

**DELIVERED VIA ELECTRONIC MAIL**

September 19, 2019

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RE: Waukesha Diversion EIS Comments

Ms. Radermacher:

Please find enclosed comments on the most recent version of the Environmental Impact Statement for the City of Waukesha's proposed diversion of Great Lakes water. These comments are submitted on behalf of the Compact Implementation Coalition and several partner organizations. Thank you for the opportunity to submit comments.

Sincerely,



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**COMMENTS ON THE ENVIRONMENTAL IMPACT STATEMENT FOR  
THE CITY OF WAUKESHA’S PROPOSED DIVERSION OF GREAT LAKES WATER**

Whenever the Department of Natural Resources (DNR) prepares an Environmental Impact Statement (EIS), it is critical that the department comply with the procedural and substantive requirements outlined in the Wisconsin Environmental Policy Act (WEPA) and implementing regulations.<sup>1</sup> The failure to comply with WEPA requirements can result in an inadequate EIS and legal challenges to state agency actions based on that EIS.<sup>2</sup> While we appreciate that the environmental review of the City of Waukesha’s proposed diversion of Great Lakes water (hereafter, “the Project”) has been atypical and protracted, we nonetheless question whether that review complies with WEPA requirements. Specifically, we question:

1. Whether the EIS released in August 2019 is another draft EIS, thus requiring DNR to start anew the public review process set forth in Wis. Admin. Code NR § 150.30(3)-(4);  
and
2. Whether the EIS released in August 2019 identifies and analyzes all reasonable alternatives to the Project, as required by Wis. Stat. § 1.11(2)(c) and Wis. Admin. Code NR § 150.30(2)(e).

To ensure that the EIS is adequate and avoid further delaying Waukesha’s access to clean drinking water, DNR should err on the side of caution and at the very least prepare a final EIS that reflects careful consideration of all comments received and incorporates any necessary changes based on those comments, including an updated analysis of all reasonable alternatives.

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<sup>1</sup> Wis. Stat. § 1.11; Wis. Admin. Code NR ch. 150.

<sup>2</sup> See, e.g., *Wis.’s Env’tl. Decade, Inc. v. Pub. Serv. Comm’n of Wis.*, 69 Wis. 2d 1, 230 N.W.2d 243 (1975).

*DNR SHOULD TREAT THE EIS RELEASED IN AUGUST  
2019 AS A DRAFT EIS AND PROCEED ACCORDINGLY*

We recognize the complexity involved in preparing the EIS for the Project, especially since previous versions of the document were prepared prior to Waukesha obtaining diversion approval from the Great Lakes – St. Lawrence River Basin Water Resources Council (hereafter, “Compact Council”). Nevertheless, DNR must not shirk its responsibility to comply with WEPA procedural requirements and provide for robust public review. Significant changes in the Project—notably, changing water suppliers from the City of Oak Creek to the City of Milwaukee—mean that the most recent EIS is in effect a draft EIS, and DNR should proceed accordingly.

WEPA regulations require the preparation of a draft EIS and a final EIS.<sup>3</sup> After preparing the draft EIS, DNR must issue a class 1 public notice at least 15 days prior to holding a public hearing, hold that public hearing, and allow the public to submit comments for at least 30 days.<sup>4</sup> Following this public review period, DNR must prepare a final EIS that summarizes the comments received on the draft EIS and the department’s response to those comments.<sup>5</sup> The final EIS may differ from the draft EIS based on the comments received or “other pertinent information that becomes known to the department.”<sup>6</sup>

DNR released a draft EIS for the Project in June 2015 and allowed public comment.<sup>7</sup> In January 2016, DNR issued a preliminary final EIS<sup>8</sup> that included a summary and response to

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<sup>3</sup> Wis. Admin. Code NR § 150.30(3)-(4).

<sup>4</sup> Wis. Admin. Code NR § 150.30(3).

<sup>5</sup> Wis. Admin. Code NR § 150.30(4)(b).

