Diversions from the Great Lakes: Out of the Watershed and in Contravention of the Compact

Christina L. Wabiszewski
Marquette University Law School

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr
Part of the Environmental Law Commons, and the Water Law Commons

Repository Citation
Christina L. Wabiszewski, Diversions from the Great Lakes: Out of the Watershed and in Contravention of the Compact, 100 Marq. L. Rev. 627 (2016).
Available at: http://scholarship.law.marquette.edu/mulr/vol100/iss2/9

This Response or Comment is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact megan.obriens@marquette.edu.
DIVERSIONS FROM THE GREAT LAKES: 
OUT OF THE WATERSHED AND IN 
CONTRAVENTION OF THE COMPACT

I. INTRODUCTION ................................................................. 627
II. THE INITIAL GREAT LAKES PROTECTION PLANS .............. 631
III. THE FEDERAL COMPACT ADOPTED IN WISCONSIN .......... 639
IV. WAUKESHA’S DIVERSION APPLICATION ............................. 645
   A. History Leading Up to the Approval ................................. 645
   B. The First Diversion Outside the Basin, Approved ............ 651
V. KENOSHA: A LEGISLATIVE CHECK ON MUNICIPAL DIVERSIONS 
   AND A DIRECT HIT ON THE GREAT LAKES COMPACT .......... 654
   A. The Recent Incorporation of the Town and Village of 
      Somers ........................................................................ 656
   B. The Implications of the Incorporation .............................. 661
   C. Enacting Item 66 ............................................................ 662
   D. The Implications of Item 66 .......................................... 665
   E. The Limits of these Implications ..................................... 666
VI. CONCLUSION ..................................................................... 668

I. INTRODUCTION

Two young fish are swimming along together. They suddenly come upon 
an older fish, who in passing says to them, “Morning, boys. How’s the water?”1 
The young fish swim hurriedly past, each looking confused. Leaving the older 
fish behind, one turns to the other and asks, “What the hell is water?”2

So begins David Foster Wallace’s commencement address to the 2005 
gradiating class of Kenyon College, the point of which was “merely that the 
most obvious, important realities are often the ones that are hardest to see and 
talk about.”3 The irony of the parable and its poignant truth reaches a more 
global resonance when considered in light of the United States’ most obvious,

1. DAVID FOSTER WALLACE, THIS IS WATER: SOME THOUGHTS, DELIVERED ON A SIGNIFICANT 
   OCCASION, ABOUT LIVING A COMPASSIONATE LIFE 3 (2009).
2. Id. at 4.
3. Id. at 8.
though least discussed crisis in history: the depletion of our freshwater resources. Alarming ly, in the next fifty years the United States will face not just drought, but complete dissemination of readily accessible water resources in areas ranging from its breadbaskets to its commercial and financial epicenters. As these lakes, reservoirs, wells, and aquifers drain, the communities that depend upon them will seek alternative and further-reaching water sources into which they can dip their proverbial straws. The most alluring and perhaps the most vital of these sources are the Great Lakes.

In recognition that such straws may descend and that “Future Diversions and Consumptive Uses of Basin Water resources have the potential to significantly impact the environment, economy and welfare of the Great Lakes–St. Lawrence River region,” the region surrounding the Great Lakes championed for effective protections of Great Lakes waters. The Great Lakes–St. Lawrence River Basin Water Resources Compact (the “Great Lakes Compact” or the “Compact”), signed into effect in 2008 by President George W. Bush after being adopted in all eight states that border the lakes, as well as the two Canadian provinces to the north, is a legally-binding, international water compact that attempts to manage withdrawals out of the Lakes by creating a blanket prohibition on diversions outside of the Great Lakes Basin. However, this stringent provision makes way for three important exceptions: the intrabasin transfer exception, the straddling community exception, and the straddling

---


5. A 2013 Kansas State University study determined that if Kansas farmers continued irrigating crops and watering livestock from the Ogallala aquifer at the current rate, in fifty years the aquifer would fall sixty-nine percent below its current level. See David R. Steward et al., Tapping unsustainable groundwater stores for agricultural production in the High Plains Aquifer of Kansas, projections to 2110, 110 PROCEEDINGS OF THE NAT’L ACADEMY OF SCI. OF THE U.S. OF AM. E3477, E3477 (Aug. 26, 2013); see also Roxana Hegeman, High Plains Aquifer will be 69 percent depleted in 50 years, K-State study says, WICHITA EAGLE, Aug. 26, 2013, http://www.kansas.com/news/article1121517.html#storylink=cpy [https://perma.cc/XA74-3YVE]. This figure is staggering, as the aquifer lies underneath more than eight Great Plains and its waters supports a fifth of all irrigated crops produced in the country. See SANDRA POSTEL, WATER: RETHINKING MANAGEMENT IN AN AGE OF SCARCITY 20 (1984).


 county exception, all of which allow diversions to communities on the fringes of the basin.9

While the Great Lakes Compact seeks to protect waters threatened by diversions, in reality far-flung communities like those in Las Vegas or Arizona do not immediately threaten the Great Lakes because the cost of a pipeline would be so expensive.10 Rather, the most immediate threats to the Compact’s purpose are communities just outside of the basin. Enter the City of Waukesha, Wisconsin: a town faced with its own unique water crisis and armed with a short, but historically and legally significant straw.11 Less than twenty miles outside of Wisconsin’s largest city, Waukesha lies in a county that straddles the basin divide,12 and thus was in a geologically fortunate position to apply for a diversion.13 Waukesha had struggled for years with overdraft issues, eventually leading to a contamination of the groundwater supply the water utility provided to its own citizens and those in neighboring communities with radium, a radio-nuclide that can cause cancer.14 After years struggling to petition the Great Lakes Council to approve a diversion of Great Lakes water to the thirsty communities, Waukesha alone was finally afforded one pursuant to the Compact’s diversion processes on June 21, 2016.15

The approval was limited to the City of Waukesha and those “town islands” located just outside its municipal boarders only, leaving the neighboring communities the water utility served without access to the diversion waters.16 This narrowing of the service areas to the municipal boundaries of the City of Waukesha was contrary to Wisconsin’s adaptation of the compact, which differs significantly in its definition of “community.” Where the Federal Compact

10. In fact, the cost of ocean water desalination would likely be cheaper. Mark Brush, Here are 2 reasons why the drought in California won’t open the door to Great Lakes water, MICH. RADIO, Apr. 23, 2016, http://michiganradio.org/post/here-are-2-reasons-why-drought-california-wont-open-door-great-lakes-water (for states like Arizona, California, and even Texas it would be cheaper for them to build desalinization plants—these plants convert ocean water into drinking water.).
12. WIS. DEPT. NAT. RESOURCES, VERSION 1.2, CITY OF WAUKESHA PROPOSED GREAT LAKES DIVERSION: DRAFT ENVIRONMENTAL IMPACT STATEMENT 14, i (2015) [hereinafter DIVERSION EIS]; see infra Figure 1.
13. Federal Compact, supra note 7, § 4.9(3).
16. Approval Decision, supra note 15, § II(5).
defines it narrowly as a “city, town, or equivalent thereof.” Wisconsin defines it much more broadly, and this broader definition allows for Waukesha’s entire service area, even that outside of its municipal boundaries, to be granted access to Lake Michigan water. These inconsistencies seem to run afoul of the universal stated purpose of the Compact: to “facilitate consistent approaches to Water management across the Basin.”

These inconsistencies serve to highlight a reoccurring theme in Wisconsin: disregard for Compact requirements. Regardless of the definition of community—indeed, regardless of the approval of the diversion itself—state action has already been taken in subversion of the Compact, seriously jeopardizing its status as the ultimate protector of Great Lakes water. The subversion began in 2015 when the Town of Somers divided itself in half to incorporate the Town and Village of Somers. Reincorporation effectively made the Village, located entirely within the basin divide, Compact compliant. The Town, however, straddled the basin and was supplied with water purchased from the City of Kenosha, a similarly situated town on the basin divide just to the south. As both municipalities fell under the “straddling communities” exception to diversions out of the basin, and both would require the expensive and time-consuming undertaking of Compact compliance in order to divert water from Kenosha to the Town of Somers.

However, these processes were effectively avoided in the summer of 2015 when the Wisconsin legislature enacted Item 66, which almost entirely restricted the Kenosha County Water Utility’s ability to deny water service to communities and municipalities along its borders. Essentially, Item 66 did what Waukesha’s diversion application sought—to extend Great Lakes water outside the municipality’s borders—though without the headache of following Compact procedures.

This Comment dives into the history and complexity of the Great Lakes Compact and develops the theory that the Compact’s past and present challenge its validity and its protective power. Part II will examine the history of the various Great Lakes protection plans that led up to the Great Lakes Compact, paying particular attention to how the history of these protection plans may

---

17. Federal Compact, supra note 7, § 1.2.
19. Federal Compact, supra note 7, § 1.3(2)(d).
20. See generally, Approval Decision, supra note 15, § II.
21. Somers Spring Election Results April 7, 2015; Published on Village and Town of Somers (http://www.somers.org [https://perma.cc/Z6C9-FNMM]).
23. See id.
shadow the Great Lakes Compact’s own potency. Part III will dissect the
Compact itself and the key differences between the definition of “community”
in Wisconsin’s adaption of the Compact and in the Federal Compact language.
Part IV will develop the road Waukesha traveled on its path to a diversion re-
quest and the analysis the Council adopted in ultimately approving it. Finally,
Part V will examine Item 66 and will apply the Council’s analysis from its de-
cision approving Waukesha’s diversion to determine whether the Town and
Village of Somers are in fact entitled to the diversions they receive, ultimately
demonstrating that the 2015 legislative act seriously undermines the potency
and staying power of the Great Lakes Compact.

Thus, the historic weakness of federal water protection measures, the ap-
proval of the Waukesha diversion, and ultimately the Wisconsin legislature’s
circumvention around the Compact all show that while the Great Lakes Com-
pact is a progressive step, it remains a weak protection for the country’s most
obvious, though least appreciated resource.

II. THE INITIAL GREAT LAKES PROTECTION PLANS

The abundance of Great Lakes waters coupled with the precariousness of
the Lakes’ hydrological condition presented a pressing protection problem for
the United States early in its history. Efforts for large scale diversions began
as early as 1840 with the building of the Chicago Sanitary and Ship Canal, and
by mid-nineteenth century Chicago saw conflict when it reversed the flow of
the Chicago River in order to divert polluted wastewater out of the city, and in
effect diverted nearly 65 million gallons a day out of Lake Michigan and into
the Mississippi watershed. Efforts to protect the Lakes began to formulate
shortly thereafter, making the Great Lakes Compact only the latest in a long
history of measures to protect the Lakes from diversions.

