

January 31, 2019

**VIA HAND DELIVERY AND EMAIL**

Mr. Brian Hayes, Administrative Law Judge  
State of Wisconsin  
Division of Hearings and Appeals  
4822 Madison Yards Way, Fifth Floor  
Madison, WI 53705

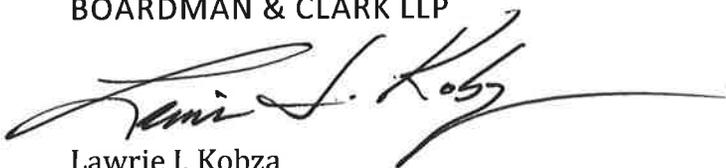
**RE: Case No. DNR-18-0006**

Dear Judge Hayes:

On behalf of the City of Racine (Racine), Village of Mount Pleasant (Mount Pleasant), and Racine County (County), enclosed please find Racine, Mount Pleasant, and the County's Motion for Summary Judgment, Brief in Support of Motion for Summary Judgment, Statements of Facts, Exhibits, and Affidavit of Lawrie J. Kobza. Copies of all documents have been served on the parties via electronic mail.

The Wisconsin Department of Natural Resources has indicated to us that their exhibits will start at exhibit number 100. Therefore in order to avoid duplication, the City, Village, and County's exhibits start at exhibit number 200.

Sincerely,  
BOARDMAN & CLARK LLP



Lawrie J. Kobza  
Enclosures

cc: Attorneys Tressie Kamp and Sarah Geers  
Attorney Jodi Habush Sinykin  
Attorneys Cheryl Heilman, and Judith Mills  
Attorney Cory Fish  
Attorneys Alan Marcuvitz, Andrea Roschke, and Smitha Chintamaneni  
Attorneys Deborah C. Tomczyk and Sara Stellflug Rapkin  
Attorney Paul Kent  
Attorney Dennis Grzezinski  
Attorney James M. Olson  
(via email only)

f:\docs\wd\22713\8\a3352034.docx

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS

---

Department of Natural Resources, Environmental  
Management Division, Findings of Fact,  
Conclusions of law, and Diversion Approval

Case No. DNR-18-0006

---

**CITY OF RACINE, VILLAGE OF MOUNT PLEASANT AND RACINE COUNTY'S  
MOTION FOR SUMMARY JUDGMENT**

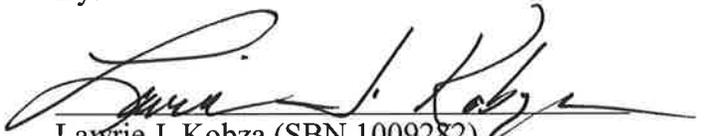
---

The City of Racine, Village of Mount Pleasant, and Racine County (“City, Village and County”) by their respective undersigned counsel, hereby move the Division of Hearings and Appeals, the Honorable Brian Hayes presiding, for an order granting summary judgment on the issue presented for review in this contested case hearing in favor of the City, Village and County. This Motion for Summary Judgment is supported by the brief of the City, Village and County; the Stipulated Facts of the parties; the Statement of Facts submitted by the City, Village and County with the affidavit of Lawrie J. Kobza; and the Exhibits submitted by all parties, including the Exhibits submitted by the City Village and County with this Motion.

Respectfully submitted this 31<sup>st</sup> day of January, 2019.

Boardman & Clark, LLP

By:



Lawrie J. Kobza (SBN 1009282)  
Jared Walker Smith (SBN 1083018)  
Attorneys for City of Racine

One South Pinckney Street, 4th Floor  
PO Box 927  
Madison, WI 53701-0927  
Phone: 608-283-1788  
Facsimile: 608-283-1709

Von Briesen & Roper, s.c.

By:



Alan H. Marcuvitz (1007942)

Smitha Chintamaneni (1047047)

Attorneys for Village of Mount Pleasant

411 East Wisconsin Avenue, Suite 1000

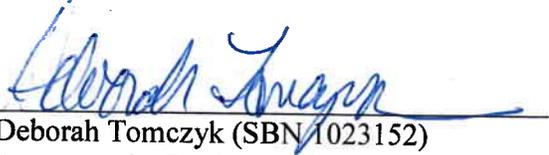
Milwaukee, WI 53202

Phone: 414-287-1515

Facsimile: 414-238-6581

Reinhart Boerner Van Deuren, s.c.

By:

A handwritten signature in blue ink, appearing to read "Deborah Tomczyk", is written over a horizontal line.

Deborah Tomczyk (SBN 1023152)

Attorneys for Racine County

1000 North Water Street, Suite 1700

PO Box 2965

Milwaukee, WI 53202-0927

Phone: 414-298-8331

Facsimile: 414-298-8097

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS

---

Department of Natural Resources, Environmental  
Management Division, Findings of Fact,  
Conclusions of Law, and Diversion Approval

Case No. DNR-18-0006

---

**CITY OF RACINE, VILLAGE OF MOUNT PLEASANT AND RACINE COUNTY'S  
BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND  
IN OPPOSITION TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT**

---

**INTRODUCTION**

The Wisconsin Department of Natural Resources (“DNR”) approved the application of the City of Racine (“Racine”) to divert Lake Michigan water to the portion of the Village of Mount Pleasant (“Mount Pleasant”) that lies outside the Lake Michigan watershed basin. In granting approval, the DNR correctly applied the Great Lakes—St. Lawrence River Basin Water Resources Compact (“Great Lakes Compact” or “Compact”)<sup>1</sup> and corresponding Wisconsin Statutes.<sup>2</sup> Specifically, the DNR correctly concluded that the proposed diversion meets all the requirements of the “straddling community diversion exception” to the Compact’s prohibition against diversions, including the requirement that the diverted water be used solely for public water supply purposes within the straddling community of Mount Pleasant. Petitioners<sup>3</sup>

---

<sup>1</sup> The Compact is an agreement between the eight Great Lakes states of Indiana, Illinois, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin. The Compact received Congressional approval and was signed by the President on October 3, 2008. It became effective on December 8, 2008. See Great Lakes-St. Lawrence River Basin Compact Council website, available at <http://www.glscompactcouncil.org/> (last visited January 28, 2019).

<sup>2</sup> Wisconsin adopted the Compact verbatim in Wis. Stat. § 281.343. Wisconsin also adopted Wis. Stat. §§ 281.344 and 281.346 to provide more specifics on how the Compact is to be implemented in Wisconsin. Section 281.344 applies to the time before the Compact was ratified by Congress and is no longer applicable. Section 281.346 is the implementation statute that is currently applicable.

<sup>3</sup> Petitioners are League of Women Voters of Wisconsin, Milwaukee Riverkeeper, Minnesota Center for Environmental Advocacy, River Alliance of Wisconsin, League of Women Voters—Lake Michigan Region, and Natural Resources Defense Council.

requested, and the DNR granted, a contested case hearing on the sole issue of whether the proposed diversion violates Wis. Stat. §§ 281.343(4n)(a) and 281.346(4)(c) and Sections 4.3.3, 4.8 and 4.9.1 of the Compact with respect to the DNR’s interpretation of “public water supply purposes.” The DNR’s Approval is correct, accords with the plain language of the Wisconsin Statutes and the Compact, and reflects the underlying compromises embedded in the Compact. For the reasons set forth below, Petitioners’ motion for summary judgment should be denied, and summary judgment should be granted to Racine, Mount Pleasant, and Racine County (the “County”).

### **FACTUAL BACKGROUND**

Racine is located on the western shore of Lake Michigan in southeastern Wisconsin. (Ex. 1, at 8, Attach. A (map).) Racine owns and operates a public water system. Racine’s water system withdraws water from Lake Michigan, treats the water at a water treatment plant located on the shores of Lake Michigan, stores the water in water towers, and distributes the treated water through pipes to customers. (Stipulated Fact No. 2.) Racine provides Lake Michigan water directly to customers in Racine, the Village of Elmwood Park, the Village of North Bay, the Village of Sturtevant, and portions of the Villages of Mount Pleasant and Somers. Racine also provides water to the Village of Caledonia on a wholesale basis. (Stipulated Fact No. 3.)

