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WILL THE WAUKESHA EXCEPTION DRAIN THE GREAT LAKES?

*Keith Harley**

I. INTRODUCTION

In December, 2013, the City of Waukesha, Wisconsin delivered an application to the Wisconsin Department of Natural Resources (“WDNR”) seeking state approval to switch the source of Waukesha’s water supply from groundwater to Lake Michigan.¹ The map² on the cover of this five-volume application³ illustrates more than a century of Great Lakes water law. The map includes the Great Lakes as well as the bordering U.S. states and Canadian provinces that are directly dependent on this freshwater resource. Just as importantly, this cover map also includes a bright, yellow line circling the entire perimeter of the Great Lakes. In some places, this bright line hugs close to the shore; in other places, it extends hundreds of miles into the land surface of the adjoining states and provinces. This bright line represents the total area of water and land that is within the Great Lakes Basin, a single hydrologic system that includes the Great Lakes and the St. Lawrence River, as well as the interconnected web of streams, rivers, lakes, connecting channels and groundwater resources.⁴

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1. *City of Waukesha Application for a Lake Michigan Diversion with Return Flow*, Wisconsin Department of Natural Resources (Oct. 2013), <http://dnr.wi.gov/topic/EIA/waukesha/App2013.html> [<https://perma.cc/58WS-KEDT>] [hereinafter *Waukesha Application*].

2. City of Waukesha, *Volume One: Application Summary, City of Waukesha Application for a Lake Michigan Diversion with Return Flow*, Waukesha Water (Oct. 2013), http://www.waukeshawater.com/downloads/1_City_of_Waukesha_Application_Summary.pdf [<https://perma.cc/74FF-BBKJ>] [hereinafter *Waukesha Application: Volume One*].

3. The five volumes are: Volume One: Application Summary, City of Waukesha Diversion with Return Flow; Volume Two: City of Waukesha Water Supply Service Area Plan; Volume Three: City of Waukesha Water Conservation Plan; Volume Four: City of Waukesha Return Flow Plan; and Volume Five: City of Waukesha Environmental Report for Water Supply Alternatives (Oct. 2013), <http://dnr.wi.gov/topic/EIA/waukesha/App2013.html> [<https://perma.cc/58WS-KEDT>].

4. *Great Lakes-St. Lawrence River Basin Water Resources Compact*, § 1.2: Definitions, “Waters of the Basin or Basin Water” (Dec. 13, 2005), <http://www.glscompactcouncil.org/Docs/Agreements/Great%20Lakes-St%20Lawrence%20River%20Basin%20Water%20Resources%20Compact.pdf> [hereinafter *Compact*].

The simple cover map shows the urgent need for Waukesha's December 2013 application. A red star 1.5 miles outside of the bright boundary line of the Great Lakes Basin represents Waukesha.⁵ The location outside the Basin has both legal and practical significance. Legally speaking, because it is outside of the Basin, Waukesha traditionally has been barred from drawing water from the Great Lakes even though Lake Michigan is only 17 miles away.⁶ As a practical result, Waukesha has been relegated to using polluted and increasingly scarce groundwater as the source of its public water supply.⁷ The region's growing population exacerbates this problem.⁸ In the short term, this problem is evidenced by a court-imposed deadline for Waukesha to address contaminants in its public water supply.⁹ Longer term, Waukesha's viability is dependent on switching its water source from diminishing, polluted groundwater to the plentiful Great Lakes.

Waukesha's 2013 application was directed in the first instance to the WDNR. Ultimately, Waukesha needed Wisconsin to recommend its request to the Great Lakes–St. Lawrence Water Resources Council, a body consisting of the Governors of the eight U.S. states that border the Great Lakes and the Premiers of Ontario and Quebec. Together, these elected officials must abide by a 2005 agreement – the Great Lakes-St. Lawrence River Basin Water Resources Compact (“Compact”) – that is designed to preserve and enhance the common freshwater resource on which their states and provinces depend.¹⁰ With only narrow exceptions, the Compact explicitly incorporates the longstanding ban preventing out-of-Basin entities from accessing Great Lakes water, a bedrock Compact principle that is designed to prevent unauthorized diversions in order to preserve the integrity of this freshwater resource.¹¹

5. *Waukesha Application: Volume One*, *supra* note 2.

6. *Id.*

7. *Id.* at 2.2-2.5.

8. *Id.* at 3.1-3.9.

