

# “Death by a Thousand Straws”: Why and How the Great Lakes Council Should Define “Reasonable Water Supply Alternative” Within the Great Lakes Compact

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*ABSTRACT: In 2008, President George W. Bush signed into law the Great Lakes–St. Lawrence River Basin Water Resources Compact (“Great Lakes Compact” or “Compact”). The Compact is a legally binding instrument between all the Great Lakes states that manages all water diversions out of the Great Lakes. The Compact sets a general prohibition on diverting water out of the Great Lakes and delineates a few exceptions to that ban. Under the Compact, a community in a “straddling county” is eligible for a diversion out of the Great Lakes if it demonstrates, among other things, that it does not have a “reasonable water supply alternative” and receives approval from all members of the Great Lakes Council. To date, the Great Lakes Council has not defined “reasonable water supply alternative,” leaving it up to the Compact member states to develop their own definitions. The Great Lakes Council’s failure to define “reasonable water supply alternative” leaves the Council’s decisions to approve or deny a community in a straddling county’s diversion application vulnerable to legal challenges. This Note suggests that the Great Lakes Council should define “reasonable water supply alternative” with a focus on the alternative’s effectiveness in terms of public health and environmental effects as opposed to the alternative’s costs because this formulation will help avoid litigation and effectuate the purpose of the Compact.*

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## I. INTRODUCTION

While looking out over any one of the five Great Lakes where the water meets the sky, each one may seem boundless and their resources may seem limitless. But for the heads of the states and provinces that call these lakes their own,<sup>1</sup> protecting these limited resources has been a constant and complicated struggle.<sup>2</sup>

Debate over how to properly manage the world's largest freshwater system<sup>3</sup> started as early as 1909, and the mechanisms designed to preserve the Great Lakes have evolved and changed over time.<sup>4</sup> One constant in the region's quest to maintain the Great Lakes, however, is the debate over how the states, region, nation, and world should manage diversions or withdrawals from the lakes.<sup>5</sup> The Great Lakes–St. Lawrence River Basin Water Resources Compact (“Great Lakes Compact” or “Compact”) is a legally binding instrument that attempts to provide processes to manage diversions out of the lakes.<sup>6</sup>

The Compact first creates a blanket prohibition on diversions out of the Great Lakes and then provides three exceptions to that rule: the “straddling community,” intrabasin transfer, and “straddling counties” exceptions.<sup>7</sup> This Note will focus exclusively on the “straddling counties” exception. A

1. The Great Lakes States include Wisconsin, Illinois, Minnesota, Michigan, Ohio, New York, Pennsylvania, and Indiana. *Overview*, COUNCIL OF GREAT LAKES GOVERNORS, <http://www.cglg.org/about-us/> (last visited Sept. 19, 2014). The Great Lakes Canadian provinces include Quebec and Ontario. *Id.* The five Great Lakes include: Lake Superior, Lake Michigan, Lake Huron, Lake Erie, and Lake Ontario. *Basic Information: Great Lakes*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/greatlakes/basicinfo.html> (last updated July 5, 2012).

2. See, e.g., Great Lakes–St. Lawrence River Basin Water Resources Compact (“Great Lakes Compact”), Pub. L. No. 110-342, 122 Stat. 3739 (2008) (showing the long trajectory of legislation the Great Lakes region has enacted in attempts to manage the Great Lakes); Water Resources Development Act of 1986 (“WRDA”), Pub. L. 99-662, 100 Stat. 4082 (codified as amended at 42 U.S.C. § 196, 201-20 (2000)); Great Lakes Basin Compact, Pub. L. No. 90-419, 82 Stat. 414 (1968); Great Lakes Charter Annex, June 18, 2001, *available at* <http://www.cglg.org/projects/water/docs/GreatLakesCharterAnnex.pdf>; Great Lakes Charter, Feb. 11, 1985, *available at* <http://www.cglg.org/projects/water/docs/GreatLakesCharter.pdf>; Boundary Waters Treaty, U.S.–Gr. Brit. (for Canada), Jan. 11, 1909, 36 Stat. 2448.

3. See *Basic Information: Great Lakes*, *supra* note 1 (describing that only the polar ice caps have more fresh water than the Great Lakes).

4. See *supra* note 2 (delineating several of the separate and unique attempts to manage the Great Lakes).

5. See *supra* note 2 (listing many of the different attempts the Great Lakes states, provinces, and Congress have made to manage diversions from the Great Lakes in the last 100 years).

6. See Brian Pokladowski, *The Effect of the Great Lakes Compact on the Water Resources of Michigan*, 11 J.L. SOC'Y 110, 123 (2010) (explaining that once all of the Great Lakes states enacted the Great Lakes Compact in their own individual legislation and the President signed the Compact, it became a legally binding interstate water compact in the Great Lakes Region).

7. Great Lakes Compact §§ 4.8–.9 (describing that all new diversions are prohibited under the Compact unless the diversion is for a straddling community, an intrabasin transfer, or a straddling county that meets several conditions).

community in a “straddling county” is one whose corporate boundary is entirely outside of the Great Lakes Basin but the community exists in a county that straddles the Great Lakes Basin line.<sup>8</sup> However, no member state or individual has fully tested the straddling county exception, and many questions remain regarding how the Great Lakes Council<sup>9</sup> will define, interpret, and apply the terms of the exception provision when considering communities’ applications for diversions of Great Lakes water.<sup>10</sup>

The Compact may soon face its first test under the straddling county exception, as Waukesha, Wisconsin, recently began the application process to divert water out of Lake Michigan.<sup>11</sup> How the Great Lakes Council chooses to define key terms within this exception will have serious implications for how other communities in the region seek diversions of Great Lakes water and how courts interpret actions under the Compact if individuals or state or local governments challenge the Council’s decisions.<sup>12</sup>

Part II of this Note outlines the Great Lakes states’ and provinces’ prior attempts to manage diversions of Great Lakes water since 1909 and how the region manages diversions today.<sup>13</sup> Part III describes the first challenge to the Compact under the straddling county exception and identifies the communities that are likely to apply for diversions of Great Lakes water in the future.<sup>14</sup> Part IV discusses the potential weaknesses in the Compact’s review process and diversionary scheme.<sup>15</sup> Finally, Part V recommends that the Great Lakes Council should define key terms, specifically “reasonable water supply alternative,” within its diversionary scheme to strengthen the Great Lakes

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8. See generally Great Lakes Compact § 1.2 (defining “straddling community” but not “straddling county” explicitly). One can infer from the definition of “straddling community” within the Compact that a “straddling county” community is a community outside the Great Lakes Basin that is in a county that is partly within the Great Lakes Basin.

9. The Great Lakes Council consists of the eight governors of each Great Lakes state as well as the two premiers from the Great Lakes Canadian provinces. *Overview, supra* note 1.

10. JARED TEUTSCH, ON TRACK? ENSURING THE RESILIENCE OF THE GREAT LAKES COMPACT 5–13 (2013), available at <http://www.greatlakes.org/document.doc?id=1410> (describing several communities within straddling counties and recognizing that the Great Lakes Council does not have set procedures yet, so there is uncertainty about how the Council will handle diversion applications).

11. Gabe Johnson-Karp, *That the Waters Shall Be Forever Free: Navigating Wisconsin’s Obligations Under the Public Trust Doctrine and the Great Lakes Compact*, 94 MARQ. L. REV. 415, 417 (2010); see also Great Lakes Compact § 1.1 (defining what a “straddling county” community is for purposes of the compact); *id.* § 4.9 (providing an exception to the diversion procedure for straddling communities); TEUTSCH, *supra* note 10, at 5 (describing Waukesha’s topography and application for Lake Michigan water).