Racine’s water system is a “public water system” under the federal Safe Drinking Water Act (SDWA) (42 U.S.C. § 300f to 300j-26) and is subject to federal and state SDWA

requirements.<sup>4</sup> Racine’s water system is also a “public utility” under Wisconsin law and is subject to regulation by the Public Service Commission of Wisconsin (“PSC”).<sup>5</sup>

Racine and Mount Pleasant entered into a retail water service agreement in 2004 (“2004 Water Service Agreement”). The 2004 Water Service Agreement obligates Racine to provide retail water service to existing Mount Pleasant customers and to extend future water service to new Mount Pleasant customers. (Ex. 202.) The 2004 Water Service Agreement also requires, except under certain limited circumstances, Mount Pleasant to obtain all of its requirements for municipal water service from Racine. (Ex. 202, at 051, § 20.) No other municipality or person (including Mount Pleasant itself) is permitted to provide water service within Mount Pleasant. (Ex. 202, at 016, § 3.g.)

On December 8, 2011, Racine obtained a Great Lakes basin withdrawal permit pursuant to Wis. Stat. § 281.346(5)(c) with an approved water withdrawal amount of more than 60 million gallons of water per day. The permitted withdrawal amount was determined under Wis. Stat. § 281.346(4g) and established Racine’s baseline under Wis. Stat. §§ 281.343(4t)(b) and 281.346(4e). (Ex. 1, at 2, ¶ 10.) For 2017, Racine reported to the DNR that it withdrew an average of 17,144,688 gallons of Great lakes water a day. (Ex. 1, at 2, ¶ 11.) Under its existing withdrawal permit, Racine could have withdrawn an additional 43 million gallons of water a day

---

<sup>4</sup> The SDWA defines a “public water system” to be “a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals. Such term includes (i) any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system, and (ii) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.” (Section 300f of the SDWA; 42 U.S. Code § 300f(4)(A).) This definition is included in Wisconsin’s regulations at Wis. Admin. Code NR § 809.04(67). This same definition of “public water system” under the SDWA applies in all eight Great Lakes states.

<sup>5</sup> Section 196.01(5), Wis. Stats., defines a “public utility” to be “every corporation, company, individual, association . . . and every sanitary district, town, village or city that may own, operate, manage or control any toll bridge or all or any part of a plant or equipment, within the state, for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly *to or for the public*.” (emphasis added.) Under § 196.02(1), Wis. Stats., the PSC has jurisdiction “to supervise and regulate every public utility in this state.”

from Lake Michigan in 2017. The availability of Racine’s excess withdrawal capacity is due, in part, to reported decreases in water sales to industrial customers; Racine’s industrial water use decreased by 51% between 1995 and 2016. (Ex. 1, at 2, ¶ 12.)

Effective December 1, 2017, Mount Pleasant and the County entered into a Development Agreement for the Foxconn Project (the “Development Agreement”) with affiliates of electronics manufacturer “Foxconn” to establish a high-tech manufacturing and technology eco-system in Mount Pleasant. (Ex. 34.) This project is located near the Interstate Highway 94 (“I-94”) transportation corridor in Mount Pleasant and includes construction of a \$10 billion fabrication facility. (Ex. 34, at 007, 009, & 020; Ex. 1, at 8, Attach. A (map).) Under the Development Agreement, Mount Pleasant is obligated to provide and pay for (with certain funding provided by the County), the infrastructure improvements needed to serve the area proposed for development, including a water extension estimated to cost \$88,374,650.<sup>6</sup> (Ex. 34, at 010, 125, 131, & 144.)

Consistent with the terms of the 2004 Water Service Agreement, Mount Pleasant requested that Racine extend water service to the area of the proposed development which the State had designated an electronics and information technology manufacturing zone under Wis. Stat. § 238.396(1m). (Ex. 214; Ex. 5, at 12 (Table C-1); Ex. 1, at 8, Attach. A (map).) While the vast majority of Mount Pleasant is located in the Lake Michigan basin, a small portion of Mount Pleasant is located in the Mississippi River basin.<sup>7</sup> (Ex. 1, at 8, Attach. A (map).) The area of

---

<sup>6</sup> Under the 2004 Water Service Agreement, all infrastructure improvements to Racine’s public water system within Mount Pleasant will be owned by Racine, regardless of the funding source. (Ex. 202, at 017-018 (§ 4.b.) and 022-024 (§ 5.b.(4)-(7).)

<sup>7</sup> Approximately 92% of Mount Pleasant’s total area is located in the Lake Michigan basin. Surface water within the Lake Michigan basin flows to Lake Michigan. The Lake Michigan basin is part of and is located within the larger Great Lakes basin. A small portion of the southwest corner of Mount Pleasant, approximately 1,800 acres or 8% of its total area, is located in the Mississippi River basin. Surface water within the Mississippi River basin flows to the Mississippi River which is not part the Great Lakes basin. (Ex. 1, at 2, ¶ 8; Ex. 1, at 8, Attach. A (map).)

proposed development was located partly in the Lake Michigan basin and partly in the Mississippi River basin. (Ex. 5, at 5.)

In order to provide water to Mount Pleasant as requested, Racine submitted an application, dated January 26, 2018, to the DNR seeking approval to divert Lake Michigan water to the portion of Mount Pleasant that lies outside the Lake Michigan basin under the straddling community diversion exception.<sup>8</sup> (Ex. 1.) Mount Pleasant is a “straddling community” as defined by the Compact because a portion of Mount Pleasant lies within the Great Lakes basin, and a portion lies outside the basin. Wis. Stat. §§ 281.343(1e)(t).

On April 25, 2018, the DNR approved Racine’s application for a Great Lakes diversion (the “Approval”). (Ex. 1.) In its Approval, the DNR determined that Racine’s proposal met the Compact’s requirement that the diverted water would be used solely for “public water supply purposes.” (Ex. 1, at 4, ¶ 5.) The DNR stated in its Approval that the proposed diversion met the “public water supply purposes” requirement “because the Racine Water Utility currently serves and will continue to serve a group of largely residential customers including within the straddling community of the Village of Mount Pleasant.” (Ex. 1, at 4, ¶ 5.)

Petitioners filed a petition for a contested case hearing on the Approval pursuant to Wis. Stat. § 281.93(2). The DNR granted the request for a contested case hearing on the limited issue of whether the DNR’s interpretation of the term “public water supply purposes” in its Approval

---

<sup>8</sup> Racine was the proper entity to apply for the straddling community diversion. Under the Compact, the person who proposes to divert Great Lakes water to a straddling community must be the one to apply for diversion approval. (Ex. 206, at 015, Compact § 4.9.1; Wis. Stat. § 281.343(4n)(a).) Wisconsin law further requires that an applicant for diversion approval operate the public water supply system that receives or would receive water from the new or increased diversion. Wis. Stat. § 281.346(4)(b)2. Since Racine is the entity that will be diverting water to the area of Mount Pleasant outside the Lake Michigan basin and because Racine owns and operates the public water supply system that provides public water service in Mount Pleasant, Racine had to be the one to apply for the straddling community diversion.

violates Wis. Stat. §§ 281.343(4n)(a) and 281.346(4)(c) and Sections 4.3.3, 4.8 and 4.9.1 of the Compact.

