Delivered via electronic mail

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RE: Comments on Draft Rules Regulating Great Lakes Diversions, Intrabasin Transfers, and Water Supply Service Area Planning, Board Orders DG-02-22 and DG-03-22

Dear Nicole and Chris:

The undersigned organizations submit these comments on the Wisconsin Department of Natural Resources' draft rules that would regulate Great Lakes diversions and intrabasin transfers, as well as water supply service area planning. Thank you for the opportunity to submit comments, and please let us know if you have any questions or concerns.

Sincerely,

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COMMENTS ON DRAFT RULES REGULATING GREAT LAKES DIVERSIONS, INTRABASIN TRANFERS, AND WATER SUPPLY SERVICE AREA PLANNING, BOARD ORDERS DG-02-22 AND DG-03-22

We appreciate the Wisconsin Department of Natural Resources undertaking the two rulemakings to establish much needed regulations further implementing the Great Lakes-St. Lawrence River Basin Water Resources Compact ("the Great Lakes Compact" or "the Compact") and Wisconsin's water supply service area planning requirements, both of which are codified in Chapter 281 of the Wisconsin Statutes. These regulations will establish much needed procedural clarity for the processing of applications to divert water from the Great Lakes basin under the Compact. Wisconsin has processed multiple diversion applications under the Compact, ranging from smaller diversions approvable at the state level to larger diversions requiring regional body review. We urge the Department to consider procedural and substantive difficulties that arose while processing past diversion applications and to take the opportunity these two rulemakings present to provide further clarity for both applicants and the public moving forward.

These comments first address specific issues with the draft rule for Great Lakes Diversion and Intrabasin Transfers. They then address the draft rule for Water Supply Service Area Planning. Finally, these comments outline environmental justice issues with both draft rules.

COMMENTS ON DIVERSION RULE

I. ALTERNATIVES AND THE DEMONSTRATION OF NEED

A. The Reasonable Water Supply Alternatives Definition Should Be Amended to Ensure Meaningful Consideration of All Alternatives for Communities within a Straddling County Diversions.

The Department should amend the definition of "reasonable water supply alternative" included in Subsection NR 851.11(13) of the draft rule to ensure meaningful consideration of all alternatives to a diversion of Great Lakes water to a community within a straddling county. As drafted, only a water supply alternative "that, when compared to the proposed diversion, is similar in cost, similarly environmentally sustainable, is similarly protective of public health, and does not have greater adverse environmental impacts" is considered reasonable. Although presumably not the Department's intent, the use of the word "similar" may inappropriately exclude alternatives that are entirely reasonable.

"Similar" is not defined in the draft rule, but the Oxford English Dictionary defines it as "resembling without being identical." The use of the word "similar" therefore could exclude an alternative with impacts that do not resemble a proposed diversion because such alternative is significantly more cost-effective, significantly more environmentally sustainable, and significantly more protective of public health.

We recommend that the Department develop a definition of "reasonable water supply alternative" that employs more workable language. Perhaps the Department could employ language found elsewhere in the rule. For example, in Subdivisions NR 851.32(2)(g)2 and (h)2 of the draft rule, which govern certain intrabasin transfers, available alternatives are those that are "feasible, cost-effective, and environmentally sound." Subsection NR 851.52(4), which governs whether diverted water is returned to the basin as close as practicable to the place at which the water is withdrawn, requires the consideration of "[e]conomic feasibility," [e]nvironmental impact such as impacts of the withdrawal on rivers or streams," and "[p]ublic health concerns."

Further, an alternative should not need to be as cost-effective as a proposed diversion to be reasonable. An alternative could cost more but still be cost-effective in achieving significant protections of the environment and public health, yet the draft rule would seemingly exclude such an alternative. We, therefore, recommend that the Department develop a definition that balances cost-effectiveness with environmental and public health protections.

The Department could also look to language employed by other states for guidance. For example, in Ohio, an application for a diversion must include "[a]n analysis for meeting the present and future water needs of the applicant, including the economic, social, and environmental impacts of further development of the water resources in the importing basin."[1] In Minnesota, an application for a water appropriation permit must include a "[s]tatement of justification supporting the reasonableness and practicality of use with respect to adequacy of the water source, amounts of use, and purposes, including available facts on . . . alternative sources of water or methods which were considered, to attain the appropriation objective and why the particular alternative proposed in the application was selected."[2]

The Department should also better define how to analyze and quantify the costs of a potential alternative. For example, the total cost of an alternative may not accurately reflect when costs are realized and thus may not reflect the actual financial burden on a municipal entity over time. Costs should be characterized in terms of short-term and long-term financial impacts, and options to address the overall financial burden on a public water system should be evaluated.

