



Protecting the Common Waters of the Great Lakes Basin  
Through Public Trust Solutions

March 1, 2016

Great Lakes-St. Lawrence River Water Resources Regional Body and Water Resources  
Council  
c/o Conference of Great Lakes and St. Lawrence Governors and Premiers  
20 N. Wacker Drive, Suite 2700  
Chicago, Illinois 60606

VIA EMAIL: [comments@waukeshadiversion.org](mailto:comments@waukeshadiversion.org)

**Re: Comments on the Waukesha Water Diversion Application under Great Lakes Compact, Section 4.9, and Wisconsin Statutes, Wis. Stat. 281.346(4) (e) (1), Wis. Stats. 281.343, 281.346, and Common Law Public Trust and Riparian Doctrines**

Dear Great Lakes-St. Lawrence River Water Resources Regional Body and Water Resources Council:

FLOW (“For Love of Water”), a Great Lakes law and policy center, submits the following comments to assist you in evaluating and making the above-described decision pursuant to the Straddling Counties Exception (“Exception”) to the diversion ban as authorized by the Great Lakes Compact<sup>1</sup> (“Compact”) and not otherwise contrary to federal or state statutes, regulations or common law. FLOW appreciates the efforts made by Wisconsin and the City of Waukesha (“Applicant”) and those who have submitted comments on this matter.

The purpose of FLOW’s comments is to address the legal and policy principles that apply to the Waukesha Application (“Application”) under the Exception and standards of the Compact, statutes, and the common law. It is critical to the policy and law of all eight states and two provinces of Canada that the strength of the ban on diversion and structure of the Compact and parallel Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement (“Agreement”) with the provinces are not undermined or compromised. Any relaxation of or wavering from the Exception authority, standards, and principles, including the common law public trust and riparian law doctrines, could jeopardize the Compact, the diversion ban, and threaten the integrity of the waters and ecosystem of the Great Lakes Basin.

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<sup>1</sup> Great Lakes Compact, Sec. 4.9, P. L. No. 110-342, 122 Stat. 3739, at 3742. (2008) (herein after “Compact”). For convenient reference, key provisions of the Compact are set forth in FLOW’s **Exhibit 1** attached to these Comments.

There is increasing competition for global, national, and regional water sources, exacerbated by drought, climate change effects, and demands for food, energy, shelter, and development by increasing population and consumption. Wisconsin, Michigan, and other states that are in the Basin and part of the Regional Body and Council, must exercise utmost caution in reviewing and applying the authority, legal standards, and principles to the Waukesha application exception to the diversion ban.

## I. OVERVIEW

FLOW submits that:

- (1) Legal standards and principles of the Compact must be interpreted and applied stringently, because any deviation or even unintentional relaxation of the standards will undermine the diversion ban and other mechanisms of the Compact; this is important because relaxed or variant interpretation will render the diversion ban and Compact less effective and increase the potential for takings, commerce clause, and North American Free Trade Agreement (“NAFTA”) claims for Great Lakes water and/or investment claims for damages.<sup>2</sup>
- (2) Evaluation under Wisconsin law and the Compact must be interpreted and applied based on the background principles of the common law public trust and riparian doctrines, because it is undisputed that the source of the water is Lake Michigan and navigable tributary waters.

Based on these two prescriptions and for the reasons described below, FLOW submits that the Waukesha Application as it now stands should not be approved.

First, more caution must be exercised and details documented consistent with the precautionary approach, protective duties, and the authority and standards for the Proposal for Exception under Section 4.9 (“Sec. 4.9”).

Second, there are legal interpretations and related technical issues that must be addressed. For example, the “public water supply service area” or “public sewer plan service area” managing or ownership entities are not a “community” such as a municipality or its

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<sup>2</sup>*NAFTA Chapter 11 Investor-State Disputes (to October 1, 2010)*, Scott Sinclair, Trade and Investment Research Project, Canadian Centre for Policy Alternatives/Centre Canadien de Politiques Alternatives; *Table of Foreign Investor-State Cases and Claims under NAFTA and Other U.S. ‘Trade Laws,’* Public Citizen, April 2015; *AbitibiBowater Inc.*, p. 19; *The Toronto Star*. “*Ottawa pays Abitibi \$130M to settle claim.*” (August 25, 2010); Kathryn Leger. “*Abitibi Bowater wins NAFTA case vs. Ottawa.*” *THE GAZETTE (MONTREAL)*, (August 27, 2010); M.A. Salman, *International Trade Law Disputes: New Breed of Claims, Claimants, and Settlement Institutions*, International Water Resources Association, 31 *Water International* pp. 2-11 (March 2006), with David Johnson, *Water and Exports under NAFTA, Law and Government Division*, 8 March 1999, PRB 99-5E <<http://publications.gc.ca/collections/Collection-LoPBdP/BP/prb995-e.htm>>, who lays out the government position and arguments about water as a “good” or “product” under international trade laws, including NAFTA.

“equivalent,” and, therefore, the water will not be used solely by the community” within a straddling county.

The Applicant’s proposal would acquire water at Oak, which obtains its water supply from an intake pipe extending into Lake Michigan. The pipeline would run west to the City of Waukesha, crossing the Basin Divide.<sup>3</sup> The public water supply service area at present is too general and indefinite to qualify for, or meet the standards of Sec. 4.9 or other provisions of the Compact. For example, to circumvent this problem, Wisconsin’s compact law, as opposed to the Compact, has been changed and interpreted to mean that “the department [Wisconsin DNR] considers the delineated water supply service area to be a ‘community with a straddling county.’”<sup>4</sup> This state law and its interpretation weaken the plain meaning of the language in the Compact.

Third, the Compact requires that any Proposal for Exception must comply with the common law. The Application and Wisconsin DNR Draft Technical Review (“Draft Technical Review”) do not address the failure to evaluate, substantial issues or limitations imposed by the public trust in the Great Lakes, including Lake Michigan and tributary navigable waters involved in this matter. In addition, the Application and Draft Technical Review do not address the qualified limitations imposed on transfers, diversions or the selling of water imposed by the common law of riparian lakes and streams, where such transfer or sale is for nonriparian municipalities, utilities, or intermediate and end-use purchasers who are located outside of the relevant watershed or Great Lakes Basin. These unanswered questions concerning the common law are significant because the effect of the decision in this matter will establish a precedent with serious effects and implications. For this reason alone, the Application as presented should be denied.

## **II. PRECAUTIONARY AND PROTECTIVE DUTIES AND STANDARDS FOR REVIEW FOR PROPOSALS FOR EXCEPTIONS TO DIVERSION BAN**

The Compact demands that the parties exercise utmost caution in determining if the proposal meets the criteria and conditions for the so-called “Straddling Counties” Exception. This means that strict attention must be paid not only to the plain meaning of the wording of the Exception, but also the application and effects of an interpretation of the Exception with appropriate standards. Careful analysis and comparison is required between the wording and meaning of the standards in the Compact and the wording of similar laws in Wisconsin. Adherence to the Compact exception standards must override state law or regulations that are less stringent.

The International Joint Commission (“IJC”), in its efforts to guide the development and implementation of the Compact and Agreement, has declared that: “the precautionary principle regarding diversions must continue to guide the states and provinces in order to

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<sup>3</sup> See Wisconsin DNR Draft Technical Review: *For the City of Waukesha’s Proposed Diversion of Great Lakes Water for Public Water Supply with Return Flow to Lake Michigan* (June 2015) <http://media.jrn.com/documents/waukeshawaterdraftreview.pdf>; Map attached as **Exhibit 2**.

