

February 12, 2018

Great Lakes-St. Lawrence River Basin Water Resources Council
Great Lakes-St Lawrence River Water Resources Regional Body
20 N. Wacker Drive
Suite 2700
Chicago, Illinois 60606

Dear Members of the Joint Great Lakes-St. Lawrence River Basin Water Resources Regional Body and Compact Council Procedures Update Team:

We the undersigned group of organizations worked, along with many others, to ensure the Compact's adoption in each of the Great Lakes states and in Congress. We represent a broad array of interest groups around the Great Lakes basin. Five of the undersigned organizations are members of the Regional Body and Compact Council Advisory Committee. We appreciate that the Great Lakes-St. Lawrence River Water Resources Regional Body ("the Regional Body") and Great Lakes-St. Lawrence River Basin Water Resources Council ("the Council") are working collaboratively to review and update regional decision-making procedures for future proposals to divert Great Lakes Basin water under the Great Lakes Compact and Agreement. We submit these comments in the spirit of improving the diversion review process to allow for transparent decision-making, robust public participation, and consequently a legally-defensible final decision that satisfies the underlying intent of the Great Lakes Compact. In summary, we are requesting:

- Improvements to the public involvement process across the entire Great Lakes region during and after the diversion application period;
- Substantial written technical and policy justification if an application is deemed to meet certain provisions of the Compact, such as the "No Reasonable Water Supply Alternative" determination;
- Improvements to the documentation of decision making processes and how members of the Regional Body have come to consensus or not; and
- Promulgation and adoption of formal rules governing the diversion application and review process.

In 2016, the Regional Body and the Compact Council issued a final decision for the first request for such a diversion under the compact's procedures and voted to grant Waukesha, Wisconsin a diversion with some amendments and conditions to the original application. While that process followed existing procedures and exemplified the power of a multijurisdictional law and an international agreement, it is important to assess the lessons learned and how to improve the process and procedures for existing and future diversion requests. While the Compact provides certain procedural guideposts for the Regional Body and Council's decision-making process, important details are not included in the statutory language. The Regional Body and Council's 2010 Interim Guidance and 2014 "Draft Sequence of Events

for Consideration of “Straddling County’ Exceptions to the Prohibition on Diversions” (“Draft Sequence of Events”), while helpful, were not developed through formal notice-and-comment rulemaking and are not binding regulations. In light of these procedural challenges, these comments urge the Regional Body and Council to incorporate certain additional measures and clarify material ambiguities to ensure an adequate process and therefore a defensible result.

The Great Lakes are a precious resource providing drinking water and recreation to over 40 million people. The Compact is an essential tool for protecting the waters of the Lakes. The Compact’s prohibition on diversions of water out of the Great Lakes Basin will save this precious drinking water and recreation resource for future generations, but only if it is properly enforced.

Our organizations offer the following comments regarding those procedural challenges:

- 1. These recommendations and those developed by the joint Procedures Update Team (Team) should be addressed and memorialized in formal rules developed through notice-and-comment rulemaking.**

While the Compact includes certain procedures, expectations and substantive goals for the review of diversion applications, few specifics are provided beyond the development of a Declarations of Fact and the obligation to approve or deny the requested diversion. In February of 2014, the Regional Body and Council issued a “Draft Sequence of Events” to provide additional guidance on the diversion application review process. Yet this was never finalized, nor was there a formal notice and comment rule making process put in place. Thus, there is no assurance that Regional Body and Council will adhere to stated provisions.

Our organizations object to the Regional Body and Council's decision to proceed with a review of the Waukesha Diversion Application without first developing implementing regulations through a formal notice-and-comment rulemaking process. The absence of formal, binding regulations prevents certainty regarding the mechanics and scope of Regional Body and Council decision-making, which hinders full public participation in the review process contrary to the Compact and principles of agency decision-making.

- 2. Improve scope and structure of the public meetings and hearings for both the Regional Body and Council as well as in each Party state.**

The underlying premise of the Compact is that the Great Lakes states have a collective interest in maintaining the integrity of the Lakes, and that every state has a stake in the diversion of water out of the Great Lakes Basin. To realize those goals, citizens from every Great Lakes state must have a meaningful opportunity to participate in the diversion review process and to provide Regional Body and Compact members with the information needed to render a decision. Public hearings provide a distinct opportunity for face-to-face, real-time interaction between the public and members of the Regional Body and Council. Public

hearings are a separate public participation opportunity from and should not be considered a mere extension of the public comment period.

