

The Great Lakes Environmental Law Center

*Protecting the world's greatest freshwater resource
and the communities that depend upon it*

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To: Great Lakes—St. Lawrence River Basin Water Resources Council: State of Michigan Representative
From: Charlotte Johnson, Wayne State Law Transnational Environmental Law Clinic & Great Lakes Environmental Law Center (“GLELC”)
RE: City of Waukesha Application for a Lake Michigan Diversion with Return Flow Under the Great Lakes-St. Lawrence River Basin Water Resources Compact
Date: February 29, 2016

City of Waukesha Application for a Water Diversion under the Great Lakes-St. Lawrence River Basin Water Resources Compact

This memorandum will provide a historical perspective of the City of Waukesha’s relationship with water and an analysis of the City of Waukesha Application for a Lake Michigan Diversion with Return Flow (Application) under the Great Lakes-St. Lawrence River Basin Water Resources Compact (Great Lakes Compact), hereafter referred to as the “Application.” The intent of these comments is to provide a foundational framework by which to critique and review the Application.

Summary by Section

City of Waukesha’s Historical Relationship with Water

The Village of Waukesha was founded along the Fox River in 1846. In 1869, the Village’s natural springs were commercialized in what would become called the Bethesda Mineral Spring. Beginning an ongoing three decade long conflict, the Wisconsin Department of Natural Resources (DNR) “issued a “notice of violation” in 1987 advising the City of Waukesha that its municipal drinking water supply contained more than twice the level of radium permitted under Wis. Admin. Code sec. NR 109.50(1).¹ It was not until 1997 that Bethesda Mineral Springs ceased operation.

¹ *State Dep’t of Natural Resources v. City of Waukesha*, 184 Wis. 2d 178 (Wis. 1994).

In April 2009, the City of Waukesha entered into Stipulation and Order of Judgement with the State of Wisconsin. The Agreement provides in part that by June 30, 2018, the City of Waukesha shall achieve complete compliance with all federal and state drinking water Radionuclide Standards, which require radionuclide-compliant water.² The City of Waukesha used the Agreement as its foundation for submitting an Application for a Lake Michigan Diversion with Return Flow in October 2013 under the diversion exception for Communities within a Straddling County.³

Point 1: Definition of Community within a Straddling County

The City of Waukesha Application is requesting a diversion under the limited exception for a Community within a Straddling County, which is defined as "... any incorporated city, town or the equivalent thereof, that is located outside the Basin but wholly within a County that lies partly within the Basin and that is not a Straddling Community." Meeting the Compact definition of a Community within a Straddling County is a threshold requirement. However, the Application is not based on the City of Waukesha, but rather on the City of Waukesha Water Supply Service Area (WSSA). The Great Lakes Compact makes no mention of "water supply service areas."

Wisconsin's implementation and interpretation of the Great Lakes Compact in §281.346 and §281.348 details the Wisconsin language for authorized excepted diversions and required the use of water supply service area declination plans. The Great Lakes Compact provides authorization for the Governor of each signatory state to implement the Compact, but it limits that power by stating that "...any change or amendment made to the Compact by any Party in its implementing legislation...is not considered effective unless concurred in by all Parties."⁴ The change made under Wisconsin Statute §281.346(4)(e)(e) of adding water supply service areas has not been approved by other parties to the Great Lakes Compact.

Therefore, Wisconsin Statute §281.346(4)(e)(e) is on its face invalid. The City of Waukesha Application is solely based upon a delineation under Wisconsin Statute §281.346(4)(e)(e) and not by the more restrictive Great Lakes Compact definition of Community within a Straddling County. Thus, the City of Waukesha Application fails to meet the threshold exception requirement of being "[a] Proposal to transfer Water to a Community within a Straddling County..." and should be denied.⁵

Point 2: Community without Adequate Supplies of Potable Water Condition Precedent Not Met

² *State of Wisconsin v. City of Waukesha*, 1st Circuit Case No. 2009-CX-4 (unpublished).

³ Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9(3)

⁴ Great Lakes-St. Lawrence River Basin Water Resources Compact §9.3

⁵ Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9(3)

A. Plain Language of the Great Lakes Compact

According to the Great Lakes Compact exception requirements for a diversion of water into a Community within a Straddling County, “[t]he Water shall be used solely for the Public Water Supply Purposes of the Community within a Straddling County that is without adequate supplies of potable water.”⁶ However, the City of Waukesha Application is not based on the City of Waukesha’s lack of potable water, but rather on potable water demand projections based on the WSSA established by the SEWRPC pursuant to Wisconsin Statute §281.346(4)(e)(e) and §281.348(3)(c). The Application attempts to justify this expansion beyond the City of Waukesha municipal boundary by reliance on Wisconsin regulations for water supply service areas whereby water demand forecasts were developed for a “...20-year planning period and the ultimate buildout, or full development condition...”⁷

There is no language within the Great Lakes Compact permitting lack of potable water to be based upon a planned geographic expansion of an existing municipal water supply. And, there is no evidence that the City of Waukesha’s current water supply system reaches out into the four auxiliary community sections (excluding a small section of the Town of Waukesha) included within the Application. Thus, based on a plain language reading of the Great Lakes Compact condition for a diversion exception requiring that “[t]he Water shall be used solely for the Public Water Supply Purposes of the Community within a Straddling County that is without adequate supplies of potable water”, the Application should be denied for failure to meet all required exception conditions.⁸

B. Desire For Sprawl Does Not Equal Need for Water

The same geographic footprint defined by the Waukesha Water Supply Service Area is likewise used by *A Land Use Plan for the City of Waukesha Planning Area: 2010* as the new City of Waukesha planning boundaries.⁹ It is within these predetermined boundaries that the City of Waukesha, prior to their Application, developed plans for future City growth and land annexation. Wisconsin legal precedent holds that “...Wis. Stat. § 66.069(2)(c) (1979-80) allows a city to fix areas outside of its boundaries for sewer service and that annexation can be an appropriate prerequisite to extending sewer services outside of city limits.”¹⁰

⁶ Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9(3)(a)

⁷ Application Summary, City of Waukesha Application for a Lake Michigan Diversion with Return Flow, pg. 3-1, (October 2013).

⁸ Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9(3)(a)

⁹ *A Land Use Plan for the City of Waukesha Planning Area: 2010*.

¹⁰ *Town of Waukesha v. City of Waukesha*, 2003 WI App 89 (Wis. Ct. App. 2003). *Hallie*, 105 Wis. 2d at 542. The United States Supreme Court held similarly in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985).

The Great Lakes Compact provides that proposals subject to regulation under exceptions within §4.9 shall be declared to meet the exception standard and may be approved as appropriate only when certain criteria are met, including that: “[t]he need for all or part of the proposed Exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies.” Reasonable avoidance methods include abating desired expansion in favor of conserving existing municipal water supplies. As the U.S. House Representative from Michigan Mr. John Dingell stated in his September 22, 2008, Congressional Remarks on the Great Lakes Compact, it “...will mandate a general ban on new diversions of water from the Basin with limited exceptions for communities near the Basin meeting rigorous standards.”

The City of Waukesha Application utilizes projections grounded in a municipal planning desire for expansion versus the Great Lakes Compact need based exception condition. While comprehensive planning is a statutorily granted municipal right and obligation under Wisconsin statute, the Great Lakes Compact is a limiting statute that sets strict limitations on Great Lakes and St. Lawrence River basin water diversions and grants limited conditional exceptions for evaluating diversion proposals. The City of Waukesha Application encourages unsustainable, irresponsible water diversion shrouded in opaque need that does not conserve, but rather expands water demand into a sprawling WSSA. The Application does not meet the needs-based criteria in §4.9(4)(a) and should be denied.

C. Conflicting and Confusing Application Data Tells a Story of Subjective Data Use

1. Deep Aquifer Level Discrepancy

The Application contains a generalized statement limiting reasonable water supply alternatives by asserting that “...the deep aquifer levels are declining again and severe drawdown is projected in future decades.”¹¹ The recorded lowest level of 493ft was reached in 1997, however USGS gathered data in July 2013, prior to the Application, had the deep water level at 382ft, an increase from low point deep aquifer levels of 111ft in only 16 years.¹² There was no acknowledgement of the increased deep aquifer levels within the City of Waukesha Application. This one example of subjective use of data is illustrative of the tainted data interpretation utilized to develop an approvable application for and by the City of Waukesha.

¹¹ Application Summary, City of Waukesha Application for a Lake Michigan Diversion with Return Flow, (October 2013).

¹² <http://groundwaterwatch.usgs.gov/AWLSites.asp?mt=g&S=430052088133501&ncd=awl>

2. Manufacturing Use Projections Discrepancy

A Land Use Plan for the City of Waukesha Planning Area: 2010 states that, "...the number of manufacturing jobs in Wisconsin has declined...[and]...manufacturers will continue to experience intense pressure to lower costs resulting in outsourcing to foreign countries."¹³ However, in the Application it was proposed and argued that industrial use in the WSSA will increase by 2035 and the City of Waukesha has proposed doubling land use dedicated for industrial use going from 3% to 6% of all land.¹⁴

During technical review of the Application, DNR stated, "[t]he department's preliminary analysis indicates that the application lacks sufficient explanation for the projected increase in the rate of water use, both in the short term and at full system build-out." DNR noted that the Application's primary reason for increased demand was attributed to projections of increased industrial demand at rates more than double the 2008-2012 averages.¹⁵ DNR responded to the Application assertion by stating that "[a]nalysis by department staff revealed evidence that does not support this assertion."

The City of Waukesha submitted a Technical Memorandum (TM) on February 19, 2014 in response to the DNR comments. In this report, the City's consultant stated that "...an envelope of projected water demands was developed to cover the range of probable water demands over a long range planning period...[and that] the average demand...at buildout (estimated 2050) – as presented in Water Demand Projections TM dated July 12, 2013 – is considered appropriate for planning purposes."¹⁶ The TM states that the projections they used are reasonable for planning purposes and in the broad sense that statement may be true. However, the Great Lakes Compact refers to "...need for all or part of the proposed Exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies" not reasonable planning for a proposed need.¹⁷

3. Conflicting Water Demand Numbers Drive Alleged Need

According to the City of Waukesha Application they had the choice between four "potential future scenarios to create an envelope, or range, of possible future demand conditions."¹⁸ Waukesha selected a planning scenario that includes a long term rebound of industrial enterprise and water demand to year 2000 levels. Propelling the water demand numbers, the Application creates a noncompliance issue for Wisconsin Statute

¹³ <http://www.ci.waukesha.wi.us/web/guest/comprehensiveplan>

¹⁴ City of Waukesha Water Supply Service Area Plan, Volume 2 of 5, Appendix A (October 2013)

¹⁵ Wisconsin DNR letter dated December 3, 2013 to Daniel Duchiniak, GM, Waukesha Water Utility

¹⁶ Technical Memorandum: Water Demand Projections – Response to DNR, prepared by Richard Hope, P.E., AECOM

¹⁷ Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9(4)(a)

¹⁸ City of Waukesha Water Supply Service Area Plan, Volume 2 of 5, Appendix A (October 2013).

§281.346(1)(ps) that defines a reasonable water supply alternative as “...a water supply alternative that is similar in cost to, and as environmentally sustainable and protective of public health as, the proposed new or increased diversion and that does not have greater adverse environmental impacts than the proposed new or increased diversion.”¹⁹ As such the Application determined that “[n]one of the other water supply alternatives are reasonable.”

Conflicting water demand numbers drive need within the Application and data is skewed high to establish the overwhelming plight of the applicant. Predestination of analytical outcome is not an objective perspective to review alternatives within the City of Waukesha Application. Based on the lack of reasonableness underlying data utilized to buttress Application propositions, the Application should be denied because there is not an expectation that “[t]he Exception will be limited to quantities that are considered reasonable for the purposes for which it is proposed.”²⁰

Point 3: Cumulative Effects of Small Deviations Create Big Impacts

Where do “community” boundaries stop if “community” is permitted to be based on planning areas?

If approved, the City of Waukesha Application would set a precedent for future Community within a Straddling County applications whereby a “community” could be defined by a statutorily permitted planning area without limitation to the boundaries of the “city, town, or equivalent thereof.” Under the Great Lakes Compact, Cumulative Impacts can result from individually minor but collectively significant Withdrawals, Diversions and Consumptive Uses taking place over a period of time.”²¹

There are 68 Straddling Counties covered under the Great Lakes Compact.²² Assuming that the City of Waukesha Application water demand projections are an average of all remaining exception requests under the exception for Straddling Counties then that would be an average of 676.7MGD and a maximum of 1.787BGD. Given the expansive precedent that would be set by permitting a planning area to meet the definition of “city, town, or equivalent thereof” the foreseeable outcomes it that other areas in straddling counties would utilize this exception to mesh otherwise divergent municipal groups and create substantial cumulative impacts. Thus, because of the precedent beings set in the Application and the potential for substantial negative cumulative impacts, the Application should be denied.

¹⁹ Wisconsin Statute §281.346(1)(ps)

²⁰ City of Waukesha Water Supply Service Area Plan, Volume 2 of 5, Appendix A (October 2013).

²¹ Great Lakes-St. Lawrence River Basin Water Resources Compact §1.2 and §9.3

²² <http://www.epa.gov/nscep>

Summary Conclusion

For the reasons stated both individually and collectively in this comment letter, the City of Waukesha's Application for a Lake Michigan Diversion with Return Flow under the Great Lakes-St. Lawrence River Basin Water Resources Compact, should be denied.

City of Waukesha Application for a Water Diversion under the Great Lakes-St. Lawrence River Basin Water Resources Compact: Comprehensive Comments

City of Waukesha's Historical Relationship with Water

The City of Waukesha was quite literally founded on water. In 1834, the first home was built near an American Indian settlement on the Fox River in what would become the Village of Waukesha and eventually the City of Waukesha.²³ By 1846, only 12 years after the first homestead was built along the Fox River, Waukesha County was an established municipal entity and the Village of Waukesha its county seat.²⁴ It only took another 22 years for the Village of Waukesha to find its unique local resource: its natural springs. "It was a discovery that would change the history of the [V]illage of Waukesha forever."²⁵

In 1869, the natural springs were commercialized in what would become called the Bethesda Mineral Spring.²⁶ From that innocuous start was born the Springs Era, a water exploitation frenzy that fed the creation of a thriving local economy and opulent lifestyle of the late 19th century Village of Waukesha, where elaborate mineral spring hotels hosted the country's elite.²⁷ Though by the early 20th century these facilities were in decline, it was not until 1997 that the last vestige of this era was closed. The Springs Era ended where it began at Bethesda Mineral Spring. Acting as a water bottling company for many years, it was closed when its parent company filed for bankruptcy in 1997. Once the crown jewel in Waukesha's network of tourist attractions, Bethesda Mineral Spring pumping machinery ceased operation for the first time in over a hundred years.²⁸ The fact that bankruptcy and not self-directed concerns for sustainability stopped the bottling and selling of water from Bethesda Mineral Springs illustrates the City of Waukesha's historical exploration of its water resources without regard to the possible long-term consequences or State of Wisconsin regulations for safe drinking water.

²³ City of Waukesha – Village History: <http://www.ci.waukesha.wi.us/web/guest/village>

²⁴ Id.

²⁵ City of Waukesha – Spring Era: http://www.ci.waukesha.wi.us/web/guest/richard_Dunbar

²⁶ Id.

²⁷ City of Waukesha – Springs Era Timeline: http://www.ci.waukesha.wi.us/web/guest/timeline_springs

²⁸ Id.

In 1987, ten years prior to the closing of Bethesda Mineral Springs, the Wisconsin Department of Natural Resources (DNR) “issued a “notice of violation,” advising the city of Waukesha that its municipal drinking water supply contained more than twice the level of radium permitted under Wis. Admin. Code sec. NR 109.50(1).”²⁹ On September 4, 1987, the state and city entered into a compliance agreement providing for the timeframe and methods for Waukesha to achieve compliance with the state's safe drinking water standards.³⁰ The city did not comply with the agreement, but choose to renegotiate it, claiming the radium level in its water supply would comply with the new standard for radium contemplated by the Environmental Protection Agency (“EPA”) and that it did not need to comply with the state's standard.³¹ Nearly four years later on April 12, 1991, the DNR filed a complaint against the City of Waukesha Water Utility seeking an injunction requiring the city to bring its water supply system into compliance with Wis. Admin. Code sec. NR 109.50(1).³² However, the City of Waukesha continued to oppose the DNR and sought dismissal on procedural grounds, which was granted in the lower courts with an appeal reaching up to the Supreme Court of Wisconsin in March 1994 where the lower court ruling was reversed.³³ During this seven year conflict over the safety of its drinking water Bethesda Mineral Springs was allowed to continue pumping, distributing, and profiting from the Waukesha water. And during that time, the City of Waukesha benefitted economically from jobs and taxes generated by the continued depletion of its limited natural resources.

