Midwest Environmental Advocates

Monday, March 4, 2019

BY EMAIL

Brian Hayes
Administrator
State of Wisconsin – Division of Hearings and Appeals
4822 Madison Yards Way, Fifth Floor North
Madison, WI 53705-5400

RE: Department of Natural Resources, Environmental Management Division, Findings of Fact, Conclusions of Law, and Diversion Approval– DNR-18-0006

Dear Judge Hayes:

Enclosed please find Petitioners' Reply Brief in Support of Motion for Summary Judgment. Copies of all documents have been served on the parties via electronic mail.

Sincerely,

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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

PETITIONERS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Mindful of the critical importance of Great Lakes water resources to the future well-being and prosperity of our region, Petitioners[1] filed this challenge to undo the dangerous legal precedent created by the Wisconsin Department of Natural Resources' (DNR) misinterpretation of the public water supply purposes requirement in the Great Lakes–St. Lawrence River Basin Water Resources Compact (hereinafter "the Great Lakes Compact" or "the Compact") and Wisconsin's implementing legislation. DNR's April 25, 2018, approval authorizing the City of Racine to divert Great Lakes water solely for industrial and commercial purposes turns the Compact's central tenet—a ban on diversions with strictly limited exceptions—on its head. DNR's interpretation ignores the plain language of the public water supply purposes requirement, the context in which it is used, as well as the stated purposes and overall structure of the Compact and Wisconsin's implementing legislation.

In an attempt to overcome the absence of residential customers in the diversion area—i.e., the out-of-basin portion of the Village of Mount Pleasant where Great Lakes water would be transferred—DNR advances a strained interpretation of the public water supply purposes requirement. Specifically, DNR focused on Racine's customers within the *entire* straddling

[1] The original Petitioners are League of Women Voters of Wisconsin, Milwaukee Riverkeeper, Minnesota Center for Environmental Advocacy, and River Alliance of Wisconsin. Two additional organizations, League of Women Voters–Lake Michigan Region and Natural Resources Defense Council, later joined the administrative appeal as parties in support of the challenge to WDNR's Approval. The six organizations are collectively referred to as "Petitioners" throughout this brief.

community of Mount Pleasant so that the *in-basin* residential customers could overcome the complete absence of any residential customers in the diversion area. Applying this misinterpretation, DNR avoided the following threshold question: Would the 7 million gallons per day of Great Lakes water diverted to the portion of Mount Pleasant located outside the basin serve "a group of largely residential customers"? The undisputed answer is no. Not only has Mount Pleasant committed to the removal of all residential landowners from the diversion area,[2] the Village has also rezoned the entire diversion area for industrial and commercial purposes,[3] including a manufacturing facility proposed by the Foxconn Technology Group.[4] DNR's inclusion of Racine's existing in-basin customers within the straddling community to satisfy the

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[2] *See* Ex. 33 at 11, (showing prior residential uses in the part of the diversion area designated "Area II"); Ex. 34 at 10 (providing that the Village will acquire those properties); *see also* Rick Romell, *Village of Mount Pleasant Declares Foxconn Area as Blight, May Use Eminent Domain to Take Properties*, MILWAUKEE J. SENTINEL (June 5, 2018) https://www.jsonline.com/story/money/business/2018/06/05/village-says-foxconn-area-blighted -may use-eminent-domain/671976002/.

[3] *See* 2017 Wis. Act 58 (creating the Electronics and Information Technology Manufacturing Zone); Pet'rs Br. at 9-14 (providing an overview and history of the Foxconn Project, the creation of an "Electronics and Information Technology Manufacturing Zone" specific to the Foxconn Project, and Mount Pleasant's establishment of an Industrial Tax Incremental District that rezoned the entire diversion area to an "industrial zoning classification").

