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January 23, 2017

VIA MAIL AND EMAIL
pjohnson@cglslgp.org.

Mr. Peter Johnson
Deputy Director
Great Lakes Compact Council
20 North Wacker Drive, Suite 2700
Chicago, IL 60606

Re: City of Waukesha's Response to the Cities Initiative Request for a Hearing

Dear Mr. Johnson:

The City of Waukesha appreciates the opportunity to respond to the Great Lakes and St. Lawrence Cities Initiative (Cities Initiative) request for a hearing. Pursuant to the letter from the Compact Council dated December 23, 2016, the City of Waukesha is hereby transmitting its response to the Cities Initiative filings by mail and email. Copies are being simultaneously sent to counsel for the Cities Initiative.

Please feel free to contact me if you have any questions.

Very truly yours,

Paul G. Kent

PGK:mai
Enclosure
cc: Daniel S. Duchniak, General Manager Waukesha Water Utility (via mail/email)
Jill M. Hutchison, Jenner & Block on behalf the Cities Initiative (via mail/email)

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BEFORE THE GREAT LAKES-ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT COUNCIL

In the Matter of the Application by the
City of Waukesha, Wisconsin
For a Diversion to Great Lakes Water — Case No. 2016-1

CITY OF WAUKESHA'S RESPONSE TO THE CITIES INITIATIVE'S REQUEST FOR A HEARING

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INTRODUCTION

The City of Waukesha (Waukesha) appreciates the opportunity provided by the Great Lakes-St. Lawrence River Water Resources Council (Council) to respond to the filings of the Great Lakes and St. Lawrence Cities Initiative (Cities Initiative). Waukesha has come before the Council for one simple reason: it urgently needs a safe, reliable and sustainable source of drinking water for its residents. The decision of the Council conditionally granting Waukesha's request for Great Lakes water (Final Decision) will allow Waukesha to meet that critical obligation. For the reasons set forth herein, there is no basis for the Council to reverse that decision.

The Cities Initiative has also come to the Council for one simple, but very different reason: it disagrees with the Council's Final Decision and its hearing request is a prerequisite to judicial review. But the Cities Initiative has offered nothing to warrant a reversal of the Council's Final Decision. In its various submittals, the Cities Initiative identifies no new arguments or information; it simply asks the Council to come to a different conclusion.[1]

The Cities Initiative's primary complaint is that because the Council trimmed the service area and withdrawal volume from what Waukesha originally proposed, the Council now needs to re-open public comment and technical review. The Cities Initiative

[1] Nor has the Cities Initiative adequately cited the record to support its claims. For example, citing to the "WDNR EIS" and "WDNR Technical Review" (*See* CI Supp at 27) falls far short of the request in the Compact Council's October 19, 2016 letter to the Cities Initiative for "references to the specific portions of the administrative record upon which Cities Initiative relies."

NOTE: Citations to the Cities Initiative initial filing will be designated CI __; citations to its Supplemental filing will be designated CI Supp ___.

asserts that it could not have reasonably anticipated this change, even though it was among the many commenters who advocated for just such changes. Moreover, there is no basis for such an endless loop of comment, especially when the impacts from a reduced service area and volume were already analyzed by the Wisconsin Department of Natural Resources (DNR) and considered by the Great Lakes-St. Lawrence River Water Resources Regional Body (Regional Body) and by the Council.

The Cities Initiative's concern about precedential cumulative impacts is equally misplaced. Apart from the unique circumstances that make any precedential impact limited, to the extent there is a precedent set by this approval, it is one that prevents adverse impacts to the Great Lakes. Among other things, the Regional Body's Findings and the Council's Final Decision requires that 100% of the volume of water withdrawn be returned to the Great Lakes. If there is no net water loss from this diversion and this sets the precedent, then there should be no water losses in the future even if there are more diversions. Any number multiplied by zero is still zero. For the Cities Initiative to assert that diminished flow over Niagara Falls from cumulative impacts is a "real concern," is at best hyperbole. (*See* CI Supp. Ex 3) The real concern here is that Waukesha needs a safe, reliable and sustainable drinking water for its residents. That concern was properly addressed by the Findings of the Regional Body and by the Council's Final Decision. There is no reason to reverse the Final Decision.

FACTS

The background facts and the procedural history of this matter are well known to the Council and are documented in the Council's Final Decision. There is no need to

repeat those facts, but a few should be noted in light of the assertions of the Cities Initiative.

First, Waukesha began the process of looking for safe, reliable and sustainable drinking water supply more than a decade ago because its primary source of water was from an unsustainable confined deep aquifer which contained unacceptable levels of radium. R.16142-43, Final Decision Finding 3; R.185, Preliminary Final EIS.[2] Today, Waukesha remains under a 2009 consent order to bring its water system into compliance with the Safe Drinking Water Act radium standards. *Id.* After evaluating 14 alternatives, it concluded that obtaining water from Lake Michigan was the only safe, reliable and sustainable long-term solution. R.16143-45, Final Decision; R.1888-89, Waukesha App. Vol. 5. It was also the best solution for the aquifer and regional ecosystem including the Great Lakes.

Second, the Final Decision in this case is based upon lengthy and detailed technical review. After years of study, Waukesha began the formal application process for Great Lakes water in 2010. A revised application was submitted to the DNR in 2013. R.189 (EIS). The 2013 application consists of five volumes and contains thousands of pages of research. DNR subjected the application to extensive review which included a thorough Environmental Impact Statement process and a Technical Review. The Bates Numbers for the Record in this case show a total of 17,850 pages.

[2] For the sake of brevity, citations to the Record will be listed as "R." followed by the Bates Number and where necessary, a description of the document.

Third, the opportunities for public participation and involvement have been equally lengthy and robust. The DNR received public comments in 2011, 2013 and 2015. R.16140, Final Decision; R.172, EIS. After the DNR completed its review, it transmitted the application to the Regional Body and the Council for review in January 2016. The application proceeded through additional public comment and public hearing on February 18, 2016. R.16140-41, Final Decision. The proposal was discussed in several public meetings of the Regional Body which consisted of all eight Great Lakes states and the two Canadian provinces – Ontario and Quebec. In a May 18, 2016 Declaration of Finding, the Regional Body concluded that the application as conditioned "satisfies all Agreement and Compact criteria for an Exception to the ban on Diversions." R.16117, Finding 1. Subsequently, the Council engaged in additional review which resulted in the Final Decision on June 21, 2016.

STANDARD OF REVIEW

The Cities Initiative requests a hearing on the Council's approval of the Waukesha diversion application, claiming that the Final Decision "exceeds the scope of authority granted in the Compact. . ." (CI at 1) Section 7.3.1 of the Compact provides, in relevant part:

> Any Person aggrieved by any action taken by the Council pursuant to the authorities contained in this Compact shall be entitled to a hearing before the Council. . . . After exhaustion of such administrative remedies . . . any aggrieved Person shall have the right to judicial review of a Council action in the United States District Courts for the District of Columbia or the District Court in which the Council maintains offices, provided such action is commenced within 90 days . . . .

The Compact thus expressly provides that the purpose of the hearing process is to provide a mechanism for "exhaustion of administrative remedies," as a prerequisite for an action

for judicial review in federal district court.

There appears to be agreement that this matter is governed by settled principles of administrative law, even though the federal Administrative Procedures Act (APA)(5 U.S.C. § 551 *et seq*) does not apply to the Compact. (CI Supp. at 13-14, 17-18)[3] The Council's decision to approve a diversion application is akin to informal adjudication.[4] To overturn such a decision, a challenger must show that the decision was arbitrary and capricious. *See Dr. Pepper/Seven-Up Companies, Inc. v. F.T.C.*, 991 F.2d 859, 863-64 (D.C. Cir. 1993).

This is a very difficult standard to meet. As the Supreme Court has summarized:

> In reviewing [the agency] decision, we may not substitute our own judgment for that of the Commission. The "scope of review under the 'arbitrary and capricious' standard is narrow." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives. Rather, the court must uphold a rule if the agency has "examine [d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Ibid.* (internal quotation marks omitted).

F.E.R.C. v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 782, 193 L. Ed. 2d 661, 84 U.S.L.W. 4084 (2016), *as revised* (Jan. 28, 2016). In a similar vein, the Seventh Circuit has described this standard as follows: "Before concluding that a decision was arbitrary

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[3] The Council appears to agree, stating, "the Compact Council will look to general principles of administrative law for guidance." (Council letter, 10/19/16).

[4] To the extent the Cities Initiative is seeking some type of trial-like hearing in accord with 5 U.S.C. § 556 (CI Supp at 18), that assertion is without merit. Section 556 of the APA specifies trial-type hearing requirements, but only for formal adjudications. The APA "does not itself mandate that a trial-type hearing be held where none is required under the administrative agency's own governing statute; the APA simply dictates the procedures to be followed when another statute provides for a hearing." *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1072 (7th Cir. 1982). Here, the Compact does *not* provide for a formal adjudicatory trial-like hearing and the Council did *not* hold one when it made its Final Decision in this matter. The Compact certainly does not provide for a trial-like hearing on reconsideration.

and capricious, a court must be very confident that the decisionmaker overlooked something important or seriously erred in appreciating the significance of the evidence." *Patterson v. Caterpillar, Inc.*, 70 F.3d 503 (7th Cir. 1995).

A person challenging an agency decision must, before resorting to the courts, present their claims to the agency. Requiring parties to exhaust administrative remedies before seeking judicial review "acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court." *McCarthy v. Madigan*, 503 U.S. 140, 145, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992).

Thus, the Cities Initiative needs to demonstrate that the Council acted in an arbitrary or capricious manner. It has not and cannot do so. Although the Cities Initiative disagrees with the Council's judgment, it has failed to identify *any* errors or omissions in the Council's decision that would warrant reversal of the Council's decision.