9. See *State of Wisconsin Department of Natural Resources v. City of Waukesha*, 184 Wis.2d 178 (Wis. 1994); see also *City of Waukesha v. Environmental Protection Agency*, 320 F.3d 228 (D.C. Cir. 2003).

10. See *Compact*, *supra* note 4, at § 1.3; see also *Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement* (Dec. 13, 2005), http://www.glsregionalbody.org/Docs/Agreements/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf [<https://perma.cc/KZN6-ZKUY>].

11. *Compact*, *supra* note 4, at § 4.8.

This article will describe how despite long odds, Waukesha is succeeding in gaining access to Great Lakes water. This years-long effort is even more impressive because it culminated in unanimous approval¹² by Great Lakes Council officials.¹³ The article will describe the process for obtaining approval for diversion, the legal standards that Waukesha was required to meet, and the key evidence it produced to satisfy these requirements. Drawing from the record of public proceedings, the article will summarize the most common objections to Waukesha's proposal, focusing on a recently abandoned challenge to the Council's approval. Based on this analysis, the article will conclude by considering whether the "Waukesha exception" is one-of-a-kind or the first use of a new strategy for many water-distressed towns to seek diversions from the Great Lakes.

II. THE COMPACT, THE COUNCIL AND A NEW OPPORTUNITY FOR PUBLIC WATER SUPPLIERS

Water diversion from the Great Lakes has prompted State-versus-State legal action since 1922 when Wisconsin sued Illinois to address the insatiable water demand of the Chicago region.¹⁴ Even worse, Chicago provided no "return flow" to replenish the Great Lakes, but instead, directed its wastewater into the Mississippi Basin by reversing the flow of local waterways.¹⁵ Wisconsin claimed that Illinois' conduct deprived it of its rightful share of an interstate water resource on which it also depended. Pursuant to Article 3, Section 2 of the U.S. Constitution, the Supreme Court possessed original jurisdiction over Wisconsin's case. Over time, other Great Lakes states joined this litigation, which became the primary forum for water diversion and allocation disputes to be adjudicated. Remarkably, the original case remains a dormant part of the SCOTUS docket, which any State party can seek to reopen.¹⁶

In 2005, the Great Lakes states developed an alternative forum to address challenges and resolve disputes. Together, they established the Great Lakes-St. Lawrence River Basin Water Resources Compact,

12. *Compact*, *supra* note 4, at § 4.9(3)(g).

13. *Application by the City of Waukesha, Wisconsin*, No. 2016-1, Before the Great Lakes-St. Lawrence River Basin Water Resources Council (Final Council Decision) (June 21, 2016), available at <http://gsgp.org/media/1825/waukesha-final-decision-of-compact-council-6-21-16.pdf> [<https://perma.cc/7F2B-6WMG>] [hereinafter *Final Council Decision*].

14. *Wisconsin v. Illinois*, 278 U.S. 367, 399 (1929).

15. *Id.* at 400.

16. *Compact*, *supra* note 4, at § 4.14.

backstopped by concurrent state-specific legislation. In 2008, the U.S. Senate unanimously consented to it.¹⁷ The Compact creates a Council consisting of the Governors of the eight Great Lakes states and the Premiers of two Canadian Provinces, Ontario and Quebec.¹⁸ The Council is charged to remove causes of present and future controversies and to develop cooperative, mutually beneficial management strategies to preserve and enhance the Great Lakes.¹⁹

The Compact also gives the Council the responsibility to adjudicate diversion requests consistent with Compact rules. Importantly, the “default” position for the Council is to prohibit diversions. As Section 4.8 of the Compact explicitly states, “All New or Increased Diversions are prohibited except as provided for in this Article.” Having said this, a substantial portion of the Compact defines circumstances under which the Council may grant a diversion request.²⁰ Some of these requirements are procedural, mandating review in the first instance by an Originating Party (the relevant jurisdiction, here, Wisconsin) and an Originating Party’s recommendation of the proposal to the Council.²¹ The Council then commences a decision-making process that includes public notice, public participation, technical review,²² a formal Declaration of Findings, and a Final Decision.²³ The Compact requires unanimous Council approval²⁴ and provides for third party challenges to Council actions.²⁵

Other Compact diversion requirements are substantive. These substantive requirements are tailored to different diversion scenarios. Waukesha is subject to the extensive requirements that apply to a “Community Within a Straddling County,” meaning that, although the City of Waukesha is outside the Basin, it is in a County – Waukesha County – that is (partially) within the Basin.²⁶ Under these circumstances, the

17. See S.J. Res. 45, 110th Cong. 2d Session (2008), <https://www.gpo.gov/fdsys/pkg/PLAW-110publ342/pdf/PLAW-110publ342.pdf> [<https://perma.cc/TR9Z-S9A6>]; see also Wis. Stat. § 281.346 (2017) (implementing Wisconsin’s responsibilities under the Compact).