<sup>4</sup> *Id.*, at p. 44.

protect the Great Lakes from an ever-increasing number of large scale removals.”<sup>5</sup> For example, the Compact declares, “protecting the integrity of the Great Lakes-St. Lawrence Seaway Basin Ecosystem shall be the overarching principle” for reviewing proposals, including recognition of uncertainties in demands that may be placed on the waters and ecosystem, effects on the flows and levels of water, changes in water or environmental conditions, such as climate change and new data or information.<sup>6</sup> In reviewing an application for a “Straddling Counties” Exception, the Compact states that “*caution shall be used* in determining whether or not the proposal meets the conditions for this exception.”<sup>7</sup>

### III. SPECIFIC COMMENTS

#### 1. The Exceptions and Decision Making Standards for Diversions to “Straddling Communities” or “Straddling Counties” Must Be Strictly Interpreted and Applied.

As noted above, increased demand, water scarcity, extreme weather, and climate change effects have created a water crisis that will intensify competition for the waters of the Great Lakes Basin. The dormant commerce clause in the federal constitution warrants careful analysis in the application of the diversion ban and its exceptions in the Compact. NAFTA and international trade law claims can leverage water out of a basin or watershed through government challenges or private investor claims – discrimination or damages to reasonable expectations based on land and property law, diversions or consumptive uses allowed without material factual relationship to protection of exhaustible water resources and protection of the environment within the Basin. These realities, conditions, and uncertainties demand utmost care in fulfilling the Regional Body’s duty to protect the integrity of the waters and ecosystem of the Basin, including preventing precedents that may have detrimental albeit uncertain effects.

##### a. Definitions and Standards for “Straddling Communities” and “Straddling Counties” Exceptions

The Compact provides:

*Straddling Communities.*<sup>8</sup> A proposal to transfer water to an area *within a straddling community* but outside the basin or outside the source watershed shall be excepted [provided that] all of the water so transferred shall be used solely for public water supply purposes within *the* straddling community.

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<sup>5</sup> Protection of the Waters of the Great Lakes: 2015 Review of the Recommendations from the 2000 Report (IJC, Dec. 2015), pp. 7-8.

<sup>6</sup> Compact, Sec. 4.9.3.d.

<sup>7</sup> Id., Sec. 4.9.3.e. Because of this cautionary standard, the lack of information shall not be used against the duty to protect the integrity of the waters and ecosystem of the Basin. Id., Sec. 1.3.2.a.

<sup>8</sup> Compact, Wis. Stat. 281.343(4n)(a).

1.a. Is part of a water supply or wastewater treatment system that combines water from inside and outside the basin.

Wisconsin law provides:

*Straddling Communities.*<sup>9</sup> The department may approve a proposal under par. (b) [for a diversion] to an area *within a straddling community* but outside the Great Lakes Basin or outside the source watershed if the water diverted will be used solely for public water supply purposes *in the straddling community* . . .

\* \* \*

2.a. The returned water will be from a water supply or wastewater treatment system that combines water from inside and outside the basin.

The Compact provides:

*Straddling Counties.*<sup>10</sup> 1. A proposal to transfer water to a community within a straddling county that would be considered a diversion under this compact shall be excepted from the prohibition against diversions if it satisfies *all* of the following conditions:

a. The water will be used *solely for the public water supply purposes of the community within the straddling county* that is *without adequate supplies of potable water*.

\* \* \*

d. There is *no reasonable water supply alternative within the basin in which the community is located*, including conservation...

e. *Caution shall be used* in determining whether or not the proposal meets the conditions for the exception. The exception *shall not be authorized unless* it can be shown that *it will not endanger the integrity* of the basin ecosystem.

Wisconsin law provides:

*Straddling Counties.*<sup>11</sup> The department may approve a proposal under par. (b) for [a diversion] if the water diverted will be used *solely for public water supply purposes in a community within a straddling county* or, if a community is partly in a straddling county and partly within a county that lies entirely outside the Great Lakes basin, the water diverted will be used solely for public water supply purposes in the portion of the community that is within the straddling county . . .

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<sup>9</sup>Wis. Stat. 281.346(4)(a), (c).

<sup>10</sup>Compact, Wis. Stat. 281.343(4n) (c).

<sup>11</sup>Wis. Stat. 281.346(4)(e)(f).

- a. The community is without adequate supply of potable water.
- b. The proposal meets the exception standard under par. f.

\* \* \*

d. There is *no reasonable water supply alternative* within the watershed in which the community is located.

\* \* \*

- (f)1. The *need cannot reasonably be avoided* through efficient use and conservation of existing water supplies.
- (f)2. The diversion is *limited to the quantities that are reasonable for the purposes for which the diversion is proposed [water supply]*.

Note also that for any exception the department must use the *current or planned service area*<sup>12</sup> for *water supply*. The service area submitted for the proposed Exception in this case is based on a 14-year-old plan for a sewage waste system,<sup>13</sup> and an 8-year-old water quality management plan for the sewage waste system.<sup>14</sup> The sewage plan is based on Southeast Wisconsin Regional Planning Commission documents, which in turn are premised on future development or build-out by 2050.<sup>15</sup>

The Exception for “straddling communities” is *solely* for public water supply “within” or “in” “the straddling community.” The proposed diversion to Waukesha is *not* just for the city or its current water supply, which is the “community within the straddling county.” Rather it is for a proposed public water supply based on the older planning document for a sewage district service area. The City of Waukesha makes up only about one-half of the “service area,” and the service area consists of a number of communities.<sup>16</sup> There is no *current* plan for a public water supply system or demonstrated present need or showing of inadequate potable water in several towns and rural areas that have been added to the proposal.<sup>17</sup> Notably, only a relatively small portion of the eastern part of Waukesha County straddles the basin divide, and this area is not served by Waukesha or the proposed service area.

A review of Figure 15 of the Draft Technical Review reveals that the area includes almost all of southeast Waukesha County, one third of the lower northeast, and parts of

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<sup>12</sup>*Id.*, 281.346(4) (bg).2.

<sup>13</sup> WI DNR Draft Technical Review, *supra* note 3 at p. 44.

<sup>14</sup> *Id.* Basically, the existing water supply plan must be compatible with sewage capacity to manage water quality. Waukesha and the sewage was plan do not have a current water supply plan that “mirrors” the sewage service area plan, although its required by 2025. Wis. Stat. 281.348(3)(a)2.

<sup>15</sup> WI DNR Draft Technical Review, *supra* note, pp. 44-47. The build-out assumptions are that water demand will increase from current water needs of 6 to 8 million gallons per day (“mgd”) to 16.1 billion gallons per day (BGD) in 2050, with average build out of 10.1 mgd.

<sup>16</sup> See Fig. 10, WI DNR Draft Technical Review, attached **Exhibit 3**.

<sup>17</sup> Fig. 10, WI DNR Draft Technical Review, *supra* note 3 at p. 47. Exemptions are allowed by regulation under narrow circumstances. W.A.C. Sec. NR 121.03(5). But this does not change the fact that there is no current water supply plan as required by law; rather there is the sewage plan service area, with various assumptions about any future water service area that is twice as large as the City of Waukesha. See attached **Exhibit 3**, *supra* note 3.

the northwest and southwest areas of the county. Any area within this service area may request water from Waukesha as part of the service area.<sup>18</sup> The towns and rural areas are included because of Wisconsin law,<sup>19</sup> and do not comply with the narrower language of the Exception in the Compact. Moreover, as described above, the service area is based on an old sewage system service area plan, not water; and the sewage plan is speculative because it has not been funded or implemented.<sup>20</sup>

To dodge the conflict with the Compact Exception definition, Wisconsin DNR follows the state law that relaxes the standard in order to support its conclusion that “the department considers the *delineated water supply service area* to be a ‘community with a straddling county.’”<sup>21</sup> The Compact defines a “community within a straddling county” as “any incorporated city, town, or the equivalent thereof, that is located outside the Basin but wholly within a County that lies partly within the Basin that is not as Straddling Community.”<sup>22</sup> Wisconsin defines “community within a straddling county” as “any city, village or town that is not a straddling community and that is located outside the Great Lakes basin but wholly within a county that lies partly within the basin.”<sup>23</sup> The Waukesha Application does not fall within either the “straddling communities” or “Straddling Counties” Exception. Rather it is based on Wisconsin’s change from the Compact that includes service areas. A service area is *not* a community as defined by the Compact. As a result, the Waukesha Application and findings do not comply with the Standard for Exception.