ARGUMENT

I. THE CITIES INITIATIVE LACKS STANDING TO CHALLENGE THE COUNCIL'S APPROVAL OF THE DIVERSION.

The Cities Initiative contends that it has standing to challenge the Council's decision, both on its own behalf and on behalf of its members. While the Cities Initiative is a "person" for purposes of requesting a hearing under the Compact, Waukesha disputes that the Cities Initiative has established that it is "aggrieved" within the meaning of Section 7.3 of the Compact such that it has standing to obtain a hearing and to seek judicial review.

Standing ultimately will be a matter for the courts to decide should the Cities Initiative seek judicial review. Although Waukesha believes the Cities Initiative does not have standing, it strongly urges the Council to address the merits of the Cities Initiative's claims to avoid needless delay should the district court conclude that the Cities Initiative does have standing. Time is of the essence, given that Waukesha is subject to a court-ordered schedule to address its radium contamination issues. Accordingly, Waukesha will first respond to the Cities Initiative's assertion of standing, and then address its other claims.

As the Cities Initiative recognizes, there are two forms of standing available to it, namely standing on behalf of the association itself, and representational standing based upon standing by at least one of its members. (CI Supp. at 5) It has neither.

A. The Cities Initiative Lacks Standing On Its Own Behalf.

The Cities Initiative is an association of *mayors* from Canadian and American cities in the Great Lakes region; it is not an organization of cities. (CI Supp Ex. 1; Decl. of Ullrich, ¶2) The Cities Initiative asserts that the Council's decision has injured the organization itself, and thus the Cities Initiative has standing on its own behalf. (CI Supp at 5) It does not.

1. The Cities Initiative cannot manufacture standing by spending money challenging diversion applications.

An organization has standing on its own behalf if it meets the same standing test that applies to individuals. The organization must show actual or threatened injury in fact

that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision. *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990).

The Cities Initiative claims that it "has been forced to spend significant time and effort opposing the threatened injury to the Compact," and "[b]ecause the Final Decision makes it more likely that other cities will seek unallowable diversions, thereby weakening the Compact, the Cities Initiative expects that it will need to expend additional funds in the future to protect the Great Lakes and St. Lawrence River from these potentially unlawful diversions." (CI Supp at 5)

This is not enough. The expenditure of funds to challenge diversion applications does not imbue the Cities Initiative with standing: "An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation." *Spann*, 899 F.2d at 27; *see also Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011) ("litigation expenses cannot establish standing"). By contrast, organizations have been held to have standing where the challenged action has caused them "to redirect their resources to counteract the effects of the defendants' allegedly unlawful acts." *Id.* The Cities Initiative makes no such claim here.

2. Concern over potential adverse precedent does not confer standing on the Cities Initiative.

While an organizational plaintiff can establish standing based upon non-monetary injury, a decision that constitutes "a mere 'setback' to the organization's 'abstract social

interests' is not sufficient." *Id.* at 1138, quoting *Spann*, 899 F.2d at 27. Translation: the Cities Initiative's fundamental opposition to all diversions of Great Lakes water does not in itself create standing to challenge every approval of a diversion application.

The Cities Initiative peppers its argument – and its supporting declarations – with assertions of injury not from the Waukesha diversion itself (which of course will result in no net loss of water from Lake Michigan), but rather from the possibility that this decision will encourage other communities to apply for diversions and the Council will be more likely to grant them based upon the Waukesha approval. *See, e.g.,* CI at 2-3, 19-20; CI Supp. at 5, 7-9; and CI Supp Ex 1 Ullrich at 3; CI Supp Ex 2 Dickert at 4-5; CI Supp Ex 3 Dyster at 3-4. Waukesha takes issue with the claim that the approval of its diversion application will inspire other municipalities to undertake the daunting task of seeking a diversion (*see* Section IV below), but regardless, such a claim is irrelevant for standing purposes.

Disagreement with the Council's "legal reasoning and its potential precedential effect does not by itself confer standing where, as here, it is 'uncoupled' from any injury in fact caused by the [challenged decision]." *Telecomms. Research & Action Ctr. v. F.C.C.*, 917 F.2d 585, 588 (D.C. Cir. 1990); *see also Wis. Pub. Power, Inc. v. F.E.R.C.,* 493 F.3d 239, 268 (D.C. Cir. 2007) (possibility that an agency decision can set unfavorable precedent for future decisions "is insufficient to establish standing"); *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998) ("mere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation").

This principle is a legal cousin to the well-established precepts that to support standing an injury must be "concrete and particularized" and cannot be "based on mere conjecture." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,* 204 F.3d 149, 156 (4th Cir. 2000), *quoting Lujan v. Defenders of Wildlife,* 504 U.S. 555, 575 (1992). The Cities Initiative's concern about hypothetical future diversion applications fails on both counts.

B. The Cities Initiative Also Lacks Standing On Behalf Of Its Members.

The Cities Initiative also asserts that it has standing on behalf of its members. (CI Supp at 5-11) This argument also falls short.

The Cities Initiative correctly observes that there are three prerequisites to representational standing:

1) at least one member would have individual standing to sue;

2) the interests at stake are germane to the organization's purpose; and

3) the organization can litigate the matter without the need for the participation of an individual member.

CI Supp. at 5-6, *citing Sierra Club v. Franklin Cty. Power, LLC,* 546 F.3d 918, 924 (7th Cir. 2008). The Cities Initiative's claim of representational standing founders on the first prerequisite; it fails to establish that any individual member of the association would have standing to challenge the Council's decision.

The elements required for individual standing are well-established:

> [t]o have standing, an individual must satisfy three requirements. First, she must have suffered an "injury in fact" that is both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, the injury must be fairly traceable to the challenged action. Third, it must be likely, not just speculative, that a favorable

> decision will redress the injury. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992).

Id. at 925. The U.S. Supreme Court has observed that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish. *Lujan*, 504 U.S. at 562. That principle applies here.

The Cities Initiative identifies two of its members who purportedly have standing in their own right: John T. Dickert, the Mayor of Racine, Wisconsin, and Paul A. Dyster, the Mayor of the City of Niagara Falls, New York. (CI Supp at 8-9) These are the only two members from whom the Cities Initiative has offered declarations. (CI Supp, Exs. B and C) Both assert injury based upon the possible precedential effect of the diversion decision, and Mayor Dickert also asserts potential environmental and financial harm from the decision. Neither mayor has asserted sufficient facts to establish individual standing.

1. The Mayor of Niagara Falls does not have standing.

In his declaration supporting the Cities Initiative standing claim, Mayor Dyster is careful not to assert that the Waukesha diversion itself will have any effect whatsoever on Niagara Falls. (CI Supp Ex. 3 Dyster) That, of course, would be impossible given the requirement that 100% of the volume of water withdrawn will be returned. R.16152; Final Decision, Condition H.[5]

[5] This condition provides, "H. *Return Flow to Root River*. The Application must return to the Root River, a Lake Michigan tributary, a daily quantity of treated wastewater equivalent to or in excess of the previous calendar year's average daily Diversion. On any days when the total quantity of treated wastewater is insufficient to meet this target, all treated wastewater must be returned to the Root River." This "results in no let loss of water volume to the Basin." R.16146, Final Decision Finding 7a.

Instead, Mayor Dyster asserts only that the precedential effect of the decision is "real concern" and that it will harm his City. (CI Supp Ex. 3 Dyster at 2-4) This includes concerns that the volume of water reduced through hypothetical *future* diversions could – in some unstated way – adversely affect Niagara Falls, and could decrease the amount of hydroelectricity available to the City, forcing it to pay more for replacement electricity. (*Id.* at 4)

Because his standing claim is limited to the potential precedential effects of the decision, which could encourage or facilitate future diversions, under the principles discussed above, Mayor Dyster cannot imbue the Cities Initiative with representational standing.[6] The same is true for the parallel, precedent-based claims of Racine Mayor Dickert.

2. The Mayor of Racine does not have standing.

Apart from the precedent based claims, Mayor Dickert asserts that "Racine will be harmed by the Waukesha Diversion" because the return flow will increase the "pollutant load" in the Root River and harm the river's "ability to serve as a recreational waterway." (CI Supp, Ex. 2 Dickert at 3) For several reasons, Mayor Dickert lacks individual standing to challenge the diversion decision.

First, the Record contains nothing showing that Mayor Dickert has the independent authority to bring legal action representing the interests of the City, much

[6] Nor has Mayor Dyster alleged facts establishing that he would have standing to bring a lawsuit on behalf of his City or its citizens, a deficiency discussed in more detail below, with respect to Racine Mayor Dickert.

less its residents.[7] Wisconsin law, which is consistent with municipal law generally, imbues the City Council – not the Mayor – with "the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public . . . ." Wis. Stat. § 62.11(5).

By contrast, the statutes make the mayor "the chief executive officer," responsible for enforcing laws and ordinances, and for recommending measures to the city council. Wis. Stat. § 62.9(8). The Mayor does not have the authority to bind the City to a contract or legal settlement – only the City Council does. *See, e.g., Town of Brockway v. City of Black River Falls*, 2005 WI App 174, ¶ 24, 285 Wis. 2d 708, 724, 702 N.W.2d 418, 426-27; *Kocinski v. Home Ins. Co.,* 154 Wis. 2d 56, 69, 452 N.W.2d 360, 366 (1990). And it is equally clear that the Mayor could not bring a legal action on his own, without council approval, purporting to represent the City. Further, contrary to the Cities Initiative's assertion, it is not a mayor's direct responsibility to supply clean water to city residents, and to comply with environmental laws and regulations. (CI Supp at 9; Ex. 2 Dickert at 2) That is the obligation of the municipality itself. And it is for this reason that the application before the Council came from the City of Waukesha, not the Mayor of Waukesha alone.