18. *Compact, supra* note 4, at § 1.2: Definitions, “State,” “Province,” “Party,” and “Council.”

19. *Compact, supra* note 4, at § 1.3.2(a)-(c).

20. *Compact, supra* note 4, at § 4.9.

21. *Compact, supra* note 4, at §§ 4.5.1-4.5.4.

22. *Technical Review: For the City of Waukesha’s Proposed Diversion of Great Lakes Water for Public Water Supply with Return Flow to Lake Michigan*, Wisconsin Department of Natural Resources (Jan. 2016), http://gsgp.org/media/1639/wdnr_technicalreview.pdf [<https://perma.cc/ELX2-LBHT>].

23. *Compact, supra* note 4, at §§ 4.5.3 (a)-(e) and 4.5.4.

24. *Compact, supra* note 4, at § 4.9.3(g).

25. *Compact, supra* note 4, at § 7.3.3.

26. *Compact, supra* note 4, at § 1.2: Definitions, “Straddling Community” and § 4.9.3.

Compact mandates that the diversion must be for a public water supplier without alternatives.²⁷ The applicant must demonstrate that conservation measures alone are inadequate to avoid the need for the diversion²⁸ and return unconsumed water back into a watershed within the Basin.²⁹

III. THE WAUKESHA SIX

Six of the Compact's procedural and substantive requirements give rise to important "lessons learned" from Waukesha's diversion request. These lessons will help guide entities that are similarly situated to Waukesha and evaluating whether a diversion request is feasible. These lessons also provide a basis to evaluate whether the Council's approval of Waukesha's request will lead to a wave of new diversions that cumulatively will threaten the integrity of Basin resources.

A. Lesson One - "State" Your Case

Waukesha needed approval from an Originating Party before coming to the Council.³⁰ The Originating Party is a state party to the Compact. To gain Wisconsin's support, Waukesha initiated its first "Application for Lake Michigan Water Supply" to the WDNR in May 2010.³¹ WDNR's response included conducting three years of technical review and evaluation, holding informational meetings and requiring additional analyses by Waukesha.³² Even after Waukesha resubmitted its Application in 2013, WDNR conducted additional public hearings and a written public comment period, consulted Wisconsin Tribes, and completed an Environmental Impact Statement pursuant to Wisconsin's Environmental Policy Act.³³ Waukesha's 2016 diversion application to the Council is the product of a six-year Wisconsin approval process that was a protracted but mandatory condition precedent for Waukesha to move forward under the Compact.³⁴

27. *Compact, supra* note 4, at § 4.9.3(a).

28. *Compact, supra* note 4, at § 4.9.4(a).

29. *Compact, supra* note 4, at § 4.9.4(c).

30. *Compact, supra* note 4, at § 4.4.

31. *Waukesha Application, supra* note 1, at 3.

32. *Id.*

33. *Final Council Decision, supra* note 13, at § I, ¶ 3.

34. *Compact, supra* note 4, at § 4.4.

B. Lesson Two - Straddle

Location matters. The Compact imposes geographic limits on diversions, employing a “straddling” test for entities that are not completely inside the Basin boundary line. Eligible entities must either straddle the Great Lakes boundary line themselves³⁵ or be within a straddling County “that lies partly within the Basin”.³⁶ The Council concluded Waukesha is a “Community Within a Straddling County” even though only an eastern sliver of Waukesha County is in the Great Lakes Basin.³⁷ In its January 7, 2016 briefing to the Council, the City’s representative presented a map that identifies 20 Wisconsin counties that straddle the Great Lakes Surface Water Divide.³⁸ In theory, every out-of-basin town in every one of those straddling counties (and the straddling counties in other jurisdictions) could assert geographic eligibility as a “Community Within A Straddling County”.

C. Lesson Three – Diversion Is a Necessity, Not an Amenity

The Compact contemplates that a new diversion should only be approved when it is a necessity. To ensure this outcome, the Compact includes three requirements which applicants like Waukesha must meet. The first requirement is that the diversion must be solely for a public water supply that is without adequate supplies of potable water.³⁹ The Council concluded Waukesha satisfies this requirement because it is a public water supplier⁴⁰ using a diminishing groundwater aquifer with unsafe levels of radium.⁴¹ Consequently, in the Council’s view, Waukesha’s current water supply is neither sustainable nor safe for the people it serves.⁴² Having said

35. *Compact, supra* note 4, at § 1.2: Definitions, “Straddling Community.”

