BEFORE THE GREAT LAKES-ST. LAWRENCE RIVER BASIN
WATER RESOURCES COMPACT COUNCIL

GREAT LAKES AND ST. LAWRENCE CITIES INITIATIVE, **Petitioner**

WRITTEN STATEMENT IN FURTHERANCE OF REQUEST FOR HEARING AND COMPACT COUNCIL CONSIDERATION

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Further to its August 19, 2016 request for a hearing before the Great Lakes-St. Lawrence River Basin Water Resources Compact Council ("Compact Council") pursuant to Section 7.3.1 of the Great Lakes-St. Lawrence River Basin Water Resources Compact ("Compact"), the Great Lakes and St. Lawrence Cities Initiative ("Cities Initiative") respectfully submits that the Compact Council's Final Decision In the Matter of the Application by the City of Waukesha, Wisconsin for a Diversion of Great Lakes Water from Lake Michigan and an Exception to Allow the Diversion (June 21, 2016) ("Final Decision") exceeds the scope of authority granted in the Compact and that it should be suspended pending clarification of the appropriate criteria for review of critical elements and a robust evaluation in light of those criteria and the substantial changes in the scope of the proposed Diversion.[1] Suspension of the Final Decision is essential to protect the long-term integrity of the Compact and the Great Lakes-St. Lawrence River Basin, and can be done in a way that assures safe drinking water for the people of Waukesha.

The Cities Initiative recognizes that the City of Waukesha ("Waukesha" or "Applicant") is under a court order to bring its water supply into compliance with radium standards and that many years of effort went into crafting and evaluating the original application. However, those reasons are not sufficient to approve ***a Diversion that is prohibited under the Compact and does not meet its express criteria for an Exception*** from that prohibition.

As the Compact Council recognized in its Final Decision, the Proposal in the Application by Waukesha, Wisconsin for a Diversion of Water from Lake Michigan and an Exception to Allow the Diversion ("Application") was overreaching and did not satisfy the conditions to be excepted

[1] Capitalized terms that are not defined in this Submission have the meanings set forth in Section 1.2 of the Compact. Accompanying this Submission is an Appendix that contains certain material cited in this Submission, as well as other material that the Compact Council should have considered or should consider in further evaluation of this Application by the City of Waukesha. Materials that can be found in the Appendix are cited beginning with "App. Ex. ___."

from the prohibition against Diversions. *See* Final Decision § II.5. The Regional Body therefore recommended a number of additional conditions to ostensibly address some of those failings, and the Compact Council gave its approval based on those conditions barely one month later. Most notably, the Compact Council significantly redefined the Diversion area to more closely replicate but not mirror the City of Waukesha boundaries, lowering the overall volume of water approved for diversion. However, those additional conditions fundamentally changed the characteristics of the Diversion itself, negating the underlying bases for the Diversion and undercutting the rationale and analyses that had been used to justify the Diversion in the first instance. Despite this significant end-game shift, the Compact Council did not permit or even consider public comment on those conditions or on whether the Diversion with the new conditions satisfied the requirements of the Compact.[2] Nor did the Applicant submit any supplemental technical analysis, such as a supplemental Environmental Impact Statement, demonstrating that, at the volumes approved in and under the conditions set in the Final Decision, the Diversion meets the conditions set forth in Compact Section 4.9(3) to qualify for the exception (which, as further discussed below, it does not).

The failure to conduct a robust review and accept comments on the Application as markedly modified is particularly glaring in light of the Compact's attention to precedential effects

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[2] "Comments submitted prior to January 12, 2016 and after March 14, 2016 were not considered." City of Waukesha Diversion Application website, *available at* www.waukeshadiversion.org. Weeks after the comment period closed, WDNR continued to submit materials and analysis based on the full service area sought. *See, e.g.,* Draft Declaration of Findings – City of Waukesha Diversion Application Submitted by the State of Wisconsin, April 7, 2016, *available at* www.waukeshadiversion.org/media/1755/draft-declaration-of-findings_04072016.pdf. The smaller service area was not proposed until late April 2016, well after the comment period closed. *See* Preliminary Discussion Draft, Declaration of Findings § II.5, April 27, 2016, *available at* www.waukeshadiversion.org/media/1773/Waukesha-April-27-2016-Preliminary-discussion-draft-declaration-of-findings.pdf.

and cumulative impacts. As the first test of the Compact, this determination included factfinding that supposedly is pertinent primarily or even exclusively to Waukesha. However, it also included freshly developed procedures and the first-ever interpretation and application of many key provisions of the Compact. This novel legal analysis and these new procedures do not apply only to the Applicant, but set the precedent for how all future applications will be evaluated. The Compact mandates that the Compact Council focus on the cumulative impacts of its action from several angles, including the impact of any precedent set and the possibility of future, small-scale Diversions that may be cumulatively significant.

Applicant posited, and the Compact Council appeared to accept by claiming that its findings would not set a precedent, that its circumstances were unique in terms of the water-supply challenges it faces, such as radium contamination and an aquifer below pre-development levels. But many other communities also experience these circumstances and, under the precedent set in June, could argue they qualify as without reasonable water supply alternatives. In neglecting the thorough cumulative impact analysis that the Compact commands in furtherance of its protective, long-term aims and in accepting blanket assurances about the Applicant's supposedly "unique" character, the Compact Council inadvertently opened the proverbial floodgates to demands by other communities and set precedent that could entitle them to Great Lakes-St. Lawrence River Basin water as well.

The Compact Council has a duty not only to rigorously scrutinize the as-conditioned Diversion and its potential cumulative impact, but also to ensure that this first-of-its-kind decision actually applied and followed the standards established by the Compact. The Compact Council's Final Decision did not and merits reconsideration on three specific grounds.

First, the approved service area, although reduced from the original proposal, still contains parts of communities that are not part of the City of Waukesha. It therefore fails to meet the definition of "Community within a Straddling County" and still cannot qualify for a Diversion under the Exception in Section 4.9(3).

Second, the Applicant has reasonable water supply alternatives available to it. As an initial matter, the definition of "reasonable water supply alternatives" used by the State of Wisconsin and de facto adopted by the Compact Council was conclusory and should be reevaluated using the fundamental tenets of contract interpretation and statutory construction that apply to all compacts. Further, under any standard, the Applicant has not shown that it has no reasonable water supply alternative for the smaller service area delineated in the Final Decision or a service area limited to the boundaries of the City of Waukesha. The Compact Council cannot reach that conclusion on the basis of the existing record because the Applicant has not conducted an adequate, scientifically sound analysis of all reasonable alternatives for supplying this more limited area and whether it can supply all or *part* of its needs through those alternatives.

Third, adverse effects of the proposed return flow of water through the Root River to Lake Michigan prohibit the Diversion. Contrary to the process used by the Regional Body and Compact Council, the Compact does not permit weighing the impact of a Diversion against the impact of denying the Diversion or against other options. Rather, it requires that any Exception be implemented in a manner that ensures no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Basin (*see* Compact § 4.9(4)(d)) and that an Exception should not be authorized unless it can be shown that it will not endanger the integrity of the Basin Ecosystem. (*Id.* § 4.9(3)(e).) As the Applicant, WDNR, the Regional Body, and the Compact Council have all recognized, the Diversion will

cause adverse impacts on the integrity and health of the Root River ecosystem. In the absence of monitoring, modeling, and other analysis to sufficiently demonstrate that these adverse impacts will not be significant or will be sufficiently mitigated to prevent these adverse impacts, rather than a perfunctory conclusion that they will not be significant or will be less impactful than other options, the Compact requires that the Diversion be denied.

In this first ever attempt at applying the Compact's Exception provisions, the Compact Council's approach identified conditions that could make the proposed Diversion more compatible with certain aspects of the Compact. However, deficiencies in the Application remain and threaten the future viability of the Compact and the Great Lakes-St. Lawrence River Basin. Given the precedential nature of this decision, the Cities Initiative demonstrates below and respectfully submits that the Compact Council should:

1. Suspend the Final Decision pending further review.
2. Reverse the Final Decision regarding the Applicant's eligibility as a "Community within a Straddling County" and restrict the delineated service area to be consistent with the City of Waukesha boundaries.
3. Apply fundamental principles of contract interpretation and statutory construction to redefine how the Compact and the Council evaluates "no reasonable water supply alternative." A standard consistent with the Compact, rather than one improperly imported from Wisconsin law, would consider (a) whether an alternative would be allowed under existing regulations; (b) whether an alternative is consistent with existing permitted water uses and criteria in the region or with routinely-permitted exemptions granted by regulators; and (c) whether an alternative is feasible.

4. Require supplemental technical analysis (including a supplemental EIS) that details demand forecasts for a service area consistent with the boundaries of the City of Waukesha, or at a minimum the narrowed service area delineated in the Final Decision, and that analyzes alternatives for supplying all *or part* of that demand.

5. Permit additional public comment on the proposed Diversion including on alternatives associated with the narrower service area and on any supplemental technical analysis.

6. Conduct a substantive review of the Application that takes into account the supplemental technical analysis, new public comments, any revised interpretation of key Compact provisions, any further modifications to the delineated service area, and the requisite attention to the cumulative impact of the decision, including its precedential effects. Determine whether the narrowed proposal still meets the clarified criteria for an Exception for a Community in a Straddling County, including whether it meets the appropriate "no reasonable water supply alternative" standard and whether all or part of the Diversion can be avoided. Carefully evaluate the impact of the return flow on any water body to ensure that the return flow does not result in an adverse impact.

7. After proper interpretation and due consideration, for the reasons further explained in this submittal, the Compact Council should find that the Proposal does not satisfy the Exception criteria in the Compact and deny the Application.

8. If, after proper interpretation and due consideration, the Compact Council finds that this Proposal does not meet the criteria for an Exception to the prohibition on Diversions absent conditions and/or modifications, but finds that the Proposal could

and should be approved with conditions and/or modifications, provide the draft Final Decision for public comment on the conditions or modifications prior to a final vote of the Compact Council. Going forward, revise the Compact Council's Interim Guidance and Draft Sequence of Events for Consideration of "Straddling County" Exceptions to the Prohibition on Diversions to encompass this critical opportunity for full review of impactful modifications and conditions.

FACTUAL BACKGROUND

On December 13, 2005, eight U.S. states and two Canadian provinces entered an agreement to protect the waters of the Great Lakes and St. Lawrence River Basin, the Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement. Then, the Great Lakes—St. Lawrence River Basin Water Resources Compact ("the Compact"), a binding compact that embodied those same principles, was entered into U.S. law on December 8, 2008, following its adoption by the eight states as the law of their respective state and consent by Congress. *See* Public Law No. 110-342 (signed Oct. 3, 2008). The Compact recognizes that the waters of the Great Lakes-St. Lawrence River Basin "are precious public natural resources shared and held in trust" and that the state and provincial governments "have a shared duty to protect, conserve, restore, improve and manage" the waters of the Basin. (Compact § 1.3.) Among the purposes of the Compact are (1) to "act together to protect, conserve, restore, improve and effectively manage the Waters and Water Dependent Natural Resources of the Basin;" and (2) "[t]o prevent significant adverse impacts of Withdrawals and losses on the Basin's ecosystems and watersheds." (*Id.*) Governing authorities under the Compact and Agreement are (1) the Compact Council, composed of all eight U.S. states' governors, and (2) the Regional Body, a body composed of the Council members' designees, along with the premiers of the participating Canadian provinces (the "Regional Body").

The Compact prohibits new withdrawals of water that would transfer water from the Basin into another watershed (*see id.* § 4.8). It does, however, allow an Exception to that general prohibition under certain limited circumstances, for only those proposed Diversion projects that meet a strict list of requirements laid out in the Compact, and even then only at the Compact Council's and Regional Body's discretion. (*See id.* § 4.9.) In May 2010, Waukesha took the first step toward seeking such an Exception under the Compact by submitting its Application to the Wisconsin Department of Natural Resources ("WDNR").

A. WDNR Review Process

WDNR evaluated Waukesha's Application over a five-and-a-half year timeframe, during which it conducted technical reviews, gathered additional information from consultants, held public meetings, accepted and considered public comments in three separate comment periods, and corresponded with Waukesha.

In July 2011, WDNR held three days of public information meetings and hearings in Wisconsin to introduce the review process and receive comments on (1) the appropriate scope of the EIS for the project, and (2) interpretation of the Wisconsin state and Compact review criteria for a Diversion Application. WDNR then provided a summary of and responses to the public comments it received.

In Fall 2013, WDNR received a revised Application from Waukesha with supplemental information. Waukesha then held informational meetings in Oak Creek, Racine, Milwaukee, and Waukesha, and WDNR accepted public comments on the revised Application. At this stage, WDNR prepared a draft Technical Review and draft EIS. After reviewing all of those materials, in Fall 2013 WDNR issued a preliminary decision that the Application was approvable.