Second, apparently recognizing the limitation of his authority, Mayor Dickert does not even purport to speak in his official capacity. In his declaration, he stated that he was

[7] This same infirmity also applies to Niagara Falls Mayor Dyster.

speaking "in my individual capacity." (CI Supp, Ex. 2 Dickert at 1) He makes no claim that the City Council has endorsed, much less authorized, his participation in a challenge to the Final Decision. He even acknowledges that "Racine is considering, though the City Council has not yet approved, taking action to oppose Waukesha's Diversion Request." (*Id.*) In fact, Racine was not even represented in the set of city council resolutions the Cities Initiative submitted with its comment during the hearing process. R.3638 (attachment Ex 3)

It is settled law that, in general, "a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410 (1991); *see also Hollingsworth v. Perry*, __ U.S. __, 133 S. Ct. 2652, 2663 (2013). Mayor Dickert cannot assert the interests of either the City itself or its citizens, particularly given Mayor Dickert's recognition that he is acting only in his individual capacity. Because Mayor Dickert asserts no interests of his own affected by the Final Decision, he lacks standing to challenge it.[8]

Third, even if these obstacles did not preclude a determination that Mayor Dickert has individual standing, his claims of injury would be insufficient even if asserted by a person with a direct, concrete interest in the Final Decision. It is not enough to vaguely assert, as Mayor Dickert does, that the Final Decision will "increase the pollutant load" of the river, may threaten the public investments in the waterway, or may threaten the

[8] Even if the City itself were a member of the association, it could not assert the interests of its citizens to support a standing claim. *City of Olmsted Falls, OH v. F.A.A.*, 292 F.3d 261, 267-68 (D.C. Cir. 2002) (a city is not analogous to an association for standing purposes; its citizens are not "members" whose interests it can assert).

harbor. (CI Supp Ex 2 Dickert at 3) While general allegations to support standing may suffice at the pleading stage, *see Lujan*, 504 U.S. at 561, the allegations here are glaringly speculative and vague, with no specific suggestions of actual harm to the sole individual asserting standing – Mayor Dickert. *Lujan* is particularly instructive on this point. There, the plaintiff organization relied on individual members to establish standing who generally alleged that they might someday return to areas where endangered species live. Such general allegations were insufficient. 504 U.S. at 565. And that is far more than Mayor Dickert has alleged here.

In sum, the Cities Initiative has failed to establish the prerequisites for standing, either on its own behalf or on behalf of its members. Nonetheless, Waukesha urges the Council to address the Cities Initiative's other claims on their merits, so that a reviewing court could reach all of the issues raised in the event it disagrees with Waukesha's position on standing.

II. THE COUNCIL'S REDUCTIONS OF THE SERVICE AREA AND ASSOCIATED WITHDRAWAL VOLUME DID NOT REQUIRE A NEW PUBLIC COMMENT PERIOD.

In approving Waukesha's application for a diversion, the Council trimmed the approved service area by eliminating areas outside the city's boundaries not currently served by the City. It then made a commensurate reduction in the amount of the requested withdrawal from Lake Michigan, from a future daily average of 10.1 million gallons to 8.2 million gallons. R.16145, Final Decision, Finding 5.

The Cities Initiative contends that before approving the application, the Council was obligated to provide a new round of public comment on these conditions. (CI Supp

at 11-15) According to the Cities Initiative, "the Compact Council *substantially rewrote* Waukesha's original application by reducing the size of the approved water supply area and the volume of the diversion," and thus, the Council "should have reopened the public comment period on the modified application." (CI Supp at 11 (Emphasis added)). Neither the facts nor the law support the Cities Initiative's contention.

A. The Standard For Holding Additional Hearings Is Whether The Final Decision Is A Logical Outgrowth Of The Original Proposal.

Numerous federal court decisions have addressed when an agency must reopen public comment because of changes made to a proposed rule or decision after the public comment period has closed.[9] The courts have long recognized that agencies cannot be required to reopen public comment whenever their final rule or decision varied from what was originally proposed: "the requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions." *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973). As that decision observed, "[a] contrary rule would lead to the absurdity that in rule-making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." (*Id.* n. 51)

The courts have reaffirmed this principle many times. In *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 533 (D.C. Cir. 1982) (emphasis added), the court

[9] Most decisions involve rulemaking, as opposed to agency decisions. The Cities Initiative cites to rulemaking cases as analogous; so will Waukesha. (CI Supp at 14-15)

stated:

> An agency adopting final rules that differ from its proposed rules is required to renotice *when the changes are so major that the original notice did not adequately frame the subjects for discussion.* The purpose of the new notice is to allow interested parties a fair opportunity to comment upon the final rules in their altered form. *The agency need not renotice changes that follow logically from or that reasonably develop the rules it proposed originally.* Otherwise, the comment period would be a perpetual exercise rather than a genuine interchange resulting in improved rules.

As reflected in numerous cases on this topic, the federal courts have settled on the "logical outgrowth" standard as the accepted formulation of this longstanding principle. Under this standard,

> an agency satisfies the notice requirement, and need not conduct a further round of public comment, as long as its final rule is a 'logical outgrowth' of the rule it originally proposed. . . . A rule is deemed a logical outgrowth if interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.

Ne. Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 951-52 (D.C. Cir. 2004) (citations omitted).

The Seventh Circuit has observed that

> The crucial issue, then, is whether parties affected by a final rule were put on notice that 'their interests [were] "at stake"' in other words, the relevant inquiry is whether or not potential commentators would have known that an issue in which they were interested was 'on the table' and was to be addressed by a final rule.

Am. Med. Ass'n v. United States, 887 F.2d 760, 768 (7th Cir. 1989); *see also Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (key factor is whether commenter "should have anticipated" the possibility of the final decision). As the Seventh Circuit noted in *Am. Med. Ass'n v. United States*, "courts have upheld final rules which differed from proposals in . . . significant respects," even

including "outright reversal of the agency's initial position." 887 F.2d at 768 (footnote with citations omitted).

The submission of comments on a topic demonstrates that there was reasonable notice that the issue was in play. *Ne. Md. Waste Disposal Auth.*, 358 F.3d at 952. *See also Appalachian Power Co.,* 135 F.3d 791, 816 (D.C. Cir. 1998) (upholding the modification of a rule proposal because comments received showed that commenters "clearly understood" that the issue was "under consideration"). And the "logical outgrowth" test is readily satisfied when the agency revises a proposal in response to comments. *Id.*

Even the Cities Initiative seems to acknowledge these basic requirements for where a new hearing is required:

> . . . courts have generally applied two tests . . .
>
> (1) whether the final rule is a "logical outgrowth" of the notice and comments occurring during the rulemaking process; and (2) whether the notice of proposed rulemaking "fairly apprised" interested parties of the subjects and issues involved in the rulemaking so they had an opportunity to comment.

(CI Supp at 14)[10]

Thus, the legal question before the Council is whether the change in service area and associated volume was a "logical outgrowth" of the original proposal and whether the Cities Initiative "should have anticipated" or was "fairly apprised" of the change.

[10] And at least some courts require more than just showing that the final rule was not a logical outgrowth of the original proposal. For example, the D.C. Circuit Court of Appeals has held that the complaining party also must establish "that it was prejudiced by the lack of opportunity to comment. . . . To show prejudicial error, a petitioner 'must indicate with reasonable specificity,' the aspect of the rule to which it objects and 'how it might have responded if given the opportunity.'" *Miami-Dade Cty. v. U.S. EPA*, 529 F.3d 1049, 1061 (11th Cir. 2008).

Stated alternatively, should the Cities Initiative have known the issue was "on the table," and "clearly understood" the issue was under consideration. This is not a close question.

B. The Modified Service Area Was Clearly A Logical Outgrowth Of The Original Service Area Proposal.

1. Reduction of the service area was the focus of comments by the Cities Initiative and numerous others.

The Record is unequivocal. There is no serious question that comments were received on the service area issue and that the Council responded to these comments. The geographic scope of the proposed service area was a focal point of numerous comments to the Council, including comments by the Cities Initiative itself. The Cities Initiative specifically objected to the scope of the service area, contending it was inconsistent with the Compact. R.3638 (attachment at 1)

Many other commenters echoed the Cities Initiative's objection to the service area, including the following:

- Compact Implementation Coalition et al. [R.3668];
- Bad River Band of Lake Superior Chippewa Indians [R.3630-32];
- Sault Ste. Marie Tribe of Chippewa Indians [R.15795-97];
- Chippewa Ottawa Resource Authority [R.15798-99];
- Friends of Vernon Marsh [R.3657 (attachment)];
- Great Lakes Indian Fish and Wildlife Commission (GLIFWC) [R.3633 (attachment)];
- Great Lakes Environmental Law Center [R.3733 (attachment)];
- Great Lakes Legislative Caucus [R.3635 (attachment)];
- Milwaukee Mayor Tom Barrett [R.3651 (attachment)];
- Milwaukee Common Council members [R.3643 (attachment)];
- Minnesota Center for Environmental Advocacy [R.3694 (attachment)];
- Toronto and Region Conservation Authority [R.3640 (attachment)];
- The Great Lakes Waterkeepers and Waterkeeper Alliance [R.3669 (attachment)].

Most of those comments were very specific in requesting that the Council limit the service area to the areas currently served by the City of Waukesha. Some commenters explicitly conceded that a scaled-back service area would comply with the Compact. *See, e.g.,* comments of Great Lakes Environmental Law Center [R.3733 (attachment, p. 10)]; Minnesota Center for Environmental Advocacy [R.3694 (attachment, p. 3)].

