

KAYLA BRINDA*

WANTED: The Great Lakes Water- Unsustainable Out-of-Basin Diversions and Canada’s Options

Introduction	199
I. The Highly Depended Upon Great Lakes Basin	202
II. The Great Lakes Water Resources Compact and the Waukesha Water Diversion.....	207
III. The Socioeconomic and Biophysical Impacts of Approving Great Lakes’ Water Diversions.....	216
IV. Setting a Precedent	218
V. How Canada Can Intervene to Prevent or Stop Future Water Diversion Approvals.....	221
A. Mayors Challenging a Diversion Approval.....	222
B. Amending the Boundary Waters Treaty.....	228
Conclusion.....	232

INTRODUCTION

It is no secret that Canada is a particularly water-rich country; in fact, it is home to some 20% of the world’s total freshwater

* Kayla Brinda earned her Bachelor of Laws (LL.B.) from the Faculté de droit de l’Université de Sherbrooke (2016), and her Master of Laws (LL.M.) in Environmental and Natural Resources Law from the University of Oregon School of Law (2017). Brinda currently works as a research professional for the *Centre de recherche sur la régulation et le droit de la gouvernance* (CrRDG) of the Faculté de droit de l’Université de Sherbrooke, in Québec, Canada. Brinda is particularly interested in transboundary water conflict management, and how alternative dispute resolution methods may be used to respond to international conflicts concerning freshwater resources.

resources.¹ This supply may seem more than enough to respond to the current and future needs of Canada's thirty million people, which corresponds to approximately 0.5% of the worldwide population.² However, the reality is quite different. First, only about 7% of this global supply is renewable.³ Second, as more than half of this water supply drains northward into the Arctic Ocean and Hudson Bay, it remains unavailable to 85% of the Canadian population who live along the country's southern border.⁴ That means the remaining supply, while still abundant in comparison to geographically dryer regions in the world, is heavily used and often overly stressed.⁵

Some of this vulnerable natural resource is shared with Canada's neighbor to the south, the United States. More precisely, 40% of Canada's boundary with the United States is water.⁶ The Great Lakes Basin is included among the various water resources straddling the boundary between the United States and Canada.⁷ Because of this binational geographic position, the Canadian provinces of Ontario and Québec must conjunctively manage the Great Lakes and the St. Lawrence River Basin with the United States, more specifically with the Great Lakes-St. Lawrence River Basin Water Resources Council (Compact Council) through the Great Lakes and the St. Lawrence River Basin Compact.⁸ As detailed later in this Article, the Compact Council is composed of the Governors from the eight U.S. Great Lakes States (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Wisconsin, and the Commonwealth of Pennsylvania).⁹

Despite the Great Lakes' vulnerability, North Americans commonly believe that the Great Lakes represent an infinite water

¹ *Frequently Asked Questions*, GOV'T OF CAN., <https://www.ec.gc.ca/eau-water/default.asp?lang=En&n=1C100657-1> (last modified Feb. 6, 2012).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Canadian Water Facts*, ALTA. WATER PORTAL, <http://albertawater.com/learn/interesting-facts/canada> (last visited Dec. 18, 2017).

⁷ *Id.*

⁸ Great Lakes-St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110-342, 122 Stat. 3739, art. 1, § 1.2 (2008) [hereinafter Compact].

⁹ *Great Lakes-St. Lawrence River Basin Water Resources Council Members and Alternates*, GREAT LAKES-ST. LAWRENCE RIVER BASIN WATER RESOURCES COUNCIL [hereinafter COMPACT COUNCIL], <http://www.glscompactcouncil.org/Membership.aspx> (last visited Dec. 18, 2017).

supply due to their size.¹⁰ This misconception leads to the illusion that the Great Lakes could be relied upon to meet the needs of out-of-basin communities. In light of this, both nations are confronted with choices concerning conservation, prevention, and possible water diversions towards geographic areas that face serious water quantity and quality challenges. The recent approval of a new out-of-basin water diversion¹¹ from Lake Michigan to the City of Waukesha, Wisconsin, has raised serious concerns.¹² In fact, some of Canada's local government entities expressed strong disagreement with the approval of the diversion towards the City of Waukesha, claiming that it is unsustainable.¹³

In response to these justified apprehensions, this Article provides an overview of certain avenues through which Canada can prevent and stop current and future out-of-basin diversions approved by the Compact Council. The first section explains how the Great Lakes Basin is a network of abundant, yet vulnerable, water resources, upon which both the United States and Canada rely environmentally, socially, and economically. The second section focuses on the Waukesha water diversion, addressing the Compact and the diversion possibilities it offers, as well as the Waukesha water diversion proposal and its approval by the Compact Council. The third section covers socioeconomic and biophysical impacts resulting from such a Great Lakes water diversion approval. The fourth section explains how this diversion sets a worrisome precedent for the future

¹⁰ See Editorial Board, *Editorial: Droughts and the Great Lakes: When Dry Regions Eet Thirsty Enough . . .*, CHI. TRIB., (Apr. 24, 2015, 11:02 AM), <http://www.chicagotribune.com/news/opinion/editorials/ct-california-drought-great-lakes-water-compact-lake-michigan-edit-0426-bd-20150424-story.html> (explaining the idea that “[s]tates like Wisconsin are awash in water,” the belief that the Great Lakes basin offers enough water supply for it to be pipelined to the Southern U.S. states).

¹¹ Compact, *supra* note 8, at § 1.2 (“Diversion is a transfer of Water from the Basin into another watershed, or from the watershed of one of the Great Lakes into that of another by any means of transfer, including but not limited to a pipeline, canal, tunnel, aqueduct, channel, modification of the direction of a water course, a tanker ship, tanker truck or rail tanker but does not apply to Water that is used in the Basin or a Great Lake watershed to manufacture or produce a Product that is then transferred out of the Basin or watershed.”).

¹² Susan Bence, *As Waukesha Diversion Plan Pushes Forward, Concerns for Great Lakes Water Remain High*, MILWAUKEE PUB. RADIO (Aug. 3, 2017), <http://wuum.com/post/waukesha-diversion-plan-pushes-forward-concerns-great-lakes-water-remain-high#stream/0>.

¹³ Press Release, City of St. Catharines, *Mayors Oppose Waukesha Water Diversion* (June 16, 2016), <https://www.stcatharines.ca/en/governin/resources/GLSLCI-Press-Release---Mayors-Oppose-Waukesha.pdf>.

application of the Compact. Finally, the fifth section addresses how Canada's federal government, provinces, and cities can intervene to stop Great Lakes Water diversions if more are approved in the near future.

I

THE HIGHLY DEPENDENT UPON GREAT LAKES BASIN

The Great Lakes Basin is a network of abundant, yet vulnerable, water resources, upon which both the United States and Canada depend environmentally, socially, and economically. To better understand the intricacies of this freshwater system, this section discusses the geophysical, social, and economic importance of each Lake and brings to light their geographical interconnectedness, which is essential to understanding how an event or phenomenon affecting one of the Great Lakes necessarily has a ripple effect on the Great Lakes basin in general. By explaining how each Great Lake is unique and of immense importance, this section sets the stage to better grasp why it is crucial for Canada to proactively protect these waters from being diverted outside the Great Lakes Basin.

The Great Lakes, which contain “95% of the surface freshwater in the United States,” are a vital component to the U.S. economy, and greatly affect all aspects of the environment.¹⁴ Lakes Ontario, Erie, Huron, Michigan, and Superior—and their connecting channels—represent the vastest fresh surface water system on our planet.¹⁵ This basin fosters a large number of streams, wetlands, marshes, and forests, which form the ecosystems home to more than 3,500 plant and animal species, including some especially diverse fish and migratory bird species.¹⁶ This network covers more than 94,000 square miles and drains twice as much land while holding approximately 6 quadrillion gallons of water, about one-fifth of the world's fresh surface water supply.¹⁷

The Great Lakes provide several ecological services, such as “water filtration and storage, flood control, nutrient cycling, and

¹⁴ *The Great Lakes*, SUSTAIN OUR GREAT LAKES, <http://www.sustainourgreatlakes.org/about/our-lakes/> (last visited Dec. 18, 2017).

¹⁵ *The Great Lakes*, GREAT LAKES INFO. NETWORK, <https://www.glc.org/lakes/> (last visited Dec. 18, 2017).

¹⁶ *The Great Lakes*, *supra* note 14.

¹⁷ *Id.*

carbon storage.”¹⁸ Additionally, the Great Lakes allow nearby communities to thrive economically. In fact, because of their “rich tradition of agricultural production, commercial and sport fishing, industrial manufacturing, and tourism and recreation,” the Great Lakes surpass that of many developed nations’ economic activity.¹⁹ Because four of the five lakes straddle the border between Canada and the United States,²⁰ the Great Lakes truly represent a system of precious freshwater resources shared between two nations.

Numerous locks, channels, and rivers connect the different Great Lakes to each other and, eventually, to the Atlantic Ocean.²¹ Despite their profound interconnectedness, each Great Lake has widely varying characteristics. In the following paragraphs, the descriptions of the Lakes are ordered according to their geographic position, proceeding from East to West, from the St. Lawrence River to Lake Superior.

Straddling the border between the United States and Canada, Lake Ontario is a downstream Great Lake, meaning that through its geophysical situation, human activities throughout Lake Superior, Michigan, Huron, and Erie basins impact it, because water comes through the other Lakes before reaching Lake Ontario.²² Its drainage basin includes Ontario, New York, and Pennsylvania,²³ and “is home- and source of drinking water- to 9-million people.”²⁴ Significant urban industrial centers were developed on the Lake’s Canadian shore, and “more Canadians live in the Lake Ontario watershed than any other watershed in the country.”²⁵ However, the U.S. shore is “less urbanized and is not as intensively farmed.”²⁶ Unfortunately, Lake Ontario is the most threatened Great Lake. In fact, “because of

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *The Great Lakes Seaway Navigation System*, AM. GREAT LAKES PORTS ASS’N, <http://www.greatlakesports.org/industry-overview/the-great-lakes-seaway-navigation-system/> (last visited Dec. 18, 2017).

²¹ *See id.*

²² *Lake Ontario*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/greatlakes/lake-ontario> (last updated Feb. 2, 2018).

