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# The Approval of Waukesha's Diversion Application under the Great Lakes -St. Lawrence River Basin Water Resources Compact -- Bad Precedent for the Great Lakes

Adriana Forest

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The Approval of Waukesha's Diversion Application under the Great Lakes  
-St. Lawrence River Basin Water Resources Compact -- Bad Precedent for  
the Great Lakes

**Erratum**  
article

# THE APPROVAL OF WAUKESHA'S DIVERSION APPLICATION UNDER THE GREAT LAKES-ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT – BAD PRECEDENT FOR THE GREAT LAKES

*Adriana Forest*<sup>†</sup>

ABSTRACT: This article examines the application of Waukesha, Wisconsin in 2010 for an exception under the Great Lakes-St. Lawrence River Basin Water Resources Compact to divert water from Lake Michigan for its municipal water supply. Being the first of its kind, the application is of concern because it will set a precedent for future applications under the Compact. This article demonstrates that the approval of Waukesha's Diversion Application is of serious concern and sets a dangerous precedent for the Great Lakes and St. Lawrence River.

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<sup>†</sup> J.D. Candidate, University of Western Ontario Faculty of Law, London, Ontario.

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## I. GENERAL INTRODUCTION

The Great Lakes and St. Lawrence River basin is a precious and finite natural resource for Canadians and Americans alike. The Great Lakes represent eighty-four percent of North America’s freshwater, and approximately twenty-one percent of the world’s freshwater. More than thirty million people surround the Great Lakes and St. Lawrence River, and rely on these freshwater resources for drinking water – this includes about ten percent of the total population of the United States, and more than thirty percent of Canada’s total population.<sup>1</sup> The Great Lakes-St. Lawrence Region has a combined Gross Domestic Product of 5.2 trillion dollars across the eight U.S. Great Lakes States and two Canadian provinces. The Great Lakes-St. Lawrence Seaway System employs over ninety-two thousand Canadians and Americans.<sup>2</sup> Thus, the Great Lakes and St. Lawrence River basin is of significant importance because it provides both economic benefits and drinking water to North Americans. As such, this natural resource must be protected.

In 2005, the Great Lakes-St. Lawrence River Basin Water Resources Compact (“Compact”) was signed by the eight U.S. States surrounding the Great Lakes. A companion Agreement (“Agreement”), which includes the Canadian provinces surrounding the Great Lakes and St. Lawrence River, was also signed. The Compact and the Agreement were created with the purpose of protecting the finite resources of the Great Lakes and St. Lawrence River for future generations, and to implement a system by which this purpose can be achieved across the region. This includes a prohibition against new or increased diversions of water from the Basin. However, exceptions are allowed in very narrow circumstances.

In May 2010, the City of Waukesha, Wisconsin applied for such an exception under the Compact to divert water from Lake Michigan for its water supply. Because Waukesha is in the United States, the final decision on the matter was made by the Compact Council, which consists of the Governors of the eight U.S. States surrounding the Great Lakes. Had the applicant been

<sup>1</sup> U.S. ENVTL. PROTECTION AGENCY, GREAT LAKES FACTS AND FIGURES, (2016), <https://www.epa.gov/greatlakes/great-lakes-facts-and-figures>.

<sup>2</sup> ENV’T AND CLIMATE CHANGE CAN., GREAT LAKES QUICK FACTS (2010), <https://www.ec.gc.ca/grandslacs-greatlakes/default.asp?lang=En&n=B4E65F6F-1>.

Canadian, the final decision would have been made under the Agreement by the Regional Body, which consists of the same U.S. Governors and the Premiers of the Canadian Provinces. Waukesha's application was approved in June 2016 by the Compact Council although the application did not strictly conform to the provisions of the Compact. Being the first of its kind, the application is of great concern because it will set a precedent for future applications under the Compact.

This article will outline Waukesha's application for a diversion of Lake Michigan water, and why the approval of the application should not stand. First, the legal status and history of interstate compacts and their uses in the United States will be presented. Next, an introduction to the Great Lakes-St. Lawrence River Basin Water Resource Compact and Agreement will be provided. Finally, this article will include a legal analysis to substantiate claims that Waukesha's Diversion Application does not meet the specific provisions of the Compact. In conclusion, this article will demonstrate that the approval of Waukesha's Diversion Application is of concern and sets a dangerous precedent for the Great Lakes and St. Lawrence River.

## II. INTERSTATE COMPACTS

### A. Introduction

An interstate compact is an agreement between multiple States under U.S. law. Interstate compacts are legal instruments used for interstate cooperation on a wide range of topics, including water allocation, environment and conservation, health, crime control, education, and child welfare.<sup>3</sup> An interstate compact is both a statute and a contract – it is a statute in each party's jurisdiction,<sup>4</sup> as well as a contract between the parties.<sup>5</sup> Interstate compacts are not merely administrative agreements – they constitute a valid and binding contract between the parties.<sup>6</sup> As a result, they are governed by the substantive law of contracts and have the force of statute.<sup>7</sup>

Interstate compacts require the elements of contract formation – offer, acceptance, and consideration – in order to be legally binding.<sup>8</sup> The “offer” is the compact itself, and the “acceptance” occurs when the parties enact identical laws in their own jurisdictions.<sup>9</sup> The “consideration” is each party's obligation to

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<sup>3</sup> NATIONAL CENTRE FOR INTERSTATE COMPACTS, INTERSTATE COMPACT CASE LAW (1976-2000) <http://www.csg.org/knowledgecenter/docs/ncic/CaseLaw.pdf> [hereinafter *Compact Case Law*].

<sup>4</sup> Frederick L. Zimmerman & Mitchell Wendell, *The Law and Use of Interstate Compacts* COUNCIL OF ST. GOV'TS, 1 (1951), <http://www.csg.org/knowledgecenter/docs/ncic/LawAndUse.pdf>. [hereinafter *Law and Use of Interstate Compacts*].

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *General Expressways, Inc v. Iowa Reciprocity Board*, 163 N.W.2d 413, 419 (Iowa. 1968).

<sup>7</sup> *Law and Use of Interstate Compacts*, *supra* note 4, at 2.

<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.* at 8.

perform or contribute to the common enterprise.<sup>10</sup> Specific provisions set procedures for compact termination, amendment,<sup>11</sup> and enforcement.<sup>12</sup> Provisions within compacts also establish interstate compact commissions that are similar to other public bodies.<sup>13</sup> These compact commissions perform functions that would be undertaken by ordinary departments, boards, agencies, etc.<sup>14</sup> in order to implement and carry out the provisions of the particular compact.

Interstate compacts cannot be unilaterally amended or modified. In *Nebraska v. Cent. Interstate Low-Level Radioactive Waste Commission*, the Court stated:

“[W]hen enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties. It, therefore, appears settled that one party may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories.”<sup>15</sup>

Additionally, because interstate compacts are contractually binding between States, as well as binding by state law, no party to the compact can act in conflict with the compact’s provisions. Any state law not in accordance with a compact would be illegal.<sup>16</sup> In fact, the terms of the contract supersede any state law<sup>17</sup> because parties to interstate compacts have agreed via contract that compact provisions are binding and above conflicting state laws.<sup>18</sup>

There are three general categories of interstate compacts: border compacts, advisory compacts, and regulatory compacts.<sup>19</sup> Border compacts are agreements between States that alter state boundaries.<sup>20</sup> An example of this is the Virginia-Western Virginia Boundary Compact of 1998. Advisory compacts are agreements that create “study commissions,” which examine interstate problems and report findings to member States. These do not result in administrative bodies or require congressional consent.<sup>21</sup> An example is the Delmarva Peninsula Advisory Council Compact. Regulatory compacts, also known as administrative compacts, are the most widely used interstate compacts, covering topics such as “regional planning and development, crime control, agriculture, flood control, water resource management, education, mental health, juvenile delinquency, and

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<sup>10</sup> *Id.* at 9-10.

<sup>11</sup> *Id.* at 10-11.

<sup>12</sup> *Id.* at 12-13.

<sup>13</sup> *Id.* at 11.

<sup>14</sup> *Id.*

<sup>15</sup> *Nebraska v. Cent. Interstate Low-Level Radioactive Waste Commission*, 207 F.3d 1021, 1026 (8th Cir. 2000).

<sup>16</sup> Michael L. Buenger, *Interstate Compacts* (2004) at 2, Council of State Governments, National Center for Interstate Compacts <<http://www.esg.org/knowledgecenter/docs/ncic/Buenger-InterstateCompacts-2004.pdf>> [hereinafter *Interstate Compacts*].

<sup>17</sup> *McComb v. Wambaugh*, 934 F.2d 474, 479 (3rd Cir. 1991).