Next, WDNR opened the process for public comments on the draft Technical Review and draft EIS with a comment period extending through August 28, 2015. That comment period

included public hearings in Waukesha, Milwaukee, and Racine on August 17 and 18, 2015. WDNR did not hold any public hearings outside of Wisconsin. WDNR then incorporated the comments it had received, and responses, into the draft Technical Review and draft EIS.

Throughout that process Waukesha, consultants, and parties commenting on the Application submitted many relevant technical documents. Some of the key analyses in the WDNR record include:

- Memo: "Brief review of new Waukesha application for a diversion from Lake Michigan," by Jim Nicholas of Nicholas H2O to National Wildlife Federation, relying on and referencing extensive U.S. Geological Survey data on the region, now archived at http://archive.usga.gov/archive/sites/wi.water.usgs.gov/glpf/im.html. (App. Ex. 4.)
- "City of Waukesha's Application for Diversion of Lake Michigan Water; Phase 2: Recommendations for an Alternative Water Supply," by Mead & Hunt ("M&H Report"). (App. Ex. 8)
- CIC Non-Diversion Alternative Technical Report (by GZA Environmental) ("GZA Report"). (App. Ex. 9.)
- "Baseline Assessment of Water Quality in Support of the Root River Watershed Restoration Plan: Data Analysis Report 2011-2013," by Adrian Koski, Sarah Wright, and Julie Kinzelman, PhD ("Root River Report"). (App. Ex. 6.)

In August 2015, WDNR issued a determination that Waukesha's Application met the Compact's criteria for an Exception.

B. Regional Body And Compact Council Review Process

WDNR forwarded Waukesha's revised Application and supplemental materials to the Regional Body and Compact Council for review on January 7, 2016. In that Application, Waukesha proposed to divert Basin water up to an annual average of 10.1 million gallons per day, for an estimated population of 97,400 by the year 2050. Waukesha would receive water from the City of Oak Creek Water Utility, and return the water, after treatment, via the Root River. The materials submitted to the Regional Body and Compact Council by WDNR in support of the Application were:

- Submission Letter;
- Overview;
- Crosswalk Table between Procedural Requirements and Review Documents;
- State of Wisconsin Draft Declaration of Findings;
- Waukesha's Revised Application (Volumes 1-5);
- Preliminary Final EIS, and response to comments;
- Wisconsin DNR Technical Review, and response to comments; and
- Supplemental Application Materials, consisting of 26 supplemental information memos on behalf of Waukesha and correspondence with Waukesha between December 2013 and November 2015.

* * *

The public comment period on Waukesha's Application for the Regional Body and the Compact Council began January 12, 2016, and ended March 14, 2016. According to the Compact Council's website, the Council did not consider any comments or other materials from the public submitted either before or after the comment period ended.[3] The Regional Body and Compact Council held one briefing and one hearing during the public comment period, on February 17-18, 2016, in Waukesha. The Regional Body and Compact Council did not hold any hearings outside of Wisconsin. On March 22, 2016, the State of Michigan and Province of Ontario submitted to the Regional Body and Compact Council their own Technical Reviews of the proposed project. No other states or provinces submitted their own Technical Reviews.

On April 7, 2016, WDNR posted the final version of its draft Declaration of Findings. From April 21 to May 18, 2016, the Regional Body held face-to-face meetings and webinars, which were open to the public, to consider that Declaration. One such meeting took place on May

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[3] "Comments submitted prior to January 12, 2016 and after March 14, 2016 were not considered." City of Waukesha Diversion Application website, *available at* www.waukeshadiversion.org.

11, 2016, at the University of Illinois. The focus at those meetings appeared to be ways to change the Application that would address concerns of particular Regional Body members. For example, at the end of that meeting one of the Regional Body representatives thanked "the willingness of Wisconsin . . . and [] Waukesha for being amenable to all of the suggestions and conditions from all of the Regional Body members." Tr., May 11, 2016 Report of Proceedings, at 434-35, Conference of Great Lakes and St. Lawrence Governors and Premiers. He further stated that "we are going to continue to look forward to working with this group and to find resolution." *Id.* at 435. The first appearance in the record of proposed "conditions" similar to those that eventually became a part of the Compact Council's decision was in an April 27, 2016 "Preliminary Discussion Draft" Declaration of Findings. The Draft noted the proposed conditions were "based on the notes of the Regional Body discussion on April 21-22, 2016."[4] After its meeting, the Regional Body then submitted its Final Declaration of Findings to the Compact Council, including the proposed conditions.

On June 8, 2016, the Compact Council began preliminary discussions on its Final Decision, which were not open to the public. During those discussions, the Compact Council considered implementing the conditions proposed by the Regional Body as part of the Application. Three states (Wisconsin, Minnesota, and Michigan) proposed amendments to the draft Final Decision. There was no public comment period after the Compact Council began its discussions. On June 21, 2016, the Compact Council held an in-person meeting to decide the Application, which was the first Compact Council proceeding open to the public. That same day, the Compact Council issued its Final Decision approving Waukesha's Application, subject to thirteen specified

[4] *See* Preliminary Discussion Draft, Declaration of Findings at Section II.5, April 27, 2016, *available at* www.waukeshadiversion.org/media/1773/Waukesha-April-27-2016-Preliminary-discussion-draft-declaration-of-findings.pdf.

conditions. Those conditions include (a) a smaller approved diversion amount (8.2 million gallons) and diversion area (limited to the area currently served by the Waukesha Water Authority) than Waukesha requested; (b) returning a certain quantity of flow to the Basin through the Root River; (c) monitoring the Root River to determine if flow from the Diversion causes changes; (d) obtaining and complying with federal and state permits; and (e) enforcement of the Final Decision by the Compact Council or any participating state or province. (Final Decision § III.2.) The public was given no opportunity to comment on the conditions before the Application was approved. No technical reports that were part of the Application were revised to address the new conditions, and no new modeling was conducted before the Application was approved.

C. Current Status

Waukesha may now begin to obtain the federal, state, and local permits and approvals needed for its Diversion. As it does so, other "Communities within a Straddling County" continue to face challenges with their current water supplies. For example, Dan Duchniak of the Waukesha Water Utility reported that the Town of Genesee, near Waukesha, is currently facing issues with its water supply. Tr., Feb. 17, 2016 Report of Proceedings, at 39:7-16, WDNR, Great Lakes-St. Lawrence River Basin Water Resources Council, Conference of Governors and Premiers, *available* at http://www.waukeshadiversion.org/media/1722/2-17-16-afternoon-transcript-qa.pdf. Shaili Pfeiffer of WDNR further stated that the cities of Pewaukee and Brookfield, also near Waukesha, currently draw their water from the same aquifer as Waukesha and are treating the water for radium. *Id*. at 111-12. When asked what would stop those cities from asking to be connected to Waukesha's supply of Lake Michigan water, Ms. Pfeiffer responded that it would require those cities to apply to the Compact Council. *Id*. at 113:4-116:10. Ms. Pfeiffer also stated it was possible, but only speculation, that Waukesha's switch to Lake Michigan water might relieve the pressure on the aquifer enough to prevent those cities from facing the same problems

as Waukesha. *See id.* At a hearing the next day, Ms. Pfeiffer noted there are "quite a number" of other communities in Wisconsin facing radium issues with their water supply. Tr., Feb. 18, 2016 Report of Proceedings, at 33:8-19, WDNR, Great Lakes-St. Lawrence River Basin Water Resources Council, Conference of Governors and Premiers, *available* at http://www.waukeshadiversion.org/media/1727/2-18-16-public-meeting-hearing-transcript.pdf. A Quebec representative also noted at an April 21, 2016 hearing that "radium can be treated quite easily," and that many communities in Wisconsin were currently doing so. Tr., April 21, 2016 Report of Proceedings, at 47-48, Conference of Great Lakes and St. Lawrence Governors and Premiers.

STANDING

Section 7.3 of the Compact provides that any "Person aggrieved by any action taken by the Council . . . shall be entitled to a hearing before the Council." The Compact defines "Person" as "a human being or a legal person, including a government or a non-governmental organization, including any scientific, professional, business, non-profit, or public interest organization or association that is neither affiliated with, nor under the direction of a government." (Compact § 1.2.)

The Cities Initiative, founded in 2003, is a "Person" under the meaning of Section 1.2 because it is a binational coalition of over 120 U.S. and Canadian mayor and local officials working to advance the protection and restoration of the Great Lakes and St. Lawrence River. It is a 501(c)(3) organization incorporated in the State of Illinois. Cities Initiative staff participate in a number of key Great Lakes basin-wide organizations, including the Great Lakes Fishery Commission, the Great Lakes Executive Committee, Chicago Area Waterway System Advisory Committee, IJC Water Quality Board, and the Great Lakes Advisory Board. The Cities Initiative

also works on Great Lakes issues in partnership with many other governmental and non-governmental organizations.

The Cities Initiative is a "Person Aggrieved" by the Compact Council's decision to approve Waukesha's application under the meaning of Section 7.3 because (a) it is a public interest organization that is not under the direction of any single government; and (b) the Compact Council's Final Decision fails to protect the integrity of the Compact. Granting an Exception and allowing a Diversion under the terms of the Council's Final Decision, and the process that led to that decision, is contrary to the strict requirements of the Compact. The Final Decision threatens the resource that provides drinking water for 40 million people and is the foundation upon which a strong regional economy is based, to the detriment of the members of the Cities Initiative.

The Cities Initiative also has standing to challenge the Compact's decision under United States law because (1) the injury to the Compact's integrity from the Final Decision harms the Cities Initiative's member mayors; (2) the Compact's integrity is central to the Cities Initiative's purpose as an organization; and (3) the Cities Initiative can effectively pursue its claim. *See Sierra Club v. Franklin County Power of Illinois, LLC*, 546 F.3d 918, 924-25 (7th Cir. 2008).

ARGUMENT

I. LACK OF PUBLIC COMMENT ON THE CONDITIONS AND FAILURE TO REQUIRE SUPPLEMENTAL TECHNICAL REVIEW UNDERMINES THE COUNCIL'S DECISION AND WARRANTS FURTHER COMMENT AND ANALYSIS OF THE APPLICATION AS MODIFIED.

As an initial matter, the Final Decision should be suspended and its evaluation reopened because necessary public comment was not allowed and required analysis has not been conducted and considered. After the close of public comment on March 14, 2016, the Compact Council made significant substantive changes to the proposed Diversion, most notably by redrawing the delineated service area and modifying the volume of water permitted. *See supra* p. 2 n.2. The

Compact Council did not permit any public comment on the conditions imposed in the Final Decision.[5] As importantly, no environmental impact study or alternative source analysis was presented to the Compact Council based on the smaller delineated service area. Each of these factors merits suspending the decision and reopening the Compact Council's review.

First, Compact Section 6.1.1 provides that Parties to the Compact recognize the importance and necessity of public participation in promoting management of the water resources in the Basin. The Compact states that "it is the intent of the Council to conduct public participation processes concurrently and jointly with processes undertaken by the Parties and through Regional Review" (Compact § 6.2). While the Compact does permit the Compact Council to approve a Proposal with modifications or conditions, *see* Compact § 4.3.5, caution is warranted when those modifications or conditions create substantial variance from the Proposal that the public was permitted to comment on.[6] Changes such as the volume at issue directly tie into whether or not an Application meets the criteria for an Exception to allow a Diversion. Other modifications, for instance a change to a return flow location or the volume being discharged, could impact other communities and ecosystems in the region differently than was analyzed during the state-level and

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[5] "Comments submitted prior to January 12, 2016 and after March 14, 2016 were not considered." City of Waukesha Diversion Application website, *available at* www.waukeshadiversion.org. Weeks after this comment period closed, the Applicant continued to submit materials and analysis based on the full service area sought. (*See, e.g.,* Draft Declaration of Findings – City of Waukesha Diversion Application Submitted by the State of Wisconsin, April 7, 2016, *available at* www.waukeshadiversion.org/media/1755/draft-declaration-of-findings_04072016.pdf.) Not until late April was the smaller service area proposed, well after the comment period closed. (*See* Preliminary Discussion Draft, Declaration of Findings at Section II.5, April 27, 2016, *available at* www.waukeshadiversion.org/media/1773/Waukesha-April-27-2016-Preliminary-discussion-draft-declaration-of-findings.pdf.)