[4] An abundance of national and local media recently called into question the Foxconn Technology Group (hereinafter "Foxconn") project in Wisconsin. Beginning in late January of this year, numerous reputable news outlets, including Reuters, Forbes, and Bloomberg Business Week reported that Foxconn is retreating from plans to build a 10 billion dollar liquid crystal display manufacturing complex, citing a variety of economic and diplomatic considerations. While the end result is yet unknown, it is becoming clearer every day that the Foxconn project may be significantly different than that promised in agreements with Racine and Mount Pleasant. *See* Austin Carr, *Inside Wisconsin's Disastrous $4.5 billion deal with Foxconn*, BLOOMBERG BUSINESSWEEK (Feb. 6, 2019) https://www.bloomberg.com/news/features/2019-02-06/inside-wisconsin-s-disastrous-4-5-billion-deal-with-foxconn; *Reuters: Foxconn Reconsiders Making LCD Panels at Wisconsin Plant*, CHANNEL 3000 (Jan. 30, 2019) https://www.channel3000.com/news/reuters-foxconn-reconsiders-making-lcd-panels-at-wisconsin-plant/995443810; Thomas Duesterberg, *What to Make of Foxconn's Rollback of Manufacturing Plans in Wisconsin*, Forbes (Jan. 31, 2019) https://www.forbes.com/sites/thomasduesterberg/2019/01/31/what-to-make-of-foxconns-rollback-of-manufacturing-plans-in-wisconsin/#58ca16a3404a.

Nevertheless, the legal challenge to the Racine diversion before this tribunal remains critically important because, whether or not the Foxconn project proceeds as planned, the fact remains that the entire diversion area is zoned exclusively for industrial and commercial use. Ex. 5 at 17. DNR's misinterpretation undermines a core element of the Compact and sets a dangerous precedent throughout the Great Lakes region. Until the State of Wisconsin withdraws the Racine diversion approval—or revises it to bring the state's interpretation of "public water supply purposes" in line with the plain meaning and stated purpose of the Compact to narrowly construe the exceptions to the ban on diversions—Wisconsin's novel and harmful interpretation stands.

public water supply purposes requirement allowed the agency to ignore the inconvenient fact that all of the Great Lakes water diverted outside of the basin will be used solely for industrial and commercial purposes.

There is no support for DNR's interpretation in the plain language, context, stated purposes, or overall structure of the Compact and Wisconsin's implementing legislation. A key limitation imposed on straddling community diversions is that all water diverted or transferred *outside of the Great Lakes basin*, in any amount, must be used for public water supply purposes. DNR's focus on Racine's customers within the entire Village of Mount Pleasant makes irrelevant the intended uses of the water transferred outside the Great Lakes basin, and significantly diminishes, if not eliminates, the value of the public water supply purposes requirement. In effect, DNR's interpretation creates a far more expansive exception to the Compact's ban on diversions—an exception that would allow any straddling community with a municipal water supply system (numbering in the 100s region-wide)[5] to divert water to *any user* in the out-of-basin portion of the straddling community for *any purpose*.[6]

DNR's interpretation opens the door to a quantity and type of diversions that was neither anticipated nor considered by the drafters of the Compact and Wisconsin's implementing legislation, thereby threatening the viability of the Compact and its goal of protecting the Great Lakes water into the future. For these reasons, Petitioners, a group of state, regional, and national organizations committed to the protection of the Great Lakes, ask that this tribunal overturn DNR's approval of the Racine diversion, in keeping with language and intent of the Compact and Wisconsin's implementing legislation to sustain the magnificent waters of the Great Lakes into perpetuity.

STANDARD OF REVIEW

[5] Ex. 110 at 5.
[6] Such diversions would also be required to return any water not consumed by the out-of-basin user or users.

Summary judgment must be granted if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). This procedure is available to parties in a contested case upon approval by the administrative law judge. Wis. Admin. Code § HA 1.10(2). Here, the parties have agreed that there is no genuine issue as to any material fact. Therefore, this contested case turns on whether Petitioners are entitled to judgment as a matter of law.