Turning to the “Straddling Counties” Exception, the primary question is whether the Waukesha Application and “service area” is within a “community within a straddling county.” A “community” is limited by Wisconsin law to a “city, village, or town.” Again, a “community” under the Compact is limited to any “incorporated city, town, or the equivalent thereof.” The Waukesha utility public water service area is not an incorporated city, town, or village, or the “equivalent thereof.” Moreover, as stated above, the public water service plan remains indefinite.

While purely hypothetical, there are many municipalities, “communities,” that straddle the Great Lakes Basin divide – Chicago, Akron, greater Milwaukee communities are served by an existing “straddling” system. There are likely more than 80 counties or similar county provincial areas that straddle the Basin divide with many, many more communities all outside the Basin.<sup>24</sup> With increased demand for water exacerbated by climate change, water scarcity, and flooding, rapid growth and competition for water in the Basin are anticipated across all industry sectors in the next 20 to 30 years. Assuming

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<sup>18</sup> *Id.*, p. 45-46.

<sup>19</sup> Wis. Stat. 281.348(3).

<sup>20</sup> WI DNR Draft Technical Report, *supra* note 3 at pp. 44-47.

<sup>21</sup> *Id.* at p. 44 (emphasis added).

<sup>22</sup> Compact, Sec. 1.2 (emphasis added).

<sup>23</sup> Wis. Stat. 281.346(1)(d); Wis. Stat. 281.343(1e)(d).

<sup>24</sup> The hypothetical is based on a review of the Great Lakes Basin boundary compared to the maps of counties or regional bodies in all eight Great Lakes states and the provinces of Ontario and Quebec. On file with FLOW (“For Love of Water”). Compare natural watershed boundaries of the Great Lakes Basin at **Exhibit 4**.

increasing pollution, competition, and growth in 100 straddling communities and counties in the next 25 years, or four per year, if the current application is accepted, with an average request based on build out of 10 one million gallons per day (“mgd”), future demand could easily reach one billion gallons per day (“bgd”) by 2050. If the number of straddling communities and communities within counties doubles, then diversions under the Exception could approach or exceed 2 bgd – equal to the present Chicago Diversion. It could hardly be said that the Regional Body, Council, states and provinces, or the governments of Canada and the U.S. consider the waters of the Basin to be exhaustible or without surplus. As a result, others farther away from the Basin could seek to undermine the diversion ban and other limitations in the Compact.

The Regional Body and Council must exercise utmost caution to protect the integrity of the Great Lakes and its ecosystem, including guarding against unanticipated precedents that could undermine the Compact diversion ban. This means when in doubt over meaning, the Compact Straddling “Exceptions” and related definitions should be carefully and narrowly construed. For a “community within a straddling county” to qualify, there must be a showing that the “community” “is without adequate supplies of potable water.”<sup>25</sup> With respect to the city and towns or other areas within the public water service area, alleged to be the “community,” there is no showing that the entire area is without adequate supplies of potable water.

Based on the current status of the Application in this matter, it should be denied because it does not qualify or fall within the authority of the Exception for “Straddling Counties.” If it is granted based on the current circumstances, the diversion ban will be undermined. Other counties or states outside the Great Lakes Basin may be able to point to the broadly interpreted qualification of the Application, which will undercut the finding and basis for the diversion ban and Compact – that the waters of the Basin are finite, exhaustible, and threatened resources.

#### **b. Public Need**

Waukesha’s application does not distinguish *current* demand from a possible future build-out demand of 16.1 mgd. It appears Waukesha’s water and sewer district did this to cover the cost of the Lake Michigan diversion out of the Basin into the county by adding outlying towns and areas to its planned service area in 2050. The district added a 20-year estimate based on a possible future full build-out of this service area, even though the plan’s demand is arrived at through assumptions about maximum growth without regard to whether these towns or areas currently *need* or will ever request public water service in the future.

Accordingly, no current public need for the proposed 10.1 to 16.1 mgd is established. Moreover, the need is admittedly speculative regarding future development and growth. It is *not* the primary intention of the Exception to spur or support future growth and development of communities in straddling counties outside the Basin. In addition, the

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<sup>25</sup> Compact, Sec. 4.9.3.a

Draft Technical Review does not adequately document actual water sources and supplies in these towns or areas that have been added to the planned water service area; there is no showing that existing private or public water sources and supply systems are inadequate. Future growth of areas that are not without adequate water supplies does not support a finding that there is a current public need for the diversion as proposed in the application.

Again, utmost caution is required to preserve the integrity of the waters and ecosystem of the Basin. This includes confining exceptions to the exact calculated public need, not an assumed full build-out or future growth in 2050. If Lake Michigan waters are diverted out of the Basin to spur future development and growth, other communities or others outside the Basin will demand equal treatment.<sup>26</sup> It can also be argued that diverting water for growth outside the Basin concedes that there is a surplus of water in the Basin and the resource is not inexhaustible; this could make it more difficult to defend potential claims under the commerce clause of the U.S. Constitution, or private investor claims under NAFTA or future trade agreements like the Trans-Pacific Partnership (“TPP”). This risk in itself endangers the integrity of Basin waters and ecosystem.

### **c. No Reasonable Alternative**

There are reasonable water supply alternatives for Waukesha’s proposed service area, even with the assumed full build-out. They may not be the best alternatives, but generally all of the alternatives would provide treated potable water within an acceptable range of costs, safety and health regulations and impacts, especially taking into account local adjustments to minimize hydrological effects on wetlands and streams.

The Applicant has the burden of demonstrating “no reasonable alternative.” The important question is: what does this mean? Under standard alternative assessment laws and principles in environmental, wetland, water, or public parkland matters, a project is prohibited unless it is clearly shown that there is no other suitable, feasible, or practicable alternative.<sup>27</sup> This is based on the idea that any diversion or loss of these natural resources constitutes an unacceptable adverse impact or harm because of the exhaustible non-renewable nature of the waters of the Basin. There is no surplus water. Necessarily none of the alternatives to the Lake Michigan diversion in this matter will affect the Great Lakes that are protected by the diversion ban of the Compact. By analogy, to protect present and future uses of wetlands, the Wisconsin DNR considers, *inter alia*, practicable alternatives to the proposed property use, which will not adversely affect wetlands or create significant adverse environmental consequences.<sup>28</sup>

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<sup>26</sup> As mentioned above, there are approximately more than 80 counties that straddle the Basin, and numerous large, medium and small cities and towns that could demand equal or similar treatment.

<sup>27</sup> Wisc. Adm. Code, Sec. NR 103.08 et seq.; Clean Water Act, Section 33 USC 1344; 40 CFR 404(b)(1). Wetlands cannot be filled unless it is clearly demonstrated there is no practicable alternatives and the other alternatives have not significant or major impacts. In other words, wetlands are not to be filled, because the law has determined that the loss of wetlands is a serious harm. A similar analysis and approach is suggested under the “no reasonable alternative” standard of the Compact.