[6] The modifications made by the Regional Body and Compact Council in this case were significant. Members of the Regional Body recognized that, without the modifications and conditions, there was a "very weak structure to support an approval." (*See* Transcript of Meeting before the Great Lakes-St. Lawrence River Water Resources Board Regional Body on April 21, 2016, at 159:21-162:7, *available* at http://www.waukeshadiversion.org/media/1801/april-21-2016-part-1.pdf.)

initial Compact Council review. Those impacted communities and experts on the affected ecosystems should have an opportunity to provide further comment and analysis to ensure that the Compact Council is aware of and taking into account the actual impact that can be expected from the Diversion being allowed.

In this instance, the Compact Council specifically stated that it did not consider any comments made after March 14, 2016, before the Regional Body recommended the conditions that constituted significant changes to Application. Despite interest in doing so,[7] the public therefore has not had an opportunity to comment on the modified Application or to offer the additional information and counter-analysis needed to robustly evaluate claims made by the Applicant and related assumptions. [8]

Second, beyond simply allowing an opportunity for comment, supplemental technical analysis should have been conducted and entered into the record, given the significance of the changes imposed. The Compact Council should not permit the Diversion to move forward until an analysis of the newly-configured Diversion has been conducted and considered.

Requiring further analysis in light of significantly changed circumstances is far from unprecedented and is the only way to fulfill the protective goals and cautionary principles of the Compact. Under the analogous National Environmental Policy Act[9] 42 U.S.C. §§ 4321 *et seq.*

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[7] For instance, the Compact Implementation Coalition issued comments in May 2016 regarding the proposed modifications and conditions that presumably were not considered. (*See* App. Ex. 19, Compact Implementation Coalition letter dated May 9, 2016.)

[8] The Regional Body review process also was inadequate in that it provided for only one public meeting held in the City of Waukesha while there was intense interest in the matter across the entire Great Lakes and St. Lawrence Basin in the United States and Canada. People in the vicinity of Waukesha can hardly be considered representative of those throughout the basin. In addition, pursuant to Compact Section 4.5.3.d, the Regional Body is required to consider comments received through public participation before issuing a Declaration of Finding.

[9] While not binding on the Compact Council, NEPA requires an EIS for certain Federal actions and legislation that details, among other things, alternatives to the proposed action. *See* 42 U.S.C.

(“NEPA”), agencies are required to prepare supplemental environmental impact statements if there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372, (1989). A change in the level of demand for the resource at issue is a significant new circumstance that warrants full reconsideration of the alternatives and a supplemental EIS. *See Alaska Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d 723, 729-30 (9th Cir. 1995). In *Alaska Wilderness*, the EIS evaluated a timber supply within certain boundaries and under certain contractual demands. When the contract terminated and the timber demand dropped, the court required a new EIS with consideration of additional alternatives because the original EIS had given short shrift to alternatives that did not supply the full amount of timber needed to fulfill the contract. 67 F.3d at 731 (“Because elimination of the contract appears significantly to alter the range of viable alternatives available to the Forest Service in managing the areas in question, we hold that the Forest Service’s decision not to reconsider land

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§ 4332(C); 40 C.F.R. § 1508.11; 40 C.F.R. § 1502.14. A goal of the NEPA process is “to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” 40 C.F.R. § 1500.2(e). In evaluating the alternatives, NEPA requires evaluating all reasonable “alternative means to accomplish the general goal of the action” and *does not permit reliance solely on an applicant’s self-serving assessment* of the options that would meet its goals or *limitations based on contractual agreements rather than what might be possible* absent those existing private arrangements. *See Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 669-70 (7th Cir. 1997) (Army Corps of Engineers’ focus on single-source water supply as desired by applicant, ignoring reasonable alternatives that relied on multiple water sources, rendered EIS inadequate and required vacating permit pending development of an adequate EIS, regardless of the delay involved in obtaining a new water supply); *Anglers of the Au Sable v. U.S. Forest Serv.*, 565 F. Supp. 2d 812, 835-36 (E.D. Mich. 2008) (holding that Forest Service’s rejection of alternative was arbitrary and capricious where the Forest Service’s consideration of alternatives was constrained by the applicant’s mineral lease and “exchanges reveal the Forest Service’s mind set that it considered itself obligated by Savoy’s lease to approve either Savoy’s initial proposal or a modified version of Savoy’s proposal, and never realistically contemplated denying the application for drilling altogether”).

use alternatives in an EIS after providing public notice and conducting proceedings in keeping with the requirements of NEPA and ANILCA was not reasonable.").

Where an EIS and its exploration of alternatives are ultimately inadequate for the approval that was granted, it is appropriate to vacate the existing authorization, even if that means delay. *See Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 669-70 (7th Cir. 1997) (The Army Corps of Engineers focused on single-source water supply preferred by applicant, ignoring reasonable alternatives that relied on multiple water sources, which rendered the EIS inadequate and required vacating the permit pending development of an adequate EIS even though the court recognized it would delay the needed new water supply.).

In sum, ***the Compact Council should suspend its Final Decision to permit public comment on the proposed Diversion as presently conditioned, require supplemental technical analysis, and conduct a substantive review of the Application that takes into account this further analysis and public comment***. Going forward, if, after proper interpretation and due consideration, the Compact Council finds that this or any future Proposal does not meet the criteria for an Exception to the prohibition on Diversions absent conditions and/or modifications, but finds that the Proposal could and should be approved with conditions and/or modifications, the Compact Council should provide the draft Final Decision for public comment on the conditions or modifications prior to a final vote of the Compact Council.[10]

[10] To accomplish this, the Cities Initiative respectfully submits that the Compact Council should consider revising its Interim Guidance and Draft Sequence of Events for Consideration of "Straddling County" Exceptions to the Prohibition on Diversions to encompass this critical opportunity for full review of impactful modifications and conditions.

II. THE COMPACT COUNCIL DID NOT GIVE DUE CONSIDERATION TO THE CUMULATIVE EFFECTS OF THIS PRECEDENTIAL DECISION.

Although Waukesha's leaders downplay the potential Cumulative Impacts and precedential effects of the Diversion, the Compact demands a more critical inquiry than how it was presented by the Applicant. Waukesha leaders are quick to point out that an individual community's alleged water demand may seem substantial and potentially impactful in comparison to nearby aquifer and local surface water resource; in comparison to the total volume of the Great Lakes, an individual community's Diversion of the same volume of water seems small.

Weighing the two against one another, resort to the Great Lakes option for that individual community may seem less impactful and better for the Basin and nearby watersheds; however, the Compact requires considering not just a single community's individual demand for Great Lakes water, but rather focuses on the potential for collectively significant use of the Great Lakes over time. By the terms of the Compact, this must include further analysis of potential impacts of any precedent-setting consequences associated with any proposal. Compact Section 4.9.4.d allows approval of an Exception to the prohibition on Diversions only when "[t]he Exception will be implemented so as to *ensure that it will result in no significant individual or cumulative adverse impacts* to the quantity or quality of the Waters and Water Dependent Natural Resources of the Basin *with consideration given to the potential Cumulative Impacts of any precedent-setting consequences associated with the Proposal*." Compact Section 1.2 defines "Cumulative Impacts" as "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, 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." (emphasis added.)

In its Final Decision, the Compact Council relied on the "unique circumstances" of Waukesha's Application and a note that the findings "do not necessarily apply to any other applicant or application." Final Decision § II.10a. Even if factual findings may not necessarily apply to a particular future applicant, the Council overlooks that the legal standards it formulated and used are precedent that will apply to future applicants.

As detailed *infra* Section III.B.1.b, Waukesha is hardly unique when considered against the factors that the Compact Council used as determinative under the key criterion that the Applicant have no reasonable water supply alternative. If the current formulation of "no reasonable water supply alternative" is allowed to stand, the collective demand of the straddling communities whose own water supplies are "not reasonable" under some aspect of the Wisconsin Definition could be far from the insubstantial effect Waukesha claims. During hearings, Compact Council members and representatives of the Applicant recognized that other communities, such as Genesee, which is in the same county as Waukesha, also have similar problems with their respective water supplies. The specter of additional applications from other communities near Waukesha was raised[11]. Allowing this definition to stand would trigger the "death by a thousand straws" problem that the Compact was designed to avoid, as other communities begin to clamor

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[11] (*See, e.g.,* Tr. Feb. 17, 2016 Report of Proceedings, at 39:7-16, 111-116:10, *available at* http://www.waukeshadiversion.org/media/172212-17-16-afternoon-transcript-ga.pdf (indicating other nearby communities have water supply issues and would need to apply to the Compact Council if they sought a correction to Waukesha's new water supply); Tr., Feb. 18, 2016 Report of Proceedings, at 33:8-19, WPNR, Great Lakes – St. Lawrence River Basin Water Resources Council, Conference of Governors and Premiers, *available at* http://waukeshadiversion.org/media/1727/2-18-16-public-meeting-hearing-transcript.pdf (WDNR representative advising that a number of Wisconsin communities have a radium issue).)

for a share of Great Lakes water as their own supplies require additional conservation measures or treatment, just as Waukesha's has. In further consideration of this or any other Application, the Compact requires that the Compact Council be attuned to and mindful of this slippery slope.

III. THE COMPACT COUNCIL WENT BEYOND THE AUTHORITY GIVEN TO IT IN THE COMPACT WHEN IT APPROVED THE WAUKESHA DIVERSION UNDER THE CONDITIONS IN THE FINAL APPROVAL.

The Compact strictly prohibits Diversions of Great Lakes water outside its surface water basin and mandates that the Council use "caution" in potentially approving a Diversion under the limited Exception provisions, including the provision under which Waukesha applied. *See* Compact § 4.9.3.e (directing the Council to use caution in allowing Diversion from the Great Lakes), §4.8 (establishing a general prohibition on Diversions).

The Compact specifies that any Proposal for an Exception, under any of the three Exceptions to the prohibition on Diversions, "may be approved as appropriate *only when*" a strict list of criteria all are met, including:

> a. The need for all or part of the proposed Exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies;
>
> b. The Exception will be limited to quantities that are considered reasonable for the purposes for which it is proposed;
>
> c. All Water Withdrawn shall be returned, either naturally or after use, to the Source Watershed less an allowance for Consumptive Use. No surface water or groundwater from the outside the Basin may be used to satisfy any portion of this criterion except if it:
>
> > i. Is part of a water supply or wastewater treatment system that combines water from inside and outside of the Basin;
> >
> > ii. Is treated to meet applicable water quality discharge standards and to prevent the introduction of invasive species into the Basin;
>
> d. The Exception will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Basin with

> consideration given to the potential Cumulative Impacts of any precedent-setting consequences associated with the Proposal;
>
> e. The Exception will be implemented so as to incorporate Environmentally Sound and Economically Feasible Water Conservation Measures to minimize Water Withdrawals or Consumptive Use . . . .

Compact § 4.9.4.

The exception sought by Waukesha also requires satisfying additional conditions that include but are not limited to:

> a. The 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;
>
> b. The Proposal meets the Exception Standard, maximizing the portion of water returned to the Source Watershed as Basin Water and minimizing the surface water or groundwater from outside the Basin;
>
> . . .
>
> d. There is no reasonable water supply alternative within the basin in which the community is located, including conservation of existing water supplies;
>
> e. Caution shall be used in determining whether or not the Proposal meets the conditions for this Exception. This Exception should not be authorized unless it can be shown that it will not endanger the integrity of the Basin Ecosystem. . . .

Compact § 4.9.3. These provisions of the Compact must be interpreted and applied strictly in order to protect the integrity and finite resources of the Great Lakes-St. Lawrence River Basin.

In this instance, the Compact Council did not apply the provisions of the Compact strictly or appropriately when rendering its Final Decision because:

A. The currently-approved Diversion area still does not meet the Compact definition of a Community;

B. The Compact Council applied an incorrect standard for "no reasonable water supply alternative" and further found that Waukesha has no reasonable alternative when, in fact, it does have such alternatives; and

C. The Compact Council misapplied the adverse impact condition and improperly found that the return flow would not have an adverse environmental impact when, in fact, such an impact has been demonstrated and even recognized by the Parties.

These deficiencies raise particular concerns given the precedent-setting nature of the Final Decision. The Compact Council should reconsider its decision to approve the Application in light of the necessary modifications and analyses detailed below.

A. The Approved Service Area Contains Parts Of Multiple Communities Which Are Not Part Of The City Of Waukesha, Amounting To A Clear Violation Of The Compact.

Pursuant to Compact Section 4.9.3.a, a "Community within a Straddling County" can be excepted from the prohibition against Diversions provided that: "The 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." A "Community within a Straddling County," as defined in Compact Section 1.2, is "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."