The City of Waukesha continued its radium compliance legal struggle with the DNR for an additional 15 years. It was not until April 2009 that a Stipulation and Order of Judgement (Stipulation Agreement) was entered providing in part that “Defendant [City of Waukesha] shall by June 30, 2018, achieve complete compliance with all federal and state drinking water Radionuclide Standards, which require that radionuclide-compliant water can be provided in the event of the failure of the system's largest well, by some combination of obtaining new sources of compliant water and by treating for radionuclide-removal existing and/or new sources of water.”³⁴ It is against this backdrop that the City of Waukesha now, after over a century of exploiting their own natural water resources, seeks to utilize Great Lakes water resources to carry it into the 21st century and fulfill its vision of growing a pastoral exurb with thriving, historic central city core. As the City of Waukesha states in their website, “...the continued operations of the planning department and the attorney's office have awarded a solid border agreement with Waukesha's neighbors which should clarify and solidify Waukesha's boundaries by the early 21st

²⁹ *State Dep't of Natural Resources v. City of Waukesha*, 184 Wis. 2d 178 (Wis. 1994).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *State of Wisconsin v. City of Waukesha*, 1st Circuit Case No. 2009-CX-4 (unpublished).

century...the City Of Waukesha [has] provided the "machinery" to keep Waukesha's city government moving for years."³⁵ Cloaking growth in a veiled foundation of need and reasonableness, the City of Waukesha has used the April 2009 Stipulation and Order of Judgement and made an application for diversion of Great Lakes water, which should be denied based on the following analysis.

Point 1: Definition of Community within a Straddling County

The Great Lakes Compact bans diversions outside of the Great Lakes – St. Lawrence River Basin. A diversion is defined as "...a transfer of Water from the Basin into another watershed, or from the watershed of one of the Great Lakes into that of another by any means of transfer..."³⁶ However, there are limited exceptions to the general rule banning diversions. Section 4.9 provides for exceptions for 1) Straddling Communities, 2) Intra-Basin Transfer, and 3) Straddling Counties.³⁷ Each exception is subject to the definition and conditions associated with the specific condition and well as exception standards criteria within §4.9(4), which applies to all proposals under §4.9.³⁸

The City of Waukesha Application requests a diversion under the limited exception for a Community within a Straddling County, which is defined as "... any incorporated city, town or the equivalent thereof, that is located outside the Basin but wholly within a County that lies partly within the Basin and that is not a Straddling Community."³⁹ Meeting the Compact definition of a Community within a Straddling County is a threshold requirement that must be met in order for an application to move forward under this limited exception to otherwise prohibited water diversions. Unless this threshold is met, an application should fail on its face without need for further review as all "New or Increased Diversions" not excepted are expressly prohibited by §4.8.⁴⁰ The City of Waukesha meets the Great Lakes Compact definition of a Community within a Straddling County as is illustrated below in Figure 1.

³⁵ City of Waukesha – City History: <http://www.ci.waukesha.wi.us/web/guest/city>

³⁶ Great Lakes-St. Lawrence River Basin Water Resources Compact §1.2

³⁷ Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9(3)

³⁸ Id.

³⁹ Great Lakes-St. Lawrence River Basin Water Resources Compact §1.2

⁴⁰ Great Lakes-St. Lawrence River Basin Water Resources Compact

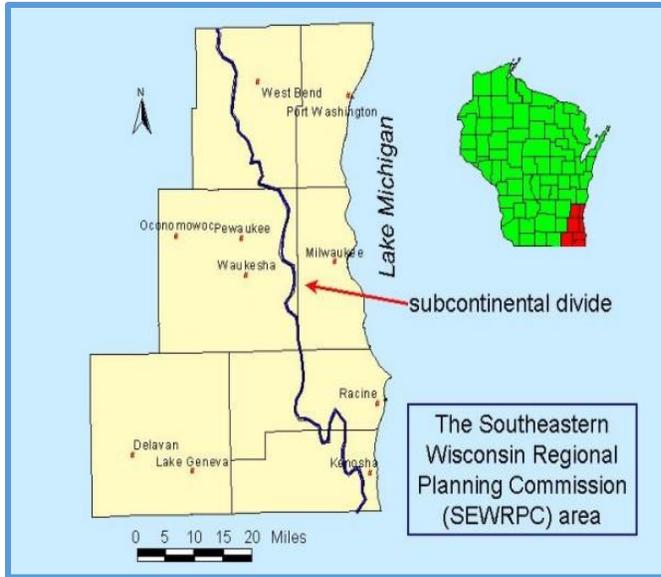


Figure 1: Great Lakes Basin Boundary Map through Waukesha County

The subcontinental divide in Wisconsin separates the Great Lakes Basin from that of other basins. As is illustrated by Figure 1, the Great Lakes Basin encompasses a very small portion of extreme Eastern Waukesha County.

And, if the City of Waukesha Application for a Lake Michigan Diversion with Return Flow were based on solely on the City of Waukesha there would be no doubt that this threshold requirement had been met. However, the Application is not based on the City of Waukesha, but rather on a delineation created by the Southeastern Wisconsin Regional Planning Commission for the City of Waukesha Water Supply Service Area (WSSA) as is outlined below in Figure 2.

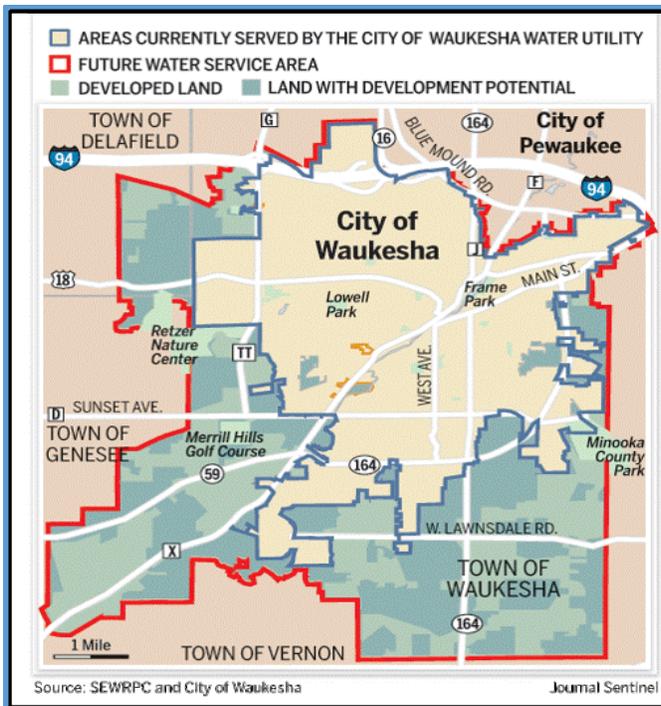


Figure 2: Waukesha Water Supply Service Area Map

The Waukesha Water Supply Service Area contains in whole or part the following Waukesha County communities:

1. City of Waukesha
2. Town of Waukesha
3. City of Pewaukee
4. Town of Genesee
5. Town of Delafield

The Great Lakes Compact makes no mention of “water supply service areas”, but it does define Community within a Straddling County as “...any incorporated city, town or the equivalent thereof...”⁴¹ Likewise, Federal Public Act 110–342, which was enacted as a Joint Resolution of the U.S. Congress and House of Representative and signed into law by the U.S. President on October 3, 2008 expressing the consent and approval of the Great Lakes Compact, defines a Community within a Straddling County as “...means any incorporated city, town or the equivalent thereof...” without further modification or expansion on that definition.⁴² When reviewing this definitional language from a plain language perspective, it is apparent that the WSSA is not an incorporated city or town. The question is does it meet the definition of “equivalent thereof”. If the word “equivalent” is taken within its dictionary definition of: 1) equal in force, amount, or value; 2) like in signification or import or having logical equivalence; or 3) corresponding or virtually identical especially in effect or function, the logical conclusion is no the WSSA is not the “equivalent thereof” of any city or town.⁴³

The City of Waukesha Water Supply Service Area does not hold equal force, amount or value of a city or town. It does not provide even one limited municipal function. Rather, it is a boundary line to which a municipal function is planned to reach though that line encompasses parts of several sever cities and towns. It is unlike in signification or import or having logical equivalence. The City of Waukesha Water Supply Service Area is unlike a city or town that is governed by elected officials who are accountable to the electorate and subject to replacement through municipal elections. It is a delineated service area created by the Southeastern Wisconsin Regional Planning Commission at the August 13, 2008, request of the City of Waukesha Water Utility General Manager in anticipation of application under the Great Lakes Compact.⁴⁴ Furthermore, the WSSA is not corresponding or virtually identical in effect or function to a city or town as the WSSA is a boundary line established for planning purposes. The WSSA creates a service delivery area limitation unlike a city or town that actually delivers or effects the delivery of services.⁴⁵

The question then is whether there is authority within the Great Lakes Compact for the City of Waukesha WSSA to meet the threshold of Community within a Straddling County. The Southeastern Wisconsin Regional Planning Commission (SEWRPC) stated in a Staff Memorandum, dated December 23, 2008, for the City of Waukesha WSSA delineation materials that they defined the area based on the Great Lakes Compact (2007

⁴¹ Id.

⁴² Federal Public Act 110–342, §1.2

⁴³ <http://www.merriam-webster.com/dictionary/equivalent>

⁴⁴ City of Waukesha Water Supply Service Area Plan, Volume 2 of 5, Appendix A (October 2013).

⁴⁵ Id.

Wisconsin Act 227).⁴⁶ However, in the same paragraph of that memorandum they indicated that "...any utility seeking a new or increased withdrawal of water from the Great Lakes basin and diverting the water to any place outside the Great Lakes basin must register with the State and provide information to the State regarding the proposed withdrawal. That information includes a water supply plan which is to be based upon a proposed water supply service area. The Act specifies that...an areawide water quality planning agency designated by the Governor...shall delineate the proposed water service supply area..."⁴⁷ Based on this memorandum, the SEWRPC based their delineation of the City of Waukesha Water Service Supply Area on 2007 Wisconsin Act 227 (Act), enacted May 27, 2008, the State of Wisconsin's Great Lakes Compact authorization and implementation legislation.

The Great Lakes Compact provides authorization for the Governor of each signatory state "...to take such action as may be necessary and proper in his or her discretion to effectuate the Compact and the initial organization and operation thereunder."⁴⁸ But, in the next section it limits that power by stating that "[t]he Parties consider this Compact to be complete and an integral whole. Each provision of this Compact is considered material to the entire Compact, and failure to implement or adhere to any provision may be considered a material breach. Unless otherwise noted in this Compact, *any change or amendment made to the Compact by any Party in its implementing legislation or by the U.S. Congress when giving its consent to this Compact is not considered effective unless concurred in by all Parties.*"⁴⁹ (Emphasis added). However, that language appeared to have been missed by Wisconsin state representatives as was evidenced by testimony in a Field Hearing before the U.S. Subcommittee on Water Resources and Environment held on April 18, 2008 in Green Bay, Wisconsin. Sitting on the subcommittee, Mr. Thomas Petri the U.S. House Representative for Wisconsin's 6th District asked if it was true that communities not entirely within the watershed may be able to use water from the watershed and if that was expanding the watershed not diverting from it.⁵⁰ Wisconsin State Senator Cowles, 2nd Senate District, Madison, Wisconsin, responded,

"In a way, it is expanding it, but that is built into *what I call the raw compact* that allows those communities to apply...[b]ut, the Great Lakes Compact gives each State discretion how you

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Great Lakes-St. Lawrence River Basin Water Resources Compact §9.2

⁴⁹ Great Lakes-St. Lawrence River Basin Water Resources Compact §9.3

⁵⁰ Lake Levels in the Great Lakes: Field Hearing before the Subcommittee on Transportation and Infrastructure, House of Representatives, 110th Congress, 2nd Session, April 18, 2008, Green Bay, Wisconsin: pg.14

define the diversion, how do you define conservation, how you define return flow. In Wisconsin, we believe we'll decide that in a very strict point of view from sustainability, which will hopefully create a precedent for the other States as they do their implementation language.”⁵¹ (Emphasis added).

The 2007 Wisconsin Act 227 ratified the Great Lakes Compact little more than a month after Wisconsin State Senator Cowles made his comments about the “raw compact”.⁵² Wisconsin’s implementation and interpretation of the Great Lakes Compact is found in §14.95 §281.346 and §281.348 of that Act. And, it is within the language for excepted diversions that Wisconsin cooked the raw compact by authorizing and requiring the use of water supply service area declination plans while utilizing the Great Lakes Compact definition of a Community within a Straddling County as “any incorporated city, town, or the equivalent thereof, that is located outside the basin but wholly within a county that lies partly within the basin and that is not a straddling community.”⁵³

Buried within its implementation legislation, Wisconsin added the requirement under 2007 Act 227 §281.346(4)(e)(e) for the approval of a Straddling Counties diversion application by stating that “[t]he proposal is consistent with an approved water supply service area plan under Wisconsin Statute §281.348 that covers the public water supply system.”⁵⁴ And, it is from that additive sentence that the City of Waukesha Water Supply Service Area was born. This implementation language added under Wisconsin Statute §281.346(4)(e)(e) in effect expands the Great Lakes Compact definition of “Community within a Straddling County” to include “water supply service areas” without proper vetting and approval as required by all Parties under the Great Lakes Compact.⁵⁵ Irrespective of Wisconsin’s ratification of the implementation language adding water service plan areas, it is not operable by law. Under the Great Lakes Compact, Wisconsin did not properly modify their expansionist language requiring creation of a water supply service area that in effect expands the definition of community, as such §281.346(4)(e)(e) is not considered effective.⁵⁶

Thus, since the City of Waukesha Application is solely based upon a defined geographical location delineated under Wisconsin Statute §281.346(4)(e)(e) and not by the more restrictive Great Lakes Compact definition of “Community within a Straddling County” and since Wisconsin Statute §281.346(4)(e)(e) is on its face invalid, the City of Waukesha Application fails to meet the threshold exception requirement of being “[a]

⁵¹ Id.

⁵² 2007 Wisconsin Act §281.343(1b): Great Lakes—St. Lawrence River Basin Water Resources Compact

⁵³ 2007 Wisconsin Act §281.343(1e)(d): Great Lakes—St. Lawrence River Basin Water Resources Compact

⁵⁴ 2007 Wisconsin Act §281.346(4)(e)(e)

⁵⁵ Great Lakes-St. Lawrence River Basin Water Resources Compact §9.3

⁵⁶ Id.

Proposal to transfer Water to a Community within a Straddling County...⁵⁷ Based on the Application's failure to meet the basic threshold for diversion exception requirement, the Application is void on its face and needs no further review nor consideration.

Point 2: Community without Adequate Supplies of Potable Water Condition Precedent Not Met

A. Plain Language of the Great Lakes Compact

The City of Waukesha has indicted in their Application that "scientific evidence, technical studies, and environmental impacts support the diversion exception criterion: that the City lacks an adequate supply of potable water."⁵⁸ Applicant's lack of an adequate potable water supply source is a condition that must be met in order for the Application to be approved under Section 4.9(3) of the Great Lakes Compact.⁵⁹ Finding that this condition is not met is grounds to reject the Application as a diversion shall be excepted only if it satisfies all listed conditions for its stated exception category.⁶⁰

According to the Great Lakes Compact exception requirements for a diversion of water into a Community within a Straddling County, "[t]he Water shall be used solely for the Public Water Supply Purposes of the Community within a Straddling County that is without adequate supplies of potable water."⁶¹ The City of Waukesha Application's foundation for stating it is without an adequate supply of potable water is the fact that the City of Waukesha is under a stipulated court order to be provide radium compliant water throughout its public water system by June 30, 2018 and that with declining groundwater levels it is unable meet the stipulation requirement through ground water treatment.⁶²

It is true that the City of Waukesha is a under a Stipulation Agreement to achieve complete compliance with all federal and state drinking water Radionuclide Standards by June 30, 2018 by some combination of obtaining new sources of compliant water and by treating for radionuclide-removal existing and/or new sources of water radium complaint water. However, there is no requirement within the Stipulation Agreement that the City if Waukesha expand its service area to provide water to parts of four surrounding

⁵⁷ Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9(3)

⁵⁸ Application Summary, City of Waukesha Application for a Lake Michigan Diversion with Return Flow, pg. 4-18 (October 2013).

