October 9, 2018

Great Lakes St. Lawrence River Basin Water Resources Council
Great Lakes St. Lawrence River Water Resources Regional Body
c/o Great Lakes St. Lawrence Governors & Premiers
20 North Wacker Drive
Suite 2700
Chicago IL 60606

Re: Comments Regarding Notice of Council's proposed Rules of Practice and Procedure; Council's proposed Council Guidance; Regional Body's proposed Regional Body Procedures; and, Council's and Regional Body's joint proposed Sequence of Events for Consideration of Proposals for Exceptions to the Prohibition on Diversions that are subject to Regional Review

To the Members of the Great Lakes St. Lawrence River Basin Water Resources Council ("Council") and the Great Lakes St. Lawrence River Water Resources Regional Body ("Regional Body"):

On September 10, 2018, the Council, acting under the authority of the Great Lakes-St. Lawrence River Basin Water Resources Compact ("Compact"), and the Regional Body, acting under the authority of the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement ("Agreement"), published the following documents for public comment: the Council's proposed Rules of Practice and Procedure, the Council's proposed Council Guidance, the Regional Body's proposed Regional Body Procedures, and the Council's and the Regional Body's joint proposed Sequence of Events for Consideration of Proposals for Exceptions to the Prohibition on Diversions that are subject to Regional Review. According to the notice of publication, comments regarding these documents are to be submitted to the Council and the Regional Body by no later than 5 PM EDT on October 10, 2018.
On behalf of the Great Lakes and St. Lawrence Cities Initiative (the "Cities Initiative"), I hereby submit the following comments regarding these proposals. The Cities Initiative is a binational coalition of over 120 U.S. and Canadian mayors 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.
In 2016, the Council issued a Final Decision approving the first request by a Great Lakes community (the City of Waukesha, Wisconsin) to divert water from the Great Lakes under the terms of the Compact. In September 2017, in light of its experiences in the Waukesha diversion proceedings, the Council announced that it would undertake a review of the procedures set forth in its Interim Guidance and Draft Sequence of Events in order to determine what modifications should be made to the procedures for reviewing future diversion requests. In order to achieve this objective, the Council established the Procedures Update Team, which included the Cities Initiative and other interested stakeholders as well as representatives of the Council and the Regional Body. The Update Team was tasked with drafting updates to the Regional Body Interim Procedures and Compact Council Interim Guidance for the Regional Body and Compact Council's consideration. The Update Team was also asked to recommend changes to these documents and potentially draft new rules for the Council's consideration.

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In early March of this year, the Council staff circulated to the Update Team an initial set of draft revisions to the Interim Guidance and Draft Sequence of Events. Representatives of the Council and Regional Body met with members of the Update Team on March 14-15 in Toronto to discuss these revisions. On April 27, 2018, the Cities Initiative submitted its initial comment letter to the Update Team outlining the Cities Initiative's concerns with the Update Team's proposed revisions to the Interim Guidance and Draft Sequence of Events. Within this letter, the Cities Initiative discussed several critical issues of concern that we identified as requiring modification by the Update Team. The Update Team issued a second set of proposed revisions on May 22, 2018, and representatives of the Council and the Regional Body met with the Update Team to discuss these revisions in Duluth on June 21, 2018. On the same date, the Cities Initiative submitted a second comment letter addressing these revisions and outlining several of the same concerns that had been expressed in its previous letter. On August 9, 2018, the Update Team circulated a final set of proposed revisions that were the subject of discussion on a conference call with interested stakeholders on August 23, 2018. During that call, Cities Initiative representatives informed the greater Update Team that the proposed revisions still contained many of the deficiencies noted by the Cities Initiative in both of its previous comment letters.

As noted above, the Council and the Regional Body have now published proposed amended rules and guidance for public comment. As with previous drafts issued by the Update Team, the September 10th revisions again fail to address many of the concerns identified by the Cities Initiative in its previous comment letters. Therefore, the Cities Initiative has provided below what it has identified as the six most crucial and deficient areas of these proposals together with suggested modifications for addressing these deficiencies. It is imperative that the Council and the Regional Body consider these modifications. If left unaddressed, these deficiencies will leave the Council and the Regional Body open to ineffective decision-making and possible adverse litigation.

