



April 25, 2018

Diane English
Chief, Water Quantity Management Section
Division of Water, Bureau of Water Resources Management
625 Broadway, Albany, New York 12233-3508

Subject: The City of Racine's Application for Water Diversion

Dear Ms. English:

Thank you for your comments and questions in your letter of March 21, 2018 regarding the City of Racine's Diversion Application (application). The Wisconsin Department of Natural Resources (WDNR) has thoroughly reviewed the application and considered the Great Lakes-St. Lawrence River Basin Water Resources Compact (Compact) in its decision on the City of Racine's request to divert water and is happy to provide you with the following information.

Public Water Supply Purposes

Section 4.9.1 of the Compact contains an exception to the ban on diversions of Great Lakes Basin water for straddling communities. To qualify for the exception, the Compact requires that "all Water so transferred shall be used solely for Public Water Supply Purposes within the Straddling Community." "Public Water Supply Purposes" are defined in section 1.2 as follows:

Public Water Supply Purposes means 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 Water withdrawn directly from the Basin and not through such a system shall not be considered to be used for Public Water Supply Purposes.

You have raised a question about whether "the proposed diversion is largely for residential customers" and therefore question whether it meets the exception for straddling communities. Both the Compact and Wisconsin's implementing statutes define public water supply purposes to mean water distributed to the public through a water supply *system* that serves "a group of largely residential customers [and] that may also serve industrial, commercial, and other institutional operators." Compact Sec. 1.2; Wis. Stat. § 281.343(1)(pm). This focus on the water supply system is further supported by the Compact which goes on to state that, "[w]ater withdrawn directly from the basin *and not through such a system* shall not be considered to be used for public water supply purposes." Compact Sec. 1.2 (emphasis added).

The City of Racine (City) operates a public water supply system that distributes water to the public through a physically connected system of treatment, storage and distribution facilities. The City serves a group of largely residential customers—approximately 90 percent of the City's customers are residential. For reference, other Wisconsin municipal water suppliers drawing water from Lake Michigan report a range of residential customers between 87 and 93 percent of the total number of customers. The City's proposal also indicates that 88% of its customers in the straddling community of Mount Pleasant are residential and only 12% are industrial or commercial users. The City's water

supply system and its service to the straddling community of Mount Pleasant both comply with the “public water supply purposes” requirements of the Compact and Wisconsin’s implementing statutes, and therefore the diversion qualifies for the straddling communities exception.

Exception Standard

You have raised the question of whether the proposal represents a new or increased withdrawal and whether the withdrawal meets the Exception standard. Section 4.9.1.b. requires “If the Proposal results from a New or Increased Withdrawal of 100,000 gallons per day or greater average over any 90-day period, the Proposal shall also meet the Exception Standard...” To determine if the application is subject to the exception standard, WDNR evaluated whether the diversion would result in a new or increased withdrawal over the City of Racine Water Utility’s (RWU) baseline.

Section 4.12 provides requirements for establishing baselines “for determining New or Increased Diversions, Consumptive Use or *Withdrawals*” (emphasis added). Wisconsin established baselines and submitted them to the Compact Council on the established timeline in December 2009. RWU baseline capacity was determined based on the most restrictive component of the water supply system. In the case of RWU the most restrictive component of its water supply system is its water treatment plant. This baseline was determined to be 60.01 million gallons per day (MGD) and is authorized in Racine’s water use permit issued December 8, 2011 in accordance with Wisconsin’s implementing legislation. Compact Section 4.12.2.b states “For all purposes of this Compact, volumes of Diversions, Consumptive Uses or Withdrawals of Water set forth in the list prepared by each Party in accordance with this Section, shall constitute a baseline volume.” In 2017 the RWU reported an average annual withdrawal of 17.1 MGD to WDNR. Excess capacity in the Racine Water Utility system is due in part to a 40% decrease in water sales in the last twenty years with decreased industrial water use. The proposed maximum diversion amount of 7 MGD, would result in RWU’s average annual water withdrawal increasing to 24.1 MGD, well below its authorized withdrawal amount of 60.01 MGD. RWU’s baseline volume was used to determine that the proposed diversion would not result in a new or increased withdrawal of Great Lakes water to implement the proposed diversion. Consequently, the requirement to meet the Exception Standard does not apply to this application.

