
To: John Stolzenberg and Rachel Letzing, Wisconsin Special Committee on the Great Lakes Water Resources Compact

From: Clean Wisconsin, Midwest Environmental Advocates, City of Milwaukee, Alliance for the Great Lakes, Sixteenth Street Community Health Center

Re: Response to Waukesha's Tributary Groundwater Proposal

Date: December 6, 2006

MEMORANDUM

Overview: The Special Committee Should Deny Waukesha's Requested Interpretation

Waukesha has submitted a requested interpretation of the term "Waters of the Basin" and the phrase "tributary groundwater" within that term. We conclude that this requested interpretation is not appropriate and should not be considered by the Legislative Council's Special Committee on the Great Lakes Compact (hereafter, the "Special Committee").

Waukesha's interpretation is not appropriate and should not be considered for the reasons that:

- I. It poses a risk to the implementation of the Compact, as it comprises either an unacceptable "material change" to the Compact if the requested language were to be incorporated into the Compact itself or an unenforceable inconsistent interpretation of the Compact if the requested language were incorporated within implementing legislation.
- II. It is not properly within the mandate of the Special Committee at this time because it serves the interest of a single withdrawer and is not an issue of general or state-wide interest;
- III. It is not based on sound science; and
- IV. It will not achieve the ultimate objective Waukesha seeks, which is avoidance of Diversion Exception standards.

I. Waukesha's Requested Interpretation Poses a Risk to the Compact.

First and foremost, if Waukesha's requested interpretation regarding "Waters of the Basin" and "Tributary Groundwater" were incorporated within the actual language of the Compact as ratified by Wisconsin, it would constitute a "material change" to the Compact and, as such, set in motion the destruction of the regional compact. In the alternative, if Waukesha's proposed language were included within implementing or companion legislation, we believe that its

inconsistency with the Compact would make it unenforceable and its weak scientific basis would ultimately jeopardize the Compact by guaranteeing confusion, protracted disputes and costly litigation.

Waukesha's position, if taken to its logical conclusion, moves Waukesha, and similarly situated communities around the Basin, outside the scope and process of the Compact concerning diversions to Communities within Straddling Counties. Indeed, if Waukesha's requested definition were to prevail throughout the Basin, it could very well lead to cities as far away from the surface water divide as Columbus and Indianapolis making the argument that, if not for human intervention, their deep aquifer groundwater sources would eventually flow naturally to the Basin. Surely this is not the intent of the Compact nor of our state legislature. Further, accepting Waukesha's premise regarding the natural flow of its deep aquifer would be rewarding it for having changed the aquifer's flow to the detriment of the Basin by providing it with Basin Water.

The negotiators of the Compact recognized the scientific limitations and difficulty with determining boundaries based on groundwater, and that is why they decided upon the surface water divide as the basis for managing water Withdrawals. While Waukesha has argued that the use of the surface water divide for determining New or Increased Withdrawals means that existing Withdrawals are to be determined on a different basis, this argument ignores the fact that "New or Increased" and "existing" are two sides of the same coin: an "existing" Withdrawal is one that is not a "New or Increased" Withdrawal. The bottom line is that the surface water divide is the basis upon which to classify whether or not Withdrawals are New or Increased.

What Waukesha is seeking to claim as a grandfathered Withdrawal would actually be a New Diversion of Lake Michigan Water. On this basis, Waukesha's argument requires a material change to the Compact and must fail.

II. Waukesha's Request Is Not Appropriate at This Time

The Special Committee has the heavy responsibility of drafting legislation for the Great Lakes Water Resources Compact, and creating legislative policies on major issues like conservation and public participation that will guide the future of the Compact in our state and nation. Waukesha's request is not appropriate for the Special Committee at this time because it is an attempt to address Waukesha's specific water usage concerns rather than an effort to draft generally-applicable legislation for the state to use in its implementation of the Compact. The Committee's highest priority should be to address issues of general or state-wide interest to the citizens of Wisconsin. Only after this priority is served should the Committee spend its time on the concerns of individual proposed future withdrawals.