To determine whether Petitioners are entitled to judgment as a matter of law, both the Compact and Wisconsin's implementing legislation must be interpreted. Congressionally approved interstate compacts constitute federal law. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). As such, the Compact is subject to the federal rules of construction. *State ex rel. Pharm v. Bartow*, 2007 WI 13, ¶ 15, 298 Wis. 2d 702, 727 N.W.2d 1 (citing *Carchman v. Nash*, 473 U.S. 716, 719 (1985)). According to the federal rules of construction, the Compact should be interpreted under the principles of contract law. *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013) (citing *Texas v. New Mexico*, 482 U.S. at 128). Wisconsin's implementing legislation may be interpreted according to the state or federal rules of statutory construction because it implements an interstate compact. *See Pharm*, 298 Wis. 2d 702, ¶ 15 (applying the federal rules of statutory construction to Wisconsin's statute implementing the Interstate Agreement on Detainers). The reason the federal rules may be applied is "to accord more consistency with the . . . interpretations of other federal and state courts." *Id.* Nevertheless, the principles of contract interpretation and statutory construction under federal and state law are largely the same.

The first step in constructing an interstate compact or an implementing statute is to examine "the express terms . . . as the best indication of the intent of the parties." *Tarrant*, 569 U.S. at 628; *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (providing that the first step in interpreting federal statutes is to examine the plain language); *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (explaining that the

interpretation of Wisconsin statutes "begins with the language of the statute"). Express terms should be examined in light of the Compact and Wisconsin's implementing legislation as a whole, not in isolation but in the context in which the terms are used, and considering the structure of the statutory scheme. *Kalal*, 271 Wis. 2d 633, ¶ 46; *see also Robinson*, 519 U.S. at 341 (explaining that the plain language analysis includes the context in which language is used); *Shell Oil Co. v. United States*, 751 F.3d 1282, 1293 (Fed. Cir. 2014) (requiring contracts to be interpreted "in a manner that gives meaning to all of its provisions and makes sense"); Restatement (Second) of Contracts §§ 202(2), 203(a) (1981) (providing contracts should be interpreted as a whole and to give reasonable meaning to all terms). The language in a compact or statute should also be construed so as to give reasonable effect to all the terms and avoid surplusage or unreasonable results. *Corley v. United States*, 556 U.S. 303, 314 (2009); *Kalal*, 271 Wis. 2d 633, ¶ 46; *see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000).

Exceptions to general rules within a statute are usually construed narrowly. *Maracich v. Spears*, 570 U.S. 48, 60 (2013); *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989); *McNeil v. Hansen*, 2007 WI 56, ¶ 10, 300 Wis. 2d 358, 731 N.W.2d 273; *cf. Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (holding that exceptions will be construed "fairly" unless there is a textual indication that exceptions should be construed narrowly). Where the express terms of an interstate compact or statute are clear and unambiguous, that meaning is determinative. *Robinson*, 519 U.S. at 340; *M & G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926, 938 (2015) (Ginsburg, J., concurring) (citing 11 R. LORD, WILLISTON ON CONTRACTS § 30:6, p. 98-104 (4th ed. 2012)); *Kalal*, 271 Wis. 2d 633, ¶ 45.

If the language of an interstate compact or an implementing statute is ambiguous, i.e., reasonably susceptible to different interpretations, it then becomes appropriate to turn to extrinsic evidence "to shed light on the intent of the . . . drafters." *Tarrant*, 569 U.S. at 631 (citing *Oklahoma v. New Mexico*, 501 U.S. 221, 234-35 n. 5 (1991)); *see also Exxon Mobil Corp.*