### **STANDARD OF REVIEW**

An interstate compact is a contract between states that becomes federal law upon ratification by Congress. *Oklahoma v. New Mexico*, 501 U.S. 221, 234 n. 5 (1991); *Id.* at 245 (Rehnquist, J., dissenting); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). As such, a congressionally approved compact is both a compact and a statute. *Oklahoma v. New Mexico*, 501 U.S. at 234 n. 5. Nevertheless, a compact is construed as a contract under the principles of contract law. *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013); *Texas v. New Mexico*, 482 U.S. at 128; *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 792 (1959); *Oklahoma v. New Mexico*, 501 U.S. at 245 (Rehnquist, J., dissenting).<sup>9</sup>

Construction of a compact begins “by examining the express terms of the Compact as the best indication of the intent of the parties.” *Tarrant*, 569 U.S. at 628. Express terms are examined in light of the compact as a whole and to avoid unreasonable results or superfluous terms. Restatement (Second) of Contracts §§ 202(2) and 203(a) (1981).<sup>10</sup>

If the plain language of a compact unambiguously conveys the parties’ intent, a court will apply the plain language of the compact and go no further. *See generally*, *Tarrant*, 569 U.S. at 628-31. Only if the plain language of a compact is ambiguous will courts use other interpretive tools to determine the intent of the parties.<sup>11</sup> These interpretive tools include the parties’ course

---

<sup>9</sup> This includes turning to hornbook contract law. *See e.g.*, *Alabama v. North Carolina*, 560 U.S. 330, 359 (2010) (Kennedy, J., concurring); *New Jersey v. New York*, 523 U.S. 767, 830-31 (1998) (Scalia, J., dissenting).

<sup>10</sup> While compacts are construed pursuant to contract law, a similar analysis exists in statutory interpretation. *See, State ex rel. Kalal v. Circuit Court of Dane County*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110 (“statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.”)

<sup>11</sup> However, courts have turned to extrinsic evidence “to confirm that the parties intended for the [language] to have its plain and ordinary meaning.” *Shell Oil Co. v. U.S.*, 751 F.3d 1282 (Fed. Cir. 2014) (citation omitted). The

of performance under the compact, the negotiation and legislative history of the compact<sup>12</sup>, and how other interstate compacts deal with similar issues. *Id.*; *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991). Importantly, the actions of the parties to a compact, including interpretation by any representative commission created by the compact, provide “highly significant” evidence of the parties’ understanding of the compact’s terms. *Alabama v. North Carolina*, 560 U.S. 330, 346 (2010); *Tarrant*, 569 U.S. at 636 (2013); *see, New Jersey v. New York*, 523 U.S. 767, 830-31 (1998) (Scalia, J., dissenting) (“It is hornbook contracts law that the practical construction of an ambiguous agreement revealed by later conduct of the parties is good indication of its meaning.”).

## ARGUMENT

### **I. DNR’S APPROVAL CORRECTLY CONCLUDED RACINE’S PROPOSED DIVERSION MEETS THE PLAIN LANGUAGE OF THE PUBLIC WATER SUPPLY PURPOSES REQUIREMENT OF THE COMPACT AND WISCONSIN STATUTES.**

In approving Racine’s diversion application, the DNR concluded that Racine’s proposal meets all the requirements for the straddling community diversion exception under the Compact. (Ex. 1, at 4, ¶ 5.) Petitioners challenge the DNR’s conclusion that the application meets the requirement that the diversion be used for public water supply purposes. This is the sole issue before the Hearing Examiner. DNR’s conclusion is correct under the plain language of the Compact and Wisconsin Statutes.

---

Wisconsin Supreme Court has likewise used the scope, context, purpose, and history of a statute to confirm a plain meaning analysis of statutory language. *Crown Castle USA, Inc. v. Orion Const. Group, LLC*, 2012 WI 29, ¶ 14, 339 Wis. 2d 252, 811 N.W.2d 332.

<sup>12</sup> As a compact is interpreted “upon the principles which govern the interpretation of contracts ... with a view to making effective the purposes of the ... contracting parties,” a court may need “to consult sources that might differ from those normally reviewed when an ordinary federal statute is at issue.” *Alabama*, 560 U.S. at 359 (Kennedy, J., concurring).

**A. As the Compact Requires, the Diverted Water Will Be Used Solely for Public Water Supply Purposes.**

Racine’s proposed diversion satisfies the plain language of the Compact’s straddling community diversion exception of Compact § 4.9.1 and Wis. Stat. § 281.343(4n)(a). The Compact provides that a straddling community diversion may be approved if, among other things, all of the Great Lakes water being distributed is used (i) solely for “Public Water Supply Purposes,” and (ii) solely “within the Straddling Community.” (Ex. 206, at 015, Compact § 4.9.1; Wis. Stat. § 281.343(4n)(a).) Specifically, the straddling community diversion exception provides:

A Proposal to transfer Water to an area within a Straddling Community but outside the Basin or outside the source Great Lakes Watershed shall be excepted from the prohibition against Diversions and be managed and regulated by the Originating Party provided that, regardless of the volume of Water transferred, *all the Water so transferred shall be used solely for **Public Water Supply Purposes** within the Straddling Community*, and:

a. All Water Withdrawn from the Basin shall be returned, either naturally or after use, to the Source Watershed less an allowance for Consumptive Use . . . .

(Ex. 206, at 015, Compact § 4.9.1; Wis. Stat. § 281.343(4n)(a) (emphasis added).)

Two separate and independent requirements related to the use of the diverted water are contained in this italicized language. One requirement – which is the issue before the Hearing Examiner – is that the water must be used for “public water supply purposes.” The second requirement is that the diverted water must be used solely within the straddling community. It is undisputed that all the water proposed to be diverted will be used within the straddling community of Mount Pleasant and not distributed to neighboring communities.

For a diversion to meet the “public water supply purposes” requirement, 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 that may also serve

industrial, commercial, and other institutional operators.” (Ex. 206, at 003, Compact §1.2; Wis. Stat. § 281.343(1)(pm).) In drafts of Wisconsin’s implementation statute, Wisconsin Legislative Council staff opined that the term “public water supply purposes” could be shortened to just “public water supply” in Wisconsin’s implementing statute “*because the compact’s definition defines a substance (a type of water) rather than a purpose.*” (Ex. 101, at 050; emphasis added.) The definition further explains that “Water Withdrawn directly from the Basin and not through such a system shall not be considered to be used for Public Water Supply Purposes.” (Ex. 206, at 003, Compact §1.2; Wis. Stat. § 281.343(1e)(pm).) The Wisconsin Legislative Council drafters opined that this second sentence was not needed in Wisconsin’s implementing statute because this exclusion is “already implied by the requirement in the first sentence [of the ‘public water supply purposes’ definition] that the water must be distributed through the *specified physically connected system* to be a public water supply.” (Ex. 101, at 050.)

The plain language of the Compact and the Statutes applies the public water supply purposes requirement to the entity supplying water to the diversion area. The critically relevant factor in the public water supply purposes definition is the characteristics of the water system over which the water is distributed (i.e., physically integrated and serving a largely residential customer base). How a public water system’s customers will use the water (whether for residential, commercial, or industrial purposes) is simply not relevant to the public water supply purposes definition.

A public water supplier’s proposal to extend water for use within a straddling community will almost always meet the public water supply purposes requirement because a public water supplier usually distributes water through infrastructure that serves a group of largely residential customers. However, the public water supply purposes requirement would not be satisfied if

water was withdrawn directly from the Great Lakes basin and delivered directly to an end user not by way of such a public water system. Diverted water must be distributed through a public water system that serves largely residential customers in order to meet the public water supply purposes requirement.

The DNR correctly concluded that the diverted water will be used solely for public water supply purposes within Mount Pleasant. Racine's proposed diversion meets the plain language and every element of the public water supply purposes requirement because Racine will be delivering water to the diversion area through its physically connected public water system that serves a group of largely residential customers and none of the diverted water will be used outside Mount Pleasant. (Ex. 1, at 4, ¶¶ 2-5.)