<sup>28</sup> See Wis. Adm. Code § NR 103.08(3)(b). If these criteria are not satisfied, the DNR must find that the requirements of Wis. Adm. Code ch. NR 103 have not been satisfied.

Similarly, the Compact standard protects the Great Lakes from diversions, including straddling communities exceptions, by demanding a showing that “there is no reasonable water supply alternative” to the diversion from Lake Michigan. However, Wisconsin changed the standard by adding a definition of “reasonable water supply alternative” to mean “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>29</sup> The Wisconsin statute added a balancing test.

However, the plain meaning of the “no reasonable alternative” standard in the Compact does *not* contain a balancing of factors. The Compact unequivocally demands a concrete showing that no other reasonable alternative exists without a factor-balancing test.

As noted above, all of the other non-Lake Michigan diversion alternatives would deliver potable water at comparatively similar costs without a loss or diversion of waters out of the Great Lakes Basin. While these other alternatives have varying degrees of risks of adverse environmental impacts, they all avoid impacts or the effects; including negative precedence for future requests for diversions or challenges to the diversion ban itself. An exception is authorized *only* if the applicant demonstrates “no reasonable alternative.” The standard and methodology followed in the application and Draft Technical Review followed the Wisconsin factors test does not demonstrate compliance under the Compact’s “no reasonable alternative” standard.<sup>30</sup>

## **2. The Waukesha Application Must Comply with Background Principles of the Public Trust Doctrine and Riparian Common Law.**

The Compact provides that “nothing contained in this Compact shall be construed as affecting . . . or in any way to interfere with the law of the respective parties relating to *common law of Water rights.*”<sup>31</sup> Similarly, the Compact “does not give any property rights, no exclusive privilege, nor shall it be construed to grant . . . any right, title, easement or interest in, to, or over any land *belonging to or held in trust* by any Party.”<sup>32</sup> Finally, the Compact provides that it does not “authorize any injury to private property or invasion of private rights, nor infringement of federal, state or local laws or regulations.”<sup>33</sup>

### **a. Common Law Public Trust Principles**

Lake Michigan, like all navigable waters, is owned and held in public trust by the states of Wisconsin, Michigan, Illinois and Indiana, as trustees, for the citizen beneficiaries of

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<sup>29</sup> Wis. Stat. s.281.346(1)(ps) (emphasis added).

<sup>30</sup>In any event, all of the other alternatives avoid any adverse impact or loss of Great Lakes waters to locations outside the Basin. While there are comparative impacts and costs, none have been clearly demonstrated to be unreasonable.

<sup>31</sup> Compact, Sec. 8.1.2.

<sup>32</sup> *Id.*, Sec. 8.1.4.

<sup>33</sup> *Id.*

these respective states for the protection of fishing, sustenance, boating, swimming, bathing, navigation, and other forms of water related recreation.<sup>34</sup> The Compact also recognizes this public trust, finding that: “The waters of the basin are precious public natural resources shared and held in trust by the states.”<sup>35</sup> Moreover, the Compact specifically preserves common law principles, like public trust and riparian law doctrines or principles.<sup>36</sup> Immediately after urging continued strict application and implementation of the Great Lakes Compact and parallel Agreement with the provinces, the International Joint Commission recently made a finding and recommended that the governments, states, and provinces harmonize, develop, and implement “a bi-national public trust framework as a ‘backstop’ to the Compact and Agreement.”<sup>37</sup>

Under the public trust doctrine, no water or bottomlands can be alienated or transferred unless for a public purpose related to the use, enjoyment or improvement of the public trust;<sup>38</sup> if there is a valid public purpose, it must be shown there will be no material or measurable impairment or precedent that could result in material impairment.<sup>39</sup>

The transfer or diversion of public trust Lake Michigan water is prohibited unless authorized by state law.<sup>40</sup> Moreover, any such authorization must fall within the two narrow exceptions noted above, namely a valid public trust purpose or public purpose related to the use and enjoyment of public trust waters in question, and no material

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<sup>34</sup> *Illinois Central R Rd v Illinois*, 146 U.S. 387 (1892); Wis. Const., Art IX, Sec. 1. 30.01.01 et seq.; *Muench v. Pub. Service Comm’n*, 261 Wis. 492, 109 NW 2d 271 (1952); *State v Pub. Service Comm’n.*, 81 NW 2d 71 (Wis. 1957); *Hilton ex rel. Homeowners v Department of Natural Res.*, 717 NW 2d 166, 173; *Lake Beulah Mgmt. Dist. V Department of Natural Res.*, 799 NW 2d 73, 76 (Wis. 2011); Mich. Const. Art. 4, Sec. 52, MCL 324.32501 et seq.; MEPA, MCL 324.1703, 1705; *Obrecht v National Gypsum Co.*, 105 NW 2d 143 (Mich 1960). See generally, Bertram Frey & Andrew Mutz, *The Public Trust in Waters and Submerged Lands of the Great Lakes*, 40 MICH J. L. REFORM 903-907 (2007); Olson, James, *All Aboard: Navigating the Course for Universal Adoption of the Public Trust Doctrine*, 15 VT J. ENV’T’L. L. 135, 147-167 (2014).

<sup>35</sup> Compact, Sec. 1.3(1(a)).

<sup>36</sup> Compact, Wis. Stat. 281.343(8)2. See also Compact, Sec. 1.3.1.a; Compact, Wis. Stat. 281.343(8)4, 281.343(9)(c); Melissa K. Scanlan, *Realizing the Promise of the Great Lakes Compact: A Policy Analysis for State Implementation*, 8 VT. J. ENV’T’L. L. 39 (2006).

<sup>37</sup> Protection of the Waters of the Great Lakes: 2015 Review of the Recommendations from the 2000 Report (IJC, Dec. 2015), pp. 1, 7; see underlying consultants’ report to the IJC, concluding that while the Compact diversion ban and related water loss measures are working, the public trust protections of the waters of the Great Lakes provide a valuable “backstop” principle to guard against negative precedents or unpredicted results or gaps in the Compact and Agreement provisions. *Id.*, Introduction, p. 1; Ralph Pentland and Alex Mayer, Ten-Year Review of the International Joint Commission’s Report on “Protections of the Waters of the Great Lakes (Dec. 2015, released for publication, Jan. 19, 2016), pp. 27-31; J. Olson and L. Kirkwood, FLOW Comments on “Draft Ten-Year Review of the International Joint Commission’s Report on Protection of the Waters of the Great Lakes Basin, (June 30, 2015), pp. 25-35.

<sup>38</sup> *Illinois Steel Co. v Bilot*, 109 Wis. 418, 426, *Muench*, *supra*, note 34; 261 Wis. at 499.

<sup>39</sup> *Illinois Central R Rd*, *supra* note 34; *City of Madison v State*, 1 Wisc.2d. 252, 843 NW 2d 674 (1957); e.g. *People v Broedell*, 365 Mich 201, 112 NW 2d 517 (1961) (nibbling effects based on precedent and cumulative impacts may constitute impairment).

<sup>40</sup> *Id.*, Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 Mich L. Rev 471 (1970); *Obrecht v National Gypsum Co.*, *supra* note 34.

interference or impairment.<sup>41</sup> Approvals of diversions or transfers of water from a watershed must consider the impacts and legal precedent effect on the integrity of the public trust waters, including improper relaxation of the public trust purpose requirement.<sup>42</sup> Without express authorization and specific factual findings that demonstrate these strict standards have been met, an application for authorization to transfer public trust waters, such as the Waukesha Application, should be denied. This includes a showing by the Applicant that the proposed diversion serves a public purpose related to the public use and enjoyment of Lake Michigan.<sup>43</sup>

There are four basic public trust questions that must be considered and determined by governments, including the Regional Body and Council, before action can be taken on the Waukesha.

