
IRRIGATING INDUSTRY: IS THE GREAT LAKES COMPACT BEING
DROWNED FOR INDUSTRIAL GAIN?

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The Great Lakes region has a long history of protecting the freshwater contained in the five lakes that give the eight-state region its name. The Great Lakes Compact, a binding agreement ratified in 2008 that establishes a specific system for controlling water withdrawals outside the confines of the Great Lakes Basin, is the most recent method of protection. This Note argues that the Compact needs to be strengthened given recent threats to its power, particularly after Wisconsin's approval of a seven million-gallon-per-day water diversion outside of the Basin for use by the newly constructed Foxconn manufacturing facility. In doing so, this Note explores the history of water regulation in the region, including the specific history of diversion requests outside the Basin. The Great Lakes Compact establishes a strong system for water regulation, but it must be updated to effectively join the Great Lakes states together as they work to ensure the continued vitality of the natural resource so central to the region.

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I. INTRODUCTION

Tom Gustafson didn't know he was living on top of what could become one of the Twenty-First Century's most contentious dividing lines the day a *Milwaukee Journal Sentinel* reporter knocked on his door.¹ Gustafson, a retired schoolteacher, was living in an unremarkable new subdivision in a Milwaukee, Wisconsin suburb thirty miles west of Lake Michigan at the time of the visit.² The importance of where Gustafson lived quickly became clear as the reporter explained that Gustafson's property in the subdivision lay just beyond the man-made boundary line determining who can access Great Lakes water and who, quite literally, could be hung out to dry if water scarcity hits a community.³

Gustafson's property is located in Walworth County, which lies outside an area known as the Great Lakes Basin ("the Basin")—the geographic zone in which water on land will return to the Great Lakes over time.⁴ That means that rainfall within Walworth County does not run east toward Lake Michigan and the Great Lakes system but instead flows west toward the Mississippi River.⁵ Gustafson's next door neighbor to the east lives in Waukesha County, which includes a slice of the Basin.⁶ That slice diverts its rainfall into Lake Michigan.⁷ Gustafson's property makes his subdivision ineligible to use Great Lakes water under a 2008 agreement known as the Great Lakes Compact ("the Compact").⁸ The subdivision is ineligible under the Compact because Great Lakes water pumped to his yard would flow to the Mississippi River and disappear from the Basin, contributing in whatever small way to the depletion of the Great Lakes watershed.⁹ That means his village, given its location, loses out on access to the

1. DAN EGAN, *THE DEATH AND LIFE OF THE GREAT LAKES* 249 (2017) ("To date, this line remains for most people out of sight and out of mind, even the mind of retired schoolteacher Tom Gustafson. . . . When I knocked on his door one gray day to talk about the border he lives just beyond . . . Gustafson confessed he had no idea he was living almost on top of what could become one of the 21st century's most contentious dividing lines, the manmade one that separates those who have access to the most expansive pool of freshwater on the planet and those who don't.").

2. *Id.*

3. *Id.*

4. *Id.*

5. *See id.* at 248–49.

6. *Id.* at 249.

7. *See id.* at 248–49.

8. *See generally* Great Lakes—St. Lawrence River Basin Water Resources Compact, 110 Pub. L. 342, 122 Stat. 3739 (2008) [hereinafter Great Lakes Compact].

9. *See id.*

most expansive pool of freshwater on the planet and has to look elsewhere for its water needs.¹⁰

Gustafson's situation in the water-rich Great Lakes region is just one piece of the evolving discussion over the history of the Great Lakes. That history includes the various ways in which humans have threatened and continue to threaten the lakes' ongoing health, an issue to which the reporter who visited him, Dan Egan, devoted an entire book.¹¹ The potential need to divert water to Gustafson's subdivision might seem like a small anomaly of urban planning, but it portends a larger problem currently facing those communities ringing the Great Lakes. The communities themselves might not only need access to the water in the future, but water-starved areas of the country and world may look to the Great Lakes for future water needs. This is a possibility that residents of the region have long feared may become a reality, even if it involves large-scale, costly efforts to divert the water away from the Great Lakes.¹²

As a matter of consistency, throughout this Note, "diversions" and discussions of efforts to divert water refer to the act of moving Great Lakes water outside of the Basin.¹³

Gustafson's property is also unique in that it lies in the particularly problem-prone southwest corner of the Great Lakes Basin that includes the suburban sprawl of Chicago and Milwaukee.¹⁴ A view of the map of the Basin shows that nowhere else in the entire region does the Basin border come so close to the lakes themselves.¹⁵ The Basin boundary line appears to overlap with Lake Michigan's shoreline as it descends south through Wisconsin and into northern Illinois,¹⁶ extending past the shoreline fewer than five miles in some stretches.¹⁷ The problems in the southwest corner come from the highly concentrated population in the region that would like Great Lakes water to sustain itself but is limited in its ability to get it because of the Basin line.¹⁸ "[I]t is in this slender slice of the watershed—where the shoreline is closest to the Basin line—that regional water

10. *Id.* at 249 ("Gustafson confessed he had no idea he was living almost on top of what could become one of the 21st century's most contentious dividing lines, the manmade one that separates those who have access to the most expansive pool of freshwater on the planet, and those who don't.").

11. *See id.* at xiv, 249 ("The story . . . illuminates an ongoing and unparalleled ecological unraveling of what is arguably North America's most precious natural resource. It's about how the Great Lakes were resuscitated after a century's worth of industrial abuse only to be hit with an even more vexing environmental catastrophe.").

12. *See* PETER ANNIN, *THE GREAT LAKES WATER WARS* 12 (Island Press rev. ed. 2018) ("For decades, Canadians and Americans in the Great Lakes Basin have feared that the thirsty will come calling. . . . [D]iverting water over long distances is very, very expensive.").

13. *See* Great Lakes Compact, *supra* note 8, at 3740.

14. *See id.* at 300 ("Along the southern rim of the Great Lakes Basin, water skirmishes are expected to be a regular feature of the future—and that will be particularly true in places like the southwest shore of Lake Michigan, where the edge of the Basin lies closest to the shoreline.").

15. Great Lakes–St. Lawrence River Basin Water Resources Council, *The Great Lakes Basin*, <http://www.glscompactcouncil.org/Docs/Misc/GLBasinMap.pdf> [hereinafter *The Great Lakes Basin*].

16. *Id.*

17. ANNIN, *supra* note 12, at 273; *The Great Lakes Basin*, *supra* note 15.

18. *See* ANNIN, *supra* note 12, at 273.

tensions are highest,” leading some to call the area “the front line in the Great Lakes Water War.”¹⁹

Part of the tensions stem from business and industry’s desire to move into the Great Lakes region to take advantage of the region’s large population and proximity to fresh water.²⁰ Great Lakes water already nourishes millions of people in cities from the Midwest to the East Coast, including Chicago, Cleveland, Detroit, Montreal, and Toronto.²¹ It is essential to the operation of industries, power plants, hydro facilities, and farms across the region.²² In fact, if the Great Lakes region were its own country, including both the U.S. and Canadian sides of the lakes, the country would boast a \$6 trillion economy and rank third in the world.²³ That pre-existing economic base makes the area even more attractive to business and industry.²⁴ But the push for economic growth can cause problems when it is pitted against citizens’ concerns for water pollution and overuse, as well as against water diversion standards like the Compact that restrict access to the water that has helped to make the area so prosperous.²⁵

One example of tensions that can arise when new industry tries to make a home in the region is the decision of Taiwan-based electronics manufacturer, Foxconn Technology Group, to build a twenty-million-square-foot liquid-crystal-display (“LCD”) manufacturing complex in southeastern Wisconsin.²⁶ The complex, located in Mount Pleasant, Wisconsin between Milwaukee and the northern border of Illinois, received Wisconsin’s approval to divert up to seven million gallons of Great Lakes water per day as part of its operations in the area.²⁷ Access to Great Lakes water was a key part of the company’s decision to pick the Mount Pleasant location.²⁸

As part of its bid to get the electronics giant to choose Mount Pleasant, the state of Wisconsin announced it would give Foxconn a \$3 billion incentives package that includes economic incentives primarily in the form of tax breaks²⁹

19. *Id.*

20. *See, e.g.*, Scott Gordon, *How Foxconn Can Turn on the Faucet in Mount Pleasant*, WISCONTEXT (Oct. 4, 2017, 11:35 AM), <https://www.wiscontext.org/how-foxconn-can-turn-faucet-mount-pleasant> [hereinafter Gordon, *How Foxconn Can Turn on the Faucet*].

21. ANNIN, *supra* note 12, at 16, 18.

22. *Id.*

23. Jeff Desjardins, *If the Great Lakes Region Were a Country, It Would Have the Third Largest Economy in the World*, BUS. INSIDER (Aug. 20, 2017, 6:05 AM), <https://www.businessinsider.com/great-lakes-region-economy-infographic-2017-8>.

24. *See generally id.*

25. *See, e.g.*, Gordon, *How Foxconn Can Turn on the Faucet*, *supra* note 20.

26. *Id.*

27. Wis. Dep’t. of Nat. Res., *Findings of Fact Conclusions of Law and Diversion Approval 5* (Apr. 2018), <https://dnr.wi.gov/topic/WaterUse/documents/Racine/RacineDiversionApproval20180425.pdf>.

28. Gordon, *How Foxconn Can Turn on the Faucet*, *supra* note 20 (“As Taiwan-based electronics manufacturer Foxconn scouted out potential locations for a LCD manufacturing complex in southeastern Wisconsin—eventually selecting a site in Mount Pleasant that’s 20 millions square feet in size—the company was also thinking about water.”).

29. Scott Gordon, *Wisconsin Enters New Territory With \$3 Billion Foxconn Deal: Two Economic Development Observers Kick the Tires of Proposed Incentives Package*, WISCONTEXT (Aug. 4, 2017, 10:00 AM), <https://www.wiscontext.org/wisconsin-enters-new-territory-3-billion-foxconn-deal>.

and environmental policy incentives in the form of exemptions from many state environmental requirements.³⁰ The environmental incentives allow Foxconn to build its facility without submitting an environmental impact statement to the state as well as allowing the company to alter wetlands and streams in the area without the need to obtain environmental permits to do so.³¹ Wisconsin's incentives package and approval of Foxconn's plan to divert millions of gallons of Lake Michigan water per day have put environmental groups, and others within the Midwest, on the defensive.³²

Those opposing the diversion have raised two major concerns—namely, that Foxconn is a private company and that its Mount Pleasant location puts it partially outside the Basin, which risks water loss from the Great Lakes water system.³³

The land that Foxconn is building on straddles the Basin line such that “flat screens may end up starting the assembly process in the Mississippi River watershed, with the finished product exiting the other end of the sprawling campus in the Great Lakes Basin.”³⁴ The Compact allows such a diversion to an area outside the Basin under what is called a “Straddling Community” exception.³⁵ But Foxconn has to rely on local water utilities to make the request on its behalf because the company is a private entity and private entities cannot make diversion requests under the Compact.³⁶ That reliance calls into question just how far private entities can go to pump Great Lakes water outside the Basin. Further, it directly implicates the Compact and its mission to oversee water withdrawals. The Foxconn proposal highlights the vagueness of the Compact's requirement that water be diverted for public use. It should also draw attention to the potential issue that can arise under the Compact when a state with strong economic and political conflicts of interest in approving a Great Lakes water diversion has near unilateral ability to approve the diversion.