The first measure to protect the Lakes came about in 1909, when the United

24. See infra Part II.
25. See infra Part III.
26. See infra Part IV.
27. See infra Part V.
28. Missouri v. Illinois, 200 U.S. 496, 520 (1906) (the Court dismissed without prejudice and
awarded costs to Illinois after Missouri alleged that the Sanitary District of Chicago would reverse the
flow of the Chicago River and in effect pollute the Mississippi).
29. See Treaty with Great Britain Relating to Boundary Waters Between the United States and
[https://perma.cc/C5EG-CEKR] [hereinafter Great Lakes Charter]; DAVID NAFTZGER, The Great
Lakes–St. Lawrence River Basin Water Resources Compact: protecting freshwater and promoting sus-
tainability, in WHOSE DROP IS IT, ANYWAY?—LEGAL ISSUES SURROUNDING OUR NATION’S WATER
States and Canada signed into effect the Boundary Waters Treaty (the “Treaty”). The Treaty purported to govern all basins shared by the United States and Canada and sought to protect the equal rights of both countries for use of the waters. It limited existing uses to those “uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement” and provided that no further uses or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided of a joint commission, to be known as the International Joint Commission.

This clause gave both the United States and Canada and the International Joint Commission great control over to whom use of the waters would be granted. However, managing the resource was a unique and complicated endeavor and these complexities infected the Treaty with fundamental weaknesses.

For example, the standard articulated above in Article III alleging to protect against diversions “affecting the natural level or flow of boundary waters on the other side of the [border]line” in fact “offers little practical value.” A single diversion would not have quantifiable effects on the Lake’s “level or

30. Treaty with Great Britain, supra note 29.
31. BARTON H. THOMPSON, JR., ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 968 (5th ed. 2013); Treaty with Great Britain, supra note 29, Art. VIII (“The High Contracting Parties shall have, each on its own side, equal and similar rights to use of the waters hereinbefore defined as boundary waters.”). It was not until the years following World War II that the Treaty evolved into an environmental protection agreement when “citizens and scientists became increasingly alarmed about water pollution in the Great Lakes.” Noah D. Hall, Boundary Waters Treaty Centennial Symposium: Introduction-The Centennial of the Boundary Waters Treaty: A Century of United States-Canadian Transboundary Water Management, 54 WAYNE L. REV. 1417, 1431 (2008).
32. Treaty with Great Britain, supra note 29, Art. III.
33. Id.
35. Id. at 486–87.
36. Treaty with Great Britain, supra note 29, Art. III.
37. Hall, supra note 31, at 1440.
flow as a result of the sheer volume of Great Lakes water. What was needed was an accounting of all diversions out of the lakes, which likely would lead to conclusions that collective diversions in fact affect levels or flow, but no “formal allegations of Boundary Waters Treaty violations” have yet surfaced to this effect. Additionally, “[w]hile individual withdrawals and diversions from tributary rivers and streams often do have a measurable effect on these waters, these [types of] waters are not protected under the Boundary Waters Treaty.”

Nevertheless, the Treaty generally helped “limit conflict between the nations over their shared water resources.” To more comprehensively control diversions out of the Great Lakes, in the 1940s and ’50s, the Basin states began to organize efforts to specifically control diversions. In 1968, Congress authorized the creation of an interstate compact that created the Great Lakes Commission (the “Commission”). The Commission sought to control Basin management through research, development, and the subsequent implementation of protection plans. To this end, the Basin’s eight governors and two premiers effectuated the Great Lakes Charter of 1985 (the “Charter”). The Charter was the first international, voluntary agreement that delineated the management procedure of a shared water resource between the United States and another international power.

Signed by the governors and the premiers of the Canadian provinces adjacent to the Great Lakes, the Charter purported “to manage diversions out of the

38. Treaty with Great Britain, supra note 29, Art. III.
40. Id. at 1441.
41. Id. Additional conflicts arise out of inconsistencies among states’ common law approaches to water law. As the Treaty covered all waterways between the United States and Canada, its scope reached some states or territories following the law of prior appropriation as well as others that follow the law of riparianism to manage the shared resources. As the Treaty did not resolutely delineate how these particular conflicts could be resolved, nor did it indicate what system of water management was preferable, the resolution of conflicts between states that follow the different doctrines is rich, but inconsistent. See id.; see generally George William Sherk, Dividing the Waters; The Resolution of Interstate Water Conflicts in the United States 29 (2000). To complicate matters more, the resolution of the conflicts between international parties is equally fraught with conflicting opinions and outcomes. Id.
42. Thompson et al., supra note 31, at 970.
43. Id. at 972.
44. Id.
45. Id.
46. Id.
47. See id.
lakes as well as consumptive uses of the lakes. Specifically in regard to diversions, the Charter required that a state or province provide “prior notice and consultation” to the others about any “major” diversions and required the State to simultaneously seek the other’s “consent and concurrence” before orchestrating or otherwise authorizing a diversion. Consent was necessary from all signing parties for diversion of five million gallons a day or more.

Preceding and prompting the enactment of the Charter, Sporhase v. Nebraska introduced the notion that water is in fact an article of commerce according to the Dormant Commerce Clause, and that movement of such an article across state lines may not be arbitrarily upheld or otherwise discriminated against. In Sporhase, a provision of a Nebraska state law prohibited the exportation of Nebraska groundwater to any other state without a permit. The Supreme Court ruled the provision to be arbitrarily discriminatory and further held that because Nebraska failed to show a compelling state interest in the provision, the provision was invalid on its face. While the decision brought to light the commercial status and marketability of water, it also brought to the surface doubts about a state’s ability to autonomously limit water diversions to locations outside of that state.

In response to Sporhase, the Charter became an agreement between the governors and premiers to vest export control of Great Lakes water in themselves. However, the Charter’s effectiveness proved unreliable. Firstly, as

---

49. Great Lakes Charter, supra note 29; see also Beggs, supra note 48, at 367–68.
52. U.S. CONST. art. I, § 8, cl. 3.
53. Sporhase, 485 U.S. at 957 (“the reciprocity provision operates as an explicit barrier to commerce between the two States”).
54. Id. at 955. While the Court held that the state’s interest in water conservation was highly appropriate and legitimate within an objective sphere, the “burden imposed imposed [by the Nebraska statute] on commerce is clearly excessive in relation to the putative local benefits.” Id. at 954. The first part of the Nebraska statute upheld the interest and the contested provision was found invalid. Id. at 955–56.
55. Dana M. Saeger, Comment, The Great Lakes–St. Lawrence River Basin Water Resources Compact: Groundwater, Fifth Amendment Takes, and the Public Trust Doctrine, 12 GREAT PLAINS NAT’L RES. J. 114, 130 (2007) (“While groundwater was indeed ruled an article of commerce by the U.S. Supreme Court in Sporhase v. Nebraska, that designation came with a condition of its own-namely the right of Congress to so regulate groundwater in the future as an article of commerce.”).
57. NAFTZGER, supra note 29, at 175–76; THOMPSON ET AL., supra note 31, at 973.
it was an entirely voluntary agreement, it was non-binding.\(^{58}\) Congress was not asked to ratify that Charter as an interstate compact, thus affording it great weight, because of the inclusion of the two Canadian provinces.\(^ {59}\) Additionally, “the voluntary Charter’s lack of meaningful standards by which diversions were to be regulated has proven impossible to enforce, leaving the Basin states and provinces with a toothless management tool.”\(^ {60}\) Thus, contrary to the intent of the Commission, the non-binding nature left the Charter as more of a “gentlemen’s agreement” than a comprehensive management plan.\(^ {61}\)

Also devastating to the Charter’s effectiveness, a year after the Charter went into effect Congress enacted the 1986 Water Resources Development Act (WRDA).\(^ {62}\) While the WRDA similarly provided that diversions of Great Lakes water without the approval of all eight Great Lakes governors and the two Canadian premiers were impermissible, it also allowed a state to “unilaterally veto any diversions occurring within an entirely separate state, creating the serious potential for abuse of power and conflicts among the Great Lakes governors.”\(^ {63}\) This unilateral veto power made it impossible for states to act with any confidence when it came to diversion issues and altogether discouraged investment and ultimate action.\(^ {64}\)

The WRDA also contained serious foundational problems. Although its enactment by Congress meant it was legally binding and actionable, it did not “set any standards or processes for challenging diversions out of the Great Lakes.”\(^ {65}\) Furthermore, “the Due Process Clause and the Commerce Clause likely rendered the WRDA unconstitutional.”\(^ {66}\) Thus, the Charter ultimately carried the day for water resources management. However, the Charter’s weaknesses rendered its legacy as merely a “Paper Tiger Regarding Water Withdrawals.”\(^ {67}\)

---

58. THOMPSON ET AL., supra note 31, at 972.
59. See Beggs, supra note 48, at 367; THOMPSON ET AL., supra note 31, at 972.
61. THOMPSON ET AL., supra note 31, at 972.
63. Beggs, supra note 48, at 368. See WRDA, supra note 62, at § 1962d–20(d). See also THOMPSON ET AL., supra note 31, at 973 (The WRDA “in effect took the dormant commerce clause and Sporhase . . . out of play in the basin.”).
64. Beggs, supra note 48, at 368.
65. Id.
66. Id.
In response to the continuing lag in freshwater resource management, the Great Lakes governors and premiers appointed representatives to the Water Management Working Group to develop what would become the Charter Annex. Over a period of almost six years, the Working Group consulted with the public, water resources experts, and representatives of key stakeholder groups to develop a new agreement that would bind the region to a consolidated management system while also providing a common standard through which diversions and other projects may be reviewed. The Annex ultimately led to the enactment of the Great Lakes Compact.