Racine distributes water to its retail and wholesale customers through its physically connected system of treatment, storage, and distribution facilities. The record contains a map of Racine's integrated water utility distribution system, showing the distribution pipes, water towers, and booster stations owned by Racine.<sup>13</sup> (Ex. 5, at 15 (Map C-1).) According to its 2017 Annual Report filed with the PSC, the Racine Water Utility owns over 2,335,000 feet of water main, and its utility facilities have a net value of over \$133 million. (Ex. 200, at 056 (Schedule W-13) & 015-016 (Schedule F-07).)

And Racine's physically connected system of facilities serves a group of largely residential customers, while also serving industrial, commercial, and other institutional customers. According to Racine's 2017 Annual Report, Racine provides water service to over 34,000 customer accounts (meters) and 31,230 of those accounts are single family or multi-family residential customer accounts. (Ex. 200, at 036 (Schedule W-02).) In Mount Pleasant,

---

<sup>13</sup> The map shows that the proposed main expansions (purple) that also serve the diversion area are interconnected to the existing infrastructure.

approximately 94% of Racine’s water utility customers are single family or multi-family residential customers.<sup>14</sup> (*See*, Ex. 1, at 2, ¶ 13.)

The fact that Racine’s water distribution system may also serve industrial, commercial, and other institutional customers does not invalidate the determination that Racine’s use of water is for public water supply purposes. The expectation that a water system, like Racine, will also serve industrial, commercial, and institutional customers is codified into the definition of “public water supply purposes.”

The application of the straddling community diversion exception to the facts here could not be any more straightforward and obvious. Racine owns and operates the public water system that will be used to deliver the diverted water to the diversion area. This public water system will include new infrastructure that will be constructed as an extension to Racine’s existing water system. Racine’s public water system is a physically integrated system of treatment, storage and distribution facilities serving a customer base that is largely residential, both within and outside of Mount Pleasant. The DNR correctly concluded that the proposed diversion meets the public water supply requirement and will not violate the Compact or Wisconsin law.

**B. Petitioners’ “Results-Oriented” Interpretation of the Compact Language Would Lead to Absurd and Unreasonable Results.**

Petitioners argue that the DNR erred in considering Racine’s entire water system and customer base to determine whether Racine’s diversion application met the public water supply purposes requirement of the straddling community diversion exception. According to Petitioners, the DNR should have only considered that part of Racine’s water system that would serve the Mount Pleasant diversion area and the customers that would benefit from the diversion.

---

<sup>14</sup> In its Approval, DNR states that 88% of Racine’s customers in Mount Pleasant are residential. (Ex. 1, at 2, ¶ 14.) The 88% figure excludes the 349 residential multi-family customers identified in ¶ 13.

Nothing in the actual language of Compact § 4.9.1 or Wis. Stat. § 281.343(1e)(pm), however, supports such a strained interpretation.

Furthermore, a few simple examples expose the absurdity and unreasonableness of Petitioners' argument regarding how the public water supply purposes requirement is to be applied. The Compact and the Statutes should be interpreted to avoid such absurd results. Restatement (Second) of Contracts § 203(a).

If the Hearings and Appeals Division adopts Petitioners' interpretation that only the infrastructure and customers in the diversion area can be considered, then a diversion to a single residential customer would violate the Compact because that one customer would be receiving water through a single pipe and not through "a physically connected system . . . serving a *group* of largely residential customers."

Likewise, under Petitioners' interpretation, the Compact would be violated if the proposed customers in the diversion area consisted of two houses, a grocery store, a bookstore, and a bait shop because these two residential customers and three commercial customers would not constitute a "group of largely *residential* customers." Nor would the pipes built in the diversion area to deliver the water to these customers meet Petitioners' view of the type of delivery system allowable under the Compact because those pipes would not serve enough residential customers.

Ironically, Petitioners' interpretation would encourage developers to develop land for residential uses, even if that was not the best use for the land, in order to obtain access to water. Petitioners' interpretation would stand in the way of communities and developers initially developing land in accordance with good land use planning practices, which could lead to an enormous waste of resources.

Petitioners' interpretation would also preclude communities from designing and constructing water distribution systems in accordance with best practices. Under Petitioners' interpretation, all the water infrastructure serving customers within a diversion area would have to be located and interconnected *within the diversion area*. This would require straddling communities and public water suppliers to design and construct water distribution systems with a focus on ensuring interconnections within the diversion area, rather than a focus on ensuring best performance and cost-effectiveness. Such an approach would be completely contrary to good management practice.

These absurd results are avoided by recognizing that the public water supply requirement does not apply to the infrastructure and customers in just the diversion area that will receive water, but applies to the infrastructure and customers of the entire public water system that is supplying water to the diversion area. Consistent with the DNR's proper conclusion, the Racine diversion does not violate the Compact because Racine will use its public water supply system to provide service to the straddling community of Mount Pleasant, and all the diverted water will be used in Mount Pleasant.

**C. Petitioners' Focus on Foxconn Ignores the Plain Language of the Compact.**

Petitioners next argue the public water supply purposes requirement of the straddling community diversion exception will not be met because Racine will be supplying the diverted water to meet the specific needs of a single large industrial customer. Petitioners allege that the infrastructure being built to serve the diversion area is being designed to meet the specific needs of one large industrial customer, the customer has a role in the design, and there will be only one customer. (P.Br. at 26.) As an initial matter, Petitioners are simply wrong that the infrastructure will service a single industrial customer. (Ex. 34, at 007, 009, & 020.) Regardless, none of these

allegations are relevant to the analysis of the public water supply purposes requirement under Section 4.9.1 of the Compact or under Wis. Stat. § 281.343(4)(c).

Section 4.9.1 and Wis. Stat. § 281.343(4)(c) place no limitation on the size, the extent, or the design of the infrastructure a public water supplier builds to deliver water to customers in a diversion area. Similarly, they place no limitation on the number of customers ultimately served by a public water supply in a diversion area, or the manner in which these customers will use the water they receive.

The fact that new infrastructure is being built to serve the diversion area is not important. Rather, the relevant fact is that the new infrastructure will be part of Racine's public water system. It is also not relevant that the new infrastructure is designed to meet customers' needs. Indeed, sound engineering dictates that public utilities consult with customers in the design of extensions to their systems to meet the needs of large customers and further the community's planning goals. What matters, again, is that the new infrastructure will be part of Racine's public water system.

The fact that the new infrastructure may only serve the designated electronics and information technology manufacturing zone is also of no relevance. What is relevant is that the customers in the zone will be receiving water through a "physically connected system of treatment, storage, and distribution facilities." If a user self-supplies water to itself in the diversion area, that would not meet the public water supply purposes requirement. But water that is provided to an industry through a public water system is water for public water supply purposes.

Moreover, the fact that the public water system's customers in the diversion area are industrial is also irrelevant because, under the Compact, the customers, whether industrial or

residential, may use the diverted water how they wish. Indeed, uses to which customers put the water may change over time. There is nothing in the Compact that dictates otherwise. While Petitioners suggest that the phrase that mentions “serving a group of largely residential customers that may also serve industrial, commercial, and other institution operators” supports their position, it does not. Contrary to what the Petitioners imply, that phrase is not used to describe who in the diversion area is entitled to receive diverted water or how these customers may use the water. Rather, the phrase is used only to describe the type of *system* or *facilities* over which water must be distributed in order to qualify as being used for public water supply purposes. If water is distributed to the public through a physically connected system of facilities and those facilities serve a group of largely residential customers that may also serve industrial, commercial, and other institution operators, the water distributed qualifies as being used for public water supply purposes, period.