This Note centers on the experiences the Great Lakes states have had in controlling water diversions both before and after formally adopting the Compact in 2008. It also explores how those experiences have highlighted areas where the Compact must get stronger to confront potential problems from companies like Foxconn that seek to siphon water for private use in exchange for what the companies promise will be large gains in the economic vitality of the surrounding region.³⁷ This Note argues that the Compact has to be strengthened through a

30. *Id.*

31. Scott Gordon, *Environmental Exemptions for Foxconn May Invite Legal Challenges*, WISCONTEXT (Aug. 8, 2017, 8:00 AM), <https://www.wiscontext.org/environmental-exemptions-foxconn-may-invite-legal-challenges>.

32. See generally Wis. Dep't. of Nat. Res., *Comments and Responses: Application for the City of Racine Great Lakes Water Diversion* (Apr. 2018), <https://dnr.wi.gov/topic/WaterUse/documents/Racine/DNRResponseComments20180425.pdf> [hereinafter *Comments and Responses*].

33. *Id.*

34. ANNIN, *supra* note 12, at 303.

35. Great Lakes Compact, *supra* note 8, at 3752.

36. *Comments and Responses*, *supra* note 32, at 3.

37. See Dominic Rushe, *'It's a Huge Subsidy': The \$4.8bn Gamble to Lure Foxconn to America*, GUARDIAN (July 2, 2018, 6:00 AM), <https://www.theguardian.com/cities/2018/jul/02/its-a-huge-subsidy-the->

clearer definition of what “water for public use” is within the Compact, and that the states that ratified the Compact must be given greater oversight authority over planned diversions of Great Lakes water, rather than relying on the states as individual entities to police their hydrologic borders. The strengthening of the Compact must be done in a way that respects the states’ authority over their own communities while recognizing that the Great Lakes are an interconnected water system that is a key resource for a large number of communities in the Midwest, Northeast, and Canada.

Part II of this Note reviews the history of water policies that led to the Compact, including prior attempts at interstate agreements focused on water usage and water rights. It also explores the pitfalls of those agreements and how subsequent agreements tried to improve on past mistakes. Part III analyzes water diversion requests before and after the Compact’s approval, including diversion requests from Pleasant Prairie, Wisconsin before the Compact existed and Waukesha, Wisconsin after the Compact was in effect. It also gleans lessons to be learned from the past diversion request experiences. Part IV recommends strengthening the Compact through a better-designed definition of “public use.” It also recommends implementing more oversight of diversion exceptions under the Compact in a way that respects individual state’s authority while joining the states together to check each other as they work to ensure the Great Lakes water is used efficiently and not depleted. Part V offers a brief conclusion.

II. BACKGROUND

The five Great Lakes are all hydrologically connected, forming a closed system that accounts for 95% of the freshwater in the United States and 20% of the world’s surface freshwater.³⁸ Because it is a closed system, any pollution or withdrawals can have ongoing negative effects across the lakes.³⁹

While the five bodies of water are distinguished both on maps and colloquially as separate lakes, they are essentially “one giant, slow-motion river flowing west-to-east, with each lake dumping like a bucket into the next.”⁴⁰ The system starts with Lake Superior, the farthest west of the five lakes, and moves east—lake by lake—until the water flows into the St. Lawrence River and moves out into the Atlantic Ocean.⁴¹ Thus, water from Lake Superior is constantly flowing out of the lake to the east and through the rest of the system with inflows from Lake Superior’s tributaries balancing out the water lost.⁴² The water that

48bn-gamble-to-lure-foxconn-to-america (“Foxconn itself has been more circumspect on the number of jobs it will create, saying in a press release it will ‘create 3,000 jobs with the potential to grow to 13,000 new jobs.’”).

38. EGAN, *supra* note 1, at 265; Katherine Hanson, *The Great Lakes Compact and Transboundary Water Agreements*, 34 WIS. INT’L L.J. 668, 670 (2017).

39. Hanson, *supra* note 38, at 670.

40. EGAN, *supra* note 1, at 13.

41. *Id.*

42. *Id.* (“The lake basin might have been carved by the glaciers, but the 1,300-foot-deep sea is not simply an oversized puddle of ancient ice melt. Lake Superior is a dynamic system, ever filling up with precipitation and stream inflows, and ever flowing out toward the Atlantic.”).

flows out of Lake Superior moves into Lake Michigan and Lake Huron before flowing through the St. Clair River into Lake Erie then down Niagara Falls into Lake Ontario and out to sea through the St. Lawrence River.⁴³ The diversions this Note focuses on take water from Lake Michigan, relatively early in the west-to-east process, but it is important to consider that there are many more opportunities, and potential needs, to divert later on in the system as the water moves toward the populous East and Northeast.⁴⁴

Lake Superior at the headwaters of the system holds enough water to submerge a landmass the size of North and South America under a foot of water.⁴⁵ Although it may seem that amount of water could never be depleted, such a conclusion would ignore recent incidents of water depletion around the world.⁴⁶ The most famous case is the fate of the Aral Sea, a 26,300-square-mile body of water⁴⁷ located between Kazakhstan and Uzbekistan; in the 1950s, the Soviet Union decided to divert the rivers that fed into it to irrigate cotton fields.⁴⁸ By 2007, the Aral Sea was 10% of its original volume with desert sand in place of what was once deep lakebed.⁴⁹ Lake Superior, at 31,700 square miles, is the only Great Lake that is larger than the Aral Sea was before the irrigation diversions.⁵⁰

While the Aral Sea is an extreme example, a simple lowering of the Great Lakes by several feet could cause massive ecological and economic damage given that the drop would occur in places where freighters dock, people live and play, and numerous cities draw their drinking water.⁵¹ For every one-inch drop in the Great Lakes, the thousand-foot freighters that ply the lakes as part of the region's economy must eliminate 270 tons of cargo from their holds to avoid scraping the lake bottom when moving from lake to lake.⁵²

Concerns of ecological and economic damage from mismanagement of the Great Lakes are not new. The U.S. and Canada have managed the Great Lakes water system for more than 100 years with regard to water sharing and water quality.⁵³ The Compact is only the most recent management agreement, binding all eight Great Lakes states—Illinois, Indiana, Michigan, Minnesota, New York,

43. *Id.* at 13–14.

44. See *Great Lakes Water Use and Diversions*, TIP OF THE MITT WATERSHED COUNCIL, <https://www.watershedcouncil.org/great-lakes-water-use-and-diversions.html> (last visited Nov. 29, 2019).

45. EGAN, *supra* note 1, at 13.

46. *Id.* at 265 ([T]o think a giant lake's current shoreline can't be scrubbed from the map by water withdrawals is to ignore recent history. The most famous case of a giant lake being catastrophically drained is the sad story of the Aral Sea . . .").

47. Kenneth Pletcher, *Aral Sea*, ENCYCLOPAEDIA BRITANNICA (May 10, 2019), <https://www.britannica.com/place/Aral-Sea>.

48. ANNIN, *supra* note 12, at 22; EGAN, *supra* note 1, at 265.

49. EGAN, *supra* note 1, at 265–66.

50. *Compare Areas and Volumes of the Great Lakes*, ENCYCLOPAEDIA BRITANNICA (Nov. 4, 2011), <https://www.britannica.com/topic/Areas-and-Volumes-of-the-Great-Lakes-1800353>, with *Aral Sea*, ENCYCLOPAEDIA BRITANNICA (May 10, 2019), <https://www.britannica.com/place/Aral-Sea>.

51. EGAN, *supra* note 1, at 266 ("Although it's hard to fathom a scenario like that ever playing out in North America, a Great Lake doesn't have to disappear to cause immeasurable ecological and economic damage.")

52. ANNIN, *supra* note 12, at 18.

53. Hanson, *supra* note 38, at 670.

Ohio, Pennsylvania, Wisconsin—and mirroring a corresponding agreement in Canada that binds Quebec and Ontario.⁵⁴

A. Early Management Efforts

The first attempt to manage the Great Lakes and control water diversions inside and outside the Great Lakes Basin came in 1909 when the United States entered into the Boundary Waters Treaty (“Treaty”) with Canada.⁵⁵ The Treaty was designed to resolve border water disputes between the two countries, but it had two major flaws that limited its effectiveness. First, it only appeared to apply to diversions of Great Lakes water that were large enough to influence “level or flow” of the Great Lakes.⁵⁶ Only the largest diversions could affect the level or flow of the lakes, leaving the Treaty ineffective against the most likely diversion problem, numerous small diversions that, when taken together, have a large effect on the lakes.⁵⁷ Second, the Treaty only applied to boundary waters between the U.S. and Canada.⁵⁸ Lake Michigan is technically not a “boundary water” because it lies entirely within U.S. borders, leading many to believe that the Treaty does not cover diversions of Lake Michigan water and thus does not cover all of the Great Lakes.⁵⁹

The Great Lakes states moved on from simply relying on the Treaty when they started negotiating the Great Lakes Basin Compact (“the Basin Compact”) in the 1940s.⁶⁰ The negotiations came about in part to create a system that would curb Chicago’s large-scale diversions out of Lake Michigan, a problem explored later in this Note.⁶¹ Congress approved the Basin Compact in 1968, but it too proved ineffective because it only gave states the ability to make recommendations about actions to take. It did not provide a way to enforce the recommendations and, even more problematically, allowed any state that had agreed to join to back out at any time.⁶²

States’ concerns about their power to curb water diversions intensified in 1983 with the U.S. Supreme Court’s announcement of its decision in *Sporhase v. Nebraska*.⁶³ The case centered on a Nebraska law that prohibited groundwater from being exported to another state if the other state refused to allow its water to be exported to Nebraska.⁶⁴ A Nebraska farmer who had property on both sides

54. *Id.*

55. ANNIN, *supra* note 12, at 75; Amanda K. Beggs, Note, ‘Death By a Thousand Straws’: Why and How the Great Lakes Council Should Redefine ‘Reasonable Water Supply Alternative’ Within the Great Lakes Compact, 100 IOWA L. REV. 361, 366 (2014).

56. ANNIN, *supra* note 12, at 75.

57. *Id.*

58. *See id.* at 75–76.

59. *Id.*; Beggs, *supra* note 55, at 365.

60. Beggs, *supra* note 55, at 365.

61. *Id.* at 366.

62. *Id.* at 366–67.

63. 458 U.S. 941, 944 (1982); ANNIN, *supra* note 12, at 74.