²³ *About the Lakes*, GREAT LAKES COMM’N, <https://www.glc.org/lakes/lake-ontario> (last visited Dec. 18, 2017).

²⁴ *Lake Ontario*, LAKE ONTARIO WATERKEEPER, <http://www.waterkeeper.ca/lake-ontario/> (last visited Dec. 18, 2017).

²⁵ *Id.*

²⁶ *About the Lakes*, *supra* note 23.

human activities, at least 10 species of fish have gone extinct and at least 15 exotic species have been introduced in the last 200 years.”²⁷

Next in line is Lake Erie, the smallest by water volume (484 cubic km)²⁸ of the five Great Lakes. Lake Erie has a surface area a little less than 10,000 square miles,²⁹ and covers four U.S. states (New York, Pennsylvania, Ohio, and Michigan), and the Canadian province of Ontario.³⁰ The Lake is surrounded by fertile soils, and thus, “the basin is intensively farmed and is the most densely populated of the five lake basins.”³¹ “About one-third of the total population of the Great Lakes basin is in the Lake Erie watershed.”³² This equates to “[a]pproximately twelve million people liv[ing] in the watershed, including seventeen metropolitan areas with more than 50,000 residents.”³³ Further, nearly eleven million inhabitants fully depend on Lake Erie for their drinking water.³⁴ This Great Lake is also very “popular with sports fishermen and it boasts an extensive walleye fishery. Charter fishing boats also take tourists out to catch small mouth bass.”³⁵ Consequently, the lake’s good health is essential to the region’s prosperity.

To the west of Lake Erie, Lake Huron is hydrologically inseparable from Lake Michigan, to which it is joined by the Straits of Mackinac.³⁶ Lake Huron has a drainage area that covers certain areas of Michigan and Ontario, and includes the intensively farmed Saginaw River basin as well as the Flint and Saginaw-Bay City

²⁷ LAKE ONTARIO WATERKEEPER, *supra* note 24.

²⁸ *Physical Features of the Great Lakes*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/greatlakes/physical-features-great-lakes> (last updated Sept. 21, 2016).

²⁹ *Lake Erie*, GREAT LAKES COMM’N, <https://www.glc.org/lakes/lake-erie> (last visited Dec. 18, 2017).

³⁰ Kim Ann Zimmerman, *Lake Erie Facts*, LIVE SCI. (June 27, 2017, 11:41 PM), <https://www.livescience.com/34480-lake-erie.html>.

³¹ *Lake Erie*, GREAT LAKES COMM’N, *supra* note 29.

³² *Lake Erie*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/greatlakes/lake-erie> (last updated Feb. 2, 2018). A watershed is defined as a precipitation collector: it consists in the section of land in which the streams are drained and rain falls to a common outlet that can take the form of an outflow of a reservoir, mouth of a bay, or point along a stream channel. The water falls in outflows and accumulates. *What is a Watershed?*, USGS, <http://water.usgs.gov/edu/watershed.html> (last modified Dec. 9, 2016).

³³ *Lake Erie*, U.S. ENVTL. PROTECTION AGENCY, *supra* note 32.

³⁴ *Id.*

³⁵ Zimmerman, *supra* note 30.

³⁶ *Lake Huron*, GREAT LAKES COMM’N, <https://www.glc.org/lakes/lake-huron> (last visited Dec. 18, 2017).

metropolitan areas.³⁷ Lake Huron is the second largest Great Lake by surface, and “[t]he population on the U.S. side of the basin is 1,191,467 and 1,502,687 in Canada.”³⁸

Contrary to the other transboundary Great Lakes, Lake Michigan is entirely located in the United States. It contains approximately 1,180 cubic miles of freshwater,³⁹ and its drainage basin “includes portions of Illinois, Indiana, Michigan and Wisconsin.”⁴⁰ Although the northern sector of this Great Lake remains less developed, sparsely populated and mostly covered with forests,⁴¹ “its more temperate southern basin contains the Milwaukee and Chicago metropolitan areas.”⁴² In fact, while approximately twelve million people live along Lake Michigan and depend on its watershed, the majority are concentrated in these two metropolitan areas.⁴³ Lake Michigan’s economic value is highlighted by its importance in the tourism industry: this lake’s shoreline features the world’s largest freshwater dunes, which attract millions of visitors annually to the beaches and state and national parks.⁴⁴ Additionally, “Lake Michigan is known for its excellent trout fishing including Chinook, Coho and Atlantic salmon as well as Rainbow, Brown and Lake Trout.”⁴⁵

Located to the Northwest of Lake Michigan, Lake Superior extends almost 350 miles from west to east, and 160 miles from north to south.⁴⁶ Its drainage basin covers Michigan, Minnesota, Wisconsin, and Ontario.⁴⁷ This lake is of significant importance as it has the largest surface area of any freshwater lake in the world and “holds 10% of the world’s fresh surface water that is not frozen in a glacier

³⁷ *Id.*

³⁸ *Lake Huron Overview*, GLOBAL GREAT LAKES, <http://www.globalgreatlakes.org/lgl/huron/> (last visited Dec. 18, 2017).

³⁹ *Physical Features of the Great Lakes*, *supra* note 28.

⁴⁰ *Lake Michigan*, GREAT LAKES COMM’N, <https://www.glc.org/lakes/lake-michigan> (last visited Apr. 20, 2018).

⁴¹ *Lake Michigan*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/greatlakes/lake-michigan> (last updated Feb. 2, 2018).

⁴² *Lake Michigan*, GREAT LAKES COMM’N, *supra* note 40.

⁴³ Kim Ann Zimmerman, *Lake Michigan Facts*, LIVE SCI. (May 25, 2017, 5:30 PM), <https://www.livescience.com/32011-lake-michigan.html>.

⁴⁴ *Id.*

⁴⁵ *Lake Michigan Overview*, GLOBAL GREAT LAKES, <http://www.globalgreatlakes.org/lgl/michigan/> (last visited Dec. 18, 2017).

⁴⁶ *Lake Superior*, GREAT LAKES COMM’N, <https://www.glc.org/lakes/lake-superior> (last updated Dec. 18, 2017).

⁴⁷ *Id.*

or ice cap.”⁴⁸ Because “[m]ost of the Superior basin is sparsely populated, and heavily forested, with little agriculture because of a cool climate and poor soils,”⁴⁹ it “has not experienced the same levels of development, urbanization and pollution as the other Great Lakes.”⁵⁰ The economy of the Lake Superior region, and more specifically the prosperity of its two metropolitan areas (Duluth, Minnesota, and Thunder Bay, Ontario), greatly rely on year-round tourism. In fact, while “[s]ummer brings boaters, sightseers, campers, kayakers, anglers, and even swimming sunbathers to the shore Winter excites skiers, snowmobilers, snowshoers, and ice fishing fans.”⁵¹ Because the region is economically dependent on the recreational industry surrounding Lake Superior, it is important for this Lake to be protected against development projects that could have a damaging effect in the short and long term.

The Great Lakes system, which is one of the longest deep draft navigation systems in the world, is composed of canals and locks that enable ships to bypass obstructions like rapids and rocks.⁵² Transforming naturally non-navigable waterways into navigable ones by taming natural obstacles, navigation locks effectively consist of water staircases: “[t]he lock chamber is gated on either end. After a ships [sic] enters a lock, water is pumped into or out of the chamber, causing the vessel to rise or fall. Once the correct elevation is achieved, the opposite gate opens and the ship exits the chamber.”⁵³ Connecting rivers also play a significant role in the functioning of the entire Great Lakes network: “Lake Superior drains into Lake Huron via the St. Mary’s River Lake Erie drains into Lake Ontario via the Niagara River. The entire system flows to the Atlantic Ocean via the St. Lawrence River.”⁵⁴

Although the information shared above portrays each Great Lake as a distinct resource, it also highlights the environmental, social, and

⁴⁸ *Superior Facts | 3-quadrillion Gallons, One Great Lake*, MINN. SEA GRANT <http://www.seagrant.umn.edu/superior/facts> (last modified Dec. 13, 2017).

⁴⁹ *Lake Superior*, GREAT LAKES COMM’N, *supra* note 46.

⁵⁰ *Lake Superior*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/greatlakes/lake-superior> (last updated Dec. 14, 2017).

⁵¹ MINN. SEA GRANT, *supra* note 48.

⁵² *The Great Lakes Seaway Navigation System*, AM. GREAT LAKES PORTS ASS’N, <http://www.greatlakesports.org/industry-overview/the-great-lakes-seaway-navigation-system/> (last visited Dec. 19, 2017).

⁵³ *Id.*

⁵⁴ *Id.*

economic importance of the Great Lakes and St. Lawrence Basin as an integral system. Because of the fundamental interrelation between the Great Lakes and their connecting waterways, whichever activity affects one specific lake inevitably impacts the entire Great Lakes and St. Lawrence River Basin. As this watershed plays a central role in North America's prosperity, it remains essential to balance the communities' diverse needs with sustainable management of such a resource. Keeping this in mind, this Article's following section explores how the Compact responds to such a reality, and how this translates in the recently approved Waukesha water diversion.

II

THE GREAT LAKES WATER RESOURCES COMPACT AND THE WAUKESHA WATER DIVERSION

As previously discussed, the Great Lakes Basin represents an invaluable asset to Canada and the United States in many ways. With this in mind, this section provides insight on dealing with such water wealth and the inevitable pressure to share it on a larger scale. This dynamic results in proposals for diversions that test the Compact. In particular, the Waukesha water diversion project, which is described below, provides a great example of this dynamic and the process of its approval by the Compact Counsel.

The Compact constitutes an authority that plays a crucial role in the cases related to Great Lakes' water management.⁵⁵ Endorsed in 2005, the Compact became U.S. state and federal law on December 8, 2008, when it was ratified by eight Great Lakes State legislatures, consented to by Congress, and signed by President George W. Bush.⁵⁶ This process created the Great Lakes–St. Lawrence River Basin Water Resources Council (Compact Council). Enabling collaboration between certain U.S. states and Canadian provinces to safeguard the Great Lakes,⁵⁷ the Compact Council is composed of Great Lakes

⁵⁵ See Compact, *supra* note 8.