⁵⁹ Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9(3)(a)

⁶⁰ Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9(3)

⁶¹ Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9(3)(a)

⁶² Application Summary, City of Waukesha Application for a Lake Michigan Diversion with Return Flow, pg. 2-2 to 2-4, (October 2013).

communities beyond its current services.⁶³ The presumption that the court order is a City based compliance requirement is evidenced by §5 of Stipulation Agreement that states:

“The Defendant implemented an effective water conservation program in April 2006 that includes, but is not limited to, the following elements: implementing Section 13.11 of the Waukesha Municipal Code limiting sprinkling; publishing a web site containing conservation practices and ideas; adopting a city-wide water conservation and protection plan; participating in a pilot project involving water saving fixtures; initiating design and construction of a water-recycling portion of the iron removal plant at Well No.8; installing sprinkling ordinance signs; collaborating on establishing, and participating in, the Waukesha County Conservation Coalition; and implementing a conservation water rate structure. Waukesha's conservation success has been demonstrated by achieving reduced maximum day and annual average day water demand to below those of the past 20 years.”

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The conservation items in §5 are Defendant (City of Waukesha) specific, including municipal codes, a city-wide conservation and protection plan, and installing sprinkling ordinance signs. The City of Waukesha has no authority to exercise such measures outside its' municipal limits and it illustrative that the Stipulation Agreement does not reach outside the municipal boundaries of the City of Waukesha. However, the Application analysis demonstrating lack of potable water reaches into four adjacent communities where no such stipulation agreement exists.⁶⁵ How is it that these areas can be covered by the Application? The answer is that the Application is not based on the City of Waukesha's lack of potable water, but rather on potable water demand projections based on the WSSA established by the SEWRPC pursuant to Wisconsin Statute §281.346(4)(e)(e) and §281.348(3)(c). The Application attempts to justify this expansion beyond the City of Waukesha municipal boundary by reliance on Wisconsin regulations for water supply service areas whereby water demand forecasts were developed for a “...20-year planning period and the ultimate buildout, or full development condition...”⁶⁶

While municipal entities have the legislative right to plan their communities and their Land Use, it is not granted that such planning rights include an expansion based justification for meeting the required exception condition for the lack of potable water requirement as contemplated within a plain language reading of the Great Lakes Compact. There is no language within the Great Lakes Compact permitting lack of potable

⁶³ *State of Wisconsin v. City of Waukesha*, 1st Circuit Case No. 2009-CX-4 (unpublished).

⁶⁴ *Id.*

⁶⁵ Application Summary, City of Waukesha Application for a Lake Michigan Diversion with Return Flow, (October 2013).

⁶⁶ Application Summary, City of Waukesha Application for a Lake Michigan Diversion with Return Flow, pg. 3-1, (October 2013).

water to be based upon a planned geographic expansion of an existing municipal water supply. However, the condition itself provides limiting language in that “[t]he Water *shall be used solely for the Public Water Supply Purposes of the Community within a Straddling County that is without adequate supplies of potable water.*”⁶⁷ (Emphasis added). There is no latitude within the word shall. It is a directive to the applicant defining the strict limitation upon which the water is to be used: solely for...”the Community within a Straddling County”.⁶⁸ The Application is not solely to provide potable water for use within the City of Waukesha to meet its stipulation requirement to achieve complete compliance with all federal and state drinking water Radionuclide Standards by June 30, 2018. And, there is no evidence that the City of Waukesha’s current water supply system reaches out into the four auxiliary community sections (excluding a small section of the Town of Waukesha) included within the Application. Thus, based on a plain language reading of the Great Lakes Compact condition for a diversion exception requiring that “[t]he Water shall be used solely for the Public Water Supply Purposes of the Community within a Straddling County that is without adequate supplies of potable water”, the Application should be denied for failure to meet all required exception conditions.⁶⁹

B. Desire For Sprawl Does Not Equal Need for Water

As previously referenced above in Point 1, the City of Waukesha Application utilizes a WSSA and develops its needs based analysis on assumptions for related to the WSSA. It is of concern that the same geographic footprint defined by the WSSA is likewise used by *A Land Use Plan for the City of Waukesha Planning Area: 2010* as the new City of Waukesha planning boundaries. It is within these predetermined boundaries that the City of Waukesha, prior to their Application, developed plans for future City growth and land annexation and through their Application are laying the foundation for expand through a provision of increased sewer and water connections.⁷⁰

“The future pattern of urban land uses is closely related to the future provision of public utilities...”⁷¹ Wisconsin legal precedent holds that “...Wis. Stat. § 66.069(2)(c) (1979-80) allows a city to fix areas outside of its boundaries for sewer service and that annexation can be an appropriate prerequisite to extending sewer services outside of city limits.”⁷² Thus, it is appropriate within Wisconsin state common law to utilize such service area boundaries when projecting future growth of a municipal footprint. But, does this permissible common law understanding serve to interpret and implement exception condition determinations within the Great Lakes Compact? Wisconsin State Senator Cowles, in an April 18, 2008 hearing said “the Great Lakes Compact gives each State

⁶⁷ Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9(3)(a)

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *A Land Use Plan for the City of Waukesha Planning Area: 2010.*

⁷¹ *Id.*

⁷² *Town of Waukesha v. City of Waukesha*, 2003 WI App 89 (Wis. Ct. App. 2003). *Hallie*, 105 Wis. 2d at 542. The United States Supreme Court held similarly in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985).

discretion how you define the diversion, how do you define conservation, how you define return flow. In Wisconsin, we believe we'll decide that in a very strict point of view from sustainability..."⁷³ His comments imply that even Wisconsin would say no to loosening the reigns on excepted conditions and permitting development-chasing water. And, for the foregoing reasons, it is clear that utilizing expanded water supply service areas for municipal annexation planning is not a permissible standard when meeting exception conditions within the Great Lakes Compact.

According to the Wisconsin Department of Administration, "[a] comprehensive plan is a local government's guide to community physical, social, and economic development...[that] provide a rational basis for local land use decisions with a twenty-year vision for future planning and community decisions."⁷⁴ Comprehensive planning creates a model and roadmap for a municipality to vision its future from a holistic perspective. However, Wisconsin law "...does not mandate how a local community should grow...[rather], individual comprehensive plans reflect[] community-specific and locally driven planning processes."⁷⁵ A required element of a Wisconsin comprehensive plan is a land use plan element. "A good land use element considers a variety of factors including, but not limited to: land supply and demand, population and employment projections, *groundwater and surface water resources*, and natural limitations (such as steep slopes, flood plains, and wetlands). *The idea behind good land use is to grow efficiently and in a fiscally and environmentally sound way.*"⁷⁶ (Emphasis added).

The City of Waukesha has been in conflict with the Wisconsin DNR regarding the levels of radium in its groundwater since 1987.⁷⁷ "Wisconsin's Comprehensive Planning Law §66.1001 was signed into law on October 27, 1999...and required land use regulations that must be consistent with a comprehensive plan beginning in 2010."⁷⁸ It is clear that prior to §66.1001 the City of Waukesha was pressured to come into compliance with groundwater regulations. But, when met with the 1999 requirement for a comprehensive plan, the City of Waukesha did not see their on-going conflict with DNR as a limiting factor to creating a good land use plan. Rather, with the Great Lakes – St Lawrence River Basin Sustainable Water Resources Agreement signing December 13,

⁷³ Lake Levels in the Great Lakes: Field Hearing before the Subcommittee on Transportation and Infrastructure, House of Representatives, 110th Congress, 2nd Session, April 18, 2008, Green Bay, Wisconsin: pg.14

⁷⁴ <http://www.doa.state.wi.us/Divisions/Intergovernmental-Relations/Comprehensive-Planning/what-is-a-comprehensive-plan>

⁷⁵ Id.

⁷⁶ *Land Use Resource Guide: A guide to preparing the land use element of a local comprehensive plan*, 2005. Provided by the State of Wisconsin to assist communities in completing their required comprehensive plans. Located electronically at: <http://www.doa.state.wi.us/Divisions/Intergovernmental-Relations/Comprehensive-Planning/Element-Guides/>

⁷⁷ State Dep't of Natural Resources v. City of Waukesha, 184 Wis. 2d 178 (Wis. 1994).

⁷⁸ Wisconsin's Comprehensive Planning Legislation: Legislative Guide Document Revised September 2010 – pg. 1

2005,⁷⁹ they seized an opportunity to marry the two: to utilize their water issues as a foundation to divert Great Lakes water while crafting expanded service boundaries they could to target land use under their yet to be developed comprehensive plan. Without a published comprehensive plan in March 2009 the City of Waukesha entered into the stipulation agreement requiring remedy of groundwater radium compliance issues.⁸⁰ Then, on September 11, 2009 the City of Waukesha met concerning adopting their comprehensive plan, which made no reference to possible groundwater contamination and only a passing reference to being "...in the process of considering applying for diversion permission to receive Lake Michigan water."⁸¹

However, as is illustrated by comparing the WSSA with the City Waukesha Land Use Plan map, there is no difference in the boundaries of the WSSA and the City Waukesha Land Use Plan map. See Figure 3 and Figure 4. It is noteworthy that the WSSA was not established by the SEWRPC until December 23, 2009, though the City of Waukesha Land Use Plan map is dated August 2009 and the SEWRPC City of Waukesha 2035 Recommended Land Use Plan is used as a source of data for WSSA.⁸² The dates of map development and the data source materials utilized to develop the WSSA Land Use provides clear evidence that that WSSA is being used as a tool for the City of Waukesha boundary expansion.

⁷⁹ Great Lakes – St Lawrence River Basin Sustainable Water Resources Agreement – pg. 29

⁸⁰ State of Wisconsin v. City of Waukesha, 1st Circuit Case No. 2009-CX-4 (unpublished).

⁸¹ <http://www.ci.waukesha.wi.us/web/guest/comprehensiveplan> - Chapter 2 - pg. 2-18

⁸² City of Waukesha Water Supply Service Area Plan, Volume 2 of 5, Appendix A (October 2013) and <http://www.ci.waukesha.wi.us/web/guest/comprehensiveplan>

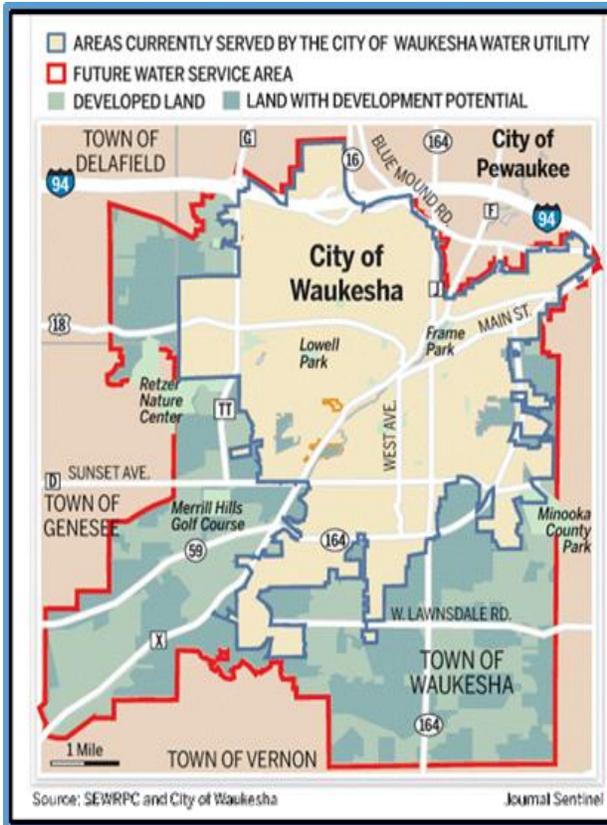


Figure 3: City Waukesha Water Supply Service Area Map

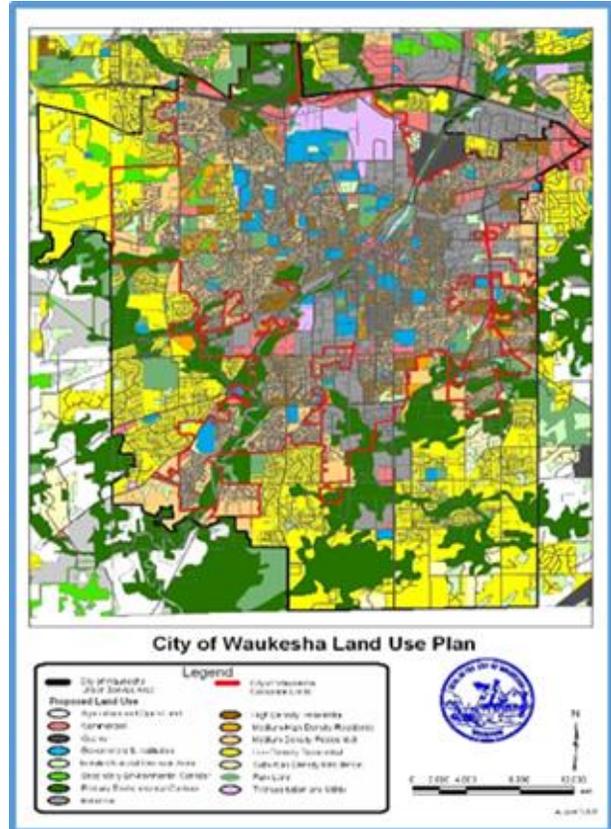


Figure 4: City of Waukesha Land Use Plan Map

Note: In Figure 4, the red boundary line is the current City of Waukesha municipal limits. And, the bright yellow areas outside the current boundary is proposed low-density residential that is currently primarily open land and agricultural.

When the City of Waukesha 2035 Proposed Land Use Plan and the existing land use inventory within the WSSA are analyzed further, a pattern evolves. While the majority of land use categories remain stable, Agricultural and Other Open Lands is projected to be reduced from 9,760 acres to 1,285 acres representing an overall reduction of 8,475 acres or 87% of Agricultural and Other Open Lands by 2035. Multi-family Residential is reduced from 921 acres to 583 resulting in a 37% reduction of Multi-family Residential space. However, Single-Family Residential land use increased from 7,978 acres to 14,589 acres or a projected 83% increase.⁸³ This troubling pattern of eliminating open space in favor of increased single family Land Use is clearly illustrated below in Figure 5 and Figure 6.

