State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
101 S. Webster Street
Box 7921
Madison WI 53707-7921

Scott Walker, Governor
Daniel L. Meyer, Secretary
Telephone 608-266-2621
Toll Free 1-888-936-7463
TTY Access via relay - 711

May 16, 2018

VIA ELECTRONIC MAIL

Subject: State of Wisconsin Approval of the City of Racine Diversion Application for the Straddling Community of the Village of Mount Pleasant

Dear Regional Body Members:

On May 3, 2018 the Wisconsin Department of Natural Resources (WDNR) held an informal briefing with representatives from the Great Lakes and St. Lawrence River states and provinces. We appreciate the opportunity to discuss issues of concern to these state and provincial representatives regarding Wisconsin's recent approval of a Straddling Community diversion application for a diversion of Great Lakes water to the Village of Mount Pleasant. This letter provides responses to questions and issues discussed on May 3rd to clarify Wisconsin's interpretation and adherence to the Great Lakes – St. Lawrence River Sustainable Water Resources Agreement (Agreement) and the Great Lakes – St. Lawrence River Basin Water Resources Compact (Compact).[1]

General Background

WDNR received an application to divert seven million gallons of water a day (MGD) to the straddling community of the Village of Mount Pleasant ("Diversion Request") on January 26, 2018 and notified the Regional Body on January 29, 2018. WDNR held a seven-week public comment period that concluded March 21st, and also held a public hearing on March 7, 2018. Approximately 250 people attended the hearing and WDNR received about 800 comments on the Diversion Request. The diversion was requested to supply a portion of Mount Pleasant that will include the proposed Foxconn facility, an electronics manufacturing company, and unspecified additional industrial and commercial development. The Diversion Request estimates that 4.3 MGD of water will be returned to Lake Michigan via the Racine wastewater treatment plant. Industries will need to meet the wastewater treatment plant water quality requirements before the wastewater utility will accept the wastewater. The consumptive use for the Diversion Request is estimated at 2.7 MGD, predominantly cooling water for the Foxconn facility. The cooling water is recirculated and the Foxconn facility will recycle 85 percent of the process water. After careful review, WDNR approved the diversion on April 25, 2018. WDNR issued a Findings of Facts, Conclusions of Law and Diversion Approval (Approval); a response to comments; and responses to letters from the Illinois Attorney General's Office and the New York State Bureau of Water Resources Management that were received during the comment period. These documents are all available at the WDNR website, wi.dnr.gov, search "Racine Diversion."

Straddling Community Review Criteria[2]

WDNR's Approval concluded that the Diversion Request meets the requirements for a straddling community diversion. Although WDNR's Approval cited Wisconsin's implementing statute, the Diversion Request also was reviewed under the criteria in Agreement Article 201 (1.) and Compact Section 4.9.1.

The criteria for any Straddling Community Diversion Proposal, including this Diversion Request are as follows:

- The water must be used solely for Public Water Supply Purposes,
- All water withdrawn from the basin must be returned less an allowance for consumptive use,

[1] This letter also responds to concerns raised in a letter to the Regional Body and Compact Council submitted by the organization FLOW on May 3, 2018, as many of the issues raised on the call overlap with the issues in the FLOW letter.
[2] The exception standard does not apply to this Proposal because it would not result from a new or increased withdrawal that would average 100,000 gallons or more per day in any 90-day period (Compact Sec. 4.9.1.b. and Wis. Stat. § 281.346(4)(c)3.).

