

VIA E-MAIL AND HAND DELIVERY

December 19, 2016

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Executive Director
Great Lakes-St. Lawrence River Basin
Water Resources Council
c/o Council of Great Lakes Governors
20 North Wacker Drive, Suite 2700
Chicago, Illinois 60606

Re: Written Submission and Hearing re Final Decision in the Matter of the Application by the City of Waukesha, Wisconsin for a Diversion of Great Lakes Water, No. 2016-1

To the Executive Director of the Great Lakes-St. Lawrence River Basin Water Resources Council:

On behalf of the Great Lakes and St. Lawrence Cities Initiative (the "Cities Initiative"), enclosed please find the Cities Initiative's Supplement to Written Statement in Furtherance of Request for Hearing and Compact Council Consideration ("Supplemental Submission"), as requested by your October 19, 2016 letter and under the extension granted in your November 28, 2016 letter. As set out further in its Supplemental Submission, the Cities Initiative respectfully requests a hearing before the Compact Council pursuant to Compact § 7.3.1.

The Cities Initiative continues to reserve all of its rights under the Compact and under all other applicable state, federal, and international laws regarding the hearing, as well as its ability to challenge the Compact Council's June 21, 2016 Final Decision in Matter No. 2016-1 through any other avenue or in any related matters.

Respectfully submitted,



Jill M. Hutchison

Cc by U.S. Mail:
State of Wisconsin
c/o Cathy Stepp, Secretary of the Wisconsin Department of Natural Resources
101 S. Webster St.
Box 7921
Madison, WI 53707-7921

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City of Waukesha
c/o Mayor Shawn Reilly
201 Delafield Street
Waukesha, WI 53188

David Ullrich, Executive Director
Great Lakes and St. Lawrence Cities Initiative
20 N. Wacker Dr., #2700
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Board of Directors of the Great Lakes and St. Lawrence Cities Initiative
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Cc by email to members of the GLSL Cities Initiative as follows:

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Cc by email:

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Bcc: Terri Busch
Nicholas Turner

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

**GREAT LAKES AND ST. LAWRENCE
CITIES INITIATIVE,**

Petitioner

**SUPPLEMENT TO WRITTEN STATEMENT IN FURTHERANCE OF REQUEST
FOR HEARING AND COMPACT COUNCIL CONSIDERATION**

On September 16, 2016, the Great Lakes and St. Lawrence Cities Initiative (“Cities Initiative”) submitted a Written Statement in Furtherance of Request for Hearing and Compact Council Consideration (the “Written Statement”). The Written Statement identified a variety of errors relating to the Compact Council’s process for review and decision making in connection with the application for a diversion by the City of Waukesha, Wisconsin and in the Compact Council’s Final Decision on the application for a diversion by the City of Waukesha, Wisconsin (the “Application”).

By letter dated October 19, 2016 (the “October 19 Letter”), the Compact Council requested that the Cities Initiative submit a brief providing certain additional information. The Cities Initiative therefore submits this Supplement to Written Statement in Furtherance of Request for Hearing and Compact Council Consideration (the “Supplement”) only as a supplement to its earlier Written Statement and only to address the particular topics raised in the October 19 Letter. The Cities Initiative refers the Compact Council to the earlier Written Statement and accompanying Appendix for the full scope of the Cities Initiative’s position and argument and the context of many of the issues addressed herein.

Through this Supplement, the Cities Initiative addresses the issues raised by the Compact Council’s October 19 Letter as follows:

1. Establishing that the Cities Initiative is an aggrieved person with standing to challenge the Final Decision under the Compact, *see infra* Section I;
2. Demonstrating that the Cities Initiative raised its issues in a timely fashion and that reliance on documents outside the formal record¹ is appropriate because of failures

¹ As used herein, the term “record” refers to the documents contained on the flash drive that the Compact Council provided to the Cities Initiative on September 16, 2016. In regards to the Compact Council’s request for citations to specific portions of the record, citations are made using

in the Compact Council’s processes prior to approval of the diversion, *see infra* Section II;

3. Providing the basis for the Cities Initiative to be granted an in-person hearing, *see infra* Section III; and
4. Distinguishing the respective errors of law, errors of fact, and combined errors of law and fact raised by the Cities Initiative’s written submission, *see infra* Section IV.

ARGUMENT

I. The Cities Initiative Is An Aggrieved Person With Standing To Challenge The Final Decision Under The Compact.

Section 7.3 of the Compact provides that any “Person aggrieved by any action taken by the Council . . . shall be entitled to a hearing before the Council.” The Cities Initiative is a “Person aggrieved” under the terms of the Compact with the right to challenge the Final Decision. Under federal law, the Cities Initiative has standing to challenge the Compact Council’s action both on behalf of its members and on behalf of the organization itself.

the “WAUKESHA”-prefixed Bates stamp number affixed to the lower right-hand corner of documents on the drive provided to the Cities Initiative in September 2016. A number of critical documents cited by the Cities Initiative in its Written Submission were submitted to the Regional Body and Compact Council within the stated comment period, yet are not Bates stamped. However, they can be found embedded in other Bates-stamped documents on the drive as attachments. For such unstamped documents, the Cities Initiative therefore cites to the Bates-stamped document to which it was attached to allow the Compact Council to locate the cited document. However, it remains unclear whether, having not been Bates stamped, these properly-submitted documents were appropriately reviewed and considered by the members of the Regional Body and Compact Council as independent and well-founded scientific analyses in and of themselves, rather than only in summary through the mischaracterizations that were oftentimes provided by the Applicant via its unique access to the Regional Body and Compact Council after the public comment period closed.

A. The Cities Initiative Is a “Person.”

The Compact defines “Person” as “a human being or a legal person, including a government or a non-governmental organization, including any scientific, professional, business, non-profit, or public interest organization or association that is neither affiliated with, nor under the direction of a government.” (Compact § 1.2.) The Cities Initiative, founded in 2003, is a “Person” under the meaning of Section 1.2 because it is a binational coalition of over 120 U.S. and Canadian mayors and local officials working to advance the protection and restoration of the Great Lakes and St. Lawrence River. It is a 501(c)(3) organization incorporated in the State of Illinois. Cities Initiative staff participate in a number of key Great Lakes basin-wide organizations, including the Great Lakes Fishery Commission, the Great Lakes Executive Committee, Chicago Area Waterway System Advisory Committee, IJC Water Quality Board, and the Great Lakes Advisory Board. The Cities Initiative also works on Great Lakes issues in partnership with many other governmental and nongovernmental organizations.

B. The Cities Initiative Is “Aggrieved.”

Under federal law, for a person to be “aggrieved” by an action in such a way that they have standing to challenge that action, the person must show “that the relief he seeks will if granted avert or mitigate or compensate him for an injury . . . caused or likely to be caused by the defendant.” *Am. Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 656 (7th Cir. 2011) (reversing dismissal of environmental organization’s claims for lack of standing). The Cities Initiative meets that standard, and (1) has standing to sue on behalf of the organization itself, (2) has standing to sue on behalf of its members, and (3) has members that would have standing to sue individually.

1. The Cities Initiative has standing to sue on behalf of the organization.

The Cities Initiative has standing to challenge the Final Decision on its own behalf. An organization can challenge an action on its own behalf when the action impedes the organization's activities in furtherance of its mission. *See, e.g., Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011) (standing inquiry is (1) whether defendant's allegedly wrongful conduct injured plaintiff organization's interests in carrying out its primary activities, and (2) whether organization has used its resources "to counteract that harm"); *Cleveland Housing Renewal Project v. Deutsche Bank Trust Co.*, 621 F.3d 554, 561 (6th Cir. 2010) (organization had standing where defendant's practices created "cognizable injury to its organizational efforts").

Here, the Cities Initiative has been forced to spend significant time and effort opposing the threatened injury to the Compact. Cities Initiative representatives appeared at hearings held by the Wisconsin DNR and the Regional Body expressing its concerns about the proposed approval, and the Cities Initiative submitted written comments opposing the diversion. Exhibit 1, December 19, 2016 Declaration of D. Ullrich ("Ullrich Decl.") ¶ 8. Since the Final Decision, the Executive Director of the Cities Initiative has spent time and money traveling throughout the region to explain the harm that will result from the Waukesha Diversion. *Id.* Because 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.