v. Allapattah Services, Inc., 545 U.S. 546, 568 (2005); *Kalal*, 271 Wis. 2d 633, ¶ 50-51. Such extrinsic evidence includes the legislative history or the negotiation history that gave rise to the compact or statute. *Oklahoma v. New Mexico*, 501 U.S. at 234-35 n. 5; *Arizona v. California*, 292 U.S. 341, 359-60 (1934); *Exxon Mobil Corp*, 545 U.S. at 568; *Kalal*, 271 Wis. 2d 633, ¶ 50. Legislative history, "of course, refers to the pre-enactment statements of those who drafted or voted for a law." *Dist. of Columbia v. Heller*, 554 U.S 570, 605 (2008); *see also Arizona v. California*, 292 U.S. at 359-60 (excluding from legislative history "oral statements made by those engaged in negotiating the treaty which were not embodied in any writing"); *Responsible Use of Rural and Agric. Land v. Public Serv. Comm'n*, 2000 WI 129, ¶ 39 n. 20, 239 Wis. 2d 660, 619 N.W.2d 888 (finding that after-the-fact media reports are not persuasive). In addition, a party's course of performance under an interstate compact is "highly significant" evidence of that party's understanding of the compact's terms. *Tarrant*, 569 U.S. at 636; *Alabama v. North Carolina*, 560 U.S. 330, 346 (2010).

Finally, the hearing examiner should not afford any deference to DNR's interpretation, but rather should apply the *de novo* standard of review. The Supreme Court is the "exclusive arbiter of controversies between the States," including the proper interpretation of interstate compacts.[7] *Alabama v. North Carolina*, 560 U.S. at 344 (internal quotations omitted). And just as the Supreme Court would not allow any single contracting party to give final meaning to an interstate compact's terms, neither should this tribunal consider DNR's interpretation authoritative. 72 Am. Jur. 2d States, Etc. § 12; *see also West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) (giving no deference to the highest court of West Virginia's interpretation of the state's obligations under an interstate compact). This approach promotes consistency when

[7] Wisconsin Manufacturers and Commerce (WMC) argues that local governments are entitled to deference regarding what constitutes a public purpose. WMC Br. at 16. WMC relies on case law regarding a local government's power to use local funds as long as it is for a "public purpose," which is a completely different term of art unrelated to the public water supply purposes requirement. Judicial decisions regarding local government expenditures have no bearing on the issue presented here: whether the Racine diversion is for public water supply purposes.

interpreting the Compact and ensures uniform implementation throughout the Great Lakes region.

The Wisconsin Supreme Court has also recently "decided to end [the] practice of deferring to administrative agencies' conclusions of law." *Tetra Tech EC, Inc. v. Dept. of Revenue*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21. Questions of law, such as the proper interpretation of a statute, should now be reviewed under the *de novo* standard in every case. *Id.*, ¶ 84. The examiner may still give "respectful, appropriate consideration to the agency's views," but only if the agency can demonstrate that its "experience, technical competence, and specialized knowledge give its view of the law a significance or perspective unique amongst the parties." *Id.*, ¶¶ 78-79. The agency's perspective may be given persuasive effect if several factors are met, *id.*, ¶ 79, but DNR's interpretation of law fails to satisfy two of these factors. As explained further below, DNR has not adhered to a consistent interpretation of law, and DNR's perspective will not "enhance uniformity and consistency of the law." *Id.* Thus, DNR's interpretation of law does not have a "significance or perspective unique among the parties" and should not be considered more persuasive than Petitioners' legal interpretation. *See id.*

ARGUMENT

The overarching framework of the Great Lakes Compact prohibits diversions from the basin with very limited and strictly regulated exceptions to serve communities along the basin boundary. The Racine diversion violates the Compact and Wisconsin's implementing legislation because the water diverted outside of the basin will not serve "largely residential customers." In fact, none of the water diverted outside of the basin will go to residential customers. As a result, the Racine diversion does not meet the public water supply purposes requirement in the straddling community exception. Petitioners' interpretation of this requirement is consistent with the plain language of the Compact and Wisconsin's implementing legislation, and is further supported by the legislative history. In stark contrast, Respondents' interpretation of the public water supply purposes requirement is untethered from the context in which it is used in the

straddling community exception and lacks support from the text or legislative history. Thus, the Racine diversion cannot be allowed to stand because it violates the spirit and language of the Compact and Wisconsin's implementing legislation.