<sup>18</sup> *Interstate Compacts*, *supra* note 16, at 2.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

child support.”<sup>22</sup> Examples include the Midwest Radioactive Waste Disposal Compact, the Columbia River Gorge Compact, the Interstate Mining Compact, and the Port Authority of New York-New Jersey Compact. The Great Lakes-St. Lawrence River Basin Water Resources Compact also falls into this category.

*B. Interstate Compacts and the United States Constitution*

The United States Constitution provides that: “No State shall, without the consent of Congress... enter into agreement or compact with another State or with a foreign power...” This implies that the consent of Congress is required for all interstate compacts.<sup>23</sup> However, the U.S. Supreme Court has held that in instances where Congress remains silent on the matter, only agreements affecting the power of the U.S. government or the “political balance” within government require consent.<sup>24</sup> Examples of compacts that would intrude on the federal government’s power and require congressional consent include: compacts settling boundary disputes, compacts settling jurisdiction over waters, and compacts that might negatively impact non-participating States.

In circumstances where a compact does not impede political balance of the federal system, the compact will continue to operate as a contract between the parties. If, however, the compact does intrude on the power of the U.S. government and Congressional consent is not obtained, the compact will be rendered void.<sup>25</sup> Interstate compacts are state law (not federal law). However, Congressional consent may give an interstate compact federal law status if its subject matter is deemed appropriate for Congressional legislation.<sup>26</sup> The granting of Congressional consent affords States regulatory power which would normally fall within federal jurisdiction.<sup>27</sup>

Congressional consent may arise impliedly post-implementation based upon federal and state government actions, explicitly by the enactment of legislation that specifically consents to the compact, or preemptively if the federal government passes legislation that encourages States to adopt a particular compact.<sup>28</sup> When Congress consents to a compact, it is entitled to impose limitations on, alter, or amend the compact<sup>29</sup> without limitation.<sup>30</sup> However, Congress may not withdraw consent or make further changes after it has granted

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 6 (citing U.S. CONST. art. 1, § 10, cl. 3.).

<sup>24</sup> *Virginia v. Tennessee*, 148 U.S. 503 (1893).

<sup>25</sup> *Interstate Compacts*, *supra* note 16, at 4.

<sup>26</sup> Compact Case Law, *supra* note 3, at 10 (citing *Cuyler v. Adams*, 449 U.S. 433 (1981) [hereinafter *Cuyler*] & *Washington Metropolitan Area Transit Authority v. One Parcel of Land in Montgomery County*, 706 F. 2d 1312 (4th Cir. 1983)).

<sup>27</sup> *Interstate Compacts*, *supra* note 16, at 10.

<sup>28</sup> *Id.* at 4-5.

<sup>29</sup> *Id.* at 5 (citing *Columbia River Gorge United-Protecting People & Property v. Yeutter*, 960 F.2d 110 (9th Cir. 1992) & *Seattle Master Builders v. Pacific N.W. Elec. Power*, 786 F.2d 1359, 1364 (9th Cir. 1986)).

<sup>30</sup> *Interstate Compacts*, *supra* note 16, at 6.

consent.<sup>31</sup> In contrast to the inability of state legislatures to act in conflict with a compact, Congress can legislatively alter the compact in any way it chooses.<sup>32</sup> The Great Lakes-St. Lawrence River Basin Water Resources Compact received the consent of the U.S. Congress,<sup>33</sup> and in December 2008, the Compact became federal law.<sup>34</sup>

### C. Federal Law Status

The granting of Congressional consent changes a compact's nature substantially – the compact becomes the “law of the United States.”<sup>35</sup> Interpretations of the compact by state courts will not set a binding precedent that must be followed by federal courts.<sup>36</sup> In some instances, federal powers will be delegated to an interstate compact commission if there is a “clear federal and interstate interest” in the commission's use of this power and the language of the compact suggests Congress intended to delegate this power to the commission.<sup>37</sup>

Congressional consent also modifies court jurisdiction in relation to compact litigation. Although state courts maintain their jurisdiction to decide cases, federal courts have jurisdiction and the “final say” above state courts.<sup>38</sup> If the dispute is between two states, this will invoke the U.S. Supreme Court's original jurisdiction. Otherwise, both state and federal courts have concurrent jurisdiction.<sup>39</sup>

### D. Interstate Compact Litigation

When interpreting compacts, the contractual nature of the arrangement means courts are limited by the specific terms of the compact unless those terms are unconstitutional.<sup>40</sup> However, if the provisions of the compact are not specific, courts may institute remedies that are in line with the compact's purpose.<sup>41</sup> Courts can use extrinsic evidence, such as the compact's negotiating history, in order to determine the compact's purpose and the intent of the parties.<sup>42</sup>

<sup>31</sup> *Id.* at 7 (citing *Tobin v. United States*, 306 F.2d 270, 273 (D.C. Cir. 1962) and *Mineo v. Port Authority of New York and New Jersey*, 779 F.2d 939 (3rd Cir. 1985)).

<sup>32</sup> *Interstate Compacts*, *supra* note 16, at 6.

<sup>33</sup> H.R. Res. 45, 110th Cong., 122 Stat. 3739 (2008) (enacted) § 1 [hereinafter *Compact*].

<sup>34</sup> GREAT LAKES ST. LAWRENCE RIVER BASIN WATER RESOURCES COUNCIL, <http://www.glscompactcouncil.org/>.

<sup>35</sup> *Interstate Compacts*, *supra* note 16, at 6.

<sup>36</sup> *Id.*

<sup>37</sup> *Washington Metropolitan Area Transit Authority v. One Parcel of Land in Montgomery County, Md.*, 706 F.2d 1312 (4th Cir. 1983).

<sup>38</sup> *Compact Case Law*, *supra* note 3, at 12.

<sup>39</sup> *International Union of Operating Engineers, Local 68, AFL-CIO v. Delaware River and Bay Authority*, 688 A.2d 569 (N.J. 1997).

<sup>40</sup> *Interstate Compacts*, *supra* note 16, at 7 (citing *New York State Dairy Foods v. Northeast Dairy Compact Commission*, 26 F. Supp. 2d 249, 260 (D. Mass. 1998)).

<sup>41</sup> *Id.* at 8.

<sup>42</sup> *Id.* at 9 (citing *Arizona v. California*, 292 U.S. 341 (1934), *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989), *Pierce v. Underwood*, 487 U.S. 552 (1988), and *Blum v. Stenson*, 465 U.S. 886 (1984)).

When litigation ensues as a result of a compact commission's action in relation to an interstate compact, courts may give deference to the commission.<sup>43</sup> In *Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency*,<sup>44</sup> the Court held that judicial review of a commission's actions is limited to the determination of whether the decision by the commission was "arbitrary, capricious, lacked substantial evidentiary support, or the agency failed to proceed in a manner required by law."<sup>45</sup> For example, in the U.S. Court of Appeals case of *Old Town Trolley Tours of Washington, Inc. v. Washington Metropolitan Area Transit Commission*,<sup>46</sup> a bus company challenged the decision of the interstate compact commission to approve a permit application. The Court held that the Commission's action in issuing the permit was neither arbitrary nor capricious, and therefore gave deference to the Commission's decision.<sup>47</sup>

#### *E. History of Interstate Compacts*

The use of interstate compacts began in colonial United States, where compacts similar to those used today were implemented to resolve boundary disputes between colonies.<sup>48</sup> In order to resolve these disputes, colonies would negotiate terms and submit a final resolution to the Crown. This began a tradition of solving interstate issues by negotiation and subsequent submission of a resolution to a central authority.<sup>49</sup> This process was then incorporated into the Articles of Confederation,<sup>50</sup> and eventually, into the U.S. Constitution. The drafting of the language of the Compact Provision in the U.S. Constitution lies in the founders' fear of unregulated interstate cooperation and powerful regional alliances.<sup>51</sup>

Interstate compacts were seldom used before 1920. Between 1783 and 1920, a total of thirty-six compacts were signed.<sup>52</sup> Between 1920 and 1941, another twenty-five interstate compacts were signed.<sup>53</sup> Following this period until 1969, the use of interstate compacts grew considerably and over 100 compacts were enacted.<sup>54</sup> The amount of interstate compacts that were enacted doubled between 1950 and 1970.<sup>55</sup>

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<sup>43</sup> *Compact Case Law*, *supra* note 3, at 27.

<sup>44</sup> *Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency*, 311 F. Supp. 2d 972 (D. Nev. 2004).

<sup>45</sup> Richard L. Masters, *A Review of Recent Compact Litigation*, <http://www.csg.org/knowledgecenter/docs/ncic/Recent%20Compact%20Litigation.pdf>.

<sup>46</sup> *Old Town Trolley Tours of Washington, Inc. v. Washington Metropolitan Area Transit Commission*, 129 F.3d 327 (D.C. Cir. 1997).