64. *Id.*

of the Nebraska-Colorado border challenged the law as a violation of the Commerce Clause.⁶⁵ The Court held that groundwater was an article of commerce and that the Nebraska law was thus an impermissible barrier on interstate commerce.⁶⁶ While the federal government deferred to states on creating and implementing water policies, infringing on interstate commerce was a step too far.⁶⁷ The ruling dealt a blow to the Great Lakes states, which had previously thought they could rely on similar legislation banning diversions outside their borders.⁶⁸

B. Great Lakes Charter and WRDA Set the Stage for the Compact

Looking for a new direction to take and unhappy with the protections the prior agreements provided, the Great Lakes states formed the Council of Great Lakes Governors (“the Council”) in the early 1980s. The Council was designed to help coordinate regional responses to a variety of Great Lakes issues, including water diversions.⁶⁹ The Council appointed a special task force that, in 1984, recommended creating the Great Lakes Charter (“the Charter”), which would be the first in a string of Great Lakes water management policies over the ensuing decades.⁷⁰

The Charter was a nonbinding agreement between the states providing that each state would consult with the others when presented with internal proposals for diversions of more than five million gallons per day—roughly the amount of water needed to support a community of 50,000 people.⁷¹ Any state that had misgivings about a proposed diversion could request a “consultation,” which meant that it could send delegates to sit down with the approving state, go over the proposal, and air any concerns that arose.⁷² The Charter stipulated that no governor or Canadian premier could approve a large-scale diversion or consumptive use plan without the consent and concurrence of the Great Lakes states and provinces. The Charter provisions sounded good in theory and underscored a collective sense of community between the states, but they ultimately did little good because the Charter was nonbinding and imposed no penalties for states that operated outside its requirements.⁷³

65. *Sporhase*, 458 U.S. at 944–45.

66. *Id.* at 954–58 (“Our conclusion that water is an article of commerce raises, but does not answer, the question whether the Nebraska statute is unconstitutional.”).

67. ANNIN, *supra* note 12, at 74–75.

68. *Id.* at 75 (“For the Great Lakes governors, the ruling shattered hopes that they could pass legislation banning diversions of Great Lakes water outside their states’ borders.”).

69. *Id.* at 76 (“Things got rolling in January of 1982 with the formation of the Council of Great Lakes Governors, which was designed to help coordinate regional responses to all sorts of Great Lakes issues, including the diversion threat.”).

70. *Id.* at 77 (“A regional agreement between the governors and premiers, the Charter was designed to control Great Lakes diversions outside the Basin as well as consumptive uses inside it. The Charter was the first in what would eventually become a string of water-regulatory systems that would follow in subsequent decades.”).

71. *Id.*

72. *Id.*

73. *Id.*

While the Charter was largely ineffective, the idea of paying attention to diversions above five million gallons per day and asserting control over not only diversions outside the Basin but also over in-basin consumptive uses were important developments that would get recycled into future versions of Great Lakes water policy and end up in the final Compact.⁷⁴ In-basin consumptive use refers to instances where a community entirely within the Basin wants to increase the amount of Great Lakes water it is using.⁷⁵

Soon after the Charter was enacted, and in part because of concerns that the Charter would be too toothless to make much difference, Congress agreed to amend the federal Water Resources Development Act (“WRDA”) to add Section 1109 on diversions of Great Lakes water.⁷⁶ The WRDA amendment importantly controlled only diversions—not in-basin transfers or increases in consumptive use—and imposed much stricter requirements on the region than prior regulations.⁷⁷ Under Section 1109, all water diversions from the Basin, no matter the size, had to first receive approval from all eight of the Great Lakes states’ governors.⁷⁸ Further, the federal government could not even study the possibility of diverting Great Lakes water unless the study had the blessing of every Great Lakes state governor.⁷⁹

The amendment was a welcome development for the hardline anti-diversion states like Michigan, which now had ultimate veto power on all diversions. But the amendment also led to serious threats of abuse of power.⁸⁰ Experts warned that the WRDA amendment sanctioned unconstitutionally arbitrary and capricious conduct given that the amendment supplied states with a veto power without specifying the way in which diversion requests should be considered and the standards against which such requests should be measured.⁸¹ Section 1109 also did not provide an avenue for appeals when a proposed diversion did not survive the governors’ votes.⁸² The lack of direction meant that the governors would have to make up rules and procedures as they went while balancing the strict, U.S.-only WRDA amendment with the nonbinding but collaborative Charter that had an international reach.⁸³

74. *Id.* at 81, 234.

75. *Id.* at 77.

76. *Id.* at 81 (“WRDA is federal legislation that is renewed periodically for major public-works projects, . . . Several Great Lakes states saw the 1986 version of WRDA as an opportunity to erect a stronger barrier to Great Lakes diversions, and they managed to slip in the wording without incident.”).

77. *Id.*

78. *Id.*

79. *Id.* at 81–82.

80. *Id.* at 82 (“WRDA was a dream come true to Michigan. Finally, it had attained a magic veto over diversion proposals in all the other Great Lakes states without the concern of retribution or the burden of regulating its own consumptive water use. That was a power that other states would come to regret . . .”).

81. *Id.*

82. *Id.*

83. *See id.* (“The wispy two-page statute lacked any guidance on how diversion applications should be judged—forcing the governors to make up the rules as they went along—and not necessarily requiring them to treat all water applicants by the same standards. In addition, the law provided no opportunity for spurned water applicants to appeal.”).

It was after these developments in the 1980s that the Great Lakes governors started the lengthy process of working toward an effective, binding agreement that would allow the states to manage the Great Lakes.⁸⁴ The Great Lakes governors chose to take a slower approach to ensure that the final compact they agreed to would not run into the same problems as the prior agreements and legislative acts. They did this by drafting an action plan for a final binding compact that became known as the Great Lakes Charter Annex of 2001 (“the Annex”).⁸⁵ The Annex tried to not only lay out a clear plan to create and implement a final, binding document, but also listed proposed diversionary requirements to be included in the document.⁸⁶ The Annex planned to require that any water diverted from the Great Lakes be returned after use; that conservation practices be adopted to prevent waste; that a water withdrawal create no significant adverse impacts on the Great Lakes; that the withdrawal comply with existing law and treaties; and that the water applicant conduct some improvement to the natural resources of the Great Lakes Basin.⁸⁷ The governors signed the Annex in 2001 and agreed to have a final compact completed in three years.⁸⁸

The march toward a final agreement the Annex started led to the Great Lakes Compact in effect today.⁸⁹ It took a long time to write the Compact, but it only took three years for all eight Great Lakes states to adopt the Compact through their separate legislatures and for all eight state governors to sign off.⁹⁰ President George W. Bush signed the Compact in 2008 and Congress passed a corresponding bill approving the agreement to give it proper federal recognition.⁹¹ The Compact became effective on December 8, 2008.⁹²

C. *Diversion-Specific Aspects of the Compact*

While the Compact covers a wide array of issues related to water conservation and management in the Great Lakes region, this Note focuses primarily on its diversion-related sections that dictate which communities can divert Great Lakes water and the process they must follow to do so.

Diversions of water outside the Basin are generally banned under the Compact, but there are two key exceptions that have played a role in recent diversion debates as well as with the Foxconn proposal. The first exception is for “Straddling Communities.” A Straddling Community is “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

84. See Beggs, *supra* note 55, at 368–69.

85. *Id.*

86. *Id.* at 369.

87. *Id.*

88. *Id.*

89. *See id.*

90. ANNIN, *supra* note 12, at 301.

91. Beggs, *supra* note 55, at 369.

92. ANNIN, *supra* note 12, at 243.

this Compact, is partly within the Basin or partly within two Great Lakes watersheds.”⁹³ In other words, a community that only partially lies within the Basin can still apply to divert Great Lakes water even if it is for use in the area of the community that lies outside the Basin. Mount Pleasant, where the Foxconn plant will be located, is an example of a Straddling Community because its community borders fall partly outside the Basin.⁹⁴ The second exception to the ban on water diversions applies when the water is to be used in a “Community within a Straddling County.”⁹⁵ A Community within a Straddling County refers to a city, town, or the equivalent that is located entirely outside the Basin but is “wholly within a [c]ounty that lies partly within the Basin.”⁹⁶ This means that as long as a community is in a county that contains at least a slice of the Basin, it can divert Great Lakes water, subject to certain requirements.

There are a series of requirements the Compact puts in place if a Straddling Community like Mount Pleasant wants to pursue a diversion under the Compact. First, and most importantly for this Note, the exception for such a community only applies if all of the water transferred outside the Basin is being used exclusively for “public water supply purposes.”⁹⁷ The Compact also requires that any proposal that would increase daily consumption by more than 100,000 gallons include a promise to comply with an “exception standard” that mandates the proposal be for a reasonable water allocation—not damage the environmental sustainability of the area from which the water would be taken—and follow local and state laws.⁹⁸ Additionally, all of the water withdrawn from the Basin has to be returned, either naturally or after use, to the Basin. Finally, if the proposal results in a new or increased average consumptive use of five million gallons per day or more over any ninety-day period, the proposal must undergo Regional Review.⁹⁹

“Regional Review” refers to a review of a proposal done by the eight Great Lakes state governors as well as the premiers of Ontario and Quebec, or their designees.¹⁰⁰ The Regional Review does not end in a binding vote but instead concludes when the Regional Body, made up of the stakeholders from the states and provinces, releases a report of its findings.¹⁰¹ The final approval decision for proposals under the Straddling Community exception lies with the state in which the proposal originated, with the idea that the state will take account of the Regional Body’s findings before making its decision.¹⁰²

93. Great Lakes Compact, *supra* note 8, at 3742.

94. See Press Release, Wis. Dep’t of Nat. Res., DNR Approves Straddling Community Diversion Application From City of Racine (Apr. 25, 2018, 2:08 PM), <https://dnr.wi.gov/news/releases/article/?id=4513>.

95. Great Lakes Compact, *supra* note 8, at 3740.

96. *Id.*

97. *Id.* at 3752.

98. *Id.*

99. *Id.* at 3752–53.

100. *Id.* at 3741.

101. *Id.* at 3751.

102. See *id.* (“The Originating Party and the Council shall consider the Declaration of Finding before making a decision on the Proposal.”).

A Community within a Straddling County that wanted to pursue a diversion would have to meet a series of more stringent requirements than those for a Straddling Community before the proposal could be approved.¹⁰³ Some requirements carry over from the Straddling Community exception, including that the water being drawn only be used for public purposes as defined in the Compact and that the proposal meet the Compact's exception standard.¹⁰⁴ But there are other requirements, including showing that there is no reasonable water supply alternative to the Great Lakes within the hydrological basin in which the community is located and that the proposal does not damage the integrity of the Basin ecosystem.¹⁰⁵ Additionally, every proposal must undergo Regional Review and must get unanimous approval from the eight state governors.¹⁰⁶

The Compact's requirement that water taken from the Basin be diverted for "public use" is a key part of the diversion exceptions.¹⁰⁷ The Compact defines "public water supply purposes" as "water distributed to the public through a physically connected system of treatment, storage, and distribution facilities serving a group of largely residential customers that may also serve industrial, commercial, and other institutional operators."¹⁰⁸ Wisconsin, in its legislation officially adopting the Compact, used the same terminology.¹⁰⁹ There is, however, no indication of what "largely residential customers" means. Moreover, there is no indication of how far the phrase "may also serve industrial, commercial, and other institutional operators" allows a community's diversion proposal to stray from only helping community residents as opposed to community businesses and industry. The unclear definition calls into question whether Great Lakes water that will be diverted to Foxconn for the company's use truly follows the spirit of the Compact's provisions.

III. ANALYSIS

Wisconsin's consideration and ultimate approval of the Foxconn water diversion provides a good example of why the Compact needs to be reconsidered and revised, both in its definition of "water for public use" and in its procedures that allow states to almost unilaterally approve Straddling Community diversions when the state likely has a conflict of interest because it is dealing with economic and political pressures from its citizens.