2. The Cities Initiative has standing to sue on behalf of its members.

An organization has standing to sue on behalf of its members "if (1) at least one of its members would otherwise have [individual] standing; (2) the interests at stake in the litigation are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested

requires an individual member's participation in the lawsuit." *Id.* at 924. Cities Initiative meets those requirements. The standing of Cities Initiative's individual members is addressed below in Section I.B.3.

The interests at stake in the Compact Council's Final Decision on the Waukesha Diversion are central to the purpose of the Cities Initiative. The purpose of the Cities Initiative is to "protect, restore and enhance the Great Lakes and the St. Lawrence River." Ullrich Decl. ¶ 2. One of the Compact's purposes, as expressed in the Compact itself, is "to protect, conserve, restore, improve and effectively manage" the Great Lakes and St. Lawrence River. Compact § 1.3.2.a. The question in this challenge is, at its core, whether the Final Decision and the process the Compact Council used to reach it properly implement that fundamental purpose of the Compact--protecting the Great Lakes, which is also a core purpose of the Cities Initiative. Part of the Cities Initiative's normal activities is "interven[ing] in environmental issues of concern to its membership and the Great Lakes-St. Lawrence region." Ullrich Decl. ¶ 3. Challenges like this, on topics like this, are precisely why the Cities Initiative exists.

Further, the Cities Initiative can pursue this challenge and its requested remedy independently of its members. The Cities Initiative has handled this challenge independently to date, and is prepared to continue to do so. The remedy the Cities Initiative requests consists solely of actions to be taken by the Compact Council, and therefore does not require any individual member participation.

3. Members of the Cities Initiative would have individual standing.

An individual person must meet three requirements to make a showing of individual standing. "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.” *Sierra Club v. Franklin County Power of Illinois, LLC*, 546 F.3d 918, 925 (7th Cir. 2008).

a. Members of the Cities Initiative have suffered an injury in fact.

The Mayors who make up the membership of the Cities Initiative all serve as elected officials in cities that are part of the Great Lakes and St. Lawrence River region. The Cities Initiative and its Mayors have long been committed to the Compact and protections for the region’s waters. For example, Mayors on the Board of Directors of the Cities Initiative testified before the Ohio legislature and U.S. Senate Foreign Relations Committee in support of the Compact before it was passed. Ullrich Decl. ¶ 4. Members of the Cities Initiative have suffered injury because the Mayors and their cities are harmed by both (1) the effects of the Waukesha Diversion and (2) the creation of procedures and standards through the Final Decision that are contrary to the plain language of the Compact, but can be used as support by any cities that seek a diversion in the future.

The injuries that the Mayors have suffered do not need to be extreme for the Mayors to demonstrate standing to bring this challenge. Rather, courts have recognized that even slight injuries are enough to confer standing. *See, e.g., Sierra Club*, 546 F.3d at 925 (quoting *US v. SCRAP*, 412 US 669, 689 n.14 (1973) (“[A]n identifiable trifle is enough for standing to fight out a question of principle”); *Village of Elk Grove Village v. Evans*, 997 F.2d 328, 329 (7th Cir.1993) (“even a small probability of injury is sufficient to create a case or controversy—to take a suit out of the category of the hypothetical—provided of course that the relief sought would, if granted, reduce the probability” (quoted approvingly in *Massachusetts v. EPA*, *supra*, 549 U.S. at 525 n. 23, 127 S. Ct. 1438)). Thus, “[t]he magnitude, as distinct from the directness, of the injury

is not critical to the concerns that underlie the requirement of standing.” *Am. Bottom Conservancy*, 650 F.3d at 656. That requirement is easily met here, where Mayors have suffered a range of injuries from the Final Decision.

Some members of the Cities Initiative will suffer economic injury as a result of the Waukesha Diversion. Economic injuries are sufficient for standing. *See Am. Iron and Steel Institute v. Occupational Safety and Health Admin.*, 182 F.3d 1261, 1274 n. 10 (11th Cir. 1999) (finding standing where individual members suffered loss of income due to administrative action); *Nat’l Recycling Coalition, Inc. v. Reilly*, 884 F.2d 1431, 1433–1434 (D.C. Cir. 1989) (finding standing based on individual members’ economic injuries). For example, the City of Racine, Wisconsin has invested considerable sums in developing the Root River as a recreational and scenic area. Exhibit 2, December 19, 2016 Declaration of John Dickert (“Dickert Decl.”) ¶ 8.a. But the effects the Waukesha Diversion will have on the Root River threaten the expected payoff from those investments by reducing the attractiveness of this area to potential visitors and to residents. *Id.* As another example, the economy of the City of Niagara Falls, New York is heavily reliant on the continued integrity of the water levels in the area of Niagara Falls, including because certain minimum water levels are required under a treaty and to maintain its supply of hydroelectric power. *See* Exhibit 3, December 16, 2016 Declaration of Paul Dyster (“Dyster Decl.”) ¶ 7.f. But the approval of the Waukesha Diversion in circumstances that do not meet the Compact’s requirements will make it easier for cities that seek diversions of water that would flow through the Niagara River to get diversions when the Compact does not allow it. That increases not only the likelihood of dropping water levels and those related impacts, but also the City of Niagara Falls’ need to monitor for and defend against future diversion requests, which will cause it to incur increased costs. *See* Dyster Decl. ¶ 7 a-c.

Racine and other cities along the Root River will also be injured because the threat and likely incidence of increased pollutant loads in the Root River will prevent its citizens from using the Root River for scenic and recreational purposes, which is in and of itself an injury sufficient to confer standing. *See, e.g., Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004) (“We have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact.”).

Further, Mayors from the Cities Initiative have been injured because approval of the Waukesha Diversion calls into question their ability to meet other government or court imposed obligations. Courts recognize that cities have a concrete interest in being able to meet their regulatory and other legal obligations. *Iowa League of Cities v. EPA*, 711 F.3d 844, 870-71 (8th Cir. 2013) (finding cities alleged injury for standing when they alleged EPA followed improper procedures to announce rules that would affect them). Here, the effects of the Waukesha Diversion damage that interest for Mayors throughout the Great Lakes and St. Lawrence region. For example, the Root River, which will handle return flow from the Waukesha Diversion under the Final Decision, flows within the City of Racine. The Mayor recognizes that return flow will increase the river’s pollutant load, increase the potential for flooding, and harm the river’s ability to serve as a recreational waterway. Dickert Decl. ¶ 8.a. Those effects will injure Racine’s ability to meet obligations imposed by the federal EPA and Wisconsin DNR.

The Mayors and their Cities have also suffered injury because approving a diversion that is contrary to the purposes of the Compact weakens the integrity of that Compact and therefore decreases the force of the Compact’s protections. The Mayors rely on those protections to fulfill their responsibilities and obligations to their electorates, including provision of fresh water and protection of water resources. Ullrich Decl. ¶ 2, 6. With this decision, it becomes more likely that other cities will improperly seek diversions, particularly other cities in Wisconsin that have radium

in their groundwater but are successfully treating that groundwater, and the Mayors and their Cities will need to defend against those requests. *Id.* ¶ 7.a.

b. Members' injuries result from the Compact Council's Final Decision.

All of the injuries the Mayors of the Cities Initiative will suffer are because of the Compact Council's Final Decision and the approval it has given to the Waukesha Diversion. The fact that the Compact Council's approval is not the final step in the process for implementation of the Waukesha Diversion does not lessen the injury from the Final Decision – the Waukesha Diversion could not happen without the Compact Council's approval, and that is enough. *See Am. Bottom Conservancy*, 650 F.3d at 656 (finding standing where preventing single permit approval would stop likely injurious project).

c. Reconsideration of the Waukesha Diversion will redress members' injuries.

If the Compact Council reconsiders its Final Decision, the Cities Initiative and its member Mayors will have the opportunity to raise their concerns with the Compact Council and explain why the procedures and standards relied upon in connection with the Waukesha Diversion are inconsistent with the Compact. If the Compact Council commits to a new review process with procedures and standards that are consistent with the Compact, setting precedent that complies with the Compact and that will further its goals of protecting this shared resource, that will be a significant step in resolving the issues raised above.