In light of the Special Committee's responsibilities, the Committee Chair has recently requested Committee members' proposals on specific issues for consideration. This request also referred to "general issues" the Committee will need to consider, such as baseline inventories and classification of new withdrawals. We would respectfully recommend the Committee prioritize its time going forward based on the issues of greatest concern to most committee members, and

on “general or statewide issues” like those referenced by the Chair, and not take up the Committee’s limited time for individual water user issues.

III. Request Lacks Sound Scientific Support and Is Inconsistent with the Compact

As further detailed in their respective presentations, letters and memos before the Legislative Council, expert hydrogeologists knowledgeable about southeastern Wisconsin’s groundwater situation have informed this Council that the data do not exist to define the boundary Waukesha has suggested. Furthermore, these experts point out that no scientific definition exists for the term “tributary groundwater.” Waukesha’s request ignores this lack of scientific certainty regarding groundwater basins -- certainty which will be necessary to guide the definition proposed by Waukesha. Creating a technical definition without scientific substantiation is irresponsible.

IV. Waukesha’s Request Will Fail to Achieve Waukesha’s Goal

The requested interpretation is one step in Waukesha’s argument that its proposed surface water Withdrawal from Lake Michigan should not be subject to the Compact’s Diversion Exception standards. However, even if this interpretation were agreed to and Waukesha could demonstrate that its existing Withdrawal was from Basin tributary groundwater, Waukesha would still be subject to the Compact’s Diversion Exception standards. Waukesha’s entire argument goes something like this: (a) Waukesha’s existing Withdrawal is from the Basin and is therefore grandfathered under the Compact; (b) Waukesha’s proposed surface water Withdrawal is not a “New” Withdrawal because it is merely replacing one Basin source of Water with another. However, this argument ultimately fails for the following reasons.

First, the Compact definition of “New or Increased Diversion” includes “the alteration of an existing Withdrawal so that it becomes a Diversion.” If we assume, for the sake of argument, that Waukesha’s existing Withdrawal is from within the Basin, the change in this Withdrawal replacing groundwater with surface water would be an alteration of an existing Withdrawal that would make it a Diversion. The change from groundwater to surface water is clearly “an alteration of an existing Withdrawal.” The question of whether this alteration would make the Withdrawal “become a Diversion” is determined by the Basin surface water divide, for that is what is “used for the purpose of managing and regulating New or Increased Diversions” (Compact at 4.12.5) Since Waukesha has proposed to withdraw Lake Michigan surface water for use outside the Basin surface water divide, this alteration would constitute a New Diversion.

Second, the standard applicable to Straddling County Diversion Exceptions includes the following language:

“Further, substantive consideration will also be given to whether or not the Proposal can provide sufficient scientifically based evidence that the *existing* water supply is derived from groundwater that *is* hydrologically interconnected to Waters of the Basin” (emphasis supplied).

Accordingly, even *if* the science and data were to establish that a portion of Waukesha’s current water supply of 8-9 million gallons/day was hydrologically connected to the Basin, the above Compact language makes clear that an existing Withdrawal’s hydrologic connection to the Basin

is *not sufficient* to make a proposed Withdrawal from the Basin exempt from the Straddling County Diversion Exception standard. In fact, the presence of this language shows that the Compact considers such proposed Withdrawals to be Diversions. This language was specifically included in the Compact in anticipation of, and as a concession to, Diversion proposals such as Waukesha's involving a possible hydrologic connection to the Basin.

In sum, Waukesha's requested tributary groundwater definition is clearly inconsistent with these controlling provisions of the Compact and, as such, Waukesha's argument fails to demonstrate that Waukesha's proposed Withdrawal of Lake Michigan surface water is anything but a New Diversion subject to the Diversion Exception standards.

V. Conclusion: Deny Requested Interpretation

Waukesha has requested a scientifically unsound, legally unsupportable definition for the phrase "tributary groundwater." This request has been made at an inappropriate time in an effort to place its needs as an individual water user ahead of those of the rest of the state. And, it turns out, this request will ultimately not provide Waukesha with the relief it seeks. We believe the Committee would be better served by addressing water resource issues of general or statewide concern.