<sup>47</sup> *Compact Case Law*, *supra* note 3, at 28.

<sup>48</sup> *Interstate Compacts*, *supra* note 16, at 1.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Patricia S. Florestano, *Past and Present Utilization of Interstate Compacts in the United States*, 24 J. FEDERALISM 13, 18 (1994) [hereinafter *Past and Present*].

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

Between 1783 and 1969, the compact changed dramatically in type. For example, border compacts, which initially constituted ninety-four percent of all compacts, declined to twenty percent.<sup>56</sup> Interstate compacts began to include a larger number of States – regional compacts rose from two percent to twenty-two percent of all compacts, and nationwide compacts rose from zero percent to thirty-three percent of all compacts.<sup>57</sup> In comparison, in 1783, there were no compact commissions created within interstate compacts; the use of commissions only increased to forty-nine percent by the end of this period.<sup>58</sup> The function of interstate compacts also changed during this time. Compacts settling boundary disputes declined from seventy-one percent to nine percent; compacts dealing with rivers decreased from twenty-three percent to sixteen percent; industrial compacts increased from zero percent to nine percent, and compacts dealing with interstate services increased from three percent to fifty-eight percent.<sup>59</sup>

Since 1970, the rate of compact formation has declined. However, compacts continue to be enacted.<sup>60</sup> In the early 2000s, U.S. States were party to an average of 25.4 interstate compacts.<sup>61</sup> There are now approximately 200 interstate compacts in effect.<sup>62</sup> Many compacts have the potential to span the United States (i.e., are “nationwide in scope”). However, only ten percent of interstate compacts have a majority of U.S. States as members.<sup>63</sup> Recently, interstate compacts have been used in an effort to address national issues. The Regional Greenhouse Gas Initiative, which was enacted in 2008, requires States to implement a cap and trade arrangement to reduce CO<sub>2</sub> emissions.<sup>64</sup> There are currently a total of ten States participating in this compact.<sup>65</sup> An example of an interstate compact that is national in scope and has gained membership of almost all U.S. States is the Wildlife Violator Compact, of which forty-four U.S. States are members.

The principal effects of the Wildlife Violator Compact are twofold: (i) the Compact recognizes the suspension of hunting, fishing, and trapping licenses amongst member States, meaning that illegal activities in one State can affect a person’s hunting or fishing privileges in all member States; and (ii) the Compact implements a process through which violations of wildlife laws are handled in a member State as if a non-resident violator were a resident. This recognition increases the efficiency of enforcement officers. Less time is spent conducting violator processing procedures for non-residents, which without the Compact

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Ann O’M. Bowman, *Trends and Issues in Interstate Cooperation* 35, <http://knowledgecenter.csg.org/kc/system/files/bowman.pdf> [hereinafter *Trends and Issues*].

<sup>62</sup> Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent?* 42 *COLUM. J.L. & SOC. PROBS.* 511, 519 (2009) [hereinafter *When Congressional Consent?*].

<sup>63</sup> *Trends and Issues*, *supra* note 61, at 36.

<sup>64</sup> *When Congressional Consent?*, *supra* note 62, at 520.

<sup>65</sup> *Id.*

include: posting collateral to secure a trial date, being taken into custody if unable to post collateral, or being taken to court for immediate appearance.<sup>66</sup> These enforcement practices are required absent the Compact in order to avoid a violator returning to his or her home State and disregarding the terms of the citation.<sup>67</sup>

Under the Compact, a non-resident violator of wildlife laws will be convicted in any member State as if it were his/her home State.<sup>68</sup> Unnecessary inconvenience, hardship, and inefficiency are avoided under the Compact.<sup>69</sup> In addition, if the violator does not comply with the terms of the citation upon conviction, the wildlife officer is required to report this to the licensing authority of the violator's home State.<sup>70</sup> This requirement ensures that all convicted violators of wildlife laws are held liable and subject to penalties. The positive impact of this Compact on a regional or even national basis serves as a model for when a Compact secures widespread membership. Depending on the purpose of the Compact, national membership may not be required. In some cases, the membership of states within a particular region is most desirable.

#### F. Good Faith in Interstate Compacts

Because interstate compacts are contracts, they are subject to the principles of contract law. Signatories to interstate compacts are therefore subject to the duty of good faith and fair dealing. The *Restatement (Second) of Contracts* states: “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”<sup>71</sup> Good faith is defined in the Uniform Commercial Code as: “honesty in fact in the conduct or transaction concerned.”<sup>72</sup> The duty has been interpreted as “an obligation to not hinder performance or prevent the other party from obtaining the fruits of the bargain.”<sup>73</sup>

The Doctrine of Good Faith also applies to state governments that are party to a compact, ensuring that compact provisions and obligations will be carried out as per the terms of the compact.<sup>74</sup> Some interstate compacts contain good faith provisions. For example, the good faith provision in the Central Interstate

<sup>66</sup> Wildlife Violator Compact, art. 1, § 1(g) (entered into force 1989) [hereinafter *Wildlife Violator Compact*].

<sup>67</sup> *Id.* art. 1, § 1(h).

<sup>68</sup> *Id.* art. 1, § 2(e).

<sup>69</sup> *Id.* art. 1, § 1(j)-(k).

<sup>70</sup> *Id.* art. 3, § (c)-(d).

<sup>71</sup> RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981).

<sup>72</sup> U.C.C. § 5-102(7) (AM. LAW INST. & UNIF. LAW COMM'N 1977).

<sup>73</sup> Marcia G. Madsen & Michelle E. Litteken, *The Implied Duty of Good Faith & Fair Dealing in Government & Commercial Contracts*, 4-5 (2014) (citing *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817 (Fed Cir. 2010), *Centex Corp v. United States*, 395 F.3d 1283, 1304 (Fed Cir. 2005)), <https://www.mayerbrown.com/files/Event/b18966a5-45bc-41cb-9f1f-0110d3df2d77/Presentation/EventAttachment/a4a538c6-61f5-48b5-be71-e041b259f951/20140512-The-Implied-Duty-of-Good-Faith.pdf>.

<sup>74</sup> CAROLINE N. BROUN ET AL., *THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS: A PRACTITIONER'S GUIDE* 150 (2006) [hereinafter *Evolving Use of Interstate Compacts*].

Low-Level Radioactive Waste Compact was relied upon in *Entergy Arkansas, Inc v. Nebraska*.<sup>75</sup> The Compact in that case specifically stated that: “[e]ach party State has the right to rely on the good faith performance of each other party State.”<sup>76</sup> In that case, the Compact Commission successfully argued that the State of Nebraska did not act in good faith when it declined to issue a license under the Compact. The Great Lakes-St. Lawrence River Basin Water Resources Compact also contains a “Good Faith Implementation” provision, which provides: “Each of the Parties pledges to support implementation of all provisions of this Compact, and covenants that its officers and agencies shall not hinder, impair, or prevent any other Party carrying out any provision of this Compact.”

#### *G. Inter-Provincial Compacts in Canada*

In Canada, inter-provincial compacts are not implemented as widely as in the United States. Canada borrowed the concept of interstate compacts from the United States when it enacted the Canadian Driver License Compact in 1990.<sup>77</sup> All Canadian provinces and territories are a party to this Compact, which promotes compliance with traffic laws across Canada and increases highway safety by not allowing violators to escape penalties when they are ticketed in another jurisdiction.<sup>78</sup>

At the federal level, there are also multiple agreements between the United States and Canada. These include the Canada-United States Free Trade Agreement,<sup>79</sup> the Canada-United States Safe Third Country Agreement,<sup>80</sup> and the Great Lakes Water Quality Agreement.<sup>81</sup> Such agreements are important to facilitate cross-border relationships between Canada and the United States on issues that are of significant importance to both countries. The Great Lakes and St. Lawrence River basin is a good example of a shared resource between the two countries that warrants protection under a regional or bi-national agreement.

### III. THE GREAT LAKES-ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT AND COMPANION AGREEMENT

#### *A. Introduction*

The Great Lakes-St. Lawrence River Basin Water Resources Compact is an interstate compact between the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, and Wisconsin, and the Commonwealth of Pennsylvania. The

<sup>75</sup> *Entergy Arkansas Inc. v. Nebraska*, 358 F.3d 528 (8th Cir. 2004) [hereinafter *Entergy*].

<sup>76</sup> *Id.* at 11.

<sup>77</sup> ERICK JEFFERY & MAX SMITH, A COMPREHENSIVE GUIDE TO TRAFFIC TICKETS 38-39 (2009).

<sup>78</sup> *Id.*

<sup>79</sup> Canada-United States Free Trade Agreement Implementation Act, S.C. 1988, c 65 (Can.)