36. *Compact, supra* note 4, at § 1.2: Definitions, “Community within a Straddling County.”

37. See *Final Council Decision, supra* note 13, at § II, ¶ 1; see also *Application by the City of Waukesha, Wis.*, No. 2016-1, Before the Great Lakes-St. Lawrence River Basin Water Resources Council (Declaration of Finding) (May 18, 2016), <http://www.glsregionalbody.org/Docs/Waukesha/Waukesha--%20May%2018%202016%20Final%20Declaration%20of%20Finding.pdf> [https://perma.cc/M3NA-UB74].

38. Great Lakes-St. Lawrence River Basin Water Resources Council, *Regional Body and Compact Council Briefing – City of Waukesha Diversion Application*, Transcript of Proceedings (Jan. 7, 2016), p. 5, [https://perma.cc/Q52K-838P].

39. *Compact, supra* note 4, at § 4.9.3(a).

40. *Final Council Decision, supra* note 13, at § II, ¶ 2.

41. *Id.* at § II, ¶ 3(b)4.

42. *Id.* at § II, ¶ 4.

this, the Council's Final Decision is not a *carte blanche*; it also imposes limits on the volume of the diversion and on the geographic region that the diversion can supply.⁴³

The second requirement is to demonstrate that a diversion is necessary because it is the only reasonable alternative.⁴⁴ This analysis incorporates current and projected demands for water in the supplier's service area and an analysis of the water supply alternatives to meet this demand.⁴⁵ One benefit of the extensive WDNR review process is that it generated a screening-level review of 14 supply alternatives and an in-depth analysis of six alternatives.⁴⁶ This groundwork by Waukesha and WDNR enabled the Council to evaluate efficiently the affected environment and environmental consequences of multiple alternatives. Notably, the Council did not confine its analysis to the direct water-supply consequences of different alternatives, but instead discounted some alternatives because of indirect environmental impacts on wetlands, surface waters, shallow aquifers, land, waste disposal, water quality and regional water conservation.⁴⁷ Ultimately, the Council discarded all water supply alternatives because it concluded they are unreliable or present environmental or human health risks.⁴⁸

The third requirement is efficient water use and conservation.⁴⁹ The efficient use/conservation requirement serves two important purposes. First, the applicant must demonstrate that the efficient use/conservation of water alone is not enough to address its water problems.⁵⁰ Second, the applicant must show that it utilizes conservation measures to minimize the amount of its diversion.⁵¹ The Third Volume of Waukesha's application to the WDNR consists of a comprehensive water conservation plan that aligns with this Compact mandate and a corresponding Wisconsin regulatory protocol.⁵² Importantly, Waukesha already implements a comprehensive water efficiency/conservation plan and can quantify the present-day reductions it

43. *Id.* at § II, ¶ 5.

44. *Compact, supra* note 4, at § 4.9.3(d).

45. *Compact, supra* note 4, at §§ 4.10 and 4.11(c).

46. *Waukesha Application: Volume One, supra* note 2, at 4-2 – 4-17.

47. *Final Council Decision, supra* note 13, at § II, ¶¶ 3(a), 4(b), 8(c), and 11.

48. *Id.* at § II, ¶ 4(a).

49. *Compact, supra* note 4, at §§ 4.9.4(a) and 4.9.4(e).

50. *Compact, supra* note 4, at § 4.9.4(a).

51. *Compact, supra* note 4, at § 4.9.4(e).

52. See City of Waukesha, *Volume Three: City of Waukesha Water Conservation Plan*, Waukesha Water (Oct. 2013), http://www.waukesha-water.com/downloads/3_City_of_Waukesha_Conservation_Plan.pdf [https://perma.cc/89K5-TDZX] [hereinafter *Waukesha Application: Volume Three*]; see also Wis. Stat. § 281.346(4)(f)6.

achieves – 0.8 million gallons per day – constituting a small fraction of its overall demand, with few additional opportunities for further reductions.⁵³