⁸³ City of Waukesha Water Supply Service Area Plan, Volume 2 of 5, Appendix A (October 2013)

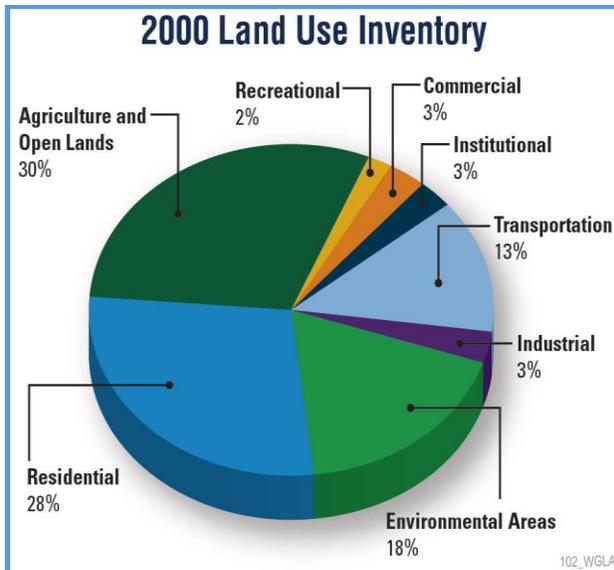


Figure 5: 2000 WSSA Land Use Inventory

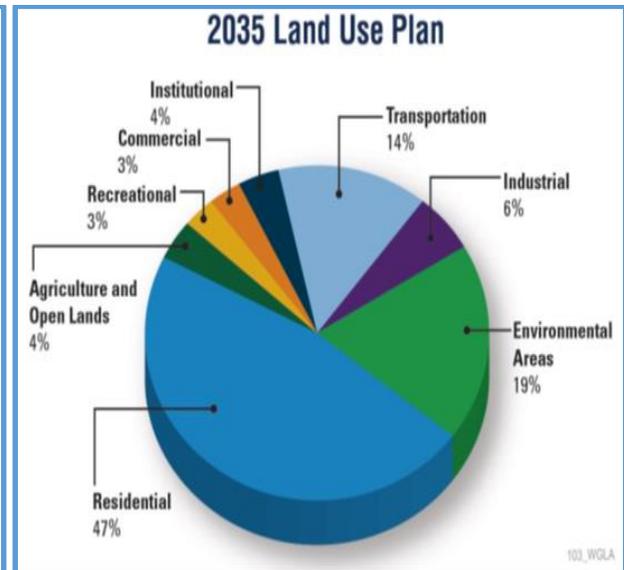


Figure 6: 2035 Projected City of Waukesha Land Use Plan

These 2035 Land Use Plan projections were used to establish the City of Waukesha’s need for increased potable water, because the designed shifts in land use and increased geographic footprint feed increased population growth. A comparison of 2000 City of Waukesha population data (inclusive of Town of Waukesha currently served by City of Waukesha water) of 65,700 persons compared to a 2030 WSSA projection of 86,636 persons in which is a 32% population increase. However, in the same time period, City of Waukesha population (inclusive of Town of Waukesha currently served by City of Waukesha water) of 65,700 persons is projected to 71,105 or an 8% increase.⁸⁴ This shocking 24% differential in population increase projections used to calculate “need” for potable water is strikingly correlated to the 2035 projected 19% increase of residential land use and is nothing shy of an expansionist planning tool used to grow a sprawling, unsustainable community not “provide an adequate potable water source” to a Community within a Straddling county.⁸⁵

The Great Lakes Compact provides that proposals subject to regulation under exceptions within §4.9 shall be declared to meet the exception standard and may be approved as appropriate only when certain criteria are met, including that: “[t]he need for all or part of the proposed Exception cannot be reasonably avoided through the *efficient use and conservation of existing water supplies*.”⁸⁶ (Emphasis added). Reasonable avoidance methods include abating desired expansion in favor of conserving existing municipal water supplies. As the U.S. House Representative from Michigan Mr. John

⁸⁴ Id.

⁸⁵ Great Lakes-St. Lawrence River Basin Water Resources Compact §1.2

⁸⁶ Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9(4)(a)

Dingell stated in his September 22, 2008, Congressional Remarks on the Great Lakes Compact, it "...will mandate a general ban on new diversions of water from the Basin with *limited expectations for communities near the basin meeting rigorous standards.*"⁸⁷ (Emphasis added).

The City of Waukesha Application utilizes projections grounded in a municipal planning desire for expansion versus the Great Lakes Compact need based exception condition. Propriety demands this Application not be approved as the condition precedent has not been met nor sought to be met though reasonable avoidance methods rigorous or otherwise. While comprehensive planning is a statutorily granted municipal right and obligation under Wisconsin statute, the Great Lakes Compact is a limiting statute that sets strict limitations on Great Lakes and St. Lawrence River basin water diversions and grants limited conditional exceptions for evaluating diversion proposals.⁸⁸ As U.S. House Representative from Illinois, Mr. Mark Kirk stated in his September 22, 2008 Congressional Remarks, the Great Lakes Compact will "...implement a host of water conservation and transparency measures that will *limit water diversions and encourage responsible, sustainable water use.*"⁸⁹ (Emphasis added). The City of Waukesha Application encourages unsustainable, irresponsible water diversion shrouded in opaque need that does not conserve, but rather expands water demand into a sprawling WSSA and it does not meet the needs-based criteria in §4.9(4)(a).

C. Conflicting and Confusing Application Data Tells a Story of Subjective Data Use

Data tells a story and paints a portrait. However, as with all storytelling, perspective matters and should not be viewed in a vacuum. Seeking Application approval, the data is utilized to place the proposal in the best possible light. However, that does not mean that there is not existing conflicting data or that the Application data is presented in a clear, inclusive manner so as to provide the Application reviewer with a comprehensive view free of confusing data sets with circular reinforcement. In 2010, then City of Waukesha Mayor Jeff Scrima "...declined to sign a letter - drafted by Water Utility General Manager Dan Duchniak at the direction of the city's Water Commission - stating a lake water supply was the only reasonable option available to the city...insist[ing] in his letter to the DNR that *our city's water utility needs to objectively and openly consider all reasonable options.*"⁹⁰ (Emphasis added). Implicit in that statement is the presumption that the City of Waukesha's perspective was not objective and that all reasonable options had not

⁸⁷ 154 Cong. Rec. E1867 2008

⁸⁸ Wisconsin Statute §66.1001 - State of Wisconsin Comprehensive Planning Law and Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9

⁸⁹ 154 Cong. Rec. E1867 2008

⁹⁰ <http://www.jsonline.com/news/waukesha/97702724.html>

been considered with an objective interpretation of the data. Consequently, the converse position is that the data was used to tell a subjective version of the options. When reviewing the Application, it must be scrutinized from an objective vantage point, discrepancies questioned and the Application denied if the compounded discrepancies work to invalidate the Application meeting the conditions or criterion under Great Lakes Compact §4.9. Discussion of a series of questionable discrepancies identified within the Application follows.

1. Deep Aquifer Level Discrepancy

The Application contains a generalized statement limiting reasonable water supply alternatives by asserting that “...the deep aquifer levels are declining again and severe drawdown is projected in future decades.”⁹¹ However, independent testing by the USGS of deep aquifer from specific locations within the City of Waukesha provided contradicting data. The USGS website indicates that testing began in 1932 and at that time the level was its highest at 122ft and the lowest level of 493ft was reached in 1997.⁹² Over the course of 65 years, the deep water aquifer had lowered by 371ft. But, data gathered in July 2013, prior to the Application, had the deep water level at 382ft, an increase from low point deep aquifer levels of 111ft in only 16 years.⁹³ See Figure 7.

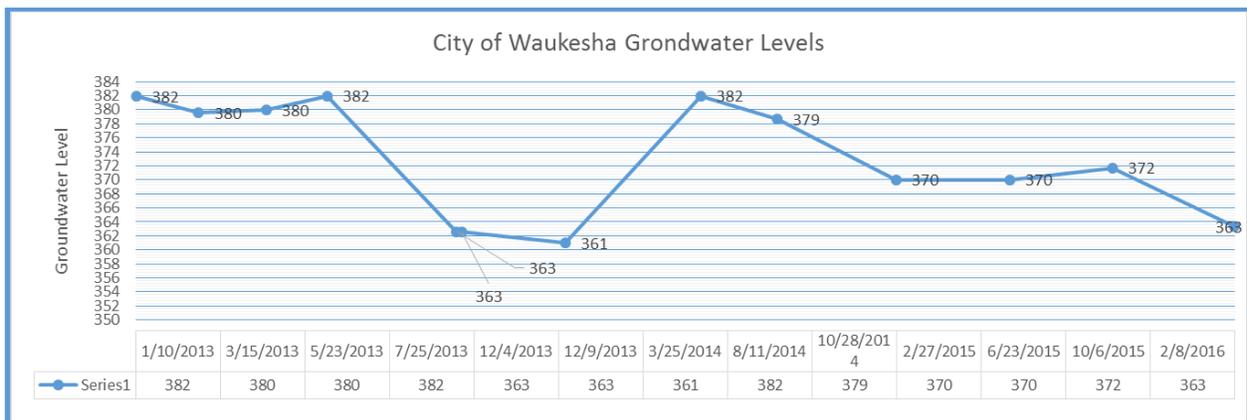


Figure 7: Graph of USGS Tested City of Waukesha Groundwater Levels since 2013. The data tables can be found at http://nwis.waterdata.usgs.gov/nwis/qwlevels?site_no=430052088133501&agency_cd=USGS&format=html

It is not surprising that the lowest levels reached in 1997 have rebounded given that in 1997 the Bethesda Minerals Springs stopped pumping and bottling water. It should be noted that there was no well testing data available for the period between December 1, 1999 and January 1, 2013. One can speculate as to why, however, the real answer is in the data that does exist, which evidences sustained increased water levels in the deep

⁹¹ Application Summary, City of Waukesha Application for a Lake Michigan Diversion with Return Flow, (October 2013).

⁹² <http://groundwaterwatch.usgs.gov/AWLSites.asp?mt=g&S=430052088133501&ncd=awl>

⁹³ Id.

aquifer. There was no acknowledgement of the increased deep aquifer levels within the City of Waukesha Application. In fact within the Application Water Supply Alternatives a summary related to the use of the deep aquifer states that it is “significantly depressed (400-600 feet below ground).” This one example of subjective use of data is illustrative of the tainted data interpretation utilized to develop an approvable application for and by the City of Waukesha.

2. Manufacturing Use Projections Discrepancy

There is more conflicting data used to subjectively support the Application. *A Land Use Plan for the City of Waukesha Planning Area: 2010* states that, “...the number of manufacturing jobs in Wisconsin has declined [and though] Wisconsin continues to maintain more skilled manufacturing positions than other states...[t]his is not the case for local manufacturers that produce commodity goods [and] [t]hese manufacturers will continue to experience intense pressure to lower costs resulting in outsourcing to foreign countries.”⁹⁴ However, in the Application it was proposed and argued that industrial use in the WSSA will increase by 2035 and the City of Waukesha has proposed doubling land use dedicated for industrial use going from 3% to 6% of all land.⁹⁵

Further, during technical review of the Application, DNR sent a letter to Daniel Duchiniak, GM, Waukesha Water Utility addressing the Great Lakes Diversion Application – Demand Estimates, in which they stated, “[t]he department’s preliminary analysis indicates that the application lacks sufficient explanation for the projected increase in the rate of water use, both in the short term and at full system build-out.”⁹⁶ DNR went on to say that expectations are that “...regional water demand will continue its long-standing decline” and requested a “...evidence-based justification for the proposed increase”.⁹⁷ DNR noted that the Application’s primary reason for increased demand was attributed to projections of increased industrial demand at rates more than double the 2008-2012 averages and at build out the Application’s industrial demand projections doubled from the original 2010 application.⁹⁸ DNR remarked that the Application stated “...weak economic conditions, evidenced after the terrorist attacks on September 11, 2001, and the start of the recession in 2008/2009 resulted in loss of local industry and reduced industrial water use.”⁹⁹ DNR responded in the letter to the Application assertion by stating that “[a]nalysis by department staff *revealed evidence that does not support*

⁹⁴ <http://www.ci.waukesha.wi.us/web/guest/comprehensiveplan>

⁹⁵ City of Waukesha Water Supply Service Area Plan, Volume 2 of 5, Appendix A (October 2013)

⁹⁶ Wisconsin DNR letter dated December 3, 2013 to Daniel Duchiniak, GM, Waukesha Water Utility

⁹⁷ Id.

⁹⁸ Id.

⁹⁹ Id.

this assertion.”¹⁰⁰ (Emphasis added). DNR provided the following three data points to support their position:

1. “Prior to 2002, industrial sales decreased 25% from 1997-2001. By comparison, industrial sales decreased only by 12% from 2008-2012.
2. Total volume of industrial sales for Waukesha increased in 2002 immediately following September 11, 2001.
3. A total of 20 industrial connections were added to public water supply between 1997 (131) and 2012 (151). Only 5 industries were reported closed to the Wisconsin Department of Workforce Development within this same time period.”¹⁰¹

The City of Waukesha submitted a Technical Memorandum (TM) on February 19, 2014 in response to the DNR letter dated December 3, 2013.¹⁰² In this report, the City’s consultant stated that “...an envelope of projected water demands was developed to cover the range of probable water demands over a long range planning period...[and that] *the average demand...at buildout (estimated 2050)* – as presented in Water Demand Projections TM dated July 12, 2013 – *is considered appropriate for planning purposes.*”¹⁰³ (Emphasis added). The time limit Wisconsin set in §381.348(3)(a)(1) requires “[t]he period covered by a *plan under this subsection may not exceed 20 years*, however, the City of Waukesha used 2050 for its demand analysis at buildout.”¹⁰⁴ (Emphasis added). The response further used “confidential” business plans to reinforce a need for increased industrial use stating that “several industrial customers are considering increasing production...[and one] industry is investigating developing within the City of Waukesha.”¹⁰⁵ That statement begs the question of how many “confidential” businesses have discussed possible closures or relocations out of the City of Waukesha. For as the City of Waukesha TM points out, “...a change in the water use of a small number of existing industrial customers...can have a large impact on the industrial water usage.”¹⁰⁶ And, while this TM stresses that it is “...reasonable to forecast that 8 to 10 moderately sized new industrial customers could develop...within the WSSA”, they neglected to address the counter position expressed in *A Land Use Plan for the City of Waukesha Planning*

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² Technical Memorandum: Water Demand Projections – Response to DNR, prepared by Richard Hope, P.E., AECOM

¹⁰³ Id.

¹⁰⁴ Wisconsin Statute §381.348(3)(a)(1)

¹⁰⁵ Technical Memorandum: Water Demand Projections – Response to DNR, prepared by Richard Hope, P.E., AECOM

¹⁰⁶ Id.

Area: 2010, that was developed for an by the City of Waukesha, which stated that there “...local manufacturers that produce commodity goods...will continue to experience intense pressure to lower costs resulting in outsourcing to foreign countries.”¹⁰⁷ The TM states that the projections they used are reasonable for planning purposes and in the broad sense that statement may be true. However, the Great Lakes Compact refers to “...need for all or part of the proposed Exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies” not reasonable planning for a proposed need.¹⁰⁸

3. Conflicting Water Demand Numbers Drive Alleged Need

According to the City of Waukesha Application they had the choice between four “potential future scenarios to create and envelop, or range, of possible future demand conditions.”¹⁰⁹ Waukesha selected a planning scenario that includes continuation of the water conservation program and long term rebound of industrial enterprise and water demand to year 2000 levels, in effect the scenario with the high possible water demand rates.¹¹⁰ The projections under the Application increase maximum gallons daily for the WSSA to 16.7 maximum daily gallons (MDG), however that number is for future full development condition: 2050.¹¹¹ But, the WSSA was created under legislation that requires a not more than a 20 year projection.¹¹² The 20-year projections are within the Application, however not stated in the water quantity statement used to open discussion regarding water demand in §7.¹¹³ Conflicting water demand numbers drive need with the Application. Data skewed high to establish the overwhelming plight of the applicant, but there are other numbers in the Application that are not so readily made obvious.

The Application provides 2030 average water use for the City of Waukesha as 8.1MGD and the WSSA as 9.7MGD. Extrapolating that raw data the City of Waukesha is projected to be 83.5% of the total average water demand. Using that same percentage to multiply the Application’s 2030 projection of 16.1 MDG, the City of Waukesha would use approximately 13.4 MGD. The Application states that the City of Waukesha currently has a maximum pumping capacity of 12.9MGD.¹¹⁴ When looking at need from the perspective of the City of Waukesha versus the WSSA it becomes apparent that the need is not as insurmountable as projected by the “future full development condition” would have readers believe. Though by propelling the water demand numbers to stratospheric

¹⁰⁷ <http://www.ci.waukesha.wi.us/web/guest/comprehensiveplan>

¹⁰⁸ Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9(4)(a)

¹⁰⁹ City of Waukesha Water Supply Service Area Plan, Volume 2 of 5, Appendix A (October 2013).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Wisconsin Statute §381.348(3)(a)(1)

¹¹³ City of Waukesha Water Supply Service Area Plan, Volume 2 of 5, Appendix A (October 2013).