By withdrawing and reconsidering the Final Decision, that Compact Council could address the lack of due process afforded to the Mayors and the precedent-setting substantive errors that are identified in the Cities Initiative's earlier submission and further discussed below in Section IV. Reconsideration of the decision would allow the Compact Council to solicit public comment that had not been permitted and allow for the introduction of evidence that was lacking in the original

decision, thereby redressing the Compact Council's error of having issued the Final Decision without allowing public comment on a substantially modified diversion or requiring the Applicant to put forth sufficient evidence on how that modified diversion meets the criteria set out in the Compact. Further, ultimately denying a diversion that is inconsistent with the terms of the Compact and that invites future diversions that do not meet the letter of the Compact would protect members' water supplies and economic interests.

II. Issues Raised By The Cities Initiative Are Timely, And Reliance On Documents Outside The Record Supplied By The Compact Council Is Appropriate Because Of Failures In The Compact Council's Process In Reviewing The Waukesha Diversion Application.

The October 19 Letter requested that the Cities Initiative address whether documents and arguments raised in the Written Submission were made to the Compact Council. However, those arguments and issues arise in the context of an inadequate process for public comment and record that failed to capture documents, data, and analysis that should have been critical to the Compact Council's process. Underlying many of these issues is the Regional Body and Compact Council's significant modification of the service area *after* the end of the public comment period, *without* providing an opportunity for interested parties to comment on whether the proposed diversion -- with a substantially modified service area but no revised EIS or submission of scientific analysis tailored to the new service area -- met the criteria set out in the Compact. The Cities Initiative and other interested parties timely and appropriately raised the issues in the Written Submission to the extent that the Compact Council gave them an opportunity to do so before issuing the Final Decision.

First, the Cities Initiative addressed the issues contained in its Written Statement during the public comment period for the Regional Body and Compact Council review process and the issues are therefore timely raised. The Cities Initiative provided comments to the Regional Body

on March 13, 2016 during the only comment period allowed by the Compact Council (January 12, 2016 through March 14, 2016).² During the public comment period, parties were invited to comment upon Waukesha's original application, which addressed a significantly larger water supply area and volume of diversion than the area and volume eventually approved by the Compact Council in its Final Decision. In its comments, the Cities Initiative raised the following issues: first, contrary to Waukesha's assertion in its application, it does have a reasonable water supply alternative to a diversion; second, the proposed water supply area as defined in the application contains areas outside the boundaries of the City of Waukesha and therefore the applicant does not qualify as a "community within a straddling county"; and third, discharging the return flow to the Root River, as Waukesha proposed, would cause significant environmental harm to the river's ecosystem.³ These are the same issues that were addressed by the Cities Initiative in its September 16, 2016 Written Statement, and therefore they were timely raised in the proceeding below.

Second, the Compact Council allowed comment on Waukesha's original application but not on the substantially modified application that it approved in its Final Decision. There were several consequences of the Compact Council's refusal to allow comment on the modified application. First, members of the public were unable to weigh in on the extent of the service area that the Compact Council finally approved. Second, the significant difference between the volume of the diversion requested by Waukesha in its original application and that approved by the Compact Council in its Final Decision affected existing options for alternative supply and members of the public were not allowed to analyze and comment upon such options. Third, as a

² Great Lakes and St. Lawrence Cities Initiative, Comments on the Waukesha Diversion Application, presented to the Great Lakes-St. Lawrence River Water Resources Regional Body on March 13, 2016, attached to the document Bates stamped WAUKESHA003638.

³ *Id.*, pp. 4-5.

result of the smaller volume approved, some options for return flow merited reconsideration but the Compact Council's refusal to allow comment on the modified application did not permit the region and the impacted communities to work together to determine whether these options would be viable at a smaller volume.

Under the terms of the Compact itself, once 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, it should have reopened the public comment period on the modified application. The Compact provides that the Parties to the Compact recognize the importance and necessity of public participation in promoting management of the water resources in the Basin. Compact Section 6.1.1. It further provides that "it is the intent of the Council to conduct public participation processes concurrently and jointly with processes undertaken by the Parties and through Regional Review." Compact § 6.2. The Compact Council is instructed to use caution when determining whether or not an application meets the criteria for an exception to the Compact's ban on diversions. Compact § 4.9.3.e. Such caution warrants public comment on a modified proposal where, as here, the modifications create substantial variance from the proposal that the public was initially permitted to comment on.⁴

Under general principles of administrative law, the Compact Council should have submitted Waukesha's modified application to public comment before issuing its Final Decision. In the context of challenges to rulemakings under the Administrative Procedures Act, 5 U.S.C.

⁴ The modifications made by the Regional Body and Compact Council in this case were significant. Members of the Regional Body recognized that, without modifications and conditions, there was a "very weak structure to support an approval." (*See* Transcript of Meeting before the Great Lakes-St. Lawrence River Water Resources Board Regional Body commencing at 1 PM on April 21, 2016, at 159:21-162:7, Bates number WAUKESHA016650, at WAUKESHA016808-16811.)

§ 551 *et seq.*, courts have generally applied two tests to determine whether a final rule should be upheld even though it differs from the proposed rule that was published for public comment: (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 that they had an opportunity to comment. *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 1999); *Air Transport Association of America v. FAA*, 169 F.3d 1 (D.C. Cir.1999). It is hard to see how the Compact Council’s Final Decision, in which it approved a modified application with a substantially smaller water supply area and volume of water diverted than that set forth in the original application made available for public review, would satisfy either of these tests.

Similarly, several environmental regulatory programs require an agency to resolicit public comment when, based upon new information or changed conditions, the agency makes substantial changes to a proposed plan of action that was previously made available for public review. For example, under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), and the rules promulgated thereunder, after publication of the proposed plan and prior to the adoption of the selected remedy in the record of decision (“ROD”), the lead agency must seek additional public comment on a revised proposed plan if it determines that the public could not have reasonably anticipated the changes in the revised proposed plan based upon the information available in the proposed plan or the supporting analysis and information in the administrative record. 40 CFR § 300.430(f)(3)(ii)(B). Likewise, when an agency chooses to make a fundamental change to a remedy selected (after initial public comment) in a ROD, it must do so through a ROD Amendment, which requires further public notice and comment. 40 CFR § 300.435(c)(2)(ii). Under another analogous scheme, the National Environmental Policy Act

(“NEPA”), and the rules promulgated thereunder, after preparing a draft environmental impact statement (“EIS”) and before preparing the final EIS, the lead agency must seek public comment. 40 CFR § 1503.1(a)(4). If changes are made in the final EIS, the lead agency may request comments on the final EIS before the decision is finally made. 40 CFR § 1503.1(b). While these regulatory requirements are not binding upon the Compact Council, the principle that they embody -- that more than one round of public comment on a proposed agency action may be necessary and appropriate in some instances -- provides instructive guidance on how the Compact Council should address public notice and comment in the present circumstances.

There was clearly public interest in commenting upon the modified application. For example, the Compact Implementation Coalition submitted comments on May 9, 2016 soon after the Compact Council indicated that it planned to revise the service area.⁵ The Compact Council, however, did not include those comments in the record and indicated that it did not consider any such comments submitted after the end of the comment period on March 14, 2016.⁶

Third, reliance on documents outside the Compact Council’s sparse record is appropriate because the record itself is incomplete. At a minimum, it should include all documents from the full Wisconsin record. The Compact Council’s own discussions as reflected in the transcripts indicate that Council members discussed many documents that are not contained in the record.⁷

⁵ See App. Ex. 19 to Written Statement, Compact Implementation Coalition letter dated May 9, 2016.

⁶ “Comments submitted prior to January 12, 2016 and after March 14, 2016 were not considered.” City of Waukesha Diversion Application website, *available at* www.waukeshadiversion.org.

⁷ For example, at the afternoon session of the April 21, 2016 hearing of the Regional Body, Grant Trigger, the Michigan representative, made reference to USGS modeling reports when discussing the hydrogeological interconnection between the Lake Michigan Basin (LMB) and the Mississippi River Basin (MRB) and whether Waukesha was inadvertently diverting Lake Michigan water by capturing LMB groundwater in its wells and discharging it to the MRB. (See Transcript of Meeting before the Great Lakes-St. Lawrence River Water Resources Board Regional Body commencing

Further, from the transcripts provided, it is apparent that Council members conducted substantive discussions off the record that addressed many issues in the proceeding but those discussions were not transcribed to provide the Cities Initiative or other members of the public with a record thereof.⁸ Having a plainly incomplete record, where many of the most substantive discussions and analyses of whether key requirements of the Compact were or could be met were conducted out of public view, is a glaring deficiency in the process used by the Compact Council in reaching its decision on the Waukesha diversion.