<sup>6</sup> *Id.*

<sup>7</sup> Wis. Dep’t of Nat. Res., *City of Waukesha Proposed Great Lakes Diversion Draft Environmental Impact Statement* (June 2015) (hereafter, “Draft EIS”), no longer available on DNR’s website, but on file with author.

public comments received.<sup>9</sup> Since the Project involves a diversion of Great Lakes water to a Community within a Straddling County, Waukesha had to obtain an exception to the ban on such diversions set forth in the Great Lakes – St. Lawrence River Basin Water Resources Compact (hereafter, “the Great Lakes Compact”).<sup>10</sup> Waukesha obtained that approval in June 2016, and the Compact Council relied in part upon the preliminary final EIS in reaching its decision.<sup>11</sup> After obtaining that approval, Waukesha changed water suppliers from Oak Creek to Milwaukee in late 2017 based on significant cost savings resulting from a shorter supply route.<sup>12</sup> On August 3, 2019, DNR publicly noticed its most recent EIS<sup>13</sup> for the Project.<sup>14</sup> A public informational hearing, covering both the wetland and waterways permit application and the latest EIS for the Project, was held on August 20, 2019.<sup>15</sup> The public notice also indicated that DNR would receive public comments on the permits and EIS through September 19, 2019.<sup>16</sup>

To be sure, the draft EIS and the preliminary final EIS identified Milwaukee as an alternative water supplier and analyzed the environmental impacts of that alternative.<sup>17</sup> Had

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<sup>8</sup> WEPA and its implementing regulations make no mention of a preliminary final EIS being part of the environmental review process. See Wis. Stat. § 1.11 and Wis. Admin. Code NR ch. 150.

<sup>9</sup> Wis. Dep’t of Nat. Res., *City of Waukesha Proposed Great Lakes Diversion Preliminary Final Environmental Impact Statement* (Jan. 2016) (hereafter “Preliminary Final EIS”), [https://dnr.wi.gov/topic/EIA/documents/Waukesha/PreliminaryFinalEIS\\_ResponsetoComments.pdf](https://dnr.wi.gov/topic/EIA/documents/Waukesha/PreliminaryFinalEIS_ResponsetoComments.pdf).

<sup>10</sup> Great Lakes – St. Lawrence River Basin Water Resources Compact, § 4.9.3.g.

<sup>11</sup> Great Lakes – St. Lawrence River Basin Water Resources Council, *Final Decision 2016-1* (June 2016) (hereafter, “Final Decision”), <http://www.glscompactcouncil.org/Docs/Waukesha/Waukesha--Final%20Decision%20of%20Compact%20Council%206-21-16.pdf>

<sup>12</sup> Wis. Dep’t of Nat. Res., *Notice to Great Lakes – St. Lawrence River Basin Water Resources Council and Regional Body regarding Water Supplier for City of Waukesha related to Final Decision 2016-1* (Nov. 2017), <http://www.glscompactcouncil.org/Docs/Waukesha/WDNR%20Letter%20regarding%20Milwaukee%20Water%20Supply%20113017.pdf>.

<sup>13</sup> Wis. Dep’t of Nat. Res., *City of Waukesha Proposed Great Lakes Diversion Environmental Impact Statement* (Aug. 2019) (hereafter, “August 2019 EIS”), <https://dnr.wi.gov/topic/EIA/documents/Waukesha/WaukeshaProposedDiversionEIS.pdf>.

<sup>14</sup> *Legal Notices*, The Freeman, Aug. 3, 2019, at 5B.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Draft EIS, pp. 12-13, 127-36; Preliminary Final EIS, pp. 14, 143-52.

Waukesha merely proposed to adopt the Milwaukee supply alternative discussed in the draft EIS and the preliminary final EIS, the change in water supplier would likely fall under the category of “other pertinent information that becomes known to the department.”<sup>18</sup> But that is not what happened. Instead, the most recent EIS identifies and analyzes three Milwaukee supply route alternatives that were not considered in the draft EIS or the preliminary final EIS.<sup>19</sup> These previously unidentified and unanalyzed Milwaukee supply route alternatives are more than just “other pertinent information.” Each alternative, including the so-called “M-1 preferred,” follows a different route than the alternative discussed in the draft EIS and the preliminary final EIS, meaning different environmental impacts will occur. Perhaps more importantly, it also means that an entirely different subset of the public and their properties will be impacted. As such, the most recent EIS has changed so significantly that it must be considered a draft EIS, and DNR should have started the public review portion of the process anew.