The Great Lakes Compact was thus in a sense a reactionary response to the failure of both the Charter and the WRDA. Reactionary because the failures of the latter two along with the ever-pressing need for the economic and environmental preservation of the precious resource all called for a more immediate, valid, and lasting means of regional Great Lakes Water management. And indeed the Compact has been lauded as accomplishing these things because of its procedural transparency and the commitment of the governors and premiers to holding themselves accountable for its success. Additionally, by electing the form of an interstate compact, the drafters of the Compact assured a more secure means of diversion management, as compacts are unrivalled in potency by any existing or proposed institutional arrangement. Sanctioned by the Constitution, interstate compacts “have provided a means by which states


69. NAFTZGER, supra note 29, at 175–84; Charter Annex, supra note 68, at 2–3.

70. Beggs, supra note 48, at 369.

71. See Habush Sinykin & McGee, supra note 67, at 1200. “For decades Canadians and Americans in the Great Lakes Basin have feared that the thirsty will come calling.” ANNIN, supra note 11 at, 11. However, some organizations have declared that such large-scale diversions are unlikely, like the International Joint Commission instituted by the 1909 Boundary Waters Treaty. Id. at 11. Nevertheless, scholars like Professor Noah D. Hall and Dr. Peter H. Gleick validate the fears of Canada and the United States in citing the incredible upswing in recent water conflicts as evidence that diversion requests will only increase. Id. at 12–13. The “somber lesson” of the Aral Sea in the former Soviet Union provides credence to the opposition’s view to bar diversions out of the Lakes. ROBERT GLENNON, UNQUENCHABLE: AMERICA’S WATER CRISIS AND WHAT TO DO ABOUT IT 98 (2009). The Aral Sea was once the fourth-largest inland body of fresh water. Id. The Soviets allowed so many diversions out of the lake that it lost 90% of its volume and 75% of surface area in a matter of mere decades. Id. While the immediate call for Great Lakes water may seem small, many such diversions could decimate the region’s water resources, as experienced in the Soviet Union. Id. at 97–98.

72. See GLENNON, supra note 71, at 96; NAFTZGER, supra note 29, at 178–84.

73. NAFTZGER, supra note 29, at 182–84.

74. SHERK, supra note 41, at 29–30.

75. U.S. CONST. art. I, § 10, cl. 3 (“No state shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.”). However, not all compacts must be ratified by
could enter into agreements for various purposes, including the delineation of shared boundaries, involvement in common-interest projects such as the building of dams and bridges, and the creation of regional or sub-regional administrative endeavors such as resource management. 76

Apart from its more significant legal potency, the Compact is “distinguishable from its predecessor, the [WRDA], by its establishment of the Regional Council to oversee exemption applications and specific standards by which exemption applications are . . . evaluated.” 77 The addition of a specific and accountable decision-making body makes the process for diversion more difficult and the potential for granting many applications may thus be more limited. 78 All this benefits the credibility of the Compact. 79

However, although the Great Lakes Compact is a much greater protective measure against diversion than ever before, the historical weaknesses of the past measures to protect the waters of the Great Lakes bode ill for the reliability of this most current effort. 80 These persistent weaknesses were recognized by New York Congressman Brian Higgins, a member of the Congressional Great Lakes Task Force, after the approval of Waukesha’s diversion. 81 He instated House Bill 5538, which was passed on July 14, 2016, about a month after the diversion plan was approved, and grants $300 million to the Great Lakes Restoration Initiative Fund. 82 Poignantly and seemingly in recognition of the

Congress. Only those interstate agreements “tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States” are subject to Congressional approval. Virginia v. Tennessee, 148 U.S. 503, 519 (1893). The mere fact that the Great Lakes Compact required approval by Congress points to the political capital held by those states controlling an enormous natural resource.

76. Johnson-Karp, supra note 60, at 429–30; see also, e.g., Virginia, 148 U.S. at 504; Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 557 (1851); Boulder Canyon Project Act, ch. 42, 45 Stat. 1057 (1928) (current version at 43 U.S.C. § 617, 617(c), (g), (l) (2006)).

77. Johnson-Karp, supra note 60, at 431.

78 See id. at 432.

79 See id.

80 See Habush Sinykin & McGee, supra note 67, at 1199.

81 Press Release from Rep. Brian Higgins (N.Y.), Higgins Wins Approval for Amendment Protecting Great Lakes from Future Attempts to Divert Water, (July 14, 2016), https://higgins.house.gov/press-center/press-releases/higgins-wins-approval-for-amendment-protecting-great-lakes-from-future [https://perma.cc/2WGG-SPQX]. Higgins urged that “[g]oing forward, it will be important to ensure that the approval of this request does not set a precedent that will threaten to deplete this resource by encouraging further diversion requests that do not uphold the strict water management standards outlined in the compact.” Id. Implicit in his remarks were displeasure with the approval and lack of confidence in the Council.

82 H.B. 5538, 14th Cong. 2d Sess. Title 1, https://www.congress.gov/bill/114th-congress/house-bill/5538/text [https://perma.cc/VE84-JQYH]. The funds could be used by “the head of any Federal department or agency, with the concurrence of such head, to carry out activities that would support the Great Lakes Restoration Initiative and Great Lakes Water Quality Agreement programs, projects, or activities; to enter into an interagency agreement with the head of such Federal department
Council’s highly contested diversion approval, the bill restricts access to the Fund by those states who seek to use it “in contravention of the interstate compact regarding water resources in the Great Lakes—St. Lawrence River Basin.”

While the bill in theory “tightens up the policy to help restrict further diversions,” merely restricting access to federal funding does not in whole protect Great Lakes waters. A more comprehensive plan including revisions to state and federal policy regarding water diversions must be instituted and programs shoring up awareness, respect, and conservation of water resources must be undertaken with more seriousness. The Lakes are still vulnerable to “death by a thousand straws.” Although their waters are plentiful, they are largely non-renewable, as “less than 1% of their waters are replenished by annual precipitation” and the other 99% was deposited by the glaciers thousands of years ago. This means that if more than one percent of water is withdrawn, only the assistance of another ice age could realistically replace that which is not returned.

Regardless of their precarious hydrological position, the Lakes remain a “particularly inviting target for diversion proposals.” As the they contain an unparalleled amount of freshwater—ninety-five percent of the total freshwater in the United States and twenty percent of the world’s freshwater—diversion requests likely will continue into the foreseeable future. With Waukesha’s diversion approved, the inevitability of future diversions loom large based on the weaknesses of the Compact and its predecessors.

or agency to carry out these activities; and to make grants to governmental entities, nonprofit organizations, institutions, and individuals for planning, research, monitoring, outreach, and implementation in furtherance of the Great Lakes Restoration Initiative and the Great Lakes Water Quality Agreement.”

83. Id. § 500.
84. Higgins, supra note 81.
85. See ANNIN, supra note 11, at 12, 71.
86. Id. at 71.
88. See ANNIN, supra note 11, at 13.
89. THOMPSON ET AL., supra note 31, at 970.
90. Id.
91. See ANNIN, supra note 11, at 12 (“I don’t think the era of water diversions is over by any means,’ argues Noah Hall, a professor at Wayne State University Law School in Michigan who spent years with the National Wildlife Federation. ‘To me it’s not even a question, it’s an inevitability. You look at what’s happening to water supplies in almost every other part of the country—it used to be just the Southwest and California, but now you are seeing it in the Southeast, and the Northeast—the economics are fluid. It’s a simple supply-and-demand model.”).
III. The Federal Compact Adopted in Wisconsin

Wisconsin, along with all territories that border the Lakes—the eight states, Wisconsin, Illinois, Indiana, Michigan, Minnesota, New York, Ohio, and Pennsylvania, and two Canadian provinces, Ontario and Quebec, adopted the Compact by 2008. Congress ratified and President Bush signed the Compact into law shortly thereafter. The Compact was then incorporated and codified by the Wisconsin Legislature into section 281.343 of the Wisconsin Statutes. The incorporation is, for the most part, a faithful adaption of the Compact and moreover speaks to the process-driven implementation the Compact drafters sought to evoke in water managers at all levels.

The diversion application process in the Wisconsin adaptation largely replicates that of the Federal Compact. Applications regarding proposed exceptions to the Compact that must undergo regional review are evaluated by the Great Lakes–St. Lawrence River Basin Water Resources Council (the “Council”), which is composed of the governors of all parties. Generally, the Council is charged to “adopt and promote uniform and coordinated policies for water resources conservation and management in the basin.” Further, a regional body, which in addition to the governors includes the two premiers for Ontario and Quebec, is further “charged with oversight authority in the regional


93. After Congress ratified the Compact, there was difficulty adopting it in Wisconsin. See Dan Egan, Great Lakes Compact Hits Rough Waters, MILWAUKEE J. SENTINEL, Feb. 7, 2008, http://archive.jsonline.com/news/milwaukee/29486169.html. Particularly, challenges developed regarding the requirement that diversion approvals necessitated the unanimous consent of all eight governors. Id. To the estimation of some Wisconsin lawmakers, this unreasonably burdened Wisconsin by giving too much weight to the prohibition on diversions. Id.

94. See supra note 8 and accompanying text.


96. See Egan, supra note 95.


99. See Wis. Stat. § 281.343(4L)(a) (“Proposals for exceptions subject to council review shall be submitted by the originating party to the council for council review, and where applicable, to the regional body for concurrent review.”); Federal Compact, supra note 7, § 4.7(1).

100. See Wis. Stat. § 281.343(2)(b) (“The council shall consist of the governors of the parties, ex officio.”); Federal Compact, supra note 7, § 2.2.

101. Wis. Stat. § 281.343(3)(a)(3); see Federal Compact, supra note 7, § 3.1.
review process” that “stops short of final decision making.”

The similarities continue in the exceptions to the stringent prohibition on “all new or increased diversions” out of the Great Lakes. To temper the prohibition and meet reasonable diversion requests outside the basin, the Compact included three exceptions to this otherwise rigid embargo.

The first exception is for “straddling communities.” The straddling communities exception provides that communities outside the basin will be permitted diversions, “regardless of the volume of water transferred,” so long as “all of the water so transferred shall be used solely for public water supply purposes within the straddling community” and “[a]ll water withdrawn from the basin shall be returned, either naturally or after use, to the source watershed less an allowance for consumptive use.” A straddling community is defined as “any incorporated city, town, or the equivalent thereof, wholly within any county that lies partly or completely within the basin, whose corporate boundary existing as of the effective date of this compact is partly within the basin or partly within 2 Great Lakes watersheds.”

