup>6</sup> The Technical Review and Environmental Impact Statement should therefore not defer consideration of several significant environmental impacts of the proposal on the assumption that they will be addressed by later regulatory processes. This improperly collapses the requirements of the Compact into paragraph 4.9(4)(f), which requires that any exception be in compliance with all applicable municipal, state, provincial and federal laws, and undermines the rigour of the Compact requirements.<sup>7</sup>

In particular, the DNR has raised concerns about the return flow through the Root River.<sup>8</sup> The Root River is on Wisconsin's Impaired Waters list.<sup>9</sup> The DNR has noted that further study is needed on several issues, including the following:

- The Applicant must determine the final design of the phosphorous removal facilities.<sup>10</sup>

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<sup>2</sup> Wisconsin Department of Natural Resources, draft Technical Review dated June 2015 ("Technical Review"), p 28

<sup>3</sup> Technical Review, pp 25-26, 28-29, 34, 38

<sup>4</sup> Wisconsin Department of Natural Resources, draft Environmental Impact Statement dated June 2015 ("Environmental Impact Statement"), pp 84-85

<sup>5</sup> International Joint Commission, *Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States*, 22 February 2000. pp 32-34.

<sup>6</sup> Compact, para 4.9(3)(e); Agreement, article 201(3)(e)

<sup>7</sup> Compact, para 4.9(4)(f); Agreement, article 201(4)(f)

<sup>8</sup> Technical Review, pp 78-85

<sup>9</sup> Environmental Impact Statement, p 54

<sup>10</sup> Technical Review, p 79

- The Applicant must submit designs, specifications and costs to show how the thermal plume would act in the receiving Root River before the department could issue a permit. The Applicant would be required to meet temperature limits before commencing a new discharge to the Root River.<sup>11</sup>
- The Applicant would have to make considerable reductions to meet Water Quality Based Effluent Limits for chloride in the Root River. It will need to fully implement all efforts in its annual chloride progress report and adopt additional efforts, including education and outreach, prior to discharging into the Root River.<sup>12</sup>

If future regulatory processes are relied upon, they should be completed prior to any Regional Review of the proposal so that the Great Lakes states and provinces are provided with sufficient information to properly assess the proposal.

### **Each element of the Compact must be considered using the same baseline for analysis**

The only reasonable interpretation of the Compact requires that each element of section 4.9 be considered using the same baseline for analysis. This proposal should be rejected because the City of Waukesha has relied on an expanded Water Supply Service Area to demonstrate why it needs a large increase in the volume of potable water per day and why there is no reasonable water supply alternative, but does not demonstrate that the entire area covered by the proposal actually requires the diverted Great Lakes water.<sup>13</sup>

The City of Waukesha has not shown that the entire expanded Water Supply Service Area meets the standard of “without adequate supplies of potable water” or “no reasonable water supply alternative” to the proposed diversion.<sup>14</sup> Rather, the Technical Review only notes that certain areas in the expanded Water Supply Service Area *may* request water service from the City of Waukesha in the future, but currently use private wells and septic systems.<sup>15</sup> The Environment Impact Statement notes that “*if there is a future need and request* for public water service”, the City of Waukesha’s water system *may* be expanded to include these areas.<sup>16</sup>

The Compact requires caution to be exercised when determining if a proposal meets the conditions for an exception to the prohibition on diversions.<sup>17</sup> The Compact would be significantly undermined by allowing the City of Waukesha to bolster its proposal for a diversion based on the expanded Water Supply Service Area without demonstrating that the entire area actually requires water from the Great Lakes or meets the requirements for a diversion.

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<sup>11</sup> Technical Review, p 82

<sup>12</sup> Technical Review, pp 82-83

<sup>13</sup> Compact, para 4.9(3)(a) and (d); Agreement, Article 201(3)(a) and (d); Technical Review, pp 45-46

<sup>14</sup> Compact, para 4.9(3)(a) and (d); Agreement, Article 201(3)(a) and (d); Environmental Impact Statement, pp 91-92

<sup>15</sup> Technical Review, p 45; Environmental Impact Statement, pp 91-92

<sup>16</sup> Environmental Impact Statement, p 92

<sup>17</sup> Compact, para 4.9(3)(e); Agreement, article 201(3)(e)

**Conclusion**

This application does not demonstrate that a diversion of Great Lakes water is truly a last resort. The City of Waukesha's proposal to divert water with return flow fails to meet the requirements of the Compact. The DNR should reject the City of Waukesha's proposal.

Sincerely,

**Nancy Goucher**  
Water Program Manager  
Environmental Defence

**Ted Cheskey**  
Senior Conservation Manager  
Nature Canada

**Jacqueline Wilson**  
Counsel  
Canadian Environmental Law  
Association

**Brenda Robertson**  
President  
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