<sup>80</sup> Canada-U.S. Safe Third Country Agreement, Can.-U.S., 2002 Can. T.S. No. 2

<sup>81</sup> Great Lakes Water Quality Agreement 2012, Protocol Amending the Agreement Between Canada and the United States of America on Great Lakes Water Quality, 1978, as Amended on October 16, 1983, and on November 18, 1987, U.S.-Can., Sept. 7 2012.

Compact was entered into on December 13, 2005. Following implementation of the Compact by state legislation, the Compact received Congressional consent, and was signed by the President of the United States on December 8, 2008. The Compact created the Great Lakes-St. Lawrence River Basin Water Resources Council (“the Compact Council”), which is the compact commission responsible for implementing and enforcing the Compact and consists of the Governors of the eight Great Lakes States (“the parties to the Compact”).<sup>82</sup> The Compact Council has the authority to make final decisions regarding proposals submitted under the Compact.<sup>83</sup>

Also, on December 13, 2005, the companion Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement (“the Agreement”), which is essentially identical to the Compact, was entered into between the eight Great Lakes States, as well as the Provinces of Ontario and Quebec. In Ontario and Quebec, provincial legislation and regulations were enacted in order to implement the Agreement.<sup>84</sup> However, due to its sub-federal nature, the Agreement was not implemented at the federal level. Under the Agreement, an administering agency referred to as the Regional Body was created, which consisted of the Governors of the eight Great Lakes States as well as the Premiers of Ontario and Quebec.<sup>85</sup>

The duties of the Regional Body under the Agreement include ensuring that proposals undergo a formalized Regional Review process in order to address any issues throughout the Basin. The Regional Body is also responsible for declaring whether “proposals subject to Regional Review” meet the exception criteria outlined within the Agreement.<sup>86</sup> The “Originating Party” is the signatory Province or State within which a proposal is made. Before the Regional Body and Compact Council become involved with decision-making or review of proposals, the Originating Party is responsible for preparing a technical review of the proposal and deciding whether the proposal meets the provisions of the Compact/Agreement. These documents are then presented to the Regional Body to inform their decision on the proposal.

If the Originating Party is a Canadian Province, then the Regional Body will make a final decision on the proposal. If the Originating Party is a U.S. State, the Regional Body will give its decision in a Declaration of Finding on whether the proposal meets or exceeds the provisions of the Compact, or if any changes must

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<sup>82</sup> *Compact*, *supra* note 33, § 2.1-2.2.

<sup>83</sup> *Id.* § 4.7.2.

<sup>84</sup> Safeguarding and Sustaining Ontario’s Water Act, S.O. 2007, c 12 (Can.); Water Taking, O. Reg. 225/14 (Can.); An Act to affirm the collective nature of water resources and provide for increased water resource protection, R.S.Q. 2009, c C-6.2 (Can.); Environment Quality Act, R.S.Q. 1978, c Q-2, § 31.104, 46, 124.1 (Can.); Regulation respecting the framework for authorization of certain projects to transfer water out of the St. Lawrence River Basin, R.S.Q. 2011, c Q-2, r. 5.1 (Can.).

<sup>85</sup> Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement, Can.-U.S., Dec. 13 2005, art. 401, ¶ 1 [hereinafter *Agreement*].

<sup>86</sup> *Id.* art. 400, ¶ 2.

be made to a proposal.<sup>87</sup> The Compact Council will then render a final decision on the proposal. This decision cannot occur, however, until the proposal has undergone the Regional Review process, and the Compact Council has considered the Declaration of Finding and the technical review that was prepared in conjunction with the Review.<sup>88</sup> Thus, the Canadian Provinces will always be involved with the Regional Review process of a proposal. However, as in the case of Waukesha's application, the Provinces will not be involved in making the final decision. Instead, the Compact procedures will apply exclusively where the Originating Party is a U.S. State.

The stated purposes of the Compact and Agreement include cooperation between the Parties to "protect, conserve, restore, improve and effectively manage" the waters of the Great Lakes-St. Lawrence River Basin, and the prevention of "significant adverse impacts of withdrawals and losses on the basin's ecosystems and watersheds."<sup>89</sup> All the parties to the Compact and Agreement recognize that the waters of the Great Lakes-St. Lawrence River Basin are precious natural resources, connected through one hydrologic network, and that any future diversions from the Basin "have the potential to significantly impact the environment, economy and welfare of the Great Lakes-St. Lawrence River region."<sup>90</sup> Recognizing that future diversions have the potential to harm the Basin, the Compact and Agreement prohibit all new or increased diversions of Basin water.

Under the Compact and Agreement, a "diversion" is defined as a transfer of water from the Great Lakes-St. Lawrence River Basin into another watershed by any means of transfer.<sup>91</sup> All new or increased diversions are prohibited<sup>92</sup> except for (i) proposals to transfer water to an area within a straddling community,<sup>93</sup> (ii) proposals for intra-basin transfer,<sup>94</sup> and (iii) proposals to transfer water to a community within a straddling county.<sup>95</sup> Each of these is an exception to the prohibition against diversions, provided that certain conditions are satisfied. These conditions include: (a) the water is used solely for public water supply, (b) the proposal maximizes the amount of water returned to the source watershed, (c) the proposal is subject to management and regulation, (d) there is no reasonable alternative for water supply, (e) caution is used when determining whether the proposal meets these conditions, and an exception should not be authorized unless it can be shown that it will not endanger the integrity of the Basin ecosystem, (f) the proposal undergoes regional review, and (g) if the Originating Party is a U.S. State, the proposal is approved by the Compact Council.<sup>96</sup>

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<sup>87</sup> *Compact, supra* note 33, § 4.5.5.

<sup>88</sup> *Id.* § 4.5.5(e).

<sup>89</sup> *Id.* § 1.3.2.

<sup>90</sup> *Id.* § 1.3(a)-(b), (d).

<sup>91</sup> *Id.* § 1.

<sup>92</sup> *Id.* § 4.8.

<sup>93</sup> *Compact, supra* note 33, § 4.9.1.

<sup>94</sup> *Id.* § 4.9.2.

<sup>95</sup> *Id.* § 4.9.3.

<sup>96</sup> *Id.* § 4.9.3.

Once a diversion proposal is approved by the Council, the Parties are responsible for conducting a periodic assessment of cumulative impacts of the diversion. These assessments occur (i) every five years, (ii) each time the water loss from the basin reaches an average of fifty million gallons per day over any ninety-day period, or (iii) at the request of one or more party.<sup>97</sup> By signing the agreement, each party pledges to support implementation of all provisions of the Compact and Agreement in good faith.<sup>98</sup> In addition, the parties recognize that each provision is material to the entire agreement, and any failure to implement or adhere to any provision may be considered a material breach.<sup>99</sup>

The City of Waukesha, Wisconsin submitted a proposal (“the Application”) to divert water from Lake Michigan under the Compact in May 2010. This application was submitted as an exception to the prohibition on diversions under the Compact – a proposal to transfer water to a community within a straddling county. The Waukesha Diversion Application was the first proposal for a “community in a straddling county” exception under the Compact. In May 2016, the Regional Body recommended unanimously that Waukesha’s application be approved. In June 2016, Waukesha’s application was approved by the Compact Council (see Appendix A, Waukesha Diversion Application Timeline). However, Waukesha’s application does not strictly meet the conditions set forth in the Compact and Agreement.

#### B. Enforcement Provisions

The Compact provides that if any person is aggrieved by an action taken by the Council under the Compact, that person is entitled to a hearing before the Council.<sup>100</sup> Once this administrative remedy has been exhausted, the aggrieved person has the right to judicial review of the Council’s action in the U.S. District Courts for the District of Columbia or the District Court in which the Council maintains offices, provided such action is commenced within ninety days.<sup>101</sup> A “person,” as defined in the Compact, is “a human being or a legal person, including a government or a non-governmental organization, including any scientific, professional, business, non-profit, public interest organization or association that is neither affiliated with, nor under the direction of a government.”<sup>102</sup>

Considering the provisions of the Compact, as well as the importance of the Great Lakes-St. Lawrence River Basin waters, Waukesha’s Application did not merit approval. As provided for under the enforcement provisions of the Compact, judicial review of the decision is an appropriate option. This review is necessary in order to prevent approval of similar applications in the future, especially in light of the precedent-setting nature of Waukesha’s application. The

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<sup>97</sup> *Id.* § 4.15.1.

<sup>98</sup> *Id.* § 7.1.

<sup>99</sup> *Compact, supra* note 33, § 9.3.

<sup>100</sup> *Id.* § 7.3.1.

<sup>101</sup> *Id.* § 7.3.1(i).

<sup>102</sup> *Id.* § 1.

next section of this article will provide background information regarding Waukesha's Application, as well as arguments as to why the Application did not in fact meet the specific provisions of the Compact.