The second exception is for “intrabasin transfers.” An intrabasin transfer is “the transfer of water from the watershed of one of the Great Lakes into the watershed of another Great Lake.” A proposal for such a transfer will only be considered if “the proposal results from a new or increased withdrawal of less than 100,000 gallons per day average over any 90-day period, [wherein] the proposal shall be subject to management and regulation at the discretion of the originating party.” Under such management, the exception also requires that (1) “[t]he proposal shall meet the exception standard and be subject to management and regulation by the originating party, except that the water may be returned to another Great Lake watershed rather than the source watershed;”

102. Johnson-Karp, supra note 60, at 431–32; see also Wis. Stat. § 281.343(4h)(e)(9); Federal Compact, supra note 7, §§ 1.2, 4.5(5)(i).
103. Hall, supra note 31, at 1444.
105. See generally Wis. Stat. § 281.343(4n) (the diversion exceptions as adopted in Wisconsin); see also Federal Compact, supra note 7, § 4.9.
106. Wis. Stat. § 281.343(4n)(a); see Federal Compact, supra note 7, § 4.9(1).
107. Wis. Stat. § 281.343(4n)(a); see Federal Compact, supra note 7, § 4.9(1).
108. Wis. Stat. § 281.343(4n)(a); see Federal Compact, supra note 7, § 4.9(1).
109. Wis. Stat. § 281.343(4n)(a)(1); see Federal Compact, supra note 7, § 4.9(1)(a).
110. Wis. Stat. § 281.343(1e)(t); see Federal Compact, supra note 7, § 1.2.
111. Wis. Stat. § 281.343(4n)(b); see Federal Compact, supra note 7, § 4.9(2).
112. Wis. Stat. § 281.343(1e)(jm); see Federal Compact, supra note 7, § 1.2.
113. Wis. Stat. § 281.343(4n)(b)(1); see Federal Compact, supra note 7, 4.9(2)(a).
(2) “[t]he applicant shall demonstrate that there is no feasible, cost-effective, and environmentally sound water supply alternative within the Great Lake watershed to which the water will be transferred, including conservation of existing water supplies;”\textsuperscript{115} and (3) “[t]he originating party shall provide notice to the other parties prior to making any decision with respect to the proposal.”\textsuperscript{116}

The third exception is for “communit[ies] within straddling counties.”\textsuperscript{117} A community within a straddling county is “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.”\textsuperscript{118} Diversion requests to communities within straddling counties “shall be excepted from the prohibition against diversions, provided that it satisfies all of the following conditions.”\textsuperscript{119}

a. The water shall be used solely for the public water supply purposes of the community within a straddling county that is without adequate supplies of potable water;
b. The proposal meets the exception standard, maximizing the portion of water returned to the source watershed as basin water and minimizing the surface water or groundwater from outside the basin;
c. The proposal shall be subject to management and regulation by the originating party, regardless of its size;
d. There is no reasonable water supply alternative within the basin in which the community is located, including conservation of existing water supplies;
e. Caution shall be used in determining whether or not the proposal meets the conditions for this exception. This exception should not be authorized unless it can be shown that it will not endanger the integrity of the basin ecosystem;
f. The proposal undergoes regional review; and
g. The proposal is approved by the council. Council approval shall be given unless one or more council members vote to disapprove.\textsuperscript{120}

As mentioned previously, Waukesha meets the community within a straddling county exception, and is the first community completely outside of the basin to apply for a diversion.\textsuperscript{121}

\begin{footnotes}
\item 115. Wis. Stat. § 281.343(4n)(b)(2)(b); see Federal Compact, supra note 7, § 4.9(2)(b)(ii).
\item 116. Wis. Stat. § 281.343(4n)(b)(2)(c); see Federal Compact, supra note 7, § 4.9(2)(b)(iii).
\item 117. Wis. Stat. § 281.343(4n)(c); see Federal Compact, supra note 7, § 4.9(3).
\item 118. Wis. Stat. § 281.343(1e)(d) (emphasis added); see Federal Compact, supra note 7, § 1.2.
\item 119. Wis. Stat. § 281.343(4n)(c); see Federal Compact, supra note 7, § 4.9(3).
\item 120. Wis. Stat. § 281.343(4n)(c)(a)-(g); see Federal Compact, supra note 7, § 4.9(3)(a)-(g).
\item 121. David Strifling, \textit{Waukesha Diversion Approved; Focus Shifts to Potential Legal Challenges},
\end{footnotes}
Before any such diversion application can be approved, the Council would need to consider whether the community requesting the diversion met the exception standard. The exception standard requires a community requesting the diversion to fulfill stringent technical requirements. For example, a community would need to prove, among a few other standards, that no reasonable water supply alternative exists; promise that quantities withdrawn would be used only for the purposes proposed; and return all water withdrawn from the Great Lakes back to the Great Lakes, less an allowance for consumptive use. In turn, the Council would also have to seriously consider whether the diversion exception would

---

MARQ. U. L. BLOG, June 23, 2016, http://law.marquette.edu/facultyblog/2016/06/23/waukesha-diversion-approved-focus-shifts-to-potential-legal-challenges/ [https://perma.cc/X93E-6XAF]; see also supra Figure 1 (showing the location of the City of Waukesha and the basin divide).


123. WIS. STAT. § 281.343(4n)(d).

124. WIS. STAT. § 281.343(4n).

125. WIS. STAT. § 281.343(4n)(d)(1)–(3) (where waters returned are not from the Great Lakes, they must (a) “[be] part of a water supply or wastewater treatment system that combines water from inside and outside of the basin,” and (b) “[be] treated to meet applicable water quality discharge standards and to prevent the introduction of invasive species into the basin”). Waukesha laid out its compliance with these standards in its application in five volumes (Application Summary, City of Waukesha Water Supply Service Area Plan, City of Waukesha Water Conservation Plan, City of Waukesha Return Flow Plan, City of Waukesha Environmental Report for Water Supply Alternatives). DIVERSION EIS, supra note 12, at i.
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 precedential impacts of the Waukesha diversion have yet to be felt in their entirety; however, the recent request by the Great Lakes and St. Lawrence Cities Initiative (the “GLSL Cities Initiative”) for a hearing before the Council will likely provide greater insight onto the exception standard’s requirement for consideration of precedent-setting consequences.  

Hidden among these procedural and definitional similarities is an impactful inconsistency with the Federal Compact, which will remain a thorn in the side of regional water conservation management for years to come unless amended. The Wisconsin adaptation of the Compact includes in its definition of community within a straddling county the notion that any diversion to the community will extend to its entire service area. Section 281.346, entitled “after the compact takes effect,” requires that communities within straddling counties submit a diversion proposal that “is consistent with an approved water supply service area plan under s. 281.348 that covers the public water supply system.”

Herein lies the crux of issue with Waukesha. Waukesha’s diversion application is inflated to reflect of not just the City of Waukesha’s needs, but also the needs of other communities outside the municipal boundaries to which the Waukesha Water Utility extends water service. Under section 4(e), such a request is required and a subsequent diversion is valid. However, applying the language of the Federal Compact, a diversion would only extend to the boundaries of the City of Waukesha and no further. This glaring inconsistency was one hurdle Waukesha faced before the Council and the Council’s final decision approved Waukesha’s service area to the municipality itself and

128. See Wis. Stat. § 281.343(1e); see generally Federal Compact, supra note 7, § 1.2.  
131. See Approval Decision, supra note 15, § II(5)(b); infra Figure 2.  
133. See Federal Compact, supra note 7, § 1.2.
town islands, thus extending water service beyond the City’s boundaries.\textsuperscript{134} However, as Section V will illustrate, communities like Waukesha—landlocked, thirsty, and determined to divert—may do so regardless of a diversion application denial at either the state or federal level.\textsuperscript{135}

\textbf{Figure 2: Approved Diversion Area}\textsuperscript{136}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{approved_diversion_area}
\caption{Approved Diversion Area\textsuperscript{136}}
\end{figure}

\textsuperscript{134} See Approval Decision, \textit{supra} note 15, § II(5).
\textsuperscript{135} \textit{Infra} Part V.
\textsuperscript{136} Approval Decision, \textit{supra} note 15, Attachment 1.
While the Compact’s adoption in Wisconsin presents significant issues for the future, the Compact’s progressive nature deserves praise. Although hydrological principles showed, and the legislatures of various states had recognized to some degree, that groundwater and surface water are hydrologically connected in many, if not most instances, the law itself was slow to adjust. In fact, the law in many regions beyond just the Great Lakes continues to treat them as separate legal entities. However, the Compact took a progressive measure by defining water as “groundwater or surface water contained within the basin.” The Compact as so adopted by the Wisconsin Legislature went on to recognize that waters of the basin, or basin water, refers to “the Great Lakes and all streams, rivers, lakes, connecting channels, and other bodies of water, including tributary groundwater, within the basin.” This progressive declaration was one of many that hopefully will herald in a new area and approach to water law and policy.

IV. WAUKESHA’S DIVERSION APPLICATION

Waukesha’s road to a diversion was neither short, nor easy to travel. Section IV.A will review the history of Waukesha’s water use and the hurdles it jumped to ultimately receive a diversion. Section IV.B will dissect the Approval Decision as it concerns the diversion area ultimately adopted by the Council and will analyze how the vagueness in the Council’s decision leaves the Compact vulnerable.

A. History Leading Up to the Approval

The City of Waukesha rests on what once was one of the most sought after freshwater resources in the American Midwest. So famous was the “Spring City” aquifer that during the 1892 World’s Fair a riot almost erupted when a

138. Id. at 1 (“In large part, the common law doctrines governing surface and groundwater use evolved separately, with little to no recognition of the nexus between surface and groundwater within the hydrologic cycle.”).
140. WIS. STAT. § 281.343(1e)(x).
141. Id.
142. See supra section IV.A.
143. See supra section IV.B.
144. See ANNIN, supra note 11, at 240.
Chicago businessman, frustrated by failed negotiations to divert the famous waters south to the fair, sent a midnight train full of workers to steal Waukesha’s water. Today, while the aboveground city has retained its historic character, below ground, its historically pristine drinking water is a thing of the past.

The City of Waukesha is currently home to more than 71,000 residents, as well as large-scale commercial and industrial water consumers. These numbers are projected to grow and as they have grown in the past, the attendant effect has been an overdraft of Spring City’s wells, resulting in plummeting water levels and contamination of the underground aquifer. While the supply of the water has dropped significantly in the past twenty years, alarming from both an economic and ecological perspective, of more immediate concern is the contamination issue. Waukesha first informed its citizens that their drinking water was contaminated with radionuclides in 1987. The Wisconsin Department of Natural Resources issued a notice of violation to the City, advising it that the water supply was contaminated with radium at twice the federal level that same year. Radium, a carcinogen once celebrated for its luminosity and cosmetic enhancing effects, currently resides on the United

145. Id. at 241. The townspeople reacted to the oncoming heist with equal fervor, arming themselves and meeting the train as a mob. Id. The thieves never disembarked and returned to Chicago that night empty-handed and unwilling to return. Id.

146. Beyond the infamous water war, the city itself is home to numerous historic sites and has even achieved Landmark & Historic District Designation according to section 28.01 of the Waukesha Municipal Code, making its wholesome surface appearance markedly different from that which lies beneath. WAUKESHA, WIS., CODE § 28.01 (2013–2014).


149. Id. at 2.

150. ANNIN, supra note 11, at 241.

151. Id., supra note 152.


153. Hall Blog, supra note 152; see ANNIN, supra note 11, at 241–42; see generally ATSDR CDC Radium Notice, supra note 14.