- a) **RECOMMENDATION:** The Regional Body and Council should hold multiple public hearings in prioritized communities, we define as: 1. the community in a straddling county itself; 2. any municipality impacted by the proposed return flow; and 3. in any other municipality substantively involved in the proposed diversion process.
- b) **RECOMMENDATION:** The Regional Body and Council should hold one additional public hearing in Canada.
- c) **RECOMMENDATION:** Advisory members, and third parties should be given a 45-day period to review the application to ensure they have sufficient time for coordination and expert review before submitting comments.
- d) **RECOMMENDATION:** Each state Party holds a public hearing within their jurisdiction, chaired by the relevant Council member and centrally located within their state's Great Lakes watershed to the best degree possible. The hearing(s) in each state Party should be conducted after the technical reviews have been completed and made available to the public. In doing so, the public is able to comment on their government's technical review.

Of primary concern, was the Council's decision to hold only one public hearing on the Waukesha Diversion Application that was not centrally located in the Basin. In contrast, Wisconsin DNR held three hearings in three different Wisconsin municipalities:

- Milwaukee, Wisconsin: the largest city in Wisconsin and the original proposed provider of Lake Michigan water to Waukesha
- Waukesha, Wisconsin: the city requesting the diversion on behalf of itself, the Town of Waukesha, Pewaukee, Dousman and Genesee
- Racine, Wisconsin: the largest municipality downstream from the Root River and the waterbody that will likely receive an average of 10.1 MGD of effluent from Waukesha.

These state hearings provided opportunities for a broader range of stakeholders to engage with Wisconsin DNR and outline concerns about Waukesha's plan. In addition, the Racine hearing directly engaged with citizens who could be seriously impacted by the diversion, but have no direct say in the development of Waukesha's plan or that plan's approval.

The Interim Guidance only directs the Regional Body and Council to hold one meeting within the jurisdiction of the Originating Party. Holding one public hearing is not adequate public participation when it concerns an issue that, while local in focus, is of such scope that it impacts stakeholders across the Great Lakes Basin in multiple states. Hearings in multiple locations would have provided more

stakeholders with meaningful opportunities to speak and would have addressed the logistical problems outlined below.

The Regional Review Waukesha hearing that took place on February 18, 2016 had several serious logistical problems. While we recognize that the Waukesha Diversion Application marks the first time the Regional Body and Compact Council have had to address these procedural issues, the public hearing held in Waukesha failed to provide adequate opportunity for meaningful public participation. Significant challenges included:

- More than 40 registered testifiers did not get an opportunity to speak. This situation may have been alleviated by providing multiple public hearings in multiple locations, giving interested individuals from outside the Waukesha area a more practical opportunity to speak. The Interim Guidance directs the Council to “...consider the comments received before taking any action on an Application.”¹ By not allowing every person with testimony to speak, the Council may have failed to consider their comments in contravention of the Compact.
- Testifiers who registered in person did not speak until more than four hours after the beginning of the hearing. Again, this situation may have been improved by providing more than one public hearing.
- The hearing provided no public ability for remote listening by phone or web. While the guidance does not specifically require this technology for the public hearing, providing for remote listening –or, even better, remote testimony— would alleviate some of the concerns with holding a single hearing in a single location.
- As conducted, the hearing –unintentionally or not—prioritized speaking opportunities for elected officials over ordinary citizens. As a result of this order, every elected official who wanted to speak was provided an opportunity to do so, but not every citizen who wished to speak was able to because some people had to leave the hearing before its conclusion.
- It is not clear if the Regional Body and Compact Council held a “Post-Hearing Briefing discussion (face to face) among Regional Body and Compact Council members” following the February 18, 2016 public hearing in Waukesha. If the Regional Body and Council held such a meeting, this should be made available to the public.

¹ “Compact Council, having considered the notice, Application, Originating Party’s Technical Review, any other Independent Technical Reviews, comments, questions and objections, *including comments by the public and Tribes/First Nations*, Regional Body Declaration of Finding, and all other information in the record considers approval of Application. Approval shall be given unless one or more members votes to disapprove.” The Draft Sequence of Events, 24.a.