1. The Cost Assessment Provision (Rules of Practice and Procedure Section 323)

It is of the upmost importance that the proposed cost assessment provision in Section 323 of the Council's proposed rules of Practice and Procedure be eliminated. The provision, which would allow the Council to impose the Council's incremental costs and fees (including legal fees) in conducting an Appeal Hearing on participants in the Hearing, is wholly unsupported by the language of the Compact and is in clear violation of the Council's obligation to provide aggrieved parties with the right to appeal Council decisions. If adopted, this provision will almost certainly be the subject of litigation by future petitioners and will very likely be struck down as unconstitutional by the courts.

Section 323 is a clear violation of the Council's obligations to aggrieved parties under the Compact. Section 7.3.1 of the Compact expressly provides aggrieved parties with a right to an Appeal Hearing before the Council. Absent from this section, however, is any indication that the Council can impose the cost of conducting an Appeal Hearing on the participants of the hearing. The absence of such language in Section 7.3.1 is telling given that Section 7.3.3 explicitly provides for the recovery of litigation costs by a substantially prevailing party in the context of a civil action. The drafters of the Compact clearly knew how to provide for the assessment of costs in specified circumstances, and their silence on this point in the context of Appeal Hearings cannot be read as an implicit endorsement of the Council's right to impose the costs of an appeal on participating parties. The Council's attempt to circumvent Section 7.3.1 by imposing a cost burden that substantially chills the parties' ability to exercise their appeal rights is, therefore, inconsistent with the terms of the Compact. In short, there is no support in the Compact, express or implied, for the proposition that the Council may levy the cost of an Appeal Hearing on participants in the manner provided in the proposed section.

Even if the Compact permitted the Council to adopt such a provision, the imposition of Appeal Hearing costs on a petitioner would still be prohibited as a direct impediment to the petitioner's constitutionally protected right to adjudicatory relief. In the limited circumstances in which administrative bodies have attempted to impose the cost of administrative hearings on petitioners, courts have found that such measures impose unfair cost burdens on appealing parties and are unconstitutional. *California Teachers Ass'n v. State of California*, 975 P.2d 622, 628 (Cal. 1999) (striking down a requirement that petitioners pay one half of administrative appeal costs as "virtually unprecedented" and clearly unconstitutional); *see also Florio v. City of Ontario*, 130 Cal. App. 4th 1462, 1466-67 (Cal. 2005) (striking down agreement requiring employees to share in administrative costs of an appeal because the workers' constitutional rights could not be waived by contractual agreement). In addition, because Section 7.3.1 of the Compact requires petitioning parties to exhaust their administrative remedies prior to filing for judicial review in federal court, Section 323 also acts as an unconstitutional barrier to parties' rights to access the federal court system.

The fact that Section 323 violates the terms of the Compact and the constitutional rights of aggrieved parties is not remedied by the Council Chair's discretionary authority to modify the assessment of Appeal Hearing costs based on a determination of parties' inability to pay. Not knowing whether one may have to pay the costs of an appeal until after the appeal is filed will have a substantial chilling effect and will likely discourage parties with otherwise meritorious claims from undertaking the procedural steps set forth in Section 302 in order to file a petition. The proposition that Section 323 is saved by the Council's authority to modify costs is particularly dubious in light of the fact that the Council—whose decision is being challenged by the petitioner—has given itself complete discretion to determine by its own standards whether it believes a participant has the ability to pay for the costs of a hearing.

When asked during the August 23, 2018 conference call if there was precedent for the Council's proposed cost assessment regime in Section 323, counsel for the Council responded that the Delaware River Basin Commission (Delaware Commission), acting pursuant to the Delaware River Basin Compact (DRBC), had adopted a similar provision in its rules and procedures. However, a review of the DRBC reveals substantial differences in the appeal process of the DRBC relative to the Compact, and such differences clearly demonstrate that the Delaware Commission's rules cannot offer valid precedent for the Council's proposed cost regime in Section 323. To put simply, the provision adopted by the DRBC Commission does not give rise to the same constitutional concerns as the Council's proposed provision because it does not similarly impede parties' ability to appeal the Commission's decisions. Unlike the Compact, the DBRC allows aggrieved parties to appeal Commission decisions to either an applicable state administrative agency or directly to federal court. In either case, the parties are not required to pay the costs of their appeal. In contrast, Section 7.3.1 of the Compact requires aggrieved parties to exhaust their administrative remedies with the Council prior to appealing to federal court, thereby subjecting them to Section 323's burdensome cost assessment regime. Because of these fundamental differences in the appeals process under the Compact and the DRBC, the Delaware Commission's cost assessment provision cannot serve as valid precedent for proposed Section 323.