I. The Racine diversion conflicts with the intent, express terms, and structure of the Compact and Wisconsin's implementing legislation.

The Compact's primary mechanism for protecting the Great Lakes is the ban on any diversions with limited exceptions for communities along the basin line. The drafters conveyed this intent through the express terms, stated purposes, and structure of the Compact and Wisconsin's implementing legislation. This intent must inform our reading of the straddling community exception and the public water supply purposes requirement at issue in this case. Respondents' interpretation ignores the plain language of the straddling community exception, which explicitly provides that it is the diverted water—defined as water transferred outside of the basin—that must be used for public water supply purposes. Petitioners' interpretation gives meaning to all words in the Compact and Wisconsin law, honoring the intent of the drafters. Allowing Respondents' interpretation to stand not only violates the Compact in this case, but also opens the door to more unlawful diversions that would seriously undermine Great Lakes protections.

A. The Compact prohibits diversions with limited exceptions that should be narrowly construed in favor of protecting the Great Lakes.

The express terms of the Compact and Wisconsin's implementing legislation make clear the intent to *prohibit* diversions with limited and conditional exceptions for communities on or near the basin boundary. The premise that the Compact is meant for diversions—for communities and economic development—as long as those diversions meet certain conditions is the fundamental flaw in Respondents' arguments. This is not just a matter of mere semantics. The intent of a statute informs how specific terms and provisions should be interpreted, and "a plain meaning interpretation cannot contravene a textually or contextually manifest statutory purpose." *Kalal*, 271 Wis. 2d 633, ¶ 49. "A statute's purpose or scope may be readily apparent

from its plain language or its relationship to surrounding or closely-related statutes—that is, from its context or the structure of the statute as a coherent whole." *Id.* The structure of the Compact and Wisconsin's implementing legislation, as well as the expressly stated purposes, affirm the drafters' intent to strictly prohibit diversions with limited exceptions.

The Compact emphasizes the prohibition on diversions by dedicating an entire section to the "Prohibition of New or Increased Diversion." Compact § 4.8. That section provides, "All or New Increased Diversions are prohibited, except as provided in this Article." *Id.* Likewise, the first provision in the diversions subsection of Wisconsin's implementing legislation provides, "Prohibition. Beginning on the compact's effective date, no person may begin a diversion, except as authorized under par. (c), (d), or (e)." Wis. Stat. § 281.346(4)(a).

There are only three limited exceptions to the express prohibition on diversions. Those exceptions are crafted to allow some diversions for communities on or near the basin boundary, but only if those diversions are necessary to serve those communities' water needs. Evidence of this intent is found in the conditions imposed on each exception. Under Wisconsin's implementing legislation, the exceptions share several common conditions. For example, only a "public water supply system" may apply for a straddling community or county diversion. Wis. Stat. § 281.346(4)(b)2. Additionally, the proposal must be consistent with an approved water supply service area plan for the public water supply system that applies for the diversion.[8] Wis. Stat. § 281.346(4)(c)2m, (d)1, (e)1.em. Further, the diverted water must be used solely for public water supply purposes. Wis. Stat. § 281.346(4)(c), (d)1, (e)1. Numerous additional requirements apply, but this non-exhaustive list evinces the drafters' intent to lift the ban on diversions only to resolve a community's public water supply needs.

[8] Section 56 of 2017 Wis. Act 58 exempted the electronics and information technology manufacturing zone from this requirement, but its inclusion for all other diversions along with similar conditions listed above indicate the drafters' intent to allow diversions only to resolve a community's water supply needs.