#### IV. WAUKESHA'S DIVERSION APPLICATION

##### *A. Background*

The City of Waukesha, Wisconsin ("the Applicant") submitted an Application for a Diversion of Water from Lake Michigan and an Exception to allow the Diversion ("the Application") in May 2010. This followed a court order requiring the Applicant to comply with radium standards by the year 2018. A background of Waukesha's radium contamination and groundwater depletion, and a summary of the Wisconsin Court Order, will be outlined below.

##### 1. Radionuclides and decreased groundwater levels in the deep aquifer.

The deep aquifer, on which Waukesha and other communities in Southeastern Wisconsin rely for their drinking water supply, contains radionuclide concentrations that exceed federal and state drinking water standards.<sup>103</sup> Radionuclide levels in Waukesha's drinking water supply have reached up to three times greater than the Radionuclide Standard of five pCi/l.<sup>104</sup> In order to maintain compliance, the City treats water from the deep aquifer and blends it with water from shallow aquifers.<sup>105</sup> However, the City is still unable to consistently meet radionuclide standards.

*Wisconsin Administrative Code* Chapter NR 809, promulgated by the Department of Natural Resources ("DNR") under the authority granted in *Wisconsin Statute* § 281.12, establishes contaminant levels for public water systems (§ 809.03 and § 809.05). Community water systems were required (as per *Wisconsin Administrative Code* Chapter NR 809.50(1) and (2)) to comply with a maximum combined radium-226 and radium-228 level of five pCi/l by December 8, 2003.<sup>106</sup> This deadline was extended to December 8, 2006 following a negotiated agreement between the Wisconsin Department of Natural Resources ("WDNR") and the U.S. Environmental Protection Agency ("USEPA").<sup>107</sup> However, the City still failed to provide drinking water in compliance with the combined radionuclide level below five pCi/l at all times by the deadline.<sup>108</sup> This is a health concern because long-term exposure to radium poses an increased risk of bone cancer to consumers.<sup>109</sup>

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<sup>103</sup> State of Wisconsin v. City of Waukesha, Waukesha County, No. 2009-CX-4 (D. Wis. filed April 8, 2009) (Civil Summons).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* ¶ 7.

<sup>107</sup> *Id.* ¶ 8.

<sup>108</sup> *Id.* ¶ 19.

<sup>109</sup> State of Wisconsin v. City of Waukesha, Waukesha County, No. 2009-CX-4, ¶ 20.

In addition to radionuclide contamination, water levels in the deep aquifer continue to decline. The deep aquifer is confined by the Maquoketa shale layer, which prevents recharging/replenishment of the aquifer.<sup>110</sup> Due to over-pumping of the deep aquifer, groundwater drawdown has reached levels of 400 to 600 feet below ground.<sup>111</sup> Drawdown, as well as radium contamination in the deep aquifer, is of concern because Waukesha relies heavily on the aquifer for its water supply. As a result of radium contamination and groundwater drawdown in the aquifer, the City maintains that the aquifer is not sustainable and that it has no other water supply alternative available.<sup>112</sup>

## 2. State of Wisconsin Court Stipulation and Order

In *State of Wisconsin v. City of Waukesha*,<sup>113</sup> the State of Wisconsin filed a civil complaint against Waukesha, seeking an injunction requiring the City to comply with radionuclide standards by a Court-specified date. In its decision in April 2009, the Court ordered that the City achieve complete compliance with Federal and State Radionuclide Standards by no later than June 30, 2018.<sup>114</sup> However, Waukesha soon discovered that it would be unable to meet this deadline, and applied for a diversion under the Compact in May 2010.

### B. Arguments

On June 21, 2016, the Compact Council rendered *The 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* (“the *Final Decision*”).<sup>115</sup> Because the Application is the first proposal for a “community in a straddling county” exception under the Compact, the precedent-setting nature of the *Final Decision* is of concern.

In comparison to the large volume of the Great Lakes and St. Lawrence River, the diversion volume proposed by Waukesha seems small. However, the Compact requires consideration of precedent-setting consequences of a proposal.<sup>116</sup> In the *Final Decision*, the Compact Council stated that Waukesha’s

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<sup>110</sup> City of Waukesha Diversion Application, Application Summary, City of Waukesha Application for a Lake Michigan Diversion with Return Flow (2013), § 2.2.1, [http://www.waukeshadiversion.org/media/1643/1\\_city\\_of\\_waukesha\\_application\\_summary.pdf](http://www.waukeshadiversion.org/media/1643/1_city_of_waukesha_application_summary.pdf).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> State of Wisconsin v. City of Waukesha, Waukesha County, No. 2009-CX-4.

<sup>114</sup> State of Wisconsin v. City of Waukesha, Waukesha County, No. 2009-CX-4 (D. Wis. filed April 8, 2009) (Stipulation and Order for Judgment), ¶ 13

<sup>115</sup> City of Waukesha Diversion Application, 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 (2016), <http://www.waukeshadiversion.org/media/1825/waukesha-final-decision-of-compact-council-6-21-16.pdf> [hereinafter *Final Decision*].

<sup>116</sup> *Compact, supra* note 33, § 4.9.4(d): “[t]he Exception will be implemented so as to ensure that it will result in no significant individual or cumulate adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Basin with

“unique circumstances... do not necessarily apply to any other applicant or application.”<sup>117</sup> However, other nearby communities experience similar problems with groundwater drawdown and radium contamination.<sup>118</sup> If the standards applied by the Compact Council to approve Waukesha’s application are applied similarly in all cases, other communities facing similar problems may also be awarded a share of Great Lakes water. This incremental impairment of the watershed is exactly what the Compact and Agreement are supposed to avoid.

It is imperative that the Compact Council strictly interprets the provisions of the Compact when rendering decisions, especially those allowing exceptions to the prohibition against diversions. The Compact expressly indicates that the Compact Council is to use caution when allowing Great Lakes water diversions.<sup>119</sup> Although the Compact states that an exception to the prohibition on diversions is appropriate “only when” the list of exception criteria are met,<sup>120</sup> the Compact Council approved Waukesha’s Application despite the fact that multiple conditions were not satisfied.

There are four points of inconsistency between the Application and the Compact and Agreement. First, the approved service area contains parts of multiple communities which are not part of the City of Waukesha, and therefore the Applicant does not meet the Compact’s definition of “community within a straddling county.” Second, there is a reasonable water supply alternative available to the Applicant. Third, the proposed return flow of water to Lake Michigan through the Root River has negative implications for the integrity and health of the River ecosystem. Fourth, the Application review process did not provide adequate opportunity for, nor was sufficient consideration given to, public opinion on the Application which is a requirement of the Compact and Agreement.

Because the Application does not meet requirements set forth in the Compact, there are ample grounds for the Compact Council to reconsider the Final Decision and disapprove the Application. The provisions of the Compact

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consideration given to the potential Cumulative Impacts of any precedent-setting consequences associated with the Proposal”; “Cumulative Impacts” are defined by the *Compact*, § 1.2 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 individual minor but collectively significant Withdrawals, Diversions and Consumptive Uses taking place over a period of time.”

<sup>117</sup> *Final Decision*, *supra* note 115, § II.10a.

<sup>118</sup> Great lakes and St. Lawrence cities initiative, petitioner, before the Great Lakes-St. Lawrence River Basin water resources compact council, “written statement in furtherance of request for hearing and compact council consideration” (2016) at 20, citing City of Waukesha Diversion Application, “Great Lakes-St. Lawrence River Basin Water Resources Council, Conference of Governors and Premiers” Feb.18, 2016 Report of Proceedings at 33:8-19, <http://www.waukeshadiversion.org/media/1727/2-18-16-public-meeting-hearing-transcript.pdf> [hereinafter *Petition*].

<sup>119</sup> *Compact*, *supra* note 33, § 4.9.3(e).

<sup>120</sup> *Id.* § 4.9.4.

should be interpreted and applied strictly in order to protect the integrity and finite resources of the Great Lakes-St. Lawrence River Basin, especially where an exception is being granted. However, there are multiple points where the Application does not meet the provisions of the Compact.

1. The Applicant is not a “Community within a Straddling County” as defined by the Compact

Pursuant to the Compact, a “Community within a Straddling County” shall 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.”<sup>121</sup> A “Community within a Straddling County,” as defined in the Compact, 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.”<sup>122</sup>

In the *Final Decision*, the Compact Council found that the Applicant is located wholly within Waukesha County, Wisconsin (which straddles the Lake Michigan watershed boundary) and therefore meets the definition of “Community within a Straddling County.”<sup>123</sup> However, the Compact Council described the limits of the approved service area as including “land outside the City of Waukesha’s jurisdictional boundaries”<sup>124</sup> and “land lying within the perimeter boundary of the City of Waukesha that is part of unincorporated land in the Town of Waukesha”<sup>125</sup> (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.”<sup>126</sup>

The inclusion of land outside the jurisdictional boundaries of the City of Waukesha amounts to a violation of the Compact.<sup>127</sup> The Compact clearly defines a “Community within a Straddling County” as “any incorporated city, town, or the equivalent thereof.”<sup>128</sup> Because land outside the City of Waukesha is included, the approved service area includes land 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.”