States Environmental Protection Agency’s list of three groups of restricted radionuclides that appear in groundwater. The radium contamination issue, while for years increasing in seriousness, finally reached levels of such concern that in 2003 the State of Wisconsin required Waukesha to sign a consent order agreeing to take “certain interim and permanent steps to achieve compliance with state radionuclide requirements” by December 8, 2006. The EPA placed an order on the City to alleviate the problem by 2018.

The problem of radium contamination is not unique to Waukesha. As Figure 3 depicts, eighteen counties in the state of Wisconsin face some level of radium contamination. Many of these counties straddle the Great Lakes basin divide. The watershed extends furthest inland in the northernmost part of Wisconsin.


158. See infra Figure 3.

159. Of the eighteen counties indicated as having radium problems in Figure 3, seven straddle the divide. Of these seven counties, three (Racine, Waukesha, and Dodge Counties) are home to seven communities whose groundwater is contaminated with radium above the federal level. Compare infra Figure 3, with Wis. Dep’t of Nat. Res., Great Lakes Drainage Basins in Wisconsin, WDNR: GREAT LAKES, http://dnr.wi.gov/topic/greatlakes/documents/DrainageBasinsMap.pdf [https://perma.cc/2PXC-U9T7] (last visited Feb. 7, 2017) [hereinafter WDNR Great Lakes Drainage Basin Map], and Wis. Dep’t of Nat. Res., Radium in Drinking Water, PUB-008 2014, http://dnr.wi.gov/files/pdf/pubs/dg/dg0008.pdf [https://perma.cc/L5S7-5W6J] (last visited on Feb. 7, 2017). While seven is arguably a low number of communities, the amount of legal, technical, and industrial infrastructure needed to supply these communities with uncontaminated water would conservatively total more than $1.449 billion. See Don Behm, Opponents of Waukesha water diversion plan focus on service map, MILWAUKEE J. SENTINEL, July 12, 2015, http://archive.jsonline.com/news/waukesha/opponents-of-waukesha-water-diversion-plan-focus-on-service-map-99935418z1-314442901.html [https://perma.cc/N6NH-JEXX] (Waukesha estimated it would cost about $207 million to build the means of providing Great Lakes water, and the sum of $207 million multiplied by seven is $1.449 billion).
the State from the shores of Lake Michigan and Lake Superior. As the Basin extends southward, the divide ebbs and flows out from the shores of Lake Michigan, eventually receding closer and closer to the shoreline. In Kenosha County, at the boarder of Wisconsin and Illinois, the divide reaches its narrowest point in the State. There, the divide runs nearly through the direct center of the city of Kenosha. In Waukesha County, the basin divide extends to the rough line of Sunny Slope Road, west of the City of Milwaukee. This position on the basin divide fortunately provided the City of Waukesha the avenue it needed to resolve its radium problem, as it opened the possibility for a Great Lakes water diversion.

Waukesha recognized that it would not be able to comply with the Order and independently alleviate its radium contamination as 2018 approached.

160. DIVERSION EIS supra note 12, at 1.
161. Id. at 2, figure 3.3 at 32.
162. WDNR Great Lakes Drainage Basin Map, supra note 159.
163. Id.
164. See supra Figure 1.
165. See infra Section V.
166. Luczaj & Masarik, supra note 152, at 337 (“Region of the state with the majority of wells that exceed the U.S. EPA maximum containment levels (MCL) for combined Radium of 5 pCi/L (0.185 Bq/L).”).
However, the Order by the state and the EPA, coupled with the adoption of the Great Lakes Compact at a federal and state level, opened the way for Waukesha to request the help it desperately needed. Before it could apply for a diversion, Waukesha first was required to exhaust alternative source options before looking eastward toward the Lakes. This was not an impossible feat. For example, New Berlin, a community that borders the Basin and thus fitting the straddling community exception, was “the first practical application” of the Compact to be granted diversion and drew praise from numerous environmental advocates for its creative attempts to source water from elsewhere outside the basin.

It was also required to return all water withdrawn back to Lake Michigan.

Before conceding to these processes, Waukesha creatively argued that it was hydrologically unique and deserving of special consideration. In addressing the issue of return flow Waukesha argued that it was already extracting water that came directly from Lake Michigan as underground recharge. This argument was essentially purporting that Waukesha did not need a return flow plan as it in fact did not need to apply for a diversion. In ways, the argument was sensible. It took up the yoke of a long running dispute centering on the interconnected nature of ground and surface waters—a dispute that scientists, hydrologists, and the Compact drafters themselves had championed for years in the face of unchanging legislation and legal agency red tape.

And in the face of the Compact, which specifically granted Great Lakes “tributary groundwater” classification and protection, the argument was all the more supported. Nevertheless, these arguments failed to take flight and directed

---

169. See WIS. STAT. 281.343(4n)(c)(1)(d) (2013–2014) (providing that diversions are only possible where “[t]here is no reasonable water supply alternative within the basin in which the community is located, including conservation of existing water supplies”).
172. ANNIN, supra note 11, at 247.
173. Not to be discussed in detail this Comment are the issues of return flow and the conservation plan required by the compact. Waukesha has considered these requirements and provided detailed plans for both in its application and environmental impact statement.
174. ANNIN, supra note 11, at 247–49.
175. Id.
176. WIS. STAT. § 281.343(1m)(2) (“The waters of the basin are interconnected and part of a single hydrologic system.”); see Federal Compact, supra note 7, § 1.3; Weston, supra note 137, at I.
177. WIS. STAT. § 281.343(1e)(x).
Waukesha further down its path to submitting to a diversion proposal.\textsuperscript{178}

As it looked more and more certain that a diversion proposal was the only means by which Waukesha could supply uncontaminated water, Waukesha was forced to consider the headache the Compact’s conservation requirements would impose upon them.\textsuperscript{179} This headache would be considerable, especially given Waukesha’s long history of neglecting conservation practices.\textsuperscript{180} In 2005, the city took a new approach to soften its image as a water waster.\textsuperscript{181} It instituted a sprinkler limitation on individual property owners, only permitting sprinkler use two days week from May through October between the hours of 5 p.m. and 9 a.m.\textsuperscript{182} It also provided rebates for buyers of certain water-efficient toilets, created a rate structure that promoted water conservation, and engaged in community and educational outreach.\textsuperscript{183} All of these efforts were cited to on the eventual application as evidence of Waukesha’s commitment to solving its water crisis.\textsuperscript{184}

Ultimately, the immediately pressing need for uncontaminated water forced Waukesha to comply with the Compact’s diversion request processes.\textsuperscript{185} The first application was submitted in May 2010 to the Wisconsin Department of Natural Resources (“WDNR”), and a revised version was resubmitted in 2013.\textsuperscript{186} In its Conservation Plan, Waukesha designated itself as a “water conservation leader” based on the significant steps it had recently taken to protect its limited water supply.\textsuperscript{187} It also at last conceded to a return flow plan through
2016] DIVERSE FROM THE GREAT LAKES WATERSHED

the Root River. After exploring the possibility of spending $77 million on developing new wells in underground aquifers just to the west of the city, Waukesha concluded that the $42 million price tag to build a pipeline from and develop a return flow plan to the Lake was more palatable. Finally, in addressing the potential for treatment plans, the City argued that potential treatment plans were too costly and found that all alternative sources lacked longevity for the city’s anticipated growth.

On December 9, 2015, the diversion application was granted a preliminary approval by the WDNR. In its Drafted Environmental Impact Statement, the WDNR advised that (1) the city does not have a reasonable water supply alternative other than Lake Michigan; (2) “the diversion will not alter the flows or levels of the Great Lakes” because of the City’s return flow plan; and (3) the potential supply alternatives “are likely to have a greater overall adverse environmental impacts primarily due to projected impacts on wetlands and lakes.” All of these issues had been adequately demonstrated by Waukesha in its diversion application. Shortly after the WDNR approval, on January 7, 2016, the diversion application was forwarded on to the Council, which reviewed the application and gave it final approval on June 21, 2016.

B. The First Diversion Outside the Basin, Approved

The June 2016 approval was granted by a unanimous vote of the Council.

188. Many water conservationists disparaged the Root River plan, because the river itself already had its own contamination issues. Returning 8.1 million gallons a day—the amount ultimately approved in the June 2016 Approval Decision—water conservationists argued would only exacerbate an existing problem. See Approval Decision, supra note 15, § 5, 7a, 8e. Waukesha’s mayor, Shawn Riley, alternatively posited that “the wastewater returned to the Lake will be fully treated to levels that satisfy all applicable state standards. The increased flow will actually improve water quality in the river.” David Strifling, Waukesha and Racine Mayors Stake Out Opposing Positions on Water Diversion Application, MARQ. U. L. BLOG., Feb. 4, 2016, http://law.marquette.edu/facultyblog/2016/02/04/waukesha-and-racine-mayors-stake-out-opposing-positions-on-water-diversion-application/ [https://perma.cc/2WFH-R2KC].

189. Behm, Waukesha concedes it can’t meet deadline, supra note 167 (“Continued reliance on radium-tainted deep wells would require additional costly treatment to remove the contaminant as well as increasing levels of salt released from the rock layers.”).


192. DIVERSION EIS, supra note 12, at 5, 95–96.

193. See generally Application Summary, supra note 183, § 6.

194. See Approval Decision supra note 15, §§ I (4), III (1); Behm, DNR to advance Waukesha water diversion bid, supra note 191.