Indeed, as early as 2013, in a letter to DNR, the Compact Implementation Coalition (CIC) challenged the expanded service area defined in Waukesha's application and stated: "*The portion of the diversion request* pertaining to those [additional] communities must be denied." R.3668 (attachment).

The public testimony offered by citizens at the public hearing conducted on February 18, 2016, likewise included numerous explicit requests to limit the service area.[11] *See, e.g.,* the following testimony:

- Milwaukee Mayor Tom Barrett (asking Council "to modify this agreement so that it will reflect what I believe is the intent of this act and that is the service area") [R.16449];
- Todd Ambs (urging Council "to provide compliant water to the existing customers" only, rather than the extended service area) [R.16484];
- Elizabeth Wheeler, on behalf of Clean Wisconsin (objecting to the inclusion of "other communities" in the service area) [R.16489-90];
- Karen [last name unreported], on behalf of the American Civil Liberties Union, Wisconsin Foundation (objecting to "the vast expansion of a service area") [R.164999];
- Dennis Grzezinski (objecting to the "vastly . . . expanded service area and vastly increased water draw") [R.16502];

[11] While the Cities Initiative complains that comments prior to January 12, 2016 and after March 13, 2016 were not considered, (CI at 16) the Cities Initiative and others commented on this very issue during the open comment period.

- Charlene Lemoine ("very concerned about the expanded service area") [R.16516];
- George Meyer, on behalf of the Wisconsin Wildlife Federation ("key concern we have is that the proposed water service area is a tremendous expansion") [R.6531];
- Jennifer McKay (urging that application "not be approved in its current form" because of, among other things, the expanded service area) [R.16549-51];
- Don Hammes, on behalf of the Sierra Club ("expanded water supply service area" does not conform to Compact) [R.16562];
- Jennifer Bolgerd Breceda, on behalf of Milwaukee Riverkeeper (objecting to inclusion of "areas and entire communities outside of city limits") [R.16582];
- Laurie Longtine, on behalf of the Waukesha County Environmental Action League ("expanded water service area . . . fails to meet the definition of a community") [R.16586];
- Nancy Gloe ("the application should not go through with this expanded service area") [R.16595]; and
- David Ullrich ("This is a very straightforward matter. The service area is not a community under the Compact.") [R.16596].

The service area issue also featured prominently in the discussions of the Regional Body and the Council. *See, e.g.*, response by DNR on February 10, 2016, to question from Michigan Department of Environmental Quality [R.3541-42]; question from Illinois and DNR response [R.3539-40] In fact, the service area was the first topic discussed at the February 17, 2016 meeting of the Regional Body. R.6193-96. Dan Injerd, representing Illinois, observed that "the service area has been a topic of a lot of discussion." R.16223. Indeed, discussion of the service area dominated the hearing. *See* R.16223-27, R.16233-38, R.16250-80, R.16290-92, R.16296-97.

Where, as here, commenters specifically requested the Council to limit the service area, it is wholly implausible to claim that such a modification was not a "logical outgrowth" of the original proposal. It was obvious to all involved that the Council might

reduce the service area. For the Cities Initiative to now argue that it could not have "anticipated" or was not "fairly apprised" of a service area reduction when it was one of the many parties who sought precisely that outcome is more than a little disingenuous. The service area issue was not just "on the table" and "under consideration," it was the *focus* of many of the comments including the Cities Initiative. Clearly, a reduced service area was a "logical outgrowth" of the proposal before the Council and requires no further public comment.

2. The impact of the reduction in service area was also known and subject to extensive comments.

Not only was the geographic extent of the service area subject to vigorous comment and debate, but the impact of the service area on the volume of water required was also known from the outset. In its initial application, Waukesha proposed a water supply service area that included outlying areas that while not currently served by Waukesha were part of Waukesha's approved sewer service area. R.481-83, 553-54, Application Vol. 2.[12]

To supply the future needs of the entire proposed service area, Waukesha requested approval of an average daily withdrawal volume of 10.1 million gallons. R.517, 577. It also disclosed that of that volume, 8.2 million gallons was the amount needed to service the areas within its existing service area. R.577. DNR's Technical

[12] Waukesha filed for the larger area because the Wisconsin law implementing the compact required that diversions be consistent with the water service area. *See* Wis. Stat. § 281.346(4)(c)2m. The water service area is required to be consistent with the sewer service area designated under the areawide water quality management plan. Wis. Stat. § 281.348(3)(cm) and (e). The sewer service area was established by the Southeastern Wisconsin Regional Planning Commission. R.481, Application Vol 2.

Review reiterated the same figures. R.70. Both of these documents were submitted to the Council and made available to the public in January 2016, in advance of the public comment period. There is no mystery here. A reduced service area would have a known reduction in demand.

The Cities Initiative asserts that there was no evaluation of alternative water sources based upon the reduced water quantity. (CI at 25, 43) That is incorrect. Not only was the amount of the reduction known, but it was also the subject of extensive analysis and comment. In a 2015 letter, CIC asked the DNR to evaluate the potential adverse environmental impacts of alternative water sources using a smaller water demand volume attributable to Waukesha's current water supply service area. It noted, "By adjusting the Department's modeling to reflect a more appropriate service area, we expect the estimated environmental impacts to be greatly reduced, especially as relates to the wetlands that Department staff have identified as of possible concern." R.3667 (attachment App. 5). Indeed, CIC engaged its own consultants, GZA, and directed them to evaluate Waukesha's proposal "based on Waukesha's existing water service supply area." R.3668 (attachment Ex. 6).

The DNR reviewed and analyzed the CIC alternative. R.448; Response to EIS Comments. In addition, in its Technical Review of the supply alternatives, the DNR explicitly assumed an average daily water demand of 8.5 million gallons, rather than the

10.1 million gallons Waukesha originally requested.[13] R.55. The DNR did this because a smaller withdrawal necessarily means lesser impacts, and "if the water supply alternatives do not prove to be 'reasonable' from an environmental impacts perspective at the low end of the demand range, they would not be reasonable at the requested demand of 10.1 MGD." *Id.*

The technical review then evaluated the various Mississippi River Basin (MRB) supply alternatives in detail at the 8.5 mgd level and concluded that each of them would likely result in significant loss of wetlands, reduction in surface water levels, or both.[14] R.55-65. With respect to wetlands, the alternatives would cause a drawdown of one foot or greater ranging between 713 and 2316 acres.[15] R.57-61. Even "the least impactful [MRB] alternative" would create "the potential for hundreds of acres of wetlands to be impacted." R.61. By contrast the Great Lakes alternative would impact no more than 5 acres of wetlands and most of those would be temporary construction impacts. *Id.*

Notably, this analysis was in DNR's Technical Review which was issued *prior* to the hearings associated with the Application. The concerns that Cities Initiative is now raising were raised at the hearings and if there were more it wanted to present, it had ample opportunity to do so at that time. There is no basis for further comment now.

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[13] As the Council observed in its Final Decision, the modest difference between 8.5 mgd and the approved amount of 8.2 mgd is "within the margin of error for the model." R.16143-44, Final Decision at 5, § 4a.

[14] There was no need to evaluate the comparative costs of the supply alternatives using the reduced withdrawal quantity of 8.5 mgd, given DNR's conclusion that the alternatives were cost-effective. R.46-47.

[15] A drawdown of one foot is commonly used as a threshold for significant adverse impacts on wetlands. R.54.

Thus, this situation is completely distinct from the case cited by the Cities Initiative, *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 687 F.3d 723, 731 (9th Cir. 1995). There, the Court held that where a change in circumstances "significantly" altered "the range of viable alternatives" available to the Forest Service, the agency was required to prepare a new EIS.[16] (CI at 17) Here, the minor changes in the withdrawal quantity did not expand the universe of viable alternative water sources.

Equally unavailing are the two decisions the Cities Initiative cites in its supplement. (CI Supp at 14) The first, *Ass'n of Battery Recyclers, Inc. v. U.S. E.P.A.*, 208 F.3d 1047, 1059 (D.C. Cir. 2000), actually rejected the claim that a modification of the original agency rule proposal required a new round of public comment, given the petitioners' failure to identify any "relevant information they might have supplied had they anticipated . . . the final rule." The Cities Initiative argument suffers from the same defect.

The second case did invalidate an agency order, but only because of new dispositive facts that the applicant submitted *ex parte,* and after the close of public comment. *Air Transport Ass'n of America v. FAA*, 169 F.3d 1, 7-8 (D.C. Cir. 1999). Further, unlike the Cities Initiative, the petitioner demonstrated prejudice by identifying specific supplemental information it would have submitted had it had the opportunity. *Id.*

In sum, the Cities Initiative's claim that the Council was obliged to restart the

[16] Of course, the federal law governing an EIS (the National Environmental Policy Act, or NEPA) does not even apply to the Council, as the Cities Initiative concedes. (CI at 16 n. 9) The EIS here was prepared pursuant to Wisconsin law, by the DNR – not the Council.

public comment process when it considered reducing the service area and withdrawal finds no support in the relevant caselaw or the Record. The Council should reject its claim.

III. THE COUNCIL'S DESIGNATION OF THE WATER SERVICE AREA IS FULLY CONSISTENT WITH THE COMPACT

The Cities Initiative contends that the Council erred by approving a service area that is inconsistent with the Compact. (CI at 23-24) Specifically, the Cities Initiative argues that the Compact does not allow a service area to include any "land outside the jurisdictional boundaries of the City." (CI at 24) The Compact is not as unbending as the Cities Initiative portrays.