The Compact’s definition of “Community within a Straddling County” should be applied strictly to avoid inappropriate diversions of Basin water in the future.<sup>129</sup> Because this is the Compact Council’s first decision regarding a “Community within a Straddling County,” the Compact Council’s interpretation

<sup>121</sup> *Id.* § 4.9.3(a).

<sup>122</sup> *Id.* § 1.2.

<sup>123</sup> *Final Decision*, *supra* note 115, § II.1.

<sup>124</sup> *Id.* § II.5.b.i.

<sup>125</sup> *Id.* § II.5.b.ii.

<sup>126</sup> *Id.*

<sup>127</sup> *Petition*, *supra* note 118, at 24.

<sup>128</sup> *Compact*, *supra* note 33, § 1.2.

<sup>129</sup> *Petition*, *supra* note 118, at 24.

will constitute a baseline in future decisions and there will be pressure to expand upon it. Thus, the *Final Decision* regarding the Applicant's eligibility as a "Community within a Straddling County" should be reversed.<sup>130</sup>

## 2. The Applicant is not without a reasonable water supply alternative

Pursuant to the Compact, a "Community within a Straddling County" will be exempted from the prohibition against diversions provided that "[t]here is no reasonable water supply alternative within the basin in which the community is located, including conservation of existing water supplies."<sup>131</sup> 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."<sup>132</sup> In the *Final Decision*, the Compact Council found none of the evaluated alternatives to be reliable sources for a sustainable public water supply and concluded that the Applicant was without a reasonable water supply alternative.<sup>133</sup>

The Compact Council did not apply the appropriate definition of "reasonable water supply alternative," as required by the Compact and its underlying principles. Additionally, the Compact Council did not consider potential alternatives in light of the modified service area, which substantially decreased the amount of water withdrawn compared with the initial application. Based upon the modified water service area, there is at least one water supply alternative available to the Applicant that does not require a diversion from Lake Michigan.

### i. The "No Reasonable Water Supply Alternative" Standard

The Applicant has the onus of demonstrating that no such reasonable alternative is available to it in order for the Application to be approved by the Compact Council. "Reasonable" is defined in *Black's Law Dictionary* as "[f]air, proper, or moderate under the circumstances, sensible."<sup>134</sup> Agencies often have difficulty defining "reasonable alternative." The Compact does not define "reasonable water supply alternative," nor does it outline any criteria for determining or considering reasonable alternatives. Case law suggests that an agency must consider all reasonable alternatives before moving forward with a project.<sup>135</sup> However, at least some of the burden rests on a project's opponents to forward alternatives.<sup>136</sup> Additionally, evaluations of reasonable alternatives

<sup>130</sup> *Id.*

<sup>131</sup> *Compact*, *supra* note 33, § 4.9.3(d).

<sup>132</sup> *Id.* § 4.9.4(a).

<sup>133</sup> *Final Decision*, *supra* note 117, § II.4.

<sup>134</sup> *Reasonable*, *Black's Law Dictionary* (10<sup>th</sup> ed. 2014).

<sup>135</sup> LINDA A. MALONE, *ENVIRONMENTAL LAW* 49 (2nd ed. 2007), citing *NRDC v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

<sup>136</sup> *Malone*, *supra* note 135, citing *Vermont Yankee Nuclear Power Corp v. NRDC*, 435 U.S. 519 (1978).

should be made in good faith.<sup>137</sup> In the case at bar, opponents of the project did forward alternatives that were evaluated by the WDNR. However, these alternatives were not properly considered due to the definition of “reasonable water supply alternative” that was applied.

Although the Compact does not define “no reasonable water supply alternative,” the State of Wisconsin adopted its own definition within its implementation of the Compact. It chose to define “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.”<sup>138</sup> The Compact Council chose to use this definition when rendering its *Final Decision*<sup>139</sup> despite the fact that it is inconsistent with the principles underlying the Compact and Agreement, and the Compact Council is not bound by Wisconsin’s definition.

The principle that one party to a compact may not alter the compact’s meaning unilaterally is expressed within the Great Lakes Compact. “[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.”<sup>140</sup> This principle is also affirmed by U.S. case law.<sup>141</sup> In fact, Wisconsin’s enactment and subsequent reliance on its own self-serving definition represents a breach of good faith.

Because interstate compacts are subject to the substantive law of contracts, good faith applies to all parties to the Compact. Party States are bound to carry out Compact provisions and obligations as set out in the specific terms of the agreement.<sup>142</sup> The Compact contains a “Good Faith Implementation” provision, stating “[e]ach of the Parties pledges to support implementation of all provisions of this Compact...”<sup>143</sup> The State of Wisconsin violated this provision and the doctrine of good faith when it chose to import its own definition of “reasonable water supply alternative.” Wisconsin’s definition is not only less stringent than what was intended by the drafters of the Compact, but it also contradicts the Compact’s purpose.

Importing this definition and setting this standard for future applications under the Compact goes against the purpose and aim of the Compact. The Compact states that “[t]he Waters of the Basin are precious public natural resources shared and held in trust by the States” 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,

<sup>137</sup> Malone, *supra* note 135, citing *Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002); *Seacoast Anti-Pollution League v. Nuclear Regulatory Commission*, 598 F.2d 1221, 1231 (1st Cir. 1979).

<sup>138</sup> Wisconsin Act 2007, 227 WIS. STAT. § 281.346(1)(ps).

<sup>139</sup> *Final Decision*, *supra* note 117, § II.4.

<sup>140</sup> *Compact*, *supra* note 33, § 9.3.

<sup>141</sup> *Petition*, *supra* note 118, at 28, citing *State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

<sup>142</sup> *Evolving Use of Interstate Compacts*, *supra* note 74, at 150.

<sup>143</sup> *Compact*, *supra* note 33, § 7.1.

including generations yet to come.”<sup>144</sup> In addition, the Compact states that “[t]he Parties agree that the protection of the integrity of the Great Lakes-St. Lawrence River Basin Ecosystem shall be the overarching principle for reviewing Proposals subject to Regional Review...”<sup>145</sup>

As well, because the Compact states that a proposal should be approved “only when” certain restrictions are met,<sup>146</sup> it is suggested that proposals should only be approved in exceptional circumstances. The definition enacted by the State of Wisconsin does not reflect the principles expressly iterated in the Compact, nor is it stringent enough to meet the exception standard intended by the drafters of the Compact. In fact, the definition works in favor of a diversion as it creates a standard where alternatives are measured against a Great Lakes diversion.<sup>147</sup>

Thus, the Wisconsin definition is not “fair, proper, or moderate” under the circumstances. By this standard, most communities experiencing difficulties with respect to their source of drinking water would be eligible for a diversion, even if there were feasible alternatives available to them. Allowing this interpretation to stand would open the floodgates and create a standard that is not protective of the Great Lakes. If the resources of the Great Lakes were infinite, it would be prudent to offer Great Lakes water to all communities in difficult situations. However, because the Great Lakes represent a freshwater resource that is finite and in need of protection, this luxury is not available. The Compact and Agreement create this protection, and the importation of Wisconsin’s definition would undermine the Compact’s integrity and purpose.

ii. *The Non-Diversion Alternative*

The non-diversion alternative (“the Alternative”) was proposed on behalf of the Compact Implementation Coalition and developed by GZA GeoEnvironmental Inc. and Mead and Hunt. With this Alternative, the Applicant would use existing deep and shallow water wells with the addition of water treatment infrastructure to remove radium, total dissolved solids, and gross alpha. This removal would include treatment by reverse osmosis (“RO”), hydrous manganese oxide treatment, and continued blending of water to meet water quality standards. In GZA GeoEnvironmental’s technical evaluation of this Alternative,<sup>148</sup> it found that the Applicant would meet water quality standards using this Alternative.<sup>149</sup> Further, the WDNR found that multiple public

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<sup>144</sup> *Id.* § 1.3.1.

<sup>145</sup> *Id.* § 4.5.1(d).

<sup>146</sup> *Id.* § 4.9.4.

<sup>147</sup> *Petition*, *supra* note 118, at 41.

<sup>148</sup> James F. Drought et al., *Non-Diversion Alternative Using Existing Water Supply with Treatment* (2015), *see* Appendix 1 to Canadian Environmental Law Association’s submission to Compact Council, <http://www.cela.ca/sites/cela.ca/files/Submissions-to-Regional-Body-Waukesha-Proposal.pdf> [hereinafter *Evaluation Report*].