The Mount Pleasant area where the Foxconn plant will be located does not have its own water diversion system but instead would have to use water that the

103. JARED TEUTSCH, ON TRACK? ENSURING THE RESILIENCE OF THE GREAT LAKES COMPACT 1, 5 (2013), <https://greatlakes.org/wp-content/uploads/2016/12/AGL-Straddling-Communities-White-Paper-9-26-13.pdf>.

104. Great Lakes Compact, *supra* note 8, at 3753.

105. *Id.* at 3754.

106. *Id.*

107. *Id.* at 3741.

108. *Id.*

109. WIS. STAT. ANN. § 281.346 (West, Westlaw through 2019 Act 5).

city of Racine, Wisconsin draws from Lake Michigan and sends to Mount Pleasant.¹¹⁰ At the time the various states were codifying the Compact into law, the cities and towns that used Great Lakes water were able to dictate how much water they foresaw they would need in the future.¹¹¹ Racine asked for and received what has turned out to be a large surplus that it can draw upon to supply Mount Pleasant and Foxconn.¹¹² Foxconn's diversionary plan, using Racine water, triggers a Compact review under the Straddling Community exception because, while the town of Mount Pleasant lies mostly within the Basin, the small portion of the town where Foxconn plans to build its production plant is the one part that juts outside the Basin border line.¹¹³

It is common for larger towns and cities in Wisconsin with access to Lake Michigan water to sell a portion of their water to smaller towns close by without similar access, like Racine would be doing for Mount Pleasant under the Foxconn proposal.¹¹⁴ Yet the drinking water systems in Milwaukee, Kenosha, Racine, and Green Bay that are most often supplying the water to the smaller areas are doing so to provide the citizens of those smaller areas access to the water, not to big business that is moving in.¹¹⁵ Individuals involved in the water distributions to smaller communities have pointed to a trend of larger population centers not using as much water and thus looking for more revenue by selling excess water off to communities without the benefit of easy water access.¹¹⁶ That trend fits with Racine's plan to supply Mount Pleasant with water that will then go to the Foxconn plant, but the fact that the diversion is almost entirely for private interests adds a troublesome and unresolved wrinkle to the plan.

Before analyzing the Foxconn proposal and the process Wisconsin used to ultimately approve it, it is necessary to understand how diversions of Great Lakes water have been handled in the past both before and after the Compact came into effect. The pre-Compact diversion procedures, largely under the WRDA framework, show the shortcomings of the previous system while the post-Compact diversion requests demonstrate how the Compact has been applied and what precedents have been set using the still relatively new set of regulations.

110. *Comments and Responses*, *supra* note 32, at 1.

111. *Id.*

112. *See id.* at 2 ("RWU holds an individual water use permit with authorization to withdraw water from Lake Michigan in an amount such that serving water to the Village of Mount Pleasant will not require an increase in a withdrawal that would average 100,000 gallons or more per day in any 90-day period.")

113. ANNIN, *supra* note 12, at 304 ("The vast majority of the village is already in the Great Lakes basin . . . it's just the far southwest corner of Mount Pleasant that happens to slightly jut out across the Basin line, and that's where Foxconn has decided to build its multifaceted facility.")

114. Scott Gordon, *Wisconsin's Drinking Water Utilities Have Many Connections: A Look at Who Sends Water Where*, WISCONTEXT (Feb. 16, 2016, 11:00 AM), <https://www.wiscontext.org/wisconsins-drinking-water-utilities-have-many-connections>.

115. *See id.*

116. *Id.* ("Scott Biernat, director of regulatory affairs and scientific program development for the Association of Metropolitan Water Agencies, said he wouldn't be surprised if larger cities seek more neighboring customers as they run up against growing water conservation practices and public resistance to water utilities raising their rates.")

A. Diversion Review Before the Compact

This Section will review two historical diversions of Great Lakes water outside the Basin that occurred prior to the enactment of the Compact. They serve to illustrate the problems that pre-Compact diversions caused from both an environmental and political standpoint.

1. Chicago's Diversion

The primary pre-Compact diversion—and the one that still looms large in the Great Lakes region—is the diversion that Chicago received and expanded during the Twentieth Century. At about 2.1 billion gallons per day, it is by far the largest diversion,¹¹⁷ and has managed to support a growing metropolitan area for years while serving as a warning of what can happen if a city gets individualized discretion in its water diversion plans.¹¹⁸ The diversion is the product of a string of court cases that arose after the city of Chicago made the controversial decision to reverse the Chicago River so that, instead of flowing out into Lake Michigan, the river would instead pull Lake Michigan water through the city and start it on a western path of waterways through Illinois until it eventually reached the Mississippi River and disappeared completely from the Great Lakes Basin.¹¹⁹

The first legal challenge to Chicago's diversion came in 1905 when Missouri tried to challenge the river reversal, arguing that the reversal sent typhoid-infected water down to St. Louis and represented a health risk to citizens.¹²⁰ Chicago won that court battle by arguing that the water was too diluted by the time it reached St. Louis to cause an increase in typhoid cases.¹²¹ While it was an unsuccessful attempt by another state to curb Chicago's use of Great Lakes water, it represented an important first in what would become a long line of cases challenging the reversal and Chicago's building of the Sanitary and Ship Canal, the man-made waterway responsible for depositing the reversed Chicago River water into the western-flowing rivers and other waterways.¹²²

Chicago officials, feeling confident after their early court victory against Missouri, built two more diversionary channels taking water out of Lake Michigan that, along with the reversed Chicago River, greatly expanded the amount of the diversion.¹²³ The city's expansions that enlarged the diversion did so in the absence of federal permits and drew the ire of other Great Lakes states. Wisconsin, Michigan, and New York sued Chicago, challenging the legality of the city's diversion

117. ANNIN, *supra* note 12, at 98.

118. *Id.* at 98–99.

119. *See id.* at 89–90 (“It was the largest and most controversial project ever to divert water outside the Great Lakes Basin. Engineering feat or not, it stands as a polarizing example of precisely what water managers and politicians throughout the Great Lakes region are determined to never see happen again.”).

120. *Id.* at 92.

121. *Id.*

122. *Id.* at 92–93.

123. *Id.* at 93 (“In just ten years the city had rapidly expanded its diversion of Lake Michigan water at three different points, sending it all into the Sanitary and Ship Canal, and eventually down the Mississippi.”).

increases.¹²⁴ Chicago lost that case and initially faced the prospect of weaning itself from the majority of the water it was using.¹²⁵ But, over time, and particularly in the post-WWII suburban boom in the area, the city regained traction and expanded its diversion once again by relying on language from earlier decisions that allowed it to expand access to public drinking water without limit.¹²⁶

In 1967, the Supreme Court issued a decision that set the maximum diversion allowed for Chicago at 3.2 cubic feet per second, about 2.1 billion gallons per day, and laid the foundation for a diversion that dwarfs any others that have come up in the past or likely will ever come up in the future under the Compact.¹²⁷

The even more significant part of the 1967 decision was that it allowed Chicago's suburbs to tap into the diverted water, even if they were outside the Basin. That allowance, in the absence of other Great Lakes states' approval, proved a key factor in the growth of Chicago suburbs in subsequent years, many of which are far outside the Basin but still enjoy access to Lake Michigan water.¹²⁸ By the early part of the Twenty-First Century, about seven million people in 205 communities in northeastern Illinois, including Chicago, were getting water from Lake Michigan.¹²⁹ Illinois is also adding about one new community to that total every two years and plans to have enough of the diversion left to continue to do so until at least 2050.¹³⁰

The Chicago diversion, though it far exceeds any other diversion in this Note, is a good example of the unchecked expansion without consultation with other Great Lakes states that the Compact is meant to prevent. It is also in the shadow of the Chicago diversion that the subsequent diversion requests from various communities in the region were considered.¹³¹

2. *Pleasant Prairie's Diversion*

The community of Pleasant Prairie, Wisconsin is located at the extreme southeast corner of the state, just over the border with Illinois and still within the suburban sprawl that emanates northward from Chicago toward Milwaukee.¹³² Like many other communities in the southwest corner of the Great Lakes Basin, it has a unique location with respect to the Basin borderline. The borderline bisects the village, causing rain to flow to Lake Michigan if it falls on the eastern

124. *Id.* at 93.

125. *Id.* at 96.

126. *See id.* at 97–98.

127. *Id.* at 98.

128. *Id.* at 99 (“The Chicago . . . metropolitan area [could] expand unhindered for the foreseeable future. That some of Chicago’s western suburbs—located far beyond the Great Lakes Basin line—are drinking Lake Michigan water seems patently unfair to contemporary opponents of Great Lakes diversions.”).

129. *Id.* at 103.

130. *Id.* at 103, 105–06 (“[The] department is adding an average of one new community every two years to the Lake Michigan drinking-water system . . . His department is working on long-term water forecasting to 2050, and based on those calculations he’s confident that there will be enough water to go around.”).

131. *Id.* at 273.

132. *Id.* at 140.

portion of the village and flow to the Mississippi River if it falls on the western portion.¹³³

The community and its unique location made it a key test case for the pre-Compact negotiations surrounding Great Lakes water withdrawal when the town discovered in the 1980s that its groundwater wells were contaminated with radium, a naturally occurring radioactive element, at four times the federal limit.¹³⁴ Forced to look elsewhere, the community looked to the sprawling waters of Lake Michigan to the east as its best way forward.¹³⁵ The city of Kenosha, immediately to the north of Pleasant Prairie, was already drawing its water from the lake. According to Pleasant Prairie, one eight-foot section of pipe was all it needed to link up to Kenosha's water system and solve the problem created by its radium-polluted wells.¹³⁶ It would have been an easy solution at the beginning of the 1980s, but by the time Pleasant Prairie was seeking the diversion, Section 1109 of WRDA was in full effect, meaning the diversion was only possible if all eight Great Lakes states gave their approval.¹³⁷

Wisconsin sent the Great Lakes governors notice of the requested diversion in March 1989 and initially received positive feedback, with Minnesota, Illinois, and Indiana all notifying Wisconsin that they did not oppose the diversion.¹³⁸ As would become normal in future Great Lakes diversion discussions, Michigan proved to be the state most opposed to a diversion.¹³⁹ Michigan requested numerous meetings with Wisconsin officials and relayed serious concerns that the 3.2 million-gallon-per-day proposal exceeded the amount of water that Pleasant Prairie really needed.¹⁴⁰ A main concern for Michigan, and a concern that has once again come up with the planned Foxconn diversion,¹⁴¹ was that the alleged excess water would be used not for the widely accepted and approved purpose of supplying water-starved citizens with access but instead as a way to turn the small community

133. *Id.*

134. Many communities between Chicago and Milwaukee are in such a unique position because of a combination of urban sprawl and the natural Basin dividing line that runs so close to the actual lakeshore in that part of the region. The proximity of the line to the lakeshore means that communities like Pleasant Prairie, which are home to individuals drawn to the area for economic opportunities in Milwaukee and Chicago, are forced to deal with larger populations that put pressure on non-Great Lakes water systems. *See id.*

135. *Id.* at 141 ("Given that the community rests on the shores of Lake Michigan, turning to the Great Lakes seemed like an obvious alternative.").

136. The limited amount of pipe needed to make the system work and start providing water to the community made the whole proposal seem like an easy fix. It was the underlying political and environmental concerns that turned the approval process into a difficult one. *Id.* at 141.