In the Final Decision, the Compact Council found that the Applicant is located wholly within Waukesha County, Wisconsin (which straddles the Lake Michigan surface watershed boundary) and therefore meets the definition of "Community within a Straddling County." Final Decision § II.1. However, the Compact Council described the limits of the approved service area as including "land outside the City of Waukesha's jurisdictional boundaries" (Final Decision § II.5.b.i) and "land lying within the perimeter boundary of the City of Waukesha that is part of unincorporated land in the Town of Waukesha." Final Decision § II.5.b.ii; referred to as "Town

Islands". The Compact Council stated in its findings that the Town Islands have been included in the approved service area because "for all practical purposes they are within the Applicant's community boundaries." Final Decision § II.5.b.ii.

The inclusion of land outside the jurisdictional boundaries of the City of Waukesha amounts to a violation of the Compact. The Compact clearly defines a "community within a straddling county" as "any incorporated city, town, or the equivalent thereof." Compact § 1.2. Because land outside the City of Waukesha is included, the approved service area includes land incorporated within multiple jurisdictions. The language of the Compact does not suggest that land outside an incorporated city, but that is "for all practical purposes" within a community's boundaries, is included within the definition of "Community within a Straddling County." While the City of Waukesha is a "Community within a Straddling County," these additional areas are not.

The Compact's definition of "Community within a Straddling County" should be applied strictly to avoid inappropriate diversions of Basin water in the future. Because this is the Compact Council's first decision regarding a "Community within a Straddling County," the Compact Council's interpretation here will set the baseline for future applications for diversions from the Basin. Thus, ***the Final Decision regarding the Applicant's eligibility as a "Community within a Straddling County" should be reversed, and the delineated service area further restricted to be consistent with the City's boundaries***.

B. Waukesha Has a Reasonable Water Supply Alternative Available and Does Not Need Nor Qualify for a Diversion.

Pursuant to the Compact Section 4.9.3.d, a "Community within a Straddling County" can be excepted from the prohibition against Diversions provided that: "There is no reasonable water supply alternative within the basin in which the community is located, including conservation of

existing water supplies." Further, in order for an application to meet the Exception Standard, it must meet the criterion that "the need for all or part of the proposed Exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies." Compact § 4.9.4.a. In its Final Decision, the Compact Council concluded that the Applicant was without a reasonable water supply alternative. Final Decision § II.4. However, in doing so the Compact Council applied an incorrect definition of "reasonable water supply alternative"; one that is neither found in the Compact nor consistent with how the Compact should be construed under basic principles of contract and statutory interpretation. Moreover, the Compact Council's conclusion is rendered even more suspect in light of the lower volume of water needed for the more limited service area; each of the water supply alternatives evaluated by the Compact Council has assumed that a higher volume of water was necessary, and there is at least one water supply alternative available to the Applicant that does not require a diversion from Lake Michigan. If allowed to stand, the Council's decision encourages future applicants to overstate future demand estimates to eliminate reasonable alternatives that would be available to meet more conservative levels of demand.

Accordingly, in connection with reevaluating this aspect of the decision, the Cities Initiative respectfully requests that the Council:

1. ***Apply fundamental principles of contract interpretation and statutory construction and expressly clarify how the Council will evaluate "no reasonable water supply alternative" in a manner that is consistent with those principles and the Compact;***
2. ***In light of the substantial reduction in service area after the most recent EIS submission, require the Applicant to provide supplemental analysis detailing***

the actual demand forecasts proposed by the Applicant and thorough review of potential alternatives for supplying all or part of that demand;

3. ***Permit public comment on the supplemental analysis regarding the demand and alternatives; and***

4. ***Only after undertaking the three actions above, evaluate whether the as-narrowed proposal still meets the clarified criteria for an exemption for a Community in a Straddling County. As explained infra Section III.A, the Council should find it does not.***

1. The Compact Council applied the incorrect standard for evaluating whether Waukesha has "no reasonable water supply alternative" and must clarify the standard to be applied to this and any future application by a Community in a Straddling County.

The Compact permits a Diversion to a Community within a Straddling County only if "[t]here is no reasonable water supply alternative within the basin in which the community is located, including conservation of existing water supplies." Compact § 4.9(3)(e). The Compact does not define "no reasonable water supply alternative."

Although the Compact was adopted by the eight states and approved by Congress, only the State of Wisconsin chose to adopt a definition of "reasonable water supply alternative. Wisconsin defined "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." Wis. Stat. § 281.346(1)(ps) (hereinafter the "Wisconsin Definition"). In the first-ever consideration of the Community in a Straddling County exception, the Regional Body and Council accepted the only definition offered by the Applicant and the State

of Wisconsin, the Wisconsin Definition. *See* Final Decision Section § II.4 (incorporating and analyzing factors from the Wisconsin Definition).[12]

However, the Compact Council was not and is not bound to follow the Wisconsin Definition. Nor is this definition appropriate under the fundamental principles by which compacts are to be interpreted and applied: (1) the plain language of the Compact does not support it; (2) it is inconsistent with the aims of the Compact; (3) basic principles of contract (and compact) interpretation require following existing definitions and common usage of these terms, which call for a definition of "reasonable water supply alternative" that is very different from that used by Wisconsin; and (4) it defies black letter principles of contract interpretation by making an explicit Condition in the Compact superfluous.

[12] The Final Decision and the on-the-record deliberation by the Compact Council do not reflect any attempt at setting a clear and consistent standard for "no reasonable water supply alternative" in terms of what the Compact permits and the proper construction of the Compact in that regard. *See* Final Decision. (*See also* Great Lakes Compact Council Report of Proceedings Held Tuesday, June 21, 2016, *available at* http://www.waukeshadiversion.org/media/1837/great-lakes-compact-council-transcript-6-21-16.pdf (containing no discussion of the actual standard for "no reasonable water supply alternative").) The Findings of the Regional Body and the on-the-record meetings of the Regional Body similarly do not firmly set out the Compact's criteria for "no reasonable water supply alternative, nor detail the basis for construing the Compact in the manner reflected in the Findings. (*See* Regional Body Findings; record of hearing and meeting transcripts *available at* http://www.waukeshadiversion.org/comments/.) By all indications, the Regional Body, and by extension the Compact Council, simply deferred to Wisconsin's definition. (*See, e.g.,* Transcript of Meeting before the Great Lakes-St. Lawrence River Water Resources Board Regional Body on April 21, 2016, at 105:11-117:20, *available at* http://www.waukeshadiversion.org/media/1801/april-21-2016-part-1.pdf (discussion among Julie Ekman (Minnesota), Eric Ebersberger (Wisconsin), and Grant Trigger (Michigan) wherein Ms. Ekman questioned whether the findings ostensibly related to the "no reasonable water supply alternative" criteria were adequate as written and where the aspects being discussed regarding reasonableness came from, and Mr. Ebersberger explained that they were factors used by Wisconsin in its technical review based on the definition that Wisconsin has but the Compact does not, and that the language used in the draft findings "paragraph on reasonable water supply alternative was just to try to mirror the state's [Wisconsin's] definition of that").)

(a) The Wisconsin Definition is not part of the Compact and does not set the standard for the Council's determination of whether an applicant has "no reasonable water supply alternative."

As an initial and critical matter, the Compact Council and other states are not bound by Wisconsin's unilateral decision to enact a self-serving definition. Compacts are both contracts among the enacting states and, once approved by Congress, Federal law. *Texas v. New Mexico*, 482 U.S. 124, 128, (1987). Congressionally-sanctioned compacts are subject to federal construction. *United States v. Jones*, 454 F.3d 642, 646 (7th Cir. 2006) (citing *Alabama v. Bozeman*, 533 U.S. 146, 149, (2001)); *also Alcorn v. Wolfe*, 827 F. Supp. 47, 52-53 (D.D.C. 1993) ("Because the compact creating the MWAA was congressionally sanctioned in accordance with the Compact Clause, it is a federal law subject to federal construction, notwithstanding its genesis in the enabling acts of Virginia and the District of Columbia.").

One party state may not unilaterally alter the meaning of a compact by its own enactment, a principle this Compact expressly affirms. Compact § 9.3 ("[A]ny 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."); *State ex rel. Dyer v. Sims*, 341 U.S. 22, 28, 71 S. Ct. 557, 560, 95 L. Ed. 713 (1951) ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States.").[13] The fact that Wisconsin

[13] *See also*, *e.g.*, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42, (1994) ([E]ntities created by compact . . . are not subject to the unilateral control of any one of the States that compose the federal system."); *Bush v. Muncy*, 659 F.2d 402, 413 (4th Cir. 1981) (rejecting additional provisions adopted by Maryland that went beyond the Interstate Agreement on Detainers, reasoning "that what the party states corporately have intended in respect of their reciprocal obligations and dependencies under such a compact rather than what any party state unilaterally may have intended defines the federally based rights and duties created. In consequence, any unilateral attempt by a party state substantially to alter the intended operation of the compact as

adopted its own definition of "reasonable water supply alternative" cannot and does not change the Compact, bind the Council, or dictate the resolution of Waukesha's Application.

(b) The Compact must be interpreted according to fundamental principles of contract construction and statutory interpretation.

Because compacts are both statutes and contracts between states, they are construed as contracts, following principles of contract law, and are properly subject to tools of statutory interpretation. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987); *also, e.g., Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130, 186 L. Ed. 2d 153 (2013). Fundamental principles applicable to compact interpretation, including determining the critical and precedential standard for "no reasonable water supply alternative" in this Compact, include:

A. First examining the express terms of the compact as the best indicator of the parties' intent and construing and applying the compact in accordance with its terms.[14]

B. If a compact is silent or ambiguous, looking to the stated aim of the compact and the interpretation that would effectuate that purpose.[15]

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determined by looking to the 'terms of (the) consensual agreement' must yield under the Supremacy Clause." (internal citation omitted, quoting *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 279, 79 (1959)); *Alcorn v. Wolfe*, 827 F. Supp. 47, 52-53 (D.D.C. 1993) ("In light of the Supremacy Clause to the United States Constitution, Art. VI, cl. 2, and because compacts are analogous to contracts between states, the terms of the MWAA compact cannot be modified unilaterally by state legislation and take precedence over conflicting state law." (internal citations omitted).

[14] *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130, 186 L. Ed. 2d 153 (2013); *Montana v. Wyoming*, 563 U.S. 368, 374 n. 4, 375 (2011); *see Texas v. New Mexico*, 482 U.S. 124, 128, (1987) (A compact "remains a legal document that must be construed and applied in accordance with its terms."); *also* Restatement (Second) of Contracts § 203(b) (1979).

[15] *E.g.*, *Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5, 237, 239 (1991) (choosing the only interpretation that harmonizes with the apparent intent of the compact drafters and Congress after resorting to extrinsic evidence and noting that "we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous." *Green v. Bock Laundry Machine Co.,* 490 U.S. 504, 511, 109 S. Ct. 1981, 1985–86, 104 L .Ed. 2d 557 (1989); *Pierce v. Underwood,* 487 U.S. 552, 564–565 (1988); *Blum v. Stenson,* 465 U.S. 886, (1984).); *see also, e.g., Int'l Union of Operating Engineers, Local 542 v. Delaware River Joint*

C. If the contract or statute is silent on an issue, such as not supplying a definition for a term, looking to common law principles and other statutes using the same or similar terms.[16]

D. Giving operative effect to all words and provisions under the fundamental principle that drafters did not intend to include provisions or language that are superfluous.[17]

Toll Bridge Comm'n, 311 F.3d 273, 275-76 (3d Cir. 2002) (affirming decision that did not superimpose state law requirements or procedures onto the compact because the court could find no legislative intent to include those requirements in the compact).

[16] *E.g.*, *Montana v. Wyoming*, 563 U.S. 368, 375 n.4, 386-88 (2011) (in context of a water appropriation compact, looking to the doctrine of appropriation and Western water law generally and determining "beneficial use" to mean a type of use, rather than an amount, because that "plain reading makes sense in light of the circumstances existing in the signatory States when the Compact was drafted," because the Court would expect "far more clarity" if the parties intended "to drastically redefine the term into shorthand for net water consumption," and because other parts of the compact would make little sense if the compact "effected a dramatic reframing of ordinary appropriation principles"); *New Jersey v. Delaware*, 552 U.S. 597, 610 (2008) (noting that in "[i]nterpreting an interstate compact, "[j]ust as if [we] were addressing a federal statute," *New Jersey v. New York*, 523 U.S. 767, 811, 118 S. Ct. 1726, 140 L.Ed.2d 993 (1998), it would be appropriate to construe a compact term in accord with its common-law meaning, *see Morissette v. United States,* 342 U.S. 246, 263, 72 S. Ct. 240, 96 L. Ed. 288 (1952)" and trying to determine "the import of the novel term 'riparian jurisdiction'" in a compact); *see also Yates v. United States*, 354 U.S. 298, 309 (1957) ("[A]doption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretation of the wording . . . [and] a presumption of legislative intent . . . which varies in strength with the similarity of the language, the established character of the decisions in the jurisdiction from which the language was adopted and the presence or lack of other indicia of intention."); *Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 365 F. Supp. 2d 1146, 1155 (D. Nev. 2005) (noting that fact that a compact contained language similar to the previously-enacted National Environmental Policy Act ("NEPA") and had a section of NEPA included in it favored an interpretation consistent with the interpretation used in NEPA).