- (1) First, what Wisconsin statute expressly authorizes the diversion of public trust waters out of the Lake Michigan Basin?
- (2) Second, does the statute contain the proper common law standards or principles, including the public purpose limitation that it should be related to protecting or enhancing public use and enjoyment of Lake Michigan and the Great Lakes? That is, does the diversion of 10.1 to 16 million gallons a day for a public water supply in towns located in the Mississippi River Basin (“MRB”) fall within the scope of public purpose under public trust law?
- (3) Third, is there a public necessity for the diversion of public trust water for a future development of a public water supply for several towns in the MRB?
- (4) Fourth, has the Applicant submitted or the Regional Body and Council considered and made specific findings that comply with public trust standards? If the effects or impacts on the public trust based on public trust standards are not considered and determined, the application as presented is not authorized under public trust law.<sup>44</sup> If it is not authorized under public trust law, it does not comply with Section 8.1.2 of the Compact.

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<sup>41</sup>*Id.*, *Illinois Central R. Rd.*, *supra* note 34; a transfer or use for a primarily private purpose is not authorized and void. *Priewe v Wisconsin State Land*, 93 Wis. 534, 67 NW 918 (1896); so too is a transfer or use of public trust land or waters for a public purpose that is not related to access to or enjoyment of public trust waters for recognized public trust rights and uses. *Muench*, *supra* note 34; *City of Madison*, *supra* note 39.

<sup>42</sup>*City of Madison*, *supra* note 39; *Lake Beulah Mgmt. District*, *supra* note 34; *Obrecht v National Gypsum Co.*, *supra* note 34; *People v Broedell*, 112 NW 2d 517 (Mich 1961).

<sup>43</sup>*City of Madison*, *supra* note 39; *Muench*, *supra* note 34.

<sup>44</sup>*Lake Beulah Mgmt. District v Dept. of Nat. Resources*, *supra* note 34; *Obrecht v National Gypsum*, *supra* note 34; *Illinois Central R. Rd.*, *supra* note 34.

The Compact demands that the integrity of the public trust and waters of the Great Lakes and tributaries are not compromised. In this second decade of the 21st century, it is more evident than ever that the Great Lakes face unprecedented geopolitical and systemic threats – climate change, extreme weather, fluctuations in flows and levels, phosphorous-loading and algal blooms, invasive species (e.g., quagga mussels and Asian carp), persistent plastics, energy development, and toxins. Ultimately the fierce competition for water threatens diversions of water from the Great Lakes Basin. In the next 15 years, a U.N. report warns the world could suffer a 40 percent shortfall in water by 2030 unless countries dramatically change their use of the resource.<sup>45</sup> 2015 marked the first time water crises claimed the top spot in the World Economic Forum’s 10th Global Risk Report.<sup>46</sup> As the U.S. Department of Energy recently observed, “we cannot assume the future is like the past in terms of climate, technology, and the evolving decision landscape.”<sup>47</sup>

Since the IJC’s 2004 and 2000 Great Lakes Reports,<sup>48</sup> private investor claims under NAFTA and other trade laws have more than tripled.<sup>49</sup> While the legal policy and approach behind the Compact’s diversion ban and the party-governments’ commitment to the regulation of consumptive uses is generally sound and defensible,<sup>50</sup> the increase or uptick of these private investor claims for money damages for discrimination or expropriation of water use rights endanger the integrity of the Great Lakes and their ecosystem. So does the potential for claims made by communities outside the Basin. As a result, the Compact Exceptions must be applied carefully and strictly.<sup>51</sup> Moreover, the IJC has recommended that the states and provinces apply public trust standards as a “backstop principle.”<sup>52</sup>

The Waukesha Application is based on a public purpose that is not current; the public purpose or need is remotely related to the waters and public trust purposes of the Great Lakes. The purpose and need are indefinite, uncertain, and based on future growth and development in towns that make up an area larger than the current water supply for the City of Waukesha. The public purpose standard under public trust law is not the same as the objective or goals supported by the exercise of general police power – the public

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<sup>45</sup> The United Nations World Water Development Report. *Water For a Sustainable World*. 2015 <http://unesdoc.unesco.org/images/0023/002318/231823E.pdf>

<sup>46</sup> World Economic Forum, *Global Risks 2015* [http://www3.weforum.org/docs/WEF\\_Global\\_Risks\\_2015\\_Report15.pdf](http://www3.weforum.org/docs/WEF_Global_Risks_2015_Report15.pdf)

<sup>47</sup> Water-Energy Nexus: Challenges and Opportunities (June 18, 2015) <http://www.sameoc.org/FD/2015/CPEN/Bauer-SAME-CPEN-Day-2015-06-18-updated.pdf>

<sup>48</sup> Protection of the Waters of the Great Lakes: Review of the Recommendations in the February 2000 Report (August 2004) <http://www.ijc.org/files/publications/ID1560.pdf>; Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States (February 22, 2000) <http://ijc.org/files/publications/C129.pdf>

<sup>49</sup> See *NAFTA Chapter 11 Investor-State Disputes (to October 1, 2010)*, Scott Sinclair, Trade and Investment Research Project, Canadian Centre for Policy Alternatives/Centre Canadien de Politiques Alternatives; *Table of Foreign Investor-State Cases and Claims under NAFTA and Other U.S. Trade Laws*, Public Citizen, April 2015.

<sup>50</sup> International Joint Commission 10-Year Review, *supra* note 37, Finding and Recommendation No. 1.

<sup>51</sup> *Id.*, IJC Recommendation No. 1.

<sup>52</sup> *Id.*, IJC Finding and Recommendation No. 2; see *supra* note 37.

health, safety and welfare in the exercise of police power. It is a trust, with standards that require the protection and enhancement of these public trust waters and their uses. The public purpose in public trust law means that the purpose of a diversion of water for public water supply outside the Basin must bear a reasonable relationship to the improvement of waters and public trust uses in the Basin. While municipalities, as owners and managers, can construct under authorized law an intake and public water supply as a public purpose from navigable trust waters, it does not mean the public purpose extends to areas beyond the watershed or Basin, particularly where the location and future growth are indefinite.<sup>53</sup>

## **b. Common Law Riparian Principles**

Generally, the removal and use of water in connection with the use of riparian lands by riparian owners on a common lake or stream is limited by the relative reasonable use by each riparian owner.<sup>54</sup> “Reasonable use” depends on the facts and circumstances of each situation.<sup>55</sup> However, when water is diverted for use on nonriparian lands or out of the common relevant watershed, a modified rule or qualified limitation applies: a removal or diversion of water by a riparian landowner from a lake or stream shared in common with other riparian landowners for sale and use out of the immediate watershed is considered unreasonable *per se* without proof of specific harm or injury.<sup>56</sup> In other words, a transfer of water for sale out of the riparian watershed constitutes an unreasonable use under the common law.

States like Wisconsin pass specific laws to authorize and permit diversions of water from one watershed to another to improve the navigation or public uses of another lake or stream. If the diversion is to promote or enhance navigation or another recognized public use associated with another navigable stream, it is considered a proper public purpose under public trust law. However, this does not necessarily satisfy riparian laws or rights of riparian owners along the common stream of origin.<sup>57</sup> Usually the consent of these other riparian owners is required or it must be shown that there is a “surplus” of water – that is water that is above “base flow” – the average low flow in the dry, usually summer months.<sup>58</sup> If these restrictions or limitations are not met, the transfer or diversion cannot be authorized by statute without the consent from the other riparians.<sup>59</sup>

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<sup>53</sup> The public purpose limitation under public trust law was not intended to foster future development and growth outside the Great Lakes Basin with public trust waters; e.g. *Nekosha-Edwards Co. v Public Service Comm’n.*, 8 Wis.2d at 594; *Omerink v State of Wisconsin*, 64 Wis2d 6, 218 NW2d 734 (1974).