12. TEUTSCH, *supra* note 10, at 18.

13. See *infra* Part II.

14. See *infra* Part III.

15. See *infra* Part IV.

Council's decisions arising under the Compact against legal challenges and to effectuate the Compact's purpose.<sup>16</sup>

## II. HISTORY OF THE GREAT LAKES COMPACT AND DIVERSIONS

On October 3, 2008, President George W. Bush signed the Great Lakes Compact into law.<sup>17</sup> The Compact is a legally binding water management agreement between all eight Great Lakes states—those states that border the five Great Lakes. The agreement also includes, but does not bind, the Great Lakes Canadian provinces.<sup>18</sup> The governors of the Great Lakes states drafted the Compact in the midst of impending global, national, and regional water crises to protect the region's most valuable resource.<sup>19</sup>

The Compact's primary purpose is to manage the Great Lakes Basin, including conservation, restoration, and diversions from the lakes.<sup>20</sup> More specifically, government leaders, environmentalists, and many others hope the Compact will prove to be the first line of defense against further depletion of the world's most valuable freshwater resource, as the Great Lakes are the world's largest surface freshwater system.<sup>21</sup> Additionally, the viability of the Compact's diversionary standards, review process, and enforcement mechanisms may be even more important today than the day Congress enacted the Compact, as many of the Great Lakes are reporting their lowest water levels in recorded history.<sup>22</sup>

This Part discusses water management within the Great Lakes region, specifically addressing water diversions within and outside of the Great Lakes Basin. Subpart A discusses how prior Great Lakes water agreements attempted to manage water resources and diversions, as well as the flaws each proposal

16. See *infra* Part V.

17. See generally Great Lakes Compact, Pub. L. No. 110-342, § 1.1-9.4, 122 Stat. 3739 (2008); Pokladowski, *supra* note 6, at 113.

18. Mark Sobocienski, *Protecting the Great Lakes in the Face of a Water Crisis: The Need for Immediate Ratification of the Great Lakes-St. Lawrence River Basin Water Resources Compact, and for an Amendment to the Boundary Waters Treaty of 1909*, 21 ST. THOMAS L. REV. 478, 496 (2009).

19. *Id.* at 494-95.

20. Noah D. Hall & Bret B. Stuntz, *Climate Change and Great Lakes Water Resources: Avoiding Future Conflicts with Conservation*, 31 HAMLIN L. REV. 639, 671-72 (2008); see also Great Lakes Compact §§ 4.8-9 (discussing the diversionary scheme for the Great Lakes as well as management of consumptive uses).

21. *Basic Information: Great Lakes*, *supra* note 1 (stating that the Great Lakes account for 84% "of North America's surface fresh water" and 21% of the world's surface freshwater).

22. See Dan Egan, *Lakes Michigan, Huron Hit Record Low Water Level*, MILWAUKEE J. SENTINEL (Feb. 5, 2013), available at <http://www.jsonline.com/news/wisconsin/lakes-michigan-huron-hit-record-low-level-dq8loc2-189903561.html> (indicating that in January 2013 Lake Michigan was more than six feet below its record-high water level and Lake Huron dipped below its record-low water level); see also Dan Egan, *Does Lake Michigan's Record Low Mark Beginning of New Era for Great Lakes?*, MILWAUKEE J. SENTINEL (July 27, 2013), available at <http://www.jsonline.com/news/wisconsin/does-lake-michigans-record-low-water-level-mark-beginning-of-new-era-for-great-lakes-216429601.html> (noting that Lake Michigan water levels have been below average for the past 14 years and show no sign of returning to average levels).

contained.<sup>23</sup> Subpart B discusses how the Compact manages water resources and diversions within the Great Lakes Basin and outside of the Basin.<sup>24</sup>

A. *GREAT LAKES DIVERSION MANAGEMENT BEFORE THE COMPACT*

The economy of the Great Lakes region “is a \$2 trillion juggernaut.”<sup>25</sup> If it were a country, the region would have one of the largest economies in the world.<sup>26</sup> “Much of that economy is intimately tied to the region’s water-rich resources, which means billions of dollars and an untold number of jobs.”<sup>27</sup> For these reasons, the Compact was not the region’s first attempt to manage the water resources of the Great Lakes or to control diversions within or outside of the Great Lakes Basin.<sup>28</sup>

The first attempt to control Great Lakes diversions instead came in the Boundary Waters Treaty of 1909 (“the Treaty”) between the United States and Canada.<sup>29</sup> The Treaty bans Great Lakes diversions which are “large enough to influence the ‘level or flow’ of the Great Lakes.”<sup>30</sup> However, most diversions out of the Great Lakes are virtually imperceptible and therefore the Treaty does not protect against “the most likely diversion problem—death by a thousand straws.”<sup>31</sup> Furthermore, Lake Michigan lies completely within the United States, which exempts any diversionary requests relating to Lake Michigan from the provisions of the Treaty.<sup>32</sup>

The second attempt to control diversions did not take shape until the 1940s when the Great Lakes states first began to negotiate the Great Lakes Basin Compact (“Basin Compact”).<sup>33</sup> Leaders of the Great Lakes states developed the Basin Compact because they were worried that the City of Chicago was diverting too much water out of Lake Michigan.<sup>34</sup> While Congress approved the Basin Compact in 1968, flaws remained: the

23. *See infra* Part II.A.

24. *See infra* Part II.B.

25. PETER ANNIN, *THE GREAT LAKES WATER WARS* 53 (2006).

26. *Id.*

27. *Id.*; *see also* John Agar, *Study Shows Surprising Impact Great Lakes Have on U.S. Economy*, MLIVE (Feb. 24, 2011, 8:20 PM), [http://www.mlive.com/news/grand-rapids/index.ssf/2011/02/great\\_lakes\\_provide\\_15\\_million.html](http://www.mlive.com/news/grand-rapids/index.ssf/2011/02/great_lakes_provide_15_million.html) (stating that the Great Lakes regional economy generates 62 billion dollars in wages each year in addition to more than a million jobs).

28. *See* Pokladowski, *supra* note 6, at 114–23 (describing how the Boundary Waters Treaty of 1909, the Great Lakes Basin Compact, the Great Lakes Charter, the 1986 Water Resources Development Act, and the Great Lakes Charter Annex of 2001 all attempted to manage the Great Lakes water resources and diversions from the lakes).

29. Boundary Waters Treaty, *supra* note 2; ANNIN, *supra* note 25, at 71; *see also* Pokladowski, *supra* note 6, at 114–15 (citing the Boundary Waters Treaty, *supra* note 2).

30. ANNIN, *supra* note 25, at 71 (quoting Boundary Waters Treaty, *supra* note 2, art. III).

31. ANNIN, *supra* note 25, at 71.

32. *Id.*

33. Great Lakes Basin Compact, Pub. L. No. 90-419, 82 Stat. 414 (1968); Pokladowski, *supra* note 6, at 116–17.

34. Pokladowski, *supra* note 6, at 116–17.

agreement only allowed Great Lakes Commissioners to make recommendations without any enforcement power, and it permitted any state to withdraw from the agreement at any time.<sup>35</sup>

The third attempt to control diversions out of the Great Lakes occurred in the 1980s, on the heels of the United States Supreme Court's decision in *Sporhase v. Nebraska*.<sup>36</sup> In *Sporhase*, a Nebraska state law prohibited individuals from exporting Nebraska groundwater to another state without a permit, but allowed individuals to pump groundwater within Nebraska without a permit.<sup>37</sup> A farmer with property that straddled both Nebraska and Colorado challenged the law.<sup>38</sup> The Court ruled in favor of the farmer and concluded that water was an article of commerce, that parts of the discriminatory Nebraska law violated the Commerce Clause of the Constitution, and that Nebraska failed to show a compelling state interest in keeping the law as it stood.<sup>39</sup> The *Sporhase* decision caused the Great Lakes governors to doubt whether they could prohibit the diversion of water to locations outside their borders.<sup>40</sup> Concerned with the legality of such a prohibition, the governors instead began to develop another way to protect the lakes.<sup>41</sup>

This new mechanism for protecting the Great Lakes took shape as the Great Lakes Charter of 1985.<sup>42</sup> The Charter was a non-binding agreement between all of the Great Lakes governors and premiers<sup>43</sup> designed to manage diversions out of the lakes as well as consumptive uses of the lakes.<sup>44</sup> In terms of controlling diversions, the Charter indicated "that each state or province would provide 'prior notice and consultation' to the others about any new 'major' diversion or consumptive use proposals, and that each state or province would seek the 'consent and concurrence' of all the other states and provinces before permitting a proposed withdrawal."<sup>45</sup> Also, if any one state

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35. *Id.* at 117 (citations omitted); see also Great Lakes Basin Compact art. VII (requiring only that "[e]ach party state agrees to consider the action the Commission recommends"); *id.* art. VIII (providing that a member state can withdraw from the compact if it gives the other member states six months notice).

36. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); see also ANNIN, *supra* note 25, at 70 (describing that this case worried many Great Lakes governors).

37. *Sporhase*, 458 U.S. at 943-44.

38. *Id.* at 944.

39. *Id.* at 957-60.

40. ANNIN, *supra* note 25, at 70-71.

41. *Id.*

42. Great Lakes Charter, *supra* note 2; ANNIN, *supra* note 25, at 72-73.

43. A premier is analogous to a United States governor and is the head of the government of a Canadian province or territory.

44. ANNIN, *supra* note 25, at 72; see also Great Lakes Charter, *supra* note 2, at 1 ("The purposes of this Charter are to conserve the levels and flows of the Great Lakes and their tributary and connecting waters . . .").

45. ANNIN, *supra* note 25, at 73 (citing Great Lakes Charter, *supra* note 2, princ. IV); see also Great Lakes Charter, *supra* note 2, princ. V (describing the approval process for Great Lakes diversions under the Charter).

or province applied for a permit to divert or use more than five million gallons of water per day, all of the states and provinces would first have to consent to the diversion.<sup>46</sup> However, the Great Lakes Charter was weak because it was non-binding.<sup>47</sup>

Shortly after the Great Lakes governors signed the Great Lakes Charter, Congress enacted the 1986 Water Resources Development Act (“WRDA”).<sup>48</sup> The WRDA provided that no state could divert Great Lakes water without the approval of all eight Great Lakes governors.<sup>49</sup> The WRDA did not apply, however, to diversions that the states approved prior to the act.<sup>50</sup> Like the other attempts to manage the Great Lakes, the WRDA had flaws.<sup>51</sup> For instance, it allowed a state to unilaterally veto any diversions occurring within an entirely separate state, creating the serious potential for abuse of power and conflicts among the eight Great Lakes governors.<sup>52</sup> While, unlike the Charter, the WRDA legally bound the member states, it also did not set any standards or processes for challenging diversions out of the Great Lakes.<sup>53</sup> Moreover, the Due Process Clause and the Commerce Clause likely rendered the WRDA unconstitutional.<sup>54</sup>

The Great Lakes governors soon realized they needed more effective binding legislation to manage the process for considering requests for diversions out of the Great Lakes and to conserve the resource. This realization led to the lengthy negotiations, which eventually yielded the Great Lakes Compact.<sup>55</sup> However, before the governors agreed to a final, binding interstate water policy, the governors chose to take “[a] slower, more methodical approach” to make sure the final compact would be a success.<sup>56</sup>

46. Great Lakes Charter, *supra* note 2, princ. V (“The principle of prior notice and consultation will apply to any new or increased diversion or consumptive use of the water resources of the Great Lakes Basin which exceeds 5,000,000 gallons (19 million litres) per day average in any 30-day period.”).

47. ANNIN, *supra* note 25, at 75.

48. WRDA, Pub. L. 99-662, 100 Stat. 4082 (codified as amended at 42 U.S.C. § 196, 201-20 (2000)); Pokladowski, *supra* note 6, at 120.

49. WRDA § 1109(d) (codified as amended at 42 U.S.C. § 1962d-20(d) (2012)).

50. Pokladowski, *supra* note 6, at 121 (citing WRDA § 1109(f) (“This section shall not apply to any diversion of water from any of the Great Lakes which is authorized on the date of the enactment of this Act.”)); *see also* 42 U.S.C. § 1962d-20(f)).

51. Pokladowski, *supra* note 6, at 121.

52. *Id.* at 122; *see also* ANNIN, *supra* note 25, at 80 (describing that the WRDA “attained a magic veto over diversion proposals in all the other Great Lakes states without the concern of retribution or the burden of regulating its own consumptive use. That was a power that other states would come to regret”).

53. ANNIN, *supra* note 25, at 80.

54. *Id.* at 81, 203-04; *see also id.* at 199 (“Current Great Lakes anti-diversion statutes—specifically WRDA—were unlikely to withstand legal challenges.”). Further discussion of the Due Process and Commerce Clauses is beyond the scope of this Note.

55. *Id.* at 207-11.

56. *Id.* at 208.



As a result, the Great Lakes governors worked to draft an action plan for the final compact, rather than an initial binding document.<sup>57</sup> This action plan document became the Great Lakes Charter Annex of 2001 (“the Annex”).<sup>58</sup>

The Annex was a concise document delineating the plan for a binding Great Lakes interstate compact.<sup>59</sup> The Annex also listed diversionary directives and included an order to develop a binding compact in the future.<sup>60</sup> The Annex attempted to require:

- (1) that withdrawn water be returned after use and conservation practices be adopted to prevent waste; (2) that a water withdrawal create no significant adverse impacts on the Great Lakes . . . ; (3) that the withdrawal comply with existing laws and treaties; and (4) that the water applicant conduct an “Improvement to the Waters and Water-Dependent Natural Resources of the Great Lakes Basin.”<sup>61</sup>

The Great Lakes governors signed the Annex at Niagara Falls on June 18, 2001, and vowed to have a completed water compact within 36 months.<sup>62</sup> The governors and countless “lawyers, policy specialists, and water managers” then worked for over three years to finalize the draft of the binding Great Lakes Compact.<sup>63</sup>

#### B. GREAT LAKES DIVERSION MANAGEMENT AFTER THE COMPACT

After years of negotiation and compromise between the Great Lakes states, the governors released the final draft of the Compact on December 13, 2005, at a ceremony in Milwaukee, Wisconsin.<sup>64</sup> The Compact was not binding, however, until all of the Great Lakes state legislatures enacted the Compact, Congress passed “a corresponding bill,” and the President signed the Compact in 2008.<sup>65</sup>

The Compact set up comprehensive mechanisms for diversions both within and outside of the Great Lakes Basin.<sup>66</sup> First, the Compact regulates

57. *Id.* at 209.

58. Great Lakes Charter Annex, *supra* note 2; *see* ANNIN, *supra* note 25, at 209; *see also* Pokladowski, *supra* note 6, at 122 (citing Great Lakes Charter Annex, *supra* note 2).

59. ANNIN, *supra* note 25, at 209.

60. *Id.*; Great Lakes Charter Annex, *supra* note 2, Directives.

61. ANNIN, *supra* note 25, at 225 (describing that the improvement standard delineated in the Annex eventually died out and was not included in the Great Lakes Compact). The discussion of the improvement standard raises several additional issues that are beyond the scope of this Note.

62. *Id.* at 210–11.

63. *Id.* at 211.

64. *Id.* at 238.

65. Pokladowski, *supra* note 6, at 113.

66. Hall & Stuntz, *supra* note 20, at 670–73; *see also* Great Lakes Compact, Pub. L. No. 110-342, § 4.9, 122 Stat. 3764 (2008) (describing the ways a state may apply for diversions within and outside the Great Lakes Basin).

new diversions out of the lakes, but also influences existing diversions by requiring each member state to create a comprehensive water conservation plan.<sup>67</sup> Second, the Compact generally prohibits new or increased diversions of Great Lakes water.<sup>68</sup> The Compact defines “diversions” as both the transfer of Great Lakes water into another watershed (interbasin transfer) and the transfer of Great Lakes water within a single Great Lake watershed (intra-basin transfer).<sup>69</sup>

While the Great Lakes Compact expressly prohibits diversions, the agreement also contains three exceptions to that general rule.<sup>70</sup> The first is the “straddling community” exception.<sup>71</sup> A straddling community is any city or town whose boundaries lie partly within the Great Lakes watershed basin line and partly outside the basin line.<sup>72</sup> The “straddling community” exception allows the member state in which the community is located to review and to manage a straddling community’s application for a diversion as long as the community fulfills two requirements: (1) all the diverted water must be for public use; and (2) the water must be returned naturally to the watershed.<sup>73</sup> If the straddling community seeks a new or increased withdrawal above 100,000 gallons per day the diversion must also meet a four-part “Exception Standard” within the Great Lakes Compact.<sup>74</sup> Also, if the

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67. Hall & Stuntz, *supra* note 20, at 670.