⁵⁶ *Agreements*, GREAT LAKES-ST. LAWRENCE RIVER WATER RESOURCES REGIONAL BODY, <http://www.glsregionalbody.org/GLSLRBAgreements.aspx> (last visited Dec. 19, 2017); see also GREAT LAKES-ST. LAWRENCE RIVER BASIN WATER RESOURCES COUNCIL, <http://www.glscompactcouncil.org> (last visited Dec. 19, 2017); see also *Protecting Great Lakes Water*, ALLIANCE FOR THE GREAT LAKES, <https://greatlakes.org/campaigns/protecting-great-lakes-water/> (last visited Dec. 19, 2017).

⁵⁷ *Protecting the Great Lakes*, NAT'L WILDLIFE FED'N, <https://www.nwf.org/Our-Work/Waters/Great-Waters-Restoration/Great-Lakes> (last visited Apr. 21, 2018).

Governors from Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin.⁵⁸ Article 2, section 2.1 of the Compact defines the Compact Council as a “body politic and corporate, with succession for the duration of this Compact, as an agency and instrumentality of the governments” of the States party to the Compact.⁵⁹ The eight Great Lakes Governors “consult and coordinate with the Premiers of Ontario, Québec and the Great Lakes–St. Lawrence River Water Resources Regional Body to protect the Great Lakes and St. Lawrence River.”⁶⁰ The Great Lakes–St. Lawrence River Water Resources Regional Body was created on December 13, 2005, when the Great Lakes Governors and Canadian Prime Ministers signed the *Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement*.⁶¹ This agreement “details how the Great Lakes States, Ontario and Québec . . . manage and protect the Basin and provide[s] a framework for each State and Province to enact laws for its protection.”⁶²

The Compact enforces the Compact Council’s mission of ensuring the Great Lakes’ protection.⁶³ This historic agreement gives the Compact Council jurisdiction within the limits of the Basin. However “[o]utside the Basin, [the Compact Council] may act in its discretion, but only to the extent such action may be necessary or convenient to effectuate or implement its powers or responsibilities within the Basin and subject to the consent of the jurisdiction wherein it proposes to act.”⁶⁴

The Compact also ensures wildlife and habitat protection from water diversions from the Great Lakes, while supporting rigorous water management within the Great Lakes–St. Lawrence River Basin.⁶⁵ While the Compact Council’s commitments are described

⁵⁸ COMPACT COUNCIL, *supra* note 9.

⁵⁹ Compact, *supra* note 8, at art. 2, § 2.1.

⁶⁰ *Great Lakes Agreements*, GREAT LAKES–ST. LAWRENCE RIVER BASIN WATER RESOURCES COUNCIL, <http://www.glscompactcouncil.org/Agreements.aspx> (last visited Dec. 19, 2017).

⁶¹ *Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement*, GREAT LAKES–ST. LAWRENCE RIVER BASIN WATER RESOURCES COUNCIL (Dec. 13, 2005), <http://www.glscompactcouncil.org/Docs/Agreements/Great%20Lakes-St%20Lawrence%20River%20Basin%20Sustainable%20Water%20Resources%20Agreement.pdf>.

⁶² GREAT LAKES–ST. LAWRENCE RIVER WATER RES. REG’L BODY, <http://www.glsregionalbody.org> (last visited Dec. 19, 2017).

⁶³ Compact, *supra* note 8, at art. 1, § 1.3.

⁶⁴ *Id.* at art. 2, § 2.7.

⁶⁵ NAT’L WILDLIFE FED’N, *supra* note 57.

more precisely in the historic agreement's section 4.2, among other things, it commits to,

[e]nsuring improvement of the Waters and Water Dependent Natural Resources; . . . [p]rotecting and restoring the hydrologic and ecosystem integrity of the Basin; . . . [r]etaining the quantity of surface water and groundwater in the Basin; . . . [e]nsuring sustainable use of Waters of the Basin; and, . . . [p]romoting the efficiency of use and reducing losses and waste of Water.⁶⁶

The Compact's apparent promotion of efficiency is mostly due to the fact that "it treats groundwater, surface water and Great Lakes tributaries as a single ecosystem,"⁶⁷ rather than considering them as dichotomous elements. Opting to manage the Great Lakes' complementary components with a disconnected approach would be less efficient because it would not correspond to the basin's reality and needs, and would therefore harm its intertwined ecosystems.

In light of the conservation and sustainable management objectives listed above, Article 4, section 4.8 of the Compact generally prohibits new or increased diversions of water resources from the Great Lakes Basin.⁶⁸ Despite its general prohibition of diversions, the Compact does include certain exceptions that may apply to this prohibition.⁶⁹ Such diversions exempted from the Compact's general water diversion prohibition make it possible to help a community in great need of drinking water by providing it with freshwater from the Great Lakes Basin.⁷⁰

The first exception to the general prohibition of water diversions from the Great Lakes and Saint-Lawrence River basin focuses on water diversion for straddling communities.⁷¹ It concerns "any incorporated city, town or the equivalent thereof[] wholly within any County that lies partly . . . in the Basin [and] whose corporate boundary existing as of the effective date of this Compact, is partly within the Basin or partly within two Great Lakes watersheds."⁷² In order for a straddling community to utilize this exception, all the

⁶⁶ Compact, *supra* note 8, at art. 4, § 4.2(1).

⁶⁷ NAT'L WILDLIFE FED'N, *supra* note 57.

⁶⁸ Compact, *supra* note 8, at art. 4, § 4.8.

⁶⁹ *Id.* at art. 4, § 4.9.

⁷⁰ Christina L. Wabiszewski, *Diversions from the Great Lakes: Out of the Watershed and in Contravention of the Compact*, 100 MARQUETTE L. REV. 628, 649 (2016).

⁷¹ Compact, *supra* note 8, at art. 4, § 4.9(1).

⁷² *Id.* at art. 1, § 1.2 (defining "Straddling Community").

surface water that is transferred to it, regardless of the volume, must be used strictly for public water supply purposes within the straddling community.⁷³ According to the Compact, “public water supply purposes” means that the water must be distributed to the public through a physically connected system of treatment, storage, and distribution facilities serving a group of largely residential customers.⁷⁴ It may also serve industrial, commercial, and other institutional operators.⁷⁵

However, there is an essential condition to the straddling communities exception: all the water that is exceptionally withdrawn from the basin to respond to the community’s needs must be returned, whether naturally or after use, to the source watershed.⁷⁶ This condition may initially seem like it protects the integrity of the Great Lakes Basin because it recognizes that rivers, locks, and channels are directly linked to the Great Lakes, and any large increase or decrease of the amount of water they hold directly affects the Great Lakes’ integrity. After all, it is required for water management authorities to put together and apply a water return plan if they propose a water diversion from a stream that is directly tributary to a Great Lake or the St. Lawrence River.⁷⁷ However, this exception is not as protective as it seems. As stated above, regular diversions and water returns cause water fluctuations, which may have serious ecologic and economic impacts. Consequently, diversions could affect fishing and recreational conditions.⁷⁸ Furthermore, although no surface water or groundwater from outside the basin can be used to increase the return quantity of withdrawn water to the source watershed, an exception to this exception may apply when the concerned water resource has certain characteristics, more precisely if it:

[i]s part of a water supply or wastewater treatment system that combines water from inside and outside of the Basin; . . . [i]s treated to meet applicable water quality discharge standards and to prevent the introduction of invasive species into the Basin; . . . [and] [m]aximizes the portion of water returned to the Source Watershed

⁷³ *Id.* at art. 4, § 4.9(1)(a).

⁷⁴ *Id.* at art. 1, § 1.2 (defining “Public Water Supply Purposes”).

⁷⁵ *Id.* at art. 1 § 1.2.

⁷⁶ *Id.* at art. 4, § 4.9(1)(a).

⁷⁷ *Id.* at art. 4, § 4.9.

⁷⁸ See Bruce A. Manny, *Potential Impacts of Water Diversions on Fishery Resources in the Great Lakes: Contribution No. 610 of the Great Lakes Fishery Laboratory, U.S. Fish and Wildlife Service, 1451 Green Road, Ann Arbor, Michigan 48105*, 9 FISHERIES 19 (1984).

as Basin Water and minimizes the surface water or groundwater from outside the Basin.⁷⁹

This process actually provides a loophole that allows for unsustainable water diversions to take place: although the diverted water is required to be replaced, there could be impacts to the Great Lakes Basin before and during the completion of the established water return plan. Consequently, interested parties have alternatives to ensure that the Great Lakes water remains in the basin, and to encourage water diversion.

The second exception to the Compact's prohibition against the diversion of Great Lakes resources applies to transfers of ground or surface water "from the watershed of one of the Great Lakes into the watershed of another Great Lake."⁸⁰ The Compact exempts such intra-basin transfers from the general rule of water diversion prohibition, if they meet certain conditions. First, in the case where the intra-basin transfer proposal results from a new or increased withdrawal less than 100,000 gallons per day on average over any 90-day period, the proposal must be subject to management and regulation at the discretion of the originating party.⁸¹ "If the Proposal results from a New or Increased Withdrawal of 100,000 gallons per day or greater average over any 90-day period and if the Consumptive Use resulting from the Withdrawal is less than 5 million gallons per day [on] average over any 90-day period," the transfer proposal must meet the exception Standard.⁸² Additionally, it must "be subject to management and regulation by the Originating Party, except that the Water may be returned to another Great Lake watershed rather than the Source Watershed."⁸³ Further, the applicant is required to demonstrate (1) that there is no feasible, cost effective, and environmentally sound water supply alternative within the Great Lake watershed to which the water will be transferred, including conservation of existing water supplies; and (2) that it is necessary for

⁷⁹ Compact, *supra* note 8, at art. 4, § 4.9(1)(a)(i)–(iii).

⁸⁰ *Id.* at art. 1, § 1.2 (defining "Intra-Basin Transfer").

⁸¹ The originating party is the State Party to this Compact within whose jurisdiction an application or registration is made or required. Compact, *supra* note 8, at art. 1, § 1.2 (defining "Party").

⁸² Compact, *supra* note 8, at art. 4, § 4.9(2)(b).