The Council's Final Decision restricted Waukesha's service area and diversion amount to cover areas currently served by Waukesha, areas within its political boundaries but not yet served, and a number of "Town Islands." R.16145, Final Decision, Finding 5b. The "Town Islands" are areas that are totally surrounded by Waukesha but for various reasons have not yet been annexed into Waukesha. The current estimated demand for the Town Island areas not yet served is 0.132 mgd or 1.5% of the total daily demand. R.16158.[17] Nevertheless, the Cities Initiative argues that allowing these de minimis areas to be served is a "clear violation of the Compact." (CI at 23-24) Neither the language of the Compact nor commonsense warrants such a conclusion.

[17] For a point of comparison, the DNR and Council noted that the difference between 8.5 mgd and 8.2 mgd was "within the margin of error." R.16143-44, Final Decision Finding 4a. Ironically, the Cities Initiative later argues that even 2.4 mgd "does not constitute a significant change in Lake Michigan." (CI at 48)

The first shortcoming in the Cities Initiative analysis is that the Compact does not require the Council to define *any* particular service area, nor does it limit the provision of service to the political boundaries of the applicant community. The Cities Initiative claim to the contrary is incorrect. What the Compact does require is that the water be used solely for the "Public Water Supply Purpose" of the applicant Community. The requirements under the Compact are as follows:

> The Water shall be used solely for the Public Water Supply Purpose of the Community within a Straddling County that is without adequate supplies of potable water. Compact 4.9.3.a
>
> The Exception will be limited to quantities that are considered reasonable for the purposes for which it is proposed. Compact 4.9.4.b.

For the purposes of these sections, two definitions are critical:

> **Community within a Straddling County** means any incorporated city, town or the equivalent thereof, that is located outside the Basin but wholly within a County that lies partly within the Basin and that is not a Straddling Community.
>
> **Public Water Supply Purposes** means water distributed to the public through a physically connected system of treatment, storage and distribution facilities serving a group of largely residential customers that may also service industrial, commercial and other institutional operators. Water Withdrawn directly from the Basin and not through such a system shall not be considered to be used for Public Water Supply Purposes.

Compact 1.2.

Thus, the amount of water needs to be "reasonable" and it must be used solely for "a public water supply purpose" of the applicant community. The public water supply purpose is defined by a "physically connected system" of facilities. The Compact does *not* limit the diversion to the political boundaries of the community.

Applying those Compact principles to the facts in this case, several things are apparent. First, Waukesha, like most communities, already provides utility services to

areas that are outside of its political boundaries. This includes areas in the City of Pewaukee and in the Town of Waukesha. R.553, 16158, 16166. Once it has done so, state law requires that it continue to serve those areas. *See City of Milwaukee v. City of West Allis*, 217 Wis. 614, 258 N.W. 851 (1935); *Town of Beloit v. PSC*, 34 Wis. 2d 145, 149, 148 N.W.2d 661 (1967); *see also* Wis. Stat. § 66.0813. Here, the Council has authorized the Diversion to include those areas outside of Waukesha's political boundaries that it currently serves. This is, of course, entirely consistent with the Compact definition of "public water supply purpose." Not even the Cities Initiative argues that Waukesha should cut off its existing external customers.

The operable question under the Compact is not political boundaries; it is what amount of water is reasonable for the public water supply purpose of the applicant community. That issue was debated at length by the Council and it ultimately chose to limit Waukesha not just to an amount but to a specific geographic area. In so doing, the Council took a more conservative and cautious approach than the Compact required. The Council limited all future service outside of Waukesha's political boundaries except for the de minimis water for the Town Islands that are transected or bordered by Waukesha's physical system of water facilities. The Council included the following:

> Land lying within the perimeter boundary of the City of Waukesha that is part of unincorporated land in the Town of Waukesha. These areas are referred to as the "Town Islands" (and colored in light blue) on Attachment 1. The Town Islands are *transected or bordered by a Waukesha Water Utility water main* and are either fully surrounded by territory incorporated in the City of Waukesha or are bordered on one side by a transportation right-of-way and on the remaining sides by territory incorporated in the City of Waukesha. For the purposes of defining the Approved Diversion Area, the Town Islands have been included because for all practical purposes they are within the Applicant's community boundaries. R. 16145-46, Finding 5b.ii. (Emphasis added).

That language directly ties back to the Compact definition of the "physically connected system" of facilities. If there is a precedent set by the Council, again it is one that limits, rather than expands, the ability of other communities to obtain Great Lakes water. The Council's reasoned application of the Compact language is decidedly neither arbitrary nor capricious.

IV. THE COUNCIL'S DECISION PROTECTS THE GREAT LAKES FROM CUMULATIVE IMPACTS AND ADVERSE PRECEDENT

The Compact requires that any diversion be implemented to ensure there will be no significant individual or cumulative adverse impacts. Section 4.9.4.d provides:

> The Exception will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Basin with consideration given to the potential Cumulative Impacts of any precedent-setting consequences associated with the Proposal.

The Cities Initiative fears that the Council's approval creates a precedent that will "open[] the proverbial floodgates" to future applications for water that will have cumulative adverse impacts. (CI at 3) These fears are misplaced for two basic reasons. First, the Council imposed stringent conditions on the approval that limits both individual and cumulative impacts. Second, the Council properly recognized that the circumstances of this diversion request were unique and any precedent extremely limited.

A. The Council Properly Considered And Limited Individual And Cumulative Impacts From The Diversion.

The Regional Body and Council were very aware of the potential implications of the first request for a diversion under the Compact. As a result, both bodies required that a quantity of water "equivalent to or in excess of" the volume of water withdrawn be

returned to the Great Lakes. R.16152, Final Decision Condition H. The Council characterized this requirement as one which requires Waukesha to return "approximately 100%" of the volume of water back to Lake Michigan. R.16148, Final Decision Finding 10a.vi. The Council and Regional Body found that this condition assures that there will effectively be no net water loss from this diversion and therefore no adverse impact on water quantity to the Basin. R.16146, Final Decision Finding 7a. *See also*, R.16113, Final Declaration Finding 7a.

The Cities Initiative fears "death by a thousand straws." (CI at 20) But if each straw does not result in a water loss, it does not matter how many straws there could theoretically be. If the Council has ensured that there is no adverse *individual* impact, then there can be no adverse *cumulative* impact. Any number times zero is still zero.[18] If there is any precedent set by the Council's approval, it is a precedent that ensures there will be no loss to the Great Lakes from any future diversion.

Furthermore, while the Compact allows for the withdrawn water volume to be returned "less an allowance for consumptive use" (Compact 4.9.4.c), no such allowance for consumptive use was granted by the Council in this case. Again, if there is a precedent, it is a conservative one.[19]

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[18] The absence of impact is underscored by the fact that the amount of water withdrawn (and then returned) from Waukesha's diversion, 8.2 mgd, is less than 1/1,000,000th of 1% of the volume of the Great Lakes.

[19] It should also be recalled that the Compact also has a separate process to review cumulative impacts so as to inform future decisions. *See* Compact Section 4.15. *See also*, Compact Sections 4.1.6 and 4.2.3. This provides yet another protection against cumulative impacts.

B. The Precedential Impact Of This Approval Is Limited.

The Regional Body and the Council made findings articulating why the decision in this case has limited precedential impacts. That finding provides:

> 10. Precedent-Setting Impacts. The Compact Council has reviewed the Application for precedent-setting impacts and finds that any precedent-setting consequences associated with the Application will not adversely impact the Waters and Water Dependent Natural Resources of the Basin. (Compact § 4.9.4.d)

R.16148, Final Decision. *See also*, R.16115, Final Declaration Finding 10. In addition, the Council and the Regional Body made several specific findings (*See Id.*; Finding 10a and R.16143, Finding 4), indicating the uniqueness of the circumstances associated with this application which include:

- Waukesha's drinking water contains radium and it is under a court order to achieve compliance.
- Terminating the deep well will eliminate dispersion of radium into the environment.
- Waukesha draws its water from a deep confined aquifer which restricts recharge and contributes to groundwater decline.
- The deep aquifer is hydrologically connected to waters of the Basin. Continued use of that aquifer draws groundwater away from the Basin.
- Alternatives would result in the unavoidable significant adverse impacts to hundreds of acres of wetlands and to surface waters.
- Alternatives would not provide a long-term, dependable and sustainable public water supply.

Furthermore, contrary to the assertions of the Cities Initiative, it is not just the presence of any *one* of these conditions that make this case unique (CI at 40), it is the combination of all of these factors and the magnitude of these factors that were considered by the Regional Body and the Council. R.16142-50, Final Decision Findings;

R.16109-17, Final Declaration Findings. It is unlikely that there are other communities for which *all* of these factors are present.

It is even less likely that these factors are present at the magnitude they are here. It is not just that the deep aquifer is below "pre-development levels" (CI at 39), it's that the water levels are approximately 350 feet below predevelopment levels and that "continued pumping at rates in excess of recharge rates is not sustainable." R.16142-43, Final Decision Finding 3.a. And the depletion is significant enough that it is drawing water out of the Lake Michigan Basin. It's not just that the deep aquifer is contaminated with radium, but that the contamination is such that Waukesha's "current system of blending deep aquifer water with shallow water and treating some deep aquifer water still does not meet state drinking water standards." R.16143, Final Decision Finding 3.b. Similarly, it's not just that the shallow well alternatives have other risks of contamination (CI at 40), it is that the shallow well alternatives would result in adverse environmental impacts to hundreds of acres of wetland and surface waters. R.16143-44, Final Decision Finding 4a.