Finally, we are concerned that the draft definition of "reasonable water supply alternative" creates the potential for expansion of existing diversion infrastructure to be the only reasonable alternative based on cost considerations alone. Even if need is demonstrated, the City of Waukesha and other diverters should not be used as a "beachhead" for new and increased diversions of Great Lakes water to communities within straddling counties when other viable alternatives are available. The Department should therefore amend the draft rule to enable it to compare the total and not the marginal cost of a diversion to the cost of alternatives. Either that, or the potential for a proposed new or increased diversion to facilitate additional diversions must be evaluated as part of the Department's cumulative impact analysis.

[1] Ohio Admin. Code 1501-2-05, available at https://codes.ohio.gov/ohio-administrative-code/rule-1501-2-05.
[2] Minn. R. 6115.0660, subpt. 3(E)(5), available at https://www.revisor.mn.gov/rules/6115.0660/.

B. Applicants Should Be Required to Identify Alternatives that Were Not Considered and Should Be Required to Analyze All Alternatives Identified in a Water Supply Service Area Plan.

The Department should amend the application sections for each application type to require the identification of alternatives that were not considered as part of the applicant's alternative analysis and the reasons those alternatives were not considered. Further, the Department should amend the rule to require analysis of any alternative identified in a water supply service area plan.

C. The Rule Should Require an Applicant for Communities Within a Straddling County to Better Demonstrate the Need for a Diversion.

The purpose of the Great Lakes Compact is to ensure that as much water is retained within the Great Lakes basin as possible, hence the prohibition on diversions of Great Lakes water with very limited exceptions. Furthermore, the requirement to assess reasonable water supply alternatives, if properly implemented as discussed above, should mean that, even if a community within a straddling county is otherwise eligible, diversions are a last resort. Put another way, diversions should never be considered the norm or inevitable, and communities should not be able to take the availability of a diversion for granted, particularly when that diversion is to facilitate straight line growth projections.

On the contrary, to the extent public water supply systems can identify the need for a diversion as a potential water supply alternative in advance, e.g., the need is based on straight line growth projections, the Department should require that the public water supply system develop a plan that seeks to avoid such a diversion. Diversions should typically be the result of unforeseen circumstances that impact a community's drinking water supply and that cannot be reasonably avoided. Diversions should not be the result of predictable circumstances that can be avoided with proper planning and water budgets.

II. THE RULE LANGUAGE SHOULD BE CLARIFIED TO ENSURE OWNERS AND OPERATORS OF THE PUBLIC WATER SYSTEMS RECEIVING AND RETURNING DIVERTED WATER ARE RESPONSIBLE FOR COMPLIANCE WITH A DIVERSION APPROVAL.

As presently drafted, the proposed rule provision assigning responsibility for obtaining and complying with the terms and conditions of a diversion approval to owners and operators of a water supply system invites either problematic outcomes or confusion.[3] It is obviously critical to be clear about which entity is responsible for compliance with a diversion's terms, but we are concerned that the draft rule does not achieve this outcome. The provision in question states, in relevant part:

[3] Draft Rule NR § 851.13.

(1) The *person* who owns or operates the *water supply system* is responsible for obtaining, amending, terminating, and complying with the terms and conditions within a preexisting diversion approval, diversion approval, or intrabasin transfer approval.

(2) The department shall issue a diversion approval or intrabasin transfer *only* to the person who owns or operates the water supply system.[4]

The draft rule, referencing statute, elsewhere defines "person" as "an individual, or other entity, including a government or nongovernmental organization, including any scientific, professional, business, nonprofit, or public interest organization or association that is neither affiliated with nor under the direction of a government."[5]

"Water supply system," again tracking statute, is defined as either "the equipment handling water from the point of intake of the water to the first point at which the water is used" or "for a system for providing a public water supply, the equipment from the point of intake of the water to the first point at which the water is distributed."[6]

Based on these definitions, it appears the "responsibility" provision in the draft rule could be read to require a city that is merely facilitating a diversion for another city to be exclusively responsible for all applications and compliance with diversion approvals, even though it is not using the diverted water and is not implementing return flow requirements. For example, if a city on the shore of Lake Michigan agreed to use its existing infrastructure to take additional water out of Lake Michigan, then send it to another city outside or straddling the basin, it would be the city on the shore of Lake Michigan, not the city receiving and using the diverted water, that would have to apply for and comply with a diversion approval. This is because it would be the city on the shore, not the city receiving the diverted water, that owns and operates the equipment from the "point of intake," i.e. Lake Michigan, to the place at which the water is "distributed," i.e. the community outside of or straddling the basin. The use of the term "only" in subsection (2), above, would seem to make that responsibility exclusive to the city on Lake Michigan.