The drafters' decision to ban all diversions of any size except in limited circumstances was a policy decision to err on the side of keeping Great Lakes water in the basin. The stated purposes of the Compact and Wisconsin's implementing legislation confirm this intent. In particular, they provide that the protection of the Great Lakes is "the overarching principle for reviewing proposals." Compact § 4.5.1.d; Wis. Stat. § 281.343(4h)(a)4. The Compact and Wisconsin's implementing legislation also provide that uncertainties should be resolved in favor of protecting the Great Lakes. Compact § 1.3.2.a; Wis. Stat. § 281.343(1m)(b)1 ("[L]ack of full scientific certainty should not be used as a reason for postponing measures to protect the basin ecosystem."). Thus, the express terms and structure of the Compact and Wisconsin's implementing legislation indicate that exceptions to the ban on diversions should be narrowly construed.[9] *See Encino Motorcars*, 138 S. Ct. at 1142.

With this intent in mind, we can examine the relevant exception for a straddling community and how the public water supply purposes requirement is used in context.

B. The context in which the public water supply purposes requirement is used demonstrates that it concerns the use of the water diverted outside of the basin.

The central dispute between the parties in this contested case is whether a diversion meets the public water supply purposes requirement based on (1) the use of the water outside of the basin or (2) the type of system that transfers the water. Petitioners urge the former interpretation and Respondents assert the latter. The context in which the phrase "public water supply purposes" is used leaves no doubt that the focus is on the use of the water outside of the basin.

The public water supply purposes requirement in the straddling community exception is substantially similar in the Compact and Wisconsin's implementing legislation. In the Compact, the straddling community exception provides as follows:

[9] DNR agrees that the exceptions should be "limited and strictly regulated." DNR Br. at 27.

> A Proposal to transfer Water to an area within a Straddling Community but outside the Basin. . . shall be excepted from the prohibition against Diversions . . . 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*.

Compact § 4.9.1 (emphasis added). The straddling community exception in Wisconsin's implementing legislation is generally comparable:

> The department may approve a proposal . . . to begin a diversion . . . to an area within a straddling community but outside the Great Lakes basin or outside the source watershed *if the water diverted will be used solely for public water supply purposes in the straddling community*.

Wis. Stat. § 281.346(4)(c) (emphasis added).

Based on the way the phrase is used in the straddling community exception, a diversion is allowed only if the water diverted outside of the basin will be used solely for public water supply purposes in the straddling community. The plain language hinges on the use of the water outside of the basin. The operative clause begins "all the Water so transferred shall be used solely for," or, in the case of the Wisconsin's implementing legislation, "the water diverted will be used solely for." Compact § 4.9.1; Wis. Stat. § 281.346(4)(c). In both instances, the analysis focuses on *the use of the water*, not the type of system transferring the water.

The language used to describe the water at issue—water diverted or water so transferred—establishes that the water *outside of the basin* is the subject of the public water supply purposes requirement. In the Compact, the clause begins with "all the Water so transferred," which refers back to the "Proposal to transfer Water to an area within a Straddling Community but *outside the Basin*." Compact § 4.9.1. Under Wisconsin law, the clause begins with "the water diverted," and Wisconsin law defines "divert" as "to transfer water from the Great Lakes basin into a watershed *outside the Great Lakes basin*." Wis. Stat. § 281.346(1)(hm). Thus, the plain meaning of this clause is to require straddling community diversion proposals to establish that all of the water diverted outside of the basin will be used solely for public water supply purposes.