Without providing for additional public review commensurate to that required for a draft EIS, those members of the public impacted by previously unidentified water supply routes will not have an adequate opportunity to participate in the EIS process. DNR is accepting public comments on the most recent EIS, but the department has not committed to taking the extra step of summarizing and responding to those comments, much less preparing a final EIS incorporating necessary changes based on those comments. Before issuing its WEPA compliance determination under Wis. Admin. Code NR § 150.35, DNR should do everything in its power to ensure that it has complied with the requirements for public review.

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<sup>18</sup> Wis. Admin. Code NR § 150.30(4)(b).

<sup>19</sup> August 2019 EIS, pp. 22-24,

*DNR SHOULD IDENTIFY AND ANALYZE ALL REASONABLE ALTERNATIVES  
TO SENDING RETURN FLOW TO LAKE MICHIGAN VIA THE ROOT RIVER*

In addition to the procedural deficiencies discussed above, the EIS released in August 2019 fails to meet WEPA substantive requirements. An EIS must contain, among other things:

A list of reasonable alternatives to the proposed project, *particularly those that might avoid all or some of the adverse environmental effects of the proposed project*, including a description of proposed preventive and mitigating measures and an explanation of the criteria used to discard certain alternatives from additional study.<sup>20</sup>

The most recent EIS plainly fails to meet these requirements because it does not analyze any alternatives that would send return flow to Lake Michigan via the Milwaukee Metropolitan Sewerage District (MMSD) and is instead limited to alternatives that send return flow to Lake Michigan via the Root River.<sup>21</sup> Although consideration of MMSD return flow alternatives in the EIS might not change agency decisions for the Project, DNR is nevertheless required to make those decisions based on all the relevant information.<sup>22</sup> If DNR has excluded alternatives and related information from consideration, it must explain why.<sup>23</sup>

Whatever the explanation for excluding MMSD return flow alternatives from the most recent EIS,<sup>24</sup> it is outweighed by countervailing considerations, such as compliance with state

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<sup>20</sup> Wis. Admin. Code NR § 150.30(2)(e) (emphasis added).

<sup>21</sup> August 2019 EIS, pp. 21-29.

<sup>22</sup> See Wis. Admin. Code NR § 150.30(1)(b) (“The purpose of an EIS is to inform decision-makers of the anticipated effects on the quality of the human environment of a proposed action or project and alternatives to the proposed action or project. The EIS is an informational tool that does not compel a particular decision by the agency or prevent the agency from concluding that other values outweigh the environmental consequences of a proposed action or project.”).

<sup>23</sup> Wis. Admin. Code NR § 150.30(2)(e).

<sup>24</sup> Given DNR’s sensitivity to the possibility that Compact Council approval would be required due to the change in water supplier, *see supra* note 12, it appears as though DNR has excluded an analysis of MMSD return flow alternatives because the Compact Council conditioned its Final Decision on all water being returned to Lake Michigan via the Root River, *see* Final Decision, p. 13. However, obtaining Compact Council approval does not warrant omission of otherwise reasonable alternatives. Rather the potential need for supplemental approval is another piece of information that must be considered when analyzing those alternatives.

law or the avoidance of adverse environmental impacts associated with the Project, which are critical to the decision-making process. Furthermore, consideration of MMSD return flow alternatives in the draft EIS and the preliminary final EIS prior to Compact Council approval is outdated and incomplete. Without an updated analysis of MMSD return flow alternatives, DNR not only lacks all the relevant information, it also deprives the public and stakeholders of the opportunity to analyze and supplement that information during the public review process.

A particularly important countervailing consideration that should compel DNR to at least consider MMSD return flow alternatives is the provision in Wisconsin’s legislation implementing the Great Lakes Compact that diverted water be “returned to the source watershed . . . *as close as practicable* to the place at which the water is withdrawn.”<sup>25</sup> This provision takes the Great Lakes Compact requirement that all water must be returned to the source watershed even further.<sup>26</sup> Due to the change in water supplier from Oak Creek to Milwaukee, there is no question that any MMSD return flow alternative would be closer to the place at which the water is withdrawn than return flow via the Root River. The only question then is whether MMSD return flow alternatives are impracticable because they are either not cost-effective, not environmentally sound, or not in the interest of public health.<sup>27</sup> If none of those criteria is satisfied, return flow via MMSD is more than a reasonable alternative—it is required under Wisconsin law.