This would not make sense for certain aspects of the diversion approval process or for certain aspects of diversion approval compliance. For instance, the community outside or straddling the basin is in control of the diverted water once received and thus, as a practical matter, responsible for returning it to the basin as required by the Great Lakes Compact and these rules. But the municipality on the shore of Lake Michigan, in the above example, would be legally responsible for the water's return flow, despite having no control over ensuring that this return of diverted water occurs as required. Responsibility and control must go together for these provisions to make sense.

[4] *Id.* (emphasis added).
[5] Draft Rule NR § 851.11(8).
[66] Draft Rule NR § 851.11(23).

At the same time, the "person" that owns or operates the water supply system in the above example *is* in control of other aspects of the diversion, e.g., the initial withdrawal of the water from within the basin and transfer of it to the receiving community. And it should remain responsible for those aspects of the diversion.

Given this, it seems to us that a clarification of this section is in order, and we recommend that the Department amend the rule to ensure responsibility for all aspects of a diversion is appropriately distributed.

III. THE RULE SHOULD IMPLEMENT THE "PUBLIC WATER SUPPLY PURPOSES" REQUIREMENT TO FORECLOSE DIVERSIONS INTENDED LARGELY FOR NON-RESIDENTIAL PURPOSES.

The Department should interpret and implement the "public water supply purposes" statutory requirement to foreclose diversions intended largely for non-residential purposes. The plain language of the public water supply purposes requirement, appropriately examined in context, prohibits diversions of Great Lakes water for anything other than "largely residential purposes."

Both "public water supply purposes" and "public water supply" are defined in statute to mean "water distributed to the public through a physically connected system of treatment, storage, and distribution facilities that serve a group of largely residential customers and that may also serve industrial, commercial, and other institutional customers."[7] The purpose of a public water supply is, therefore, to "serve a group of largely residential customers," while also allowing as a practical matter the public water supply to "serve industrial, commercial, and other institutional customers."

Read in context, the focus of the public water supply purposes requirement is not on all the water a public water system uses, but specifically on the water being diverted: "The department may approve a proposal . . . to begin . . . or to increase the amount of a diversion . . . if *the water diverted* will be used solely for public water supply purposes."[8] Thus, the water being diverted must be used to serve a group of largely residential customers, while some water may also be used for industrial, commercial, and other purposes.

Any argument that a proposed diversion intended for largely non-residential purposes (i.e., industrial, commercial, or other institutional customers) can be authorized under the Great Lakes Compact and Wisconsin's implementing legislation inappropriately renders the public water supply purposes requirement superfluous, particularly if that argument focuses on the public water supply system as a whole to find that it serves "largely residential customers." To even apply for a diversion, applicants must own or operate a public water supply system.[9] But that phrase is defined in the draft rule to mean essentially the same thing as public water supply with the

[7] *Compare* Wis. Stat. § 281.346(1)(pm) *with* Wis. Stat. § 281.343(1e)(pm).
[8] Wis. Stat. § 281.346(4)(c) (emphasis added). *See also* Wis. Stat. § 281.346(4)(e).
[9] Wis. Stat. § 281.346(4)(b)2.

additional requirement that the system must serve or be owned by municipalities and other local corporations of the state.[10] In other words, only public water supply systems can apply for diversions, and, under an interpretation that looks at the system as a whole, applicants could satisfy the public water supply purposes requirement simply by virtue of being a public water supply system, rendering the public water supply purposes requirement superfluous.

We recommend that the Department amend the draft rule to clarify that applications to use diverted water largely for non-residential purposes will be denied. We also recommend that the Department amend the diversion amendment process to ensure that proposed changes in the use of diverted water are appropriate and not used as an end run around the public water supply purposes requirement as interpreted herein.

IV. ENVIRONMENTAL REVIEW

A. The Rule Should Address Procedural Issues with Environmental Review for Diversion Requiring Regional Body Approval.

A significant issue the draft rule does not address is the interplay between processing diversion applications and environmental review. This was a significant issue during the Waukesha Diversion, which required regional body approval. There, the Department attempted to complete preliminary environmental review of the proposed diversion while simultaneously completing the technical review necessary to obtain regional body approval, all before the water supplier—i.e., the entity diverting the water—was changed from the City of Oak Creek to Milwaukee. Ultimately, the regional body had to confirm its original decision, and the Department had to venture outside the confines of Chapter NR 150 of the Wisconsin Administrative Code and prepare a supplemental environmental impact statement ("EIS"). That process was clunky and confusing, and we encourage the Department to improve how it processes future diversion applications.