- The water must be treated to meet applicable permit requirements and to prevent the introduction of invasive species to the Great Lakes basin,
- The Proposal must maximize Great Lakes water returned to Great Lakes basin and minimize the return of water from outside the basin,

The criteria for reviewing a Straddling Community Diversion Proposal are different than the review criteria for a Community in a Straddling County Diversion Proposal, such as the Waukesha Diversion. A Community in Straddling County Proposal is reviewed under the criteria in Compact Sec. 4.9.3., which always requires Regional Review (Compact Sec. 4.9.3.f) and must be approved by the Compact Council unless one or more Council members vote to disapprove (Compact Sec. 4.9.3.g.). A Straddling Community Proposal, such as the Village of Mount Pleasant, is reviewed under the criteria in Compact Section 4.9.1. and is subject to the management and regulation of the Originating Party (Compact Sec. 4.9.1.), in this case Wisconsin. Attachment A provides a comparison of the two types of Proposals and the applicable review criteria.

The City of Racine as the Applicant

WDNR has been asked to explain how an entity other than the Straddling Community identified in a Straddling Community Diversion Proposal can be the Applicant for the diversion. The Agreement and Compact do not specify who must file the Proposal, but rather focus on what criteria a Proposal must meet. Whether the Applicant is the City of Racine (the public water supply system that currently serves Village of Mount Pleasant customers and would divert the water) or the Village of Mount Pleasant (the Straddling Community), it in no way changes the analysis, or exempts the Application from any criteria. No Agreement or Compact criteria are avoided in this case by having the City of Racine apply. What is most important from the perspective of the Agreement and Compact is how a Diversion Proposal to a Straddling Community is evaluated for compliance with the Agreement and Compact criteria, not who submits the Proposal.

The Agreement and Compact define "Applicant" as:

> … a Person who is required to submit a Proposal that is subject to management and regulation under this Compact.
> (Compact Sec. 1.2.)

The Agreement and Compact define "Proposal" as:

> . . . a . . . Diversion . . . that is subject to this Compact.
> (Compact Sec. 1.2.)

The Agreement and Compact define "Straddling Community" as:

> … any incorporated city, town or the equivalent thereof, wholly within any County that lies partly or completely within the Basin, whose corporate boundary existing as of the effective date of this Compact, is partly within the Basin . . .
> (Compact Sec. 1.2.)

Article 201 (1.) and Compact Sec. 4.9.1 do not specify who must file the Proposal, but those sections do specify that Straddling Community Proposals and Exceptions shall be managed and regulated by the Originating Party:

> A Proposal to transfer Water to an area within a Straddling Community but outside the Basin or outside the source Great Lake Watershed shall be excepted from the prohibition against Diversions and be managed and regulated by the Originating Party . . .

The Diversion Request seeks to divert water to the Village of Mount Pleasant, which meets the definition of a "Straddling Community".

The Compact defines an "Applicant" as "a Person who is required to submit a Proposal" but does not elaborate beyond that. Some have asserted that that the Applicant should be the Straddling Community,

but the Compact does not address this issue. Although silent on who must file a Diversion Application, the Compact gives each party authority to "require an Applicant to submit an Application in such manner and with such accompanying information as the Party shall prescribe." (Compact Sec. 4.3.2). Wisconsin's implementing legislation specifies that an Applicant for a diversion must operate a public water supply system, and this requirement does not conflict with any Compact provision regarding a Proposal to divert water to a Straddling Community. The Straddling Community of Mount Pleasant does not operate a public water supply system. Because the city of Racine currently operates the public water supply system that serves the majority of the Village of Mount Pleasant within the Great Lakes Basin, Racine submitted the Diversion Request to divert water to the area of Mount Pleasant that lies outside the Basin.

Wisconsin's review of the Diversion Request by Racine to divert water to the Straddling Community of Mount Pleasant considered all of the above-referenced Compact criteria and the Approval was consistent with those criteria. Wisconsin law clarifies the procedure for processing an Application, by requiring an Applicant to operate the public water supply system that would divert the water for a Proposal, but this in no way changes the Compact requirements.