<sup>54</sup> *State v Apfelbacher*, 167 Wis.2d 233; 167NW 244 (1919); *Nekosha-Edwards Paper Co.*, *supra*, 8 Wis.2d 582, 593-594; 99 NW2d 821 (1959). There is also a limitation where it would be contrary to the protections and limitations of the public trust in navigable waters or tributary non-navigable waters.

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

<sup>56</sup> *McEvoy v Gallagher*, 107 Wis. 331; 83 NW 633 (1900); *Wis. Ex. Rel. Chain O’Lakes Ass’n v Moses*, 153 Wis.2d 579; 93 NW2d 708 (1972); *Dumont v Kellogg*, 29 Mich 420, 425 (1874). Where a riparian owner diverts water to other land or out of the watershed, proof of injury is presumed, and the use is unreasonable and prohibited. *Id.*, *McEvoy; Dumont v Kellogg*, 29 Mich at 422.

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

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

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

As referenced above, the Great Lakes Compact does not affect the rights and interests of others, such as riparian landowners. Moreover, a proposal for an Exception under Sec. 4.9 must meet both the standards and comply with the common law. As a result, the Waukesha Application for a “Straddling Counties” Exception must be shown to comply with the common law of riparian rights in Wisconsin and Michigan, and arguably because of legal precedent risks by the other Great Lakes states and provinces.

Equally important, even if there is consent or implied consent because of the public purpose and transfer or diversion of a “surplus” portion of the water of a stream or lake, a finding of “surplus” in the instant matter could run contrary to the non-renewable or exhaustible natural resources basis underlying the Compact. As recognized by the Compact and the IJC, “it is important to remember that there is no ‘surplus’ water in the Great Lakes Basin; from an ecosystem perspective, it is in all in use, even in periods of high supply.”<sup>60</sup>

Accordingly, the Application for Exception to authorize a diversion and sale of water from the Basin to Waukesha, as presented, should be denied, because it does not comply with common law of water and riparian rights as required by Section 8.1.2 of the Compact.<sup>61</sup>

#### **IV. RECOMMENDATIONS**

The Applicant, Waukesha, applies for a “Straddling County” Exception to the diversion ban. An Exception can be authorized only if the applicant qualifies and the standards and conditions in the Compact have been met. Utmost caution and strict compliance with the Compact standards is required because of the precedent that will be set by the decision in this matter.

Based on the foregoing comments on the current Waukesha Application, FLOW recommends the following recommendations:

First, more caution must be exercised and details documented consistent with the precautionary approach, protective duties, and the authority and standards for the Proposal for Exception under Section 4.9.

Second, there are legal interpretations and related technical issues that must be addressed. For example, the “public water supply service area” or “public sewer plan service area” managing or ownership entities are not a “community” such as

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<sup>60</sup> Pentland and Mayer, Ten-Year Review of the International Joint Commission’s Report on “Protections of the Waters of the Great Lakes,” *supra* note 37, p. 16.

<sup>61</sup> If necessary, both the public trust and riparian common law issues must be carefully considered before the Regional Body and Council take any action to approve the application. For example, under Section 4.5.4 of the Compact, a simple majority of the Regional Body or Council can demand an Independent Technical Review of these technical legal issues or other issues that have not been adequately considered or addressed.

a municipality or its “equivalent,” and, therefore, the water will not be used solely by the community” within a straddling county.

Third, the Compact requires that any Proposal for Exception must comply with the common law. The Waukesha Application and Draft Technical Review do not address substantial issues and limitations imposed by the public trust in the Great Lakes, including Lake Michigan and tributary navigable waters involved in this matter. In addition, the application and Draft Technical Review do not address the qualified limitations imposed on transfers, diversions or the selling of water imposed by the common law of riparian lakes and streams. These limitations apply because the transfer or sale is for nonriparian municipalities, utilities, or intermediate and end-use purchasers who are located outside of the relevant watershed or Great Lakes Basin. These unanswered questions concerning the common law are significant because the effect of the decision in this matter will establish a precedent with serious implications. For this reason alone, the application as presented should be denied.

Thank you for the effort on the part of Regional Body in reviewing the Waukesha Application and for the opportunity to provide these comments. Please include them in the record of decision in this matter.

Sincerely yours,



James M. Olson  
President and Policy Advisor  
FLOW (For Love of Water)

## EXHIBIT 1<sup>62</sup>

### Key Provisions of the Great Lakes Compact to Proposal for Exception to Diversion Ban

**Exception** means a transfer of Water that is excepted under Section 4.9 from the prohibition against Diversions in Section 4.8.

**Exception Standard** means the standard for Exceptions established in Section 4.9.4.

**Public Water Supply Purposes** means water distributed to the public through a physically connected system of treatment, storage and distribution facilities serving a group of largely residential customers that may also serve industrial, commercial, and other institutional operators. Water Withdrawn directly from the Basin and not through such a system shall not be considered to be used for Public Water Supply Purposes.

**Standard of Review and Decision** means the Exception Standard, Decision-Making Standard and reviews as outlined in Article 4 of this Compact.

**Straddling Community** means any incorporated city, town or the equivalent thereof, wholly within any County that lies partly or completely within the Basin, whose corporate boundary existing as of the effective date of this Compact, is partly within the Basin or partly within two Great Lakes watersheds.

### Section 1.3. Findings and Purposes

The legislative bodies of the respective Parties hereby find and declare:

#### 1. Findings:

a. The *Waters of the Basin are* precious public natural resources shared and *held in trust* by the States.<sup>63</sup>

c. The Waters of the Basin can *concurrently serve multiple uses*. Such multiple uses include municipal, public, industrial, commercial, agriculture, mining, navigation, energy development and production, recreation, the subsistence, economic and cultural activities of native peoples, Water quality maintenance, and the maintenance of fish and wildlife habitat and *a balanced ecosystem*. And, other purposes are encouraged, recognizing that such uses are interdependent and *must be balanced*.

d. Future Diversions and Consumptive Uses of Basin Water resources have the potential to significantly impact the environment, economy and welfare of the Great Lakes—St. Lawrence River region;

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<sup>62</sup> The italicized language in this compilation of key provisions of the Compact have been added to emphasize authority, duties, standards, and limitations on the decision making process, and the decision by the Regional Body, Council, and parties (the states) for straddling community or county exception under Section 4.9.

<sup>63</sup> The public trust doctrine and its principles have been recognized by each of the eight Great Lakes States. Olson, James, *All Aboard: Navigating the Course for Universal Adoption of the Public Trust Doctrine*, 15 VT J. ENV'T'L L. 135, 147-167 (2014).

e. Continued sustainable, accessible and adequate Water supplies for the people and economy of the Basin are of vital importance; and,

f. The Parties have a shared duty to protect, conserve, restore, improve and manage the renewable but finite Waters of the Basin for the use, benefit and enjoyment of all their citizens, including generations yet to come.

2. Purposes:

a. To act together to protect, conserve, restore, improve and effectively manage the Waters and Water Dependent Natural Resources of the Basin under appropriate arrangements for intergovernmental cooperation and consultation because current *lack of full scientific certainty should not be used as a reason for postponing measures to protect the Basin Ecosystem.*

d. To facilitate consistent approaches to Water management across the Basin while retaining State management authority over Water management decisions within the Basin.

### **Section 3.1. General Powers**

\* \* \*

The Council and the Parties shall use the *Standard of Review and Decision and procedures contained in or adopted pursuant to this Compact* as the means to exercise their authority under this Compact.