Finally, the Cities Initiative seeks a hearing before the Compact Council in part to bring the process deficiencies described above to the Compact Council's attention. Through this request, the Cities Initiative seeks to highlight the real effect that these process-related choices have, both on the information and expertise that the Compact Council has available to it as it makes these significant decisions and on the members of the public and the many communities that will be impacted by the Compact Council's decisions without having an opportunity to review and comment on the diversion as approved. As indicated in its November 17, 2016 letter, the Cities

at 1 PM on April 21, 2016, at 113:17-116:5, WAUKESHA016650, at WAUKESHA016762-16765.) The USGS modeling reports, which provided the basis for the discussion of this important issue, seem to have not been made part of the record by the Applicant.

⁸ For example, at the evening session of the April 21, 2016 hearing of the Regional Body, Chairman Zehringer assigned the critical issues of the "service area" and "no reasonable water supply alternative" to "subcommittees" consisting of certain members of the Regional Body for off the record discussions during a recess from the meeting. (*See* Transcript of Meeting before the Great Lakes-St. Lawrence River Water Resources Board Regional Body commencing at 6 PM on April 21, 2016, at 62:7-65:3, Bates number WAUKESHA016832, at WAUKESHA016893-16896.) While a representative from each subcommittee did report back on the record when the meeting was reconvened to the conclusions reached by his or her group, the groups' discussions were neither open to the public at the time nor transcribed and later made available to the public. Thus, the public was deprived of the opportunity to observe the exchange of ideas that led to each group's conclusions.

Initiative would prefer to work cooperatively with the Compact Council to address these issues and ensure a more robust process going forward.

III. The Cities Initiative Is Entitled To An In-Person Hearing On The Issues Raised In The Written Statement.

Pursuant to Section 7.3.1 of the Compact, the Cities Initiative is entitled to an in-person hearing before the Council. Section 7.3.1 of the Compact provides that “[a]ny 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.” As it has explained in detail previously (*see* Section I, *supra*), the Cities Initiative is an aggrieved Person under Section 7.3.1 of the Compact. Accordingly, the Cities Initiative requested an in-person hearing in its letter to the Council’s Executive Director, dated August 19, 2016, to address the issues it raised in the Cities Initiative Statement.

Although the Compact does not provide any details on the procedure for the hearing an aggrieved party is entitled to, in its October 19, 2016 letter, the Council stated it will look to general principles of administrative law for guidance on its hearing procedures. When courts apply general principles of administrative law, they often look to the Administrative Procedure Act (“APA”) for guidance as part of their analysis. *See Mingo Logan Coal Co. Inc. v. U.S. Env’tl. Prot. Agency*, 70 F. Supp. 3d 151, 165 (D.D.C. 2014) (applying general principles of administrative law and APA simultaneously), *aff’d sub nom. Mingo Logan Coal Co. v. Env’tl. Prot. Agency*, 829 F.3d 710 (D.C. Cir. 2016); *Buntrock v. U.S. S.E.C.*, No. 02-C-1274, 2003 WL 260681, at *2 (N.D. Ill. Feb. 6, 2003) (discussing APA in review of relevant administrative principles), *aff’d sub nom. Buntrock v. S.E.C.*, 347 F.3d 995 (7th Cir. 2003). Courts have also looked to the APA as a gap filler when the originating compact for a multistate council does not address an issue in the litigation. *See Old Town Trolley Tours of Washington, Inc. v. Washington Metro. Area Transit Comm’n*, 129 F.3d

201, 204 (D.C. Cir. 1997) (adopting APA standards of review by reference where compact did not specify standard of review).

The APA supports the Cities Initiative’s right to an in-person hearing before the Council. Where a federal statute requires a hearing for either an agency adjudication or rulemaking⁹, Section 556 of the APA governs the hearing’s procedure. 5 U.S.C. § 554 (a) (adjudication); 5 U.S.C. § 553 (c) (rulemaking). Under Section 556, “[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.” 5 U.S.C. § 556 (d) (emphasis added). Thus, when an administrative hearing is required under federal law, the APA affords parties the right to present evidence to an agency orally in order to facilitate a full and true disclosure of facts.

The Compact requires that an aggrieved party be afforded a hearing before the Council, but does not specify the procedure for that hearing. The Cities Initiative is an aggrieved party, and general principles of administrative law favor the use of the APA to fill gaps in the Compact. Based on the procedures required under the APA, whether the Cities Initiative’s requested hearing represents an adjudication or a rulemaking, the Council should allow the Cities Initiative to present oral evidence. Therefore, the Cities Initiative is entitled to an in-person hearing before the Council.

⁹ The APA defines “adjudication” as an “agency process for the formulation of an order,” and “order” as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking...” 5 U.S.C. § 551. The APA defines “rulemaking” as agency statements of general or particular applicability and future effect designed to implement, interpret, or proscribe various enumerated policies. *Id.*

IV. In Addition To The Significant Procedural And Precedential Concerns Raised By The Waukesha Diversion Decision, The Final Decision Includes Specific Errors Of Law And Fact That Should Be Resolved By The Compact Council.

The Compact Council asked the Cities Initiative to provide additional information on the specific grounds raised in its earlier Written Submission. As requested, the following distinguishes issues raised in the Written Submission that respectively constitute errors of law, errors of fact, and combined errors of law and fact.¹⁰ As the Written Submission analyzed the context and legal framework for these issues and how the Compact Council’s Final Decision contradicted fundamental legal principles and the factual bases required for a diversion under the Compact, the Cities Initiative refers back to its Written Submission for the substance of these issues. By identifying and further detailing errors of fact and law as described herein, the Cities Initiative does not waive any other issues raised in its Written Submission, including but not limited to issues related to the process followed by the Compact Council.

A. Erroneous Conclusions of Law and Other Errors of Law.

1. Including areas outside the Applicant’s community boundaries in the Approved Diversion Area is an error of law.

The Final Decision contains an error of law because it includes “Town Islands,” which are not part of the City of Waukesha, in the Approved Diversion Area.

As detailed further in the Written Submission at pages at 23-24, when an Applicant seeks Water under the Community within a Straddling County exception, “[t]he Water shall be used solely for the Public Water Supply Purposes of the Community within a Straddling County that is

¹⁰ The errors of law and fact detailed below address the substance of the Compact Council’s decision, as reflected in the Final Decision. Issues related to the process followed by the Compact Council, including issues related to the lack of opportunity for public comment on the significantly revised service area and the implications thereof, are addressed *supra* Section II.

without adequate supplies of potable water.” Compact § 4.9.3.a. “Community within a Straddling County means any incorporated city, town or the equivalent thereof” Compact § 1.2. The Compact Council recognized that the Town Islands are not part of the City of Waukesha, but nonetheless included them in the Approved Diversion Area on the assumption that “for all practical purposes they are within the Applicant’s community boundaries.” *See* Final Decision § 5b.ii. The Compact includes no such allowance for areas that are not part of the incorporated city, town, or equivalent.

2. The standard reflected in the Final Decision regarding whether the Applicant has “no reasonable water supply alternative” constitutes an error of law.

The Final Decision contains an error of law because “no reasonable alternative water supply” was determined using an unfounded standard, as detailed in the Written Statement at pages 26-41. The following documents were discussed in the prior analysis of this error:

- Great Lakes Compact Council Report of Proceedings Held Tuesday, June 21, 2016, *available at* <http://www.waukeshadiversion.org/media/1837/great-lakes-compact-council-transcript-6-21-16.pdf>, was included in the record and begins at WAUKESHA017525.
- Transcript of Meeting before the Great Lakes-St. Lawrence River Water Resources Board Regional Body on April 21, 2016, *available at* <http://www.waukeshadiversion.org/media/1801/april-21-2016-part-1.pdf>, was included in the record and begins at WAUKESHA016650.
- App. Ex. 12, Letter from the Compact Implementation Coalition to WDNR dated August 28, 2015, was submitted during WDNR’s Summer 2015 public comment period and was part of the underlying Wisconsin record that should have been relayed

to the Regional Body and considered by the Compact Council. Moreover, a substantially similar but updated version of that Comment Letter from the Great Lakes Coalition, dated March 14, 2016, was submitted to the Compact Council within the designated comment period. Although the Compact Council did not give the March 14, 2016 Comment Letter a Bates stamp within the Record, it is attached to the document WAUKESHA003700, which contains the text of the letter.