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<sup>25</sup> Wis. Stat. § 283.344(4)(f)3m (emphasis added).

<sup>26</sup> Great Lakes – St. Lawrence River Basin Water Resources Compact, § 4.9.4.c.

<sup>27</sup> *Id.*

Both the draft EIS and the preliminary final EIS did include a discussion of four MMSD return flow alternatives.<sup>28</sup> However, three of these alternatives were given short shrift because all water, including inflow from the Mississippi River Basin, would be conveyed to MMSD for treatment and discharge to Lake Michigan, resulting in the decommission of Waukesha's wastewater treatment plant (WWTP).<sup>29</sup> According to the draft EIS and the preliminary final EIS, these alternatives would also require improvements to the MMSD collection system and treatment plants, resulting in costs that exceeded those associated with other return flow alternatives.<sup>30</sup> A fourth alternative, involving treatment at Waukesha's WWTP and construction of a sewer pipeline that would bypass MMSD's South Shore facility but utilize its outfall into Lake Michigan, was analyzed more in depth.<sup>31</sup> Although DNR indicated it would need more information to thoroughly analyze this alternative, the department's main concern seemed to be whether MMSD's South Shore facility had the capacity to accept Waukesha's wastewater, especially during wet weather events.<sup>32</sup>

The above analysis is outdated and incomplete for several reasons. First, rather than approving the requested diversion of 10.1 million gallons per day, the Compact Council only approved the diversion of 8.2 million gallons per day.<sup>33</sup> This alters the analysis when it comes to concerns about the capacity of MMSD to accept Waukesha's wastewater and may limit or even eliminate costs associated with any necessary improvements. For the fourth MMSD alternative, costs were already estimated to only be a little more than 1.4 times the cost of Root River

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<sup>28</sup> Draft EIS, pp. 17-18; Preliminary Final EIS, pp. 18-19.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; see also Se. Wis. Reg'l Planning Comm'n, *A Regional Water Supply Plan for Southeastern Wisconsin*, p. 631 (2010), <http://www.sewrpc.org/SEWRPCFiles/Publications/pr/pr-052-regional-water-supply-plan-vol1.pdf>.

<sup>31</sup> Draft EIS, pp. 17-18, 155-63; Preliminary Final EIS, pp. 18-19, 173-80.

<sup>32</sup> Draft EIS, pp. 155-56; Preliminary Final EIS, p. 173.

<sup>33</sup> Final Decision, p. 6.



return flow alternatives.<sup>34</sup> Second, the Compact Council effectively conditioned its approval on Waukesha returning all water in excess of the amount diverted to the Mississippi River Basin instead of returning it all to the Great Lakes Basin.<sup>35</sup> This means that MMSD would not receive all of Waukesha's wastewater and that Waukesha's WWTP would not have to be decommissioned.<sup>36</sup> Third, the only MMSD alternative DNR analyzed that does not involve building a sewer pipeline all the way to MMSD's South Shore facility was the interceptor connection near Greenfield Park Pump Station. Other intermediate MMSD interceptor connections, such as those in the City of Franklin that might have available capacity even during wet weather events due to recent improvements,<sup>37</sup> were not analyzed. Finally, there is no indication that DNR or Waukesha reached out to MMSD since the preliminary final EIS was released in January 2016 to obtain more information about return flow alternatives—information that could have been substantially updated in the intervening three and a half years. In addition to altering the analysis for alternatives already identified, such information could make DNR aware of previously unconsidered alternatives.

MMSD return flow alternatives would also avoid significant adverse environmental impacts. All adverse impacts to the Root River would be avoided because MMSD discharges directly to Lake Michigan, obviating among other things the need to discharge phosphorus into a waterbody already impaired for that pollutant<sup>38</sup> and the need to obtain a variance to

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<sup>34</sup> CH2MHill, *Evaluation of Treated Return Flow to Lake Michigan through the Milwaukee Metropolitan Sewerage District*, p. 29 (Mar. 10, 2015),

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.692.9152&rep=rep1&type=pdf>.

<sup>35</sup> *See id.* at 7.

<sup>36</sup> *See* August 2019 EIS, p. 5.