This point is confirmed by Todd Ambs, who negotiated the Compact on behalf of Wisconsin under Wisconsin Democratic governor Jim Doyle. As reported in *The Great Lakes Water Wars*,

[Mr. Ambs] says the language referring to predominately residential customers [in the definition of public water supply purposes] does not refer to the community that *wants* the water, but rather the community *supplying* the water. Under that line of thought, as long as Racine has plenty of water to share, and most of its customers are residential, it can supply water to Foxconn and the company can use it for whatever it wants. Mr. Ambs doesn't see a problem with a Foxconn straddling-community application “as long as they're getting the water through a public utility that still has room under their cap,” which Racine definitely does.

(Annin, *The Great Lakes Water Wars* 307 (rev. ed. 2018).) Mr. Ambs' view is reflected in the plain language of the Compact and the implementing Statutes. A public water supplier is permitted to supply diverted water to customers in a straddling community and those customers are permitted to use the water for their own purposes. Nowhere does the Compact prohibit a

public water supplier from using diverted water to serve industrial customers in the straddling community.<sup>15</sup>

Applying a proper interpretation of the straddling community diversion exception to the facts here, one can only conclude that the Compact does not prohibit Racine, as a public water supplier, from providing Great Lakes water for use by industrial customers located outside the Great Lakes basin but within the straddling community of Mount Pleasant. Consistent with the DNR's Approval, determining whether a proposed diversion meets the public water supply purposes requirement depends on the nature and use of the entire water system delivering the Great Lakes basin water to the diversion area. In approving Racine's diversion application, the DNR properly determined that Great Lakes basin water delivered through Racine's integrated public water system, which serves largely residential customers and which will be extended to serve the diversion area, will be used in Mount Pleasant solely for public water supply purposes.

**D. The DNR's Approval Is Not Inconsistent With Prior Diversion Approvals.**

DNR's Approval of Racine's application and its evaluation of the public water supply purposes requirements is not in any way inconsistent with its approval of water diversions to the Cities of Waukesha and New Berlin. Nothing in DNR's approval of the City of New Berlin's water diversion (Ex. 38) supports Petitioners' public water supply purposes interpretation. To the contrary, DNR found that New Berlin was a "straddling community" proposing to divert water from Lake Michigan "solely for public water supply purposes." (Ex. 38, at 002, §§ 2-3.) The DNR did not evaluate how New Berlin's public water supply customers used water. New Berlin was only required, on a *prospective* basis, to report usage by various customers. (Ex. 39, at 002, § IV.) The DNR's approval of the City of Waukesha's diversion is not relevant in any

---

<sup>15</sup> Indeed, here, this diversion makes up some of Racine's 51% decrease in industrial water use between 1995 and 2016. (See, Ex. 1, at 2, ¶ 12.)

way. Waukesha is a “community in a straddling county” and not a “straddling community” under Compact § 1.2, and the requirements applicable to Waukesha’s application and approval are wholly distinguishable from this case. Nothing in these approvals casts doubt on the DNR’s Approval in this case; the approvals are entirely consistent with each other and confirm the DNR’s even-handed application of the Compact.

**II. THE DNR’S APPROVAL OF THE RACINE DIVERSION REQUEST IS CONSISTENT WITH THE GOALS AND PURPOSES OF THE COMPACT.**

**A. The Purpose of the Compact’s Straddling Community Diversion Exception Is to Allow All Parts of a Straddling Community to Receive Public Water Supply From the Same Great Lakes Supplier.**

The straddling community diversion exception was created to provide straddling communities – those communities located partly within and partly outside the Great Lakes basin – with the opportunity to use Great Lakes water for public water supply purposes for their *entire* communities. Without the exception, the Compact’s diversion prohibition would force a straddling community to obtain public water service from two different water systems. The portion of the community located within the Great Lakes basin would be able to receive service from a public water system that uses Great Lakes water, but the portion of the community located outside the Great Lakes basin would have to receive service from a different system that relies upon a non-Great Lakes water source. The straddling community diversion exception resolves this problem by allowing all parts of a straddling community to obtain public water supply service from one single, well-planned system and avoid the need for unnecessary and costly duplication of water utility facilities.

**B. The DNR’s Approval of the Racine Diversion Is Consistent With the Protections in the Compact.**

The straddling community diversion exception to the Compact’s diversion prohibition is limited and strictly defined to ensure adequate protection of the Great Lakes. The straddling community diversion exception is only available to those communities that meet the Compact’s “straddling community” definition. (Ex. 206, at 015, Compact § 4.9.1.) A community qualifies as a straddling community based on the community’s boundaries at the time the Compact was ratified. If a community was not a straddling community at the time the Compact was ratified, it cannot become a straddling community later. (Ex. 206, at 004, Compact § 1.2; Wis. Stat. § 281.343(1e)(t) (definition of “Straddling Community”).)

The number of Wisconsin straddling communities is limited. *See* Wisconsin Legislative Council memo, maps, and lists showing Wisconsin straddling communities, a copy of which is provided as Exhibit 209.<sup>16</sup> According to this 2006 memorandum, only 14 of Wisconsin’s 597 cities and villages, and only 115 of Wisconsin’s 1,255 unincorporated townships are eligible for the straddling community diversion exception.<sup>17</sup> No other Wisconsin communities are eligible to receive a straddling community diversion under any circumstances.

The geographic extent of straddling community diversion exceptions are also limited. A straddling community diversion can never extend into a county that is located completely outside the Great Lakes basin. This limitation is clear from the definition of a straddling community

---

<sup>16</sup> This Exhibit identifies both those communities that meet the definition of a “straddling community” and those that meet the definition of a “community within a straddling county.” The “community within a straddling county” exception is not relevant to this case.

<sup>17</sup> Revised Memo No. 3 with the attached maps and lists is Ex. 209. Information on the current number of local governmental bodies in Wisconsin is found on the Wisconsin Demographics Services Center, Wisconsin Department of Administration, Official Final Estimates, 1/1/2018 website. [https://doa.wi.gov/Pages/LocalGovtsGrants/Population\\_Estimates.aspx](https://doa.wi.gov/Pages/LocalGovtsGrants/Population_Estimates.aspx) (last visited January 18, 2019).

which is based upon the community being located “wholly within any county that lies partly or completely within the Great Lakes basin.” (Ex. 206, at 004, Compact § 1.2.)

Even if a community is one of the relatively few eligible to receive a straddling community diversion, it may not receive a diversion unless a request for a diversion is submitted to the originating state,<sup>18</sup> the strict requirements for diversion approval are met, and diversion approval has been granted. An applicant seeking to divert water to a straddling community must meet these strict diversion exception criteria and must obtain approval from its own state for the diversion. If the proposal would exceed certain thresholds not applicable here, an applicant would also have to obtain regional approval. (Ex. 206, at 015, Compact § 4.9.1; Wis. Stat. § 281.343(4n)(a)2. & 3.)