It has been suggested that because Mount Pleasant is without its own public water supply system, this disqualifies it as a Straddling Community.[3] Neither the Compact's definition of "Straddling Community" nor Compact Sec. 4.9.1 provide that a Straddling Community must have its own public water supply system. In Wisconsin, there are many configurations for how water is delivered to customers from a public water supply system. A public water utility is typically owned by a municipality, and water is then served to residential, commercial and industrial customers in the municipality. The water utility may sell water to a "consecutive system" (*i.e.*, a water utility that does not withdraw water but owns and operates its own distribution system) or the water utility may have direct customers in other municipalities. In the case of direct customers, the water utility owns and operates the distribution system and directly bills these customers in the other municipality. The Village of Mount Pleasant does not own a water utility. Customers in the Village of Mount Pleasant are direct customers of the Racine Water Utility, which owns and operates the distribution system for public water supply in the Village of Mount Pleasant. This is not an uncommon situation in Wisconsin and relates to the geography and development patterns of communities.

The only reference to water supply system in Compact Sec. 4.9.1., is that if surface water or groundwater from outside the Basin is returned to the Source Watershed, it must be "part of a water supply or wastewater treatment system that combines water from inside and outside of the Basin" (and must comply with additional requirements for return of the water) (Compact Sec. 4.9.1.a.i.). Public water service in Mount Pleasant is currently *part of the Racine Water Utility's water supply system*, and the diversion area will also be part of that system and the other provisions regarding return flow will be met.

There is also no requirement in the Compact that an existing *public water supply system* must straddle the Basin divide as a prerequisite for a Proposal to divert water to a Straddling Community. Instead, the requirement for a Straddling Community is that, "the corporate boundary existing as of the effective date of this Compact, is partly within the Basin . . ." (Compact sec. 1.2.). The corporate boundary of Mount Pleasant existing as of December 8, 2008, meets this definition. The Village of Mount Pleasant incorporated in 2003 with its current boundaries that straddled the Basin divide.

Finally, WDNR is aware of some concern that Wisconsin law regarding water supply service area plans was changed in contravention of the Agreement and Compact. In 2017 Wisconsin Act 58, the Wisconsin legislature chose to exempt diversion proposals that include an electronics and information technology manufacturing zone (such as that within Mount Pleasant) from the requirement to complete a water supply service area plan, which

[3] Letter to Regional Body and Compact Council, c/o Conference of Great Lakes and St. Lawrence Governors and Premiers, from FLOW (For Love of Water), dated May 3, 2018.

otherwise would be required under Wisconsin's Compact implementing law. However, water supply service area planning is not a requirement of the Compact, so no Compact criteria were avoided by this change in Wisconsin law.

Public Water Supply Purposes

WDNR has received questions requesting further clarification of its determination that the Diversion Request meets the Agreement and Compact requirements in Compact Section 4.9.1 that, "all the Water so transferred shall be used solely for Public Water Supply Purposes within the Straddling Community."

The Agreement and Compact define "Public Water Supply Purposes" as:

> … water distributed to the public through a physically connected system of treatment, storage and distribution facilities serving a group of largely residential customers that may also serve industrial, commercial, and other institutional operators. Water withdrawn directly from the Basin and not through such a system shall not be considered to be used for Public Water Supply Purposes.

In evaluating this Compact criterion, WDNR attempted to give meaning to the definition of "Public Water Supply Purposes" in light of its use in Compact Sec. 4.9.1., which states that, "all the water so transferred shall be used solely for Public Water Supply Purposes within the Straddling Community." WDNR considered whether the water transferred to the Village of Mount Pleasant would be distributed to the public through a physically connected system of treatment, storage and distribution facilities serving a group of largely residential customers, but that may also serve industrial, commercial, and other institutional operators, within the Straddling Community.