137. *Id.* ("WRDA did apply, however, and local officials weren't quite sure what that meant because the federal anti-diversion statute had never been used before. Pleasant Prairie was about to become a test case for the first federal Great Lakes anti-diversion law ever passed in the United States.").

138. *Id.* at 142 ("Governors from Illinois, Ohio, and Indiana said they had 'no objection' to the diversion as well But not all the correspondence was affirmative. Ontario officials said they would prefer a solution that did not require a diversion.").

139. *Id.* at 142-43.

140. *Id.* at 143-44.

141. *Id.*

into a hub for future economic growth.¹⁴² Wisconsin attempted to allay the concerns with data it thought showed that the diversion would primarily be for Pleasant Prairie residents. But one of Michigan's chief negotiators during the process wrote to state officials explaining Michigan's continued concern:

You have indicated that the justification for the proposed 3.2 [million gallons per day] temporary diversion is based solely on the need to provide a potable water supply to address public health concerns. Nevertheless, the proposed diversion may provide substantial water for commercial and industrial development . . . Michigan strongly maintains that any warranted diversion of Great Lakes water must be used to address public health concerns and should not be used for commercial and industrial development.¹⁴³

The back and forth negotiations continued for months, all while Pleasant Prairie languished with a supply of undrinkable water. The drawn out discussions led Wisconsin officials to become anxious and resentful of the Michigan officials who continued to ask for more meetings, paperwork, and data.¹⁴⁴ Finally, in December 1989, Michigan, through a state official other than its governor, sent a letter that called the diversion "not unreasonable" but did not explicitly say that the state approved the diversion request.¹⁴⁵ Wisconsin officials decided to use the letter as if it were an approval and move forward with the diversion, even though it had not received explicit approvals from New York and Pennsylvania. There were numerous questions left open by Wisconsin's choice, including whether WRDA required the diversion approvals to come directly from the governors and whether Wisconsin could move forward without explicit consent from each governor.¹⁴⁶

The diversion was a success for Pleasant Prairie as the community began using Lake Michigan water by the start of the 1990s.¹⁴⁷ But Michigan's concerns about promoting economic and residential growth because of the diversion came true in the ensuing decades. Throughout the 1980s, as the community dealt with radium-laced drinking water, the population remained stagnant at 12,000.¹⁴⁸ Today, Pleasant Prairie is only using about 2.4 million gallons of its allotted 3.2

142. Michigan is in a unique position among the eight Great Lakes states as nearly the entire state is within the Great Lakes Basin. That means that it does not have to face the same diversion proposal issues that states like Wisconsin do, whose communities in densely populated areas often fall right on the Basin border line or just beyond the line. Michigan's inclusion within the Great Lakes Basin gives it a position of power in negotiations because it does not have to face the same pressures that other states partially outside the Basin must if access to water becomes a problem. *See id.* ("A key issue for Michigan's negotiators emerged: how was the water going to be used? They had no problem helping the people of Pleasant Prairie out of their drinking water bind. But Michigan was very suspicious that Pleasant Prairie officials were asking for more water than they really needed.")

143. *Id.* at 144.

144. *See id.* at 145-48 ("I again state my earnest hope that all of Michigan's concerns . . . have been answered by this letter and the preceding correspondence Your reticence in approving this proposal has placed . . . Pleasant Prairie and this Department in an untenable position.")

145. *Id.* at 147.

146. *Id.* at 148 ("WRDA seemed to require a strong affirmative vote from all eight Great Lakes governors for a diversion to be approved After much deliberation, the decision was made to go ahead.")

147. *Id.* at 149.

148. *Id.*

million gallons per day, and it has a residential population of about 21,000 and a daytime population that swells to about 35,000 as people come to work in the businesses that have moved into the area.¹⁴⁹ Much of that growth in business was made possible by the diversion of the Great Lakes water and many of the businesses that consume the water operate outside the Great Lakes Basin border line.¹⁵⁰

The aftermath of the approved diversion, particularly given that many of Michigan's concerns came true, raises questions about how successful the approval was for the Great Lakes region as a whole. It is true the diversion helped to alleviate the town's concerns about supplying its residents with access to clean water, but the increase in business activity in the area after the diversion went into effect gives reason for pause. It may be true that there is little a town can do to prevent businesses from taking an interest in the area after the town attains an allotment of water, but the 3.2 million-gallon-per-day diversion has proved to be excessive.¹⁵¹

The town's remaining ability to divert nearly a full million gallons per day on top of what it is already using might allow it to open itself up to more business use. The lack of specificity in the Compact as to what percentage of the water must be reserved for business use and what can be used for residential use leaves much to be answered. That uncertainty—expanded across the many towns ringing the Great Lakes that have an interest in boosting their economies and making themselves attractive places for people to live—is problematic and raises the question of whether the current policy designed to preserve water, unless there is public need, is truly working.

Despite those concerns, it remains true that Pleasant Prairie received its diversion and is a strong example of a WRDA-controlled diversion request. As Wisconsin found out, one state, like Michigan, could hold up the entire diversion process under WRDA while citizens of Wisconsin were waking up every day without access to clean water.¹⁵² That realization played into the Great Lakes states' decision to set a lower hurdle for Straddling Communities like Pleasant Prairie to get a diversion under the Compact.¹⁵³

The Pleasant Prairie negotiations also uncovered a disagreement as to what each state considered a diversion. Wisconsin argued that moving water outside the Basin would not count as a diversion, as long as the water was eventually

149. *Id.* (“What about the growth that Michigan was so concerned about? There’s no doubt that gaining access to Lake Michigan change Pleasant Prairie into a sprawling exurb.”).

150. *Id.* (“The village’s daytime population swells to 35,000 people, most of them employees of LakeView and other businesses out by I-94—all of which are outside the Great Lakes Basin.”).

151. *See id.*

152. *See id.* at 146–50.

153. *Id.* at 259 (“The primary goal of the Compact’s ‘straddling community’ exception clause was to find a way for [the] communities to send Great Lakes water to the water-stressed side of town . . . without [opening] the floodgates to long-range, large-scale diversions to far-flung, water-parched areas of the continent.”).

returned to the Basin through a “return-flow” system.¹⁵⁴ Michigan disagreed, arguing that any moving of water outside the Basin, no matter the plans for returning the water, constituted a diversion covered under WRDA.¹⁵⁵ The lack of a clear definition only exacerbated the problem and hinted at areas that would need more specificity in a later document like the Compact.¹⁵⁶

The Compact, drafted by state officials in the aftermath of Pleasant Prairie and other diversion requests under WRDA that required states to undergo intense scrutiny, would clarify many of the questions first brought up through the Pleasant Prairie diversion process, including classifying return-flow as a diversion and changing the requirements for communities requesting a diversion based on whether they were a Straddling Community, a Community within a Straddling County, or neither.¹⁵⁷

B. *Post-Compact Reviews*

This Section explores several diversions that occurred after the passage and implementation of the Compact. It serves to illustrate how the new procedures the Compact implemented in the region affected the process for diverting Great Lakes water outside the Basin.

1. *New Berlin*

The first review under the Compact actually began with a diversion request from New Berlin, a suburb of Milwaukee, that came to light as the Compact was still in the process of being formed. New Berlin was, like Pleasant Prairie, uniquely situated to trigger water diversion questions.¹⁵⁸ The eastern third of the town, which was mostly residential, was within the Basin and was already receiving Lake Michigan water. The middle third, which contained a mix of residential and commercial areas, was just outside the Basin and was relying on contaminated wells. The western third was mostly farmland and was comfortably relying on shallow wells.¹⁵⁹ New Berlin started thinking about making a request to divert some Great Lakes water to the middle portion of town after discovering that the wells in that area were contaminated.¹⁶⁰

New Berlin’s location put it in the unique position of being a Straddling Community within the scope of the Compact because part of the town was within the Great Lakes Basin. That meant if the Compact were enacted, the town would

154. *Id.* at 144 (“As a new corporate development, this return-flow plumbing could be installed from the start. So the thinking in Wisconsin was that LakeView would use Lake Michigan water, but because it was returning its treated wastewater to Lake Michigan, it would not be a diversion.”).

155. *Id.* at 145.

156. *See generally id.* at 149–51.

157. *See* Great Lakes Compact, *supra* note 8, at 3752–54.

158. ANNIN, *supra* note 12, at 259–60 (“Few straddling communities fit the bill better than New Berlin.”).

159. *Id.* at 260.

160. *Id.* at 261–62 (“It was that middle section of town . . . that the suburb was interested in servicing It seemed like a simple request, but New Berlin’s proposal would turn out to be a convoluted and controversial first test of the brand-new Great Lakes Compact.”).

only have to get approval from Wisconsin's governor instead of having to receive unanimous approval from all eight Great Lakes governors.¹⁶¹ The states had agreed on that lower standard to "find a way for these water-troubled, uniquely positioned communities to send Great Lakes water to the water-stressed side of town, outside the Great Lakes Basin, without setting a legal precedent that would open the floodgates to long-range, large-scale diversions to far-flung, water-parched areas of the continent."¹⁶² The Compact, however, had not been approved at the time New Berlin was thinking about submitting an application, leaving Section 1109 of WRDA to govern.

The first problem New Berlin encountered with its diversion plan came after it ignored Wisconsin Department of Natural Resources ("DNR") advice and submitted a diversion proposal for 2.48 million gallons of water per day in April 2006. The DNR had discouraged the submission because it feared other states would look unfavorably on such a request before the Compact was finalized.¹⁶³ That fear became reality after Michigan found out about the request and immediately, through its governor, indicated it had no intention of considering a diversion while the Compact was being finalized and no state should consider a diversion until the Compact was in effect.¹⁶⁴ Politics was a driving force behind the refusal to even consider a diversion. As Peter Annin notes, "Any water bureaucrat in the Great Lakes region should have known that a diversion application during a Michigan election year would be an extremely tough sell, no matter how strong the application might be."¹⁶⁵

New Berlin encountered a second problem when it came to light, through a Wisconsin official's interview with the *Milwaukee Journal Sentinel*, that the state had been diverting water outside the Basin for years without getting approval from the other Great Lakes states, potentially in violation of WRDA.¹⁶⁶ Wisconsin defended its diversions by returning to its argument about return flow requirements, which it still argued meant that the water use did not count as a diversion.¹⁶⁷

Despite the Wisconsin-Michigan disagreement over return flow and whether to move forward with the New Berlin proposal, other Great Lakes states and provinces eventually began giving Wisconsin feedback on the proposal.

161. *Id.* at 258–59.

162. These concerns are closely held in the Basin as concerns abound that water diverted from the lakes will eventually end up getting shipped to the more water-starved areas of the country, like Arizona and California, as well as the world. *Id.* at 259.

163. *Id.* at 261–62 ("The DNR agreed that New Berlin's case was straightforward, but in the mid-2000s—as with Waukesha—state officials discouraged New Berlin from applying for a diversion because the Great Lakes Compact was still working its way through regional legislatures.").

164. *Id.* at 263 ("Governor Granholm made no reference to her campaign in the press release, but politics aside, she did make another overall key point in her statement that would end up resonating in the region: no water-diversion proposals should be considered until the Great Lakes Compact becomes law.").

165. *Id.* at 262.