D. Lesson Four - Diversion Is a Zero Sum Game

The Compact requires Waukesha to develop a plan to ensure there is no net loss of Great Lakes water.⁵⁴ This part of Waukesha’s application reflects a complicated mass balance exercise. Waukesha may acquire a certain volume of water from an existing Lake Michigan public water supplier (the nearby City of Oak Creek)⁵⁵, but must provide a comparable volume of return flow into a tributary that replenishes Lake Michigan (the Root River).⁵⁶ The Council concluded Waukesha will return approximately 100% of the volume withdrawn from the Basin via return flow into the Root River.⁵⁷ Moreover, because the return flow consists of “high quality effluent,” the Council concluded the return flow will provide environmental benefits to the Root River and produce no loss of biological integrity to Lakes.⁵⁸ The Council highlighted Waukesha’s wastewater treatment plant will provide “high quality effluent” because it employs tertiary-level treatment and ultraviolet disinfection, removing chemical phosphorus, suspended solids and associated contaminants, and organic materials from the return flow.⁵⁹

E. Lesson Five – Integrity Matters

The Council’s decision to approve Waukesha’s request includes a groundwater analysis that is not strictly required by the Compact. The Council characterizes this analysis as fulfilling a Compact requirement that urges caution and which mandates that an exception should not be authorized unless it can be shown the exception will not endanger the integrity of the basin.⁶⁰ In its decision, the Council notes that the deep

53. *Final Council Decision*, *supra* note 13, at § II, ¶ 6(a).

54. *Compact*, *supra* note 4, at § 4.9.4(c).

55. *Waukesha Application: Volume Three*, *supra* note 52. At the time of this article, Waukesha’s agreement with Oak Creek expired. Waukesha is evaluating a new agreement with Oak Creek as well as a new proposal from Milwaukee.

56. *See Id.*; *see also* City of Waukesha, *Volume Four: City of Waukesha Return Flow Plan*, Waukesha Water (Oct. 2013), http://www.waukesha-water.com/downloads/4_City_of_Waukesha_Return_Flow_Plan.pdf [<https://perma.cc/6DKU-CPLG>] [hereinafter *Waukesha Application: Volume Four*]

57. *Final Council Decision*, *supra* note 13, at § II, ¶ 7(a).

58. *Id.* at § II, ¶ 8(e).

59. *Id.* at § II, ¶ 8(h).

60. *Compact*, *supra* note 4, at § 4.9.3(e).

groundwater aquifer now used by Waukesha is hydrologically connected to Lake Michigan.⁶¹ The natural flow of this deep aquifer is toward Lake Michigan.⁶² When Waukesha and other southeast Wisconsin communities began pumping water from this aquifer, they were in effect drawing water away from Lake Michigan but providing no return flow.⁶³ When Waukesha receives Lake Michigan water, it will stop pumping from the aquifer which, in turn, "...will aid the recovery of the natural groundwater flow system."⁶⁴ Based on its technical analysis, the Council concludes the restoration of a more natural hydrogeologic system will result in a net increase of water to the Lake Michigan watershed of 1.6 million gallons per day.⁶⁵ This benefit is in addition to the return flow Waukesha will provide through the Root River.

F. Lesson Six – The Long Haul

After spending six years to achieve Wisconsin's approval, Waukesha still faced a potentially protracted review process by the Council itself with no assurance of success. Adding to this uncertainty, Council approval shall be given "...unless one or more Council Members vote to disapprove."⁶⁶ The Compact also allows for third parties to Petition for Hearings⁶⁷ and to challenge Council decisions in federal district court.⁶⁸ Under the Compact, the Council as a whole and all Council members are authorized to conduct a technical review of diversion requests.⁶⁹ Waukesha's request also triggered a public process.⁷⁰ Ultimately, the Council's public process included public notice of the application, the establishment of an on-line repository of information, a two-month public comment period, six days of public hearings, and targeted outreach to Canadian First Nations and U.S. Tribes.⁷¹ The Council's decision was executed in stages, beginning with a Declaration of Findings, public notice of these Findings, a public meeting of the Compact Council to make a Final Decision, and a Final Decision supported by a record of decision.⁷²

61. *Final Council Decision*, *supra* note 13, at § II, ¶ 11.

62. *Id.*

63. *Id.*

64. *Id.* at § II, ¶ 11(c).

65. *Id.* at § II, ¶ 11(d).

66. *Compact*, *supra* note 4, at § 4.9.3(g).

67. *Compact*, *supra* note 4, at § 7.3.1.

68. *Compact*, *supra* note 4, at § 7.3.1(i).

69. *Compact*, *supra* note 4, at § 4.5.4.