- e) **RECOMMENDATION:** The Council's "face-to-face meeting" should be publicly noticed, open to the public and moderated (except with respect to issues of personnel)
- f) **RECOMMENDATION:** The Regional Body and Council should make clear announcements of all meetings related to a diversion application. Announcements should provide the time, location, and expected format for meetings. They should also clearly state all means for remote participation.
- g) **RECOMMENDATION:** Remote participation by phone, webinar, etc. should be made available to facilitate public participation and ensure transparent decision-making
- h) **RECOMMENDATION:** Under this review process, the RB/CC should take Tribal and First Nation decisions and determinations about diversion proposals into account. First Nations and Tribal authorities should be provided with special emphasis for notification and engagement. While they are not part of the Compact Council or Regional Body, they do have specific treaty rights that can be affected by Compact/Agreement decisions. First Nations and Tribal representatives should be seated alongside Council/Body members during discussions and negotiations. First Nations & Tribal representatives could make a non-binding decision on proposals in an advisory capacity, and/or determine whether any proposal conflict with treaty rights and obligations. In the long term, however, in order for the Tribes and First Nations to be equal partners in the Compact and Agreement, they would need to be given an equal vote in decisions made by the Compact Council and Regional Body.
- i) **RECOMMENDATION:** Create process for any interested party to request additional public meetings for specific cause (including if technical questions arise during working sessions or individual State technical analyses)
- j) **RECOMMENDATION:** A draft Declaration of Finding should be noticed and formal comment period for the public before a final vote is conducted. Advisory members, and third parties should be given a 45-day period to review the Declaration of Finding and any significant amendments to ensure they have sufficient time for coordination and expert review before submitting comments. The Regional Body and Council failed to provide the public with the opportunity to comment on the amended application/Declaration of Finding before final decision.

3. **Thorough written documentation should exist throughout the process.**

- a) **RECOMMENDATION:** The Regional Body and Council should look to the Administrative Procedures Act to fill the procedural gaps and ambiguities inherent in the Compact, Interim Guidance and Draft Sequence of Events;
- b) **RECOMMENDATION:** In regards to the Waukesha application, we commend the Council and Regional Body on fully documenting in writing each member's position on an application and the justification for that position in the Determination of Fact(s). The Council and Regional Body should also document, in writing, their decision. The Council and Regional Body should address and respond to significant

public comments –as is required by the federal rulemaking process. The Council should respond to all Technical Reviews submitted by Council members. Finally, this procedure should be memorialized in formal rules developed through notice-and-comment rulemaking.

- c) **RECOMMENDATION:** The Regional Body and Council should make the full record of their decision-making processes available to the public. The record of both bodies' decisions should be available at the Council's website, and paper copies should be made available upon request.
- d) **RECOMMENDATION:** Any post-hearing briefings should be transcribed and the transcript made available to the public.

4. The written decision should include detailed discussion of significant undefined terms

In addition to the procedural ambiguities identified above, there were notable substantive ambiguities in the Compact that prompted disagreement over the substantive merit of the Waukesha Diversion Application. While we recognize that the Compact was the result of extensive negotiation and compromise, the states' implementing laws have resulted in differing and potentially conflicting approaches and definitions to material Compact concepts. Consequently, the Regional Body and Council have an important role to play in defining the terms of the Compact, a role that is explicitly created by the Compact and a role that they have authority to fulfill. In the absence of formal implementing regulations, the Regional Body and Council therefore should take the opportunity of the formal review process to clarify ambiguous terms found in the Compact that impact diversion application review.

- a) **RECOMMENDATION:** The Council should provide a substantial justification in writing for its interpretation of key Terms that are undefined in the Compact:
 - a. Current Interim Guidance does not define nor does it provide a justified interpretation of key terms used in the diversion request review process (e.g., “no reasonable water supply alternative”, see below), thereby rendering the Compact Council decision-making process less certain and more subjective and possibly overly-reliant on any one Parties definition.
 - b. These key terms definitions could be developed through notice and comment rulemaking, thus allowing for input from stakeholders.
- b) We put forward the following substantively ambiguous terms in the Compact that directly impact the Regional Body and Council's assessment of applications as evidenced in the Waukesha application review process, and recommendations to be considered in interpretation of those terms:
 - a. Regarding the use of “**No Reasonable Water Supply Alternative**”, the Compact Council could incorporate a clearer interpretation or a more expressed process for how to evaluate this term that would apply to future diversion requests. For instance, as in the case of the Waukesha application, the Compact Council could have:

- i. Referenced that Compact Section 3.1 authorizes the Council to revise the Standard of Review and Decision (Section 4 that details the review process and exceptions) after consultation with the provinces and unanimous vote by the Council members;
 - ii. Clarified it did not follow the statutory definition from Wisconsin and that it instead will consider (a) whether an alternative would be allowed under existing regulations; (b) whether an alternative is consistent with existing permitted water uses and criteria in the region or with routinely-permitted exemptions granted by regulators; and (c) whether an alternative is feasible;
 - iii. Issued a statement that use of radium treatment is not per se unreasonable; and
 - iv. Prescribed particular analysis that should be completed before ruling an alternative not reasonable.
- b. The language of the Compact should state that a **“community in a straddling county”** must be “incorporated city, town or the equivalent thereof.” This definition should limit the “water service supply area” to those existing at the time of compact application.
- c. The language of the Compact should clarify what is an impermissible **“cumulative impact.”** This was not seen in the process for assessing the Waukesha Application’s plan to send return flow to the Root River. The Regional Body and Council did not have its own process for hearing public input, discussing, or assessing the impacts to a river reach previously devoid of sewage-based effluent that will potentially be forever changed by that effluent. Analyses of “cumulative impacts” must address the effects:
 - i. On water quality and biota of the return flow waterbody for both regulated and nonregulated pollutants and contaminants of emerging concern;
 - ii. On the socio-economic and public health impact to recreational contact or public drinking water supply of downstream populations by the additional load of regulated pollutants and nonregulated contaminants of emerging concern; and
 - iii. Of the combined impact of likely future diversions, in terms of water quantity, quality, and geomorphology and this evaluation should include quantified estimates of those combined impacts, not cursory conclusory language.
- d. The language of the Compact should state what an **“environmentally sound water supply alternative”** is. As in the case of the Waukesha Application, there was not an accounting of the cost of a new discharger discharging to the Root River - a non-effluent dominated and TSS and Phosphorus impaired river. As such, in Wisconsin there are strict water quality based standards for TSS and Phosphorus and in Waukesha’s case this requires an expensive upgrade of the

wastewater facility, therefore the state has alternatives for wastewater facilities to comply with those standards more cost effectively. However, Waukesha would be required to upgrade their facility on day one of discharging to an impaired waterway and therefore not explore alternatives that could have provided them more cost effective solutions over a longer timeline. The Regional Body and Council did not necessarily take this type of expense into account, and the cost of these upgrades is now affecting the utility rates which is further compounded by caps on those rates promulgated by the Wisconsin Public Service Commission.

5. The Regional Body will need to clarify how its members have reached “a consensus” or not.

- a) **RECOMMENDATION:** The Regional Body should ensure the validity of a consensus of all members by taking an open vote --one taken in a forum open to the public and then placed on the written record.

Conclusion

This collective of organizations is committed to ensuring the integrity of the Compact and of this Regional Review process. Procedures that emphasize public participation, transparency, thoroughness, and fairness will reduce the chances of litigation over proposed diversions. The APA provides straightforward criteria for defining the Regional Review procedures, and adopting such standards will increase the likelihood that this decision-making process is well-reasoned and ultimately passes judicial muster in the event of a legal challenge. Similarly, clearly defining ambiguous Compact terms will further the cooperation, collaboration and transparency envisioned by the Compact negotiators. The next steps in the Regional Review process provide the Regional Body and Council with an opportunity to develop a clear, thorough written record that will hold up to public scrutiny. We trust that the Regional Body and Council are also deeply invested in getting this process right.

~Signatories on next page~

Sincerely,

**Molly M. Flanagan,
Vice President, Policy
Alliance for the Great Lakes**

**Marc Smith
Director of Conservation Partnerships
National Wildlife Federation**

**George Meyer
Executive Director
Wisconsin Wildlife Federation**

**Deanna White
State Director
Clean Water Action Minnesota**

**Jennifer McKay
Policy Director
Tip of the Mitt Watershed Council**

**Marc Hudon
Chair, Water Commission
Nature Québec**

**Jennifer Bolger Breceda
Executive Director
Milwaukee Riverkeeper**

**Mark Redsten
President & CEO
Clean Wisconsin**

**Steve Morse
Executive Director
Minnesota Environmental Partnership**

**Jacqueline Wilson
Counsel
Canadian Environmental Law Association**

**Kristy Meyer
Vice President of Policy, Natural Resources
Ohio Environmental Council**

**John P. Lenczewski
Executive Director
Minnesota Trout Unlimited**

**Mayor Paul Dyster
Chair
Great Lakes and St. Lawrence Cities Initiative**

**Kathryn Hoffman
Chief Executive Officer
Minnesota Center for Environmental Advocacy**

**Karen Hobbs
Senior Director for Midwest Advocacy
Natural Resources Defense Council**

**Craig Sterle
President
Minnesota Division Izaak Walton League of
America**

**Jill Ryan
Executive Director
Freshwater Future**

**Natalie Johnson
Executive Director
Save the Dunes**

**Lori Andresen
President
Save Our Sky Blue Waters**

**James Clift
Policy Director
Michigan Environmental Council**

CC: Mr. Daniel Meyer
Ms. Marie-Claude Théberge
Mr. James Tierney
Mr. Jason Travers
Mr. James Zehringer
Mr. David Naftzger
Mr. Peter Johnson

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