[17] *See, e.g., Montana v. Wyoming*, 563 U.S. at 388 (indicating that given interpretation was appropriate because other parts of the compact would make little sense if the Court followed the rejected interpretation); *New Jersey v. Delaware*, 552 U.S. at 611 (rejecting proposed meanings of "riparian jurisdiction" as being the same as "jurisdiction" or as the more distinct "exclusive jurisdiction" because those meanings would not give operative effect to each word in the compact); *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) ("The cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section . . . . "); *Doe v. Ward*, 124 F. Supp. 2d 900, 913 (W.D. Pa. 2000) (adopting interpretation of Interstate Agreement on Detainers, also known as the "Parole Compact," that is consistent with the 'fundamental rule of construction

(c) Fundamental principles of contract construction and statutory interpretation compel the Council to reject the Wisconsin Definition and adopt a new standard.

Superimposing the Wisconsin Definition onto the Compact violates these fundamental contract and statutory interpretation principles because it far exceeds the plain language of the Compact, results in an interpretation that is inconsistent with the purpose of the Compact, ignores other extant uses of these terms, and makes the provision superfluous.

First, the plain language of the Compact specifies that "[a] Proposal to transfer Water to a Community within a Straddling County that would be considered a Diversion under this Compact shall be excepted from the prohibition against Diversions, provided that it satisfies all of the following conditions: . . . [that t]here is no reasonable water supply alternative within the basin in which the community is located, including conservation of existing water supplies . . . ." Compact § 4.9.3.d. The Compact does not provide a definition of what constitutes a "reasonable water supply alternative" or set out any criteria for making that determination, although Black's Law Dictionary (10th Ed.) defines "reasonable" holistically and flexibly as "[f]air, proper, or moderate under the circumstances, sensible."

The Compact does use the term "reasonable" in a number of other instances, including one that highlights the absence of specific, disqualifying factors in the formulation of "no reasonable water supply alternative." In Section 4.10.1, the Compact requires that the Parties each establish a program to manage and regulate New or Increased Withdrawals and Consumptive Uses. It lists five criteria that any proposed New or Increased Withdrawal or Consumptive Use subject to the

[ ] that effect must be given to every part of a statute or regulation, so that no part will be meaningless' and rejecting an interpretation that would render a subsection meaningless (quoting *Sekula v. Federal Deposit Ins. Corp.*, 39 F.3d 448, 454 (3d Cir.1994)).

Compact must meet to be approved as appropriate under the Party's program, including the criterion that:

> The proposed use is reasonable, based upon a consideration of the following factors:
>
> a. Whether the proposed Withdrawal or Consumptive Use is planned in a fashion that provides for efficient use of the water, and will avoid or minimize the waste of Water;
>
> b. If the Proposal is for an increased Withdrawal or Consumptive use, whether efficient use is made of existing water supplies;
>
> c. The balance between economic development, social development and environmental protection of the proposed Withdrawal and use and other existing or planned withdrawals and water uses sharing the water source;
>
> d. The supply potential of the water source, considering quantity, quality, and reliability and safe yield of hydrologically interconnected water sources;
>
> e. The probable degree and duration of any adverse impacts caused or expected to be caused by the proposed Withdrawal and use under foreseeable conditions, to other lawful consumptive or non-consumptive uses of water or to the quantity or quality of the Waters and Water Dependent Natural Resources of the Basin, and the proposed plans and arrangements for avoidance or mitigation of such impacts; and,
>
> f. If a Proposal includes restoration of hydrologic conditions and functions of the Source Watershed, the Party may consider that.

Compact § 4.11.5. This detailed, six-factor list of considerations for determining whether a proposed use is "reasonable" indicates that the Compact drafters enumerated limiting factors if they found particular factors to be determinative in evaluating reasonableness. It stands in stark contrast to the bare use of the word "reasonable" in Section 4.9.3, where the drafters declined to provide such detailed, dispositive criteria for determining whether there is "no reasonable water supply alternative." The Compact Council improperly went beyond the plain language of the Compact when it superimposed the factors from the Wisconsin Definition onto a Compact section where the drafters declined to incorporate such determinative factors.

Second, use of the Wisconsin Definition violates the fundamental principle of looking to the stated aim of a compact and the interpretation that would effectuate that purpose. *See supra* Section III.B.1.b, n.14. The Compact's purpose, goals, and framework are highly protective of the precious Great Lakes water supply and ecology and focus on strictly limiting Diversions that may threaten them, not just individually, but also considering the cumulative impact of other Diversions or increased uses occurring in the future.

Compact findings include that "[t]he Waters of the Basin are precious public natural resources shared and held in trust by the States," that "Future Diversions and Consumptive Uses of Basin Water resources have the potential to significantly impact the environment, economy and welfare of the Great Lakes—St. Lawrence River region," that "[c]ontinued sustainable, accessible and adequate Water supplies for the people and economy of the Basin are of vital importance," and that "[t]he 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." Compact § 1.3.1.a, d-f. Purposes of the Compact emphasize communal action to protect the Great Lakes water supply.[18] The Compact also includes a commitment on the part of the Compact Council to water conservation and efficiency objectives and includes significant sections and processes related to those objectives. *E.g.*, Compact § 4.2.

A commitment to protecting the Great Lakes water supply and a precautionary principle are at the heart of any review of a Proposal for a potential Diversion. "The Parties agree that the protection of the integrity of the Great Lakes – St. Lawrence River Basin Ecosystem shall be the

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[18] Purposes include to "act together to protect, conserve, restore, improve and effectively manage the Waters and Water Dependent Natural Resources of the Basin under appropriate arrangements for intergovernmental cooperation and consultation . . . ," to "facilitate consistent approaches to Water management across the Basin," and to "prevent significant adverse impacts of Withdrawals and losses on the Basin's ecosystems and watersheds." Compact § 1.3.2.a, d, f.

overarching principle for reviewing Proposals subject to Regional Review, recognizing uncertainties with respect to demands that may be placed on Basin Water, including groundwater, levels and flows of the Great Lakes and the St. Lawrence River, future changes in environmental conditions, the reliability of existing data and the extent to which Diversions may harm the integrity of the Basin Ecosystem." Compact § 4.5.1.d.

The Compact strictly bans new Diversions of Great Lakes water and mandates that the Compact Council use "caution" in potentially approving a Diversion under the limited Exception provisions, including the provision under which Waukesha applied. *See* Compact § 4.9.3.e (directing the Council to use caution in allowing Diversion from the Great Lakes), §4.8 (establishing a general prohibition on diversions). The Compact specifies that any Proposal for an exception, under any of the three exceptions to the prohibition on Diversions, "may be approved as appropriate *only when*" a number of criteria are met, including:

> a. The need for all or part of the proposed Exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies;
>
> b. The Exception will be limited to quantities that are considered reasonable for the purposes for which it is proposed;
>
> . . .
>
> d. The Exception will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Basin with consideration given to the potential Cumulative Impacts of any precedent-setting consequences associated with the Proposal . . . .

Compact § 4.9.4.

These restrictions within the Compact are strong evidence that the drafters, enacting States, and consenting United States Congress intended for the Compact Council to approve Diversions only in extreme and exceptional circumstances; not simply because a community's alternative water source is more expensive, requires greater commitment to conservation and efficiency, or

requires additional—yet entirely feasible and commonly-used—treatment methods in comparison to drawing water from the Great Lakes. Further, the Compact compels close consideration of the possible cumulative effect of any Withdrawal, Diversion, or Consumptive Use, no matter how individually minor[19] it may seem in comparison to the scale of the Great Lakes, and to the precedent set by any diversion that may be allowed.[20]

Contrary to the Compact's protective and highly conservative findings, goals, purposes, and framework that strongly restrict Diversions, the Wisconsin Definition improperly creates a default presumption in favor of the Diversion, as opposed to the Diversion being only a last resort when other alternatives are unavailable. Under the Wisconsin Definition, an Applicant does not have a reasonable water supply alternative, and may qualify for a Diversion, if the alternative is not as "environmentally sustainable" as the Diversion of Great Lakes water, is not as "protective of public health" as the Diversion, is not "similar in cost to" the Diversion, or would "have greater adverse environmental impacts" than the diversion. Wis. Stat. § 281.346(1)(ps). These detailed factors are irreconcilable with the clear and overwhelming protective purpose of the Compact.

The Wisconsin Definition sets a low bar, especially in comparison to the high bar established by the Compact. Under the Wisconsin definition, applicants do not even have to show

[19] Compact Section 1.2 defines "Cumulative Impacts" as "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, 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*."

[20] Compact Section 4.9.4.d allows approval of an Exception to the prohibition on Diversions *only when* "[t]he Exception will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Basin with *consideration given to the potential Cumulative Impacts of any precedent-setting consequences* associated with the Proposal." *See also supra* Section II.

substantially higher cost or *substantially* greater environmental impact. Further, the Wisconsin Definition does not directly incorporate or account for conservation which *is explicitly required* in the Compact.

Despite this ill fit, the Compact Council based its findings on this Wisconsin Definition.

The Compact Council erred in using the multi-factored Wisconsin Definition as the standard for determining whether the "no reasonable water supply alternative" criteria was met.

Third, the Wisconsin Definition, and the comparison to Great Lakes water inherent in it, is irreconcilable with accepted, legal options for water supplies and other statutes using similar terms. Common usage of "reasonable," when considered with existing laws and regulations regarding water supplies, and existing definitions of "reasonable alternative" in other Federal laws, calls for a definition of "reasonable water supply alternative" that is very different from that used by Wisconsin. The Compact Council could and should have followed a standard that measures the alternatives against what could be and likely would be legally allowable under Federal and state laws and regulations, against what other communities in the region are legally using for their own water supplies, or against other existing environmental laws.

At its most basic, "reasonable" means "[f]air, proper, or moderate under the circumstances, sensible." Black's Law Dictionary (10th ed.). The bounds of existing permits and what Federal and state statutes and regulations permit for other communities, including other nearby communities, provides a strong guide for what is "fair," "proper," or "sensible." As detailed further at pages 46-47, other communities in Wisconsin and elsewhere in the region face the same challenges as Waukesha but have employed treatment and conservation measures to address these challenges and are legally operating their water supplies under permits issued by state agencies,

including WDNR.[21] Nothing in the communal, protective language of the Compact requires providing Applicants with a water supply that requires less treatment,[22] or with water that avoids long-term sustainability considerations and conservation obligations inherent in use of a smaller, more bounded resource like an aquifer when neighboring communities are subject to those very same considerations and obligations. It is hardly "fair" or "sensible" to employ criteria that presume Applicants, such as the City of Waukesha, are entitled to something far beyond what their neighbors—some of whom are also Communities in a Straddling County—are legally using and conserving.

Looking to not just what laws and regulations permit and what other communities are doing, but to the definition provided in other statutes and regulations, Wisconsin is alone in its narrow interpretation of what constitutes a "reasonable alternative." While no other state has enacted legislation defining "no reasonable water supply alternative" in the context of the Compact, other Federal environmental laws include precedent for what constitutes a reasonable alternative in similar analyses.

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[21] For instance, other communities in the region draw from the same deep aquifer as Waukesha and operate under permits that allow them to treat the water for radium and to legally dispose of the byproducts of that treatment. These other communities require additional water supply treatment to be as healthful as Great Lakes water in spite of radium or other contaminants, are allowed disposal of radium-containing treatment waste that may cause an adverse environmental effect that would not occur with Great Lakes water, or face longer-term sustainability issues or more local environmental impacts due to drawdowns of the local supply that could be avoided through access to Great Lakes water.

[22] As detailed *infra* Section III.B.2.b, communities that draw upon the same deep aquifer as Waukesha have been on notice of high levels of radium for many years. Other communities invested in treatment options to address the radium concern and have been operating within that standard for years. Waukesha did not. It instead challenged the requirement that it meet radium standards, which it only violates during limited periods of peak usage that are driven in large part by discretionary uses such as lawn watering. After being ordered by a court to comply with radium standards, it then turned to the Great Lakes instead of adapting to its own resources, as its neighbors had. *See* App. Ex. 12, August 28, 2015 Comment Letter from Great Lakes Coalition, at 2.