### **Section 4.2. Water Conservation and Efficiency Programs.**

1. .... These objectives are based on the goals of:

a. *Ensuring improvement* of the Waters and Water Dependent Natural Resources;

b. *Protecting and restoring the hydrologic and ecosystem integrity* of the Basin;

c. *Retaining the quantity of surface water and groundwater* in the Basin;

d. *Ensuring sustainable use* of Waters of the Basin.

2. *Within two years* of the effective date of this Compact, each Party shall develop its own Water conservation and efficiency goals and objectives consistent with the Basin-wide goals and objectives, and shall develop and implement a Water conservation and efficiency program, either voluntary or mandatory, within its jurisdiction based on the Party's goals and objectives.

### **Section 4.3. Party Powers and Duties.**

1. Each Party, within its jurisdiction, shall manage and regulate New or Increased Withdrawals, Consumptive Uses and Diversions, *including Exceptions, in accordance with this Compact.*

\* \* \*

3. *No Party may approve* a Proposal if the Party determines that the Proposal is inconsistent with this Compact *or the Standard of Review and Decision or any implementing rules or regulations promulgated thereunder.* The Party may approve, approve with modifications or disapprove any Proposal depending on the Proposal's consistency with this Compact and the Standard of Review and Decision.

### **Section 4.5. Regional Review.**

\* \* \*

c. Proposals for Exceptions subject to Regional Review shall be submitted by the Originating Party to the Regional Body for Regional Review, and where applicable, to the Council for concurrent review.

d. The 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, recognizing uncertainties with respect to demands that may be placed on Basin Water, including groundwater, levels and flows of the Great Lakes and the St. Lawrence River, future changes in environmental conditions, the reliability of existing data and the extent to which Diversions may harm the integrity of the Basin Ecosystem

\* \* \*

#### 4. Technical Review.

c. Any member of the Regional Body may conduct their own Technical Review of any Proposal subject to Regional Review.

d. At the request of *the majority of its members*, the Regional Body shall *make such arrangements* as it considers appropriate *for an independent Technical Review* of a Proposal.

e. All Parties shall exercise their best efforts to ensure that a Technical Review undertaken under Sections 4.5.4.c and 4.5.4.d does not unnecessarily delay the decision by the Originating Party on the Application. Unless the Applicant or the Originating Party otherwise requests, *all Technical Reviews shall be completed no later than 60 days* after the date the notice of the Proposal was given to the Regional Body.

#### 5. Declaration of Finding.

\* \* \*

b. The Regional Body, having considered the notice, the Originating Party's Technical Review, *any other independent Technical Review that is made, any comments or objections* including the analysis of comments made by the public, First Nations and federally recognized Tribes, and *any other information that is provided* under this Compact shall issue a Declaration of Finding that the Proposal under consideration:

- i. Meets the Standard of Review and Decision;
- ii. Does not meet the Standard of Review and Decision; or,
- iii. Would meet the Standard of Review and Decision if certain conditions were met.

\* \* \*

h. The Regional Body shall release the Declarations of Finding to the public.

I. The Originating Party and the Council shall consider the Declaration of Finding before making a decision on the Proposal.

#### **Section 4.7. Council Actions.**

1. Proposals for Exceptions subject to Council Review shall be submitted by the Originating Party to the Council for Council Review, and where applicable, to the Regional Body for concurrent review.

2. The Council shall review and take action on Proposals in accordance with this Compact and the Standard of Review and Decision.

#### **Section 4.8. Prohibition of New or Increased Diversions.**

All New or Increased Diversions are *prohibited, except as provided for in this Article.*

#### **Section 4.9. Exceptions to the Prohibition of Diversions.**

**1. Straddling Communities.** A Proposal to *transfer Water to an area within a Straddling Community but outside the Basin* or outside the source Great Lake Watershed shall be excepted from the prohibition against Diversions and be managed and regulated by the Originating Party *provided that, regardless of the volume of Water transferred, all the Water so transferred shall be used solely for Public Water Supply Purposes within the Straddling Community*, and:

- a. All Water Withdrawn from the Basin shall be returned, either naturally or after use, to the Source Watershed less an allowance for Consumptive Use. *No surface water or groundwater from outside the Basin may be used to satisfy any portion of this criterion except if it:*
  - i. *Is part of a water supply or wastewater treatment system that combines water from inside and outside of the Basin;*
  - ii. *Is treated to meet applicable water quality discharge standards and to prevent the introduction of invasive species into the Basin;*
  - iii. *Maximizes the portion of water returned to the Source Watershed as Basin Water and minimizes the surface water or groundwater from outside the Basin;*
- b. *If the Proposal results from a New or Increased Withdrawal of 100,000 gallons per day or greater average over any 90-day period, the Proposal shall also meet the Exception Standard;* and,
- c. *If the Proposal results in a New or Increased Consumptive Use of 5 million gallons per day or greater average over any 90-day period, the Proposal shall also undergo Regional Review.*

**3. Straddling Counties.** A Proposal to transfer Water to a Community within a Straddling County that would be considered a Diversion under this Compact shall be *excepted from the prohibition against Diversions, provided that it satisfies all of the following conditions:*

- a. *The Water shall be used solely for the Public Water Supply Purposes of the Community within a Straddling County that is without adequate supplies of potable water;*
- b. *The Proposal meets the Exception Standard, maximizing the portion of water returned to the Source Watershed as Basin Water and minimizing the surface water or groundwater from outside the Basin;*
- c. *The Proposal shall be subject to management and regulation by the Originating Party, regardless of its size;*
- d. *There is no reasonable water supply alternative within the basin in which the community is located, including conservation of existing water supplies;*
- e. *Caution shall be used in determining whether or not the Proposal meets the conditions for this Exception. This Exception should not be authorized unless it can be shown that it will not endanger the integrity of the Basin Ecosystem;*
- f. *The Proposal undergoes Regional Review; and,*
- g. *The Proposal is approved by the Council. Council approval shall be given unless one or more Council Members vote to disapprove.*

*A Proposal must satisfy all of the conditions listed above. Further, substantive consideration will also be given to whether or not the Proposal can provide sufficient scientifically based evidence that the existing water supply is derived from groundwater that is hydrologically interconnected to Waters of the Basin.*

**4. Exception Standard.** Proposals subject to management and regulation in this Section shall be declared to meet this Exception Standard *and may be approved as appropriate only when the following criteria are met:*

- a. *The need for all or part of the proposed Exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies;*

- b. The Exception will be *limited to quantities that are considered reasonable for the purposes for which it is proposed*;
- c. All Water Withdrawn shall be returned, either naturally or after use, to the Source Watershed less an allowance for Consumptive Use. *No surface water or groundwater from the outside the Basin may be used to satisfy any portion of this criterion except if it:*
  - I. *Is part of a water supply or wastewater treatment system that combines water from inside and outside of the Basin;*
  - ii. *Is treated to meet applicable water quality discharge standards and to prevent the introduction of invasive species into the Basin;*
- d. The Exception will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Basin *with consideration given to the potential Cumulative Impacts of any precedent-setting consequences* associated with the Proposal;
- e. The Exception will be implemented so as to *incorporate Environmentally Sound and Economically Feasible Water Conservation Measures* to minimize Water Withdrawals or Consumptive Use;
- f. The Exception will be implemented so as to ensure that it is in *compliance with all applicable municipal, State and federal laws* as well as regional interstate and international agreements, including the Boundary Waters Treaty of 1909; and,
- g. All other applicable *criteria in Section 4.9 have also been met.*

**Section 4.12. Applicability.**

1. Minimum Standard. *This Standard of Review and Decision shall be used as a minimum standard. Parties may impose a more restrictive decision-making standard for Withdrawals under their authority. It is also acknowledged that although a Proposal meets the Standard of Review and Decision it may not be approved under the laws of the Originating Party that has implemented more restrictive Measures.*

2. Baseline.

a. To establish a baseline for determining a New or Increased Diversion, Consumptive Use or Withdrawal, each Party shall develop either or both of the following lists for their jurisdiction:

I. A list of existing Withdrawal approvals as of the effective date of the Compact;

ii. A list of the capacity of existing systems as of the effective date of this Compact. The capacity of the existing systems should be presented in terms of Withdrawal capacity, treatment capacity, distribution capacity, or other capacity limiting factors. The capacity of the existing systems must represent the state of the systems. *Existing capacity determinations shall be based upon approval limits or the most restrictive capacity information.*

b. For all purposes of this Compact, volumes of Diversions, Consumptive Uses, or Withdrawals of Water set forth in the list(s) prepared by each Party in accordance with this Section, shall constitute the baseline volume.

c. The list(s) shall be furnished to the Regional Body and the Council within one year of the effective date of this Compact.