⁸³ *Id.* at art. 4, § 4.9(2)(b)(i).

the originating party to provide notice to the other parties prior to making any decision with respect to the water transfer proposal.⁸⁴

Finally, the third exception to Great Lakes water diversions involves straddling counties and applies to each state's largest territorial divisions for local government that lie partly or completely within the basin, and whose corporate boundary is partly within the basin or partly within two Great Lakes watersheds.⁸⁵ In its water diversion proposal, the City of Waukesha argues that this third exception applies, because although the City is "located outside the boundary of the Great Lakes basin, it is part of a county straddling that geographical line and should be allowed access to the lakes' water."⁸⁶ The section below details the specifications of this third exception to the water diversion prohibition, and directly applies them to the City of Waukesha's diversion proposal. Additionally, it describes the Waukesha proposal's background, timeline, and content, and depicts the approval process in which the Compact Council actively participated.

For decades, the City of Waukesha attempted to deal with its radium-tainted aquifers⁸⁷ and struggled in its search for an ecologically and economically sustainable solution to deal with the growing water contamination problem.⁸⁸ Eventually, the City of Waukesha felt bound to apply for a Great Lakes diversion as its last resort.⁸⁹ In 2010, the City of Waukesha submitted a first water diversion application.⁹⁰ In 2013, it then submitted an updated Application for a Lake Michigan Diversion with Return Flow.⁹¹ On June 21, 2016, the Compact Council conditionally approved the

⁸⁴ *Id.* at art. 4, § 4.9(2)(b)(ii).

⁸⁵ *Id.* at art. 4, § 4.9(3).

⁸⁶ Diana Mehta, *Ontario Takes Issue with Wisconsin City's Great Lakes Water Diversion Plan*, THE STAR (Apr. 1, 2016), <https://www.thestar.com/news/canada/2016/04/01/ontario-takes-issue-with-wisconsin-citys-great-lakes-water-diversion-plan.html>.

⁸⁷ Mary Kate McCoy, *As Wells Go Deeper, Radium Levels Rise in State Tap Water*, WISCONSIN WATCH (Mar. 6, 2016), <http://wisconsinwatch.org/2016/03/as-wells-go-deeper-radium-levels-rise-in-state-tap-water/>.

⁸⁸ Wabiszewski, *supra* note 70, at 645–51 (detailing the history leading up to the approval).

⁸⁹ McCoy, *supra* note 87.

⁹⁰ *City of Waukesha Water Diversion: Background*, WIS. DEP'T OF NAT. RESOURCES, <http://dnr.wi.gov/topic/EIA/waukesha/background.html> (last revised Dec. 1, 2017).

⁹¹ Dan Duckniak, *The City of Waukesha Application for Lake Michigan Diversion with Return Flow*, WAUKESHA WATER UTILITY (Nov. 14, 2013), <http://waukesha-water.com/downloads/Presentations/2013-11-14.pdf> (explaining the updated application).

previously proposed Wisconsin diversion project.⁹² Since then, the City of Waukesha has begun the process of obtaining the numerous federal, state, and local permits and approvals required to proceed with the accepted diversion.⁹³

The City of Waukesha is located in southeast Wisconsin, seventeen miles west of Lake Michigan,⁹⁴ and is the largest city in Waukesha County. Although the City of Waukesha “used to be famous for its refreshing, clear spring water,”⁹⁵ this situation has changed dramatically over the last few decades. As water shortages have increased because of groundwater over-pumping, public water systems have been obligated to drill deeper in order to meet increasing demands.⁹⁶ Consequently, more radium has contaminated the water because this radioactive element is found in the deep geological formations of Wisconsin’s aquifer.⁹⁷ For more than twenty years, the City of Waukesha has been struggling with radium-contaminated water,⁹⁸ and it does not stand alone through this struggle. In fact, hundreds of thousands of Wisconsin residents face the specter of unsafe drinking water,⁹⁹ as many community water systems currently exceed the federal health limit for the radioactive element.¹⁰⁰

Because of its highly problematic radium-tainted aquifers and the seeming impossibility of finding a local and low-cost solution, the City of Waukesha submitted a diversion application to Wisconsin’s Department of Natural Resources for a Lake Michigan Diversion with Return Flow.¹⁰¹ Through this diversion application document, Waukesha “proposes to divert an average of 10.1 million gallons per

⁹² WIS. DEP’T OF NAT. RESOURCES, *supra* note 90.

⁹³ *Id.*

⁹⁴ CITY OF WAUKESHA, APPLICATION SUMMARY, CITY OF WAUKESHA APPLICATION FOR A LAKE MICHIGAN DIVERSION WITH RETURN FLOW 1-1 (Oct. 2013) [hereinafter APPLICATION SUMMARY], http://www.waukesha-water.com/downloads/1_City_of_Waukesha_Application_Summary.pdf.

⁹⁵ Sarah Gardner, *Waukesha Fights for a Share of Lake Michigan’s Water*, MARKETPLACE (Feb. 4, 2015, 5:00 AM), <https://www.marketplace.org/2015/02/04/sustainability/water-high-price-cheap/waukesha-fights-share-lake-michigans-water>.

⁹⁶ Wabiszewski, *supra* note 70, at 646; McCoy, *supra* note 87.

⁹⁷ McCoy, *supra* note 87.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See APPLICATION SUMMARY, *supra* note 94, at 1-1–1-2.

day (MGD) at full build-out of the water supply service area, around 2050.”¹⁰² According to the plan, the city would benefit from treated water transported from the Oak Creek City Water Utility.¹⁰³ This facility is situated in the Great Lakes basin and already withdraws surface water from Lake Michigan.¹⁰⁴ Pipelines would be used in order to transport the water resource to Waukesha.¹⁰⁵ Additionally, “the city proposes that water will be treated at the city’s wastewater treatment plant before it is piped and discharged to the Root River located in the Lake Michigan basin. Water supply and wastewater return flow pipelines would be approximately 20 miles long and share much of the same route.”¹⁰⁶

The Compact Council’s final decision to approve the diversion from one of the Great Lakes towards Waukesha is based on the “straddling county” exception provided by the Compact. The Compact Council decided that this exception applies to the City of Waukesha because, although it is entirely located outside the Great Lakes Basin, it is nevertheless wholly located inside Waukesha County, which straddles the Lake Michigan watershed boundary.¹⁰⁷

For the exception to apply, certain conditions have to be satisfied. According to the Compact Council, the City of Waukesha’s case met all of the conditions set out in article 4, section 4.9 of the Compact. First, the water must be “used solely for the Public Water Supply Purposes of the Community within a Straddling County that is without adequate supplies of potable water,”¹⁰⁸ which is the use proposed in the Waukesha proposal.¹⁰⁹ Second, the suggested

¹⁰² WIS. DEP’T OF NAT. RES., TECHNICAL REVIEW: FOR THE CITY OF WAUKESHA’S PROPOSED DIVERSION OF GREAT LAKES WATER FOR PUBLIC WATER SUPPLY WITH RETURN FLOW TO LAKE MICHIGAN 13 (Jan. 2016), http://dnr.wi.gov/topic/EIA/documents/Waukesha/WDNR_TechnicalReview.pdf.

¹⁰³ APPLICATION SUMMARY, *supra* note 94, at iii.

¹⁰⁴ OAK CREEK WATER AND SEWER UTILITY, 2017 ANNUAL OAK CREEK WATER QUALITY REPORT 1 (2017), <http://www.water.oak-creek.wi.us/wwwroot/2017OCWaterQualityReport.pdf>.

¹⁰⁵ *Id.*

¹⁰⁶ WIS. DEP’T OF NAT. RES., *supra* note 102.

¹⁰⁷ GREAT LAKES-ST. LAWRENCE RIVER BASIN WATER RES. COUNCIL, FINAL DECISION IN THE MATTER OF THE APPLICATION BY THE CITY OF WAUKESHA, WISCONSIN FOR A DIVERSION OF GREAT LAKES WATER FROM LAKE MICHIGAN AN EXCEPTION TO ALLOW THE DIVERSION 3 (June 21, 2016) [hereinafter FINAL DECISION], <http://www.glsiregionalbody.org/Docs/Waukesha/Waukesha--Final%20Decision%20of%20Compact%20Council%206-21-16.pdf>.

¹⁰⁸ Compact, *supra* note 8, at art. 4, § 4.9(3)(a).

¹⁰⁹ FINAL DECISION, *supra* note 107, at 3.

diversion has to maximize the portion of water returned to the source watershed as basin water while minimizing the surface or groundwater from outside the basin.¹¹⁰ The Compact Council decided that the Waukesha case meets this condition because the City of Waukesha states in its application that it would “return up to the previous year’s average daily withdrawal amount per day and, therefore, a volume of water approximately equal to the volume of water withdrawn from Lake Michigan will be returned to the Lake Michigan watershed.”¹¹¹ Third, the City of Waukesha had to demonstrate in its proposal that “[t]here is no reasonable water supply alternative within the basin in which the community is located, including conservation of existing water supplies.”¹¹² The Compact Council agreed that the proposed diversion could not be avoided through water conservation and efficiency, and that all of the Waukesha’s water supply alternatives within the Mississippi River Basin were likely to have, and could not be sustained without, greater unfavorable environmental impacts than the proposed diversion.¹¹³

Fourth, the Compact Council found that the proposed diversion “[would] not endanger the integrity of the Basin Ecosystem,”¹¹⁴ because “[t]he return of Basin water via the Root River is projected to provide a net environmental benefit to the Root River while simultaneously producing no loss of biological integrity to Lake Michigan.”¹¹⁵

Finally, in finding that the last condition¹¹⁶ that must be met in order for the straddling counties’ exception to apply, the Compact Council concluded that implementing such a diversion would not create any significant individual or cumulative impacts, nor would it have any precedent-setting impact.¹¹⁷ Although the thorough analysis done by the Compact Council may seem complete according to the evaluation requirements provided by the Compact, the approved proposal does not ensure that an unsustainable diversion will not occur, as discussed below. Indeed, although the Compact’s main

¹¹⁰ Compact, *supra* note 8, at art. 4, § 4.9(3)(b).

¹¹¹ FINAL DECISION, *supra* note 107, at 7.

¹¹² Compact, *supra* note 8, at art. 4, § 4.9(3)(d).