Properly viewed, the cost of conducting appeal hearings is a cost of governing. Therefore, the Council should include such costs within its operating budget and seek funding therefor from its member states. It should not attempt to impose these costs upon parties that are pursuing their right of appeal under the Compact.

In sum, the Cities Initiative strongly urges the Council to eliminate the cost assessment provision of Section 323 in its entirety.

2. Rulemaking V. Guidance (Guidance Preamble)

The Cities Initiative is dismayed to see that the Council is proposing to publish its procedures relating to the review and approval of diversions as guidance rather than binding rules. The Preamble to the proposed Council Guidance provides that the Council reserves the discretion to deviate from the procedures set forth therein "if circumstances warrant". For the reasons set forth below, the Cities Initiative continues to believe that the Council should adopt all of its procedures, and not just those set forth in its proposed rules of Practice and Procedure, as binding rules.

First, setting formal, binding regulations will provide a measure of certainty to the diversion application process that guidance documents simply cannot provide. This certainty will benefit future applicants in that they will have a better sense, going forward into the process, of what they will have to establish in order to win approval of a diversion proposal and how they should expect the Council to rule on important issues. Second, having a formal set of binding rules will promote greater consistency in the Council's decision-making regarding diversion proposals across the Great Lakes Basin and will thereby increase public support for and acceptance of the Council's decisions. Third, in the absence of a formal set of regulations, the Council's more ad hoc decision-making is likely to be subject to a less deferential standard of judicial review since courts are less likely to afford the Council the deference that is typically shown to administrative agencies under the Administrative Procedures Act (APA). While the Council is not strictly speaking subject to the APA, where, as here, no standard of judicial review is set forth in the statute, courts will often look to the APA as "gap-filler".

Within the context of the APA, courts do not afford the same deferential standard of review to agency decisions that have been made on the basis of guidance rather than rules developed through formal notice-and-comment rulemaking. *See Christensen v. Harris Cty.*, 529 U.S. 576 (2000); *see also Reno v. Koray*, 515 U.S. 50, 61, (1995). In short, guidance documents lack legal finality. As a result, leaving Parts I and II, which are at the heart of the diversion review and approval process, as guidance could lessen the likelihood of future Council decisions surviving legal challenges, or at the very least, subject the Council's decisions to heightened levels of judicial scrutiny. A reversal of future Council decisions could, in turn, undercut the functionality of the Compact and reduce the Council's ability to operate without intrusion from reviewing courts.

For the above stated reasons, the Cities Initiative continues to recommend that the Council and Regional Body procedures be adopted as binding regulations and not as guidance.

3. Public Meetings for Diversion Proposals (Guidance Section 200.8)

Given the interest that communities throughout the Great Lakes Basin will likely have in a proposed diversion anywhere in the Basin (for reasons of precedent or otherwise), the Cities Initiative continues to believe that each member state or province should be required to hold its own public meeting or hearing in its jurisdiction regarding all diversion proposals.

Proposed Section 200.8 of the Guidance requires each member state or province to at least host a public meeting or educate the public as to its opportunity to submit comments to the Council regarding an Application. While the Cities Initiative acknowledges that proposed Section 200.8 is an improvement over prior versions of this provision, we continue to believe that merely apprising the public of its opportunity to submit comments is not sufficient to maintain the high level of public participation demanded by the Compact. We also believe that the Council's decision-making process will benefit from more public participation across the Great Lakes Basin rather than less.

Therefore, the Cities Initiative recommends that Section 200.8 require that a public meeting or hearing be held by each member state or province within its own jurisdiction.

4. Standard for Reopening Public Comment for Modified Diversion Proposals (Guidance Section 201.2, Section 201.4)

Proposed Section 201.4.4 of the Guidance provides that the Council Chair should issue a draft Council Decision at least 14 days prior to the Council meets to issue a Final Decision. However, the Council continues to propose using the "logical outgrowth test" to determine whether it will provide an additional public comment period with respect to its draft decision. As noted in prior comment letters, the Cities Initiative believes that the logical outgrowth test, which courts have often applied in the context of rulemaking cases, is not an appropriate standard by which the Council should determine when to reopen public comment in the diversion review process.