68. Great Lakes Compact § 4.8 (“All New or Increased Diversions are prohibited, except as provided for in this Article.”).

69. *Id.* § 1.2 (defining diversion as “a transfer of Water from the Basin into another watershed, or from the watershed of one of the Great Lakes into that of another by any means of transfer”).

70. *Id.* § 4.9.

71. *Id.* § 4.9(1).

72. *Id.* § 1.2 (defining a straddling community as “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”).

73. *Id.* § 4.9.

74. *Id.* § 4.9(1)(b). The Exception Standard states in relevant part:

Proposals subject to management and regulation in this Section shall be declared to meet the 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 . . . ;
- 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

community creates a new or increased consumptive use over five million gallons per day, the Great Lakes Council must review the application, and the application must satisfy the “Exception Standard.”<sup>75</sup>

The second exception to the Great Lakes Compact’s diversionary scheme is for an intrabasin transfer, which is the transfer of Great Lakes water within a single Great Lake watershed.<sup>76</sup> If the proposed transfer is a withdrawal of less than 100,000 gallons per day, then the state where the party is seeking the diversion must manage the application.<sup>77</sup> However, if the diversion is a withdrawal that exceeds five million gallons per day, then the diversion must meet additional requirements: First, the application must meet the four-part “Exception Standard” within the Compact.<sup>78</sup> Second, the state in which the party is seeking the diversion must also manage the proposal.<sup>79</sup> Third, the Great Lakes Council must unanimously approve the application.<sup>80</sup> Finally, the applicant must show that there is no other, cost-effective alternative, including conserving current resources, and the state where the party is seeking the diversion must notify the other Great Lakes states before deciding whether to approve the request.<sup>81</sup>

The third exception to the Great Lakes Compact’s general ban on diversions is for communities in “straddling counties.”<sup>82</sup> A community in a straddling county is one whose corporate boundary is entirely outside of the Great Lakes Basin but the community exists in a county that straddles the Great Lakes Basin line.<sup>83</sup> To meet the straddling county exception, the

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 Measure 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.

*Id.* § 4.9(4).

75. *Id.* § 4.9(c); *see also* Powkladowski, *supra* note 6, at 127 (“[T]he proposal must meet the exception standard and undergo regional review if it results in a new or increased consumptive use of 5 million gallons per day or greater over a 90 day period.” (footnotes omitted)).

76. Powkladowski, *supra* note 6, at 127 (citing Great Lakes Compact § 4.9(2)).

77. Great Lakes Compact § 4.9(2) (a).

78. *Id.* § 4.9(2) (b) (i); *see also supra* note 74 (quoting the exception standard).

79. Great Lakes Compact § 4.9(2) (b) (i).

80. *Id.* § 4.9(2) (b).

81. Pokladowski, *supra* note 6, at 128 (citing Great Lakes Compact § 4.9 (2) (b)).

82. *Id.* (citing Great Lakes Compact § 4.9(3)).

83. *See generally* Great Lakes Compact § 1.2 (defining “straddling community” but not “straddling county” explicitly). One can infer from the definition of “straddling community” within the Compact that a “straddling county” community is a community outside the Great Lakes Basin that is in a county that is partly within the Great Lakes Basin.

community must fulfill numerous requirements. First, the community must demonstrate that it will use the water it wants to divert solely for the public water supply within the community, and the community must not have an adequate supply of useable water.<sup>84</sup> Second, the proposal must satisfy the four-part “Exception Standard” within the Compact.<sup>85</sup> Third, the state in which the community seeks the diversion must review and manage the proposal.<sup>86</sup> Fourth, the community must demonstrate that there is no “reasonable water supply alternative” in the area where the community is located, and this requirement includes adequate attempts at conserving the existing water supply.<sup>87</sup> Finally, the diversion cannot endanger the integrity of the Basin, is subject to regional review, and the Great Lakes Council must use caution in approving the proposal unanimously.<sup>88</sup> This Note will focus exclusively on this third, straddling county exception.<sup>89</sup>

### III. THE GREAT LAKES COMPACT’S FIRST TEST

The Compact provides for three limited exceptions to its general prohibition on diversions of Great Lakes water.<sup>90</sup> Specifically, the straddling county exception has recently garnered local, national, and international attention, as Waukesha, Wisconsin, became the first community to apply for a diversion under this provision.<sup>91</sup> As a result, Waukesha’s application may be

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84. Pokladowski, *supra* note 6, at 128 (citing Great Lakes Compact § 4.9(3)(a)).

85. *Id.* (citing Great Lakes Compact § 4.9(3)(b)); *see also supra* note 74 (setting forth the language of the exception standard in the Great Lakes Compact).

86. Pokladowski, *supra* note 6, at 128 (citing Great Lakes Compact § 4.9(3)(c)).

87. *Id.* (citing Great Lakes Compact § 4.9(3)(d)).

88. *Id.* (citing Great Lakes Compact § 4.9(3)(e)–(g)).

89. The Great Lakes Compact also delineates two *exemptions* to the general ban on diversions. The first exemption is for supply vehicles that may need to divert water for the needs of animals being transported or human operators of the vehicles. Pokladowski, *supra* note 6, at 128 (citing Great Lakes Compact § 4.13(1)). The second exemption is for short-term use for humanitarian or emergency response purposes. *Id.* at 128–29 (citing Great Lakes Compact § 4.13(2)).

90. *See supra* Part II.B for a discussion of those exceptions.

91. *See, e.g.,* Sarah Millard, *Waukesha Water Utility Taking Great Lakes Project to National Politicians*, WAUKESHA PATCH (Mar. 5, 2013), <http://waukesha.patch.com/groups/politics-and-elections/p/waukesha-water-utility-taking-great-lakes-project-to-8d89886437> (describing how Waukesha was seeking millions of dollars in grants from the federal government to set up its application to divert water from Lake Michigan); Mitch Potter, *Why Waukesha’s Thirst for Great Lakes Water Is Raising Alarms on Both Sides of the Border*, TORONTO STAR (July 8, 2013), [http://www.thestar.com/news/world/2013/07/08/why\\_waukeshas\\_thirst\\_for\\_great\\_lakes\\_water\\_is\\_raising\\_alarms\\_on\\_both\\_sides\\_of\\_the\\_border.html](http://www.thestar.com/news/world/2013/07/08/why_waukeshas_thirst_for_great_lakes_water_is_raising_alarms_on_both_sides_of_the_border.html) (describing how Waukesha’s application will impact Canada and the Great Lakes Compact on the whole); Jodi Habush Sinykin, *Waukesha Application Needs Careful Study*, MILWAUKEE J. SENTINEL (Sept. 14, 2013), <http://www.jsonline.com/news/opinion/waukesha-application-needs-careful-study-b999549221-223698161.html> (explaining how the City of Waukesha’s diversion application will be a major test for the Great Lakes Compact).

the first test of the Compact under this exception, and many in the region are paying close attention to how the Great Lakes Council handles the proposal.<sup>92</sup>

This Part introduces the first test under the straddling county exception to the Great Lakes Compact and describes Waukesha, Wisconsin's diversion application. Subpart A describes in detail the straddling county exception to the Compact's ban on diversions and explains why Waukesha, Wisconsin is seeking a diversion of Lake Michigan water.<sup>93</sup> Subpart B describes other communities in straddling counties that will likely need another water source in the future and may apply for diversions of Great Lakes water.<sup>94</sup>