While in sum granting the diversion, the approval came with certain amendments and conditions on the initial request.\(^{196}\) The most obvious changes are the decrease from Waukesha’s original request for 10.1 million to 8.2 million gallons per day, and the reduction of the diversion area.\(^{197}\) Though not clearly articulated, these reductions nevertheless have significant precedential value as they set the standards for future diversions.\(^{198}\) Particularly relevant to this Comment is the reduction of the service area to only the municipal boundaries and the “town islands.”\(^{199}\)

Waukesha initially based its application on its water supply service area, thus including all areas to which its water utility provided water services.\(^{200}\) These areas included small pockets, known as “town islands,” to be absorbed into Waukesha via an intergovernmental agreement, as well as areas in the City of Pewaukee, the Town of Delafield, the Town of Genesee, and the Town of Waukesha, all to which the city provided water in limited capacities through its water utility.\(^{201}\)

 Provision of water services outside the boundaries to these outside areas was contemplated in Wisconsin’s adaptation of the Compact and its incorporation into the larger statutory scheme.\(^{202}\) While free to adopt the Federal Compact, the states had leave to make their adaptations narrower according to federal preemption principals.\(^{203}\) Nevertheless, and as discussed above in Section IV, Wisconsin’s adaptation of the Federal Compact differs significantly in its definition of “community.”\(^{204}\) Where the Federal Compact defines it narrowly as a “city, town, or equivalent thereof,” Wisconsin defines it much more broadly.\(^{205}\) Its statutes implementing the Compact procedures at section 281.346 and section 281.348 include provisions that require the diversion area to encompass the “water supply service area plan.”\(^{206}\) This broader definition

---

196. Id. § III(2).
197. Approval Decision, supra note 15, §§ I(1), II(5). See supra Figure 2.
198. See Approval Decision, supra note 15, § II(10).
199. Id. § II(5)(5b)(i–ii).
200. Id. §§ I(1), II(5); see also City of Waukesha Water Supply Service Area Plan § 3, CH2M Hill, Inc., Oct. 2013, prepared for the City of Waukesha and Submitted to the Wis. Dep’t Nat. Res. [http://www.waukeshadiversion.org/media/1646/2_city_of_waukesha_water_supply_service_area_plan.pdf](https://perma.cc/2HSA-G3GT).
201. See Approval Decision, supra note 15, §§ I(1), II(5); see also Application Summary, supra note 183, § 3.3.
204. See discussion supra Section III.
205. Federal Compact, supra note 7, § 1.2.
allowed for most of Waukesha’s service area, even that outside of its municipal boundaries, to be granted access to Lake Michigan water to be approved for a diversion by the WDNR.208 These inconsistencies seem to run afoul of the universal stated purpose of the Compact: to “facilitate consistent approaches to water management across the basin.”209

In sum, the Council based its Approval Decision on Wisconsin’s definition of community,210 and in so doing either pointedly ignored or essentially ratified Wisconsin’s violation of federal preemption principals.211 The Council mandated that “[n]o part of the Diversion of water from the Basin authorized as the Approved Diversion Amount may be used by the Originating Party or the Applicant for any territory outside of the Approved Diversion Area.”212 The Approved Diversion Area was greatly reduced from that originally requested as it extended only to “[i]ncorporated land within the boundaries of the City of Waukesha and land outside the City of Waukesha’s jurisdictional boundaries that is served with municipal water by the Applicant through the Waukesha Water Utility as of May 18, 2016.”213 Nevertheless, this area allowed Great Lakes waters to be diverted outside of those areas the Federal Compact contemplated.214

In approving the diversion to extend outside of the City of Waukesha’s municipal boundaries, the Council refuted the precedent of “[t]he highest courts of at least two states, . . . [which] have said that a water compact is federal law for purposes of the supremacy clause of the federal constitution, and thus, it supersedes inconsistent state laws.”215 Essentially, where differences emerge between a federal compact and a state’s adaptation of the same, the federal compact should prevail, even where “a compact is silent on how its terms effect

---

208. Id.
209. WIS. STAT. § 281.343 (1m)(b)(4).
211. See infra Part IV.
213. Id. § II(5)(5b)(b)(i).
214. See Approval Decision, supra note 15, § II(5)(5b)(b)(ii).
state law.”216 In its Approval Decision, the Council did not follow this established precedent.217

Additionally, the decision did not substantially articulate any clear standards regarding the definition of “community.”218 Rather, an amorphous standard emerged regarding service areas, whereby the limits of the diversion are established at the discretion of the Council.219 As a result, ambiguities and questions remain regarding the distance to which the Council would permit a diversion outside a requesting party’s boundaries and what standards those outside areas must meet in order to attain diverted waters.220

These ambiguities and questions tee up the Compact for significant legal challenges.221 Already the Council’s decision has been challenged by the Great Lakes St. Lawrence Cities Initiative, which on August 19, 2016, requested a hearing to, among other things, oppose “the service area that includes communities that are not part of the City of Waukesha.”222 These challenges may bring a more articulated standard to light, but until then, the Approval Decision has wracked the Compact with even more vulnerabilities.223 As discussed below in Section V, these vulnerabilities will reach beyond Waukesha to Kenosha’s water woes, which likely be exacerbated by the decision.224

V. KENOSHA: A LEGISLATIVE CHECK ON MUNICIPAL DIVERsIONS AND A DIRECT HIT ON THE GREAT LAKES COMPACT

The Compact’s potency is currently being tested, unacknowledged by the Compact Council.225 Very recently, the City of Kenosha attempted to limit its provision of water supply services to the newly incorporated Town of Somers.226 In response, during the summer of 2015, the Wisconsin State Legislature

216. SHERK, supra note 41 (stating that when the terms conflict or differ in a state’s adaptation of a compact, “the results [in applying the compact] are likely to be the same”); see Hall Blog, supra note 152.
217. See SHERK, supra note 41; Approval Decision, supra note 15, § II(5).
218. Compare Approval Decision, supra note 15, §§ II(1) with II(5)(5b)(i).
219. See id. § II(5); see generally Hall Blog, supra note 152.
220. See generally Approval Decision, supra note 15, § II(5); Hall Blog, supra note 152.
221. Press Release, Great Lakes St. Lawrence Cities Initiative, Cities Challenge Decision to Allow Waukesha Water Diversion—Aim to Preserve Great Lakes Regional Compact (Aug. 22, 2016) (on file with author); see also Infra Section V.
222. Press Release, Great Lakes St. Lawrence Cities Initiative, supra note 221.
223. See generally Federal Compact, supra note 7; Approval Decision, supra note 15, § III.
224. See supra Section V.
225. See Press Release, Great Lakes St. Lawrence Cities Initiative, supra note 221.
226. Meeting Minutes from Board of Water Commissioners Meeting, Charter Ordinance No. 37 by the Mayor—E lecting Not To Be Governed by the Provisions of Wis. Stat. § 66.0813(5m), and Establishing Limits on the City’s Provision of Water and Sewer Service Outside of Its Municipal Bound-
buried in the state budget bill Item 66, which limited Kenosha’s denial of said services to neighboring municipalities, and thus the newly minted Town of Somers secured a diversion of Great Lakes water to the site of a large-scale industrial development. The incorporation of the Town of Somers combined with the legal implications of Item 66 circumnavigated the procedures enacted by the Great Lakes Compact to restrict such diversions. This circumnavigation has not been widely discussed and seems an underappreciated piece of legislative fiat and municipal deception.

Section V.A will briefly explore the history of Kenosha’s water supply and the Town of Somers’ position on the basin divide. Section V.B will discuss the implications of the incorporation. Section V.C will analyze Item 66, the recent legislation strong-arming Kenosha’s water supply to Somers. Section V.D will discuss the serious, though covert, implications that Item 66 has for the vitality of the Great Lakes Compact. Last, Section V.E will weigh the counterarguments and limitations to these implications. In conclusion, this Section will demonstrate the lack of administrative oversight that should regulate...
diversions of any scale both within and without of the basin.\textsuperscript{237}

A. The Recent Incorporation of the Town and Village of Somers

Kenosha County is wedged snugly between the Wisconsin–Illinois border to the south, and Lake Michigan to the east.\textsuperscript{238} In the northern part of the county, extending at its farthest point at a little less than five miles out from the shores of Lake Michigan, lies the recently incorporated Town (to the west) and Village of Somers (to the east along Lake Michigan).\textsuperscript{239}

\textsuperscript{237} See infra Conclusion.


\textsuperscript{239} See infra Figure 5. Figure 5 shows the proposed, and subsequently adopted, boundary-lines for the Town and Village of Somers. Id. The map also shows the areas left to be absorbed by Kenosha per the original 2005 intergovernmental agreement. Id.
Figure 4: Watersheds in Kenosha County

Figure 5: Town and Village of Somers Proposed and Subsequently Adopted Boundaries

Until April of 2015, the Town and Village were a conjoined and unified municipality known as the Town of Somers. In place between the former whole Town of Somers and the City of Kenosha was the “City of Kenosha and Town of Somers Cooperative Plan Under Section 66.0307 Wisconsin Statutes” (Cooperative Plan), an intergovernmental agreement that required certain areas of Somers (“Growth Areas”) to be annexed and thus absorbed into the City of


Kenosha by 2035. The agreement contemplated the Town incorporating as a Town or Village and provided that in the event this should occur, the new municipal entities would be bound by the terms of the Cooperative Plan. Additionally, the Cooperative Plan incorporated by reference past agreements between the whole Town and the City in which the two entities agreed that the City would extend services to Town Growth Areas.

Before the contemplated annexation could occur, wealthy developers set their sights to build an industrial complex on a family farm, becoming one of the few large-scale industrial developments in the Town. The site, at the intersection of Highways H and S, was a little less than a mile from the basin divide and wholly within the watershed. Suddenly, events were put into motion that would chip away at the integrity of the agreement. Shortly after the proposal occurred, Somers applied for an incorporation application to cut the town in two and in effect force the City of Kenosha to serve water to the new Town and Village of Somers at low costs for the municipalities.

Today, the remnant Town is split by the basin divide, as the “[f]ar western portions of Somers, lie[s] west of the sub-continental divide . . . and drain[s] . . . ultimately to the Mississippi River.” In contrast, the Village is


244. Cooperative Plan, supra note 243.

245. Id. § 18.

246. See Kobza, supra note 229; see also Brines Kreuser supra note 227.

247. See supra Figure 5 (the basin divide is at 100th Avenue, and the site is just east of this at the intersection of 88th and 38th Streets).

248. These events were precipitated by the pressing urges of the wealthy developers who sought water services to a new industrial development proposed in the middle part of the town. See Kobza, supra note 229, § 3; Terry Flores, Council OKs 38th Street rezoning, Residents object, say they’re being shut out by developer, KENOSHA NOW, Jan. 20, 2016, http://www.kenoshanews.com/news/council_oks_38th_street_rezoning_486234077.php. It seems that Kenosha saw this development as a threat to the intergovernmental agreement in place between itself and the Town and denied the extension to the development. In an effort to avoid Kenosha’s limitation, the Town incorporated the new Village and succeeding in seeking legislation via Item 66 to allow the development to continue.


directly adjacent to Lake Michigan and as it “lies entirely east of the sub-continental divide that separates the Great Lakes basin from the Mississippi River basin . . . [all of its important waterways] drain . . . ultimately into Lake Michigan.”

The geological positions of the Town and Village are unique in that they each could individually be afforded diversions: the Town is within a “straddling county,” per either the Wisconsin or Federal Compact, and the Village lies entirely within the watershed. However, these boundaries only became effective on April 24, 2015, and before their enactment, Somers was a municipality to which any new diversions would have been subject to Compact diversion procedures.