166. *Id.* at 263–64 ("In an interview with the *Milwaukee Journal Sentinel*, Bruce Baker, the DNR's deputy water administrator, said that his state had been quietly permitting water diversions *for years*—without seeking the permission of other Great Lakes states—as long as that water was being returned to the Great Lakes Basin.").

167. *Id.* at 264.

Some asked for more information about supply alternatives, while others wanted to know about adverse environmental impacts.¹⁶⁸ Wisconsin appeared ready to move forward without approval from Michigan under its return-flow argument that it alleged made complying with WRDA unnecessary¹⁶⁹ until Wisconsin's own attorney general disagreed with the long-time interpretation from the state's DNR officials and said in a detailed letter that a diversion to New Berlin, even with return flow implemented, would count as a WRDA diversion and require a full consensus.¹⁷⁰

Ultimately, the debate over return flow and the need for unanimity kept the New Berlin proposal in consideration until the state legislatures and federal government adopted the Compact, which became effective in December 2008.¹⁷¹ The Compact's Straddling Community provisions thus took over and provided a clearer course of action for Wisconsin and the other states involved. New Berlin only had to seek approval from the Wisconsin governor and no longer had to bow to Michigan concerns.¹⁷² While the Compact process meant that there had to be another period for public comments as well as a new proposal and diversion report from New Berlin, the process only took a matter of months and New Berlin had its approval by May 2009.¹⁷³

While those following the Compact generally see New Berlin as a successful first test of the Compact, there are several unique characteristics that call into question how accurate a picture of future Straddling Community diversion considerations it was.¹⁷⁴ One unique aspect of the proposal was that 1,800 homes in the town drew their water from private wells but sent their sewage back to Lake Michigan, resulting in a net increase in water for the Great Lakes Basin, even after losses from consumptive use under the diversion.¹⁷⁵ The town, which had water use numbers well below the national average at the time of the diversion

168. *Id.* at 267.

169. *Id.* at 268 ("As 2006 came to a close, in yet another interview with the *Milwaukee Journal Sentinel*, Bruce Baker continued to claim that Wisconsin could proceed unilaterally.").

170. *Id.* ("Wisconsin's attorney general . . . surprised everyone by releasing an official letter saying Wisconsin could [not proceed] . . . [The] seventeen-page, single-spaced letter warned Wisconsin officials that if they approved New Berlin's diversion unilaterally, they ran the risk of marginalizing their state's voice in future water-diversion controversies.").

171. *Id.* at 270 ("The following spring, Wisconsin did adopt the Compact. Federal approval soon followed. On December 8, 2008, the Compact became law, and New Berlin's application was tracking perfectly alongside it. Weeks later, New Berlin's consultants asked the DNR to finally make the long-sought diversion a reality.").

172. *Id.* ("Now that the Compact had been passed the agency was required to run New Berlin's application through the Compact process . . . before the suburb could get its water. That would require a new water-supply service-area plan . . . and more examination of the suburb's water-conservation efforts.").

173. *Id.*

174. New Berlin was able to mount a special case for a diversion proposal not only because it was more clearly planning to use the Great Lakes water for use in a residential area, but also because the underlying infrastructure allowed the diversion to actually result in a net gain for the Great Lakes Basin. The net gain in particular makes it appear that a new proposal without such a benefit to the Great Lakes Basin may receive more involved scrutiny and face a harder road to approval. *Id.* at 271 ("History had shown that prior water diversions have always had a huge influence on how pending Great Lakes diversion applications were judged. . . . New Berlin would not only influence how straddling-community applications would be handled in Wisconsin, but in other states, too.").

175. *Id.* at 269–71.

request, also promised, as part of the request, to further reduce its usage by 10%.¹⁷⁶ As Annin notes, New Berlin created a “tough act to follow for future straddling-community applicants.”¹⁷⁷ There have been no Straddling Community applications under the Compact since New Berlin, leaving a question as to how the high bar New Berlin set will affect future proposals. Ultimately though, the main takeaway for those following the New Berlin process was that the approval process for a Straddling Community under the Compact was far easier and much less contentious than the WRDA process to which Pleasant Prairie was subjected.¹⁷⁸

2. *Waukesha Makes its Request*

The first major test of a Community within a Straddling County exception under the Compact came when the city of Waukesha, Wisconsin decided to submit a diversion application in 2010.¹⁷⁹ Waukesha was a Community within a Straddling County because it was located in a county that contained part of the Great Lakes Basin, but did not itself include a portion of the Basin.¹⁸⁰ The city’s efforts to get Great Lakes water started when it realized the radium-contaminated wells from which it had been drawing its water were mostly depleted after more than a century of heavy use.¹⁸¹ A series of studies that Waukesha conducted to assess the problem concluded in 2010 that Lake Michigan was the city’s best option for an alternative water source.¹⁸²

Waukesha submitted an application in June 2010 seeking access to Lake Michigan water, starting a six-year review process: first by Wisconsin environmental regulators, then by regional water resources officials from the other seven

176. *Id.* at 271.

177. *Id.* at 271.

178. New Berlin’s experience first with trying to work through the proposal process under the existing WRDA framework and then through the Compact process showed how different the processes were. The WRDA process would have required that Wisconsin receive unanimous approval from all eight Great Lakes states, which led Wisconsin to try to circumvent that requirement with its argument that because it was implementing “return-flow,” as part of the diversion, the diversion did not qualify as a true diversion under the Compact. The debate about return-flow no longer mattered once the Compact was adopted as the concerns from the other states dropped away and all of the power was shifted to Wisconsin’s DNR and governor to shepherd the proposal through the Compact process and toward approval. *See id.* at 272 (“Not requiring regional review, and keeping the decision-making process within the local state, made things much simpler for these uniquely positioned communities. In fact, New Berlin might have found things to be much easier if it has just waited until the Compact was adopted[.]”)

179. *Id.* at 275.

180. *See* Don Behm, *Great Lakes Mayors Halt Challenge to Waukesha Diversion of Lake Michigan Water*, MILWAUKEE J. SENTINEL (Aug. 3, 2017, 9:58 AM), <https://www.jsonline.com/story/news/local/milwaukee/2017/08/03/great-lakes-mayors-halt-challenge-waukesha-diversion-lake-michigan-water/534825001> [hereinafter Behm, *Great Lakes Mayors*].

181. Don Behm, *Great Lakes Governors Approve Waukesha Water Request*, MILWAUKEE J. SENTINEL (June 21, 2016), <http://archive.jsonline.com/news/waukesha/decision-day-arrives-for-waukeshas-lake-michigan-water-request-b99747111z1-383762921.html> [hereinafter Behm, *Great Lakes Governors*].

182. *See* ANNIN, *supra* note 12, at 275 (“The water would be obtained from one of three Lake Michigan waterfront communities: Milwaukee, Oak Creek, or Racine, with Milwaukee’s water being the leading contender—Milwaukee’s water was the cheapest, because it was the closest.”).

states subject to the Compact, as well as officials from Ontario and Quebec.¹⁸³ The process started with the Wisconsin DNR reviewing what would become 5,400 pages of application and supporting material laying out the reasoning and logistics for the proposed diversion.¹⁸⁴ After the DNR determined that the application was sufficiently complete, it took another five years, until June 2015, for the DNR to determine that the application actually met the requirements of the Compact and was ready to be shared with the other Great Lakes states for their consideration and approval.¹⁸⁵ Despite the DNR's decision, there were still numerous environmental groups that publicly criticized the application because the groups believed that, among other things, Waukesha had not done enough to find alternative water sources to Lake Michigan and the city planned to divert the water to too large an area.¹⁸⁶

The application moved on to the Regional Review stage of the Compact approval process with those concerns still in play. The Regional Review marked the first time the states and provinces had come together to work through the procedures they had agreed to for Communities within Straddling Counties under the Compact.¹⁸⁷ The review began with consideration by the Regional Body, which planned to come to a nonbinding decision regarding the proposal and include the Canadian officials who were following the diversion requests.¹⁸⁸ The Great Lakes governors would then take the Regional Body's findings and, with those considerations in mind, decide how they wanted to vote on the diversion. Just like under WRDA, the governors had to be unanimous in their approval for a diversion to pass.¹⁸⁹

Waukesha cleared the first voting hurdle of the process on May 18, 2016 when every state except Minnesota, which abstained, approved the proposal in a Regional Body vote.¹⁹⁰ That set a final vote date for the state governors of June 21.¹⁹¹ As was true for the prior diversion considerations both pre- and post-Com-

183. *See id.*; *see also* Behm, *Great Lakes Governors*, *supra* note 181.

184. *See* ANNIN, *supra* note 12, at 275, 279 (“Waukesha supplied the DNR with additional information by the spring of 2011, and the already-voluminous application ballooned to more than 2,400 pages, plus an additional 3,000 pages of supporting material.”).

185. *See id.* at 278–81 (“[M]ore than five years after Waukesha had originally applied for a diversion, and more than a decade after it had first expressed interest in Lake Michigan water—the Wisconsin DNR announced that the application . . . it was almost ready to be shared with other states and provinces.”).

186. *Id.* at 281–82 (“It argued that millions of gallons were available to Waukesha from a combination of deep and shallow aquifers, that the diversion amount was excessive, and the expanded water supply service area was a nonstarter.”).

187. *Id.* at 282 (“While the regional review process ramped up the drama, it was arduous and confusing to the general public, in part because it had never been done before. The application would first be picked over by what’s called the Regional Body . . .”).

188. *See id.* (“In order to be inclusive with Canada, the Regional Body would come to a nonbinding determination on Waukesha first.”).

189. *Id.* (“[T]he eight Great Lakes governors—keeping the Regional Body’s conclusions in mind—would make a final determination on Waukesha with a binding vote. All it took was one gubernatorial veto and Waukesha’s application was dead.”).

190. *Id.* at 286.

191. *Id.*

fact, there was a flurry of political and other negotiations that took place in between votes with officials from various states meeting with each other to try to arrive at a consensus regarding how to proceed.¹⁹² Despite the concerns some states had that one governor would vote no, Waukesha cleared the second voting hurdle on June 21, 2016 when the long process of review ended with a unanimous vote to approve the diversion.¹⁹³

While the states approved the diversion, there were several last-minute changes to the initial request that the approving states required Waukesha to accept before starting on its plans to divert the water.¹⁹⁴ Minnesota and Michigan offered the amendments that were incorporated as part of the approved withdrawal request.¹⁹⁵ One amendment stated that Waukesha's originally proposed water distribution area that extended into four other communities and had received approval from the Wisconsin DNR "did not clearly meet" all the terms of the Compact.¹⁹⁶ The states required that Waukesha cut the proposed water distribution area down to include only the city's existing water service area plus several town islands, or those pieces of smaller municipalities completely surrounded by the city of Waukesha itself.¹⁹⁷ In a further effort to bring the proposal into compliance with the Compact, the approving states required that Waukesha divert no more than an average of 8.2 million gallons per day of lake water by midcentury, an amount that was less than the average of 10.1 million that Waukesha had requested in its proposal.¹⁹⁸

There were also amendments that dealt with ensuring that the seven states other than Wisconsin would still have a say in Waukesha's diversion activities even after the proposal had been approved. One such amendment allows individual states, or the Great Lakes states together, to take enforcement actions against Waukesha and compel compliance with the conditions of the approval or of the Compact itself.¹⁹⁹ The representative from Minnesota who proposed the amendment said it was meant to emphasize there would be another layer of enforcement beyond Wisconsin's existing authority to control the city's diversion activities.²⁰⁰ An additional amendment subjects the city's water utility to performance audits with only thirty days of advance notice. The audits would require Waukesha to open its operating records for inspectors from any of the seven Great Lakes states. The amendment was meant as a way to ensure transparency as Waukesha implements the new water diversions.²⁰¹

192. See *id.* at 288–90 ("It was a crazy month for the Compact Council. From May 18 to June 21, Wisconsin, Michigan, and Minnesota continued to have extensive conversations about the application—conversations that crescendoed the week before the vote.").