#### A. THE STRADDLING COUNTY EXCEPTION AND WAUKESHA WOES

The community of Waukesha, Wisconsin, a western suburb of Milwaukee, lies just outside of the Great Lakes Basin and is only 15 miles from Lake Michigan.<sup>95</sup> The city is located in Waukesha County, which straddles the Great Lakes Basin line; as a result, the City of Waukesha is a community that may seek a diversion of Lake Michigan water under the straddling county exception to the Great Lakes Compact's general ban on diversions.<sup>96</sup> At present, Waukesha's water supply comes from groundwater that the city pumps. However, well-water levels have dropped more than 500 feet and the more deeply the city pumps to procure water the more contaminants the city's water contains.<sup>97</sup> Even more problematic—and the primary reason Waukesha must seek another water source—is that the present well water contains twice the amount of radium that federal law allows.<sup>98</sup> The amount of radium in the city's water supply has exceeded the federal limit for years, but the city has not yet been able to correct the problem.<sup>99</sup> In 2003, the State of Wisconsin forced Waukesha to sign a consent order agreeing to remedy the radium problem by December 8, 2006.<sup>100</sup> To comply with the order, Waukesha had to find a way to treat its well-water supply or find another safer water source.<sup>101</sup>

The city considered two primary options to comply with the consent order: (1) spending \$77 million to develop new wells in underground water aquifers west of the city; or (2) spending \$42 million to divert water from Lake

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92. See Joe Barrett, *Great Lakes Compact Faces First Test*, WALL ST. J. (Oct. 3, 2012), <http://onlinewsj.com/news/articles/SB10000872396390443493304578034851099308848> (explaining how Waukesha's application would be the first application to divert water from Lake Michigan from a community outside the Great Lakes Basin).

93. See *infra* Part. III.A.

94. See *infra* Part III.B.

95. ANNIN, *supra* note 25, at 241, 243.

96. Great Lakes Compact § 4.9(3) (describing the straddling county exception).

97. ANNIN, *supra* note 25, at 241.

98. *Id.*

99. *Id.*

100. *Id.* at 241–42.

101. *Id.* at 242.

Michigan.<sup>102</sup> Both options had significant disadvantages. Adding wells west of the city threatened to lower the levels of nearby rivers and streams, while diverting water out of Lake Michigan would have required a lengthy application process, all of the Great Lakes governors would have had to approve the application, and returning the water back to Lake Michigan would have been a significant expense.<sup>103</sup> The idea that Waukesha might apply to divert Lake Michigan water also provoked controversy, as many environmentalists worried about the precedent that allowing the city to divert water would set, while community members worried about the safety of their drinking water.<sup>104</sup>

After Waukesha did not remedy its radium problem by the December 2006 deadline, the Environmental Protection Agency (“EPA”) stepped in and placed the city under a federal order to remedy the radium situation by June 2018, which remains in effect today.<sup>105</sup> The City of Waukesha submitted its first draft of an application to divert water out of Lake Michigan to the Wisconsin Department of Natural Resources (“WDNR”) in May 2010, and it submitted its revised application on October 14, 2013.<sup>106</sup> The application must now proceed through a lengthy review process, an environmental impact study by the WDNR, and public hearings before the city can submit the proposal to the Great Lakes Council for unanimous approval.<sup>107</sup> As of September 2014, Waukesha’s application remains in the process of WDNR review.<sup>108</sup>

*B. OTHER COMMUNITIES IN STRADDLING COUNTIES ON THE BRINK OF A WATER CRISIS*

Waukesha, however, is not the only community in a straddling county that will need a new water source in the near future.<sup>109</sup> The Alliance for the Great Lakes, an environmental organization dedicated to the Great Lakes, has identified several additional communities in Wisconsin, Indiana, and Ohio that will soon need additional water resources.<sup>110</sup> In Wisconsin, for example, Pewaukee and Sussex are communities that neighbor Waukesha in Waukesha

102. *Id.* at 243.

103. *Id.* at 243–44; *see also* Great Lakes Compact, Pub. L. No. 110-342, § 4.9(3), 122 Stat. 3764 (2008) (delineating the review process for the straddling country exception).

104. ANNIN, *supra* note 25, at 243–44.

105. Barrett, *supra* note 92.

106. Don Behm, *New Waukesha Lake Diversion Documents Tout Benefits to Great Lakes*, MILWAUKEE J. SENTINEL (Oct. 14, 2013), <http://www.jsonline.com/news/waukesha/new-waukesha-lake-diversion-documents-tout-benefits-to-great-lakes-b9911799721-227617921.html>.

107. *Id.*; *see also* Great Lakes Compact § 4.9(3)(g) (requiring unanimous approval of diversion applications by the Great Lakes Council).

108. *City of Waukesha Water Diversion Application*, WIS. DEPARTMENT NAT. RESOURCES, <http://dnr.wi.gov/topic/wateruse/WaukeshaDiversionApp.html> (last revised Sept. 23, 2014).

109. TEUTSCH, *supra* note 10, at 5–12.

110. *Id.*

County, which straddles the basin line.<sup>111</sup> Both of these communities are growing rapidly, their water resources are depleting quickly, and, if the Council approves Waukesha's diversion application, then these communities are also likely to apply for Lake Michigan water.<sup>112</sup>

Similarly, Lowell, Indiana, is in a county that straddles the Lake Michigan basin line and is reaching its water resource capacity.<sup>113</sup> Lowell has had water issues in the past, and in 1987 the EPA ordered Lowell to reduce its water supply's fluoride levels within a two-year deadline.<sup>114</sup> The city considered two ideas to remedy the problem: drilling more wells south of the town or buying Lake Michigan water from neighboring Gary, Indiana.<sup>115</sup> However, the idea that Lowell might procure Lake Michigan water did not please the Great Lakes governors, and after years of controversy the town decided to sink shallow wells outside of the town.<sup>116</sup> The wells staved off Lowell's water issues for a bit, but the problem is rearing its head as the wells are no longer sufficient, which may force Lowell to again consider Lake Michigan water.<sup>117</sup>

Wadsworth, Ohio, is also poised to apply for a diversion out of Lake Erie.<sup>118</sup> Wadsworth lies outside the basin, but is in a county that straddles the basin line.<sup>119</sup> With significant population growth in the past twenty years and the town already at 60% of its water capacity, Wadsworth will likely be looking for a new water source in the near future.<sup>120</sup>

#### IV. CONFLICTS UNDER THE COMPACT'S DIVERSIONARY SCHEME

As the likelihood that additional straddling county communities will need more water resources increases, how the Great Lakes Council handles the first application for a diversion out of the Great Lakes under this provision will receive intense scrutiny.<sup>121</sup> While the Compact does provide a general prohibition on new diversions out of the Great Lakes, the Compact may be too complex and cumbersome to apply in real situations.<sup>122</sup> One study also suggests that the Compact has several flaws within its diversionary scheme,

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111. *Id.* at 6–7.

112. *Id.*

113. *Id.* at 7–8.

114. ANNIN, *supra* note 25, at 140.

115. *Id.* at 141.

116. *Id.* at 141–51.

117. TEUTSCH, *supra* note 10, at 7–8.

118. *Id.* at 8.

119. *Id.*

120. *Id.*

121. *Id.* at i.

122. See Mark Squillace, *Rethinking the Great Lakes Compact*, 2006 MICH. ST. L. REV. 1347, 1360 (“[T]he highly specific standards for evaluating new withdrawal applications cannot be simply applied, and the complex assessment that the Compact requires states to make to ascertain compliance with the standards cannot be done efficiently.”).

which might make handling a community in a straddling county's application even more difficult.<sup>123</sup>

Specifically, the study states that if a city or county did challenge the Great Lakes Council's decision to deny a diversion application, that decision may not hold up in court because the Council "lack[s] . . . administrative rules, especially rules governing procedures for reviewing applications for diversions."<sup>124</sup> It is difficult to know how the Great Lakes Council will handle a community in a straddling county's application for a diversion, but there are some clear procedural requirements: all eight Great Lakes governors must approve the application and the community must meet all the requirements of section 4.9 of the Compact.<sup>125</sup>

This Part describes some of the conflicts and weaknesses in the Compact's diversionary scheme. Subpart A describes how the Great Lakes Council's lack of detailed and binding processes for reviewing diversion applications could be problematic in terms of enforcement and legal challenges.<sup>126</sup> Subpart B describes the Great Lakes Council's lack of definitions for many key terms appearing within the Compact and the problems those omissions could cause for state implementation and the application review process.<sup>127</sup>

#### A. LACK OF REGULATORY PROCESSES AND BINDING GUIDANCE

Perhaps the most problematic flaw in the Great Lakes Compact's diversionary scheme is that while the Great Lakes governors must unanimously approve any application for a diversion out of the Great Lakes, the Compact does not delineate a specific process through which the governors should handle these types of applications.<sup>128</sup> The Interim Guidance document, which the Great Lakes Council issued in 2010, provides the only administrative direction for the Great Lakes governors regarding reviewing communities in straddling counties' diversion applications.<sup>129</sup> However, the Council did not develop the Interim Guidance through a federal notice and

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123. TEUTSCH, *supra* note 10, at 5–19.