Anytime the Department receives a diversion application, the Wisconsin Environmental Policy Act ("WEPA") requires the Department to determine whether approvals for the diversion constitute "a major action significantly affecting the quality of the human environment."[11] If the proposed diversion does constitute such a major action, the Department must prepare an EIS. Although an EIS does not direct Department decision-making, it nevertheless has two important purposes: (1) to ensure agency decision-making is based on all the available information related to environmental impacts; and (2) to ensure informed public participation in the decision-making

[10] *Compare* Draft Rule NR § 851.11(12) *with* Wis. Stat. § 291.346(1)(pm).
[11] Wis. Stat. § 1.11(2)(c).

process.[12] As part of an EIS, the Department must analyze the direct, secondary, and cumulative environmental impacts of a diversion and the alternatives thereto.[13]

The Department should amend the draft rule to address procedural issues with environmental review, particularly for diversions requiring regional body approval, that ensure both WEPA purposes are accomplished. For starters, the Department should ensure that it has the authority to toll any decision-making deadlines while it prepares an environmental impact statement, if applicable. To perform meaningful environmental review of a diversion, the Department needs time, and it should not be arbitrarily truncated. That said, the process must be orderly, and any general member of the public should be able to assess where the Department is at in the process at any given time.

In addition, to prevent unnecessary redundancies and conserve resources, the Department needs to clarify the order in which it navigates the diversion application and environmental review process. For diversion approvals necessitating an EIS and regional body approval, we recommend an ordered process where the Department (1) determines it has received a complete application; (2) engages in the scoping process for an EIS; (3) prepares a technical review document and submits it along with the application and other necessary materials to the regional body for review and approval; (4) based on any conditions and changes to proposed diversion in a regional body approval, prepares a draft EIS; (5) notices the draft EIS and holds a public hearing and comment period; (6) finalizes the EIS; (7) notices the diversion application and holds a public hearing and comment period; and (8) makes a decision on the diversion application.

Regarding the public hearing on the diversion application itself, it is vital to fulfilling the second WEPA purpose identified above that the public have information contained in at least a draft EIS (if not the full EIS) so that information can be used during the public participation portion of the substantive decision-making process.

Finally, as part of an EIS, we urge the Department to consider requiring a more in-depth analysis of alternatives given how important the evaluation of alternatives is to different aspects of the diversion application process. Initial information should be available from a corresponding water supply service area plan to set the Department up for success.

B. The Department Should Ensure it is Able to Impose Fees that Will Cover the Cost of Environmental Review.

Unless authorized elsewhere in statute or regulation, the Department should amend Section NR 851.14 of the draft rule to ensure it is able to impose fees that will cover the cost of environmental review. Environmental review, and particularly the preparation of an EIS, can be extremely costly for the Department to prepare, and the Department must have at least some ability to recoup

[12] *Wisconsin's Env't. Decade, Inc. v. Wis. Dep't of Nat. Res.*, 94 Wis. 2d 263, 271, 288 N.W.2d 168, 172 (Ct. App. 1979).
[13] Wis. Stat. § 1.11(2)(c).

those costs from applicants. The draft rule authorizes the Department to recoup costs for regional body review,[14] but is silent when it comes to environmental review.

V. THE RULE SHOULD BE CLARIFIED TO ENSURE THAT THE COMMINGLING OF IN-BASIN AND OUT-OF-BASIN WATER IS NOT REQUIRED IN EVERY INSTANCE.

Several provisions in the rule oddly seem to require that all diverters commingle in-basin and out-of-basin water before satisfying the return flow requirement. For example, Subdivision NR 851.22(2)(i)1 states that, for the Department to issue a straddling community diversion approval, the "[w]ater returned to the Great Lakes basin will . . . be from a water supply or wastewater treatment system that combines water from inside and outside the Great Lakes basin."[15]

Although the Great Lakes Compact, Wisconsin statute, and the draft rule require that "[a]n amount of water equal to the amount of water withdrawn will be treated and returned to the Great Lakes basin," that requirement allows for consumptive uses.[16] In other words, diverters do not necessarily need to augment return flow with out-of-basin water. As such, the requirement to commingle in-basin and out-of-basin water should be qualified to apply only when out-of-basin water will be used to satisfy the return flow requirement or when out-of-basin water enters the return flow system (e.g., a homeowner has a private well but is connected to city sewer).