70. *Compact*, *supra* note 4, at § 4.5.3, 6.1, and 6.2.

71. *Final Council Decision*, *supra* note 13, at § I, ¶¶ 4-5.

72. *Id.* at § I, ¶¶ 4-6.

The Council is also authorized to impose and enforce forward-looking conditions on its approval.⁷³ Waukesha is now subject to 13, Council-imposed conditions that are enforceable by the Compact Council and any Party under the Compact.⁷⁴ Simply put, the Compact Council and its individual members now exercise significant oversight on the way Waukesha, Wisconsin will do its business. In the future, Waukesha is subject to Council oversight on the amount of its diversion,⁷⁵ the area to which it provides diverted water,⁷⁶ the protocols for continued use of groundwater,⁷⁷ water efficiency and conservation measures to meet an overall 10% reduction goal,⁷⁸ a pharmaceutical and personal care products recycling program,⁷⁹ the return flow to the Root River,⁸⁰ and a study of the impacts of the return flow on the Root River.⁸¹ Waukesha must provide a compliance report to the Council every year⁸² and is subject to a Council-initiated inspection and audit "...of the City of Waukesha operations."⁸³

IV. CITIES VERSUS STATES – THE CHALLENGE TO COUNCIL APPROVAL

The most articulate, effective and persistent objector to the Council's Waukesha diversion approval was the Great Lakes-St. Lawrence Cities Initiative, a binational coalition of more than 131 U.S. and Canadian mayors and local officials.⁸⁴ The Cities Initiative shares the same geographic focus and mission as the Compact Council⁸⁵ but expressed a very different point of view about the Waukesha diversion application. The Cities Initiative argued "...[a]llowing a Diversion that is contrary to the strict requirements of the Compact threatens a resource that provides drinking water for 40 million people and is the foundation upon which a strong regional economy is based, to the detriment of the members of the

73. *Compact*, *supra* note 4, at §§ 4.9.3-4.9.4.

74. *Final Council Decision*, *supra* note 13, at § III, ¶¶ 2(A)-(M).

75. *Id.* at § III, ¶ 2(B).

76. *Id.*

77. *Id.* at § III, ¶¶ 2(D)-(F).

78. *Id.* at § III, ¶ 2(C).

79. *Id.* at § III, ¶ 2(G).

80. *Id.* at § III, ¶ 2(H).

81. *Id.* at § III, ¶ 2(I).

82. *Id.* at § III, ¶ 2(J).

83. *Id.* at § III, ¶ 2(L).

84. *About The Great Lakes and St. Lawrence Region*, Great Lakes and St. Lawrence Cities Initiative, <https://glslcities.org/about-the-great-lakes-and-st-lawrence-cities-initiative/about-the-great-lakes-and-st-lawrence-region/> (last visited Jan. 31, 2018) [<https://perma.cc/AWE4-UWTV>].

85. *Id.*

GLSL Cities Initiative.”⁸⁶ This objection was especially vexing because it pitted the Governors and Premiers who comprise the Compact Council against the mayors and local officials who make up the Cities Initiative. Yet the difference in scale between the two organizations (regional v. local) was not critical to the Cities Initiative’s arguments. Instead, simply put, the Cities Initiative asserted Council officials made wrong decisions. The arguments were not a matter of jurisdictional scale but rather of second guessing.

Procedurally, the Cities Initiative effectively utilized the Compact’s opportunities for public challenges to Council decisions. After the Council’s approval of Waukesha’s diversion request, the Cities Initiatives formally requested that the Council hold a new hearing to reconsider its June 21, 2016 approval.⁸⁷ The Cities Initiative subsequently supported its request with a thorough “Written Statement In Furtherance of Request For Hearing and Compact Council Consideration.”⁸⁸

Substantively, the Cities Initiatives asserted the Council’s diversion approval was contrary to “fundamental principles of contract interpretation and statutory construction” in several ways.⁸⁹ In the view of the Cities Initiative, the Council wrongly determined that Waukesha is a community within a straddling county, and improperly allowed Waukesha’s water service area to extend beyond municipal boundaries.⁹⁰ The Cities Initiative asserted the Council’s evaluation of key requirements, like alternatives, were based on an inappropriate legal interpretation and an incomplete or misapplied technical record.⁹¹ As part of applying the correct legal standards and additional technical requirements, the Cities Initiative argued

86. Letter from Jill M. Hutchinson, Jenner & Block, on behalf of the Great Lakes and St. Lawrence Cities Initiative, to the Executive Director of the Great-Lakes-St. Lawrence River Basin Water Resources Council (Aug. 19, 2016) (on file with the Great Lakes and St. Lawrence Cities Initiative), available at <https://glslicities.org/wp-content/uploads/2015/11/Request-for-Hearing-re-Final-Decision-in-the-Matter-of-the-Application-b....pdf> [<https://perma.cc/RDM5-24AS>].