124. *Id.* at iii.

125. Great Lakes Compact, Pub. L. No. 110-342, § 4.9(3)(a)–(g), 122 Stat. 3764 (2008) (“The Water shall be used solely for the Public Water Supply Purposes . . . . There is no reasonable water supply alternative within the basin in which the community is located . . . . Caution shall be used in determining whether or not the Proposal meets the conditions for this Exception . . . . Council approval shall be given unless one or more Council Members vote to disapprove.”).

126. *See infra* Part IV.A.

127. *See infra* Part IV.B.

128. *See* TEUTSCH, *supra* note 10, at 14–15.

129. *Id.* at 16. *See generally* GREAT LAKES–ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT INTERIM GUIDANCE (2010), *available at* [http://www.glscompactcouncil.org/Docs/Misc/Compact\\_Council\\_Interim\\_Guidance.pdf](http://www.glscompactcouncil.org/Docs/Misc/Compact_Council_Interim_Guidance.pdf).



comment system, and the guidance is merely discretionary.<sup>130</sup> As a result, the Council can choose to follow the recommendations found in the Interim Guidance, but it may also deviate from that guidance.<sup>131</sup> The fact that this guidance is discretionary, and that the Council has not developed specific processes for reviewing diversion applications, makes any decision that it promulgates regarding these straddling county diversions vulnerable to legal challenge.<sup>132</sup> In addition to a lack of guidance documents, the Great Lakes Council's lack of regulatory processes is also concerning for whether the Great Lakes Compact will be able to withstand challenge in court, but the remedy for this issue is beyond the scope of this Note.

#### B. LACK OF DEFINITION FOR KEY TERMS OF ART

Equally as concerning as the Council's lack of definitive decision-making processes is the fact that the Compact fails to define several key "terms of art" both within its diversionary scheme and its exceptions to the ban on diversions provisions.<sup>133</sup> This Part describes how the Compact's omission of key definitions within its provisions is problematic. Subpart 1 describes the Council's lack of definition for "reasonable water supply alternative" and the complications the omission raises for states managing diversion applications.<sup>134</sup> Subpart 2 describes how Wisconsin defines "reasonable water supply alternative."<sup>135</sup>

The Compact's text fails to define several of its key terms including "adverse impact"<sup>136</sup> and "reasonable water supply alternative,"<sup>137</sup> among other terms of art.<sup>138</sup> This is problematic because the Compact requires each member state to implement the Compact's mandates and to create regulatory procedures to comply with the Compact's provisions.<sup>139</sup> Since the Compact does not define these key terms within its provisions, each member state is left

130. TEUSTCH, *supra* note 10, at 16; *see also* GREAT LAKES–ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT INTERIM GUIDANCE, *supra* note 129, at 1 ("The Council reserves the discretion to deviate from these guidelines if circumstances warrant.").

131. *See supra* note 130 and accompanying text.

132. *See* TEUSTSCH, *supra* note 10, at 16 (citing *Old Town Trolley Tours of Wash., Inc. v. Wash. Metro. Area Transit Comm'n*, 129 F.3d 201, 206 (D.C. Cir. 1997) for the proposition that courts are more likely to uphold interstate compact provisions when the decision-making authority limited its authority to relevant factors and had evidence to support the reasons for its decision).

133. *Id.* at 17–18. *See generally* Great Lakes Compact, Pub. L. No. 110-342, § 1.2, 122 Stat. 3764 (2008) (failing to define several terms within the Compact's provisions).

134. *See infra* Part IV.B.1.

135. *See infra* Part IV.B.2.

136. TEUSTCH, *supra* note 10, at 17. *See generally* Great Lakes Compact §§ 1.2, 1.3(2)(f), 4.11(2), (5)(e).

137. TEUSTCH, *supra* note 10, at 17; *see also* Great Lakes Compact §§ 1.2, 4.9(3)(d).

138. TEUSTCH, *supra* note 10, at 17.

139. Great Lakes Compact § 4.3(1) ("Each [State], within its jurisdiction, shall manage and regulate New or Increased Withdrawals, Consumptive Uses and Diversions, *including Exceptions*, in accordance with this Compact." (emphasis added)).

to create its own definitions of those terms and to develop regulatory processes that it thinks may comply with the ambiguous and vague provisions.<sup>140</sup> The lack of definition of these key terms gives individuals trying to apply for diversions little guidance for how to go about the submission and review process.<sup>141</sup>

The lack of definitions also renders the Council's review of diversion applications more arbitrary and subjective<sup>142</sup> and the Council's decisions regarding diversion applications more vulnerable to legal challenge, as individuals who apply for diversions do not have a clear idea of how to comply with the Compact's provisions.<sup>143</sup> Furthermore, a court may overturn any ruling the Council makes regarding diversion applications because, since the Compact does not define key terms, the court may find the Council's ruling contrary to the purpose or intent of the Compact.<sup>144</sup>

### 1. Lack of Definition of "Reasonable Water Supply Alternative"

The lack of definition for key terms of art within the Compact is certainly true for section 4.9, which delineates the exception to the general prohibition on Great Lakes diversions for straddling counties.<sup>145</sup> The most glaring omission within section 4.9 is the Compact's lack of a definition for a "reasonable water supply alternative."<sup>146</sup> This term of art concerns what a community in a straddling county must demonstrate in order to apply for a diversion out of the Great Lakes.<sup>147</sup> While the community must show that it does not have a "reasonable water supply alternative," the Compact does not define what constitutes such an alternative.<sup>148</sup> This lack of definition forces each individual member state to guess at what the Great Lakes Council meant by that term or to develop its own definition for the term in creating its implementation plans for the Compact.<sup>149</sup>

The fact that each state is required to develop its own definition of "reasonable water supply alternative," or to develop a definition as an application for a diversion unfolds, is additionally problematic simply based on the way courts interpret interstate compacts.<sup>150</sup> When states enter into

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140. TEUSTCH, *supra* note 10, at 17.

141. *Id.*

142. *Id.* at 18.

143. *Id.* at 17-18.

144. *Id.* at 18.

145. Great Lakes Compact, Pub. L. No. 110-342, § 4.9(3), 122 Stat. 3739 (2008).

146. See TEUSTCH, *supra* note 10, at 17-18 (explaining the fact that the Great Lakes Compact does not define "reasonable water supply alternative" is problematic); see Great Lakes Compact § 4.9(3)(d) (omitting a definition for "reasonable water supply alternative").

147. Great Lakes Compact § 4.9(3)(d).

148. *Id.*

149. TEUSTCH, *supra* note 10, at 18.

150. *Id.*

interstate compacts they agree to give up some of their state sovereignty, and the congressionally approved interstate compact terms will take precedence over any conflicting state law.<sup>151</sup> Courts also interpret interstate compacts as binding contracts that the parties can only amend or modify with the consent of all the other parties.<sup>152</sup> What that means here is that any member state that creates its own definition of “reasonable water supply alternative” may be modifying the Compact’s terms because the Compact itself does not define the term.<sup>153</sup> If a court finds that the state’s definition of “reasonable water supply alternative” does not comport with the Compact’s definition, it may invalidate the state’s definition as contrary to the Compact.<sup>154</sup>

## 2. Wisconsin’s Definition of “Reasonable Water Supply Alternative”

Wisconsin is the only member state that has developed its own definition of “reasonable water supply alternative” to handle applications for diversions from communities in straddling counties.<sup>155</sup> The state defines this term as “a water supply alternative that is similar in cost to, and as environmentally sustainable and protective of public health as, the proposed new or increased diversion and that does not have greater adverse environmental impacts than the proposed new or increased diversion.”<sup>156</sup> Wisconsin added this definition to its legislation implementing the Compact in August 2012, likely in response to Waukesha’s proposed application for a diversion.<sup>157</sup>

While other states may begin to adopt their own definitions of “reasonable water supply alternative” in their legislation, the fact that none have yet done so may mean that states will have to develop definitions and processes to review diversion applications as they arise because the Great Lakes Compact does not provide any—much less adequate—guidance.<sup>158</sup>

151. *Id.* (citing *Cuyler v. Adams*, 449 U.S. 433, 438–40 (1981); *W. Va. ex rel. Dyer v. Sims*, 341 U.S. 22 (1951); *Del. River Joint Toll Bridge Comm’n v. Colburn*, 310 U.S. 419, 427 (1940)).