Even then the argument that this "opens the floodgates" ignores the reality of the process. As a matter of context, the Compact limits exceptions to a narrow band of straddling counties and communities. Compact 4.9. Any community in that area would have to need water, have no reasonable alternative and would need to meet the other Compact criteria. Then it would need to undertake the time and cost of applying and then complying with the Council conditions. For Waukesha, this process has taken more than a decade, has included dozens of public meetings and hearings and has involved dozens

of technical consultants and all of the associated expense. *See, e.g.*, R.15962, Comments of Mayor Reilly. To suggest that this kind of process is an easy "default" (CI at 35) which will attract numerous applications has no basis in reality.

V. THE COUNCIL PROPERLY DETERMINED THAT WAUKESHA HAS NO REASONABLE WATER SUPPLY ALTERNATIVE.

The Compact provides that a community within a straddling county, like Waukesha, must show that "there is no reasonable water supply alternative within the basin…" Compact 4.9.3d. The Council and Regional Body concluded that Waukesha was without a reasonable water supply alternative, noting in part as follows:

> **Applicant Without Reasonable Water Supply Alternative.** All of the Applicant's water supply alternatives within the Mississippi River Basin ("MRB") are likely to have, and cannot be sustained without, greater adverse environmental impacts than the proposed diversion. The Compact Council further finds, as stated in several Findings including 4a, 4b, 7b, 8c, 8e, and 11a, that the diversion as conditioned in this Final Decision does not have significant adverse impacts in the Basin. In addition, none of the evaluated MRB alternatives were found to be reliable sources for a long-term, dependable, and sustainable public water supply and, therefore, the Applicant is without a reasonable water supply alternative. (Compact § 4.9.3 and 4.9.3.d)

R.16143, Final Decision Finding 4; R.16111, Final Declaration Finding 4. It then enumerated several additional findings in further support of that determination.

The Cities Initiative challenges the Council's determination that Waukesha lacks a reasonable water supply alternative. (CI at 24-50) The Cities Initiative argues that the Compact Council applied the incorrect legal standard for evaluating whether Waukesha demonstrated that it has "no reasonable water supply alternative" and that there were other reasonable alternatives. The Cities Initiative's argument is wrong both as a matter of law and fact.

A. The Language of the Compact Gives the Council Broad Authority In Determining Reasonableness.

The Cities Initiative first argues the Council applied the wrong legal standard in determining reasonableness. Its position is that consideration of environmental sustainability, adverse environmental impacts, public health, and cost are, "detailed factors [that] are irreconcilable with the clear and overwhelming protective purpose of the Compact." (CI at 35) In its view, the Compact requires that a diversion should only be authorized as a "last resort." *Id.* The position of the Cities Initiative is contrary to the very principles of interpretation that they cite and is contrary to the express purpose of the Compact.

1. The express language of the Compact requires that the Council give meaning to the term reasonable.

Waukesha agrees with the Cities Initiative that compacts are construed as contracts in accordance with the principles of contract law. *Tarrant Reg'l Water Dist. V. Herrman*, 133 S. Ct. 2120, 2130 (2013). As with any contract, the goal is to ascertain the intent of the parties to the Compact. *Id.*; *see also Life Plans, Inc. v. Security Life of Denver Ins. Co.*, 800 F.2d 343, 349 (7th Cir. 2015). In furtherance of this goal, interpretation must begin "by examining the express terms of the Compact as the best indication of the intent of the parties." *Tarrant*, 133 S. Ct. at 2130; *see also Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (A compact "must be construed and applied in accordance with its terms."). Compacts, like other contracts, must be construed in the context of the entire contract as a whole. *See Selective Ins. Co. v. Target Corp.*, __ F.3d __, 2016 WL 7473786 (7th Cir. Dec. 29, 2016); *Fuentes-Fernandez & Co., PSC v. The*

Corvus Group, Inc., 174 F. Supp. 3d 378, 387-88 (D.D.C. 2016). In its examination of the terms of a compact, a court is to give "operative effect to each word in the Compact." *New Jersey v. Delaware*, 552 U.S. 597, 611 (2008). Where a compact term is not specifically defined, it is "appropriate to construe a compact term in accord with its common-law meaning." *See id.* Applying these principles, it is clear that the Council appropriately interpreted the Compact condition that Waukesha demonstrate it had "no reasonable water supply alternative."

The plain language of the Compact language requires that before approving a diversion the Council must determine that there is "no *reasonable* water supply alternative." Compact Section 4.9(3)(e) (Emphasis added). "Reasonable" is a modifying word. The Compact drafters chose to include the modifying word "reasonable" rather than to require that a showing that there were *no* water supply alternatives *at all* which is in essence the Cities Initiative position.

The Cities Initiative would like to replace the concept of reasonableness with a markedly different standard: "only [as] a last resort when other alternatives are unavailable." (CI at 35) But the Cities Initiative position would require the impermissible: effectively striking the word "reasonable" from the Compact. The fundamental tenets of interpretation stand in the way of its desired editing; the word "reasonable" must remain and be given meaning. *See New Jersey*, 552 U.S. at 611.

Ignoring the term reasonable and engrafting the term "last resort" onto the Compact would also, of course, fundamentally alter the terms of the Compact, at least in the way the Cities Initiative seems to view the Compact. Deeming an alternative viable

no matter the cost or threat to the environment – as the Cities Initiative appears to suggest – would nullify the exception provision in the Compact. On the other hand, if the Cities Initiative maintains that there are some limits to their concept of "last resort," then it has arrived back at the point of reasonableness, which of course is exactly what the Compact says.

2. Applying the term reasonable necessarily requires the Council to consider relevant factors in making that determination.

Where a term is not defined in a document, the specific meaning of the term should be given its ordinary meaning. As the Cities Initiative itself points out, "Black's Law Dictionary (10th Ed.) defines 'reasonable' holistically and flexibly as '[f]air, proper, or moderate under the circumstances, sensible.'" (CI at 31) A holistic and flexible interpretation of the term "reasonable" would allow the Council to consider environmental impacts and sustainability; or put another way, it is "fair, proper . . . and sensible" for the Council to consider a variety of factors, such as environmental impacts and sustainability.

The Cities Initiative appears to argue, remarkably, that the Compact does not permit the Council to consider individual factors in making its reasonableness determination. (CI at 32) Any such contention is baseless. It ignores the fundamental precept that an agency decision is arbitrary and capricious when "[t]here are no findings and no analysis . . . to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962). *See also Motor Vehicle*

Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (to avoid being arbitrary and capricious, agency must "examine the relevant data and articulate a satisfactory explanation for its action"). To satisfy its obligation to adequately explain its decision and withstand judicial review, an agency at a minimum must articulate the facts and reasoning underlying its decision, which necessarily includes discussing the factors it found relevant to a determination of reasonableness. In other words, it would be arbitrary and capricious to use the standard put forth by the Cities Initiative.

The Cities Initiative attempts to support its untenable position that the Council cannot look at relevant factors in determining reasonableness, by making a strawman argument. It claims that the Council erred because it used Wisconsin's definition of "reasonable water supply alternative," which in turn utilizes factors not articulated in the Compact.[20] (CI at 26-29) In the Cities Initiative's telling, the Council acted as if it were "bound by" Wisconsin's definition. *Id.* at 28. This of course is not the case.

No one has ever suggested that the Council is "bound by" Wisconsin's definition. The Council's final decision neither cites nor quotes the Wisconsin definition and it considers factors different from those in the Wisconsin definition. The only evidence that the Cities Initiative cites to support its assertion that the Council relied on Wisconsin's definition does not, in fact, support this assertion. (*See* CI 27 and n. 12) While

[20] Wis. Stat. § 281.346(1)(ps) defines the term as follows: "Reasonable water supply alternative" means 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.

Wisconsin may have presented information that Waukesha met the "no reasonable water supply alternative" condition by referencing the Wisconsin definition, that does not mean that the Council relied on that the definition in making its final decision, much less that it was "bound by that decision."

The real question is not whether the Council considered some factors that also appear in the Wisconsin definition, the question is whether consideration of factors such as environmental impacts and the long-term sustainability of a public water supply are factors the Council can consider in evaluating whether alternatives are reasonable. Clearly it can. Consideration of such factors is not only consistent with the plain meaning of the term "reasonable," as described above, it is also consistent with the context and purpose of the Compact for the reasons noted below.

3. The Council's Interpretation of Reasonable Is Consistent with the Intent of the Compact as a Whole.

Contrary to the Cities Initiative's contention, the Council's approach to the term "reasonable" is entirely proper when read in context with other terms in the Compact. As the Cities Initiative notes, elsewhere in the Compact, the drafters "enumerated *limiting factors* if they found particular factors to be determinative in evaluating reasonableness." (Emphasis added). (CI at 32, citing Compact Section 4.11.5.) The drafters did not do so here. If the Compact drafters wanted to limit the scope of the term reasonable in this case they could have chosen to do so, but they chose not to do so. Contrary to the Cities Initiative argument, the clear consequence of this language is that the term reasonable is

not to be given a restricted or "limited" meaning and is left to the discretion of the Council to interpret this term.[21]

The Council's interpretation also aligns with the purpose of the Compact as a whole. The intent of the Compact is to facilitate the multiple uses of the Great Lakes by protecting the Great Lakes as a public natural resource while allowing use for "sustainable, accessible and adequate Water supplies for the people and economy of the Basin." Compact § 1.3.1.e; *see also* § 1.3.1 and 1.3.2 (generally expressing intent of Compact). The Compact provides that the signatory parties "have a shared duty to protect, conserve, restore, improve and manage the renewable but finite Waters of the Basin for the use, benefit and enjoyment of *all their citizens*." (Emphasis added) Compact § 1.3.1.f.