¹¹⁴ *Id.*

levels by utilizing high industrial demand and the increased geographic WSSA, the Application creates a noncompliance issue for Wisconsin Statute §281.346(1)(ps) that defines a reasonable water supply alternative as "...a water supply alternative that is similar in cost to, and as environmentally sustainable and protective of public health as, the proposed new or increased diversion and that does not have greater adverse environmental impacts than the proposed new or increased diversion."¹¹⁵As such the Application determined that "[n]one of the other water supply alternatives are reasonable."¹¹⁶

Predestination of analytical outcome is not an objective perspective to review alternatives within the City of Waukesha Application. And, objectivity would tend to be a hallmark when utilizing a reasonableness standard for exception review of the Application.¹¹⁷ When data is subjectively utilized to reach a predetermined outcome the veil of reasonableness is breached and the analysis is mired in unreasonableness. Based on the lack of reasonableness underlying data utilized to buttress Application propositions, the Application should be denied because there is not an expectation that "[t]he Exception will be limited to quantities that are considered reasonable for the purposes for which it is proposed."¹¹⁸

Point 3: Cumulative Effects of Small Deviations Create Big Impacts

Where do "community" boundaries stop if "community" is permitted to be based on planning areas?

The City of Waukesha Application if approved would set a precedent for future Community within a Straddling County applications whereby a "community" could be defined by a statutorily permitted planning area without limitation to the boundaries of the "city, town, or equitant thereof" as defined within the Great Lakes Compact, because all parties would have agreed to the expand definition by granting approval of the Application.¹¹⁹ It is within this context that the potential cumulative impact of such an approval precedent must be considered when evaluating the Application. Under the Great Lakes Compact

"[c]umulative impacts mean the impact on the Basin Ecosystem that results from incremental effects of all aspects of a Withdrawal, Diversion or Consumptive Use in addition to other past, present,

¹¹⁵ Wisconsin Statute §281.346(1)(ps)

¹¹⁶ City of Waukesha Water Supply Service Area Plan, Volume 2 of 5, Appendix A (October 2013).

¹¹⁷ Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9

¹¹⁸ Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9(4)(b)

¹¹⁹ Great Lakes-St. Lawrence River Basin Water Resources Compact §1.2 and §9.3

and reasonably foreseeable future Withdrawals, Diversions and Consumptive Uses regardless of who undertakes the other Withdrawals, Diversions and Consumptive Uses. Cumulative Impacts can result from individually minor but collectively significant Withdrawals, Diversions and Consumptive Uses taking place over a period of time.”¹²⁰

Cumulative effects are multiplicative in nature and it is when viewing them as a whole that the potential precedent setting impacts become reasonably foreseeable. If the WSSA is permitted usurp the Great Lakes Compact “community” definition, how will future Application “community” boundaries be determined? Can two cities join together, a village and city? Is a community an entire Straddling County?

To understand the potential cumulative impacts of permitting the precedent setting expanded definition of “city, town, or equivalent thereof” is to understand the number of Straddling Counties within the Great Lakes-St. Lawrence River Basin Water. There are 68 Straddling Counties covered under the Great Lakes Compact. See Attachment A: U.S. EPA Great Lakes Drainage Basin Counties.¹²¹ Assuming that the City of Waukesha Application water demand projections are an average of all remaining exception requests under the exception for Straddling Counties then we would have an average of 676.7MGD and a maximum of 1.787BGD.¹²² In comparison, one of the largest public water systems in the country: The Detroit Water and Sewerage Department, pumps an average 610 million gallons per day.¹²³

Under the Great Lakes Compact, cumulative impacts are incremental effects that are reasonably foreseeable. The impacts don’t need to be likely or probable, but only reasonable. And, given the expansive precedent that would be set by permitting a planning area to meet the definition of “city, town, or equivalent thereof” the foreseeable outcomes it that other areas in straddling counties would utilize this exception to mesh otherwise divergent municipal groups to slip a giant straw into the Great Lakes Compact and pillage “...precious public natural resources shared and held in trust by the States.”¹²⁴ Thus, because of the precedent beings set in the Application and the potential for substantial negative cumulative impacts, the Application should be denied.

¹²⁰ Id.

¹²¹ <http://www.epa.gov/nscep>

¹²² Average daily number is calculated using 10.1MGD x 67 (68-Waukesha County) and maximum daily number is calculated using 16.1MGD x 67 (68-Waukesha County)

¹²³ http://www.dwsd.org/downloads_n/about_dwsd/fact_sheet/dwsd_fact_sheet.pdf

¹²⁴ Great Lakes-St. Lawrence River Basin Water Resources Compact §4.9(3) and §1.3

Conclusion:

The City of Waukesha, after more than a century of exploiting their own natural water resources, seeks to utilize Great Lakes water resources to fulfill its planned vision of a growing pastoral exurb with thriving, historic central city core. For the reasons stated both individually and collectively in this comment letter, the City of Waukesha's Application for a Lake Michigan Diversion with Return Flow under the Great Lakes-St. Lawrence River Basin Water Resources Compact should be denied.

Thank you for the opportunity to comment.

Sincerely,

Charlotte C. Johnson
Student Attorney
Transnational Environmental Law Clinic and Great Lakes Environmental Law Center
chjohns7@wayne.edu

Nicholas J. Schroeck
Director, Transnational Environmental Law Clinic
Executive Director, Great Lakes Environmental Law Center
nschroeck@wayne.edu
(313) 577-3943

Attachment A:

U.S. EPA

Great Lakes

Drainage Basin Counties

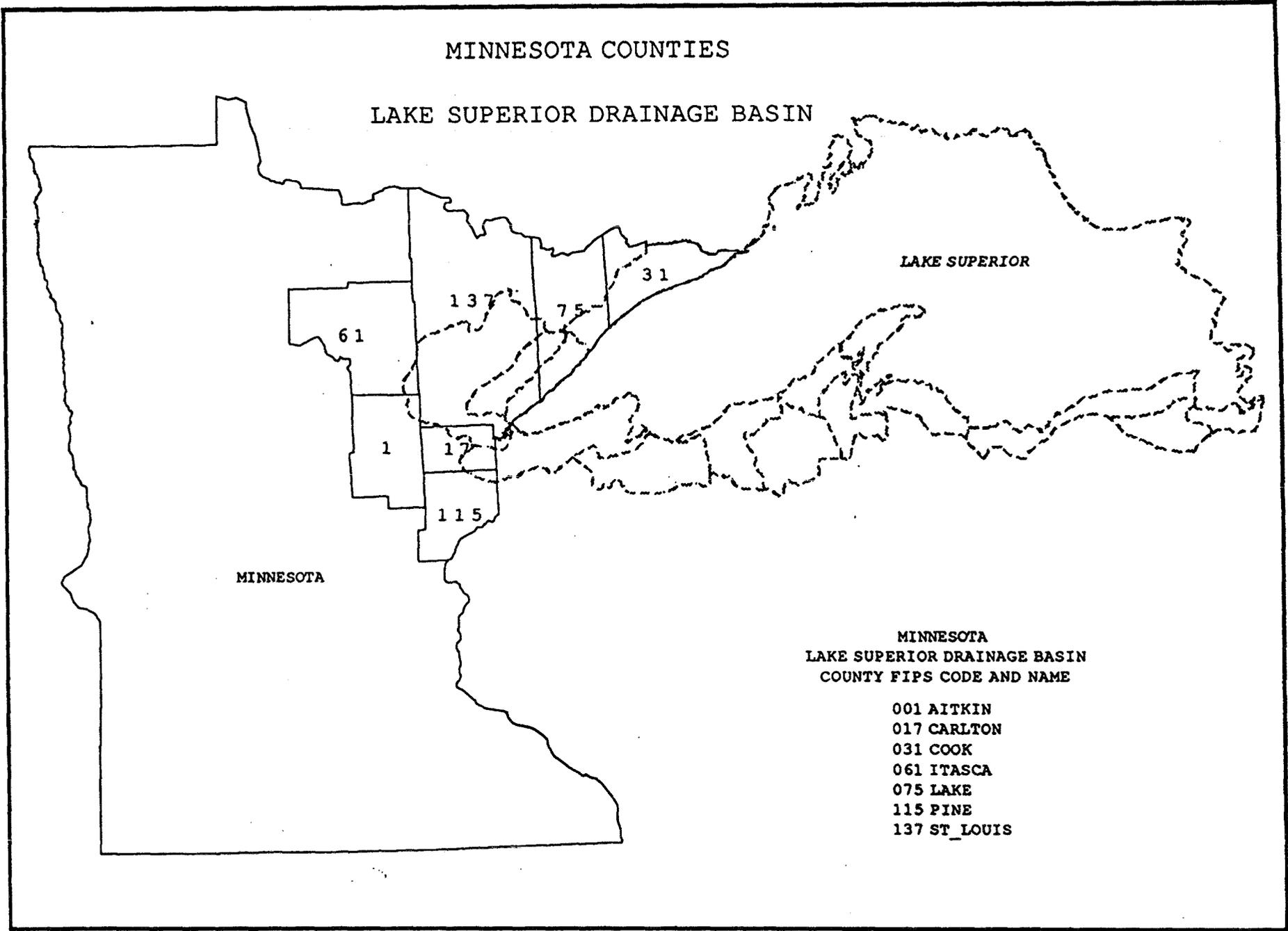
U.S. GREAT LAKES

DRAINAGE BASIN COUNTIES

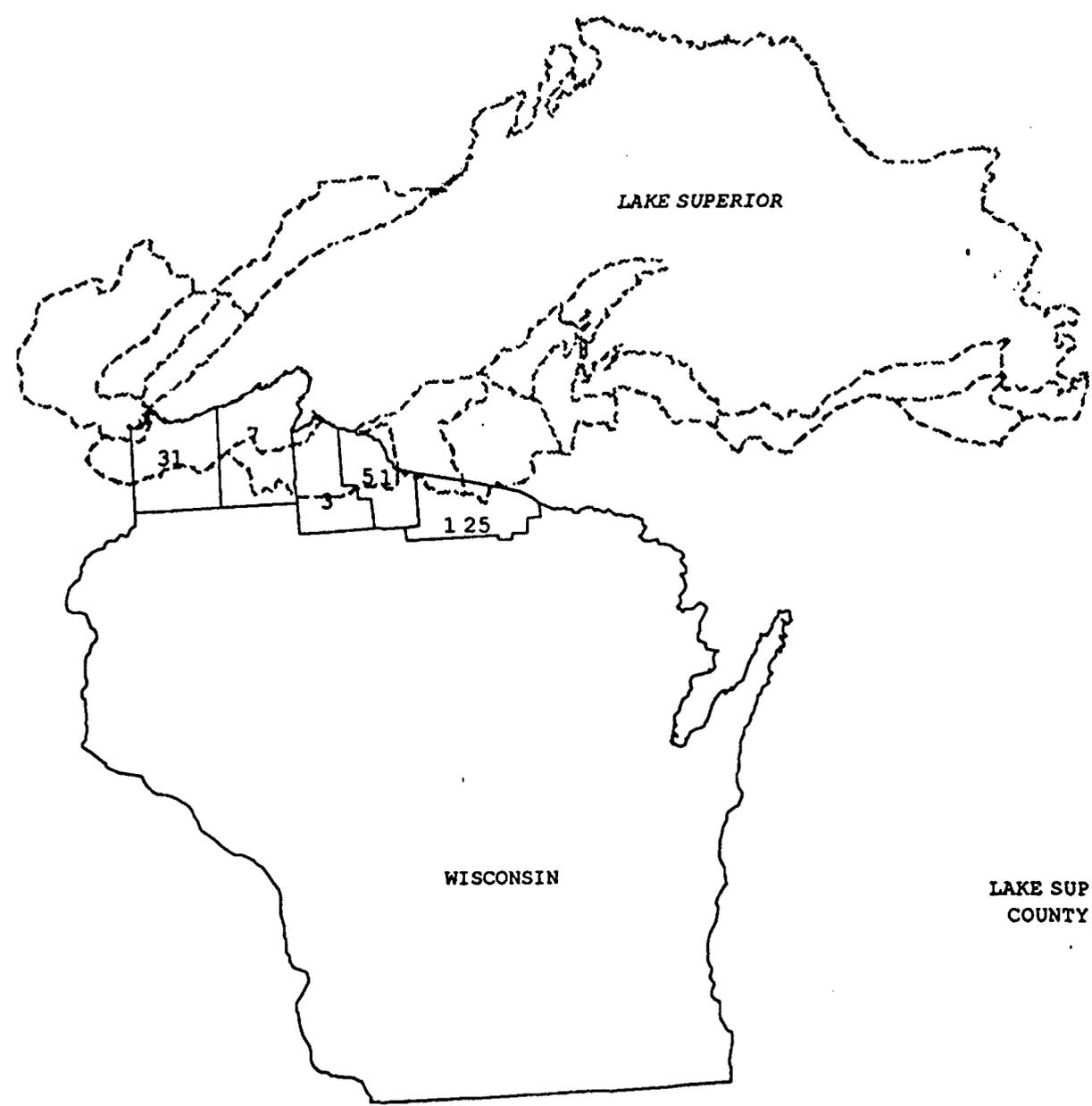
U.S. ENVIRONMENTAL PROTECTION AGENCY
GREAT LAKES NATIONAL PROGRAM OFFICE
CHICAGO, ILLINOIS JULY, 1990