152. *Id.*; see also *Tarrant Reg’l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013) (stating that interstate water compacts are interpreted as binding contracts under the principles of contract law).

153. See TEUTSCH, *supra* note 10, at 18 (explaining that each individual state’s definition may run contrary to the purpose of the Compact since the Compact does not provide guidance on this issue).

154. *Id.* (discussing again that a congressionally approved interstate compact invalidates any state law that runs contrary to its provisions).

155. See WIS. STAT. § 281.346 (2012) (providing a specific definition for what “reasonable water supply alternative” means in the State of Wisconsin).

156. *Id.* § 281.346(1)(ps).

157. *Id.*

158. See TEUTSCH, *supra* note 10, at 18 (explaining that in order to review diversion applications, states will have to determine what a “reasonable water supply alternative” is). At this point, the Great Lakes Council has given little guidance on what that term means and seems to be taking a position that it will handle each application on a “case-by-case” basis. *Id.* at 17–18; see also *Great Lakes Compact*, Pub. L. No. 110-342, § 4.9(3)(d), 122 Stat. 3739 (2008) (failing to define “reasonable water supply alternative” within the Compact’s provisions).

## V. THE COUNCIL SHOULD DEFINE “REASONABLE WATER SUPPLY ALTERNATIVE”

The Great Lakes Compact is a young document. As it may face its first real test, it is important that it is able to stand up to judicial scrutiny and any challenge that a party may bring against it.<sup>159</sup> As it stands now, the Great Lakes Council does not have a definition of “reasonable water supply alternative” and is relying on member states to come up with a definition as they review applications for water diversions and implement the mandates of the Compact.<sup>160</sup> However, relying on each individual state to develop its own definition is problematic because it leads to an arbitrary and subjective review process.<sup>161</sup> The Great Lakes Council should instead develop its own concrete definition of “reasonable water supply alternative” to make the Compact less vulnerable to legal challenge and to effectuate the purposes of the Compact.<sup>162</sup>

This Part suggests that the Great Lakes Council should develop a concrete definition for “reasonable water supply alternative.” Subpart A describes why the Council should define “reasonable water supply alternative.”<sup>163</sup> Subpart B suggests how the Council should define the term by focusing on the effectiveness of the alternative in terms of public health and environmental impacts, rather than economic considerations.<sup>164</sup>

### A. WHY: TO STRENGTHEN THE GREAT LAKES COMPACT AGAINST LEGAL CHALLENGES

The Great Lakes Council should create its own definition of “reasonable water supply alternative” and record it in binding regulatory guidance so any decisions the Council makes regarding applications for diversions from straddling counties will be less vulnerable to legal challenge and scrutiny.<sup>165</sup> At present, a party may challenge the Council’s decision regarding an application and point to its failure to define what constitutes a “reasonable water supply alternative.”<sup>166</sup> Since each individual member state may create its own definition of this term of art, the Council’s review of whether or not an

159. See TEUTSCH, *supra* note 10, at 13 (describing that the Compact is up against its first test and the way the Council handles the test will determine if its decisions can withstand legal scrutiny).

160. *Id.* at 17.

161. *Id.* at 18.

162. *Id.* at 17 (describing that the Council should define key terms within the Compact to make it stronger against legal challenges).

163. See *infra* Part V.A.

164. See *infra* Part V.B.

165. See TEUTSCH, *supra* note 10, at 17–18 (explaining that, as the Compact stands now, its lack of key definitions make it *more* vulnerable to legal challenge).

166. See *id.* (describing that the Compact’s omitted definitions make the Council’s decisions more arbitrary, subjective, and, therefore, vulnerable to legal challenge).

alternative water supply is reasonable is subjective and would vary for applicants from state to state.<sup>167</sup>

If the Council promulgates a concrete definition of “reasonable water supply alternative” to review diversion applications that parties can refer to when seeking a diversion, it will create a much more predictable and stable process for reviewing diversion applications.<sup>168</sup> Predictability and stability in laws and regulations is a bedrock principle in American law.<sup>169</sup> For this reason, if the Compact’s regulations and mandates provide this type of predictability and stability in their enforcement, they are much more likely to withstand legal challenge. To achieve this end, the Great Lakes Council should work to define “reasonable water supply alternative” within the Compact to both give member states guidance in how to implement the Compact and to create predictable outcomes in terms of diversion applications from communities in member states.<sup>170</sup>

In addition, if the Great Lakes Council fails to define key terms within the Compact, such as “reasonable water supply alternative,” then the Compact may demonstrate the same kinds of weaknesses as the earlier Great Lakes water management instruments.<sup>171</sup> For example, the Great Lakes Council wanted a binding instrument unlike the Boundary Waters Treaty of 1909, the Basin Compact, the Great Lakes Charter, or the Annex that came before the Compact.<sup>172</sup> However, the Great Lakes Council also realized that a binding instrument, like the WRDA—which gave unilateral veto power to each member state without set processes or procedures—was not an effective or likely legal way to manage the Great Lakes.<sup>173</sup> The Council painstakingly drafted and finalized the Compact, in part, to remedy the weaknesses of the WRDA by creating stable processes and procedures to manage Great Lakes

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167. *Id.* at 18.

168. *See id.* (describing that, as it stands now, the Council’s omission of key definitions will result in “chaos and conflict.”).

169. *See* *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991) (describing that legal precedent helps achieve the goal of stability and predictability in the law).

170. *See* TEUSTCH, *supra* note 10, at 17–18 (suggesting that the Council should define key terms within the Compact or at least provide guidance as to what might be acceptable definitions).

171. *See, e.g.*, WRDA, Pub. L. 99-662, § 1109, 100 Stat. 4082 (codified as amended at 42 U.S.C. § 196,201-20 (2000)) (failing to set reasonable processes for allowing diversions out of the Great Lakes); Great Lakes Basin Compact, Pub. L. No. 90-419, 82 Stat. 414 (1968) (failing to allow Commissioners to enforce their recommendations); Great Lakes Charter Annex, *supra* note 2, Directive 1 (depicting the weaknesses of non-binding instruments in managing the Great Lakes); Great Lakes Charter, *supra* note 2 (depicting the weaknesses of non-binding instruments in managing the Great Lakes); Boundary Waters Treaty, *supra* note 2 (failing to regulate diversions out of Lake Michigan).

172. ANNIN, *supra* note 25, at 210 (describing how the Great Lakes governors wanted a binding agreement beyond the Annex).

173. *Id.* at 207 (indicating that Great Lakes governors were worried that if the WRDA were challenged it would fail and the Great Lakes governors would lose their power to deny diversions).

diversions.<sup>174</sup> Nevertheless, as it stands now, while the Compact does purport to create binding processes and procedures to manage Great Lakes diversions, those processes and procedures are neither clear nor well-defined, making the Compact subject to the same kinds of legal challenges as the WRDA.<sup>175</sup>

For example, Michigan State Representative Rudy Hobbs has already spoken out against Waukesha's diversion application, urging Michigan Governor Rick Snyder to veto Waukesha's diversion if it makes it to the final stage of the Compact review process.<sup>176</sup> If Governor Snyder heeds Representative Hobbs' request and refuses to approve the diversion, the Council would be required to deny Waukesha's application under the Compact.<sup>177</sup> However, under the Compact's current framework, such an action might not be the end of Waukesha's fight. Waukesha could claim the Compact lacks definitive procedures for review and challenge the Compact as containing ambiguous terms such as "reasonable water supply alternative." While this hypothetical situation may never come to pass, it illustrates why the Council should define key terms within the Compact—to stave off litigation and create a more predictable application process for diversion applicants and application reviewers.