While the Compact generally prohibits diversions, there are express exceptions to authorize diversions of Great Lakes waters to certain communities, including communities within straddling counties such as Waukesha. Without those exceptions, the Compact may not have been approved by Wisconsin or other states.[22] The Cities Initiative not only wants to read the term reasonable out of the Compact, it wants to

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[21] Because the Compact provides for judicial review of the Council's actions, under general administrative law principles deference is owed to the Council's construction and implementation of the Compact. *See Alabama v. N. Carolina,* 560 U.S. 330, 344 (2010); *The Organic Cow, LLC v. Ne. Dairy Compact Comm'n,* 164 F. Supp. 2d 412, 423 (D. Vt. 2001) (according deference to compact commission's interpretation of interstate compact).

[22] *See* for example, statement of former Wisconsin State Representative Scott Gunderson, who was the chair of the Assembly Committee on Natural Resources. He stated at the public hearing: "Everyone understood that the provision in the Compact about straddling counties was intended to meet the water needs of Waukesha. The Compact would not be law today without that provision or without the trust of Wisconsin and the Legislature that Waukesha's needs would be met." *See* R.3815 (attachment).

effectively read the exceptions out of the Compact. As noted above, that is not permissible. And, contrary to the assertion of the Cities Initiative, the factors utilized by the Council do not make a diversion a "default presumption" nor open the floodgates to allow "virtually any Community in a Straddling County" to obtain Great Lakes water. CI at 41. Such speculation has no basis in law or in fact. *See* Section IV, above.

The Council properly interpreted and applied the term "reasonable" in evaluating possible alternative water sources. For the reasons set forth below, its determination is fully consistent with the broad language in the Compact and the discretion given to the Council. It is certainly not arbitrary or capricious.

B. The Council Properly Rejected the CIC Non-Diversion Alternative.

The record reflects a lengthy process of evaluating numerous possible alternative water supplies, to comply with the Compact. The EIS and DNR's Technical Review both contained extensive discussion and analysis of the various alternatives. *See* R.288-350, Preliminary Final EIS and R.43-66, DNR Technical Review.

The Cities Initiative focuses on a single alternative, presented initially in July 2015 by the Compact Implementation Coalition (CIC). CIC proposed a non-diversion alternative based on work by the consultants GZA, and Mead & Hunt. The report claimed that Waukesha could use its existing wells with treatment to meet its water needs. As noted above, the report was subject to review and comment by DNR and others. *See* R.448-49, EIS Response to Comments. There were multiple problems with the CIC proposed alternative, and the Council properly disqualified it as a reasonable

alternative under the Compact. The Council's decision is adequately supported on the Record and is not arbitrary and capricious.

1. The CIC alternative would not supply an adequate volume of water.

The Cities Initiative claims that this option was rejected primarily because it could not meet the needs of the larger service area and now that the service area has been reduced this is a viable option. (CI at 42-43) The Cities Initiative is mistaken on several levels. Although the inability to provide adequate water to the original service area was one reason cited for rejecting this alternative, the CIC proposal was not adequate under either service area scenario.

First, the CIC proposal assumed an unrealistically low *average* day water demand. CIC assumed an average day demand at a final 20-year build of 6.7 mgd; essentially the current water demand. No other agency, Southeast Regional Planning Commission (SEWRPC), the DNR or Waukesha found this projection to be reasonable. *See* R.73-76, Technical Review. The Council had a reasonable basis to conclude the reduced service area would need 8.2 mgd and the CIC proposal would not meet that demand.

Second, this proposal did not provide for *maximum* day demand capacity.[23] The 6.7 mgd average day demand translates to a maximum day demand of 11.1 mgd and the existing system with treatment would only have a capacity of 9.3 mgd. The CIC proposal over estimated the actual capacity of the deep and shallow wells. In other words, the

[23] This amount is the maximum daily amount of water required by a community averaged over a 24-hour period.

existing system with treatment would not provide adequate water capacity even at CIC's lower estimated water demand levels. R.65-66, DNR Technical Review.

In response to these comments, GZA submitted a revised alternative in February 2016 that addressed the lack of capacity by installing additional new deep aquifer wells and suggesting an alternative radium treatment that used less water. Use of additional deep aquifer wells only served to exacerbate the impacts of the current wells depleting the deep aquifer and continuing to pull more water out of the Great Lakes basin. This proposal continued using shallow wells so those adverse environmental impacts to wetlands remained. The alternative radium treatment would produce a radioactive waste and would not address increased total dissolved solids. R.3668, App. 14, p.6.

2. The CIC alternative posed significant adverse environmental impacts.

The CIC alternative also had several significant adverse environmental impacts. First, as noted above, DNR did in fact study the impacts of a reduced demand at 8.5 mgd average day demand. That analysis demonstrated that between 700 and 1,000 acres of wetlands would be adversely impacted from increased pumping of shallow wells. R.57-61, DNR Technical Review. Any claim that the reduced demand was not considered is simply false. The Cities Initiative now claims that with proper placement of wells, those impacts could be mitigated to merely several hundred acres of wetlands. But under any

scenario, it is clear hundreds of acres of wetland would be impacted.[24] The Council properly considered these significant impacts in rejecting this alternative.

Second, the CIC proposal does not account for long-term impacts from the use of the deep aquifer. DNR cited numerous studies showing the deep aquifer, which has declined 400 to 500 feet, is not a long-term sustainable water supply. While the removal of some communities from use of the deep aquifer has resulted in some recent rebound in the groundwater level, these one-time changes do not account for increased water demand over time. Groundwater modeling indicates that the deep aquifer will continue to decline.[25]

Conversely, the use of Great Lakes water would allow the deep aquifer to rebound. It would also prevent the current loss of Great Lakes basin water to the Mississippi River basin caused by Waukesha pumping of the deep aquifer. The Council found that "about 30% of the replenishment of the water withdrawn by the Applicant's deep wells originates from the Lake Michigan watershed." R.16144; Finding 4c. The Cities Initiative criticizes the Council for considering that factor. (CI at 47-48) However, the Compact specifically allows the Council to consider just such a factor:

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[24] Cities Initiative claims that the Mead & Hunt study shows that wetland impacts at 10.1 mgd could be reduced to 600 acres. At 8.5 mgd those impacts could be less, but Cities Initiative offers no specifics to refute the DNR analysis.

[25] While it is true that water levels recovered about 50 feet from 2000 to 2010, pumping rates in the sandstone aquifer increased by 9% from 2010 to 2014. R.3278, Jansen Memo. Thus, the memo noted, "The future water levels in the aquifer will depend on future pumping. If current pumping rates are held constant, water levels will decline very slowly over the next 50 years. More realistic pumping scenarios suggest aquifer levels will decline by 175 to 200 feet over the next 50 years." *Id.* at R. 3276.

> Further, substantive consideration will also be given to whether or not the Proposal can provide sufficient scientifically based evidence that the existing water supply is derived from groundwater that is hydrologically interconnected to Waters of the Basin.

See Compact 3.9.3.

Ironically, the focus of the Cities Initiative critique is that while 30% of withdrawals by Waukesha from the deep aquifer are replenished from Lake Michigan basin water, this is only 2.4 mgd. The Cities Initiative asserts this is not significant when put "in context" because this "does not constitute a significant change in Lake Michigan water levels." (CI at 48) That is a rather remarkable assertion given that the Cities Initiative simultaneously argues that a lesser amount – the 1.9 mgd difference between the original request for 10.1 mgd and the approved 8.2 mgd – is significant enough to warrant a whole new hearing. And it is also remarkable that while the Cities Initiative asserts the hypothetical loss from future diversions presents a "real concern" for Niagara Falls, it also asserts that a real saving of 2.4 mgd is insignificant.

Third, the Cities Initiative alternative would require radium treatment. It claims that reverse osmosis (RO) is an option for treating radium and the concerns about its use were overstated. This is not a new argument nor one related to the reduced service area. The primary concerns with respect to this option were well documented.

Any radium treatment method removes radium from deep in the ground and brings it into the human environment. RO systems produce a high volume of salt laden wastewater. Treatment and disposal options for that waste are limited particularly given increased regulations for wastewater discharges. Simply discharging this waste stream to the sewer, as the CIC proposal suggests, is not a long-term option given limits on

chloride and other regulations. Alternatives for treatment of that waste stream are extremely expensive and energy intensive. *See* R.602, Application Vol. 2 § 11.3.2. A detailed multi-state analysis of this issue can be found in R.3255-61, Technical Memo. RO waste contains concentrated radium that could be discharged into the surface aquatic environment or applied to land in wastewater biosolids. As CIC concedes, alternative treatment methods such as radium selective adsorptive media create a low level radioactive waste that requires special handling. *See* R.3668, App. 14, p.6. The Record supports the Council's decision to reject the treatment option.

The bottom line is that contrary to the assertion of the Cities Initiative, the DNR and the Council properly considered whether there were reasonable alternatives to a reduced demand at 8.5 mgd and rejected such claims. The Council's decision is adequately supported on the record and is not arbitrary and capricious.

C. A "Partial Diversion" Was Considered And Rejected.

The Cities Initiative also contends that the Compact obligated the Council to evaluate whether an approach using a combination of diverted Lake Michigan water and the city's existing wells would be feasible. (CI at 50) This argument rests on a misreading of section 4.9.4.a of the Compact. That section requires, as a prerequisite to an approval of a diversion, a determination that "[t]he need for all or part of the proposed Exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies." The obvious import of this provision is to ensure that all reasonable conservation and use practices are being implemented for purposes of

calculating the water demand. The Council found that Waukesha met that criteria. That section does not rquire an evaluation of a "split system."

Nevertheless, the analysis demanded by the Cities Initiative occurred. The Cities Initiative states that "there has been no determination as to whether an alternative that uses Waukesha's deep and/or shallow groundwater in addition to some water diverted from Lake Michigan can avoid part of the Diversion." (CI at 50) The Record shows otherwise. In the 2013 EIR, that option was discussed and rejected: there was discussion of just such a "split" alternative.