- WDNR Technical Review was included in the record and begins at WAUKESHA000011.
- WDNR EIS was included in the record and begins at WAUKESHA000171.
- App. Ex. 14, Feb. 29, 2016 GZA Response to Comments, was submitted within the designated comment period. Although the Compact Council did not give the February 29, 2016 GZA Response to Comments a Bates stamp within the Record, it is attached to the document WAUKESHA003668.
- App. Ex. 19, May 6, 2016 GZA Response to Regional Body, is not found on the drive provided to the Cities Initiative as the record. This document was submitted to the Compact Council after the close of the comment period on March 14, 2016. However, the Compact Council should have received and considered this GZA Response and any others that similarly addressed the substantial modifications to and conditions on the proposed diversion, which the Regional Body and Compact Council made without ever subjecting them to public comment, as discussed *supra* Section II.

3. **Relying on a “net benefit” analysis for the conclusion that 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” constitutes an error of law.**

The Final Decision contains an error of law because the criterion that “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” does not depend on whether there may be a “net benefit” from the diversion, but on whether it will have no significant adverse impact(s). As detailed in the Written Statement at pages 50-51 and 55, the Compact Council improperly relied on an inapplicable “net benefit” concept to reach its conclusion on this criterion.

The analysis of this error referenced WDNR EIS, which was included in the record and begins at WAUKESHA000171.

B. Erroneous Findings of Fact.

1. **The Final Decision reflects an error of fact because the analysis of reasonable water supply alternatives was insufficient.**

The Compact Council did not have a sufficient factual basis for its determination of “reasonable water supply alternative” for the service area approved, such as an analysis of demand based on current assumptions for an approved service area that was significantly smaller than in the original application and up-to-date analysis of options available to meet that demand level, as detailed in the Written Submission at pages 41-49. As noted *supra* Section II, the Compact Council did not permit public comment on this smaller service area, omitting from its factual inquiry any analysis beyond that provided by the Applicant.

The following documents were discussed in the prior analysis of this error:

- App. Ex. 9, James F. Drought, Jiangeng Cai, and John C. Osborne, July 9, 2015, “Non-Diversion Alternative Using Existing Water Supply With Treatment” (“GZA Report”), was submitted within the designated comment period. Although the Compact Council did not give the July 9, 2015 GZA Report a Bates stamp within the Record, it is attached to the document WAUKESHA003668.
- App. Ex. 4, “An Analysis of the City of Waukesha Diversion Application,” originally dated February 2013 and updated November 25, 2013 (collectively the “Nicholas Report”), was submitted within the designated comment period. Although the Compact Council did not give the Nicholas Report a Bates stamp within the Record, both the February 2013 and November 25, 2013 documents are attached to the document WAUKESHA003668.
- App. Ex. 8, “City of Waukesha’s Application for Diversion of Lake Michigan Water,” April 6, 2015, by Mead and Hunt (“M&H Report”), was submitted within the designated comment period. Although the Compact Council did not give the M&H Report a Bates stamp within the Record, it is attached to the document WAUKESHA003668.
- WDNR EIS was included in the record and begins at WAUKESHA000171.
- WDNR Technical Review was included in the record and begins at WAUKESHA000011.
- CH2MHill, 2013, City of Waukesha Water Supply Service Area Plan, Vol. 2 of 5, was included in the record and begins at WAUKESHA000541.

- Southeastern Wisconsin Regional Planning Commission (“SEWRPC”) modeling provided with the Written Submission is found in the WDNR record at <http://dnr.wi.gov/topic/WaterUse/waukesha/additionalMaterials.html> as Appendices to May 2010 Application Appendix I, volumes I and II.
- Nov. 25, 2015 Memorandum from John Jansen, Leggette, Brashears & Graham, Inc. to Waukesha Water Utility was included in the record and begins at Waukesha003267.
- App. Ex. 14, Feb. 29, 2016 GZA Response to Comments, was submitted within the designated comment period. Although the Compact Council did not give the February 29, 2016 GZA Response to Comments a Bates stamp within the Record, it is attached to the document WAUKESHA003668.
- App. Ex. 19, May 6, 2016 GZA Response to Regional Body, is not found on the drive provided to the Cities Initiative as the record. This document was submitted to the Compact Council after the close of the comment period on March 14, 2016. However, the Compact Council should have received and considered this GZA Response and any others that similarly addressed the substantial modifications to and conditions on the proposed diversion, which the Regional Body and Compact Council made without ever subjecting them to public comment, as discussed *supra* Section II.

2. The Final Decision contains errors of fact regarding the deep water aquifer.

The Compact Council reached incorrect findings of fact regarding the deep aquifer, such as that it is not sustainable because the groundwater level is below pre-development water levels and is not a reasonable alternative because it contains low levels of radium contamination, as discussed further in the Written Submission at pages 41-49. These errors of fact are supported by the same documents listed *supra* Section IV.B.1.

3. The Final Decision incorporates multiple errors of fact in the conclusion that return flow via the Root River would not have a substantial adverse impact.

First, without requiring affirmative factual evidence from the Applicant that return flow via the Root River would not have a substantial adverse impact, the Compact Council found that the adverse impact criterion was met despite substantial evidence presented by other commenters regarding likely impacts. Second, the Compact Council's finding that return flow via the Root River would have a "net benefit" is unsubstantiated. These errors of fact related to the finding that there would be no substantial adverse impact from returning Waukesha's wastewater via the Root River are discussed in the Written Submission at pages 50-57.

The following documents were discussed in the analysis of this error:

- WDNR EIS was included in the record and begins at WAUKESHA000171.
- App. Ex. 6, Baseline Assessment of Water Quality In Support of Root River Watershed Restoration Plan (the "Root River Report"). The Root River Report is the tip of the iceberg on the type of analysis that would be expected before a finding that there would not be a significant adverse impact to the River, as suggested by Racine Public Health Department Laboratory Director/Research Scientist Julie Kinzelman's comments to WDNR on August 28, 2015 (App. 15). Dr. Kinzelman highlighted that WDNR's conclusion that there would not be an adverse impact seemed to be not substantiated, neither based on sufficient data or nor taking into account earlier findings related to the Root River.
- Technical Review was included in the record and begins at WAUKESHA000011.
- App. Ex. 11, Letter from the Compact Implementation Coalition to WDNR dated August 28, 2015, was submitted during WDNR's Summer 2015 public comment

period and was part of the underlying Wisconsin record that should have been relayed to the Regional Body and considered by the Compact Council. It was re-submitted to the Compact Council and is attached to the document Bates stamped WAUKESHA004018. Moreover, an updated version dated March 14, 2016 was submitted to the Compact Council and is attached to the document Bates stamped WAUKESHA003668.

- App. Ex. 7, City of Waukesha WWTP Phosphorus Operational Evaluation Report, Strand and Associates, June 19, 2014, at 1.

C. The Final Decision Fails to Reflect Whether Part of the Diversion Could Be Avoided by Efficient Use and Conservation of Existing Water Supplies, a Combined Error of Law and Fact.

The Final Decision contains a combined error of law and fact in that it omits consideration of whether part of the diversion could be reasonably avoided by existing supplies, as detailed in the Written Statement at page 50.

D. The Final Decision Relies on Unsupported, Technically Unlikely, and Speculative Future Permit Requirements and Monitoring to Theoretically Avoid Anticipated Adverse Impacts to the Root River, Which Has No Basis in the Legal Requirements of the Compact and Is a Fact Error.

The Final Decision contains a combined error of law and fact because return flow via the Root River is expected to cause significant adverse impacts, yet the Final Decision provides no assurance that these adverse impacts will be mitigated. As detailed in the Written Submission at pages 54-57, the Final Decision assumes that these impacts could be mitigated through permit limitations on the discharge, yet the limits needed to avoid these impacts are likely not feasible or not adequate. These permits have not yet been granted, and the likelihood of actually imposing the necessary standards via Wisconsin's permitting process or undertaking adequate action *after* monitoring reveals an impact is unclear, as is the authority to impose and enforce such a condition

post-approval. An assumption of speculative future action to avoid expected impacts, without a commitment to actually undertake and meet the standard *before* beginning the diversion, is not sufficient to meet the Compact's requirement that the planned diversion would not cause significant adverse impacts.

The following documents were discussed in the analysis of this error:

- WDNR EIS was included in the record and begins at WAUKESHA000171.
- WDNR Technical Review was included in the record and begins at WAUKESHA000011.
- App. Ex. 7, City of Waukesha WWTP Phosphorus Operational Evaluation Report, Strand and Associates, June 19, 2014, at 1.