¹¹³ FINAL DECISION, *supra* note 107, at 4.

¹¹⁴ Compact, *supra* note 8, at art. 4 § 4.9(3)(e).

¹¹⁵ FINAL DECISION, *supra* note 107, at 9.

¹¹⁶ Compact, *supra* note 8, at art. 4, § 4.9(3)(d).

¹¹⁷ FINAL DECISION, *supra* note 107, at 8–9.

purpose purportedly revolves around ensuring wildlife and habitat protection from water diversions from the Great Lakes, and supporting rigorous water management within the Great Lakes-St. Lawrence River basin,¹¹⁸ its sustainability and conservation commitments fall short when applied in reality.

III

THE SOCIOECONOMIC AND BIOPHYSICAL IMPACTS OF APPROVING GREAT LAKES' WATER DIVERSIONS

In its articles, the Compact affirms that its goals are to promote sustainability and to ensure the Great Lakes Basin conservation.¹¹⁹ However, it is highly unsustainable and economically detrimental for the Compact Council to approve water diversions from the Great Lakes-St. Lawrence River basin,¹²⁰ even if they are only done in exceptional circumstances and according to the Compact's agreed upon dispositions. Indeed, approved water diversions, like the one for the City of Waukesha, may easily and rapidly lead to water level changes, land subsidence, decrease in water quality, vegetation degeneration, and destroyed ecosystems. Further, it may result in countless economic difficulties when added to an already noticeable groundwater overdraft and decrease in surface water supplies. Therefore, the type of diversion approved for the City of Waukesha poses a threat to the ecological integrity of the Great Lakes Basin. How can the Compact Council affirm to be protecting a water resource if, in fact, the decision it made allows for the diminished Great Lakes water resources to decrease even further?

There are several examples of how the Compact's dispositions drastically fail to protect the Great Lakes Basin. One such example shows that returning the diverted water to the watershed from which the withdrawal originated can be environmentally destructive.¹²¹ In the case of the City of Waukesha's diversion from Lake Michigan, "the water return system agreed upon will pump water back into the

¹¹⁸ NAT'L WILDLIFE FED'N, *supra* note 57.

¹¹⁹ Compact, *supra* note 8, at art. 1, § 1.3(1)(e).

¹²⁰ INT'L JOINT COMM'N REFERENCE ON CONSUMPTION, DIVERSION, & REMOVAL OF GREAT LAKES WATER, DIVERSIONS AND BULK REMOVALS OF GREAT LAKES WATER 24-26 (Aug. 26, 1999), <http://www.ijc.org/files/publications/K124.pdf>.

¹²¹ See, e.g., Scott Gordon, *Waukesha Water Decision Puts Regional Spotlight on Wisconsin's Environmental Enforcement*, WISCONTEXT (June 27, 2016, 11:40 AM), <https://www.wiscontext.org/waukesha-water-decision-puts-regional-spotlight-wisconsin-environmental-enforcement>.

Root River on its way to Lake Michigan.”¹²² This will increase the river’s water flow and level, which will directly affect the concerned ecosystems and do serious ecological harm to the Root River.¹²³ Furthermore, because of the river’s water increase, certain hydraulic conditions will be seriously altered, perhaps resulting in some flooding, which, among other things, affects fishing and recreational activities that take place on the Root River.¹²⁴ Also, a fluctuating flow causes far more erosion damage than a stable flow.¹²⁵ In other words, the concept of diverting water and returning it is not “as uncomplicated as removing a teaspoonful of water from a swimming pool and returning it as clean as ever.”¹²⁶

Furthermore, resulting water level alterations can seriously affect a Great Lakes community. Changing water levels can provoke important changes in the shoreline, including more lakebed exposure.¹²⁷ This creates a hazard for navigation: as the water in harbors becomes shallower, it increases the possibilities for the docking boats to get stuck in sediments.¹²⁸ In order to remediate this problem and make it feasible for vessels to circulate, dredging projects must deepen and restructure harbors.¹²⁹ However, this process is increasingly difficult and entails high costs to support

¹²² Meredith Keller, *On the Waukesha Diversion: Two Opinions*, WIS. ACAD. OF SCI. ARTS & LETTERS (July 18, 2016, 1:26 PM), <https://wisconsinacademy.org/blog/waters-wisconsin/waukesha-diversion-two-opinions>.

¹²³ *Id.*

¹²⁴ Don Behm, *Waukesha's Root River Water Plan: Better Fishing or Worse Flooding*, MILWAUKEE, WIS. J. SENTINEL (Nov. 13, 2013), <http://archive.jsonline.com/news/waukesha/waukeshas-root-river-water-plan-better-fishing-or-worse-flooding-b99140148z1-231752221.html>.

¹²⁵ Patrick Leary, *Local Environmental Activists Want Root River Analyzed*, THE J. TIMES (Aug. 1, 2016), http://journaltimes.com/news/local/local-environmental-activists-want-root-river-analyzed/article_b35d25c5-b7f0-5535-a27c-9618db972ea4.html.

¹²⁶ Kurt Chandler, *Who Gets to Drink from the Great Lakes?*, THE ATLANTIC (May 10, 2016), <https://www.theatlantic.com/politics/archive/2016/05/who-gets-to-drink-the-great-lakes/481887/>.

¹²⁷ WAYNE WURTSBAUGH ET AL., *IMPACTS OF WATER DEVELOPMENT ON GREAT SALT LAKE AND THE WASATCH FRONT* 3–4 (Utah State University, 2016) (providing information as to how increased lakebed exposure, due to water development, may greatly impact the Great Salt Lake and its surrounding communities).

¹²⁸ *Id.* at 4–5.

¹²⁹ U.S. DEP’T OF TRANSP. MARITIME ADMIN., *STATUS OF THE U.S.-FLAG GREAT LAKES WATER TRANSPORTATION INDUSTRY* 60–63 (Feb. 2013), https://www.marad.dot.gov/wp-content/uploads/pdf/US-Flag_Great_Lakes_Water_Transportation_Industry_Final_Report_2013.pdf.

harbor walls and remove hard lakebed till.¹³⁰ Therefore, projects required to alleviate the negative effects of serious water quantity decrease and falling shorelines impose a huge financial burden on communities that economically depend on harbors and their related activities.

Even if the Waukesha case is the only exception ever applied to the general diversion prohibition, there are alarming changes that may result from it. The Waukesha diversion proposal creates a tremendously dangerous precedent for future water diversion proposals. “Environmentalists argue that the Waukesha clause sets a bad precedent . . . [as] it would distort the boundaries of the Great Lakes basin and lead the [C]ompact down a dangerous slippery slope.”¹³¹

IV SETTING A PRECEDENT

The decision made by the Compact Council to approve an exceptional diversion unfortunately creates a strong precedent for future diversion applications. Although the Compact Council qualified the City of Waukesha as a straddling county, and therefore benefitting from the exemption of the Compact’s general diversion prohibition, this approval opens the door to an array of damaging diversion possibilities that could be greatly destructive for the Great Lakes Basin’s ecosystem in the long run. Indeed, because the Compact Council approved a diversion for a straddling county such as the City of Waukesha, more communities facing water shortages or contamination may feel enticed to apply and fight to be recognized as exempted from the Compact’s prohibition that requires water resources to stay within the basin.¹³²

Among many concerned parties in Canada and in the United States, the Canadian province of Ontario has expressed worries about this

¹³⁰ WURTSBAUGH ET AL., *supra* note 127, at 5 (providing information as to how expensive it can become to try to deal with increased lakebed exposure, using the Great Salt Lake as an example).

¹³¹ Chandler, *supra* note 126.

¹³² Codi Kozacek, *Waukesha Awaits Great Lakes Water Diversion Decision*, CIRCLE OF BLUE (June 20, 2016), <http://www.circleofblue.org/2016/great-lakes/waukesha-awaits-great-lakes-water-diversion-decision/>.

diversion approval.¹³³ Because the “issue of increasing radium concentrations in public groundwater supplies is occurring up and down eastern Wisconsin and is therefore not restricted to just Waukesha,” Ontario fears that “[t]he Waukesha water diversion proposal is only one part of a bigger water demand scenario.”¹³⁴ Although this precedent is set in the context of a diversion from the only Great Lake that is located entirely in the United States, Canada’s worry is natural because the same decision could eventually be made about a diversion from a transboundary Great Lake, in light of the precedent set by Lake Michigan’s approved diversion. Such an applied precedent creates policy advancements applicable to Great Lakes management and undermines decades of careful policy development.¹³⁵

Additionally, U.S. parties have also shared their disapproval of this allowed diversion. U.S. Representatives Debbie Dingell (Democratic Party-Michigan) and Candice Miller (Republican Party-Michigan) are two of the most vocal critics of the proposed diversion, arguing that the City of Waukesha does not meet the requirements of the Compact.¹³⁶ In a joint statement, Dingell and Miller argued that the City of Waukesha does not meet the Compact’s requirements because it has not exhausted all the other alternatives to surmount their water issues.¹³⁷ They based this statement on a study conducted by the Wisconsin Compact Implementation Coalition, which “found that Waukesha can treat its wells for radium, which surrounding communities do safely . . . [and] questioned the Council’s ability to monitor the planned withdrawal and return of the water.”¹³⁸ In other words, their concern involves not only the application of the

¹³³ Mark Gollom, *Great Lakes Water Ruling Sparks Fear of Thirsty Cities*, CBC NEWS (June 27, 2016, 5:00 AM), <http://www.cbc.ca/news/world/great-lakes-water-basin-waukesha-1.3650062>.

¹³⁴ Diana Mehta, *Wisconsin Plan to Draw More Great Lakes Water Worries Ontario*, CBC NEWS (Apr. 1, 2016, 9:08 AM), <http://www.cbc.ca/news/canada/kitchener-waterloo/waukesha-wisconsin-great-lakes-michigan-water-plan-worries-ontario-1.3516177>.

¹³⁵ Robert Sanford, *Canadian Mayors Worry that Water to Waukesha Sets a Dangerous Precedent*, CBC RADIO (June 23, 2016), <http://www.cbc.ca/radio/thecurrent/the-current-for-june-23-2016-1.3648733/canadian-mayors-worry-that-water-to-waukesha-sets-a-dangerous-precedent-1.3648749>.