<sup>37</sup> *See* Milwaukee Metro. Sewerage Dist., *2020 Facilities Plan Reports*, ch. 12 (accessed Sep. 17, 2019), [https://www.mmsd.com/application/files/1714/8226/3178/2020\\_Chapter\\_12\\_Appendix\\_12ABCDE\\_Binder1.pdf](https://www.mmsd.com/application/files/1714/8226/3178/2020_Chapter_12_Appendix_12ABCDE_Binder1.pdf).

<sup>38</sup> August 2019 EIS, p. 60.

discharge chloride into a waterbody with relatively limited assimilative capacity.<sup>39</sup> Intermediate MMSD interceptor connections, which would limit the length of new sewer pipeline infrastructure, could also significantly reduce adverse environmental impacts resulting from temporary and permanent wetlands fill and waterway crossings. Other adverse impacts associated with the Project may be avoided or mitigated as well, but many are unknown largely because DNR failed to include an updated analysis of MMSD return flow alternatives in the most recent EIS.

The most recent EIS also fails to account for the significant environmental justice red flags associated with Root River return flow alternatives that MMSD return flow alternatives would avoid. Root River return flow alternatives would almost certainly turn the river, at least during the summer months, into an effluent dominant stream.<sup>40</sup> This, in turn, would expose the public to increased bacteria loads along with associated viruses and pathogens.<sup>41</sup> Unregulated contaminants, including pharmaceuticals and endocrine disruptors,<sup>42</sup> would also be introduced into the Root River and near North Beach in the City of Racine.<sup>43</sup> These potential health risks, plus future risks of flooding due to rising water levels on the Root River and Lake Michigan under climate change conditions,<sup>44</sup> would be imposed on Racine with no attendant benefits.

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<sup>39</sup> See Facility Specific Chloride Variance Data Sheet for Waukesha Clean Water Plant, WPDES Permit No. WI-0029971-09.

<sup>40</sup> Draft EIS, p. 169.

<sup>41</sup> August 2019 EIS, p. 109.

<sup>42</sup> *Id.* at 110 (“The DNR recognizes that pharmaceuticals and endocrine disruptors are a growing concern. However, the DNR does not have regulatory authority to mandate the monitoring of pharmaceuticals and endocrine disruptors or require limits in wastewater effluent.”).

<sup>43</sup> See, e.g., Julie L. Kinzelman, Comment Letter on June 2015 City of Waukesha Proposed Great Lakes Diversion Draft Environmental Impact Statement (Aug. 28, 2015), on file with author; Sandra McLellan, Comment Letter on June 2015 City of Waukesha Proposed Great Lakes Diversion Draft Environmental Impact Statement (Aug. 27, 2015), on file with author.

<sup>44</sup> See e.g., The Guardian, *‘Bigger picture, it’s climate change’: Great Lakes flood ravages homes and roads* (Sep. 3, 2019), <https://www.theguardian.com/environment/2019/sep/03/great-lakes-region-flooding-climate-crisis>

The bottom line is that each Root River return flow alternative, unlike any MMSD return flow alternative, would discharge wastewater posing public health and safety concerns through an exceedingly hard-pressed community<sup>45</sup> with a significant minority population.<sup>46</sup> This return flow option thus burdens Racine with all the risks and none of the benefits of the diversion. Indeed, Waukesha would share none of the environmental or socioeconomic burdens, and the exclusion of these environmental justice considerations from the analysis of the most recent EIS calls into question its adequacy under both state and federal law.

Unless DNR prepares a final EIS that considers MMSD return flow alternatives, the department will have failed to comply with WEPA substantive requirements. Rather than undermining the EIS process when it is so near to completion and further delaying Waukesha's access to clean drinking water, DNR should prepare an EIS that unquestionably complies with both the letter and spirit of the law.

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<sup>45</sup> See Wisconsin Public Policy Forum, *City of Racine's Fiscal Condition*, (Apr. 2018), [https://publicpolicyforum.org/sites/default/files/LivingWithinItsMeans\\_FullReport\\_Final.pdf](https://publicpolicyforum.org/sites/default/files/LivingWithinItsMeans_FullReport_Final.pdf)

<sup>46</sup> For racial minority distribution of southeastern Wisconsin, see August 2019 EIS p. 83, Table 4-9.