Subsection NR 851.52(5) does qualify similar language, stating that it only applies "[i]f water from outside the Great Lakes basin will be returned to the source watershed." This provision recognizes that while there is a high potential for out-of-basin water to be returned to the Great Lakes basin, it is not a foregone conclusion in every instance. We recommend amending the three other provisions identified herein to track the language of Subsection NR 851.52(5).

VI. THE OPEN RECORDS REQUESTS PORTION OF THE RULE MUST BE NARROWED TO REFLECT THE STATUTORY LIMITS OF ASSERTING DOMESTIC SECURITY CONCERNS.

Section NR 851.76 of the draft rule must be amended to ensure compliance with Wisconsin's Public Records Law, codified at Wis. Stat. §§ 19.31-.39. We recognize that statute authorizes DNR to consider domestic security concerns when withholding information responsive to a public records request related to a diversion.[17] We also acknowledge that domestic security is a very real concern.

However, the Public Records Law entitles "all persons . . . to the greatest possible information regarding the affairs of government and the official acts and those officers and employees who represent them."[18] While the Public Records Law certainly has exceptions, access to information

[14] Draft Rule NR § 851.14(3).
[15] *See also* Draft Rule NR §§ 851.21(2)(p)2; .51(3)(b).
[16] Draft Rule NR § 851.22(2)(h).
[17] Wis. Stat. § 281.346(3)(cm).
[18] Wis. Stat. § 19.31.

about proposed diversions is vital to meaningful public participation and those exceptions should be read as narrowly possible.

The Department's statutory authority to withhold information for domestic security concerns is explicitly limited to "information regarding locations of withdrawals and diversions."[19] The draft rule, on the other hand, contains no limitation on the types of information for which the Department may consider domestic security concerns.[20] Other rules implementing the domestic security statutory authority do identify the appropriate limitation.[21]

In addition, the draft rule authorizes DNR to "request" that records requesters put a request in writing, identify themselves, or the reason the information is being requested and how it will be used—something the Public Records Law generally prohibits the Department from doing.[22]

The Department can require "acceptable identification whenever . . . security reasons . . . so require."[23] And as a functional matter, requesters who do not submit their requests in writing are not entitled to bring a mandamus action to enforce the Public Records Law.[24] But we are not aware of any other statutory provision that authorizes the Department to require a requester to provide the reason for making a records request and how they will use the records. And the Department would need to identify such a statutory provision to overcome the Public Records Law's general prohibition, which states that "no request . . . may be refused because the person is unwilling to . . . state the purpose of the request."[25] Furthermore, the requirement to provide the reason the information is being requested and how it will be used simply does not make sense. If a requester really does pose a domestic security concern, it seems axiomatic that they would not provide the Department with an honest answer.

To the extent Subsection NR 851.76(2) of the draft rule merely authorizes the Department to request that a records requester voluntarily provide the reason for requesting information but does not authorize the Department to withhold or redact records for the failure to provide that reason, it is misleading and should be amended for clarity. In any event, the Department can also

[19] *Id.*
[20] *See* Draft NR § 851.76(1).
[21] Wis. Admin. Code NR § 856.15(2); Wis. Admin. Code NR § 860.14(2).
[22] *See* Wis. Stat. § 19.35(1)(h) ("A request may be made orally . . ."); Wis. Stat. § 19.35(1)(i) ("[N]o request . . . may be refused because the person making the request is unwilling to be identified or to state the purpose of the request.").
[23] Wis. Stat. § 19.35(1)(i).
[24] Wis. Stat. § 19.35(1)(h).
[25] *Id. See also* Wis. Stat. § 19.35(j) (Authorizing regulations limiting access to or use of information, but only notwithstanding Wis. Stat. § 19.35(1)(a) to (f). In other words, the Department cannot adopt a regulation that conflicts with Wis. Stat. § 19.35(1)(g)-(L).).

likely use other information about a requester it has at its disposal in weighing whether a domestic security concern warrants the withholding or redaction of public records.[26]

We request that the Department amend Section NR 851.76 to at least distinguish between locational information and all other diversion-related information as it has in past rulemakings. We also recommend that the Department consult with its Bureau of Legal Services and with the Wisconsin Department of Justice regarding the scope of the Department's authority to request information from records requesters and to withhold or redact records based on domestic security concerns.