¹³⁶ Derek Draplin, *Vote Sends Lake Michigan Water Outside the Great Lakes Basin*, MICH. CAPITOL CONFIDENTIAL (June 24, 2016), <https://www.michigancapitolconfidential.com/22551>.

¹³⁷ *Id.*

¹³⁸ *Id.*

Compact's dispositions, but also the enforcement mechanisms the Compact Council has once it approves a diversion. As the Mayor Paul Dyster of Niagara Falls, New York, cautioned, "this decision opens the door to every neighboring city and county [on] the Great Lakes and St. Lawrence Basin in the U.S. and Canada to get water from the basin without meeting the conditions of the Compact."¹³⁹

As water scarcity becomes more common in certain areas of North America, it may initially seem like it is in every stakeholder's interest to protect and preserve such a prolific water resources system and that this Compact seeks to preventively achieve this goal. However, the applied transboundary water resources management mechanism does not prevent some of the most harmful actions, such as diversions. The application of the Compact's dispositions demonstrates that the tool we have at our disposal to manage the transboundary waters shared between the United States and Canada reflects a misconception that water is infinite because it currently seems abundant. This view is completely dissociated from the Great Lakes Basin's reality, which already has quality and quantity worries.

Furthermore, as mentioned in this Article's previous sections, the Compact Council does not include the Canadian provinces of Ontario and Quebec; in fact, the Compact only gives these provinces a consultative role, rather than a decisive power. The fact that the Compact fails to give Canadian provinces the power to actively and decisively stop such diversions completely misses the point of the Compact: it undermines the science that proves just how heavily interconnected resources are, and how large-scale geographical impacts occur even if the source of the problem is in a different ecosystem.¹⁴⁰ Because of how integrated this environment is, excluding Quebec and Ontario from the final decision-making step entirely contradicts the protection and conservation of the Great Lakes that the Compact claims to ensure.

¹³⁹ *Great Lakes cities say Waukesha diversion is bad precedent*, CAN. CONSULTING ENG'R (Aug. 23, 2016) (internal quotations omitted), <http://www.canadianconsultingengineer.com/water-wastewater/great-lakes-cities-say-wakausha-diversion-bad-precedent/1003403244/> (last visited Apr. 8, 2018).

¹⁴⁰ Kim Rutledge et al., *Ecosystem*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/ecosystem/> (last updated Aug. 15, 2011) (explaining that ecosystems are connected); SYBILLE VAN DAN HOVE & VINCENT MOREAU, DEEP-SEE BIODIVERSITY AND ECOSYSTEMS: A SCOPING REPORT ON THEIR SOCIO-ECONOMY, MANAGEMENT AND GOVERNANCE 24 (2007) (explaining that "[n]ature is composed of highly diverse, complex and interconnected ecosystems").

V

HOW CANADA CAN INTERVENE TO PREVENT OR STOP FUTURE WATER DIVERSION APPROVALS

The Great Lakes' waters are mostly a non-renewable resource.¹⁴¹ In fact, “[a]lthough the total volume in the lakes is vast, on average less than 1 percent of the waters of the Great Lakes is renewed annually by precipitation, surface water runoff, and inflow from groundwater sources.”¹⁴² This reality should seed worry in the minds of governors, mayors, Prime Ministers, and Presidents. They should be especially aware that water diversion applications and approvals like Waukesha will inevitably increase substantially in the near future. Indeed, “there are plenty of ‘straddling’ communities around the basin. An Alliance for the Great Lakes analysis in 2013 identified 8 other communities in Ohio, Indiana and Wisconsin that could apply for water if Waukesha is approved”¹⁴³

As explained above, the Waukesha diversion creates more problems than it solves. With this in mind, some parties on both sides of the border have become more reactive in the Great Lakes water resources protection:

Although Waukesha says it needs one-millionth of one percent of the 6 quadrillion gallons of fresh Great Lakes water, the people who live around the Great Lakes fiercely guard that vast resource. Droughts in the West, failing U.S. drinking water infrastructure and an increasing worldwide demand for fresh water have made people even more protective of the lakes.¹⁴⁴

If more diversions from the Great Lakes are approved in accordance with the exceptions the Great Lakes Compact allows, Canada should absolutely adopt a clear position against these diversions and ensure that this position seriously weighs into the final decision that is rendered by the Compact Council. In light of this, the fifth section of this Article concentrates on analyzing what Canada and its provinces can do in the event that more water diversions from

¹⁴¹ *Great Lakes Water Use and Diversions*, TIPP OF THE MITT WATERSHED COUNCIL, https://www.watershedcouncil.org/gl_water_use_diversions.html (last visited Sept. 17, 2017).

¹⁴² *Id.*

¹⁴³ Garret Ellison, *Why Wisconsin City's Bid to Tap Great Lakes Water is a Big Deal*, MICH. LIVE (Jan. 8, 2016, 4:20 PM), http://www.mlive.com/news/index.ssf/2016/01/explainer_wisconsin_citys_bid.html.

¹⁴⁴ *Id.*

the Great Lakes are approved. This section addresses the possibility for mayors to play a substantial role in stopping a water diversion that is already approved by the Compact Council, as illustrated by the Waukesha case. This section also explores the possibility of amending the Boundary Waters Treaty to solve the Great Lakes Compact's flaws that disadvantage Canada in the decision process concerning diversions.

A. Mayors Challenging a Diversion Approval

One of the methods by which Canada can intervene to stop a water diversion that the Great Lakes Compact Council has already approved lies in the hands of the mayors of the Great Lakes cities. This subsection focuses on what is currently occurring in the Waukesha case.

Shortly after the Great Lakes governors unanimously approved the Waukesha diversion proposal in June 2016, the mayors of Great Lakes cities in the United States and Canada openly objected to the approval, taking a stand through the Great Lakes and St. Lawrence Cities Initiative (GLSL Cities Initiative).¹⁴⁵ This binational group of cities,¹⁴⁶ including Montréal, Toronto, Milwaukee, and Chicago, among others, asked the governors for a hearing to challenge the approval.¹⁴⁷ The coalition's concerns mainly revolve around the "substance of the Compact Council's decision, the procedures used, and the standards applied in making the decision."¹⁴⁸ Specifically, the mayors disagree with the Compact Council's conclusion that the City of Waukesha does not have an alternative to this diversion: the participating mayors believe that the City of Waukesha has not

¹⁴⁵ See *Great Lakes and St. Lawrence Cities Initiative*, GREAT LAKES AND ST. LAWRENCE CITIES INITIATIVE: MAYORS PROTECTING AND RESTORING THE GREAT LAKES & ST. LAWRENCE RIVER, <https://glslcities.org> (last visited Dec. 20, 2017).

¹⁴⁶ Allison Torrence, *Great Lakes and St. Lawrence Cities Initiative Requests Hearing on City of Waukesha Lake Michigan Water Diversion*, JENNER & BLOCK (Aug. 29, 2016), http://environblog.jenner.com/corporate_environmental_1/2016/08/great-lakes-and-st-lawrence-cities-initiative-requests-hearing-on-city-of-waukesha-lake-michigan-wat.html (explaining that the GLSL Cities Initiative represents a binational coalition of over 120 U.S. and Canadian mayors and local officials, representing over 17 million people, working to advance the protection and restoration of the Great Lakes and St. Lawrence River).

¹⁴⁷ *Id.*

¹⁴⁸ Chuck Quirnbach, *Waukesha Water Diversion Project Faces Fresh Round of Scrutiny*, WIS. PUB. RADIO (Jan. 9, 2017, 11:15 AM), <https://www.wpr.org/waukesha-water-diversion-project-faces-fresh-round-scrutiny>.

proven the no water supply alternative.¹⁴⁹ Mayor John Dickert from Racine, Wisconsin, who is also participating in this group, is particularly worried about “the potential of diminished quality of the water that would flow through the Root River in Racine if the Waukesha water diversion becomes reality.”¹⁵⁰

The GLSL Cities Initiative has taken steps in the Waukesha case to try to stop the diversion from actually materializing. This example shows how the Great Lakes cities, represented by their mayors, may take a stand and protest the Compact Council’s decision.

On August 19, 2016, the GLSL Cities Initiative submitted to the Executive Director of the Compact Council a request for a hearing before the Compact Council regarding the Compact Council’s final decision in the matter of the Waukesha diversion proposal.¹⁵¹ This request was made pursuant to Section 7.3 of the Great Lakes Compact.¹⁵²

The GLSL Cities Initiative has standing to request such a hearing because it falls in the category of “person aggrieved” by the Compact Council’s decision, following the meaning of Section 7.3. More specifically, the Compact Council’s Final Decision fails to protect the integrity of the Compact.

Allowing a Diversion that is contrary to the strict requirements of the Compact threatens the resource that provides drinking water for 40 million people and is the foundation upon which a strong regional economy is based, to the detriment of the members of the GLSL Cities Initiative.¹⁵³

In a more detailed written statement submitted approximately one month later on September 16, 2016, the GLSL Cities Initiative requested that the Compact Council engage in the following:

¹⁴⁹ CAN. CONSULTING ENG’R, *supra* note 139 (noting that the Mayors’ “opposition also hinges on other factors. They suggest Waukesha has other reasonable alternatives for water supply.”).

¹⁵⁰ Gary Wilson, *Wisconsin Mayor Makes Emotional Case Against Waukesha Diversion*, GREAT LAKES NOW (Jan. 24, 2017), <http://www.greatlakesnow.org/2017/01/wisconsin-mayor-makes-emotional-case-against-waukesha-diversion/>.

¹⁵¹ *Challenge to Waukesha Diversion Approval & Settlement Agreement with Compact Council*, GREAT LAKES & ST. LAWRENCE CITIES INITIATIVE: MAYORS PROTECTING & RESTORING THE GREAT LAKES & ST. LAWRENCE RIVER, <https://glslcities.org/initiatives/basin-management/compact-and-agreement/> (last visited Dec. 20, 2017).

¹⁵² Compact, *supra* note 8, at art. 7, § 7.3(1).

¹⁵³ Torrence, *supra* note 146.