CONCLUSION

Having provided the Written Submission and this Supplement to address further requests made by the Compact Council, the Cities Initiative respectively reiterates its request for a hearing before the Compact Council pursuant to Compact § 7.3.1.

Date: December 19, 2016

Respectfully submitted,

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EXHIBIT 1

Final Decision in the Matter of the Application
by the City of Waukesha, Wisconsin for a
Diversion of Great Lakes Water, No. 2016-1:
Request for Hearing by the Great Lakes-St.
Lawrence Cities Initiative

Great Lakes Compact Council

DECLARATION OF DAVID A. ULLRICH

I, David A. Ullrich, of full age, hereby declare as follows:

1. I am the Executive Director of the Great Lakes-St. Lawrence Cities Initiative (“the GLSL Cities Initiative”). I have served in that position since 2003. I submit this Declaration in support of the GLSL Cities Initiative’s challenge to the Final Decision by the Great Lakes-St. Lawrence River Basin Water Resources Council (“Compact Council”) in the Matter of the Application by the City of Waukesha, Wisconsin for a Diversion of Great Lakes Water, No. 2016-1 (“Waukesha Diversion Request”). If called to testify I would be competent to testify to the facts contained in this Declaration.
2. The GLSL Cities Initiative is an association of 127 Mayors from the US states and Canadian provinces that surround the Great Lakes and St. Lawrence River Basin. The GLSL Cities Initiative was formed in 2003. Since that time and continuing today, the organization’s goal is to protect, restore and enhance the Great Lakes and the St. Lawrence River to ensure the long term sustainability of those water resources, and thereby improve the economic well-being and quality of life for the region’s population. The fact that the GLSL Cities Initiative’s membership is composed of elected officials with responsibilities and obligations to their electorates, including provision of fresh water and protection of water resources, gives the organization a unique perspective and unique set of concerns regarding sustainability of water

resources.

3. The GLSL Cities Initiative monitors, educates, provides recommendations, and, where necessary, intervenes in environmental issues of concern to its membership and the Great Lakes-St. Lawrence region. Over the past decade, the GLSL Cities Initiative has focused on issues including Great Lakes beaches and coasts; preventing harm caused to the lakes by invasive species, microbeads, radioactive waste, oil transport and nutrients; and protecting wetlands. In 2007, the Cities Initiative launched a successful Water Conservation Framework for its members and other interested cities to reduce water withdrawals from the Great Lakes and St. Lawrence by 15% between 2000 and 2015. In September 2014, the Cities Initiative convened a drinking water summit in response to the Toledo drinking water crisis to find ways to better respond to and prevent such incidents in the future.

4. In my capacity as Executive Director of the GLSL Cities Initiative, I participated as the local government representative in a series of meetings during which the terms of the Compact were discussed and negotiated in 2004 and 2005. I also helped Mayors on the Board of Directors of the GLSL Cities Initiative prepare and deliver testimony before the Ohio legislature and the U.S. Senate Foreign Relations Committee in support of the Compact. The GLSL Cities Initiative passed resolutions in 2006, 2007, and 2008 encouraging ratification of the Compact and Agreement by the states, provinces, and the U.S. Congress.

5. Implementation and enforcement of the Great Lakes-St. Lawrence River Sustainable Water Resources Compact ("the Compact") is an issue of primary importance to the GLSL Cities Initiative and its membership. We feel that the Compact is an essential protection necessary to achieve the GLSL Cities Initiative's goal of ensuring current and long-term

sustainable use of the Great Lakes and St. Lawrence River.

6. Members of the GLSL Cities Initiative decided that the organization should take action to oppose the Compact Council's Final Decision to approve the Waukesha Diversion Request because the Final Decision is not in accordance with the law and principles enshrined in the Compact. Members of the GLSL Cities Initiative, and the organization as a whole, believe that allowing a Final Decision that is contrary to the terms and principles of the Compact weakens the integrity of the Compact, and weakens the Compact's ability to fulfill its purpose of protecting the Great Lakes and St. Lawrence River. Accordingly, the Final Decision impairs the GLSL Cities Initiative's mission of ensuring the long term sustainability of the Great Lakes and the St. Lawrence River, which is designed to improve the quality of life and economic well-being of the region's population.

7. Concerns that individual members of the GLSL Cities Initiative have raised since the Compact Council's Final Decision, as to how they and their cities are harmed by the decision, include:

- a. The Final Decision sets a precedent that damages the integrity of the Compact and encourages additional unwarranted diversions in the future. Other municipalities can rely on the Final Decision to argue that they are entitled to a diversion of Great Lakes Water under the Compact, even when the terms of the Compact do not permit it, because the Final Decision incorporates standards and determinations that are unfounded under and inconsistent with the Compact's terms and principles of compact interpretation. This includes multiple cities in Wisconsin that use the same aquifer as Waukesha and have the same type of

radium-related issues, who could cite the Final Decision to assert a claim to Great Lakes water. References to the allegedly “unique” nature of Waukesha’s circumstances do not remedy this effect, but instead cause further lack of clarity about when diversions may be allowed. This injury to the Compact’s integrity will make it harder for those cities to rely on the Compact when they require its protections at a later date.

- b. The Waukesha diversion will cause non-Great Lakes water to return to the Great Lakes basin, thereby changing the composition of the watershed and the water that goes to their citizens.
- c. Impacts to the Root River from return flow will harm that river’s ability to function as a natural waterway in compliance with water quality standards and criteria, and harm its ability to support recreation and tourism for the region.
- d. I understand from my members that the citizenry to whom the Mayors answer have voiced their disagreement and asked their Mayors to take action to prevent the Waukesha diversion through at least 25 city council resolutions supporting the action by the GLSL Cities Initiative to challenge the Waukesha diversion approval.

8. In addition to this challenge, the GLSL Cities Initiative has taken other action to oppose the proposed approval and the Final Decision, both before and after the Final Decision was made. First, the GLSL Cities Initiative passed a resolution at its annual meeting on June 15, 2016 encouraging the Compact Council to reject the Waukesha diversion. Second, GLSL Cities Initiative representatives appeared at hearings held by the Wisconsin DNR and the Regional

Body expressing its concerns about the proposed approval, and the GLSL Cities Initiative submitted written comments opposing the diversion. Third, the GLSL Cities Initiative prepared a model resolution opposing the Final Decision and encouraged its members to have their city councils pass the resolution. As of the date of this declaration, we are aware of at least 25 cities that have passed a version of that resolution. Fourth, I have spoken and been invited to speak at conferences and other engagements throughout the Great Lakes-St. Lawrence region to explain why the Final Decision does not meet the requirements of the Compact.

9. If the Final Decision stands, the members of the GLSL Cities Initiative collectively and I, in my capacity as Executive Director, feel that the Final Decision will make it more difficult for the GLSL Cities Initiative to fulfill its organizational mission.

In accordance with 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: December 19, 2016
Chicago, Illinois

A handwritten signature in black ink, reading "David A. Ullrich". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

DAVID A. ULLRICH

EXHIBIT 2

Final Decision in the Matter of the Application
by the City of Waukesha, Wisconsin for a
Diversion of Great Lakes Water, No. 2016-1:
Request for Hearing by the Great Lakes-St.
Lawrence Cities Initiative

Great Lakes Compact Council

DECLARATION OF JOHN T. DICKERT

I, John T. Dickert, of full age, hereby declare as follows:

1. I am the Mayor of the City of Racine, Wisconsin. I was elected Mayor in May 2009 and have served in that role since that time. I submit this Declaration in my individual capacity in support of the challenge by the Great Lakes-St. Lawrence Cities Initiative (“the GLSL Cities Initiative”) to the Final Decision by the Great Lakes-St. Lawrence River Basin Water Resources Council (“Compact Council”) in the Matter of the Application by the City of Waukesha, Wisconsin for a Diversion of Great Lakes Water, No. 2016-1 (“Waukesha Diversion Request”). If called to testify I would be competent to testify to the facts contained in this Declaration.