\* \* \*

6. Withdrawal Systems. The *total volume of surface water and groundwater resources that supply a common distribution system* shall determine the volume of a Withdrawal, Consumptive Use or Diversion.

#### **Section 4.15. Assessment of Cumulative Impacts.**

1. The Parties in cooperation with the Provinces shall collectively conduct within the Basin, on a Lake watershed and St. Lawrence River Basin basis, a periodic assessment of the Cumulative Impacts of Withdrawals, Diversions and Consumptive Uses from the Waters of the Basin, every 5 years or each time the incremental Basin Water losses reach 50 million gallons per day average in any 90-day period in excess of the quantity at the time of the most recent assessment, whichever comes first, or at the request of one or more of the Parties

b. Give substantive consideration to climate change or other significant threats to Basin Waters and take into account the current state of scientific knowledge, or uncertainty, and appropriate Measures to exercise caution in cases of uncertainty if serious damage may result;

c. Consider adaptive management principles and approaches, recognizing, considering and providing adjustments for the uncertainties in, and evolution of science concerning the Basin's water resources, watersheds and ecosystems, including potential changes to Basin-wide processes, such as lake level cycles and climate.

#### **Section 5.1. Consultation with Tribes**

1. In addition to all other opportunities to comment pursuant to Section 6.2, appropriate consultations shall occur with federally recognized Tribes in the Originating Party for all Proposals subject to Council or Regional Review pursuant to this Compact.

#### **Section 8.1. Effect on Existing Rights.**

1. *Nothing in this Compact shall be construed to affect, limit, diminish or impair any rights validly established and existing as of the effective date of this Compact under State or federal law governing the Withdrawal of Waters of the Basin.*

2. *Nothing contained in this Compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective Parties relating to common law Water rights.*<sup>64</sup>

3. Nothing in this Compact is intended to abrogate or derogate from treaty rights or rights held by any Tribe recognized by the federal government of the United States based upon its status as a Tribe recognized by the federal government of the United States.

4. *An approval by a Party or for the Council under this Compact does not give any property rights, nor any exclusive privileges, nor shall it be construed to grant or confer any right, title, easement, or interest in, to or over any land belonging to or held in trust by a Party; neither does it authorize any injury to private property or invasion of private rights, nor infringement of*

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<sup>64</sup> The common law of a party would include the common law of riparian surface lakes and streams, groundwater, and public trust in navigable waters of an affected state that is a part to the Compact.

*federal, State or local laws or regulations; nor does it obviate the necessity of obtaining federal assent when necessary.*

\* \* \*

**Section 8.4. Additional Laws.**

*Nothing in this Compact shall be construed to repeal, modify or qualify the authority of any Party to enact any legislation or enforce any additional conditions and restrictions regarding the management and regulation of Waters within its jurisdiction.*

## EXHIBIT 2

Figure 2. Location of water supply and wastewater return flow routes.



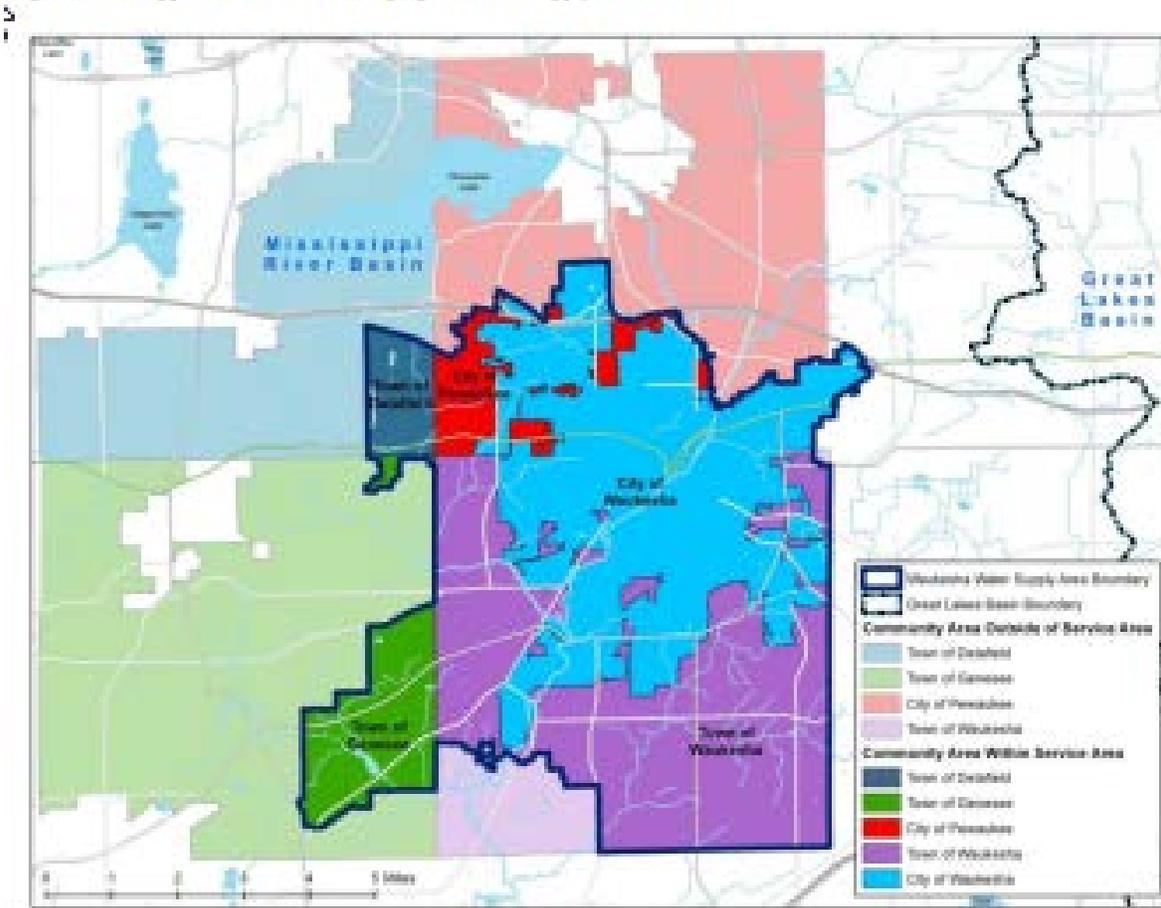
DRAFT JUNE 2015

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<http://media.jrn.com/documents/waukeshawaterdraftreview.pdf>

### EXHIBIT 3

Figure 18. The Applicant and SEMRPC's proposed water supply service area.



## EXHIBIT 4



<http://www.miseagrant.umich.edu/explore/about-the-great-lakes/>