<sup>149</sup> *Id.* at 9.

comments were in favor of the Alternative.<sup>150</sup> However, the Alternative was dismissed for multiple reasons.

First, the WDNR dismissed the Alternative because the Applicant's existing service area was considered in its formulation.<sup>151</sup> As a result, the WDNR stated that the Alternative does not meet state laws requiring the Applicant to consider the delineated water service area when developing projected water demands.<sup>152</sup> However, the Alternative was formulated based upon the existing service area only because the proposed delineated service area did not meet Compact requirements.<sup>153</sup> Indeed, at the time of the evaluation in July 2015, the proposed service area was significantly larger than the service area approved in the *Final Decision*. This difference is not a valid reason for dismissal of the Alternative. Because the Applicant's delineated service area was subject to adjustment during the Application review process, it would be prudent and necessary to reconsider alternatives in light of the approved service area. Because the Alternative was not reconsidered in light of the approved service area, the Alternative was prematurely and improperly dismissed.

Another reason for dismissing the Alternative was the sustainability of the deep aquifer. The Compact Council maintains that the deep aquifer is not sustainable.<sup>154</sup> However, this finding is not consistent with the Evaluation Report. Firstly, the use of the deep sandstone aquifer was rejected based on the initial delineated service area, which was more than double the approved service area. The service area considered in the Evaluation Report was Waukesha's existing service area, which is based on Waukesha's current water supply needs and similar in size to the approved service area. Given the trends in aquifer levels, the Evaluation Report concluded that the deep sandstone aquifer is sustainable and can meet the Applicant's water supply projections.

Further to the service area considered by the Applicant, the Applicant also did not consider recent trends in the use of the deep sandstone aquifer. The Evaluation Report concluded that the City of Waukesha's water use has declined since 2006.<sup>155</sup> Despite the data which demonstrates that Waukesha's per capita water use has been consistently declining since then, the Applicant used the *average* water use over a ten-year period to calculate its future demands. Thus, the Applicant's forecast for water demand is not based on the most recent available data or consistent with declining water use trends.<sup>156</sup> Based upon the current and projected future water demand forwarded in the evaluation, the deep sandstone aquifer is sustainable.<sup>157</sup>

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<sup>150</sup> City of Waukesha Diversion Application, Preliminary Final Environmental Impact Statement (2016) at 7, <http://www.waukeshadiversion.org/media/1641/preliminaryfinaleis.pdf> [hereinafter *WDNR EIS*].

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Evaluation Report*, *supra* note 148, *see* Executive Summary.

<sup>154</sup> *Final Decision*, *supra* note 117, § II.3.c.

<sup>155</sup> *Evaluation Report*, *supra* note 148, at 4-5.

<sup>156</sup> *Id.* at 6.

<sup>157</sup> *Id.* at 13.

Finally, the Compact Council rejected the Alternative because it does not prevent redistribution of radioactive waste that results from RO treatment.<sup>158</sup> However, the WDNR noted that RO treatment is used by multiple other public water systems in Wisconsin and other nearby States for radium treatment, some of which are larger than the Applicant's.<sup>159</sup> In addition, the WDNR has stated that the current quantities of radium in wastewater sludge are approved under Waukesha's Wisconsin Pollutant Discharge Elimination System permit and these quantities will remain the same under this Alternative.<sup>160</sup>

It is also important to note that this alternative does not require additional wells and therefore results in no additional adverse impacts to surface waters and wetlands.<sup>161</sup> As well, the Alternative's estimated cost is approximately half the cost of the approved diversion.<sup>162</sup> Therefore, not only is the Alternative less harmful to the environment, but it is much more cost-effective and economically prudent. Therefore, a viable, economically- and environmentally-sound alternative that is fair, proper, moderate, and sensible under the circumstances is available to the Applicant. Because this reasonable alternative was disregarded, this amounts to a violation of the Compact.

### 3. The diversion will cause adverse environmental impacts to the Root River

Pursuant to the Compact, a "Community within a Straddling County" exception should not be authorized by the Compact Council "unless it can be shown that it will not endanger the integrity of the Basin Ecosystem."<sup>163</sup> 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."<sup>164</sup> "Water Dependent Natural Resources" are defined in the Compact as "the interacting components of land, water, and living organisms affected by the Waters of the Basin."<sup>165</sup>

In the *Final Decision*, the Compact Council found that while there may be some negative impact on aquatic life within the Root River, the return flow to Lake Michigan will provide "an overall net benefit" to the Root River by stabilizing river flows during low-flow periods and improving conditions for salmonids during spawning.<sup>166</sup> As a result, the Compact Council found that the Exception Standard was satisfied.<sup>167</sup> However, the WDNR's Environmental Impact Statement does not suggest that the Root River will remain unimpaired by the return flow.

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<sup>158</sup> *Final Decision*, *supra* note 117, § II.4(b).

<sup>159</sup> *WDNR EIS*, *supra* note 150, at 109.

<sup>160</sup> *Id.*

<sup>161</sup> *Evaluation Report*, *supra* note 148, at 14.

<sup>162</sup> *Id.*

<sup>163</sup> *Compact*, *supra* note 33, § 4.9.3(e).

<sup>164</sup> *Id.* § 4.9.4(d).

<sup>165</sup> *Id.* § 1.2.

<sup>166</sup> *Final Decision*, *supra* note 117, § II.7(b).

<sup>167</sup> *Id.* § II.8(e).

Firstly, effluent from the Waukesha Wastewater Treatment Plant (“WWTP”) will contribute to phosphorus loading in the Root River. As a result, increased plant growth will occur in Racine Harbor over time, which may necessitate aquatic plant management, including herbicide treatments.<sup>168</sup> Increased phosphorus loading to the Root River could also increase the range of daily fluctuations in dissolved oxygen levels.<sup>169</sup> Daily periods of very low dissolved oxygen levels will have a negative impact on aquatic life within the River.

In addition, increased concentrations of chlorides from WWTP effluent may present a risk to fish and aquatic invertebrates within the Root River estuary.<sup>170</sup> The current WWTP chloride effluent concentrations are higher than the proposed water quality based effluent limits (“WQBEL”) for the River.<sup>171</sup> Although the Applicant drafted a compliance plan demonstrating how chloride WQBEL could be met,<sup>172</sup> chloride levels are already elevated in the Root River.<sup>173</sup> The addition of chloride in WWTP effluent will increase the risk of toxicity to the aquatic life and biota in the Root River ecosystem.<sup>174</sup>

Furthermore, pharmaceuticals and endocrine disruptors will enter the Root River in WWTP effluent.<sup>175</sup> Previous studies surrounding the impacts of wastewater treatment plant effluent on ecosystems have observed pharmaceutical levels likely to harm entire populations of aquatic organisms.<sup>176</sup> Exposure to pharmaceuticals will have negative impacts on resident fish and aquatic macroinvertebrates within the Root River estuary.<sup>177</sup> The WDNR does not have regulatory authority to enforce monitoring of pharmaceuticals or to impose limits in wastewater effluent.<sup>178</sup> As a result, pharmaceutical levels in WWTP effluent that is discharged to the Root River will remain unregulated.<sup>179</sup>

In addition to the WDNR’s Environmental Impact Statement, a fairly recent study of the Root River Watershed points to potential adverse environmental impacts arising from return flow effluent.<sup>180</sup> The Applicant asserts that the addition of effluent will have no effect on pollutant concentrations in the River and that the addition of effluent will have a “dilutional” effect, thereby decreasing contaminant concentrations.<sup>181</sup> However, the addition of water will

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<sup>168</sup> *WDNR EIS*, *supra* note 150, at 182.

<sup>169</sup> *Id.* at 184.

<sup>170</sup> *Id.* at 182.

<sup>171</sup> *Id.* at 185.

<sup>172</sup> *Id.* at 182.

<sup>173</sup> *Id.* at 186.

<sup>174</sup> *Petition*, *supra* note 118, at 52.

<sup>175</sup> *WDNR EIS*, *supra* note 150, at 182.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Petition*, *supra* note 118, at 53.

<sup>180</sup> Adrian Koski et al., *Baseline Assessment of water quality in support of the Root River Watershed Restoration Plan* (2013), [http://www.sewrpc.org/SEWRPCFiles/Environment/RootRiverWshedRestorationPlan/RR\\_DataAnalysisReport\\_March2014.pdf](http://www.sewrpc.org/SEWRPCFiles/Environment/RootRiverWshedRestorationPlan/RR_DataAnalysisReport_March2014.pdf) [hereinafter *Root River Report*].

<sup>181</sup> *WDNR EIS*, *supra* note 150, at 184.

not remove pollutants from the River. The pollutants that are already present in the River will remain and the pollutants within the effluent will only add to the amount of contaminants present.