VII. THE RULE SHOULD BE CLARIFIED THAT ONLY A "PERSON" WHO OPERATES A PUBLIC WATER SUPPLY SYSTEM THAT RECEIVES OR WOULD RECEIVE WATER FROM A NEW OR INCREASED DIVERSION MAY APPLY FOR A DIVERSION.

Wisconsin legislation implementing the Great Lakes Compact specifically requires applicants to be a "person" who "operates a public water supply system that receives or would receive water from the new or increased diversion."[27] Although the draft rule appropriately limits Department approval to only those applicants who own or operate a public water system,[28] there seems to be no corresponding limitation on who can apply. There should be, and the Department should amend the rule accordingly.

COMMENTS ON WATER SUPPLY SERVICE AREA PLANNING RULE

I. THE RULE SHOULD BE AMENDED TO ENSURE WATER SUPPLY SERVICE AREA PLANS CONTEMPLATE PROPOSED DIVERSIONS IN EVERY INSTANCE BEFORE THE DEPARMENT APPROVES THOSE DIVERSIONS.

The Department should amend either the Water Supply Service Area Planning Rule or the Diversion Rule to ensure that water supply service area plans contemplate a proposed diversion in every instance before the Department approves that diversion. Only two types of water supply service area plans require Department approval: (1) public water supply systems that serve a population of 10,000 or more and are seeking department approval for a new or increased *withdrawal* of Great Lakes water; and (2) public water supply systems seeking department approval for a new or increased *diversion* of Great Lakes water, regardless of population served, unless the diversion is to a designated "electronics and information technology manufacturing

[26] *See, e.g., Ardell v. Milwaukee Bd. of Sch. Directors*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894 (citing a domestic abuse injunction, which requester did not provide but was publicly available, that prohibited requester from contacting employee when employee was subject of public records request as a basis for denying a records request out of concern for the safety of the employee).
[27] Wis. Stat. § 281.346(4)(b)2.
[28] Draft Rule NR §§ 851.22(2)(b), .42(2)(b).

zone."[29] Further, although apparently repeatedly miscited in the draft rule, the requirements for both types of plans requiring approval appear to be the same.[30]

Conflating the requirements for plans requiring Department approval creates the potential for a public water supply system that prepares a water supply service area plan for a *withdrawal* of Great Lakes water to become eligible for a *diversion* despite the plan not contemplating that diversion.[31] This is the case even though the draft diversion rule requires Department approvals to be "consistent with" corresponding water supply service area plans[32] because the Wisconsin Legislature has defined "consistent with" in other planning contexts as effectively meaning *not inconsistent with* the applicable plan.[33] In other words, a proposed diversion may be "consistent with" a corresponding water supply service area plan even though that plan does not contemplate the diversion so long as the diversion does not contradict the plan.

II. THE RULE SHOULD REQUIRE AN ANALYSIS OF OPTIONS TO COVER, ABSORB, OR OTHERWISE DEFRAY COSTS OF ALTERNATIVE.

Wisconsin statute requires public water supply systems to include in a water supply service area plan that provides for a diversion a cost-effectiveness analysis of water supply alternatives "that will minimize total resource costs and maximize environmental benefits over a planning period."[34] We view this provision as designed, at least in part, to ensure public water supply systems are not pursuing alternatives that are significantly more costly but have no corresponding environmental benefits because those costs are likely to be incurred by ratepayers. Accordingly, the rule should require an analysis of options to cover and otherwise defray costs of each identified alternative and how those costs will be passed on to ratepayers.

Options to cover, absorb, or defray costs associated with each identified alternative may vary, and the ultimate cost to the public water supply system should be adjusted to reflect those variations. Some alternatives may qualify for different state or federal grants or revolving loan funds than other alternatives, and this difference should be accounted for. These issues should be addressed during the planning stage, not after a preferred alternative has been identified and has administrative inertia in its favor.

[29] Draft Rule NR § 854.04(2)-(3).
[30] *See* Draft Rule NR §§ 854.05, .06(1) (repeatedly referencing plans that need approval under Draft Rule NR § 854.04(3) or (4) when the only plans that need approval are under Draft Rule NR § 854.04(2) or (3))
[31] *See* Draft Rule NR § 854.04(3).
[32] Draft Rule NR §§ 851.22(2)(d), .23(3)(d), .42(2)(k), .61(1)(c).
[33] *See* Wis. Stat. § 66.1001(1)(am) (defining "consistent with" to mean "furthers *or does not contradict* the objectives, goals, and policies contained in the comprehensive plan.") (emphasis added).
[34] Wis. Stat. § 281.348(1)(b). *See also* Wis. Stat. § 281.348(3)(c)4m.