2. The City of Racine is a member of the Great Lakes-St. Lawrence Cities Initiative (“the GLSL Cities Initiative”), and has been a member since 2006 and I served as Chair of the GLSL Cities Initiative from June 2014 to June 2015. Racine joined the GLSL Cities Initiative because (1) Racine shares the organization’s mission to protect, restore and enhance the Great Lakes and the St. Lawrence River to ensure the long term sustainability of those water resources, and thereby improve the quality of life for the region’s population and the people of Racine, and (2) Racine believes that the activities of the GLSL Cities Initiative are an important way to further that mission. In my position as Mayor, I began serving as a member of the Board of Directors of the GLSL Cities Initiative in 2010, and will continue serving in that position for a

term that runs from June 2016 to June 2019.

3. As an elected official, I have unique responsibilities and obligations to my electorate, including providing fresh water and maintaining sustainable and clean waterways in my region. Racine supported Wisconsin joining the Great Lakes-St. Lawrence River Sustainable Water Resources Compact (“the Compact”) as one method of meeting those obligations.

4. Enforcement of the Great Lakes-St. Lawrence River Sustainable Water Resources Compact (“the Compact”) is an issue of primary importance to Racine. I feel that the Compact is an essential protection necessary to ensure sustainable use of the Great Lakes and St. Lawrence River now and long into the future.

5. Racine is considering, though the City Council has not yet approved, taking action to oppose Waukesha’s Diversion Request because that diversion, both as it was proposed by Wisconsin and as it was approved by the Compact Council, is not in accordance with the law and principles enshrined in the Compact. For instance, in public comments, Dr. Julie Kinzelman from the Racine Department of Public Health raised key questions related to the impact on the Root River that had not been, and were never, adequately addressed by the applicant. She pointed out that studies that ordinarily would be conducted prior to permitting this sort of waterway change had not been conducted. She referenced the Baseline Assessment of Water Quality In Support of the Root River Watershed Restoration Plan, an extensive report that she co-authored on the health of the Root River that was based on 2011-2013 data analysis.

6. As Mayor of Racine, I provided testimony opposed to the proposed diversion at the public hearing held by the Regional Body in Waukesha, including on February 18, 2016.

7. At the time of Dr. Kinzelman’s comments, at the time of my comments, and during

the narrow window when the Compact Council permitted public comment, the proposed diversion differed significantly from the more limited service area approved by the Compact Council. The City of Racine had no opportunity to study and comment on the impacts of a diversion tied to the smaller service area with the conditions attached by the Compact Council, including but not limited to whether the lower volume supports any of the alleged benefits to the Root River fishery, what would be needed to determine or protect against potential adverse impacts to the Root River and the City of Racine and whether the Applicant adequately made these showings, or whether other return flow options may be viable at this lower volume and would cause less impact. As the leader of a community that will be directly impacted by the water from this diversion, I strongly feel that the City of Racine could and should be permitted to analyze and comment on the diversion as substantially modified by the Compact Council and to contribute its expertise on the Root River to allow the Compact Council an adequate basis for evaluating whether the diversion will cause a substantial adverse impact. As a current Director and past Chair of the GLSL Cities Initiative I believe that the GLSL Cities Initiative should be permitted similar analysis and comment on the substantially modified diversion, because its members will also be impacted by the diversion.

8. Racine will be harmed by the Waukesha Diversion in the following ways:
 - a. The Waukesha Diversion contemplates that the diverted water will return to the Great Lakes via the Root River, which runs through Racine. That return flow will harm Racine by increasing the river's pollutant load, increasing the potential for flooding, and harming the river's ability to serve as a recreational waterway. The City of Racine has invested considerable sums in developing the Root River as a

recreational and scenic area, and the proposed changes to water flow and constituents threaten the future of those improvements.

- b. The return flow through the Root River to Lake Michigan may cause damage to North Beach and Racine Harbor, both of which are key features of the Racine economy and contribute significantly to the quality of life of the people of Racine.
- c. The Final Decision sets a precedent that damages the integrity of the Compact and encourages additional unwarranted diversions in the future, including diversions that may further impact the Root River. Other municipalities can point to the Final Decision to argue that they are entitled to a diversion of Great Lakes Water under the Compact, even when the terms of the Compact do not permit it, because the Final Decision incorporates standards and determinations that are unfounded under and inconsistent with the Compact's terms and principles of compact interpretation. References to the allegedly "unique" nature of Waukesha's circumstances do not remedy this effect, but instead cause further lack of clarity about when diversions may be allowed. This injury to the Compact's integrity will make it harder for those cities to rely on the Compact when they require its protections at a later date, either as a community that may seek water or as a community that will be impacted by further diversions.
- d. The integrity of the Compact is also harmed by the Compact Council's refusal to address the many and valid questions from public interest organizations, municipalities, and other interested parties about the standards and substance of

the decision and the processes used to get there before allowing the Waukesha Diversion.

- e. These precedential effects raises particular concerns for Racine. Several communities near Waukesha use the same aquifer as Waukesha and have the same type of radium-related issues, and they could cite the findings in the Final Decision about radium treatment options and the viability of the aquifer to assert a claim to Lake Michigan water. This precedent raises the specter of additional communities near Waukesha seeking Lake Michigan water and seeking to follow the source and return flow routes that Waukesha would have already established, further contributing to potential impacts to the Root River.

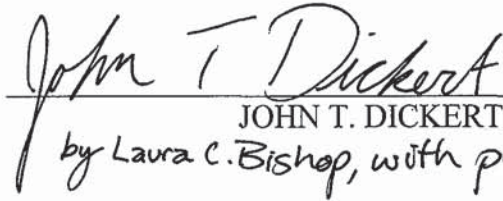
9. If the Compact Council reverses its Final Decision, the harms described above in Paragraph 8 will not occur because there will be no new return flow down the Root River from Waukesha or from future diversions from nearby communities. If the Compact Council engages in a new consideration and examination of Waukesha's proposed diversion, Racine could present additional evidence of the harms that would be caused by the Waukesha Diversion at the new proposed level of water diversion. Further, additional consideration could lead the Compact Council to impose new conditions, or follow a new return flow method, which could limit or entirely solve the harms described above in Paragraph 8.

10. I feel that the Compact Council's Final Decision impairs Racine's ability to fulfill its responsibilities and obligations to provide fresh water and maintain sustainable and clean waterways in the region.

In accordance with 28 U.S.C. § 1746, I certify under penalty of perjury that the

foregoing is true and correct.

Dated: December 19, 2016
Racine, Wisconsin



JOHN T. DICKERT
by Laura C. Bishop, with permission

EXHIBIT 3

Final Decision in the Matter of the Application
by the City of Waukesha, Wisconsin for a
Diversion of Great Lakes Water, No. 2016-1:
Request for Hearing by the Great Lakes-St.
Lawrence Cities Initiative

Great Lakes Compact Council

DECLARATION OF PAUL A. DYSTER

I, Paul A. Dyster, of full age, hereby declare as follows:

1. I am the Mayor of the City of Niagara Falls, New York. I was elected Mayor in November 2007 and have served in that role since January 1, 2008. I submit this Declaration in support of the challenge by the Great Lakes-St. Lawrence Cities Initiative (“the GLSL Cities Initiative”) to the Final Decision by the Great Lakes-St. Lawrence River Basin Water Resources Council (“Compact Council”) in the Matter of the Application by the City of Waukesha, Wisconsin for a Diversion of Great Lakes Water, No. 2016-1 (“Waukesha Diversion Request”). If called to testify I would be competent to testify to the facts contained in this Declaration.

2. The City of Niagara Falls, New York is a member of the Great Lakes-St. Lawrence Cities Initiative (“the GLSL Cities Initiative”), and has been a member since 2010. Niagara Falls joined the GLSL Cities Initiative because (1) Niagara Falls shares the organization’s mission to protect, restore and enhance the Great Lakes and the St. Lawrence River to ensure the long term sustainability of those water resources, and thereby improve the quality of life for the region’s population, and (2) Niagara Falls believes that the activities of the GLSL Cities Initiative are an important way to further that mission. In my position as Mayor, I am currently the Vice-Chair and Lower Lakes Regional Director of the Board of Directors of the GLSL Cities Initiative, and will serve in that position for a term from June 2016 to June 2017, when I expect to become

Chair. I have served on the Board of Directors since 2012.

3. Enforcement of the Great Lakes-St. Lawrence River Sustainable Water Resources Compact (“the Compact”) is an issue of primary importance to the City of Niagara Falls. I feel that the Compact is an essential protection necessary to ensure sustainable use of the Great Lakes and St. Lawrence River.