MINNESOTA COUNTIES

LAKE SUPERIOR DRAINAGE BASIN

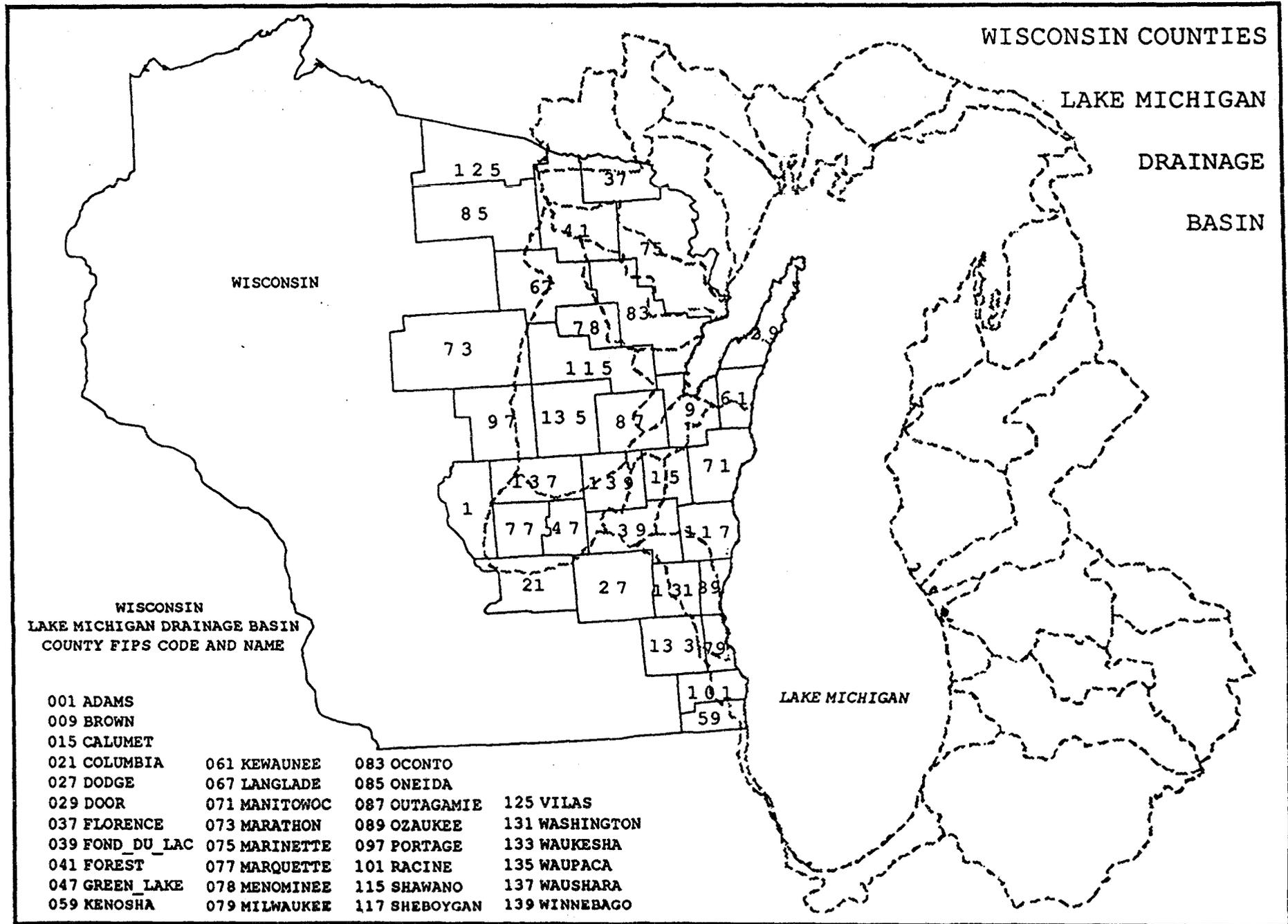


WISCONSIN COUNTIES
LAKE SUPERIOR DRAINAGE



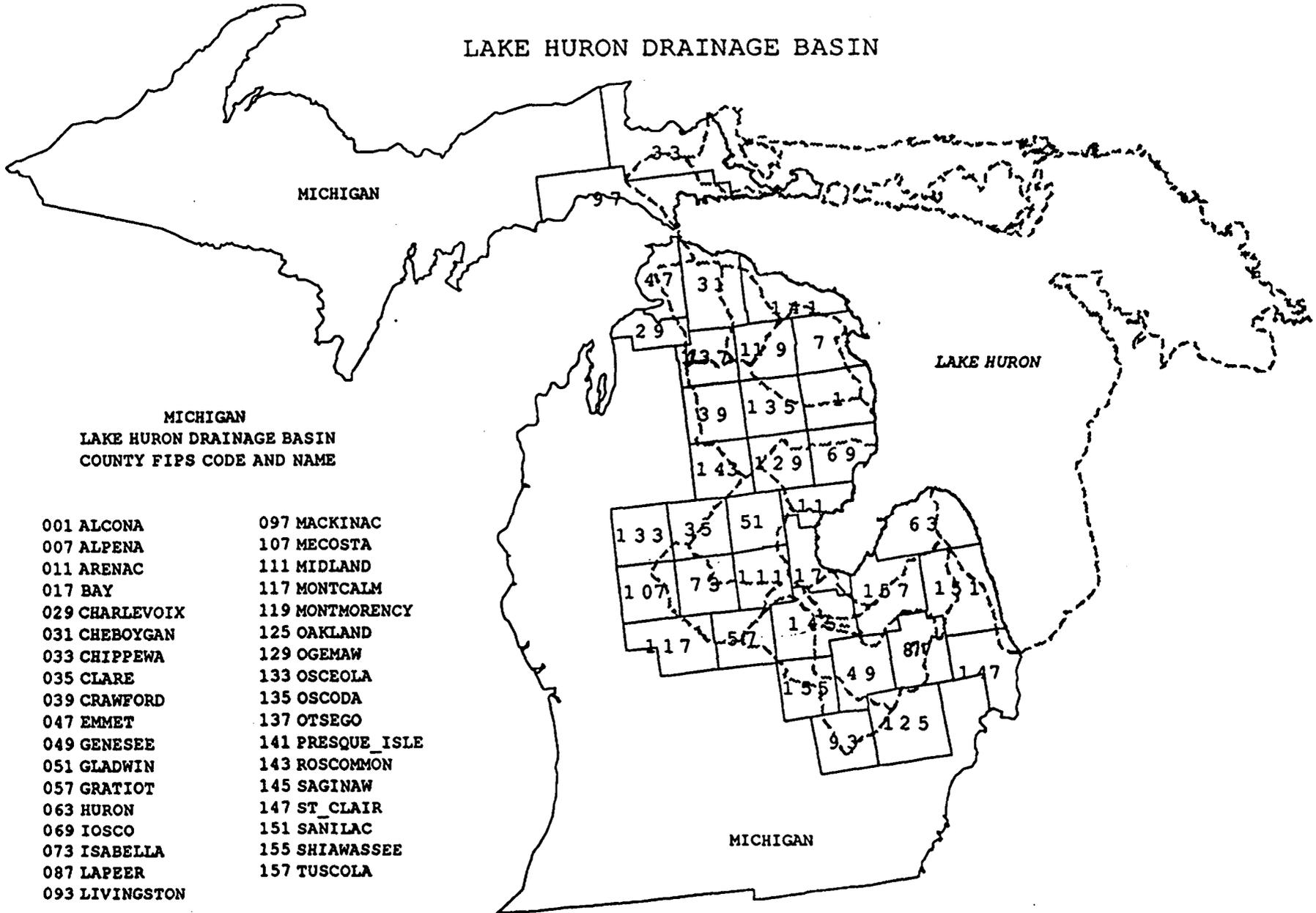
WISCONSIN
LAKE SUPERIOR DRAINAGE BASIN
COUNTY FIPS CODE AND NAME

- 003 ASHLAND
- 007 BAYFIELD
- 031 DOUGLAS
- 051 IRON
- 125 VILAS



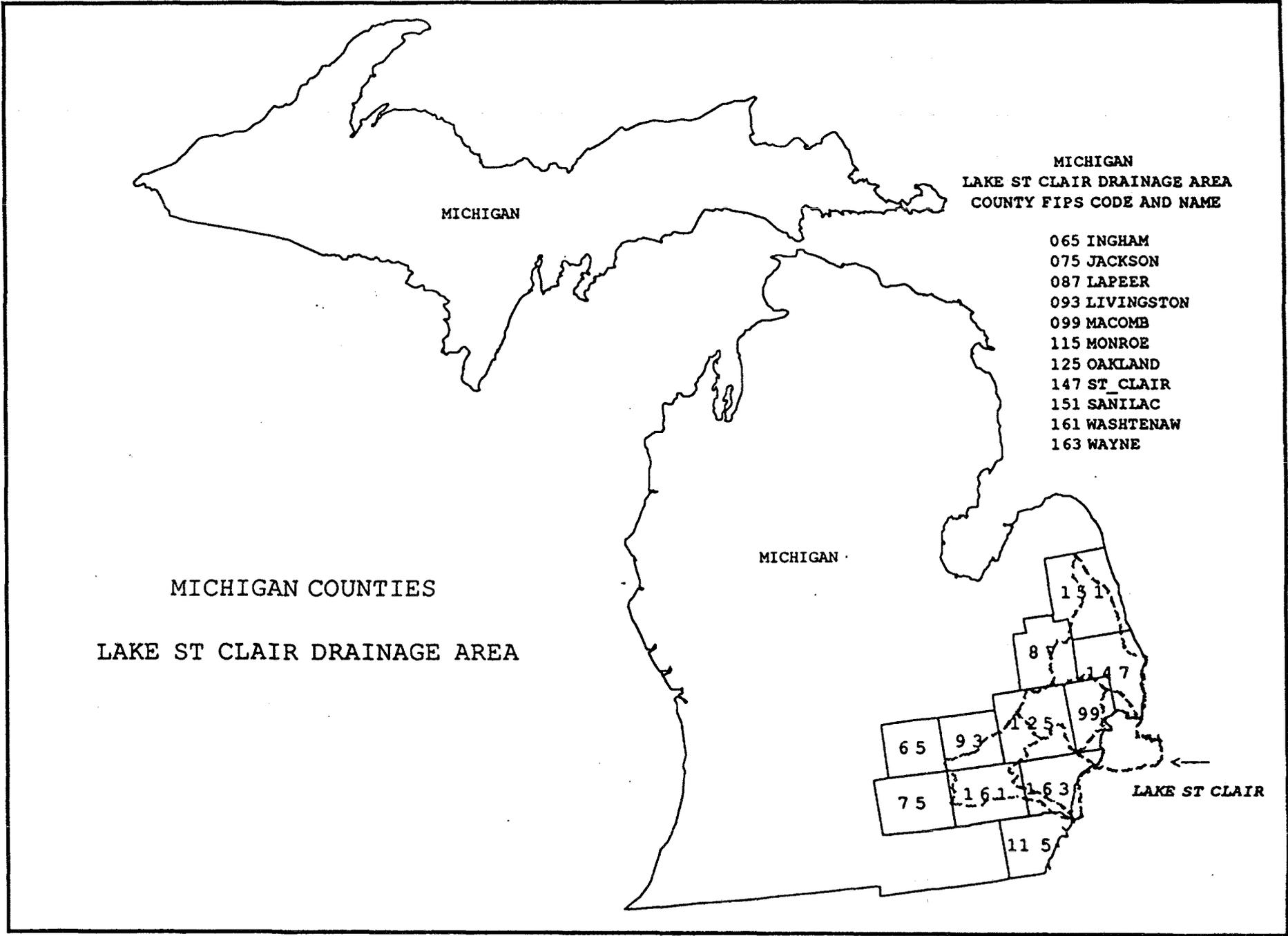
MICHIGAN COUNTIES

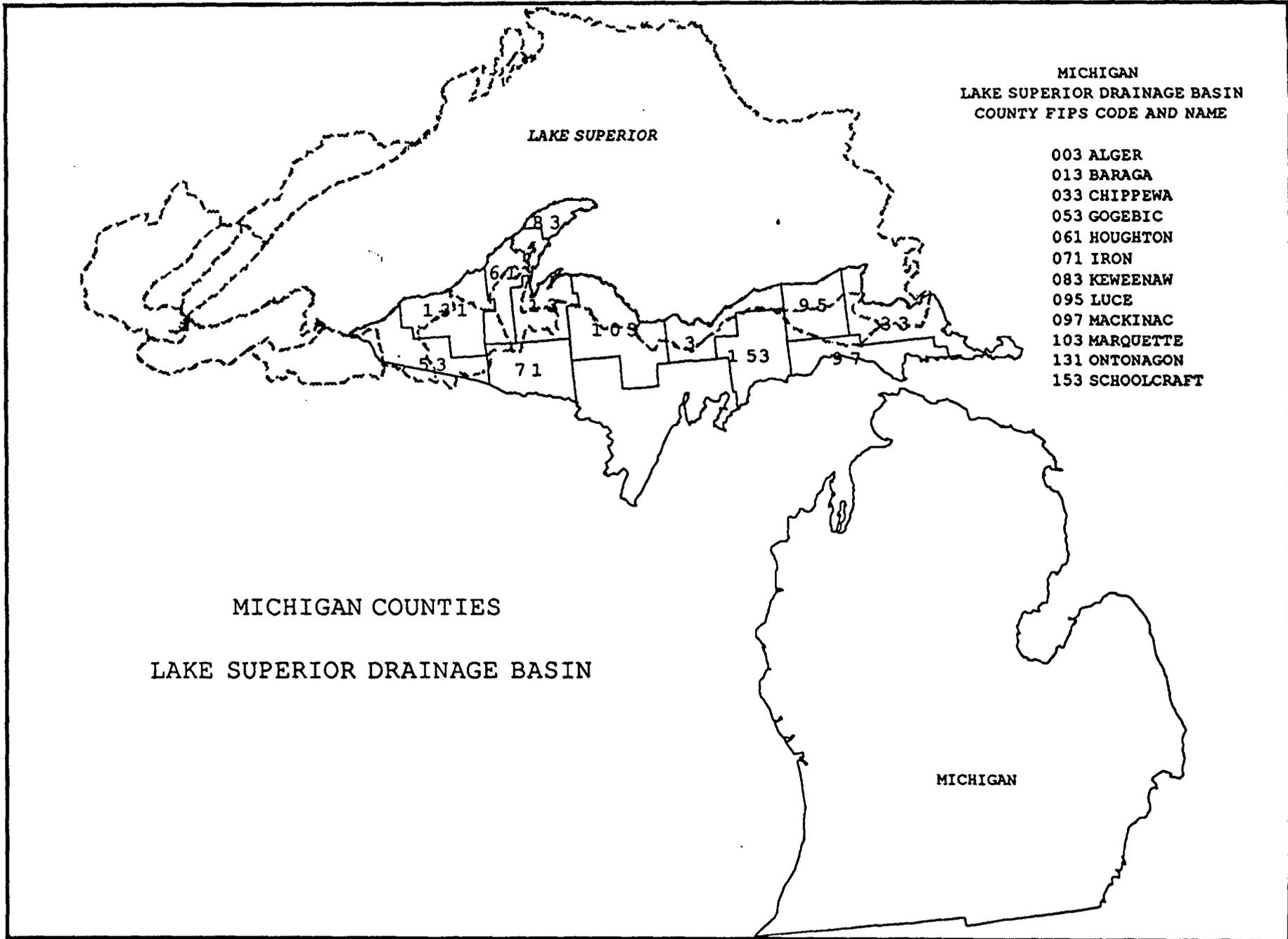
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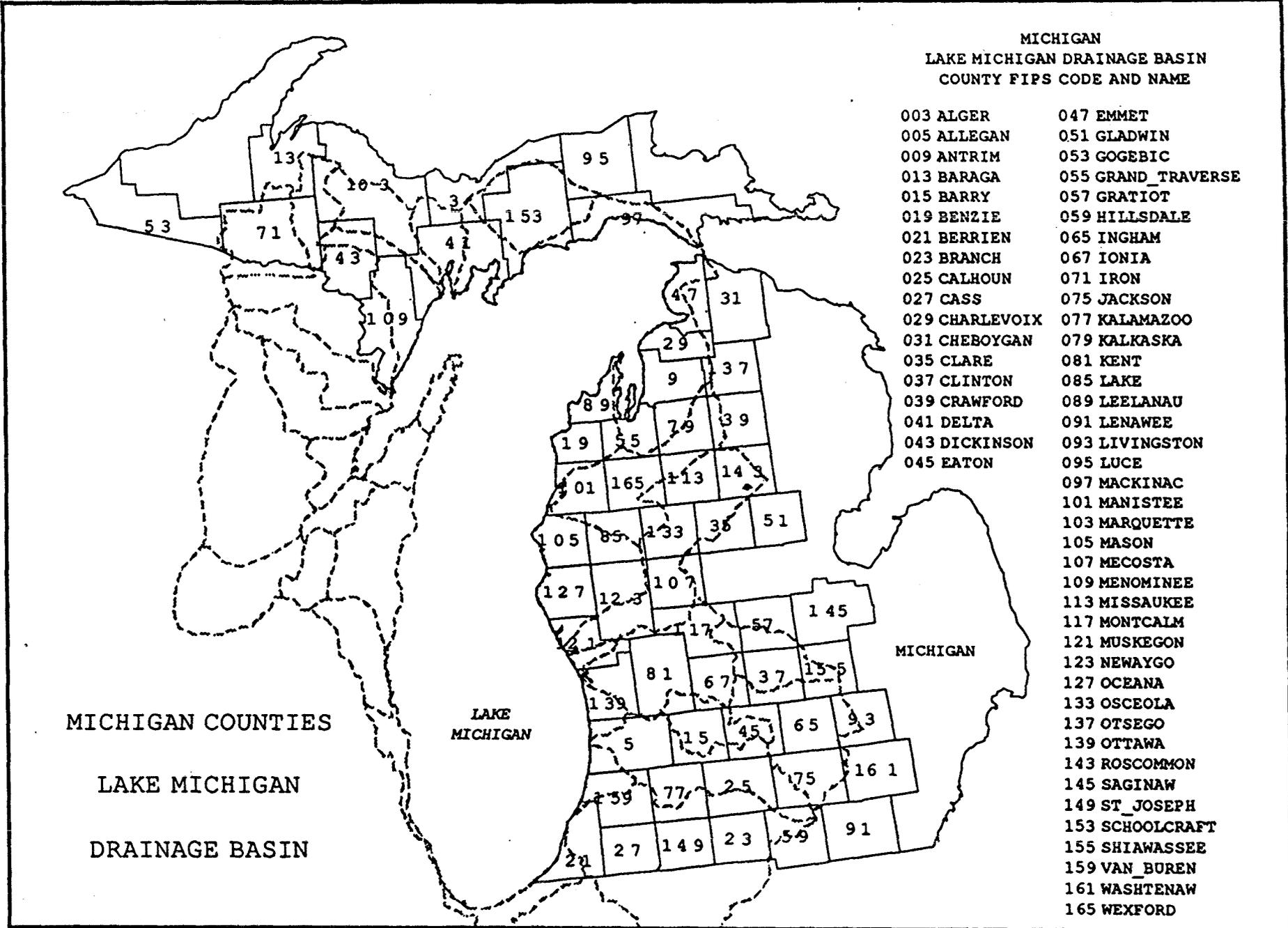