The definition of "Public Water Supply Purposes" requires a *physically connected system* that serves a group of largely residential customers. The requirement to serve largely residential customers in this definition applies to the *water supply system* within the straddling community. The Racine water utility is a physically connected system that serves a group of largely residential customers; approximately 90 percent of the Racine water utility customers are residential customers. In addition, of the approximately 6,000 customers Racine's water utility serves in the Village of Mount Pleasant, about 90 percent are residential customers. Ninety-two percent of the land area of the Village of Mount Pleasant is in the Lake Michigan Basin. Public water supplied to the Straddling Community of Mount Pleasant is, and will remain, largely residential and therefore the diversion satisfies the requirement for "public water supply purposes."

WDNR also considered whether the phrase "largely residential customers" in the definition of Public Water Supply Purposes is intended to mean the number of customers, the volume of water, or the extent of land area served. Because the definition of Public Water Supply Purposes references "customers," WDNR used the number of customers in its determination that the water supply system in this case will serve a group of largely residential customers. Wisconsin's interpretation of the Compact is that in a fact situation such as this—with 92 percent of the Straddling Community's land area in the Great Lakes Basin and 90percent of the water utility's customers in that area being residential— the Compact authorizes Wisconsin to approve the Diversion and the Compact itself was not meant to dictate land use in the remaining 8 percent of the Straddling Community's land area.

Precedent

WDNR received questions about the precedent this Diversion Request may set for other Straddling Community Diversion Proposals. Some are concerned that this Approval changes or weakens the Compact. However, the WDNR's review and determination are completely consistent with the language and intent of the Compact. WDNR's decision on the Diversion Request was based on a unique set of facts that may or may not apply to any other Applicant or Application. The findings in WDNR's Approval are specific to this Diversion Request. If there is a precedent set by this application, it may be as follows:

- Straddling Community Applications that meet the Agreement and Compact criteria will be approved.

- As the Agreement and Compact do not specify who "a Person who is required to submit a Proposal" is, states' and provinces' implementing legislation may clarify this procedural issue for Straddling Community Diversion Applications as long as the clarification is consistent with all Agreement and Compact definitions and criteria.

WDNR remains committed to working with the members of the Regional Body to further the goals of the Agreement and Compact to protect the Great Lakes and ensure their long-term viability. Please contact me at 608-267-7638 if you have further questions or issues you would like to discuss related to the Village of Mount Pleasant Straddling Community Diversion.

Sincerely,

Adam Freihoefer
Water Use Section Chief
Bureau of Drinking Water and Groundwater

Attachment A: Diversion application requirements for a "straddling community" or "community in a straddling county."

Wisconsin and Great Lakes Compact requirements specified for a diversion approval	Application Type	
	Straddling Community	Straddling County
Application must be from a public water supply system	Yes	Yes
Diversion for public water supply purposes	Yes	Yes
All water returned less an allowance for consumptive use	Yes	Yes
The water will be treated to meet applicable permit requirements and to prevent the introduction of invasive species to the Great Lakes basin.	Yes	Yes
Maximizes Great Lakes water returned to Great Lakes basin and minimizes out of basin water returned	Yes	Yes
Requires a water conservation plan	Yes	Yes
Requires a water supply service area plan	Yes (see footnote 1)	Yes
Proposal meets Great Lakes Compact exception standard	No (see footnote 2)	Yes
Community without adequate supply of potable water	No	Yes
No reasonable water supply alternative including water conservation	No	Yes
The proposal will not endanger the integrity of the Great Lakes basin and will have no significant adverse impacts on the Great Lakes	No	Yes
The proposal undergoes regional review	No (see footnote 3)	Yes
DNR conducts and publishes a formal technical review	No (see footnote 4)	Yes
The proposal requires approval by the Great Lakes Compact Council	No	Yes

Footnotes

1. Unless the proposal is to provide water to a straddling community that includes an electronics and information technology manufacturing zone.
2. Unless the diversion requires a new or increased withdrawal of Great Lakes water
3. Unless the diversion requires a new or increased withdrawal of Great Lakes water and the diversion will result in a consumptive use averaging 5 million gallons a day or more in any 90 day period.
4. Unless proposal requires regional review.