4. The City of Niagara Falls has taken action to oppose Waukesha’s Diversion Request because that diversion, as approved, is not in accordance with the law and principles enshrined in the Compact. The City of Niagara Falls unanimously adopted a resolution on September 6, 2016 to support the GLSL Cities Initiative challenge to the Waukesha Diversion. A certified copy of the Resolution is attached hereto as Exhibit A.

5. As an active Board member, I have opposed the diversion in meetings of the Board of Directors. I also wrote directly to the Governor of New York on January 12, 2016 to express my opposition, and spoke to his staff to convey my position, as well.

6. Niagara Falls was hampered in taking action to oppose Waukesha’s Diversion Request because there were no public hearings on the proposed diversion anywhere in the state of New York. To the best of my knowledge, the City of Niagara Falls did not receive notice of any hearings outside of the state of Wisconsin. Representatives of the City would have participated in a hearing, if one had been held at a closer location.

7. The City of Niagara Falls is harmed by the principles and standards used by the Compact Council in making its Final Decision on the Waukesha Diversion, which can now be pointed to as precedent for future diversion requests. These principles and standards harm the City of Niagara Falls in the following ways:

- a. The Waukesha Diversion allows a diversion even though it may have adverse impacts on a waterway, which is inconsistent with the Compact. This will make it easier for a municipality to obtain a diversion that would have an adverse impact on the Niagara River, which borders the City of Niagara Falls and is the source of the City's drinking water, contrary to the aims of the Compact.
- b. The successful Waukesha Diversion will embolden other municipalities to seek a diversion, in particular municipalities that have the same type of radium-related issues. That increases the likelihood that the City of Niagara Falls will need to defend against additional unlawful diversions in the future.
- c. Other municipalities can point to the Final Decision to argue that they are entitled to a diversion of Great Lakes Water under the Compact, even when the terms of the Compact do not permit it, because the Final Decision incorporates standards and determinations that are unfounded under and inconsistent with the Compact's terms and principles of compact interpretation. References to the allegedly "unique" nature of Waukesha's circumstances do not remedy this effect, but instead cause further lack of clarity about when diversions may be allowed.
- d. A Final Decision contrary to the Compact weakens the integrity and protective force of the Compact, which lessens the protections for and increases the vulnerability of the water resources the City of Niagara Falls relies on for providing clean water to its citizens, economic livelihood for the city's tourism industry, and other recreational value.

- e. The Niagara Falls are a world-renowned resource that draws visitors from across the globe to the City of Niagara Falls. The Falls are the dominant element of the City's economy, and they depend on the integrity of the Great Lakes and St. Lawrence ecosystem for their appeal. The harms listed above are a particularly real concern for the City of Niagara Falls because of the City's dependence on the Falls.
 - f. The City of Niagara Falls received an allocation of electric power from the New York Power Authority's hydroelectric plant located on the Niagara River. The Niagara River Water Diversion Treaty of 1950 establishes minimum water flows over Niagara Falls during both the tourist and non-tourist seasons to maintain the scenic attractiveness of the Falls. Water in excess of the minimums can be diverted for the production of electricity by both the New York Power Authority plant and the Adam Beck power plants located on the Canadian side of the Niagara River. The City's electric allocation is contractually tied to water flows. If water flows are low, as could happen if water is diverted from the river, and power diversions decreased to maintain Treaty flows over the Falls, the City's electric allocation is reduced and it is forced to obtain more expensive power.
8. If the Compact Council reverses or withdraws its Final Decision, the harms described above in Paragraph 7 will not occur because there will be no Final Decision that is contrary to the terms of the Compact. If the Compact Council engages in further consideration and examination of Waukesha's proposed diversion, Niagara Falls and other organizations will have the opportunity to explain why the standards and principles previously used by the Compact

Council to make its decision are contrary to the terms of the Compact and to review and comment on the substantially revised scope of the proposed diversion and whether it satisfies the Compact. The Compact Council will have the opportunity to adopt and implement more appropriate standards and procedures that can be used consistently across future diversion applications.

9. I feel that the Compact Council's Final Decision impairs the City of Niagara Falls's ability to fulfill its responsibilities and obligations to provide fresh water and maintain sustainable and clean waterways in my region, and keep the economy of the City healthy.

In accordance with 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: December 16, 2016
Niagara Falls, New York



PAUL A. DYSTER

Exhibit A

I hereby certify that the following Resolution was adopted at a Meeting of the City Council held on September 6, 2016:

RESOLUTION No. 2016-100

**RELATIVE TO
SUPPORTING GREAT LAKES AND ST. LAWRENCE CITIES INITIATIVE'S
OPPOSITION FOR THE APPROVAL OF THE WAUKESHA WATER DIVERSION APPLICATION**

BY:

COUNCIL CHAIRMAN ANDREW TOUMA
COUNCIL MEMBER KRISTEN GRANDINETTI
COUNCILMAN EZRA SCOTT, JR.
COUNCIL MEMBER KENNY TOMPKINS
COUNCIL MEMBER CHARLES WALKER

WHEREAS, the Great Lakes and St. Lawrence River Basin represents approximately 20% of the world's surface freshwater resource and supports the third largest economy in the world; and

WHEREAS, on December 13, 2005, the Great Lakes Governors of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin, and the Premiers of Ontario and Quebec signed the Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement (the "Agreement"), and the Governors endorsed the companion Great Lakes—St. Lawrence River Basin Water Resources Compact (the "Compact"), which was later approved by the United States Congress and signed by the President, banning new water diversions from the Basin except in communities located in counties straddling the water division line between the Great Lakes-St. Lawrence Basin and other basins; and

WHEREAS, the City of Waukesha, WI, is located in Waukesha County, a county straddling the basin division line; and

WHEREAS, the City of Waukesha applied to the Wisconsin Department of Natural Resources under the exception for a "Community within a Straddling County" to use Lake Michigan as its source of drinking water (the "Waukesha Application"); and

WHEREAS, the Compact requires proposals for diversions to satisfy seven specific conditions; and

WHEREAS, the Regional Body, after having reached an agreement on a Declaration of Finding and a set of conditions for the application, forwarded its recommendation to the Compact Council, and that all eight Great Lakes states voted in favor of the Waukesha Application; and

WHEREAS, on June 21, 2016, the Compact Council issued its Final Decision approving the Waukesha Application with Conditions; and

WHEREAS, the Waukesha Application does not meet the terms of the Agreement nor the Compact, and the precedent-setting nature of the Final Decision to approve the Application is of great concern to the Mayors of the Great Lakes and St. Lawrence Cities Initiative; and

WHEREAS, the approved service area still contains parts of communities which are not part of the City of Waukesha and which have not demonstrated a need for the water, amounting to a clear violation of the Compact; and

WHEREAS, this broader service area is not a "Community within a Straddling County" as defined and required by the exception conditions in the Agreement and Compact; and

WHEREAS, there are reasonable water supply alternatives to meet the drinking water quantity and quality needs

of the City of Waukesha; and

WHEREAS, the impacts of the proposed return flow of water through the Root River to Lake Michigan are likely to have adverse impacts on the ecosystem and to the urban shores of the mouth of the River; and

WHEREAS, the Conditions for Approval were not subject to public comment while debated by the Regional Body and Compact Council despite the Compact's requirement that all relevant information be available to the public for comment; and

WHEREAS, the Regional Body review process did not provide adequate opportunity for public comment as only one public meeting was held in the City of Waukesha, and that hundreds of public comments against the Application did not appear to be considered during the Regional Body or Compact Council process.

NOW, THEREFORE, BE IT RESOLVED, that the City of Niagara Falls affirms its commitment to the protection of our water resources by calling on the Governors of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin, and their representatives on the Compact Council to reconsider their Final Decision to approve the Waukesha Application; and

BE IT FURTHER RESOLVED, that the City of Niagara Falls supports any and all challenges on behalf of the Great Lakes and St. Lawrence Cities Initiative to the Compact Council's approval of the Waukesha Application, especially given the precedent set by the Application's approval; and

BE IT FURTHER RESOLVED, that the City of Niagara Falls urges the Governors and Premiers of the Regional Body and Compact Council, consistent with good public policy, to reverse its approval of the Waukesha diversion application and ensure that the provisions of the Compact are strictly applied in this and any future application in order to protect the finite water resources of the Great Lakes and St. Lawrence River basin.

Witness my Hand and Seal this
15th day of December 2016


Carol A. Antonucci
City Clerk