III. THE OPEN RECORDS REQUESTS PORTION OF THE RULE MUST BE NARROWED TO REFLECT THE STATUTORY LIMITS OF ASSERTING DOMESTIC SECURITY CONCERNS.

This section of our comments incorporates by reference and reasserts the comment above regarding Open Records Requests in Section NR 851.76 of the draft Diversion Rule.

ENVIRONMENTAL JUSTICE

I. PUBLIC NOTICE AND PARTICIPATION PROCEDURES SHOULD BE ALTERED TO PROVIDE ALL IMPACTED INDIVIDUALS AN OPPORTUNITY TO PARTICIPATE.

The procedural safeguards established in the draft rules should be strengthened to ensure an equitable opportunity for all interested Wisconsin citizens to have their concerns about a new or amended diversion addressed. As written, Paragraph NR 851.75(3)(b) of the draft diversion rule states that hearings "may" be in-person, online, or a combination.[35] The selection of the word "may" uses a permissive verb implying the agency has discretion to only conduct virtual hearings for all diversion hearings if it so chooses. Although virtual hearings certainly expand access to many individuals, solely relying on virtual hearings will exclude others. Not all Wisconsin citizens have uninterrupted access to necessary technology to participate in virtual spaces in an equitable way. For example, these barriers can be the result of unreliable internet access or limited? access due to health conditions or impairments. Additionally, virtual hearings remove the human element of public hearings by typically utilizing only audio with video access disabled. Considering the large public interest in prior diversion hearings and to fully accommodate all interested citizens, we recommend that the permissive language in Paragraph NR 851.75(3)(b) of the draft rule be altered to require both in-person and virtual opportunities for public participation in diversion hearings.

In addition to the permissive language being problematic, the location of the in-person hearings should not be confined to the "area where the diversion or intrabasin transfer is located."[36] The communities directly impacted by a diversion include the point of the withdrawal, the community receiving the diverted water, the point of wastewater return to the basin, and all communities downstream from the wastewater return point. The communities both surrounding the point of wastewater return and downstream from the point of return are notably not the required location for public hearings, if there is one, in the draft rules. In-person diversion hearings should be held within communities facing the environmental burdens of increased pollutants in their waters, not just in those communities that will benefit from a diversion. This improvement to the draft rules will prevent unnecessary commuting obstacles from being placed on individuals likely to experience the most severe negative impacts in a diversion decision and ensure the human element so often lost during virtual hearings.

[35] Draft Rule NR § 851.75(3)(b) ("A public hearing may be held in-person in the area where the diversion or intrabasin transfer is located, online, or a combination of in-person and virtual.").
[36] *Id.*

Concerned citizens will not be able to meaningfully participate if they are not properly informed that a public hearing is scheduled. Class 1 public notice is only required "in the county or counties where the water is proposed to be withdrawn and where the water will be diverted or transferred."[37] Only electronic notice, including outreach to information outlets, is required for other "areas affected by the proposal."[38] As mentioned above, not all members of the community have the same access to electronic communications. To ensure broad notice to all potentially impacted citizens, downstream communities in both the main proposal and alternatives should be explicitly referenced in Section 851.72 of the draft rule as an "area affected by the proposal." Additionally, a Class 1 public notice should be required in all counties potentially impacted by return flow.

Similar to the permissive verbiage used in Subsection NR 851.75(3)(b) of the draft diversion rule, Section NR 854.08 of the draft water supply service area planning rule establishes no mandatory public participation requirements when developing a water supply service area plan other than at least one public hearing must occur.[39] We request that the rule be amended to better establish a floor for the level of public participation that a person developing a plan must provide during the development, particularly when there is no corresponding diversion application, to at least also include a written comment period. The locality could then go above and beyond the minimum requirements if desirable.

Concluding the public participation process, the draft rules must provide meaningful review of the comments received. Matching the language of Wis. Stat. § 281.346(9)(c), Subsection NR 851.72(3) of the draft diversion rule simply states that the Department must retain and "shall consider the comments in making its decisions on the application." Paragraph NR 851.75(3)(k) of the draft diversion rule goes no further by requiring only that the "hearing examiner shall make a written report of public participation" for the decision record. Crucial to environmental justice is making a demonstration that comments from concerned citizens were actually considered and, therefore, had an equitable opportunity to impact Department decision-making. We recommend that the Department amend the rule to require not just a written report on the comments received, but also a summary of the Department's response to and the impact of the comments.