- [S]uspend the final decision pending further review, and to reverse it regarding the City of Waukesha's (as the "Applicant") eligibility as a "Community within a Straddling County;"
- [R]estrict the delineated services to be consistent with the City of Waukesha boundaries;
- Apply fundamental principles of contract interpretation and statutory construction to redefine how the Compact and the Compact Council evaluates "no reasonable water supply alternative;"¹⁵⁴
- Require supplemental technical analysis, necessarily including a supplemental environmental impact statement, detailing the demand forecasts for a service area consistent with the boundaries of the City of Waukesha, or at the very least the narrowed service area delineated in the Compact Council's final decision;
- [P]ermit additional public comment on the proposed Waukesha diversion;
- [C]onduct a substantive review of the application that takes into account all of the new information accumulated through the previous steps, and determine whether the narrowed proposal still meets the clarified criteria for an exception for a community in a straddling county, while carefully evaluating the impact of the return flow on any water body, among other things;
- [F]ind that the Waukesha diversion proposal satisfy the Compact's exception criteria, and should consequently deny the application, after proper interpretation and due consideration;
- [P]rovide the draft of the final decision for public comment before a final vote is done by the Compact Council, if, after proper interpretation and due consideration the Compact Council finds that the proposal does not meet the criteria for an exception, but finds that the proposal could and should be approved with conditions and/or modifications.¹⁵⁵

On October 19, 2016, the Compact Council responded to the GLSL Cities Initiative by providing the mayors with an opportunity to be

¹⁵⁴ It suggests to ensure consistency with the Compact by considering whether an alternative would be allowed under the existing regulations, whether an alternative is consistent with existing permitted water uses and criteria in the region or with routinely-permitted exemptions granted by regulators, and whether an alternative is feasible. FINAL DECISION, *supra* note 107, at 12.

¹⁵⁵ Letter from Jill M. Hutchison, Jenner & Block, to the Exec. Dir. of the Great Lakes-St. Lawrence River Basin Water Res. Council, Written Submission and Hearing re Final Decision in the Matter of the App. by the City Waukesha, Wisconsin for a Diversion of Great Lakes Water, No. 2016-1 (Sept. 16, 2016), <https://glslicities.org/wp-content/uploads/2015/11/Cities-Initiative-Letter-to-Compact-Council-9-16-16.pdf>.

heard regarding their detailed written statement.¹⁵⁶ The Counsel requested that the GLSL Cities Initiative submit a substantive brief on its written statement's brief points, a showing that the group represents an "aggrieved person," and the reasons why the Compact Council should allow oral argument.¹⁵⁷

On December 19, 2016, the GLSL Cities Initiative submitted a supplement to the written statement in furtherance of the GLSL Cities Initiative's request for a hearing and the Compact Council's consideration.¹⁵⁸ In this document, GLSL Cities Initiative presents its previously stated requests and arguments in more detail.¹⁵⁹ More specifically, the GLSL Initiative's main affirmations are that: (I) the GLSL Cities Initiative is an aggrieved person, with standing to challenge the final decision under the Compact; (II) issues raised by the GLSL Cities Initiative are timely, and reliance on documents outside the record supplied by the Compact Council is appropriate because of failures in the Compact Council's process in reviewing the Waukesha diversion application; (III) the GLSL Cities Initiative is entitled to an in-person hearing on the issues raised in the written statement; and (IV) in addition to the significant procedural and precedential concerns raised by the Waukesha diversion decision, the final decision includes specific errors of law and fact that should be resolved by the Compact Council.¹⁶⁰

On December 23, 2016, the Compact Council responded to the GLSL Cities Initiative, summarizing the steps undertaken by all parties so far and informing the group of mayors that it granted the City of Waukesha's recent request to have the opportunity to participate in the hearing process as a party.¹⁶¹

¹⁵⁶ Letter from David Naftzger, Exec. Dir. of the Great Lakes-St. Lawrence River Basin Water Res. Council, to Jill M. Hutchison, Jenner & Block, Re: Final Decision on Application by the City of Waukesha: Request for Hearing (Oct. 19, 2016) (on file with author).

¹⁵⁷ *Id.*

¹⁵⁸ Memorandum from Jill M. Hutchison, Jenner & Block, to Exec. Dir. of the Great Lakes-St. Lawrence River Basin Water Res. Council, on Supplement to Written Statement in Furtherance of Request for Hearing and Compact Council Consideration (Dec. 19, 2016) (on file with author).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Letter from David Naftzger, Exec. Dir. of the Great Lakes-St. Lawrence River Basin Water Res. Council, to Paul G. Kent, Stafford Rosenbaum LLP and Jill M. Hutchinson, Jenner & Block, Re: Final Decision on Application by the City of Waukesha: Hearing Process (Dec. 23, 2016) (on file with author).

On January 23, 2017, the City of Waukesha submitted a response to the GLSL Cities Initiative's request for a hearing, revealing its arguments against the GLSL Cities Initiative's statements. More precisely, the City of Waukesha stated that:

- (I) The Cities Initiative lacks standing to challenge the Council's approval of the diversion;
- (II) The Council's reductions of the service area and associated withdrawal volume did not require a new public comment period;
- (III) The Council's designation of the water service area is fully consistent with the Compact;
- (IV) The Council's decision protects the Great Lakes from cumulative impacts and adverse precedent;
- (V) The Council properly determined that Waukesha has no reasonable water supply alternative;
- (VII) The Council properly determined that the return flow met the Compact standards.¹⁶²

The GLSL Cities Initiative responded to this on February 6, 2017, adding to its previous detailed brief that, in relevant part: (1) the Compact Council should have reopened the public comment period after reducing the service area and associated water volume in the Waukesha application; (2) Waukesha's suggestion that a community within a straddling county, or any other community withdrawing Great Lakes water, has no fixed bounds on its service area and may provide water to any physically connected area is unfounded and would eviscerate the Compact; and (3) Waukesha's efforts to minimize the adverse impacts of the Root River discharge are unpersuasive.¹⁶³ Following this response, the Compact Council gave public notice under the Compact that the Compact Council would be meeting to hear oral argument as part of the hearing process on March 20, 2017.¹⁶⁴

¹⁶² Letter from Paul G. Kent, Stafford Rosenbaum LLP, to Peter Johnson, Deputy Director of the Great Lakes Compact Council, Re: City of Waukesha's Response to the Cities Initiative Request for a Hearing (Jan. 23, 2017) (on file with author).

¹⁶³ Memorandum from Jill M. Hutchinson, Jenner & Block, to Exec. Dir. Of the Great Lakes-St. Lawrence River Basin Water Res. Council, Re: Reply in Support of Request for Hearing re Final Decision in the Matter of the Application by the City of Waukesha, Wisconsin for a Diversion of Great Lakes Water, No. 2016-1 (Feb. 6, 2017) (on file with author).

¹⁶⁴ Public Notice on behalf of the Great Lakes-St. Lawrence River Basin Water Resources Council to hear Oral Argument as part of the hearing process initiated in response to the Great Lakes and St. Lawrence Cities Initiative's Request for Hearing

At the close of arguments, the Compact Council “took the matter under advisement,” and indicated that the Compact Council would likely issue a written decision in early May 2017.¹⁶⁵ On April 20, 2017, the Compact Council “decided to not reopen or modify the decision allowing the Waukesha diversion.”¹⁶⁶

Because the Compact Council did not grant the GLSL Cities Initiative the revision the group of mayors was hoping for, the binational coalition could head to court. Indeed, under the Great Lakes Compact, the governors are the decision makers, but the mayors can nevertheless lead a powerful intervention by challenging the Compact Council’s decision through the court system. However, the Compact does not allow an aggrieved party to immediately file a lawsuit, as the first step is for a party to appear in front of the Compact Council,¹⁶⁷ which, in the case of Waukesha, occurred on March 20, 2017.¹⁶⁸

In August 2017, the Great Lakes mayors opted not to pursue a legal remedy to attempt to overturn or revise the decision made by the Great Lakes governors, granting Waukesha’s water diversion request from Lake Michigan.¹⁶⁹ Instead, the Compact Council agreed to create and collaborate with an advisory committee that would update procedures regarding potential water diversion requests to come.¹⁷⁰ This outcome is interesting because it opens the door for greater collaborative governance. Now, a wider group of stakeholders can actively participate in the decision process concerning future Great

regarding the Compact Council’s Final Decision in the matter of the Application by the City of Waukesha, Wisconsin for a Diversion of Great Lakes Water, No. 2016-1 (Feb. 17, 2017), <http://greatwateralliance.com/wp-content/uploads/2017/02/march-20-2017-public-notice.pdf>.

¹⁶⁵ Allison Torrence, *Great Lakes Compact Council Holds Hearing on Cities Initiative Challenge to Waukesha Diversion of Lake Michigan Water*, JENNER & BLOCK (Mar. 22, 2017), http://environblog.jenner.com/corporate_environmental_1/2017/03/great-lakes-compact-council-holds-hearing-on-cities-initiative-challenge-to-waukesha-diversion-of-la.html.

¹⁶⁶ Susan Bence, *Compact Council Rejects Request to Reconsider Waukesha Water Decision*, WUWM 89.7 (Apr. 20, 2017), <http://wuwm.com/post/compact-council-rejects-request-reconsider-waukesha-water-decision#stream/0>.

¹⁶⁷ Compact, *supra* note 8, at art. 7, § 7.3(1).

¹⁶⁸ Bence, *supra* note 166.

¹⁶⁹ Gary Wilson, *Great Lakes Mayor Drop Legal Threat on Waukesha Diversion*, GREAT LAKES NOW (Aug. 3, 2017), <http://www.greatlakesnow.org/2017/08/great-lakes-mayors-drop-legal-threat-waukesha-diversion/>.

¹⁷⁰ *Id.*

Lakes water diversions, regardless of whether they are intra-basin or out-of-basin transfers.

Through the GLSL Cities Initiative, the Great Lakes mayors from both sides of the border can actively intervene to attempt to stop the Great Lakes diversions towards cities such as Waukesha. This course, among other Compact Council activities, represents a step forward in attaining a greater inclusion of municipal governments in the diversion approval process. By regrouping into a binational coalition and taking a clear stand on the Waukesha diversion, the mayors are requesting that the Compact Council treat them as central stakeholders rather than impassive bystanders to the Compact Council's decisions.