193. *Id.* at 291; Behm, *Great Lakes Governors*, *supra* note 181.

194. Behm, *Great Lakes Governors*, *supra* note 181.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

Numerous environmentalists were “shattered” about the outcome of the Waukesha vote, but many individuals who had been involved with the process saw it as a victory for the Compact.²⁰² The proposal brought up numerous issues that such diversions have led to in the past within the region, including suburban sprawl, racial inequality, environmental sustainability, party politics, and legal precedent.²⁰³ There is a debate about what effect Waukesha’s experience will have on future communities considering a similar course of action given that Waukesha expended a tremendous amount of time and money in getting its proposal approved.²⁰⁴ Annin and environmentalists believe that it is just a matter of time before another community in a similar position to Waukesha decides to take a similar course of action and ensure access to Great Lakes water.²⁰⁵ “The magnetism of Great Lakes water is just too strong,” according to Annin.²⁰⁶ The question of which community is next may take a while to answer, but the experiences that officials working on the Waukesha proposal had will no doubt influence the way the states and provinces weigh in on and attempt to alter future proposals.

Waukesha is currently in the process of overseeing construction of water pipes that will carry the lake water from Milwaukee to Waukesha for Waukesha’s use. The city will also have to oversee construction of a separate set of pipes to carry the already used, treated lake water into a river that will carry the water back into Lake Michigan as part of complying with the return-flow requirement.²⁰⁷ That pipeline is expected to be installed between 2020 and 2022.²⁰⁸

C. *The Foxconn Diversion Review*

The Foxconn diversion review is the latest in the history of Wisconsin-based reviews. Because the diversion would require the multi-step process of

202. See ANNIN, *supra* note 12, at 299 (“As shattered as some environmentalists were about the outcome, they played an enormously important role in reducing the size of Waukesha’s diversion and in adding a long list of conditions that could end up looming large after the Waukesha diversion goes on line.”).

203. *Id.* at 298.

204. *Id.*

205. See *id.* at 299 (“Despite comments by some Compact Council members that the time and money that Waukesha expended could have a chilling effect on future water-diversion applications, sooner or later another community is bound to apply for its own straddling-county diversion.”).

206. Environmental groups continue to believe that the diversions within the Great Lakes Basin are just getting started. Wisconsin may be an especially popular place for the diversion proposals to originate given that much of the southern portion of the state along the Lake Michigan coast, which is a main population center in the state, straddles the Basin border line. *Id.* (“Despite comments by some Compact Council members that the time and money that Waukesha expended could have a chilling effect on future water-diversion applications, sooner or later another community is bound to apply for its own straddling-county diversion.”).

207. See Don Behm, *Waukesha Alerts Hundreds of Property Owners in Three Communities to Field Work Along Route of Lake Diversion Pipeline*, MILWAUKEE J. SENTINEL (Apr. 23, 2018, 6:40 AM), <https://www.jsonline.com/story/news/local/milwaukee/2018/04/23/waukesha-calls-hundreds-property-owners-supporting-cast-hundreds-start-field-work-along-lake-water-d/529650002/> (“Nearly 1,300 other property owners in New Berlin, Muskego and Franklin will watch construction from 2020 to 2022 of a separate pipeline. That one will carry fully treated wastewater from Waukesha’s sewage treatment plant to the Root River, where it will flow downstream to the lake.”).

208. *Id.*

Racine supplying Mount Pleasant with water and then Mount Pleasant supplying Foxconn with water, Racine was the entity that had to submit Foxconn's application for a diversion outside the Basin.²⁰⁹ The Wisconsin DNR opened up a public comment period on the application after receiving Racine's diversion request on January 26, 2018.²¹⁰

Commenters on the proposal brought up concerns about whether Racine was the proper applicant for the water diversion under the Compact given that Mount Pleasant was the "straddling community" that would actually be making use of the water.²¹¹ They also expressed concern that allowing such a diversion would set a poor precedent as it would be seen as encouraging industrial and private entities to blatantly circumvent the Compact by using a local water utility, like Mount Pleasant, for the water use in a way for which the Compact was not designed.²¹²

The DNR responded to the concerns about Racine's role as the applicant by explaining that Racine, being the entity that is ultimately providing the Great Lakes water, was the proper entity to make the withdrawal request.²¹³ But the DNR gave a much more general response to the concerns about setting a bad precedent. The agency assured commenters that any future requests would be "required to independently meet statutory criteria and Compact requirements applicable to the diversion request," including the requirement that the diverted water only be used for public water supply purposes and that private entities are prohibited from applying for diversions.²¹⁴ Further, it noted that "[t]he specifics of any diversion approval are likely to be a unique set of facts that will have limited applicability to any other diversion application."²¹⁵

The response ignores the key point of the commenters' concerns by saying that the Compact can be trusted to keep the water supply well-regulated. The commenters, many of whom live in southeastern Wisconsin,²¹⁶ were clearly concerned anyway and raised a valid point that allowing this practice, while generally pointing to the Compact as a protection, misses that the Compact will have done nothing to stop the Foxconn deal from going through. If the Compact can be circumvented, as it was when Foxconn found a willing public water utility,

209. ANNIN, *supra* note 12, at 304.

210. *Comments and Responses*, *supra* note 32, at 1 ("The Department of Natural Resources . . . held a public comment period from January 31 to March 21, 2018 on the Racine Diversion Application With the support of the straddling community of Mount Pleasant, the City of Racine [applied] to receive a diversion of Great Lakes water for a straddling community under the [Compact].").

211. *Id.*

212. *Id.* at 2 ("The department received many comments that expressed the opinion that the purpose of water being diverted was primarily for a private industry (Foxconn) not for 'public water supply' purposes (i.e., a group of largely residential customers).").

213. *Id.* at 1 ("The Racine water utility (RWU) owns and operates the public water supply system which provides municipal water service to the residents and businesses of Mount Pleasant. . . . Therefore, the City of Racine is the appropriate diversion applicant.").

214. *Id.* at 3-4 ("Private entities are prohibited from applying for diversions of Great Lakes Water under the Compact. The specifics of any diversion approval are likely to be a unique set of facts that will have limited applicability to any other diversion application.").

215. *Id.* at 4.

216. *Id.* at 1.

industrial or private entities could do the same thing again and again to the potential detriment of the Great Lakes region.

Commenters on the proposal also expressed concern as to whether the water diverted to the Foxconn plant would truly be used for public use, as the Compact envisioned, or whether Foxconn was trying to skirt the Compact by exploiting what could be seen as a loophole to the diversion restriction for private companies.²¹⁷

The DNR explained away those concerns, saying that public use under the Compact allows for some industrial usage as long as the public utility drawing the water is primarily providing it to residential customers.²¹⁸ But the DNR made this claim while relying on percentages of people and entities served as opposed to volume of use by the people and entities being served.²¹⁹ That difference could skew the numbers in favor of low-use residential areas that may make up the vast majority of customers being served, as opposed to what may only be two or three high-use industrial areas that make up the vast majority of volume of water being used in the particular area. Additionally, the DNR's response ignores the fact that Racine made the diversion request solely for Foxconn's private interest in getting water. It is true that the diversion will be part of a larger water utility that supplies residential customers, but it is important to note that the diversion would never have come about if it were not for Foxconn's private interest. The DNR thus failed to address the commenters' underlying concern with a potential violation of the spirit of the Compact by hiding behind numbers that do not tell the entire story.

D. *Legal Challenge*

Unhappy with the DNR's approval of the diversion, a slew of midwestern environmental groups filed a petition for rehearing with the DNR on May 25, 2018 challenging the approval and arguing that diversions under the Compact can only serve a group of largely residential customers. The groups argue that the large majority of the approved diversion would instead be used to supply "one single private industrial customer, Foxconn," and the rest would be used by industrial and commercial facilities surrounding the Foxconn plant.²²⁰ The DNR granted the petition and the issue went before an administrative law judge.²²¹

217. *Id.* at 2 ("The department received many comments that expressed the opinion that the purpose of water being diverted was primarily for a private industry (Foxconn) not for "public water supply" purposes (i.e., a group of largely residential customers).").

218. *Id.* ("[Racine's] proposal also indicates that 88% of its customers in the straddling community of Mount Pleasant are residential and only 12% are industrial or commercial users").

219. *See id.* ("The City's water supply system and its service to the straddling community of Mount Pleasant both comply with the 'public water supply purposes' requirements of the Compact and Wisconsin's implementing statutes.").

220. ANNIN, *supra* note 12, at 309.

221. Prehearing Conference and Scheduling Order, River Alliance of Wisconsin, Case No. DNR-18-0006 (State of Wis. Division of Hearings and Appeals, 2018) [hereinafter River Alliance].

Administrative Law Judge Brian K. Hays ruled against the petitioners on June 7, 2019 in an opinion that rested on his industry-friendly statutory interpretation of the Wisconsin legislative language implementing the Compact.²²² Hays sided with the DNR, taking the view that the Compact and state implementing legislation intended to measure the amount of public use by number of customers as opposed to the volume of use for which each customer accounted.²²³ He held that “the volume of water diverted is immaterial to the approval of a diversion. The important criterion for a diversion is that it be done for public supply purposes through a physically connected system serving largely residential customers.”²²⁴ His interpretation allows Foxconn to use the Racine water utility’s residential customers as a shield protecting the true private nature of the diversion. The Racine water utility reported withdrawing slightly more than seventeen million gallons of water per day in 2017.²²⁵ Adding the seven million gallons Foxconn can withdraw under the proposal to that number would mean the city would be withdrawing twenty-four million gallons per day, about 30% of which would be going directly to Foxconn, a single, completely private customer. By ignoring volume as “immaterial,” Hays ignores the problems with calling that single diversion a public use.²²⁶

Hays bolsters his position with an appeal to the public interest and the underlying premise of a public water utility.²²⁷ “The universality of its service and the benefits it offers are furthered by a reading that allows the public utility to serve the whole village. It benefits the public.”²²⁸ He further holds:

To read an “un-public” purpose into the Applicant’s intent is to read an absurdity into the law If the Compact and its enabling statutes had intended to have a public water utility serve its residential, commercial, industrial and institutional customers within the Basin and only residential customers with diverted water outside the Basin, it would have said something very different. It would have directed the diverted water [to] go to the area outside the Basin and restrict its customers to solely residential users.²²⁹

What Hays misses is the Compact and Wisconsin’s enabling statutes do provide those restrictions. The Compact does not exist to dictate who public water utilities can serve generally. It exists to dictate who public water utilities can serve when the water is being sent outside the Basin.²³⁰

The Compact defines “public water supply purposes” as “water distributed to the public through a physically connected system of treatment, storage and

222. Dept. of Nat. Res., DNR-18-0006 Wis. Dep’t of Admin., Div. of Hearings and Appeals (2019), <https://dnr.wi.gov/topic/WaterUse/documents/Racine/CityofRacineDNR180006Decision.pdf> [hereinafter Hays Opinion].