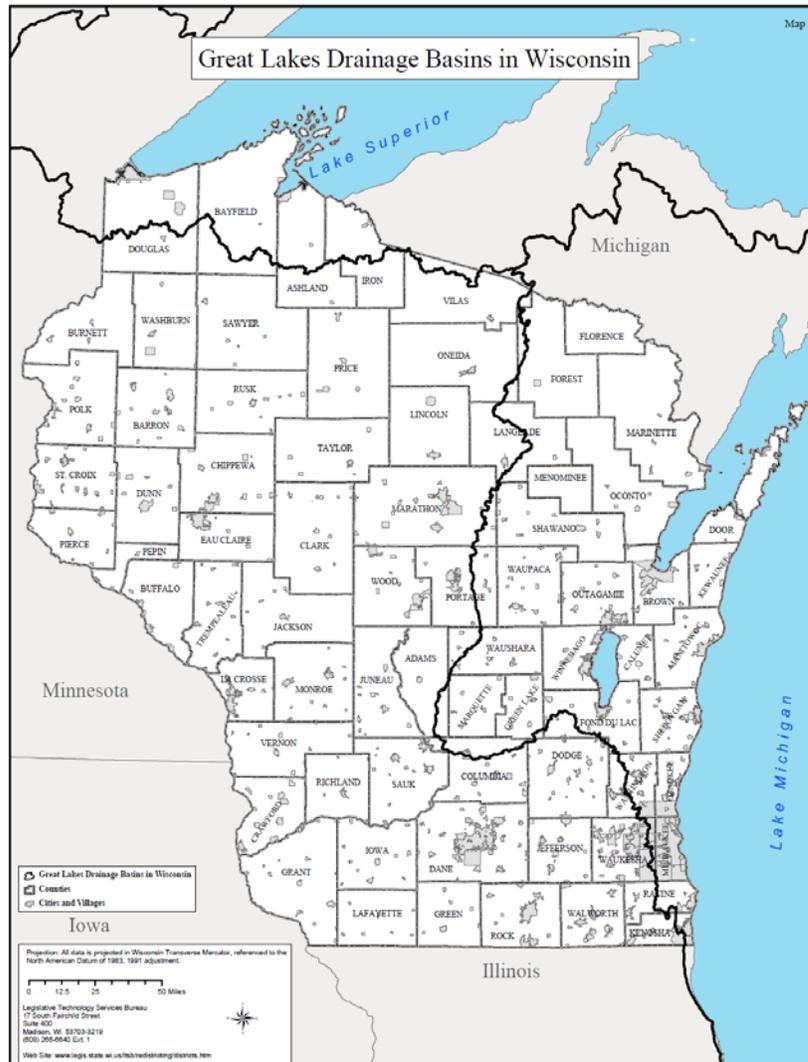
One of the most important requirements for a straddling community diversion approval is that an applicant agree to return the diverted Great Lakes water back to the Great Lakes. The Compact requires that “[a]ll Water Withdrawn from the Basin shall be returned, either naturally or after use, to the Source Watershed less an allowance for Consumptive Use.” (Ex. 206, at 015, Compact § 4.9.1.a; Wis. Stat. § 281.343(4n)(a).) The provision of return flow ensures that a diversion has no greater effect on the Great Lakes than an in-basin use of water.<sup>19</sup>

The map below shows that most Wisconsin communities that straddle the Great Lakes divide are located so far away from the Great Lakes to make it highly unlikely that they would ever seek to use Great Lakes surface water for their water source given the return flow requirement.

---

<sup>18</sup> The originating state is the state within whose jurisdiction a diversion application is made. (Ex. 206, at 003, Compact § 1.2 (defined as “Originating Party”).)

<sup>19</sup> According to the author Peter Annin in his book, *The Great Lakes Water Wars*, “[h]istory had shown that ‘return-flow’ was *the* biggest issue for diversion applicants.” (Annin, *The Great Lakes Water Wars* 261 (rev. ed. 2018) (emphasis in the original).) The reason for this is the cost associated with sending wastewater back to the Great Lakes basin.



Only in southeastern Wisconsin is the Great Lakes divide close enough to Lake Michigan so that some straddling communities are able to look to Lake Michigan surface water as a water source.

It is undisputed that Racine’s proposal meets the return flow requirement, as the wastewater from the diversion area will be returned to the Racine wastewater treatment plant and Lake Michigan.<sup>20</sup>

The Racine proposal also satisfies another important requirement for a straddling community diversion in Wisconsin. Specifically, a public water system applying for a new or

<sup>20</sup> See Ex. 1, at 2-3 (¶¶ 16-19) & 4 (¶¶ 6-7) (Approval Findings of Fact and Conclusions of Law not at issue).

increased diversion must submit with its application a water conservation plan and written documentation demonstrating that it has implemented or completed those conservation and efficiency measures required by Wisconsin law for the public water supply sector.<sup>21</sup> Wis. Stat. § 381.346(8); Wis. Admin. Code NR Ch. 852. The DNR found that Racine’s Water Conservation and Efficiency Plan meets these requirements. (Ex. 1, at 4, ¶ 8.)

Also noteworthy is the fact that Racine’s application falls *below* the withdrawal level that triggers application of the “Exception Standard” set out in Section 4.9.4 of the Compact. Under Section 4.9.4, any diversion that would result in a new or increased withdrawal of Great Lakes basin water of 100,000 gallons per day or greater must meet the Exception Standard requirements.<sup>22</sup> Under the Exception Standard, the applicant must: (i) demonstrate that the need for the proposed diversion cannot reasonably be avoided through the efficient use and conservation of existing water supplies, (ii) ensure that the diversion will result in no significant adverse individual impacts or cumulative impacts to the quantity or quality of the waters of the Great Lakes basin or to water dependent natural resources, including cumulative impacts that might result due to any precedent-setting aspects of the proposed diversion, and (iii) implement environmentally sound and economically feasible water conservation measures to minimize water withdrawals or consumptive use. (Ex. 206, at 017, Compact § 4.9.4.) Where, as here, the threshold is not triggered, the proposal would not result in a new withdrawal that would impact the Great Lakes or a withdrawal that exceeds those already permitted by the Compact.

---

<sup>21</sup> NR ch. 852 establishes water conservation and efficiency measures for seven different water sectors, one of which is the public water supply water use sector. Wis. Admin. Code NR §§ 852.04, Table 1, 852.05, Table 2, and 852.06.

<sup>22</sup> Racine’s proposal is not subject to the Exception Standard because Racine’s proposal does not require an increase in its existing withdrawal baseline. Racine has the capacity to provide water to the proposed development as its approved water withdrawal baseline is 60,010,000 gallons a day, and in 2017, Racine only withdrew an average of 17,144,688 gallons a day.

The requirements for obtaining a straddling community diversion exception are strict. But, for the relatively few straddling communities that qualify (such as Mount Pleasant), the exception is essential to ensure the safe, predictable, and efficient provision of public water service community-wide. Here those strict requirements have been satisfied.

The DNR's Approval and its interpretation of the "public water supply purposes" requirement does not diminish the protections in the Compact, and the straddling community diversion exception will remain strictly and narrowly defined. The DNR's Approval will not enable additional communities to claim straddling community status. All future diversion applicants will still have to comply with each and every condition set out in the Compact, be it the return-flow requirement, the additional standards that apply where Compact quantity thresholds are exceeded, or the submission and implementation of a water conservation plan. The impact of the Racine diversion will be well within the scope of what is allowed under the straddling community diversion exception.

**C. The DNR's Approval is Consistent with Wisconsin's Interest in Allowing Great Lakes Water to Be Used for Economic Development Purposes in Straddling Communities.**

It is important to keep in mind that the Compact is an agreement between eight separate states with varying positions and interests in the Great Lakes basin. The straddling community diversion exception reflects compromises made by these states during the negotiation of the Compact so that a final agreement could be reached.

Wisconsin's negotiators were mindful of the interests of communities located along Lake Michigan in southeastern Wisconsin. The sustainability, growth, and economies of these communities depend upon their ability to access a reliable public water supply for both residential and commercial uses. For these communities that rely on or intend to rely on Lake

Michigan for their water supply, the Compact's provisions relating to diversions are critically important.

Wisconsin negotiators also knew that the ability of Illinois communities to use Lake Michigan water is not limited by the Compact, but instead is governed by the terms of the United States Supreme Court's decision in *Wisconsin v. Illinois*, 388 U.S. 426 (1967) (attached as Ex. 207). Under this Supreme Court case, the State of Illinois is permitted to divert over 2 billion gallons of Lake Michigan water a day, without any requirement for return flow. (Ex. 206, at 020-021, Compact § 4.14; Wis. Stat. § 281.343(4x).) Illinois is then allowed to apportion this volume of diverted water among its municipalities, political subdivisions, agencies, and instrumentalities to use for domestic purposes, which, according to the Supreme Court, explicitly includes the provision of water to commercial and industrial establishments. *Wisconsin v. Illinois*, 388 U.S. at 427-428. This Supreme Court decision allowed Illinois communities located outside the Great Lakes basin – and just south of Wisconsin – to grow and expand based upon their ability to provide Lake Michigan water to their residents, businesses, and industries.