II. DOWNSTREAM IMPACTS RETURN FLOW SHOULD BE CONSIDRED.

Diversions that do not return wastewater directly to the Great Lakes but rather to the basin through surface water tributaries have an impact on communities downstream of that return flow discharge location. Although returned wastewater must be treated,[40] not all potential harms are prevented. Wastewater utilities are often granted variances to existing water quality standards, and water quality standards for emerging contaminants like per- and polyfluoroalkyl substances

[37] Draft Rule NR 851.72(2)(a).
[38] Draft Rule NR § 851.72(2)(b).
[39] Draft Rule NR § 854.08(1) (stating that public participation "may include" the dissemination of information, outreach activities, involvement in the decision-making process, and responses to the public involvement).
[40] Wis. Stat. § 281.346(4)(c)(2)(b) ("The returned water will be treated to meet applicable permit requirements under s. 283.31 and to prevent the introduction of invasive species in the Great Lakes basin.").

are in their infancy and continuing to be developed. The potential risk of pollutants from industrial and residential use is increased for in-basin communities beginning at the wastewater return location and flowing to downstream communities.[41] By default, these in-basin communities shoulder an inequitable burden for each gallon of diverted and returned water. The downstream burden being placed on in-basin communities should be a key factor in diversion decisions, and particularly for diversions to communities within straddling counties. Section NR 851.22 of the draft rule, governing straddling community diversion review, and Section NR 851.42, governing department review for a community within a straddling county diversion, should therefore include an assessment of any increased wastewater burden being placed on in-basin communities as part of the review process. Further, impacts to downstream communities should be considered when determining whether diverted water is being returned as close as practicable to the location from which it is withdrawn."[42]

III. THE CUMULTATIVE IMPACTS OF DIVERSIONS, INCLUDING IMPACTS TO FUTURE GENERATIONS, SHOULD BE A CONSIDERATION IN THE REVIEW PROCESS.

The key consideration of impacts on future generations is missing from the draft diversion rule. As statutorily adopted, the Compact explicitly found the protection and conservation of the Great Lake basin for future generations to be a duty placed on the parties including Wisconsin.[43] For future generations to "enjoy" the quantity and quality of the finite waters of the Great Lakes basin, it must be properly managed in perpetuity. Impacts on future generations are exacerbated by each diversion approval due to cumulative effects. The most effective way to make certain that short-term benefits are not outweighed by long-term, compounding impacts is to include it in the rule.

The cumulative impacts of diversions on future generations could be explicitly recognized in several sections of the draft rules. First, the definition of "reasonable water supply alternative" could include the public health and adverse environmental impacts on future generations in addition to the public health and adverse environmental impacts of the current generations. Second, amendments to Sections NR 851.23 and NR 851.43 to the draft diversion rule could expressly require consideration of cumulative impacts. Third, cumulative impacts should be included in the standard of reviews for straddling community diversions and community within a straddling county diversions.

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[41] *See, e.g.*, Wis. Dep't of Nat. Res., *Final Environmental Impact Statement: City of Waukesha Proposed Great Lakes Diversion* 166 (2019), https://widnr.widen.net/s/rb5ftmfj2g/waukeshaproposeddiversionfinaleis (presenting additional "pollutant loading" in the Root River as an "unavoidable adverse effect" of the proposed diversion).

[42] Draft Rule NR 851.52(4).

[43] Wis. Stat. § 281.343(1m)(a)(6) ("The parties have a 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 yet to come.").

IV. THE RULE SHOULD REQUIRE AN ANALYSIS OF THE DISPROPORTIONATE IMPACTS TO LOW-INCOME HOUSEHOLDS.

"Costs" or being "cost-effective" are identified for consideration in multiple places throughout the draft rules.[44] However, the method of calculating costs is not defined nor is an analysis of those costs' impact on different cross-sections of ratepayers required in the draft rules. The ability to absorb increased costs can be especially burdensome on low-income households. Costs that are passed onto ratepayers equally can disproportionately impact low-income households and thus be inequitable. Additionally, the financial impact on ratepayers for each alternative may vary depending on the options to cover, absorb, or defray the cost associated with each respective alternative. Thus, the rule should require an analysis of options to cover and otherwise defray costs of each identified alternative and an analysis of disproportionate impacts to low-income households.

[44] *See* Draft Rule NR §§ 851.11(13) ("is similar in cost");.31(2)(q)(2) ("including costs and environmental impacts"); .32(2)(g)(2) ("is no feasible, cost-effective, and environmentally sound"); .32(2)(h)(2) (same); .41(2)(r) ("relative costs").