As well, the increased flow that will result from the addition of WWTP effluent may increase the release of pollutants that are bound on sediments in the River. Sediment is transported down the River and settles where it meets an obstruction or low flow. In low flow areas within the River, pollutants are bound to sediment and the continual flow that will result from WWTP could result in re-suspension of these sediments, further increasing the amount of pollutants in the River.<sup>182</sup> A sediment transport model has not been completed for the River, so it is unclear what the effect of this increased flow will be. It is clear, however, that increased flow will result. The Waukesha Wastewater Treatment Plant would be the largest discharger to the River. There are three other wastewater treatment plants discharging into the watershed currently but these service very small communities.

Aside from sediment re-suspension, increased flow may also impact habitat characteristics within the River. In some areas of the River which currently experience very low flow, the addition of effluent will cause an increase in flow as well as movement of water. While increased flow in these areas may be beneficial in some respects, such as fish migration, it may be detrimental in others. For example, it may limit the types of fish and macroinvertebrates that are able to survive in the River.<sup>183</sup> The change in temperature and amount of sediment (turbidity) that will result from the increased effluent may only allow tolerant species to survive, therefore altering the species composition of the River.<sup>184</sup>

Finally, the fact that a baseline assessment of the River has not taken place and there is no robust monitoring plan in place is of concern. Without such a baseline assessment, it will not be possible to compare future conditions in the River to the River's condition prior to the diversion. Therefore, it will be impossible to say with any degree of certainty what the impact of the return flow actually is. In addition, without a robust monitoring plan in place, it will be difficult to tell whether the return flow is having adverse environmental impacts on the integrity and ecology of the River.

The Compact Council has found that the return flow to Lake Michigan will positively impact salmonid spawning events to the Root River Steelhead facility<sup>185</sup> and that the effluent from the WWTP will result in a "net benefit" to the Root River. However, this positive impact is only true during low-flow periods in the Root River.<sup>186</sup> In addition, it is difficult to see how this potential benefit results in a "net benefit" to the Root River. Even if a "net benefit" to the

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<sup>182</sup> *Root River Report*, *supra* note 180, at 1-5, 1-11.

<sup>183</sup> *Id.* at 1-1.

<sup>184</sup> James R. Karr, *Assessment of Biotic Integrity Using Fish Communities*, 6 *FISHERIES* 21, at 23 (1981).

<sup>185</sup> *Final Decision*, *supra* note 117, § II.7(b).

<sup>186</sup> *WDNR EIS*, *supra* note 150, at 190.

Root River is provided, this does not preclude the existence of significant adverse environmental impacts on the Root River. The return flow through the Root River will endanger the integrity of the Basin ecosystem and may present significant adverse impacts to the Water Dependent Natural Resources of the Root River. Therefore, the lack of a plan represents a violation of the Compact.

#### 4. The Compact's public participation requirements were not satisfied

The Compact provides that Parties to the Compact recognize the importance and necessity of public participation in promoting management of the water resources in the Basin.<sup>187</sup> 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.”<sup>188</sup> However, the Regional Body review process was inadequate as 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 the Compact, the Regional Body is required to consider comments received through public participation before issuing a Declaration of Finding.<sup>189</sup> It does not appear the Regional Body gave any consideration to the hundreds of public comments against the Application.

The Compact also provides that procedures for review of applications are subject to the requirement that they “assure public accessibility to all documents relevant to an Application, including public comment received.”<sup>190</sup> This public participation requirement was not met because the conditions for approval were not open to public comment while they were being debated by the Regional Body and Compact Council. Conditions for approval were relevant to the Application and the public was given no opportunity to comment on these conditions prior to the Final Decision.

The public comment period closed on March 14, 2016, after which the Compact Council significantly changed the proposed diversion area and modified the volume of water that would be withdrawn in the diversion. Despite these substantial changes to the application, no public comment on the conditions in the *Final Decision* were allowed as required by the Compact. All documents relevant to an Application are to be accessible to the public.

The only way in which the public participation provisions of the Compact could be fulfilled would be if these supplementary technical analyses were carried out, made available to the public, and public feedback was allowed and considered prior to a final decision on the matter. The inadequacy of the public participation process throughout the application process amounts to a violation of the Compact.

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<sup>187</sup> *Compact, supra* note 33, § 6.1.

<sup>188</sup> *Id.* § 6.2.

<sup>189</sup> *Id.* § 4.5.3(d).

<sup>190</sup> *Id.* § 6.2.2.

## V. CONCLUSION

In conclusion, the Compact Council should reconsider the Waukesha Diversion Application. In order to protect the integrity of the Great Lakes-St. Lawrence River Basin Water Resources Compact and Agreement, the decision to approve the Application should be overturned. Although the *Final Decision* was rendered by the Compact Council because the Originating Party in this case was a U.S. State, any future proposals that originate in either Canada or the United States will be decided based upon the precedent set by this decision.

In order to merit approval under the Compact and set the appropriate standard for future applications under the Compact and Agreement, the Application must be amended or the decision to approve the application overturned. An appropriate approval of the Application can only be achieved following: (i) revision of Waukesha's water service area so that it complies strictly with the Compact's definition of "community within a straddling county"; (ii) application of an appropriate definition of "reasonable water supply alternative" that is protective of the Great Lakes and reconsideration of water supply alternatives in light of the revised service area; (iii) environmental baseline assessments of the Root River to determine the conditions of the River and a more comprehensive monitoring program to ensure protection of the River. In the alternative, reconsideration of other options for return flow that are more protective of the watershed and that do not cause adverse environmental impacts; and (iv) a process which is respectful and adheres to the public participation requirements set out in the Compact and Agreement, including allowance for public comment on revised Application materials, especially those which fundamentally change the nature of the Application.

The Great Lakes and St. Lawrence River basin is of great importance to Americans and Canadians alike. In order to protect this natural resource, the Compact and Agreement must be strictly adhered to. This is especially true in light of North America's growing population and the increasingly complex environmental issues that persist in the Great Lakes region as well as around the world. The water resources provided by the Great Lakes and St. Lawrence River are finite and sustaining this resource for future generations is of utmost importance. Setting a "loose" precedent puts the basin in danger of increased withdrawals in the future. This may impede the ability of future generations to access the benefits drawn from the Great Lakes and St. Lawrence River on which millions of North Americans depend.

## APPENDIX A

*Waukesha's Diversion Application Timeline*

May 2010	Waukesha submits Application for diversion to WDNR.
July 2011	WDNR holds public informational meeting/hearing to introduce the review process and receive comments on the Environmental Impact Statement (EIS) and interpretation of review criteria.
October 2013	WDNR receives revised Application (version posted on web) from Applicant (vol. 1 Application Summary, vol. 2 Water Supply Service Area Plan, vol. 3 Water Conservation Plan, vol. 4 Return Flow Plan, vol. 5 Environmental Report).
Fall 2013	Applicant holds informational meetings in Oak Creek, Racine, Milwaukee, and Waukesha; WDNR accepts comments on revised Application, and receives supplemental Application information from Applicant.  WDNR reviews Application and public comments; WDNR prepares draft Technical Review and draft EIS; WDNR makes preliminary decision on whether Application is approvable.
August 2015	WDNR reviews public comments & incorporates them into Technical Review and EIS; WDNR determines that Application meets Compact criteria.
January 7, 2016	WDNR forwards Application and supplemental materials (including memos) to Regional Body and Compact Council in addition to Preliminary Final EIS, Technical Review, and Originating Party's Draft Declaration of Findings; Regional Body Review Process begins.
January 12, 2016	Public Comment period begins.
February 18, 2016	Regional Body and Compact Council hold informational hearing in Waukesha.
March 14, 2016	Public Comment period ends.

- March 22, 2016 Michigan submits Technical Review to Compact Council (coincides with deadline for submission of Technical Reviews).
- April 7, 2016 Final draft of Originating Party's Declaration of Findings is posted; Regional Body face-to-face meetings and webinars (open to public) to consider draft Declaration of Findings are carried out from April 21 to May 18.
- May 18, 2016 Regional Body submits final Declaration of Findings to Compact Council following proposed amendments by Wisconsin, Minnesota, and Michigan to draft Declaration of Findings.
- June 8, 2016 Preliminary discussion on draft Compact Council Final Decision (including Conditions) begins (not open to public).
- June 21, 2016 Compact Council holds face-to-face meeting to make decision on Application (open to public); Compact Council issues Final Decision approving Application with Conditions following proposed amendments to draft Final Decision by Wisconsin, Minnesota, and Michigan.
- Next Waukesha will submit application for required permits to WDNR; WDNR will conduct permit reviews and issue decisions on permits; WDNR will issue a final decision on the Application; opportunities for dispute resolution in WI.