*B. HOW: BY FOCUSING ON THE PUBLIC HEALTH AND ENVIRONMENTAL EFFECTIVENESS OF AN ALTERNATIVE, NOT ECONOMIC CONSIDERATIONS*

How the Council chooses to define "reasonable water supply alternative" will have significant impacts on which straddling county communities will have successful diversion applications and which communities will not. How the Council defines this term will also have a significant impact on the Compact's diversionary scheme and potentially the ecological health of the Great Lakes Basin. For these reasons, it is important that the Council define "reasonable water supply alternative" with a focus on the effectiveness of the water supply alternative in terms of public health and environmental impacts—rather than the economic characteristics of the alternative.

At this point, Wisconsin is the only member state that has a definition of "reasonable water supply alternative," which it defines as one that is similar in cost to the proposed new or increased diversion, is similar in its protection of the environment and does not have greater detrimental effects than the

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174. *Id.* at 204–10 (describing the compromise between a total ban on diversions and processes for managing certain diversions under the proposed Compact).

175. See TEUSTCH, *supra* note 10, at 17–18 (noting the lack of binding processes and lack of key definitions in the Compact as precursors to litigation).

176. Don Behm, *Michigan Legislator Seeks Veto of Waukesha's Great Lakes Water Bid*, MILWAUKEE J. SENTINEL (Dec. 17, 2013), <http://www.jsonline.com/news/waukesha/michigan-legislator-seeks-veto-of-waukeshas-great-lakes-water-bid-b9916577921-236271521.html>.

177. Great Lakes Compact, Pub. L. No. 110-342, § 4.9(3)(g), 122 Stat. 3739 (2008) (requiring all Great Lakes governors to approve an application for a diversion).

proposed increased diversion.<sup>178</sup> Wisconsin's statute defining this term therefore has an economic focus, specifying that in order for an alternative water source to be reasonable it must be "similar in cost" to a diversion from the Great Lakes.<sup>179</sup> This "similar in cost" language is wholly fact dependent and subjective. It is also ripe for litigation if the Great Lakes Council denies an application for a diversion, and a disgruntled party latches onto the "similar in cost" language and argues that the water supply alternative was not economically feasible or similar in cost to a diversion from the Great Lakes.<sup>180</sup> For example, if the Council denies Waukesha's diversion application, the City may challenge the Council's decision and claim that its alternative water supply—constructing wells west of town—was not similar in cost to a diversion from Lake Michigan and therefore the Council should have approved the diversion.<sup>181</sup> Comparable language in environmental and other regulatory contexts has created vast controversy and lengthy and costly litigation.<sup>182</sup>

This focus on cost will lead the Council, member state, and party seeking a diversion to quibble over dollars, rather than look to the more important factors of public health and environmental impact.<sup>183</sup> To avoid litigation over the economic characteristics of a particular water alternative and to ensure that the goals of the Compact's diversionary scheme are met, the Council should define "reasonable water supply alternative" in a way that considers whether the alternative is safe for the public and whether the alternative is safe for the environment—not whether the alternative is too expensive.

The purpose and the clear language of the Compact provide support for this conclusion. In reviewing the history and the context of the Compact, it is apparent that the Great Lakes states and governors intended for the agreement to manage diversions out of the Great Lakes, to promote conservation of the resource, and to foster the ecological health of the region.<sup>184</sup> The Compact itself places a sweeping ban on diversions of Great

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178. WIS. STAT. § 281.346 (2012).

179. *Id.*

180. Melissa Kwaterski Scanlan et al., *Realizing the Promise of the Great Lakes Compact: A Policy Analysis for State Implementation*, 8 VT. J. ENVTL. L. 39, 63 (2006) (describing the large amount of litigation that may develop over "economically feasible" language).

181. ANNIN, *supra* note 25, at 243 (indicating that in 2003, Waukesha's alternative water supply option was to sink wells outside the city which would cost \$35 million more than diverting water from Lake Michigan).

182. *See, e.g.*, *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 495 (1981) (discussing a cotton mill's challenge to the meaning of "economically and technologically feasible" within the Occupational Safety and Health Act); *Union Elec. Co. v. Env'tl. Prot. Agency*, 427 U.S. 246, 255 (1976) (rejecting a public utility company's argument that the EPA had to consider the "economic and technological infeasibility" of particular regulation within the Clean Air Act).

183. *See* Scanlan, et al., *supra* 180, at 63.

184. *See, e.g.*, Great Lakes Compact, Pub. L. No. 110-342, § 4.2, 122 Stat. 3739 (2008) (delineating the mandates for water conservation and efficiency programs within the Compact); *id.* § 4.5(1)(d) (describing the member states' intent to protect the integrity of the Great Lakes and manage the lakes through environmental changes that may happen); *id.* § 4.8 (setting the

Lakes water and, even though the Compact provides for exceptions to this ban, it mandates that the Great Lakes Council use “caution” in approving diversions of Great Lakes water under the exception provisions.<sup>185</sup> This language within the Compact is strong evidence that the Compact drafters intended for the Great Lakes Council to only approve diversions in extreme circumstances and not simply because a community’s alternative water source is more expensive than a Great Lakes diversion.<sup>186</sup>

By removing cost from the definition of “reasonable water supply alternative,” the Council will also effectuate another goal of the Compact—giving communities a greater incentive to conserve their existing water resources.<sup>187</sup> If a community knows that once it depletes its existing water resources the Council will not just approve a diversion simply because the community’s other water alternatives are more expensive, the community will work harder and quicker to implement programs to conserve existing resources rather than relying on diversions of nearby Great Lakes water. In this way, a definition of “reasonable water supply alternative” that does not focus on the costs of the water alternative effectuates the goals and purpose of the Compact as a whole.<sup>188</sup>

## VI. CONCLUSION

The Great Lakes states have spent over one hundred years attempting to manage diversions out of the lakes.<sup>189</sup> Arguably the strongest step toward regulating diversions from the lakes came in 2008 when Congress approved the Great Lakes Compact. However, the Compact is about to face its first real test as Waukesha, Wisconsin, pushes through the application process for the straddling county exception to the Compact’s total ban on diversions.<sup>190</sup> How the Great Lakes Council handles this application will set a precedent for similar applications in the future and will prove whether the Council’s decision-making process can withstand legal challenge or judicial scrutiny.<sup>191</sup>

This Note suggests that the Great Lakes Council should define “reasonable water supply alternative” within the Compact with a focus on the effectiveness of the alternative water supply in terms of public health and

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general prohibition on diversions from the Great Lakes). See also *supra* Part II for a discussion of the history of Great Lakes water management and the goal to prevent water diversions throughout history.

185. See Great Lakes Compact § 4.9(3)(e) (directing the Great Lakes governors to use caution in allowing diversion from the lakes; see also *id.* § 4.8 (setting the general prohibition on diversions from the lakes)).

186. See *supra* note 185.

187. See Great Lakes Compact § 4.2 (mandating that the members states set up procedures to conserve the resources of the lakes).

188. See *supra* note 185 and accompanying text.

189. See *supra* Part II.

190. See *supra* Part III.A.

191. See *supra* Part IV.



environmental goals, rather than economic considerations.<sup>192</sup> The Council should implement such a definition to avoid litigation and effectuate the purpose of the Compact's diversionary scheme.<sup>193</sup> At a bare minimum, the Council should adopt some definition of "reasonable water supply alternative" to make its decisions to approve or to deny a community in a straddling county's diversion application less vulnerable to legal challenge and scrutiny.<sup>194</sup> The Council should implement a definition that places the focus on public health and environmental effects to avoid litigation and effectuate the purpose of the Great Lakes Compact's diversionary scheme.<sup>195</sup>

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192. *See supra* Part V.B.

193. *See supra* Part V.B.

194. *See supra* Part V.

195. *See supra* Part V.B.