Compact Council Review

You have raised the question of whether the Compact requires the Compact Council to review and take action on the proposal prior to WDNR authorizing the diversion. Compact Section 4.7 states that “Proposals for Exception *subject to Council Review* shall be submitted by the Originating Party to the Council for Council Review, and where applicable, to the Regional Body for concurrent review.” (emphasis added) Compact Section 4.9 specifies what level of review is required for an exception to the prohibition of diversions. Proposals to transfer water to an area within a straddling community are to be “be managed and regulated by the Originating Party,” in this case, the State of Wisconsin. Compact Section 4.7.2. states “The Council shall review and take action on Proposals in accordance with this Compact and Standard of Review and Decision.” WDNR does not read the Compact to require the Compact Council to review and act on the proposal prior to WDNR authorizing a straddling community diversion application.

WDNR’s interpretation is that the Compact was thoughtfully drafted to delegate decision making authority to the Parties, while reserving Regional Review and Compact Council oversight for limited circumstances. For example, the Regional Body and Compact Council had clear authority to review the

Waukesha, Wisconsin diversion application, because it was an application for a diversion to a community in a straddling county, rather than a straddling community application. Section 4.9.3.f. and g. of the Compact requires Regional Review and Council approval for diversions to communities in a straddling county. WDNR worked diligently to support the efforts of the States and Provinces in their review of that application. We appreciate the time and effort put forward by all the Parties to carefully implement the Compact.

I hope this response addresses your concerns. We would be happy to talk further regarding these questions.

Sincerely,

A handwritten signature in black ink that reads "Adam Freihoefer". The signature is written in a cursive, flowing style.

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

Cc via email:

Donald Zelazny, NYSDEC, Regional Body Designee
James Tierney, NYSDEC, Compact Council Alternate
Anthony London, NYSDEC

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March 21, 2018

DNR Drinking Water and Groundwater Program DG/5
Attn: Adam Freihoefer
PO Box 7921
Madison, WI 53707-7921

**SENT BY EMAIL AND
AND REGULAR FIRST
CLASS MAIL**

Re: City of Racine Water Diversion Application

Dear Mr. Freihoefer:

The New York State Department of Environmental Conservation ("NYSDEC") submits the following comment with respect to the application by the City of Racine to divert up to an annual average of 7 million gallons of water a day outside the Great Lakes-St. Lawrence River Basin to an area within the straddling community of the Village of Mt. Pleasant. Prior to processing the application, it must first be determined whether the proposed project is excepted from the prohibition against diversions under the Great Lakes-St. Lawrence River Basin Water Resources Compact (the "Compact").

In this regard, Section 4.8 of the Compact includes a prohibition on new or increased diversions except as provided for in Article 4 of the Compact. In order to qualify for the straddling community exception, Section 4.9.1 of the Compact states that "regardless of the of the volume of Water transferred, all Water so transferred shall be used solely for Public Water Supply Purposes within the Straddling Community." Section 1.2 defines "Public Water Supply Purposes" to mean "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." (Emphasis added.) Here, it is unclear that the proposed diversion is largely for residential customers where the water is intended to facilitate the construction and operation of the future industrial site of the Foxconn facility.

Section 4.9.1 (b) of the Compact also requires that a proposal meet the Exception Standard if it "results from a New or Increased Withdrawal of 100,000 gallons per day or greater average over any 90-day period." Here it is unclear whether the proposal represents a new or increased withdrawal and whether or not that withdrawal meets the Exception Standard as provided for in Section 4.9.4 of the Compact.

In light of the general prohibition against new or increased diversions (Section 4.8), the Compact favors, and potentially mandates, that proposals for Exceptions be subject to Council Review. See Section 4.7 of the Compact. Furthermore, the Compact vests the Council with the authority to "review and take action on Proposals in accordance with this Compact and the Standard of Review and Decision." This authority is consistent

with the Parties "*shared* duty to protect, conserve, restore, improve and manage the renewable but finite Waters of the Basin for the use, benefit and enjoyment of all their citizens, including generations to come." Section 1.3.1 (f) (emphasis added).

NYSDEC respectfully requests that the Wisconsin Department of Natural Resources ("DNR") consider these provisions and provide DNR's position to the following questions:

- Is it DNR's position that the sole use of this new diversion outside the Great Lakes Watershed is for public water supply purposes as defined in the Compact?
- Does the proposed diversion meet the Exception Standard?
- Does the Compact require the Compact Council to review and take action on the proposal prior to DNR authorizing this diversion?

NYSDEC respectfully requests that DNR respond to these questions prior to taking any action on the proposal. NYSDEC looks forward to your response. Thank you.

Sincerely,



Diane English, P.E.

Chief, Water Quantity Management Section
Bureau of Water Resource Management
Division of Water