For instance, the Endangered Species Act ("ESA") permits an exemption from the general ban on projects jeopardizing an endangered species if the Endangered Species Committee determines that, among other things, "there are no reasonable and prudent alternatives to the agency action." 16 U.S.C.A. § 1536(h)(1)(A)(i). Enabling regulations for the ESA specify that a "reasonable and prudent alternative" is an option "that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species." 50 C.F.R. § 402.02. The Endangered Species Committee is charged with making findings—including that there is no reasonable and prudent alternative to the proposed agency action—similar to what the Council makes under the Compact in evaluating a Proposal, and in 37 years has only twice found that there is no such alternative. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 666 F. Supp. 2d 1137, 1150-52 (E.D. Cal. 2009) (detailing role of Endangered Species Committee and process for analyzing requested actions that would threaten an endangered species); *see also* Hannah Gosnell, *Section 7 of the Endangered Species Act and the Art of Compromise: The Evolution of A Reasonable and Prudent Alternative for the Animas-La Plata Project*, 41 Nat. Resources J. 561, 562-63 (2001) ("the FWS rarely, if ever, uses Section 7 of the ESA to prohibit a federal project outright. More often than not, the agency identifies a "reasonable and prudent alternative" (RPA) in its Biological Opinion, allowing the project to go forward in modified form.").

The Wisconsin Definition followed by the Compact Council in making the precedential determination of what constitutes "no reasonable water supply alternative" is unwarranted and incompatible with the detailed regulatory schemes that dictate how to make water supplies

adequate, feasible, and legal. It also is inconsistent with the sound framework in the ESA, a statute with similar resource-protective goals, that views "reasonable" through the broader lens of feasibility and accomplishing relevant goals. The Compact Council could better achieve the protective purpose of the Compact with a standard for evaluating whether there is "no reasonable water supply alternative" based on:

1. Whether a possible alternative would be allowed under existing regulations;
2. Whether a possible alternative is consistent with existing permitted water uses and criteria in the region or with permitting exemptions that have been granted by the relevant regulators; and
3. Whether a possible alternative is feasible.

Fourth and finally, the Wisconsin Definition defies black letter principles of contract interpretation by making an explicit and critically important Condition in the Compact superfluous. The Wisconsin Definition requires the alternative to be (1) as "environmentally sustainable" as the diversion; (2) as "protective of public health" as the diversion; and (3) "similar in cost to" the diversion, as well as to (4) "not have greater adverse environmental impacts." Wis. Stat. § 281.346(1)(ps). Taken together, it is hard to imagine a water supply that could qualify as a reasonable alternative, as the process of elimination during the application process and the Findings in the Final Decision showed. For example:

- The Compact Council found use of the deep aquifer would not be sustainable because continued use of the aquifer will cause it to continue to decline or, at a minimum, will not return it to pre-development levels. Final Decision § II.3a. If an aquifer remaining at or near current levels that are adequate to support existing withdrawals, but being below pre-development levels, is a basis to deem an alternative "not reasonable," then

presumably few, if any, aquifer options are acceptable because it will be almost impossible for the aquifer to return to pre-development levels.

- The Compact Council found use of surface water options will not be as protective as the Great Lakes because of greater risk for contamination. Final Decision § II.4a. The Originating Party's Technical Review presumes that surface water options in general are not reasonable alternatives because they are more susceptible than the larger bodies of water to certain types of contamination, such as bacterial contamination. However, even Great Lakes water supplies have and are treated for these types of contaminants, and routine treatment methods are adequate to make these supplies safe for consumption. (WDNR Technical Review pp. 29-30.) Nonetheless, this finding about surface water being more subject to contamination renders it not "as protective of public health" as Great Lakes water and precludes the use of any surface water alternatives generally.
- The Compact Council found treatment of radium-contaminated water poses risks to the environment and public health, and it therefore does not equal Great Lakes water on those attributes. Final Decision § II.4b. This criterion and finding presumably excludes the use of the deep water aquifer across a significant swath of the region, as many of Waukesha's neighbors rely on the aquifer and treat the radium to make the water safe for consumption.

If any and each of these comparisons between Great Lakes water and a potential alternative can render the alternative "not reasonable," then it is hard to see how this Condition in the Compact could ever be a basis for rejecting an application for a Diversion. It presumably is not the Compact Council's intent to set the precedent that an express Condition in the Compact is superfluous. In

any further review or determination on this Application or otherwise, the Compact Council should specifically adopt and apply a definition of "no reasonable water supply alternative" that gives effect to the provision.

Taking into account all of these fundamental principles of compact construction, allowing the Wisconsin Definition to stand as precedent for what a "no reasonable water supply alternative" means and as the standard against which future Diversion applications will be measured is truly where the proverbial floodgates would open. It permits virtually any Community in a Straddling County to claim a share of Great Lakes water because its existing or available supply is by some measure not as good as Great Lakes water. The Compact Council has set an unsustainable precedent that is not protective of the long-term viability of the Great Lakes-St. Lawrence River Basin, in conflict with the clear intent and purposes of the Compact.

Therefore, to achieve the goals of the Compact, at a minimum the Compact Council must clarify the proper standard for evaluating whether an Applicant has "no reasonable water supply alternative." A standard consistent with the Compact would consider instead (a) whether a possible alternative would be allowed under existing regulations; (b) whether a possible alternative is consistent with existing permitted water uses and criteria in the region or with permitting exemptions that have been granted by the relevant regulators; and (c) whether a possible alternative is feasible.

2. Waukesha has water supply alternatives that are, in fact, reasonable, under any standard.

Regardless of the standard applied, Waukesha has a reasonable water supply alternative within its own Mississippi River basin. The determination by the Compact Council that Waukesha's existing groundwater sources are not a reasonable water supply alternative is contrary to facts presented in the record by numerous parties. Technical reports presented to WDNR by

Nicholas-h2o ("Nicholas"), GZA GeoEnvironmental, Inc. ("GZA"), and Mead and Hunt ("Mead & Hunt") provide ample evidence that Waukesha's deep and shallow groundwater aquifers are sustainable and reasonable sources of drinking water for Waukesha (and even more so in light of the reduced demand). These technical reports show that there are several potential alternatives that can provide sufficient drinking water for Waukesha's current and future needs without significant environmental impact or unreasonable costs, including: (1) Waukesha's existing system of deep and shallow groundwater wells, with the addition of treatment and blending facilities and (2) Waukesha's existing wells with additional riverbank inducement ("RBI") shallow wells and treatment and blending facilities. Due to the availability of these other water supplies, Waukesha has not established that it has no reasonable water supply alternative, a necessary and crucial requirement for a Diversion under the Compact.

(a) The groundwater alternatives are a sustainable source of drinking water for Waukesha's realistic future water demand.

The Applicant can use existing deep and shallow water wells with the addition of water treatment infrastructure to remove contaminants, including radium, to meet its current and future water demand needs. GZA, Nicholas, and Mead & Hunt all found that Waukesha can meet drinking water demand and water quality standards in a sustainable use of Waukesha's groundwater. (App. Ex. 9, James F. Drought, Jiangeng Cai, and John C. Osborne, July 9, 2015, "Non-Diversion Alternative Using Existing Water Supply With Treatment" ("GZA Report") p. 9; App. Ex. 4, "An Analysis of the City of Waukesha Diversion Application", February 2013 and updated November 25, 2013 ("Nicholas Report") p. 31; App. Ex. 8, "City of Waukesha's Application for Diversion of Lake Michigan Water," April 6, 2015, by Mead and Hunt ("M&H Report") pp. 32-33.) Notably, one of the primary reasons that WDNR rejected the groundwater alternative water supply sources was due to Waukesha's and WDNR's determination that the

groundwater alternatives could not sustainably produce enough drinking water to meet the higher volume of water needed to provide for Waukesha's requested expanded service area. (WDNR EIS p. 7; WDNR Technical Review p. 45.) However, the Compact Council has determined that the expanded service area requested by Waukesha was not consistent with the Compact's requirements and has limited Waukesha's service area to its existing service area, with a few exceptions.[23] Thus, the analyses done by GZA, Nicholas, and Mead & Hunt—all of which evaluated the groundwater alternatives based on drinking water needs in Waukesha's existing service area—are valid and highly relevant to the Compact Council's determination of whether a reasonable water supply alternative is available to Waukesha

Although the Compact Council restricted the size of Waukesha's service area, it did not conduct or require any additional analysis as to whether Waukesha had a reasonable water supply alternative for the smaller sized service area. Instead, the Compact Council concluded that the deep aquifer currently used by Waukesha as its primary source of drinking water is not sustainable based on existing analyses. Final Decision § II.3.c. However, particularly in light of the reduced size of Waukesha's service area, the Compact Council's finding is not consistent with (1) empirical trends in Waukesha's water use or (2) USGS data for the deep aquifer used by Waukesha.

First, the City of Waukesha's water use has declined steadily and predictably over the past 40 years and Waukesha's projections of increased future water demand are not realistic. Both GZA and Nicholas noted that Waukesha's per capita water use, measured in gallons per capita day ("gpcd") has steadily decreased in a linear fashion since 1970. (App. Ex. 9, GZA Report p. 9;

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[23] Of course, as discussed in Section III. A, these exceptions are inconsistent with the Compact's mandates, and therefore the Diversion should not have been approved on that basis alone.

App. Ex 4, Nicholas Report pp. 10-11.) As seen in the Figure below, Waukesha's gpcd was close to 200 in 1970 and was well below 100 in 2014.

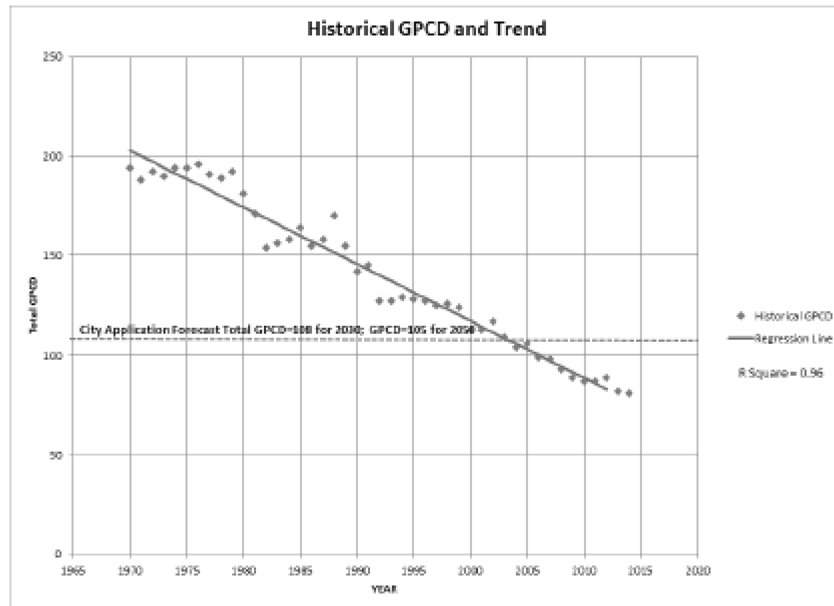

Figure 2: Historical GPCD and Trend

(App. Ex. 9, GZA Report p. 7.) Despite the continuing decrease in per capita water use, Waukesha used the average per capita water use over the past 10 years when it calculated future water demands. (CH2MHill, 2013, City of Waukesha Water Supply Service Area Plan, Vol. 2 of 5.) Thus, Waukesha used 108 gpcd when it calculated 2030 water demand and 105 gpcd when it calculated 2050 water demand. (App. Ex. 9, GZA Report p. 6.) In contrast, the gpcd in 2010 was 86, and has continued to decrease in subsequent years. (App. Ex. 4, Nicholas Report p. 10.)

If Waukesha had used a more realistic per capita water use amount, its calculated future water demand would be significantly lower than what it requested and lower than the Diversion amount approved by the Compact Council. As GZA calculated, the average gpcd from 2008-2012 was 89.1. Using that number in future demand calculations leads to a total average day demand of 6.7 million gallons per day at Waukesha's future 2050 population; significantly lower than the 8.2 million gallons per day approved by the Compact Council or the 10.1 million gallons per day

requested by Waukesha. (App. Ex. 9, GZA Report p. 8.) In sum, the Applicant's forecast for water demand is not consistent with declining water use trends or based on the most recent available data.