87. *Id.*

88. *Written Statement in Furtherance of Request for Hearing and Compact Council Consideration*, Great Lakes and St. Lawrence Cities Initiative (Sept. 16, 2016), <https://glslicities.org/wp-content/uploads/2015/11/Cities-Initiative-Written-Statement-9-16-16.pdf> [<https://perma.cc/QQZ3-KEMZ>].

89. Letter from Jill M. Hutchinson, Attorney, Jenner & Block, to Executive Director, Great Lakes-St. Lawrence River Basin (Sept. 16, 2016) (on file with the Great Lakes and St. Lawrence Cities Initiative), available at <https://glslicities.org/wp-content/uploads/2015/11/Cities-Initiative-Letter-to-Compact-Council-9-16-16.pdf> [<https://perma.cc/6Y9X-GR7Q>].

90. *Id.*

91. *Id.*

that the Council should suspend its approval and reopen the public participation process.⁹² The Cities Initiative was especially concerned about the precedent that would be created by an approval which it believed lacks technical and legal merit. Tactically speaking, if successful, the Cities Initiative would create another protracted re-application and public process before the Council while also retaining the full range of its appeal rights at the conclusion of this “second round.” This would have the practical effect of creating an interminable review process, a potentially fatal blow to Waukesha’s efforts.

In response to the Cities Initiative, the Council conducted the requested reconsideration hearing on March 20, 2017 and April 20, 2017.⁹³ On May 4, 2017, the Compact Council issued its Opinion unanimously reaffirming its June 16, 2016 approval of the WDNR-Waukesha diversion request.⁹⁴ As part of its Opinion, the Compact Council provides a justification for the public notice-and-comment process it employed as part of reaching its June 16, 2016 decision, discounting the need for a more formal “trial-like” hearing.⁹⁵ The Compact Council defends omissions in the administrative record but ultimately agrees to supplement the record of decision, mostly with documents that were part of the Wisconsin-based process.⁹⁶ The Compact Council questions whether the Cities Initiatives actually qualifies as a “person aggrieved by the final decision” authorized to challenge Council decisions,⁹⁷ but prudently avoids using its misgivings as the sole basis for evaluating the challenge.

The bulk of the Compact Council’s decision consists of describing in detail the legal and technical bases for its June 16, 2016 diversion approval. Unlike the June 16th decision itself, the Compact Council painstakingly re-creates the decisive moments in the give-and-take between participants in the Council process, which is an extremely valuable addition to the record.⁹⁸ The Opinion thoroughly explains the Council’s reasoning in applying

92. *Id.*

93. Susan Bence, *Compact Council Rejects Request to Reconsider Waukesha Water Decision*, NPR News in Milwaukee (Apr. 20, 2017), <http://wuwmm.com/post/compact-council-rejects-request-reconsider-waukesha-water-decision#stream/0> [<https://perma.cc/P56S-CAGD>].

94. City of Waukesha, *Diversion Hearing No. 2016-1*, Before the Great Lakes-St. Lawrence River Basin Water Resources Council (Opinion) (May 4, 2017), <http://www.glsrregionalbody.org/Docs/Waukesha/Compact%20Council%20Opinion%20on%20GLSLCI%20Request%20for%20Hearing%205-4-17.pdf> [<https://perma.cc/YQY8-STVL>].

95. *Id.* at 4-8.

96. *Id.* at 10-13.

97. *Id.* at 8-10.

98. *Id.* at 19-21, 25-27, 30-32, 38, 45-47, and 50.

Compact standards, while at the same time emphasizing the practical aspects of, and consequences for, the case at hand. The Opinion consistently contrasts the Council’s “deep dive” into the record of this case with the arguments of the Cities Initiative. For example, as to the appropriate service area, the Opinion claims the Cities Initiative did not cite any facts in the administrative record that contradict those the Compact Council relied on, but “merely asserts” a different conclusion is required.⁹⁹ The Opinion then describes the consequences of the Cities Initiative’s position by identifying particular communities that would suffer if these “mere assertions” were implemented.¹⁰⁰ On this and several other issues, the Cities Initiative challenge succeeds in provoking a more complete description of the Council’s deliberative process and ultimate reasoning, but fails to change the Council’s decision on any important point.