223. *Id.* at 11.

224. *Id.* (“The volume of water diverted is accounted for more holistically in the baseline withdrawal amount under which the Applicant must adhere.”).

225. *Comments and Responses*, *supra* note 32, at 2.

226. *See* Hays Opinion, *supra* note 222, at 11.

227. *See generally id.*

228. *Id.*

229. *Id.* at 12.

230. *See* Great Lakes Compact, *supra* note 8, at 3743 (explaining that a purpose of the Compact is “[t]o prevent significant adverse impacts of Withdrawals and losses on the Basin’s ecosystems and watersheds”).

distribution facilities serving a group of largely residential customers that may also serve industrial, commercial, and other institutional operators.”²³¹ Hays partially rests his statutory interpretation on the latter portion of the “public water supply purposes” definition that focuses on industrial and commercial users, finding “that the [implementing] statute’s intent is to allow a system serving many kinds of customers as a public water supply purpose.”²³² But the interpretation misreads the definition as allowing a solely private water diversion.

The Compact’s “public water supply purposes” definition should instead be interpreted in two parts. The first part, “water distributed to the public,”²³³ should be read as defining the type of diversion that is allowed, a diversion that at least in part goes to the public. The second part of the definition, “through a physically connected system of treatment, storage and distribution facilities serving a group of largely residential customers that may also serve industrial, commercial, and other institutional operators,”²³⁴ should be read as defining the type of system that can be used to make that diversion. As Hays notes himself, the statutory construction of Wisconsin’s implementing legislation “protects the Basin by allowing a diversion (and return) of water that is processed through a regulated utility.”²³⁵ The second part of the definition is not meant to allow a solely private diversion, it is only meant to ensure that a reputable system is being used to make the diversion that will serve the “public” mentioned in the first part of the definition. Thus, Hays misses the intent of the Compact and implementing language by reading what is only meant to be a description of the method of getting the water to the public to support a fully private diversion.

Contrary to what Hays suggests, the Compact was not designed to regulate the minutiae of public water utilities operations, it was designed to regulate whether and how those utilities could transfer water outside the Basin. The Compact makes clear that diversions must be for public use. A solely private diversion, like Foxconn’s, falls outside those bounds.

Hays finally addresses the petitioners’ valid fear that decisions like his will open a “floodgate of diversion requests” by noting that there are relatively few communities that would meet the straddling community exception under the Compact in Wisconsin.²³⁶ While Hays is right in the sense that about 7% of total jurisdictions in Wisconsin could be considered a straddling community,²³⁷ he misses the possible ramifications across the other seven Great Lakes states that may have similarly situated straddling communities with companies like Foxconn that want exclusively private diversions.²³⁸

231. See Great Lakes Compact, *supra* note 8, at 3741.

232. Hays Opinion, *supra* note 222, at 10.

233. See Great Lakes Compact, *supra* note 8, at 3741.

234. See *id.*

235. *Id.* at 11.

236. *Id.* at 12.

237. *Id.*

238. Hays also seems to undermine his statutory interpretation by concluding on this point. In a sense he is suggesting that even if his statutory interpretation is wrong and that his decision will allow private diversions

Ultimately, Hays's decision shows the need to make the already clear for-public-use requirement under the Compact even clearer so that decisions like this do not continue. In doing so, it also allows there to be a broader spotlight cast on the Compact and the potential need to revisit how the Compact deals with diversions.

IV. RECOMMENDATION

A. *Revising Straddling Community Requirements*

The Great Lakes region's prior experience with the New Berlin, Waukesha, and Foxconn diversion approvals under the Compact warrant a re-evaluation of the process by which Straddling Community exceptions are evaluated. New Berlin set a high standard for future Straddling Community proposals, but the ease with which it passed the Compact review, which it did in a matter of months, contrasts sharply with the six-year process Waukesha underwent to get its own Community in a Straddling County proposal approved.²³⁹ States whose communities are suffering from poor water quality are more likely to approve such diversions, or at least try to find workarounds, to ensure that the citizens or prospective businesses get access to clean water. Leaving the final decision up to just one state, as ultimately happens even if a Straddling Community proposal is subject to Regional Review, is problematic. That state is more than likely conflicted in its decision-making given inherent political and economic pressures. Such a conflict runs counter to the Compact's idea of bringing all the players in the region together to make sure that diversion decisions are both well thought out and appropriate in light of the common interest in maintaining the Great Lakes.²⁴⁰ Michigan clearly had a problem with the New Berlin proposal before the Compact was enacted, but after the Compact, its voice no longer mattered because it ceded all of its approval power to Wisconsin.²⁴¹

Requiring a unanimous vote for Straddling Community exceptions would be too extreme, though. Instead, there should be a requirement that five out of the eight states approve a diversion to a Straddling Community before the diversion can move forward. Such a change would help ensure that the system for approval is not as strict as the system for a Community within a Straddling County while still allowing other states to have a final say in the process.

The change would also have helped in a situation like that of Foxconn where questions about complying with the Compact's public use requirement came up. Having five states weigh and vote on the question to determine if the proposal aligns with the Compact gives a proposal more legitimacy, as opposed

against the better interest of the Great Lakes community, at least it will be somewhat limited. That line of reasoning has no foundation on which to rest. *See id.*

239. ANNIN, *supra* note 12, at 270, 275.

240. *See generally* Great Lakes Compact, *supra* note 8, at 3742–43 (“The most effective means of protecting, conserving, restoring, improving and managing the Basin Waters is through the joint pursuit of unified and cooperative principles, policies and programs mutually-agreed upon, enacted and adhered to by all Parties.”).

241. *See* ANNIN, *supra* note 12, at 270.

to just one state having control, and would help to avoid future litigation on the issue. The five-state requirement would also align with the states' goal of finding a way for the water-troubled, uniquely positioned communities that meet the requirements for the exception to get Great Lakes water without risking large-scale diversions to far-flung, water-parched areas of the continent.²⁴²

B. *Defining Public Use*

The Great Lakes states should also come together to better define what the Compact envisions when it requires that diversions be made solely for public use. A better definition would help curb concerns, like those that Michigan brought up during the Pleasant Prairie consideration,²⁴³ as well as those that environmental groups continue to bring up with the Foxconn proposal,²⁴⁴ that large industrial and business entities may try to use diversions not to benefit the public but to enrich themselves. As is clear from how the Wisconsin DNR and Judge Hays approached the public use question, it is easy to circumvent the theme of the requirement by simply claiming that the majority of customers are residential even if the few business or industry customers are using vastly more water than those residential customers. Skirting the issue with such denunciations of public concern sets a poor precedent as communities inside Wisconsin and within the other seven Great Lakes states may look to attract similar commercial investment that could spur economic growth but deplete the region's water resources.

The Great Lakes states could address this issue by revising the Compact to more clearly require at least some public use in every diversion under the Compact. The states could also revise the Compact to include a specified percentage threshold allowed for water use by business and industry in what is otherwise viewed as a public use diversion under the Compact. The percentage threshold that the states agree to should be derived based on analyses of current water usages among the eight states, particularly in those areas that are home to dense concentrations of industry, like the areas around major cities or suburban corridors like the stretch between Chicago and Milwaukee. Setting such a percentage would give a much clearer understanding of what water for public use means under the Compact and eliminate the guesswork currently associated with that requirement.²⁴⁵

No matter how fitting a percentage threshold could be at the time it is adopted though, there would undoubtedly come a time in the future where a community would think the percentage is too low and is restricting the community's ability to attract business and spur economic development. Given that concern, it would be most beneficial to make the threshold just that, a threshold. Anything below the percentage threshold would be deemed to comply with the Compact

242. *See id.* at 259.

243. *Id.* at 143–44.

244. *See River Alliance, supra* note 221.

245. ANNIN, *supra* note 12, at 305 (“A key question in the Foxconn debate is whether the Compact’s water-diversion exception clauses were designed to encourage corporations like Foxconn to develop large industrial facilities at the edge of the Great Lakes Basin.”).

and would not require further action other than fully completing whatever regulatory requirements exist in the state where the proposal was made. If, however, the planned diversion exceeds the allowed percentage of use by business or industry, the states should agree to a mandatory review of the proposal that includes opportunities for the states, as stakeholders, to offer input and possible changes. After having an opportunity for input, the seven states other than the state in which the proposal originated should have the ability to vote on the proposal with a four-state majority being the minimum to move the proposal along.

The key difference between the prior recommendation about approving Straddling Community requests and approving requests to exceed the industrial and business use threshold is that the state from which the industrial use request originated would not be part of the final vote to approve the request. It would have control over bringing the request to the other states and explaining its decision to move forward with the request, but its likely conflict of interest in such a vote because of economic incentives from an approval, coupled with the importance of adhering to the Compact's goal of allowing diversions primarily for public use, means it should be removed from the final voting process. That system would thus give the originating state the power to lobby on behalf of its industries while keeping the final vote in the hands of the other states. Those other states would not have the same conflicts of interest but also, because of the simple majority nature of the vote, would not have power to unilaterally hold up approval of such a request. In that way, there would be more oversight of diversions of Great Lakes water that could unevenly benefit private interests.

Alternatively, the states could avoid the threshold model and instead amend the Compact with a requirement that states alert one another if any new plans arise that involve diversions of more than two million gallons per day that will at least in part include use by business or industry. While simply requiring a state to alert other states of such a plan for a larger withdrawal that falls outside of strictly public use does not have the same teeth as the percentage proposal and thus would do less to solve the definitional problem, it would still ensure that the states are kept up-to-date on water diversions and force interstate conversations. Such reporting would also lead to a better, centralized record of where Great Lakes water is being diverted across the region instead of relying on eight different accounts from the individual states. The two million-gallon-per-day threshold is simply a starting point for discussion among the states and could be raised or lowered depending on what they see fit after exploring such a course of action. The governors and their officials would also be free to revisit something more similar to the voting requirements discussed above if a simple alert and consult strategy proves to be ineffective.

While the Compact has established clearer standards and given the region a base from which to work as it controls diversions of Great Lakes water, it is now ten years old and is in need of an update to account for issues that may not have been foreseen at the time of its negotiation and adoption.

V. CONCLUSION

The debate over how to control Great Lakes water is not new, and the threat of diversions to areas outside the Great Lakes Basin is not likely to go away. The states and provinces in the region have come a long way from the Boundary Waters Treaty at the beginning of the Twentieth Century, but, in such a diverse region with competing interests, there will continue to be new issues that arise. The Compact was a clear response to the years of somewhat haphazard and often contentious relations between the regional stakeholders whenever diversion requests would arise, as it creates a system by which such proposals can be reviewed and approved. There are, however, key portions of the Compact that are still too vague—most important of which is the definition of “public use.” The Compact should be improved through revisions that make the definition of public use clearer, set thresholds on the amount of water that can be diverted for business or industrial use, create a voting requirement if a diversion proposal exceeds those thresholds, and establish a requirement that five out of the eight Great Lakes states approve every diversion for a Straddling Community. The states owe it to their citizens to keep the interests of industry from drowning the needs of the public and region.