Second, U.S. Geological Survey ("USGS") (*see* App. Exs. 2&3) data and Southeastern Wisconsin Regional Planning Commission ("SEWRPC") modeling show that the water levels in the deep aquifer currently used by Waukesha have rebounded in recent years and are currently at a sustainable level. (App. Ex. 9, GZA Report p. 12.) Although water levels in the deep sandstone aquifer have undoubtedly declined since pre-development times, recent data show that water levels rose approximately 50-115 feet from 2000 to 2012. (*Id.* p. 13). This is likely due to overall decreases in pumping from the deep aquifer caused by lower per capita demand and increased use of shallow groundwater wells in Waukesha and neighboring communities. Waukesha has maintained that there will be increased demand in the near future from Waukesha or other municipalities using the same deep aquifer that will cause the water levels to decline once again. (*See* Nov. 25, 2015 Memorandum from John Jansen, Leggette, Brashears & Graham, Inc. to Waukesha Water Utility.) However, this argument fails to acknowledge the recent downward trend in water use and pumping from the deep aquifer. Communities are implementing water conservation efforts —as required by Compact—and finding other sources, like shallow groundwater, to supplement pumping from the deep aquifer and the result is that the deep aquifer is rebounding to a sustainable level. If pumping from the deep aquifer remains at 2000 rates, SEWRPC modeling shows that groundwater levels will decrease by only 4%, or less than 16 feet in the next 20 years. (App. Ex. 9, GZA Report p. 12.) If pumping decreases from 2000 levels, as would be likely under recent water use and pumping trends, the deep aquifer levels will continue to rise.

Overall, the declining trends in water use and rebounding groundwater levels show that a groundwater alternative that uses Waukesha's deep aquifer is a sustainable alternative water source.

(b) The groundwater alternatives are reasonable in light of their minimal environmental impacts.

The Compact Council also rejects the groundwater alternatives because of their potential environmental impacts, including (1) radium contamination in the deep aquifer; (2) surface water impacts to streams and wetlands from shallow aquifers; and (3) impact to groundwater located in the Great Lakes Basin. However, none of these impacts are significant, nor do they preclude the groundwater alternative from being a reasonable water supply alternative.

First, although the deep aquifer contains radium at levels that have occasionally caused Waukesha to exceed drinking water standards for radium (primarily only in the higher use summer months), the groundwater can be effectively treated and blended so that it meets all drinking water standards. In fact, WDNR has noted that reverse osmosis ("RO") treatment is used for successful radium treatment by multiple other public water systems in nearby states, including in some systems that are larger than Waukesha's. (WDNR EIS § 4.2.2.1 at 109.) In addition, WDNR has stated that systems of a similar size to the Waukesha system typically discharge wastewater from RO treatment to the sanitary sewer system and that the radium in wastewater sludge from RO treatment is approved under Waukesha's current WPDES permit. (WDNR EIS § 4.2.2.1 at 109.) GZA has also presented evidence of alternative treatment options in the event that RO is not feasible. For example, the City of Brookfield and the City of Pewaukee Water Utilities use a radium treatment technology known as Water Remediation Technology ("WRD") Z-88®, which removes radium by passing contaminated water through a fluidized bed of natural adsorptive media – without adding chemicals, generating liquid waste, or wasting water. (App. Ex. 14, Feb.

29, 2016 GZA Response to Comments pp. 6-7; App. Ex. 19, May 6, 2016 GZA Response to Regional Body pp. 2-3.) In light of these widely-used treatment options, groundwater with low levels of radium in the water supply can still be a reasonable alternative that can provide clean drinking water to the people of Waukesha.

Second, environmental impacts to surface water resources are overstated by the alternatives presented by the Applicant. Under the groundwater alternative that utilizes only Waukesha's existing deep and shallow groundwater wells, there will be no additional environmental impacts as there will be no new wells. If Waukesha were to supplement its existing drinking water well system with new shallow RBI wells, there could be some environmental impacts to private wells and wetlands. However, the careful placement of the RBI wells can greatly reduce the environmental impact to a reasonable level. (App. Ex. 8, M&H Report pp. 22-23.) The Application evaluates a system of RBI wells that are located in close proximity to a sensitive wetland area. Mead & Hunt evaluated environmental impacts under a RBI well system that was more carefully sited so as to minimize impacts to surface water. (Id. p. 22.) Under the Mead & Hunt analysis, which used the water demand numbers proposed by Waukesha (average daily demand of 10.1 million gallons per day) the number of impacted private wells dropped from 3,000 in the Application to 260, and the wetlands impacted from 3,000 acres to 600 acres. (M&H Report p. 23.) Of course, the Final Decision limited Waukesha's average daily demand to 8.2 million gallons per day, thus these environmental impacts would be even less significant. Thus, after more careful evaluation, the groundwater alternatives have either no increased environmental impact or a reasonable environmental impact that can be minimized through thoughtful planning.

Finally, another reason given in the Final Decision justifying dismissal of the groundwater alternative is that withdrawals from the deep aquifer are replenished in part by the Lake Michigan

watershed. Final Decision § II.4.c-e. This is a result of the interconnection between the deep aquifer and the groundwater in the Lake Michigan Basin. Final Decision §§ II.4.c, II.4.e. Thus, the Compact Council maintains that continued use of the deep aquifer will result in water loss to Lake Michigan, as this water is not returned. Final Decision § II.4.e. However, it is important to note that although WDNR estimates that 30% of withdrawals by Waukesha from the deep aquifer are replenished by water from the Lake Michigan Basin, water from Lake Michigan accounts for only 4% of the replenishing water to the deep aquifer. (WDNR EIS § 4.3.2.1 at 128; App. Ex. 1, USGS Water Source Memo.) To put this amount of water in context, Waukesha has traditionally lost approximately 14% of water to consumptive use. (WDNR Technical Review p. 2.) Additionally, WDNR has stated that Waukesha's requested annual diversion under the Application of 10.1 million gallons per day (absent return flow) does not constitute a significant change in Lake Michigan water levels. (WDNR EIS § 4.3.3.1.1 at 144.) If only 4% of the Applicant's current withdrawal from the deep aquifer is replenished by the Lake Michigan loss, this also does not constitute a significant change in Lake Michigan water levels. Furthermore, the amount of Lake Michigan Basin water replenishing the deep aquifer is also not significant. At 30%, about 2.4 million gallons per day of the water pumped by Waukesha is replenished by Lake Michigan Basin water. (App. Ex. 19, May 6, 2016 GZA Response to the Regional Body p. 4.) The recharge inflow to the entire Lake Michigan Basin is estimated to be 16,220 million gallons per day. (*Id.*) The 2.4 million gallons per day replenishing the Waukesha pumping from the deep aquifer is approximately 0.015% of the Lake Michigan Basin's recharge inflow.

In addition, although the Compact does allow for consideration of whether the existing water supply is derived from groundwater that is hydrologically interconnected to Waters of the Basin, that consideration comes *only after* the applicant establishes all of the seven conditions that

an applicant is required to meet in order to get a Diversion. To do otherwise renders those carefully enumerated criteria superfluous and goes against the plain language of the Compact as it was structured by the drafters and enacted by the States and consented to by Congress. In other words, consideration of the interconnection of the existing water supply to Waters of the Basin is not relevant to, and certainly not determinative of, the initial determination of whether Waukesha has meet all of the requirements for a Diversion. Waukesha has not established those criteria here and is not entitled to a Diversion regardless of any interconnection of its ground water supply to Lake Michigan.

Because the Compact Council's reasons for dismissing the groundwater alternatives are not based upon realistic evaluation of radium treatment options, actual environmental impacts to surface water resources, or actual benefits to Lake Michigan water levels, the groundwater alternatives were improperly rejected as reasonable water supply alternatives.

The Council's decision here disregards relevant and current information and makes several determinations about the availability of a reasonable water supply alternative that set a dangerous precedent. Most significantly, the Compact Council found that (1) Waukesha's deep aquifer is not sustainable because the groundwater level is below pre-development water levels, and (2) the deep aquifer is not a reasonable alternative because it contains low levels of radium contamination. Those two characteristics could be used to describe a multitude of water supplies in many Straddling Counties. These perceived problems with Waukesha's water supply alternatives are common, but are easily treated and addressed. These factors should not be used to disqualify Waukesha's reasonable water supply alternatives and pave the way for this Lake Michigan Diversion and many more to come.

3. Waukesha has not shown whether part of the Diversion can be avoided by use of its existing water supply.

In addition to requiring that the applicant to prove it does not have a reasonable water supply alternative, a Diversion proposal must also establish that it "meets the Exception Standard." Compact § 4.9.3.b. A proposal meets the Exception Standard only when "[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." Compact § 4.9.4.a (emphasis added). Even if Waukesha's existing groundwater water sources cannot provide a complete source of drinking water for Waukesha (which we dispute), neither Waukesha, WDNR, nor the Compact Council have evaluated or determined whether part of the proposed Diversion can be reasonably avoided through the use of Waukesha's existing water supplies. Notably, the Final Decision states that "The proposed Exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies…" Final Decision § II.6. The Final Decision ignores the Compact's requirement to evaluate whether "part of" the Diversion can be avoided by use of Waukesha's existing groundwater. Thus, there has been no ***determination as to whether an alternative that uses Waukesha's deep and/or shallow groundwater in addition to some water diverted from Lake Michigan can avoid part of the Diversion***. This failure is in direct contradiction to the express requirements of the Compact and ***needs to be addressed before a Diversion can be approved***.

C. The Proposed Return Flow Of Diverted Water To Lake Michigan Through The Root River Will Result in a Significant Adverse Impact on the River Ecosystem, Violating The Exception Standard Required By The Compact.

Pursuant to Compact Section 4.9.3.e, a "Community within a Straddling County" exception cannot be authorized by the Compact Council "unless it can be shown that it will not endanger the integrity of the Basin Ecosystem." Further, the following criterion is included in the Exception Standard: "The Exception will be implemented so as to ensure that it will result in *no*

significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Basin" (emphasis added). Compact § 4.9.4.d. "Water Dependent Natural Resources" are defined in Compact Section 1.2 as "the interacting components of land, Water, and living organisms affected by the Waters of the Basin."

In its Final Decision, the Compact Council inappropriately discounted evidence of adverse impacts of the return discharge to the Root River while highlighting positive findings to conclude that the proposed return flow via the Root River would provide a "net environmental benefit" to the Root River. Final Decision § II.8.e. The Exception Standard, however, does not provide for a cost benefit analysis; instead, the focus must be on whether the return flow will have a significant adverse individual or cumulative impact on the Root River.

1. There is Substantial Evidence in the Record Regarding the Adverse Impacts that Will Result From the WWTP's Return Flow Discharge Through the Root River.

There is substantial evidence in the record regarding the adverse impacts that the return discharge will have on the Root River. In addition to the many comments that discussed these adverse impacts, the WDNR's own EIS and Technical Review identified a number of instances where the return flow into the Root River would in fact result in an adverse impact.

The Root River is listed as impaired under Section 303(d) of the Clean Water Act for phosphorus (as well as for other contaminants). 40 CFR § 130.7 (2013). The WDNR EIS acknowledges that the effluent from the Waukesha Wastewater Treatment Plant ("WWTP") will contribute to increased phosphorus loading in the Root River, which could increase algae and other plant growth in the river leading to an increase the range of daily fluctuations in dissolved oxygen levels. (WDNR EIS § 4.4.2.3.1.5 at 184).[24] Daily periods of very low dissolved oxygen levels

[24] A baseline assessment of water quality in the Root River prepared in support of the Root River Watershed Restoration Plan noted that elevated levels of phosphorus were almost always found

will adversely impact aquatic life within the Root River. The increased phosphorus loading could also lead to increased plant growth in Racine Harbor over time, which may necessitate aquatic plant management, including herbicide treatments (WDNR EIS § 4.4.2.3.1.3 at 182).

Another example of the adverse impact of the return flow through the Root River is the increased risk to fish and aquatic invertebrates within the Root River estuary due to the increased chloride concentrations. (WDNR EIS § 4.4.2.3.1.3 at 182). As WDNR acknowledges, "chlorides contained in the proposed discharge could have a negative effect on the fish community of the Root River" and further admits that "[c]urrent chloride levels in the Root River exceed both chronic and acute toxicity." (WDNR EIS § 4.4.2.3.1.7 at 189.)

The current WWTP chloride effluent concentrations are higher than the proposed water quality based effluent limits ("WQBEL") for the River (WDNR EIS § 4.4.2.3.1.5 at 185). Although the Applicant drafted a compliance plan demonstrating how chloride WQBELs might be met in the effluent (WDNR EIS § 4.4.2.3.1.3 at 182), chloride levels are already elevated in the Root River (WDNR EIS § 4.4.2.3.1.5 at 186). The addition of chloride in WWTP effluent will increase the risk of toxicity to the aquatic life and biota in the Root River ecosystem (WDNR EIS § 4.4.2.3.1.5 at 186).