> Utilizing two different water sources (Lake Michigan surface water and shallow groundwater) adds significant operational and maintenance complexity when blending a surface water source with a groundwater source. In addition, this alternative is significantly more costly than other alternatives that have less implementability and environmental impacts. Because of these reasons, this alternative is not evaluated further in this document.

R.1948.

Apart from these substantial operational concerns, this alternative is not consistent with the Compact. The Compact requires that any diversion result in "maximizing the portion of water returned to the Source Watershed as Basin Water and minimizing the surface water or groundwater from outside the Basin." Compact 4.9.3.b. A "split system" would by its very nature result in a substantial contribution of water from outside the basin that would be returned to Lake Michigan. Given all of these factors, there was no reason for the Council to have given this alternative further consideration.

VI. THE COUNCIL PROPERLY DETERMINED THAT THE RETURN FLOW MET COMPACT STANDARDS

The Cities Initiative concludes its attack on the Council's Final Decision by

asserting that the return flow to the Root River will create adverse impacts to the Root River, and thus violate the Compact. (CI at 50) These claims are also factually and legally incorrect.

A. The Council Properly Found That The Return Flow Would Not Result In Significant Adverse Impacts On The Root River.

The Council determined that the Diversion would have "no significant individual or cumulative adverse impacts." R.16147, Final Decision citing Compact provisions 4.9.3.e and 4.9.4.d. As applied to the return flow to the Root River, the Council specifically noted that the return flow would meet Wisconsin's water quality standards, Wisconsin's antidegradation requirements and would provide beneficial low flow augmentation. R.16147-48, Final Decision, Findings 8a, 8c and 8h.

The Council's Findings are entirely consistent with the Compact standards. The Compact does not hold an applicant to an absolute "no impact" standard; rather the Compact requires an assessment of whether there will be a "significant" adverse impact and whether the Diversion would "endanger the integrity of the Basin Ecosystem."

The Cities Initiative does not claim an endangerment to the Basin. Instead, it cites various potential "risks" to the Root River identified in the EIS, and assert that collectively these "could be viewed as 'significant.'" (CI at 54) The potential for some impact is not the same as a significant adverse impact. Nothing in the EIS supports the assertion that there is a significant adverse impact from the return flow.

The Council correctly observed that the return flow must meet federal and state water quality standards. R.16148, Final Decision, Finding 8h. The state of Wisconsin

sets water quality standards at levels necessary to "protect the fish and aquatic life" and "other public uses."[26] Among other things, state water quality standards must meet the Great Lakes water quality standards in 40 C.F.R. Part 132.[27] The Cities Initiative cites to nothing in the record that demonstrates these standards are not adequate to prevent significant adverse impacts to the Root River.

The Council and Regional Body also correctly noted that the phosphorus standards applicable to Waukesha's discharge to the Root River are on an order of magnitude lower than existing discharges to the Great Lakes.[28] Thus, while the cities in Wisconsin that discharge to Lake Michigan, like the City of Racine, are governed by a standard of 0.6 mg/l of phosphorus, Waukesha's phosphorus discharge standard to the Root River will be lower than 0.075 mg/l.[29]

Further, the Council and Regional Body correctly noted that Waukesha will be required to meet anti-degradation requirements that further protect water quality. R.16147. However, the Cities Initiative misrepresents how these standards work. Anti-degradation standards impose additional requirements on new sources, over and above the requirements applicable to existing facilities, like Racine. These standards impose

[26] Wis. Admin. Code § NR 102.01(2) provides in part, "Water quality standards shall protect the public interest, which includes the protection of public health and welfare and the present and prospective uses of all waters of the state for public and private water supplies, propagation of fish and other aquatic life and wild and domestic animals, domestic and recreational purposes, and agricultural, commercial, industrial, and other legitimate uses."

[27] *See* Wis. Admin. Code ch. NR 106, which implements those standards statewide.

[28] Wis. Admin. Code NR 217.13(4) establishes an interim limit for "discharges directly to Great Lakes" based on a technology limit of 0.6 mg/l and Wis. Admin. Code NR 102.06(3)(b) establishes 0.075 mg/l for discharges to streams.

[29] Waukesha will be providing a "margin of safety" below the 0.075mg/l criteria for phosphorus. R.2762.

additional restrictions related to the assimilative capacity of the water. Contrary to the claim of the Cities Initiative, antidegradation provisions do *not* allow a water quality based effluent limitation to be relaxed. (CI at 54) A demonstration of necessary economic or social development is a means to allow a new or increased discharge to occur but that discharge must still meet all water quality criteria.

The net result of these state and federal requirements is that this new discharge will have effluent quality that protects the biological and chemical integrity of the Root River. As the DNR noted in its response to comments on its Technical Review,

> The impact of any additional loading is expected to be minimal, as draft water quality limits show concentrations are expected to be at or below water quality standards and in some cases, the discharge effluent will have lower contaminant concentrations than the Root River background levels.

R.170, Response to comments.

This conclusion is also consistent with the water quality modeling submitted with Waukesha's application. That modeling demonstrated that,

> average water quality improved or continued to meet water quality standards or background reference concentrations for all water quality parameters (fecal coliform, dissolved oxygen, total phosphorus and total suspended solids). Modeling results also indicate that with return flow, nuisance algae growth will also decrease in the Root River.

R.1849.

Above and beyond these state and federal requirements, applicable to all municipal dischargers in Wisconsin, the Council also imposed additional requirements on Waukesha. The Clean Water Act does not impose standards on pharmaceuticals for any discharge in Wisconsin or elsewhere. But the Council required Waukesha to implement a comprehensive pharmaceutical and personal care products recycling program. R.16152;

Final Decision, Condition G. Similarly the Clean Water Act requires dischargers to monitor their effluent; it does not require dischargers to monitor the receiving water. But the Council requires Waukesha to monitor the Root River for a minimum of 10 years to determine changes that may have resulted from return flow. *Id.,* Condition I.

The Cities Initiative offers nothing that demonstrates a "significant individual or cumulative adverse impact" to the Root River from the return flow. Again, the Council's finding of no significant adverse impact is well documented and is clearly not an arbitrary or capricious finding.

B. The Council Properly Found That The Return Flow Would Have A Positive Benefit On The Root River.

The Cities Initiative argues that the Council erred in finding that the return flow was a net positive benefit to the Root River. (CI at 51) The Cities Initiative claim is again misplaced. The Council's finding that there is a net positive benefit is not a substitution of a cost-benefit analysis for Compact standards. Rather, it is an additional finding which the Council was authorized to consider in assessing the "integrity of the basin." Such a holistic assessment is entirely consistent with the Compact requirements. Compact 4.9.3.e.

The Council correctly noted that increased flow will result in an improvement of the fishery and benefits to the Basin salmonid egg collection facility located downstream on the Root River. R.6148; Final Decision, Finding 12. In the EIS, DNR found that the addition of return flow would greatly enhance the availability of wetted fish spawning and resident habitat during the lower flow periods, increase the ability of fish to mobilize

between shallow river segments, and enhance forage opportunities. R.373; EIS, p. 190. It concluded, "This would all have a positive effect on the numbers, and possibly diversity, of the Root River fishery." *Id.*

Additionally, during low-flow periods, the return flow is expected to benefit the DNR's Root River Steelhead Facility. The Root River Steelhead Facility is Wisconsin's main source of rainbow trout (steelhead) eggs and brood (parent) stock and is the back-up facility for the collection of eggs of other trout and salmon species. During some years when flow on the Root River is low, fish egg collection quotas have not been met. The DNR has evaluated flow augmentation of the Root River to improve fish migration for egg collection. The proposed return flow would provide the flow augmentation considered by the DNR to allow more fish to reach the Steelhead Facility, meet egg collection quotas, and fish stocking goals. *Id.* The Council's finding is amply supported by the Record.[30]

CONCLUSION

The Council's Final Decision upholds both the letter and intent of the Compact. The Final Decision ensures protection of the Great Lakes and the environment as a whole. Among other things, the Council's Decision ensures the following:

- 100% of the volume of water withdrawn from Lake Michigan will be returned.
- Current losses from Lake Michigan resulting from water drawn into the deep aquifer from Waukesha's pumping from the deep aquifer will cease.

[30] The Cities Initiative offers nothing to dispute these benefits other than to assert they are merely "speculative." (CI at 55)

- The deep aquifer will be able to recover once Waukesha is no longer reliant on deep aquifer wells.

- There will be no need to treat for radium and to dispose of radium laden waste if Waukesha is not using deep aquifer wells.

- Use of Lake Michigan water will prevent the loss of hundreds of acres of wetlands and adverse impacts to other surface waters that would result from an alternative using shallow wells.

- The return flow to the Root River will augment stream flow which benefits the local fishery.

- The return flow to the Root River will be required to meet all of the water quality standards under the Clean Water Act, and will be subject to additional monitoring requirements imposed by the Council.

In sum, the Council's Final Decision is highly protective of the Great Lakes and imposes several conditions beyond the requirements of the Compact. To the extent there is a precedent here, it is a very conservative precedent. Among other things: the Final Decision requires 100% return flow without consideration of consumptive use; it limits the Diversion not just to an amount but to a limited service area; and it imposes requirements on return flow that go beyond the requirements of the Clean Water Act.

The Cities Initiative has identified no errors either in the Council's procedures or decisionmaking that warrant reversal. The Council carefully and methodically reviewed the extensive Record in reaching its Final Decision. Nothing in the decision was arbitrary or capricious. Accordingly, Waukesha respectfully requests that the Council decline the Cities Initiative's request to revisit any aspect of its decision.

DATED this 23rd day of January, 2017.

Respectfully Submitted:

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