In light of this background, Wisconsin negotiators would certainly not have agreed to a Compact provision prohibiting the use of Great Lake resources for economic development projects in those limited number of straddling communities eligible for a diversion exception, when nearby Illinois communities could do so without even having to meet a return-flow requirement. Indeed, the plain language of the Compact shows that no such prohibition was ever agreed to.

### **III. THE DNR'S APPROVAL IS CONSISTENT WITH THE ACTIONS OF THE GREAT LAKES STATES.**

DNR's Approval and interpretation of the public water supply purposes requirement is consistent with the plain language of the Compact and implementing Wisconsin Statutes (as

discussed in Section I. above), consistent with Wisconsin's interests when negotiating the Compact (as discussed in Section II. above), and is consistent with how the Great Lakes states have treated public water supply, and the provision of water to an industry through a public water system, both before and after the Compact was adopted. While the plain language of the Compact is the best indicator of what the "public water supply purposes" requirement and definition means, the actions of the Council and the Great Lakes states provide highly significant evidence on their understanding of the Compact's terms. *Alabama v. North Carolina*, 560 U.S. 330, 346 (2010); *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614 (2013).

**A. The Great Lakes States Have Consistently Treated Water Provided to an Industry Through a Public Water System as Public Water Supply.**

Before the Compact was adopted, the Great Lakes states and the provinces of Ontario and Quebec signed a nonbinding, voluntary arrangement called the Great Lakes Charter in which they agreed to begin collecting water withdrawal data. (Ex. 26, at 003-006.) The Great Lakes Regional Water-Use Database that was subsequently created and organized included seven water use categories with one of those categories being "public water supply." (Ex. 203, at 038-039; *see* Ex. 204.) The "public water supply" category was defined to include "Water withdrawn for all uses by public and private water suppliers and delivered to users that do not supply their own water." (Ex. 203, at 038-039.) The definition further noted that "Water suppliers provide water for a variety of uses such as residential, commercial, industrial and public water use." *Id.* In that Database, water provided to an industry through a public water system was treated as "public water supply." *Id.* Water was only categorized as being "industrial water" if the industry "self-supplied" the water. *Id.*

After the Compact became effective, the governors of each of the eight Great Lakes created the Great Lakes – St. Lawrence River Basin Water Resources Council ("Council"), a regional body

established in accordance with the Compact, and charged with, among other things, assisting each state in developing a common base of water data. (Ex. 206, at 006 & 010, Compact §§ 2.1, 2.2, & 4.1.2.) The Council adopted “Reporting Protocols” for the states to use to report water information, and those Protocols established ten water use sectors for reporting, with one of those sectors being a “Public Water Supply” sector. (Ex. 212.) The description of the “Public Water Supply” sector adopted in the Reporting Protocols matches the Compact’s definition of “public water supply purposes.” (*Compare* Ex. 212, at 002 *with* Ex. 206, at 003, Compact § 1.2.) The Council’s Reporting Protocols expressly direct states to report all water distributed through a public water supply system as “public water supply.” If an industry uses water provided through a public water supply, it is to be counted as public water supply. (Ex. 212, at 003-004.) Water used by an industry is only to be counted as “industrial use” if it is self-supplied.<sup>23</sup>

Thus, both before and after the Compact was adopted, the Great Lakes states classified the provision of water to an industry through a public water system as “public water supply.” The standard reporting procedure required by the Council is to count all the water distributed by a public water supplier to any customer as “public water supply.” The DNR’s interpretation and application of the public water supply requirement is consistent with this approach. Water provided through Racine’s public water system is “public water supply” regardless of how its customers in the diversion area will use the water or who the customers will be. This approach is in no way novel, as Petitioners contend, rather it is Petitioners that propose the novel

---

<sup>23</sup> The Reporting Protocols provide the following with respect to the industrial water use sector:  
5. Self-Supply Industrial Water. . . . *Withdrawals and Consumptive Uses for industrial and mining purposes (including dewatering operations) recorded under another category (e.g., public supply) will not be recorded here. . . .*  
(Ex. 212, at 004.)

interpretation that water served to customers of a public water supplier is to be considered something other than for “public water supply purposes.”

**B. The Great Lakes States Have Not Required Compact Requirements to Be Applied to a Public Water System’s Customers.**

The Great Lakes states consistently apply Compact requirements to public water suppliers and not their customers. A good demonstration of this is the implementation of the Compact’s conservation and efficiency requirements.

The Compact requires each Great Lakes state to commit to promote conservation measures, and establish water management, conservation, and efficiency programs.<sup>24</sup> The Council is then required to review states’ water management and conservation and efficiency programs and make findings on whether they meet Compact requirements. (Ex. 206, at 009, Compact § 3.4.)

Wisconsin’s conservation and efficiency program is set out in Wis. Admin. Code NR Ch. 852. The code establishes conservation and efficiency requirements for seven different water sectors, including a public water supply water use sector. Wis. Admin. Code NR §§ 852.03(1), (12), (14), (15), (19), (20), and (21). The public water supply use sector is defined as “public water supply systems that distribute water 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 customers.” Wis. Admin. Code NR § 852.03(21). This definition is consistent with the term “public water supply” as defined in the

---

<sup>24</sup> The Compact requires each Great Lakes state to commit to promote “Environmentally Sound and Economically Feasible Water Conservation Measures.” (Ex. 206, at 011, Compact § 4.2.) The Compact defines these measures to mean “those measures, methods, technologies or practices for efficient water use and for reduction of water loss and waste or for reducing a Withdrawal, Consumptive Use or Diversion” that, among other things, “reflect best practices applicable to the water use sector.” (Ex. 206, at 002, Compact § 1.2.) Each Great Lakes state is to provide the Council and the Regional Body with reports on its programs every five years. (Ex. 206, at 009, Compact § 3.4.1.)

Compact, and the Compact’s Reporting Protocols. (*Compare* Wis. Admin. Code NR § 852.03(21) *with* Ex. 206, at 003, Compact § 1.2 *and with* Ex. 212, at 003.) Other water use sectors, including industrial, explicitly exclude users that do not self-supply their water. Wis. Admin. Code NR §§ 852.03(1), (12), (19), and (20).

A public water system applying for a new or increased diversion falls under Tier 3 of Wisconsin’s conservation and efficiency program. Along with its application for a diversion, the public water system must submit a water conservation plan that meets applicable requirements as well as written documentation showing that the system has implemented or completed the conservation and efficiency measures required by Wis. Admin. Code NR Ch. 852 for the *public water supply sector*. Wis. Admin. Code NR §§ 852.02(3), 852.04, 852.05, and 852.06. All the required measures applicable to public water suppliers are the responsibility of the public water suppliers – not their customers. Wis. Admin. Code NR §§ 852.04, Table 1, 852.05, Table 2, and 852.06. While public water suppliers may establish programs for their residential, commercial, and industrial customers, there are no enforceable requirements applicable to public water supply customers in Wis. Admin. Code NR Ch. 852. Notably, Wis. Admin. Code NR Ch. 852 requires an industry to implement conservation and efficiency measures only if the industry supplies its own water.

Wisconsin submitted a report on its water management and conservation and efficiency programs to the Council.<sup>25</sup> The Council issued a resolution finding that Wisconsin’s programs meet or exceed the requirements of the Compact.<sup>26</sup> In concluding that Wisconsin’s program complies with the Compact’s conservation and efficiency requirements, the Council implicitly recognized that the Compact’s conservation and efficiency requirements apply to the public

---

<sup>25</sup> Wisconsin’s submissions to the Council are attached to Ex. 213 at pages 004-022.