Yet even the Council’s May 4, 2017 decision did not conclude this matter. The Compact gives a right to “any Person aggrieved by any action taken by the Council” to seek judicial review within 90 days of a Council action in the United States District Courts for the District of Columbia or the District Court in which the Council maintains offices.¹⁰¹ The ongoing uncertainty for Waukesha did not end until August 2, 2017, when the Cities Initiative announced a settlement of its challenge to the Compact Council’s decision. In exchange for an agreement for collaboration on improvements in the Compact Council’s review process, the Cities Initiative agreed to abandon its legal challenge.¹⁰²

V. CONCLUSION - WATER, WATER, EVERYWHERE NOR ANY DROP TO DRINK (EXCEPT FOR WAUKESHA)?

Waukesha’s experience should give pause to every municipality with a similar diversion goal. As a threshold, how many municipalities will be able to demonstrate the same kind of dire predicament as Waukesha and that reasonable alternatives do not exist? With due respect to the Cities Initiative, it is clear that originating parties like WDNR and the Compact Council are committed to imposing expensive and logistically complicated

99. *Id.* at 21.

100. *Id.*

101. *Compact, supra* note 4, at § 7.3(i).

102. Press Release, Mayors and Governors Reach Agreement to Improve Water Diversion Application Process (Aug. 2, 2017) (on file with the Great Lakes and St. Lawrence Cities Initiative), available at <https://glsccities.org/wp-content/uploads/2015/05/080217-Cities-Initiative-Press-Release.pdf> [<https://perma.cc/SSR5-RUUX>].

requirements like water conservation programs and “no net loss” return flow systems. Moreover, in order to initiate a diversion application, a municipality must have access to technical and legal expertise that few municipalities will have in-house, and which will be expensive to acquire and sustain.

The Compact Council’s quick approval must be viewed in the context of Waukesha’s six-year, self-funded effort to obtain Wisconsin’s endorsement and the subsequent uncertainty created by the actions of an aggrieved third party.¹⁰³ This protracted process is in stark contrast with Waukesha’s urgent need to fulfill a fundamental responsibility to its residents, namely, to provide a safe and adequate public water supply. Notably, this lengthy process occurred even though Compact Council members unanimously approved Waukesha’s request, a variable that is not assured for future applicants and which could create its own time-consuming complications. Moreover, even with unanimous Council approval, the Compact provides generous opportunities for third party challenge, creating a risk factor that no applicant can control.

A municipality which attempts to create shortcuts in the state-based approval process may face other risks. Waukesha’s long engagement with Wisconsin generated a robust technical analysis including an Environmental Impact Statement that was largely adopted by the Council and its members. A municipality that acquires quick approval from its sponsoring state but does not generate a comprehensive, credible technical analysis can anticipate an independent technical review process by the Council and/or any of its participating parties, with uncertain conclusions. This risk is compounded because the failure to meet any one of the Compact’s approval requirements will doom the entire enterprise.

Municipalities should also take note of the continuing control the Compact Council will assert over municipal affairs as a condition for approving a diversion. Even though Waukesha was ultimately successful, it will be subject to a degree of Compact Council control and oversight that many municipalities might find intrusive. Waukesha will remain accountable to the Compact Council and its individual parties for as long as the diversion continues. It is essential that municipalities understand that

103. *City of Waukesha Water Diversion*, Wisconsin Department of Natural Resources, <http://dnr.wi.gov/topic/EIA/waukeshadiversionapp.html> [https://perma.cc/8TGL-W22V].

their relationship with this regional tribunal and its individual parties will create a new set of permanent, municipal obligations.

The Cities Initiative believes the Waukesha exception could lead to a proliferation of diversion requests by applicants emboldened by the Compact Council's leniency in this test case. The Cities Initiative fears that the Waukesha "exception" will become normative, causing cumulative, irreversible damage to the integrity of the Great Lakes. A careful review of the Waukesha case study suggests the opposite is probably true. Waukesha may achieve its goal, but only with enormous expenditures of municipal time, money and effort, in a process without any certainty of ultimate success. What municipality would look at Waukesha's example and follow it if it had any other alternative? Waukesha's experience suggests diversions are achievable, but only worthwhile for municipalities that have no other options. Perhaps Waukesha's most practical lesson about seeking a diversion is this – you had better be desperate.