The Root River is also listed as impaired under Section 303(d) of the CWA for total suspended solids ("TSS"). 40 CFR § 130.7 (2013). WDNR's Technical Review acknowledged that high volumes of TSS can increase turbidity, block light from reaching beneficial aquatic vegetation which in turn can lead to decreased dissolved oxygen levels in the water. (Technical Review at 84.) As such, WDNR recommended that the TSS in the discharge be minimized as

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downstream of waste water treatment plans that are already discharging to the Root River. (App. Ex. 6, Baseline Assessment of Water Quality In Support of Root River Watershed Restoration Plan, at 3-5.)

much as possible because the Root River already has long-standing turbidity issues but implicitly recognized that the TSS from the return flow would adversely impact the Root River. (*Id.*) Moreover, there is no indication that any sediment transport modeling was conducted in order to evaluate the impact of increased stream flow on TSS in the Root River. Such modeling should have been done before WDNR and the Compact reached any conclusion with respect to the increased TSS levels that will be associated with the return discharge to the Root River.

Furthermore, pharmaceuticals and endocrine disruptors will enter the Root River in WWTP effluent (WDNR EIS § 4.4.2.3.1.3 at 182). Previous studies surrounding the impacts of wastewater treatment plant effluent on ecosystems have observed pharmaceutical levels likely to harm entire populations of aquatic organisms (WDNR EIS § 4.4.2.3.1.3 at 182). Exposure to pharmaceuticals will have negative impacts on resident fish and aquatic macroinvertebrates within the Root River estuary (WDNR EIS § 4.4.2.3.1.3 at 182). The WDNR does not have regulatory authority to enforce monitoring of pharmaceuticals or to impose limits in wastewater effluent (WDNR EIS § 4.4.2.3.1.3 at 182). As a result, pharmaceutical levels in WWTP effluent that is discharged to the Root River will remain unregulated. This underscores the importance of considering carefully the potential impacts at this stage, rather than relying on the party's permitting process to avoid such impacts.

Finally, although WDNR notes that the WWTP would be subject to fecal coliform bacteria limits, WDNR also acknowledges that there is a risk to human health from the return flow due to residual pathogens in Waukesha's wastewater that will not be treated by the WWTP. (WDNR EIS

at 188.) However, WDNR has made no effort to determine the nature and extent of these pathogens nor does WDNR have any plans to regulate these pathogens. (*Id.*)[25]

On a more individual basis, each of these adverse impacts could be viewed as "significant"; however, when viewed cumulatively, there should be no dispute that these adverse impacts are "significant."

2. The Final Decision Provides No Assurance that These Adverse Impacts Will Be Mitigated.

In an effort to "mitigate" these acknowledged significant adverse impacts to the Root River, the Compact Council made the following specific findings:

1. The anti-degradation procedures in Wisconsin's Administrative Code will be implemented to ensure that Wisconsin's anti-degradation standards in s. NR 102.05(1) are met. Final Decision § II.8.a.

2. The return flow is projected to provide a net environmental benefit to the Root River. Final Decision § II.8.e.

3. The return flow will meet Wisconsin and federal permit requirements. Final Decision § II.8.h.

4. Waukesha must monitor the Root River system in order to minimize adverse impacts of the return flow. Final Decision § III.2.I.

However, none of the "conditions" in fact ensure that the adverse impacts of the return flow on the Root River will be avoided.

Wisconsin's anti-degradation statute specifically allows water quality standards in the State to be relaxed if the less stringent standards and lowered water quality can be justified due to

[25] Other adverse impacts that the return flow will have on the Root River include increased potential for flooding during high flow events; increased risk of sanitary sewer overflows from the WWTP during high flow events; an increased risk of invasive species being introduced into the Root River; and the inability of the effluent flow to meet effluent temperature limits necessary to avoid adverse impacts on the health of fish and aquatic communities. (*See* App. Ex. 11, Letter from the Compact Implementation Coalition to WDNR dated August 28, 2015 at 25-27; Technical Review at 81-95.)

necessary economic or social development. Wisconsin Admin. Code § NR 102.05(1). The Compact Council already noted the requested diversion would "correct a public health problem (radium contamination) by providing clean, safe and sustainable water in a manner that protects environmental, economic and social health" (Final Decision § II.8.a) so the groundwork has already been laid for Waukesha's discharge to diminish the water quality standards in the Root River.

With respect to the Compact Counsel's finding that the return flow will have a projected net environmental benefit to the Root River (even if one where to ignore for the moment that the Compact does not contemplate a cost benefit analysis), the only positive benefit identified by the Compact Counsel was the possibility that during low flow periods, the Root River salmonids community might benefit. (Final Decision § II.7.b; WDNR EIS § 4.4.2.3.1.7 at 190.) Again, however, the Compact does not allow the Compact Council to ignore the significant adverse impacts of the return flow to the Root River based on the speculative benefit of one Root River fish community during low flow periods.

Acknowledging as they must the fact that return flow through the Rock River would in fact have an adverse impact, Waukesha and WDNR represented that the adverse impact could be mitigated through strict permit limitations on the discharge from Waukesha's WWTP. The Compact Council relied on these representations in approving Waukesha's applications, noting that Waukesha would be required to comply with all applicable state and federal permits. Final Decision § II.8.h. However, WDNR has yet to impose any specific permit limits on Waukesha's WWTP discharge.

Instead, in the WDNR EIS and accompanying technical review, WDNR discussed speculative phosphorus, total suspended solids ("TSS"), temperature and chloride permit limits

but noted that further evaluation was necessary in order to determine what specific permit limitations might be feasible for the WWTP. For example, WNDR noted that the WWTP as currently designed was intended to meet a phosphorus water quality standard of 0.075 mg/L; however, WDNR noted that in order to discharge to the Root River, the WWTP would likely be required to meet a discharge limit of between 0.039-0.060 mg/L. (WDNR Technical Review at 83.) However, WDNR fails to acknowledge that Waukesha's own consultants have publicly stated that just meeting the 0.075 mg/L standard "represents a very challenging level for wastewater facilities to meet with current technology and operations, and that even with source reduction and treatment optimization, the WWTP system "is insufficient to consistently meet the six-month average limits."[26]

Similarly, WDNR noted that it would propose TSS standards set at WDNR's most stringent limits (5 mg/L for summer months; 10 mg/L for winter months) (WDNR Technical Review at 83) but provides no basis as to how it arrived at these limits, nor is there any guarantee that these limits would actually wind up in the final permit. With respect to chlorides, WDNR acknowledges that the WWTP would be unable to meet WDNR's recommended chloride limit of 400 mg/L and notes that the WWTP's current weekly average chloride discharge is 518 mg/L. (WDNR Technical Review at 83.) Likewise, WDNR admits that it will not regulate pharmaceuticals, at least not in the foreseeable future.

Even if one were to assume that the permit limits discussed in WDNR's Technical Review and EIS are appropriate to mitigate the adverse of the return flow to the Root River, nothing in the Compact Council's finding requires such permit limits to be incorporated into the WPDES permit

[26] App. Ex. 7, City of Waukesha WWTP Phosphorus Operational Evaluation Report, Strand and Associates, June 19, 2014, at 1.

as a condition to approval of Waukesha's application. Finally, even if these permit limits ultimately were incorporated into Waukesha's WPDES permit, there is nothing that would prohibit Waukesha from seeking a variance as provided for in Wis. Statute §283.15(4) as it has already done with respect to the WWTP's existing chloride discharge limits. (Technical Review at 86.)

Finally, the Compact Counsel's requirement that Waukesha be required to monitor the Root River for ten years from the beginning of return flow to the Basin, while useful, does not rectify the Compact Counsel's failure to strictly apply the Compact's standards. The Compact does not provide that the Diversion shall be allowed so long as the monitoring does not evidence any adverse impact on the Root River. What happens if an adverse impact is identified—is the switch thrown shutting off the flow of Lake Michigan water to Waukesha?

The Compact sets strict limits on a "Community within a Straddling County" to obtain Lake Michigan water for a reason. ***The Compact Council should carefully evaluate the impact of the return flow on any water body to ensure that the return flow does not result in an adverse impact. Where the state agency that is charged with regulating the applicant acknowledges on numerous occasions acknowledges that the Diversion will in fact cause adverse impacts, it is incumbent on the Compact Council to deny the Diversion request.***[27]

CONCLUSION

Given that the Compact Council's Final Decision was inconsistent with the express terms of and the intent of the Compact and lacked an adequate scientific foundation and justification for

[27] Additional return flow options were mentioned at various states of the WDNR review, but the options were narrowed based in part on a lack of data for one return flow option and the Applicant's concern over negotiations with municipalities and private landlords. As noted *supra* page 16, contractual arrangements are not a sufficient basis for limiting options in reviews under other environmental statutes, and they would not be for the Compact, either. Any further return flow or adverse impact analysis should take into account all options, unlimited by the Applicant's contractual or political decisions.

critical criteria for a Diversion of waters, the Compact Council should suspend its Final Decision, clarify key legal standards to be applied, and require further analysis of the substantively modified Application and a smaller service area. In doing so, the Compact Council will find that the strict requirements of the Compact are not satisfied in this instance, and ultimately should deny the Application.

More particularly, the Compact Council should:

1. Suspend the Final Decision pending further review.

2. Reverse the Final Decision regarding the Applicant's eligibility as a "Community within a Straddling County" and restrict the delineated service area to be consistent with the City of Waukesha boundaries.

3. Apply fundamental principles of contract interpretation and statutory construction to redefine how the Compact and the Council evaluates "no reasonable water supply alternative." A standard consistent with the Compact, rather than one improperly imported from Wisconsin law, would consider (a) whether an alternative would be allowed under existing regulations; (b) whether an alternative is consistent with existing permitted water uses and criteria in the region or with routinely-permitted exemptions granted by regulators; and (c) whether an alternative is feasible.

4. Require supplemental technical analysis (including a supplemental EIS) that details demand forecasts for a service area consistent with the boundaries of the City of Waukesha, or at a minimum the narrowed service area delineated in the Final Decision, and that analyzes alternatives for supplying all *or part* of that demand.

5. Permit additional public comment on the proposed Diversion including on alternatives associated with the narrower service area and on any supplemental technical analysis.

6. Conduct a substantive review of the Application that takes into account the supplemental technical analysis, new public comments, any revised interpretation of key Compact provisions, any further modifications to the delineated service area, and the requisite attention to the cumulative impact of the decision, including its precedential effects. Determine whether the narrowed proposal still meets the clarified criteria for an Exception for a Community in a Straddling County, including whether it meets the appropriate "no reasonable water supply alternative" standard and whether all or part of the Diversion can be avoided. Carefully evaluate the impact of the return flow on any water body to ensure that the return flow does not result in an adverse impact.

7. After proper interpretation and due consideration, for the reasons further explained in this submittal, the Compact Council should find that the Proposal does not satisfy the Exception criteria in the Compact and deny the Application.

8. If, after proper interpretation and due consideration, the Compact Council finds that this Proposal does not meet the criteria for an Exception to the prohibition on Diversions absent conditions and/or modifications, but finds that the Proposal could and should be approved with conditions and/or modifications, provide the draft Final Decision for public comment on the conditions or modifications prior to a final vote of the Compact Council. Going forward, revise the Compact Council's Interim Guidance and Draft Sequence of Events for Consideration of "Straddling

County" Exceptions to the Prohibition on Diversions to encompass this critical opportunity for full review of impactful modifications and conditions.

Further, as a matter of procedure, should the Applicant or any other entity submit a response in opposition to this Request, as the Petitioner the Cities Initiative respectfully requests the opportunity to submit a reply to any such opposition prior to any hearing on the matter.

Above all else, clarification and rigorous application of appropriate, consistent standards is critical given the precedent-setting nature of this decision and the need to ensure the predictable process and equal treatment for any future applications.

Date: September 16, 2016

Respectfully submitted,

JENNER & BLOCK LLP

By:
Jill M. Hutchison

Stephen A. Armstrong
E. Lynn Grayson
Anne S. Kenney
Steven S. Siros
Jill M. Hutchison
Allison A. Torrence
Laura C. Bishop
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

Tel: (312) 222-9350
Fax: (312) 840-7590
Email: sarmstrong@jenner.com
(Stephen A. Armstrong)
lgrayson@jenner.com
(E. Lynn Grayson)
akenney@jenner.com
(Anne S. Kenney)
ssiros@jenner.com
(Steven S. Siros)

jhutchison@jenner.com
(Jill M. Hutchison)
atorrence@jenner.com
(Allison A. Torrence)
lbishop@jenner.com
(Laura C. Bishop)

Attorneys for Petitioner the Great Lakes and St. Lawrence Cities Initiative