<sup>26</sup> The Council’s Declaration on Wisconsin’s program is Ex. 213 at pages 001-003.

water supplier's use of water. Compact requirements do not apply to the public water supplier's customers.

**C. History and Practice Demonstrate that the Great Lakes States Consider the Public Water System as the Water User.**

As each of these examples show, the Great Lakes states and the Council have consistently interpreted and applied Compact compliance requirements to public water system and their use of water. The Great Lakes states have not applied Compact requirements to the customers of public water suppliers.

There is no basis for adopting a different approach here with respect to the public water supply purposes requirement. The public water supply purposes requirement should be applied to public water systems and their use of water. This is consistent with the plain language of the Compact and how related provisions of the Compact have been applied in other situations. It would be unprecedented to apply this Compact requirement to the *customers* of public water supply systems.

**IV. THE DNR'S APPROVAL ALLOWS ALL PARTS OF MOUNT PLEASANT TO RECEIVE PUBLIC WATER SUPPLY FROM RACINE, AS PLANNED LONG BEFORE THE ELECTRONICS AND INFORMATION TECHNOLOGY MANUFACTURING ZONE WAS DESIGNATED IN MOUNT PLEASANT.**

It is important not to lose sight of the fact that, even before the electronics and information manufacturing zone was designated, it was anticipated that the out-of-basin area of Mount Pleasant would, given its location near the I-94 transportation corridor (as shown on the map below), most likely be developed for commercial or industrial purposes and that Racine would supply water to that out-of-basin area.

Attachment A - Diversion Area within Southeast Wisconsin



Long before the Compact was ratified in 2008, Racine had been providing public water supply service in Mount Pleasant. In 2003, Racine provided public water service to about 40% of Mount Pleasant, while the rest of Mount Pleasant relied upon private wells. (Ex. 201, at 034.) In 2004, Racine and Mount Pleasant reached an agreement on how water service would be extended to new Mount Pleasant customers in the future. (Ex.202, at 010-012, § 2.) The contemplated extension of service was consistent with Racine’s 2002 Water Supply System Plan for the Greater Racine Area, prepared by the engineering consulting firm, Ruckert/Mielke, which recommended that Racine plan to provide retail water service to an area extending from Lake Michigan on the east to a westerly boundary located approximately one mile west of I-94. (*Id.* at 007-008.) The Plan further recommended that Racine design and operate its water system

facilities so that water could be conveyed through the territories of municipalities receiving retail service without regard to municipal boundaries, with the goal of achieving efficiencies and cost savings and increased reliability of service for the benefit of all water users. (*Id.*)

The 2004 Water Service Agreement required, except under certain limited circumstances, that Mount Pleasant obtain all of its requirements for municipal water service from Racine. (*Id.* at 051, § 20.) New subdivisions and new commercial and industrial development within Mount Pleasant were required to be connected to the Racine water system. (*Id.* at 016-017, § 3.h.) If a new water user was located outside of the Lake Michigan basin, the 2004 Water Service Agreement required that the user's wastewater would have to be treated by the Racine Wastewater Utility treatment plant. (*Id.* at 011, § 2.a.(3).)

The expectation that Racine water service would be extended to other areas of Mount Pleasant when needed, and would be valuable in promoting industrial and business growth, especially along the I-94 corridor, was recognized by the Wisconsin Department of Administration ("DOA") when it considered Mount Pleasant's petition for incorporation in 2003. (Ex. 201, at 054.)

The location of Mount Pleasant's business park and business park reserve lands is significant. Five of the six township Sections comprising these lands run along the I-94 transportation corridor. This is particularly important because ready access to transportation systems benefit industry and commerce in terms of providing access to labor and product/service delivery capabilities. Additionally, *since sewer services as well as water services are to be extended out to the I-94 corridor, public infrastructure would support the I-94 development potential, which will likely affect the rate of development in this area.* Mount Pleasant's intent to develop along this transportation corridor has been made clear by the Town's Administrator, Kevin O'Donnell, who states that through incorporation, "Mount Pleasant would have the tools it needs to spur business development along the eastern I-94 corridor," which he envisions as encompassing "research and development offices, industry and other business..." Furthermore, investors consider commercial development along the I-94 in Racine County as a "driving boomlet of activity."

The DOA recognized that commercial and industrial development in Mount Pleasant would benefit the area as a whole, given existing agreements between Mount Pleasant and Racine which the DOA referred to as “extraordinary.” (Ex. 201, at 068)

The “Racine Area Intergovernmental Sanitary Sewer Service, Revenue Sharing, Cooperation, and Settlement Agreement,” through its’ revenue sharing component, addresses regional tax base and revenue inequities. Sensitivity analysis of the revenue sharing formula that is part of the Racine Area Agreement suggests that the tax base sharing formula tends to neutralize the competitive effect of siting commercial and industrial development in one community versus another. . . . The revenue sharing between Racine and Mount Pleasant found in the “Racine Area Intergovernmental Sanitary Sewer Service, Revenue Sharing, Cooperation, and Settlement Agreement” partially breaks down a division between the municipalities that otherwise segregates tax revenues within separate jurisdictions. . . . It is extraordinary that Racine Area municipalities have recognized their mutual interdependence and took action to form a basis for cooperation and sharing rather than competition between each other.

The plan to develop the electronics and information technology manufacturing zone, including Foxconn’s facility, in Mount Pleasant, near the I-94 transportation corridor that lies along the western edge of Mount Pleasant, is consistent with the area-wide planning that development would occur in this area given its location and ready access to a major transportation corridor. Racine’s extension of water service to this area of proposed development is similarly consistent with how Racine and Mount Pleasant expected water to be provided to this area under the 2004 Water Service Agreement. (Ex. 202.) Racine’s request for a diversion to serve this area and the DNR’s approval of that request is not in any way surprising or exceptional, but rather represents the culmination of careful, intergovernmental planning for the entire metropolitan Racine area.

**CONCLUSION**

The DNR's determination that Racine's diversion proposal meets the public water supply requirement of the straddling community diversion exception is supported by the plain language of the Compact and implementing Wisconsin Statutes, the intent underlying the compromises embedded in the Compact, the parties' course of conduct, and by the undisputed facts related to Racine's proposed provision of water. For these reasons, the DNR's Approval of Racine's application should be upheld. Petitioners' summary judgment motion should be denied, and summary judgment should be granted to Racine, Mount Pleasant, and the County.

Dated this 31st day of January, 2019.

Boardman & Clark, LLP

By:



Lawrie J. Kobza (SBN 1009282)  
Jared Walker Smith (SBN 1083018)  
Attorneys for City of Racine

One South Pinckney Street, 4th Floor  
PO Box 927  
Madison, WI 53701-0927  
Phone: 608-283-1788  
Facsimile: 608-283-1709

Von Briesen & Roper, s.c.

By:



Alan H. Marcuvitz (1007942)

Smitha Chintamaneni (1047047)

Attorneys for Village of Mount Pleasant

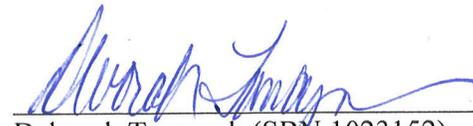
411 East Wisconsin Avenue, Suite 1000

Milwaukee, WI 53202

Phone: 414-287-1515

Facsimile: 414-238-6581

Reinhart Boerner Van Deuren, s.c.  
By:



---

Deborah Tomczyk (SBN 1023152)  
Attorneys for Racine County

1000 North Water Street, Suite 1700  
PO Box 2965  
Milwaukee, WI 53202-0927  
Phone: 414-298-8331  
Facsimile: 414-298-8097

F:\DOCS\WD\22713\8\VA3352029.DOCX