The Council's diversion review process is in many ways the equivalent of an environmental permitting process — in that approval is either given or not given to an applicant that requests permission to divert water — and the "substantial change" standard that we propose for determining when to reopen public comment is consistent with the standard used by the Environmental Protection Agency ("EPA") in this context. For example, permitting rules under the Clean Water Act provide that additional public comment should be conducted anytime "substantial new questions" are raised concerning a potential permit. In similar contexts, the National Environmental Policy Act requires supplemental public comment for a proposed action if there are "substantive changes" or "significant new circumstances or information" regarding a potential action, while the Comprehensive Environmental Response, Compensation and Liability Act requires supplemental public comment periods anytime new information or conditions would "fundamentally alter" a selected remedy. In short, in each of the above situations, supplemental public comment is required prior to the EPA's approval of a final action where the terms and conditions of the approval differ significantly from those previously circulated for public comment. Adopting a similar standard would ensure that the Compact Council is provided with the opportunity to receive relevant information from the public following any substantial changes in the conditions of a diversion request, and allow the Council to make informed decisions regarding these changes. It would also increase support for Council decisions by making the Council's decision-making process more transparent and robust.

Therefore, we recommend that Section 201.4 be revised to provide that when a Council Chair's draft decision contains provisions or conditions not previously published for public comment that would result in a "substantial change" in an Application, the Council must issue the draft decision accompanied by an additional 30 day comment period.

5. Requirement that Diversion Applicants Provide a Monthly Usage Estimate (Guidance Section 200.5)

The Council proposes to eliminate from Section 200.5 the requirement that Diversion Applicants provide an estimate of how much water they are proposing to divert from the Great Lakes on a monthly basis. The Cities Initiative is concerned that the removal of this estimate will create a "blind-spot" in the Regional Body and Council's ability to accurately determine the potential environmental impacts of a proposed diversion. That is, a heavy increase in an Applicant's volume of withdrawal during certain months could result in a negative ecological impact from the increased volume of the Applicant's return flow. This impact would be impossible to identify without requiring a Diversion Applicant to accurately

estimate its usage rate on a monthly basis. This concern is precisely why EPA requires applicants provide monthly usage rates in the context of permitting considerations. *See e.g. U*.S. EPA, *NPDES Permit Writers' Manual* (September 2010)
For this reason, we recommend that the requirement for a monthly usage estimate be reinstated in Section 200.5.

6. Post-approval monitoring and enforcement role of Council (Guidance Section 202)

The Cities Initiative believes that, following the Council's approval of a diversion, the Council has an important, ongoing role in helping to ensure that an applicant operates within the terms of its approved diversion. Proposed Section 202 does not expressly place any monitoring or enforcement obligation on the Council following the approval of an application. Instead, the revisions only permit parties to request information regarding an applicant's compliance with the terms of its diversion through an Originating Party. While the Cities Initiative recognizes that the primary responsibility for ensuring compliance with approved diversions rests with the Originating Party, we believe it is imperative that the Council accept and assert its responsibility to also monitor and enforce an applicant's compliance. Leaving these responsibilities solely in the hands of the Originating Party opens the door to the possibility that an Originating Party will act in the best interest of its constituents to the detriment of the greater Great Lakes Community. The potential for such a risk was recently highlighted in an article by the Chicago Tribune regarding the unilateral decision by the State of Wisconsin to approve a substantial diversion of water outside the Great Lakes Basin. *See* Michael Hawthorne, *Before Foxconn got access to millions of gallons of Lake Michigan water, Wisconsin quietly gave small village even more*, Chicago Tribune (September 18, 2018) available at: http://www.chicagotribune.com/news/local/breaking/ct-met-lake-michigan-water-wisconsin-20180917-story.html
We recommend that Section 202 be revised to explicitly state that the Council has an ongoing role in ensuring that an Applicant operates within the allowed terms of its diversion. At a minimum, the words "and the Council" should be inserted in Section 202 to clarify that the Council has a continuing obligation to monitor and enforce the terms of a diversion subsequent to the proposal being approved.

In conclusion, the Cities Initiative is disappointed that the Council and the Regional Body have failed to address many of the critical issues that were raised in our prior comment letters. We urge that careful and due consideration be given to the concerns that we have identified above. It is our belief that the Council and we share a common goal of strengthening the Compact by making the diversion proposal review process as robust as possible. To that end, we hope that we can work together to achieve this common goal for the benefit of the Great Lakes community.

Yours truly,

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