Though nominally different, the two municipal entities remain largely one-in-the-same. For example, at the time of reincorporation, the Town and Village were set to “develop [another] intergovernmental agreement that provides specifics regarding future service sharing (fire & rescue, public works including sewer and water utilities, garbage and recycling, employees, etc.), regulatory control, and municipal boundaries, among other issues that will arise between the Town and Village.” Of these shared services, the shared sewer and water utilities ultimately came from the City of Kenosha. While the “Town of Somers Water Utility purchases water on a wholesale basis from the City of Kenosha,” “the Village located along the Lake Michigan shoreline [is] served directly [by] the Kenosha Water Utility.” Notably, some Town of Somers residents receive water from individual wells, implying that the Kenosha water utility service is not the only practicable means of supplying water. Outside of individual wells, the two municipal entities receive 31 million gallons of Lake Michigan water per year from Kenosha. This sum may require Compact compliance; however, the incorporation of the Village effectively rendered
such compliance inapplicable. The Town, on the other hand, may lack certain Compact requirements.

B. The Implications of the Incorporation

The incorporation of the Town and Village events circumnavigated the Compact’s procedures and effectively prove the existence of unregulated diversions. The reincorporation of the Village of Somers rendered it completely independent of the landlocked Town of Somers. The secondary effect of the reincorporation was to make the Village Compact-compliant as it now lies entirely within the basin and automatically is exempt from diversion request procedures. Such gerrymandering of municipal boundaries is not barred by the Compact at either a state or federal level. The Wisconsin Compact at section 281.346(2)(d) provides that a “county’s boundaries as of December 13, 2005, shall be used to determine whether a county lies partly within the Great Lakes basin.” No similar provision exists to permanently establish municipal or “community” boundaries, and indeed it seems unmanageable to restrict towns, cities, or the equivalent thereof from expanding their boundaries to service citizens as they grow in population. This implies that Waukesha too could have reincorporated either (a) to annex and thus include the municipalities that received its water services or, though admittedly implausibly, (b) to reincorporate and include portions of land that extended over the basin divide to effectively make itself more diversion-eligible.

This secondary effect is not to be understated for two reasons. Firstly, in

261. See Kobza, supra note 229, § 3; WIS. STAT. § 281.346(3)(a)1.
262. Infra Section V.B.
263. See Kobza, supra note 229, § 3.
264. See supra Figure 5; VILLAGE OF SOMERS CERTIFICATE OF INCORPORATION, supra note 249.
265. See supra Figure 5.
268. See id. § 281.343(1e)(t) (“‘Straddling community’ means any incorporated city, town, or the equivalent thereof, wholly within any county that lies partly or completely within the basin, whose corporate boundary existing as of the effective date of this compact is partly within the basin or partly within 2 Great Lakes watersheds.”).
269. The City of Waukesha is a poor example of a town that could incorporate a portion of land outside the basin to render itself compact compliant because it is quite far from the basin divide and it already satisfies another compact exception. See supra Section IV.
rendering the Village compliant, the Somers municipalities saved their taxpayers significant time, money, and outside resources. Where Somers spent about a year getting Lake Michigan water to the industrial complex development, Waukesha spent over twenty years and millions of dollars on researching, developing, and eventually lobbying for a Compact Diversion. Secondly, and more pointedly, the incorporation of the Town and Village reveal a means to circumnavigate the Compact through annexation or reincorporation of other towns, cities, or the equivalent thereof.

While the Village was made Compact-compliant, the Town was not rendered so fortunate. As it remained a “straddling community,” any new or increased diversions to it would be subject to a diversion proposal and subsequent approval by the Council according the exception standard, “regardless of the volume of water transferred.” As previously mentioned, the expense of such a process is incredible; however, both process and expenses imposed by the Compact were avoided by the enactment of Item 66.

C. Enacting Item 66

Further damage to the Compact’s potency occurred in June of 2015 “during a secretive, last-minute stage of the budget process,” wherein the Wisconsin Legislature passed and the Governor Scott Walker signed Item 66. Enactment of Item 66 was prompted by the development of the industrial site along Highways H and S. During the development planning stages, Kenosha initially offered to provide the site with water and sewage services in exchange for the annexation of the area to supplement those areas which were to be annexed in accordance with the Cooperative Plan between the Town and City. However, Somers refused and Kenosha in turn denied the extension of water

270. As Representative Samantha Kerkman of Salem put it, “Somers doesn’t have to run laterals from other places. It will save taxpayers millions of dollars.” Brines Kreuser, supra note 227.

271. See supra Section V.A.

272. See generally Kobza, supra note 229, § 3.

273. See generally Profile of Village and Town, supra note 250.


275. infra Section V.C.


278. Kobza, supra note 229, § 3 (“An existing water and sewer agreement between Kenosha and Somers requires Kenosha to provide water and sewer service anywhere in Somers provided service is taken at certain specified master-meter locations. However, there apparently was interest from a developer or property-owner in the Town of Somers in obtaining service at a different location. Rather than seeking to negotiate a revision to the existing water and sewer agreement to allow service at this other location, legislation was sought and obtained to override the agreement.”).

279. See Brines, supra note 198; see also Cooperative Plan, supra note 243, § 19.
utility services to the new development.\textsuperscript{280} Shortly after this refusal, Item 66 became law.\textsuperscript{281}

Applying exclusively to Kenosha County,\textsuperscript{282} Item 66 ultimately limits Kenosha County’s ability to deny the extension of municipal water access to neighboring municipalities.\textsuperscript{283} The statute provides that these neighboring municipalities may request the extension of water or sewer service from another municipality in that county that owns and operates a water or sewer utility if the request for service is for an area that, on the date of the request, does not receive water or sewer service from any public utility or municipality and the municipality requesting the service contains an area that, on the date of the request, receives water or sewer service from the water or sewer utility owned and operated by the other municipality.\textsuperscript{284}

The neighboring municipalities’ ability to demand water service is an incredibly powerful one, while Kenosha’s ability to limit service is extremely confined.\textsuperscript{285} The only means by which Kenosha may deny service is if “the utility does not have sufficient capacity to serve the area that is the subject of the request or if the request would have a significant adverse effect on the utility.”\textsuperscript{286}

Since Kenosha draws its waters from Lake Michigan,\textsuperscript{287} the supply is virtually unlimited and unencumbered, and thus a denial of an extension to its neighbors under a claim of incapacity seems virtually unavailable.\textsuperscript{288} More likely is a claim that the Kenosha water utility suffers a significant adverse impact in complying with Item 66, because in so doing it violates the Compact.\textsuperscript{289} The Town, as a straddling community, is required to follow the diversion procedures when any newly proposed diversion to it would result in withdrawals

\begin{itemize}
\item \textsuperscript{280} See Brines Kreuser, \textit{supra} note 227.
\item \textsuperscript{281} Id.
\item \textsuperscript{282} Id. Although the statute did not specifically mention Kenosha County, as Kenosha is the only “county bordered by Lake Michigan and the state of Illinois,” the implication that the legislature refers to Kenosha County cannot be refuted. See Wis. Stat. Ann. § 66.0813(5m)(b).
\item \textsuperscript{283} See Wis. Stat. Ann. § 66.0813(5m); Brines Kreuser, \textit{supra} note 227 (“The city of Kenosha holds a lot of the cards over the years and this levels the playing field,” [Representative Samantha] Kerkman said. “Somers doesn’t have to run laterals from other places. It will save taxpayers millions of dollars.”).\textsuperscript{284} Wis. Stat. Ann. § 66.0813(5m)(b).
\item \textsuperscript{285} See generally id.
\item \textsuperscript{286} Id. (emphasis added).
\item \textsuperscript{287} Kenosha, Wis., Ordinance No. 28-10, \textit{Comprehensive Plan for the City of Kenosha: 2035, supra note 240, § 3.}
\item \textsuperscript{288} See Annin, \textit{supra} note 11, at 244.
\item \textsuperscript{289} See Wis. Stat. § 281.343(4n) (2013–2014); see generally Kobza \textit{supra} note 229, § 3.
\end{itemize}
in excess of 100,000 gallons a day.\footnote{290} The Town and the Village already use 31 million gallons of water a year from the Kenosha Water Utility.\footnote{291} It thus is reasonable to assume that the increased diversions to the Town for the industrial development would likely use a supply in excess of the 100,000-gallon-per-day minimum. Since no compliance with the Compact procedures has been implemented, Somers and the Kenosha water utility are in violation of its requirements.\footnote{292} Violations of the compact could result in a hearing before the Council or even litigation.\footnote{293} The impending litigation to be contemplated in the GLSL Cities Initiative hearing before the Council is an example of the Compact’s conflict resolution procedures in action and in effect poses a significant adverse impact for the parties involved in terms of liability and litigation expenses.\footnote{294}

However, this liability and the attendant adverse impact are uncertain.\footnote{295} The Town and Village could counter by claiming that their payment for services balances out the adverse impact of diversions—though this is a weak claim; payment does not dispel litigation. Regardless of these claims, Item 66 nevertheless weighs heavily in favor of granting requests, and although it sets up measures for Kenosha to deny these requests, these measures are untested and thus uncertain.\footnote{296}

Before being passed into law, Item 66 was met with strong opposition by not just the Kenosha County municipal water utility, but also by numerous water protection groups and municipal support groups.\footnote{297} In a memorandum to the Wisconsin State Legislature, the Wisconsin Rural Water Association, League of Wisconsin Municipalities, Municipal Environmental Group-Water, and Wisconsin Water Association, as representatives of “virtually every community, water, and wastewater utility in the state of Wisconsin” vehemently urged the legislature to reject Item 66.\footnote{298} They argued that granting “one municipality [the power] to in essence force another municipality to extend water and sewer services is ill-conceived, short-sighted public policy that will have

\footnotesize{\begin{itemize}
\item \footnote{290}{Wis. Stat. § 281.343(4n)(a)(2).}
\item \footnote{291}{Profile of Village and Town, supra note 250.}
\item \footnote{292}{See Wis. Stat. § 281.343(4n)(a)(2).}
\item \footnote{293}{See Wis. Stat. § 281.93 (2013–2014); see also Wis. Stat. § 281.95 (2013–2014).}
\item \footnote{294}{Request for Hearing Letter, Great Lakes and St. Lawrence Cities Initiative, supra note 127.}
\item \footnote{295}{See generally Memorandum from Wisconsin Rural Water Association, et. al. to Members, Wisconsin Legislature, Remove Budget Provision on Extension of Water and Sewer Service between Municipalities (July 6, 2015), http://www.lwm.info/DocumentCenter/View/45[https://perma.cc/RF9A-ECJC]; Kobza, supra note 229, § 3.}
\item \footnote{296}{See generally Memorandum from Wisconsin Rural Water Association, supra note 295.}
\item \footnote{297}{See id.}
\item \footnote{298}{Id.}
\end{itemize}}
2016]  

**DIVERSIONS FROM THE GREAT LAKES WATERSHED**  

significant adverse financial, health and other impacts.”  