MICHIGAN
LAKE HURON DRAINAGE BASIN
COUNTY FIPS CODE AND NAME

- | | |
|----------------|------------------|
| 001 ALCONA | 097 MACKINAC |
| 007 ALPENA | 107 MECOSTA |
| 011 ARENAC | 111 MIDLAND |
| 017 BAY | 117 MONTCALM |
| 029 CHARLEVOIX | 119 MONTMORENCY |
| 031 CHEBOYGAN | 125 OAKLAND |
| 033 CHIPPEWA | 129 OGEMAW |
| 035 CLARE | 133 OSCEOLA |
| 039 CRAWFORD | 135 OSCODA |
| 047 EMMET | 137 OTSEGO |
| 049 GENESEE | 141 PRESQUE_ISLE |
| 051 GLADWIN | 143 ROSCOMMON |
| 057 GRATIOT | 145 SAGINAW |
| 063 HURON | 147 ST_CLAIR |
| 069 IOSCO | 151 SANILAC |
| 073 ISABELLA | 155 SHIAWASSEE |
| 087 LAPEER | 157 TUSCOLA |
| 093 LIVINGSTON | |









MICHIGAN

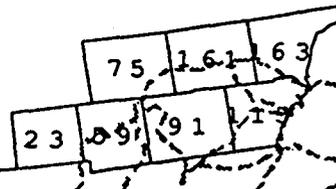
MICHIGAN

MICHIGAN
LAKE ERIE DRAINAGE BASIN
COUNTY FIPS CODE AND NAME

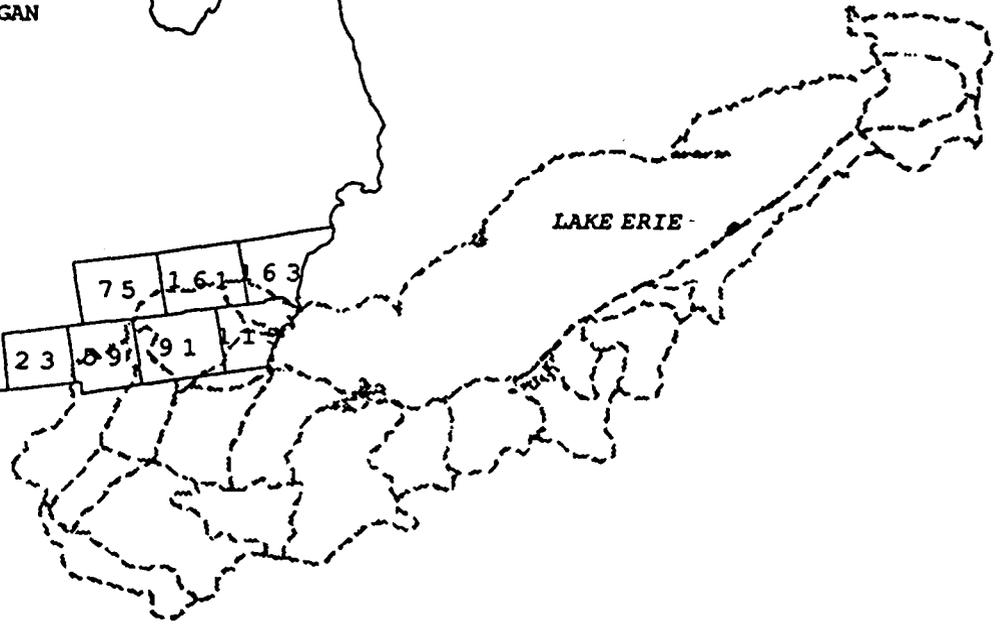
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- 059 HILLSDALE
- 075 JACKSON
- 091 LENAWEE
- 115 MONROE
- 161 WASHTENAW
- 163 WAYNE

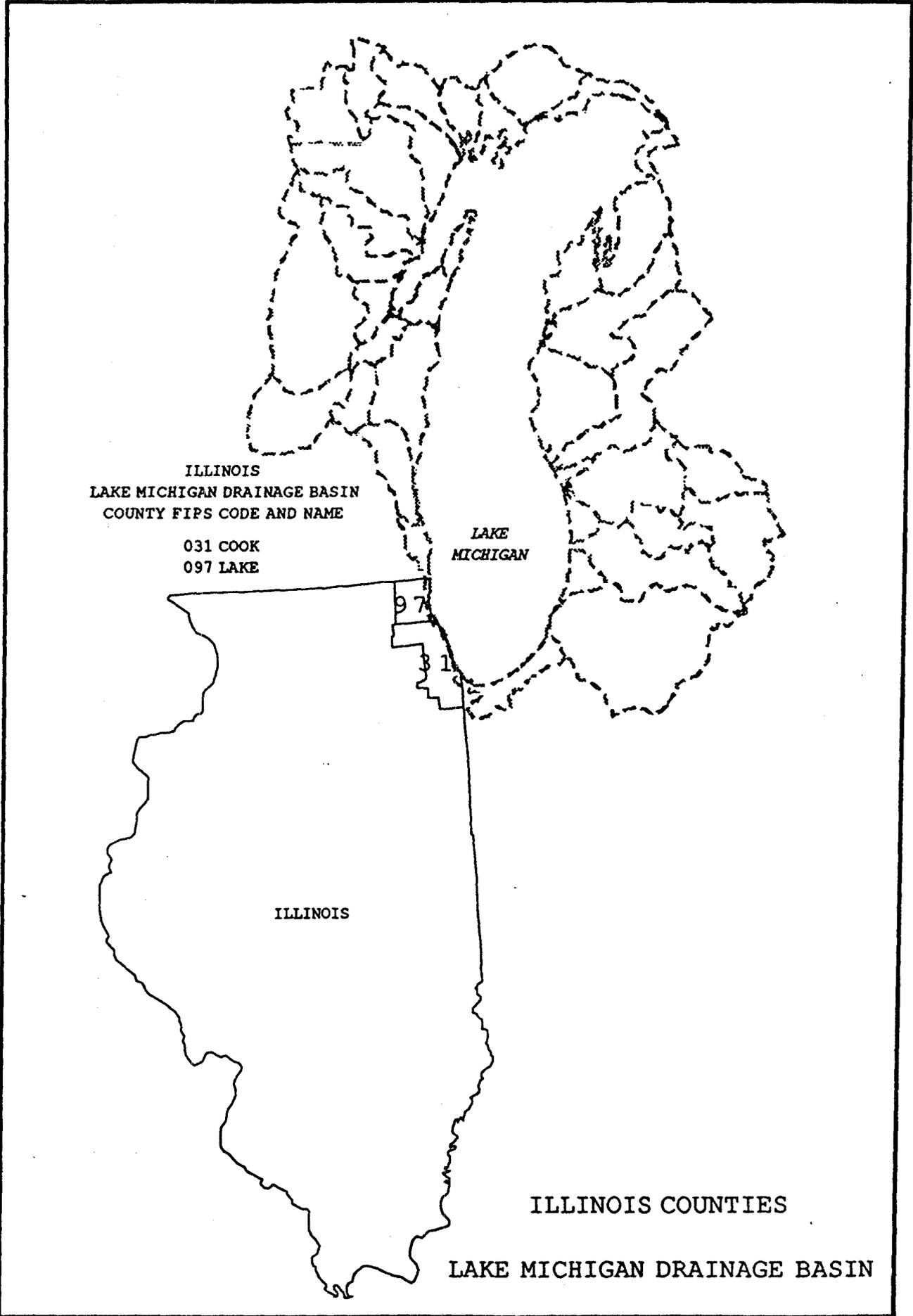
MICHIGAN COUNTIES

LAKE ERIE DRAINAGE BASIN



LAKE ERIE





ILLINOIS
LAKE MICHIGAN DRAINAGE BASIN
COUNTY FIPS CODE AND NAME

031 COOK
097 LAKE

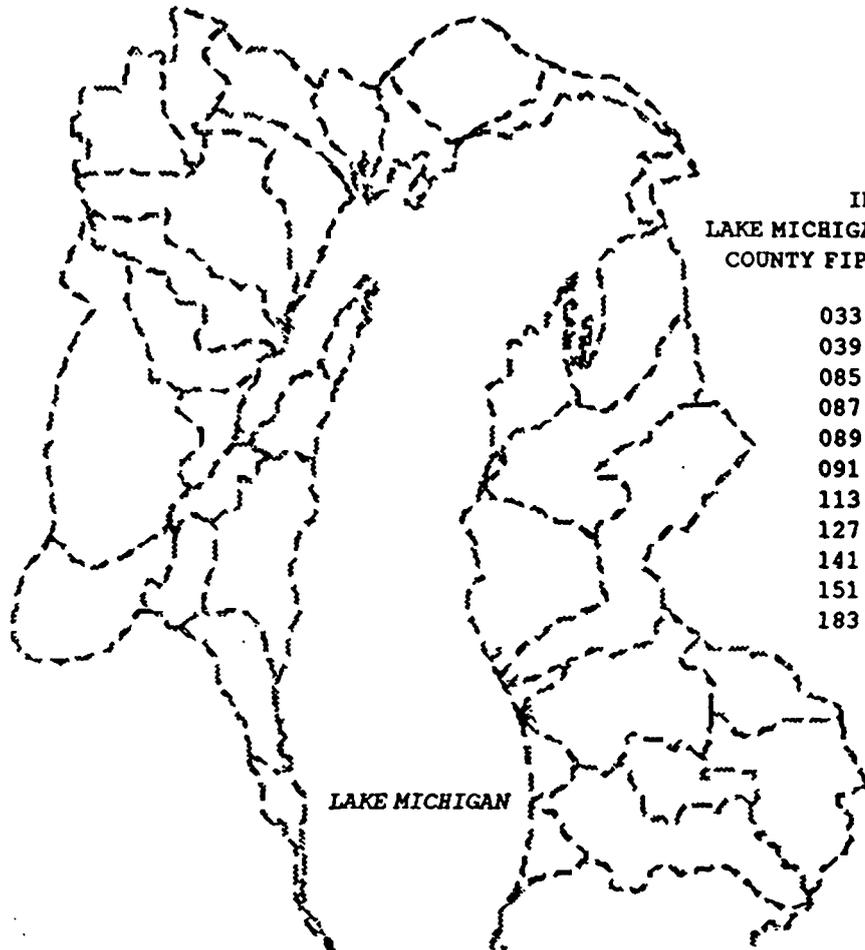
LAKE
MICHIGAN

97
31

ILLINOIS

ILLINOIS COUNTIES

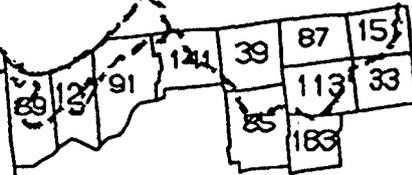
LAKE MICHIGAN DRAINAGE BASIN



INDIANA
LAKE MICHIGAN DRAINAGE BASIN
COUNTY FIPS CODE AND NAME

- 033 DE_KALB
- 039 ELKHART
- 085 KOSCIUSKO
- 087 LAGRANGE
- 089 LAKE
- 091 LA_PORTE
- 113 NOBLE
- 127 PORTER
- 141 ST_JOSEPH
- 151 STEUBEN
- 183 WHITLEY