In order to reduce the possibilities of unsustainable management of the Great Lakes (which, in this case, translates through water diversions), Canada should support this type of expression of local governance. Indeed, “[c]ross-border environmental cooperation between local governments is increasingly becoming a vital instrument for managing the waters of the Great Lakes Basin and a vital component in managing the bilateral environmental relations between Canada and the United States which were once the exclusive domain of federal governments.”¹⁷¹ Where the Compact Council does not grant the GLSL Cities Initiative's requests and it goes to court, it could be “an ideal opportunity to formally embed local governments within the governance structures in recognition of their growing participation in, and contribution to, the management of a shared and treasured ecosystem.”¹⁷²

B. Amending the Boundary Waters Treaty

Rather than simply relying on the mayors of the Great Lakes cities to act, Canada should amend the Boundary Waters Treaty to prevent future water diversions from the Great Lakes Basin. The United States and Great Britain (on behalf of the Dominion of Canada) formed the Boundary Waters Treaty in 1909, in order to resolve border-straddling water resources issues, including those concerning

¹⁷¹ GREAT LAKES: LESSONS IN PARTICIPATORY GOVERNANCE 127 (Velma I. Grover & Gail Krantzberg eds., 2012).

¹⁷² *Id.*

the Great Lakes.¹⁷³ This treaty's provisions created the International Joint Commission (IJC).¹⁷⁴ The IJC is composed of three U.S. commissioners and an equal number of Canadian Commissioners.¹⁷⁵ In theory, the IJC is relatively powerful; it "has the authority, if directed by the two federal governments, to arbitrate disputes involving diversions and construction projects that affect the level and flow of boundary waters on the other side of the border."¹⁷⁶ Additionally, the United States and Canadian federal governments require the IJC to periodically report on water management issues that relate to the Boundary Waters Treaty.¹⁷⁷

Despite the Treaty's seemingly good intentions, it lacks comprehensiveness in its dispositions and structure, which consequently, greatly limit its ability to ensure the Great Lakes' efficient management.

The Treaty does not include tributaries (e.g., rivers flowing into the Great Lakes) or groundwater. Further, among the Great Lakes, Lake Michigan is wholly situated within the United States (although Lake Huron and Lake Michigan are hydrologically one unit). Second, the Treaty is limited to managing uses affecting levels and flows. Lastly, because it is a Treaty among the two federal governments, it does not formally include the states, provinces, First Nations, Tribes, or other governments.¹⁷⁸

One theory suggests the need to amend the Boundary Waters Treaty in order to solve the serious issues stemming from the numerous flaws of the Great Lakes Agreement.¹⁷⁹ The Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement

¹⁷³ Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada, U.S.-Eng., May 5, 1910, 36 Stat. 2448.

¹⁷⁴ *Id.* at art. VII.

¹⁷⁵ *Id.* at art. VIII.

¹⁷⁶ WHOSE DROP IS IT, ANYWAY?: LEGAL ISSUES SURROUNDING OUR NATION'S WATER RESOURCES 170 (Megan Baroni ed., 2012).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See generally Paul Shugar, *A Troubled Agreement for Troubled Waters: How an Amended Boundary Waters Treaty Can Solve the Great Lakes Agreement's Fatal Flaws*, 3 GLOBAL BUS. L. REV. 251 (2013) (explaining how an amendment of the Boundary Water Treaty of 1909 would provide a uniform approach to regulating the Great Lakes so Canada and the United States will follow the same rules regarding water withdrawals and diversions).

(the Agreement), alongside the Compact, resulted from years of negotiations between the United States and Canada.¹⁸⁰ The Agreement's main points first include prohibiting new diversions from the Great Lakes Basin while nevertheless permitting strictly regulated exceptions for bordering communities to extract water for their public-water supplies, but those exceptions would be strictly regulated.¹⁸¹ Further, the Agreement aims to ensure that the economic development is balanced with sustainable water uses in order to engage in responsible Great Lakes water management.¹⁸² Additionally, the Agreement focuses on ensuring that the management of these transboundary water resources reflects the fact that they represent a shared public treasure.¹⁸³ Consequently, strong public involvement should be allowed in the implementation of this agreement.¹⁸⁴

The Compact, which highlights these principles in its dispositions, was federally ratified in 2008 by the U.S. states, "to support the U[nited] S[tates] side of the Agreement."¹⁸⁵ In Ontario, the *Safeguarding and Sustaining Ontario's Water Act*¹⁸⁶ (SSOWA) implemented the Great Lakes Agreement in the Canadian province of Ontario (it became law in 2007), while the Québec *Act to Affirm the Collective Nature of Water Resources and Provide for Increased Water Resources Protection*¹⁸⁷ implemented the Agreement in the Canadian province of Québec, and became law in 2011.¹⁸⁸

When it comes to possible diversions, however, the Agreement has noticeable and serious flaws. Not only does it afford too much autonomy to the states and provinces when it comes to setting water withdrawal standards, but it also "fails to address the inequality

¹⁸⁰ These negotiations were initiated after the province of Ontario's premier granted a license in 1998 that allowed a Canadian company to export 150-million gallons of Lake Superior water for a year for bottling in Asia. *Id.* at 267. "After the premier canceled the license under public pressure, the U.S. and Canadian governments studied the issue and proposed what became the Great Lakes Agreement on December 13, 2005." *Id.*

¹⁸¹ *Id.* at 267-68.

¹⁸² *Id.* at 268.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Safeguarding and Sustaining Ontario's Water Act*, 2007, S.O. 2007, c. 12-Bill 198 (Can.).

¹⁸⁷ *Act to Affirm the Collective Nature of Water Resources and Provide for Increased Water Resource Protection*, CQLR, c. C-6.2 (Can.).

¹⁸⁸ Shugar, *supra* note 179, at 271.

existing diversions create, and allows different standards on both sides of the border to govern the implementation of future diversions.”¹⁸⁹ In fact, the Agreement allows its member states and provinces to “place their own respective economic interests over the Region’s economic interests as a whole.”¹⁹⁰ This leads to tremendous imbalance with regard to diversions in the United States’ and Canadian governments. “While the SSOWA and the Act to Affirm both ban Ontario and Quebec from starting new diversions from the Great Lakes, the Compact allows communities located outside the Basin or straddling the Basin’s border to pursue diversions under the Compact’s vague regulations governing the process.”¹⁹¹ This is especially worrisome because neither the Canadian federal government, the Canadian provinces, nor the IJC have the power to veto diversion projects that are approved by the Compact.¹⁹²

The information above demonstrates just how incoherent and unsustainable the implementation—notably through the Compact—of the Great Lakes Agreement really is. Amending the Boundary Waters Treaty constitutes one of the most plausible methods that could help deal with this imbalance. Mainly, “an amended Boundary Water Treaty must fix the Agreement’s failure to address existing diversions and to set standards for future diversions that member states and provinces must abide by.”¹⁹³ Although it may be politically impossible for Canada to request that current diversions in the States be halted, the amendment should require the United States to guarantee that they will never increase diversions, such as the one providing water for the city of Chicago, even in case of drought and other water shortages. Additionally, there should be a compensation destined to fix the resulting inequality of access to the Great Lakes water resources, to which both nations are entitled.¹⁹⁴

As previously discussed, neither the Canadian federal government nor the Canadian provinces have a veto power that could allow them to prevent water diversions approved by the U.S. governors under the Great Lakes Compact. This disparity in power is absolutely inconceivable: the fact that, contrary to the Canadian legislation

¹⁸⁹ *Id.* at 272.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 275.

¹⁹² *Id.*

¹⁹³ *Id.* at 283.

¹⁹⁴ *Id.* at 284.

implementing the Agreement, the Compact allows U.S. states to grant new diversions outside the Basin completely undermines the widely undisputable interconnectivity of the Great Lakes and their tributaries. Therefore, the amended Boundary Water Treaty must absolutely be rid of any form of advantages given to the United States when it comes to granting new diversions under the Compact.

Finally, “[o]nly when all the Great Lakes states and provinces are subject to the same regulations governing diversions will the freedom to use the Great Lakes be properly regulated to ensure a tragedy of the commons does not occur.”¹⁹⁵ By imposing and monitoring the same restrictions in Canada and the United States, the parties remain loyal to the “symbiotic relationship between water supplies and the economies they fuel.”¹⁹⁶ This would be a powerful step towards a comprehensively sustainable management of the binational Basin.

CONCLUSION

The Great Lakes-St. Lawrence River Basin truly represents one of North America’s most invaluable assets. The Great Lakes’ visible richness nevertheless remains vulnerable to climate change and the growing population’s water needs. Because the Great Lakes constitute the environmental and economic strength of the northeastern United States, and southeastern Canada, the countries must implement and rigorously apply transboundary instruments to conserve the Basin’s integrity.

Although legal authorities such as the Great Lakes-St. Lawrence River Water Resources Compact are supposed to uphold the protection of such a rich ecosystem, this Article demonstrates that they fail to ensure proper management of these abundant, yet fragile, water resources. The most recent proof of such failure is the approval of the Waukesha water diversion, which opens the door to a wide array of out-of-basin water transfers in the decades to come. As water depletion and contamination increase and urban populations grow, the Great Lakes will most likely be considered by many interested parties

¹⁹⁵ *Id.* at 284–85. “[N]otion of Commons is ‘the idea that through our public institutions we recognize shared humanity and natural resources to be preserved for future generations.’” Melissa Kwaterski Scanlan, Jodi Habush Sinykin & James Krohelski, *Realizing the Promise of the Great Lakes Compact: A Policy Analysis for State Implementation*, 8 VT. J. ENVTL. L. 39, 41 (2006) (citing MAUDE BARLOW & TONY CLARK, *BLUE GOLD: THE FIGHT TO STOP THE CORPORATE THEFT OF THE WORLD’S WATER* 9 (2002)).

¹⁹⁶ Paul Shugar, *supra* note 179, at 286.

as a great water diversion source. If the United States increasingly approves such water diversion, Canada can react through mayoral mobilization and consider modifying the Boundary Waters Treaty to protect its water wealth. These set objectives are socially, economically and politically hard; however, they remain the adequate standard to protect our precious and finite resource.