Imperatively, “provision 66 supersedes any ordinance or agreement relating to shared services currently in effect, thereby, preempting previously negotiated boundary agreements and water and sewer agreements.”

Before Item 66 was even signed into effect, the Kenosha Board of Water Commissioners put to vote whether or not to be governed by the soon to be enacted legislation. In a charter issued before the City Council by the Mayor of the City of Kenosha on February 16, 2015, the Council unanimously voted not to be governed by the provisions of Item 66 and thereby established limits on the city’s delivery of water services to neighboring municipalities. This motion seems to place Item 66 in the position of a paper tiger, much like the Charter, although the ability of a municipality to refuse to follow state law is uncertain.

**D. The Implications of Item 66**

The codification of Item 66 at section 66.0813(5m) gives it the teeth the Charter lacked and expands its implications beyond the boundaries of Kenosha. Where many items that pass through the budget do not have the force of law, by codifying Item 66, the Wisconsin legislature essentially provided Somers a cause of action and enforcement power should Kenosha refuse to abide by it. Additionally, it opened the possibility of Item 66 being scrubbed of its geographical limits and expanding its reach to other communities. A further possibility remains that similar legislation could be passed in other basin states permitting Great Lakes water to be serviced to communities outside the basin. These possibilities echo the spirit of the Wisconsin Rural Water Association memorandum, which urged that Item 66 could have far-reaching consequences if approved.

Like the precedential impact of the permitting of the Waukesha diversion, the precedential value of Item 66’s enactment broaches a variety of issues.

---

299. Id.
300. Id. (emphasis omitted).
301. Meeting Minutes from Board of Water Commissioners Meeting, supra note 226.
302. Id. The charter was moved by Commissioner Juliana, seconded by Commissioner Gordon to approve, and subsequently passed by a 5-0 vote. Id.
303. See WIS. STAT. ANN. § 66.0813(5m) (West Supp. 2015).
304. See generally WIS. STAT. ANN. § 66.0813(5m); Memorandum from Wisconsin Rural Water Association, supra note 295.
305. See Memorandum from Wisconsin Rural Water Association, supra note 295.
306. Id.; see Kobza, supra note 229, § 3; Strifling, Waukesha and Racine Mayors Stake Out Opposing Positions, supra note 188.
307. See Memorandum from Wisconsin Rural Water Association, supra note 295.
308. Id.
First and foremost, if the terms of a negotiated agreement between two governmental bodies can be so easily overridden by legislation, the binding nature and magnitude of all intergovernmental agreements, here particularly the Great Lakes Compact, is called into question.  

Second, the Council’s interpretation of “community” and Approved Diversion Area—meaning the limited areas of the City of Waukesha and its town islands—does not altogether bar Waukesha’s entire service area from access to Great Lakes water.  

As Item 66 demonstrates, a town in a straddling community, and thus requiring compact adherence, can nevertheless lobby its legislature and demand access to Great Lakes water from its suppliers.  

Thus, if such legislation were to be passed regarding Waukesha, the neighboring municipalities of Pewaukee, Genesee, Delafield, and the Town of Waukesha, to which Waukesha provides water services, could access the Great Lakes Water.  

Third, the incorporation acted as a sort of utility service area redistricting akin to the much-litigated issue of legislative redistricting and showed that towns outside the basin, like the Town of Somers, can easily get Great Lakes water.  

Finally, although the Compact makes exceptions from the diversion prohibition for preexisting diversions, it does not afford the same courtesy to newly created diversions through legislative mandate.  

Thus, new diversions approved by Item 66 would nevertheless require Compact compliance.  

As these steps have not been contemplated by the Town of Somers, nor even by the City of Kenosha, it appears again that Item 66 has supplanted the Compact’s rigorous procedural requirements.  

For these reasons, it seems that Item 66 is in serious jeopardy of both violating the Compact and subjecting it to startling vulnerability.  

E. The Limits of these Implications  

As explained above, the incorporation of the Town and Village of Somers and Item 66 circumvent the Compact as they each allow a diversion to a community outside the basin.  

Per the Wisconsin and the Federal Compact, “[a]ll  

---  

309. See Kobza, supra note 229, § 3.
310. See Approval Decision, supra note 15, § II(5)(b)(ii).
311. See Kobza, supra note 229, § 3.
312. See Memorandum from Wisconsin Rural Water Association, supra note 295.
313. See generally Approval Decision, supra note 15, § II.
315. See WIS. STAT. § 281.343(4n).
316. See generally WIS. STAT. § 281.343(4n).
317. See supra Section V.D.
new or increased diversions are prohibited.\textsuperscript{318} A “[n]ew or increased diversion” means a new diversion, an increase in an existing diversion, or the alteration of an existing withdrawal so that it becomes a diversion.\textsuperscript{319} The measures undertaken in Somers increased an existing diversion of Great Lakes water and at least in theory should subject the Town to Compact procedures.\textsuperscript{320}

However, implications from the approval of Waukesha’s diversion could potentially limit the potency of such observations on Kenosha’s water woes.\textsuperscript{321} The Town of Somers, although entirely outside of the basin, nevertheless could in theory successfully apply for a diversion pursuant to the requirements of a community in a straddling county.\textsuperscript{322} And if it does so successfully, it could be afforded access to Lake Michigan water no matter the objections of the City of Kenosha, thus rendering these observations moot.\textsuperscript{323} It is also entirely possible that the Town would not need a diversion permit if its newly proposed water use would not exceed 100,000 gallons a day.\textsuperscript{324}

Additionally, unlike Waukesha, Kenosha has no foreseeable need to supply neighboring municipalities—the sole exception being the Town of Somers.\textsuperscript{325} Perhaps the legislature in some way saw Item 66 as a remedial measure for a small town that could not otherwise afford to provide its citizens with the infrastructure they deserved.\textsuperscript{326} In approving Item 66, the legislature granted a small exception, and thus it may be unlikely that Item 66 would ever apply to other Wisconsin communities.\textsuperscript{327}

All these limitations on this Comment’s argument could give back to the Compact the influence it very rightly deserves.\textsuperscript{328} Yet the limitations are only potential ones, and the very existence of this Comment shows the reality of the Compact’s weaknesses and vulnerabilities. At the very least, the implications of a town that straddles the basin divide accessing the waters without Compact Council approval should give any water conservationist or legal expert—or indeed any resident of the Great Lakes region—pause.\textsuperscript{329}

\textsuperscript{318} WIS. STAT. § 281.343(4m). \textit{See} Federal Compact, supra note 7, § 3.8.
\textsuperscript{319} WIS. STAT. § 281.343(1e)(km).
\textsuperscript{320} WIS. STAT. § 281.343(4h).
\textsuperscript{321} \textit{See supra} Section V.A.
\textsuperscript{322} WIS. STAT. § 281.343(4n)(a).
\textsuperscript{323} However, such an option comes at a considerably greater expense to Somers, which would be responsible for the water management and the return flow. As such, the option is both unattractive and unlikely.
\textsuperscript{324} WIS. STAT. § 281.343(4n)(a)(2).
\textsuperscript{325} \textit{See generally} Memorandum from Wisconsin Rural Water Association, supra note 295.
\textsuperscript{326} \textit{See Memorandum from Wisconsin Rural Water Association, supra note 295.}
\textsuperscript{327} \textit{Id.}
\textsuperscript{328} \textit{See supra} Sections IV, V.
\textsuperscript{329} \textit{See} Kobza, supra note 229, § 3.
VI. CONCLUSION

While “the Waukesha case has been a striking demonstration that the process set up under the Compact works, no matter what one’s position on the outcome,” the water diversions into Somers equally demonstrates that the Compact is not universally applied where necessary.330 Indeed, in its apparent disregard for intergovernmental agreements, Item 66 seriously calls into question the binding nature of the Great Lakes Compact.331 Couple Item 66’s success in diverting Compact procedure with Waukesha’s precedential success in the issuance of a Compact diversion, and the United States could face an unprecedented threat to the environmental sanctity and the economic vitality of the Great Lakes region.332 While one such diversion is seemingly inconsequential, the refreshed potential to send water outside the basin is nevertheless disconcerting.333

While Waukesha’s immediate water woes likely will be solved by the 2016 diversion, the Approval Decision’s vagueness leaves uncertain certain standards required for a diversion.334 Equally uncertain is the immediate future for Kenosha’s ability to limit water service.335 Additionally and in general, issues remain regarding whether in approving the diversion the Wisconsin DNR violated its duties as trustee under the public trust doctrine, a doctrine which requires that the state preserve for its people the quality and quantity of water available.336 Similar issues are unresolved about whether granting to a municipality power over a large chunk of water is a similar abdication of the public trust.337 Finally, the application of federal preemption principles remains untested.338

As this Comment discussed, the historic weakness of federal water protection measures, the approval of the Waukesha diversion, and ultimately the Wisconsin legislature’s circumvention around the Compact all show that while the Great Lakes Compact is a progressive step, it remains a weak protection for the

330. Strifling, Waukesha Diversion Approved, supra note 121.
331. See Kobza, supra note 229, § 3.
332. The Great Lakes region’s economy “is a $2 trillion juggernaut.” ANNIN, supra note 11, at 53.
333. See supra note 125 and accompanying text.
334. Supra Section IV.B.
335. Supra Section V.
336. Johnson-Karp, supra note 60, at 416 n.4 (“Wisconsin’s parallel enactment of Compact, including provisions that nothing in Wisconsin’s enactment of the Compact ‘may be interpreted to change the application of the public trust doctrine under article IX, section 1, of the Wisconsin Constitution or to create any new public trust rights.’ Wis. Stat. § 281.343(1),”).
337. See, e.g., Melissa K. Scanlan, Implementing the Public Trust Doctrine: A Lakeside View into the Trustees’ World, 39 ECOLOGY L.Q. 123, 156 (2012).
338. Supra Section IV.B.
county’s most obvious, though least appreciated resource. 339 It is notable that in a 2016 survey conducted by the Marquette University Law School Poll, only fourteen percent of participants had ever heard of a contamination issue in their communities, and only forty-one percent expressed any level of concern about water safety in their communities. 340 These statistics seem to show, if not a lack of concern, at least a lack of understanding about the source from which an individual’s water is derived. At the conclusion of all these observations, one can turn again to David Foster Wallace’s fish allegory and “wonder if we’re like David Foster Wallace’s fish: surrounded by water, yet somehow unable to appreciate its existence.”341

CHRISTINA L. WABISZEWSKI*

339. Supra Sections IV, V.


* J.D., 2017, Marquette University Law School; B.A., 2013, Marquette University. This article is for my father, whose decency, humility, faith and character have made me the person I am today. Without him, this article would never have been written. Thank you, dad.