LAKE MICHIGAN



INDIANA COUNTIES

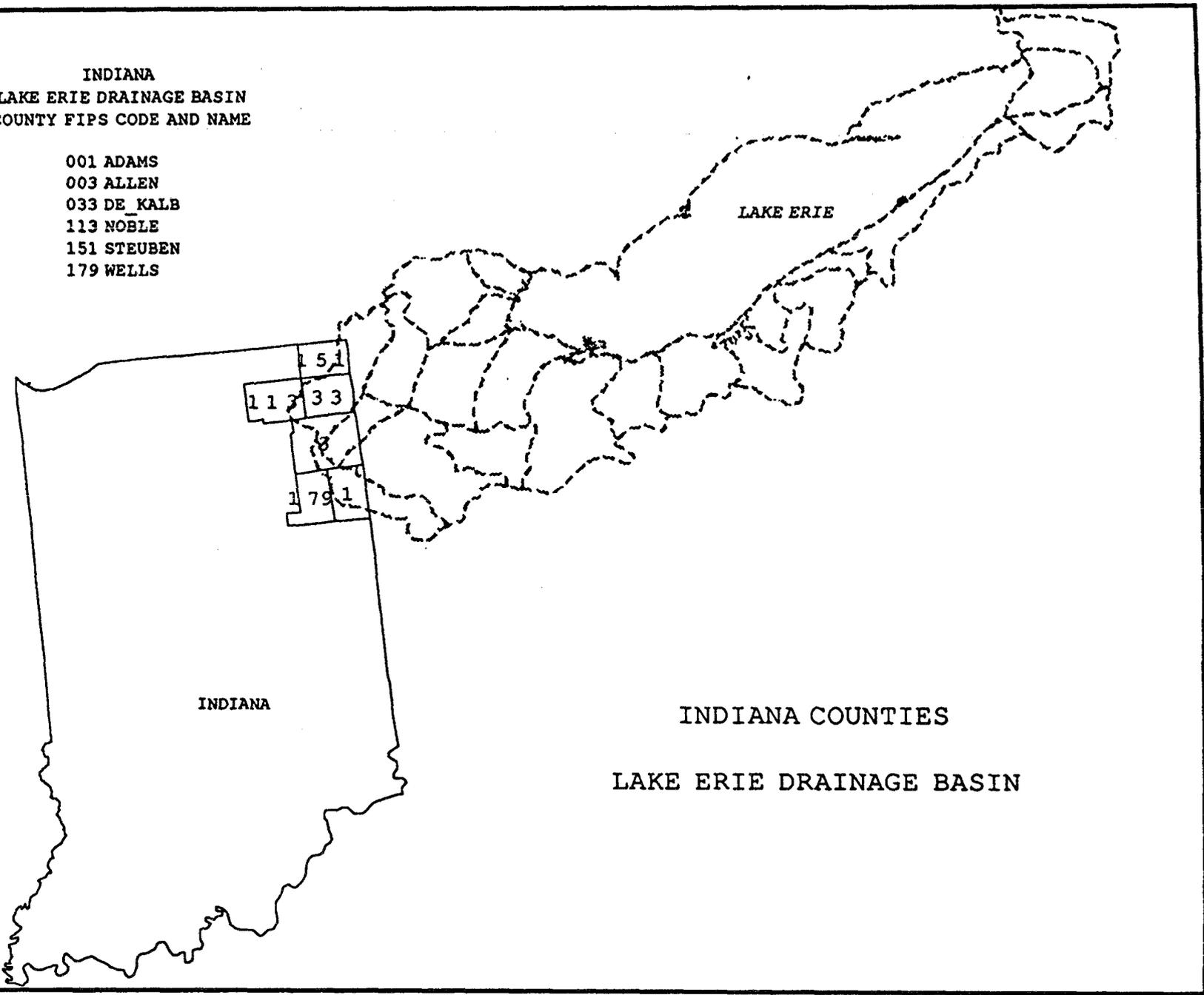
LAKE MICHIGAN

DRAINAGE BASIN

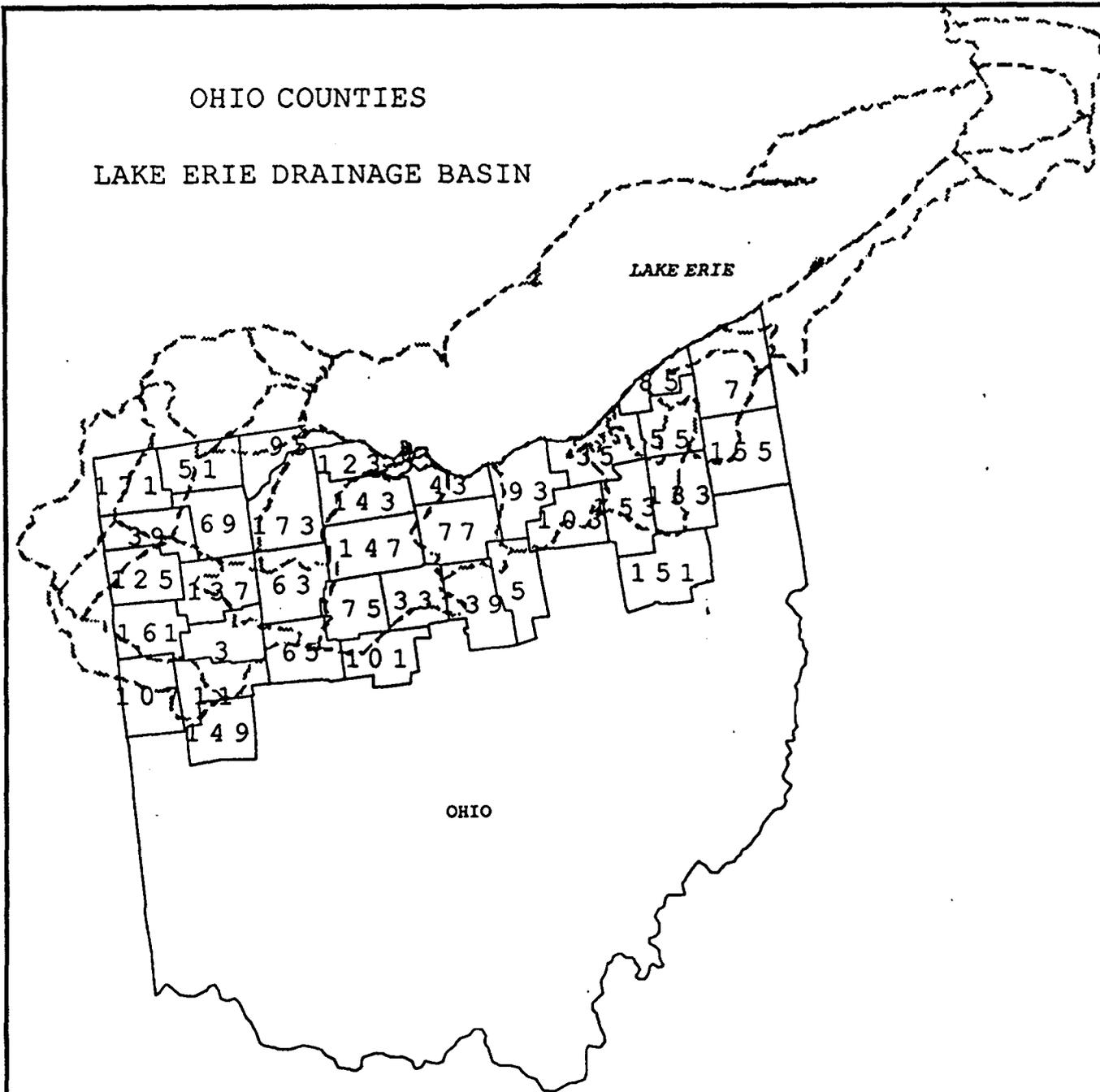
INDIANA

INDIANA
LAKE ERIE DRAINAGE BASIN
COUNTY FIPS CODE AND NAME

- 001 ADAMS
- 003 ALLEN
- 033 DE_KALB
- 113 NOBLE
- 151 STEUBEN
- 179 WELLS



OHIO COUNTIES
LAKE ERIE DRAINAGE BASIN



OHIO
LAKE ERIE DRAINAGE BASIN
COUNTY FIPS CODE AND NAME

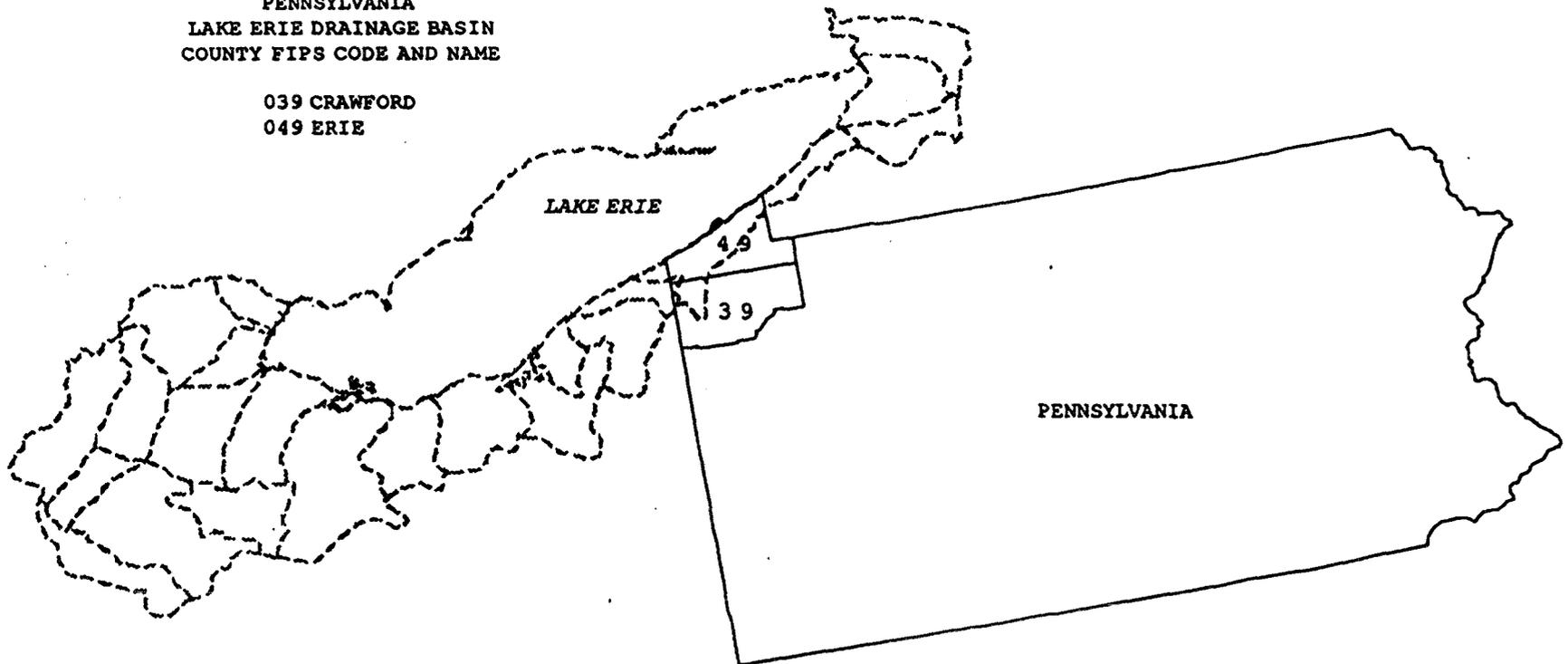
- 003 ALLEN
- 005 ASHLAND
- 007 ASHTABULA
- 011 AUGLAIZE
- 033 CRAWFORD
- 035 CUYAHOGA
- 039 DEFIANCE
- 043 ERIE
- 051 FULTON
- 055 GEauga
- 063 HANCOCK
- 065 HARDIN
- 069 HENRY
- 077 HURON
- 085 LAKE
- 093 LORAIN
- 095 LUCAS
- 101 MARION
- 103 MEDINA
- 107 MERCER
- 123 OTTAWA
- 125 PAULDING
- 133 PORTAGE
- 137 PUTNAM
- 139 RICHLAND
- 143 SANDUSKY
- 147 SENECA
- 149 SHELBY
- 151 STARK
- 153 SUMMIT
- 155 TRUMBULL
- 161 VAN_WERT
- 171 WILLIAMS
- 173 WOOD
- 175 WYANDOT

PENNSYLVANIA COUNTIES

LAKE ERIE DRAINAGE BASIN

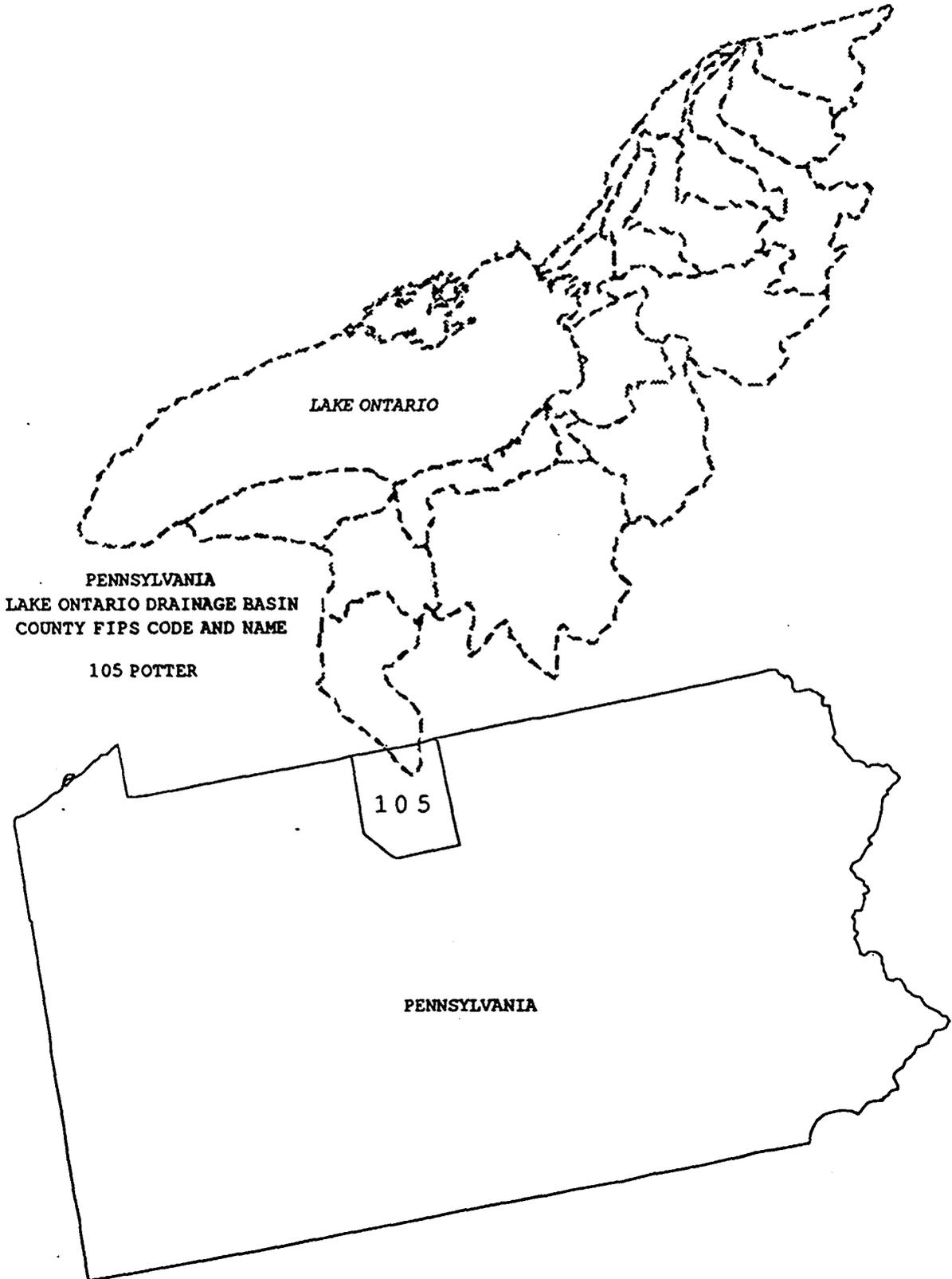
PENNSYLVANIA
LAKE ERIE DRAINAGE BASIN
COUNTY FIPS CODE AND NAME

039 CRAWFORD
049 ERIE



PENNSYLVANIA COUNTIES

LAKE ONTARIO DRAINAGE BASIN



PENNSYLVANIA
LAKE ONTARIO DRAINAGE BASIN
COUNTY FIPS CODE AND NAME

105 POTTER

105

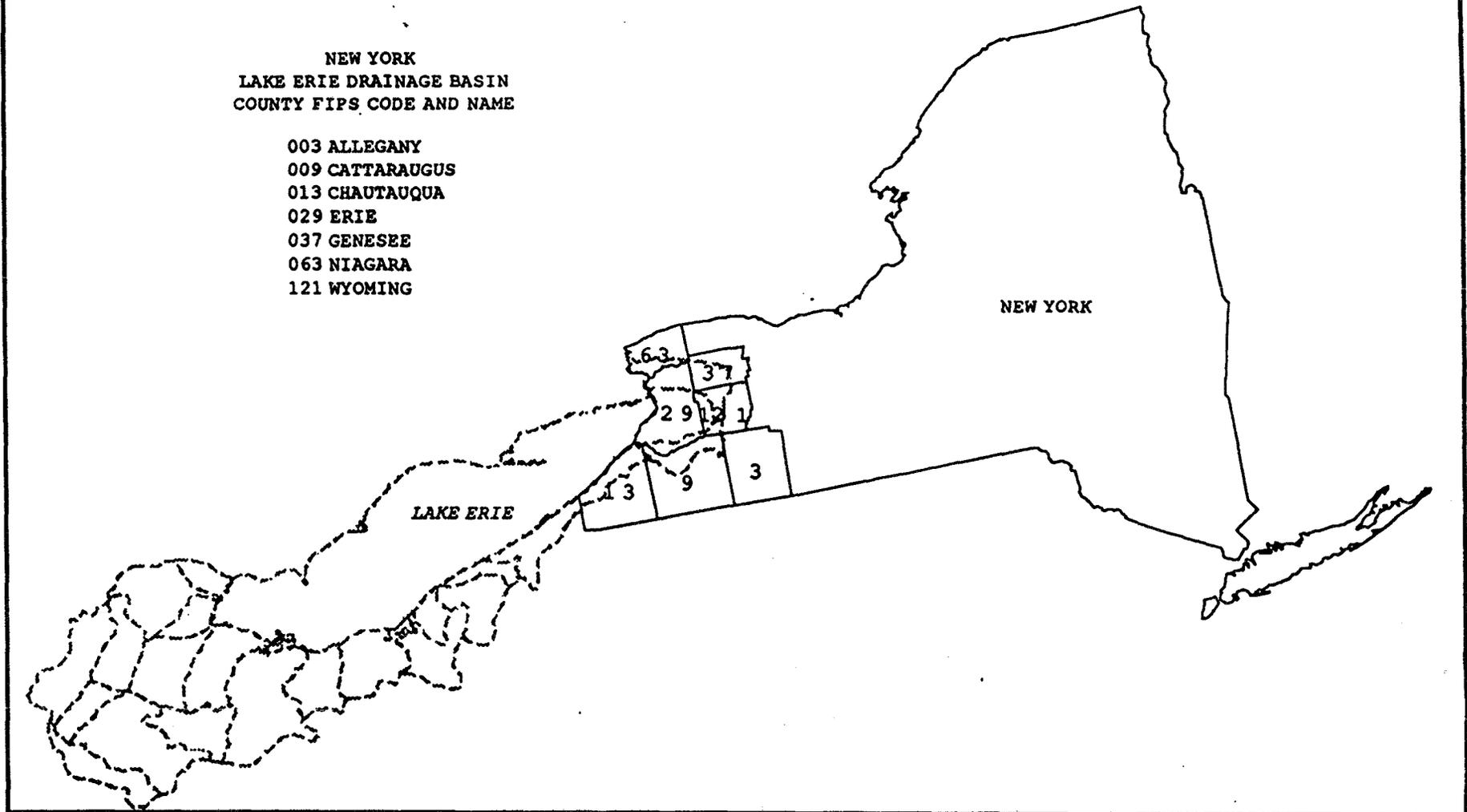
PENNSYLVANIA

NEW YORK COUNTIES

LAKE ERIE DRAINAGE BASIN

NEW YORK
LAKE ERIE DRAINAGE BASIN
COUNTY FIPS CODE AND NAME

- 003 ALLEGANY
- 009 CATTARAUGUS
- 013 CHAUTAUQUA
- 029 ERIE
- 037 GENESEE
- 063 NIAGARA
- 121 WYOMING



NEW YORK COUNTIES

LAKE ONTARIO DRAINAGE BASIN

NEW YORK
LAKE ONTARIO DRAINAGE BASIN
COUNTY FIPS CODE AND NAME