The inclusion of "in the straddling community" at the end of the clause does not change the analysis. It simply adds another requirement. Namely, that the water used outside of the

basin must be used within the straddling community and cannot be used in any other out-of-basin communities. Respondents rely on this language—in the straddling community—in isolation to defend their conclusion that the Racine diversion is for public water supply purposes based on both in-basin and out-of-basin customers. DNR Br. at 23-25; Racine Br. at 10-11; Wisconsin Manufacturers and Commerce (WMC) Br. at 12-13. But the context in which that phrase is used demonstrates Respondents' error. The phrase "in the straddling community" does specify where the water diverted outside of the basin must be used. Nevertheless, it is illogical to read this language to expand the analysis to both in-basin and out-of-basin customers in the straddling community where the preceding language already limits the analysis to the water diverted outside of the basin. Such an expansive analysis implies that some of the water diverted *outside* the basin could be used *inside* the basin, but that would be absurd since any water used inside the basin would not fit the definition of diverted water.

C. The requirement that diverted water be used for public water supply purposes cannot be satisfied solely by diverting water through a public water supply system.

The way in which Wisconsin implemented the public water supply purposes requirement into Wisconsin law evinces the drafters' intent that transferring water through a public water supply system is a necessary, but not sufficient condition to qualify for a diversion. Statutory language should be construed so as to give reasonable effect to all the terms and avoid surplusage. *Corley*, 556 U.S. at 314; *Kalal*, 271 Wis. 2d 633, ¶ 46. If the public water supply purposes requirement could be satisfied simply by transferring the diverted water through a public water supply system, Wisconsin law would not retain both as separate and distinct requirements.

The Compact and Wisconsin's implementing legislation contain substantially similar language authorizing an exception to the diversion ban for straddling communities that use the diverted water solely for public water supply purposes. Compact § 4.9.1; Wis. Stat. § 281.346(4)(c). Both contain nearly identical definitions, though the Compact defines "public

water supply purposes," and Wisconsin law defines "public water supply." *Compare* Compact § 1.2 *with* Wis. Stat. § 281.346(1)(pm). Wisconsin law additionally provides that only a "public water supply system" may apply for a straddling community diversion.[10] Wis. Stat. § 281.346(4)(b)2. The additional requirement in Wisconsin law limiting applicants to "public water supply systems" informs the proper interpretation of "public water supply purposes" as it is used in both the Compact and Wisconsin law. Namely, because the law uses one phrase—public water supply system—to limit potential applicants—and another phrase—public water supply purposes—to limit the authorized use of diverted water, we must recognize a distinct meaning for each term. *Corley*, 556 U.S. at 314; *Kalal*, 271 Wis. 2d 633, ¶ 46.

Under DNR's interpretation, if an applicant is a "public water supply system," then it will always meet the "public water supply purposes" requirement. DNR asserts that the Racine diversion satisfies the public water supply purposes requirement because:

> 1) the water will be distributed to the public through the Racine Water Utility's physically connected system of treatment, storage and distribution facilities; and 2) the Racine Water Utility's system will continue to serve a group of largely residential customers, along with industrial, commercial and other institutional customers, within the straddling community of Mount Pleasant.

DNR Br. at 23-24. But DNR fails to acknowledge that both of these requirements must be satisfied in order for an applicant to qualify as a "public water supply system." *See* Wis. Stat. § 281.346(1)(pm), (4)(b)2. Neither DNR nor Racine could explain how their interpretation gives each of these phrases a distinct meaning. DNR Br. at 19; Racine Br. at 9-10, 14. WMC concedes that DNR's interpretation renders the public water supply purposes requirement superfluous. WMC Br. at 11. None of the Respondents could identify a single additional criterion added by the public water supply purposes requirement that is not satisfied by the requirement that the applicant be a public water supply system.[11] The fatal flaw in Respondents' legal argument is the

[10] Petitioners do not dispute that the applicant, Racine Water Works, qualifies as a public water supply system.

[11] WMC asserts that a "water supply system that meets the requirements to apply must also meet additional criteria to be granted approval," but does not specify the referenced criteria. WMC Br. at 11.

conflict with the canon of statutory construction to give each distinct term a distinct legal meaning and to avoid interpretations that render language superfluous. *Corley*, 556 U.S. at 314; *Kalal*, 271 Wis. 2d 633, ¶ 46.

D. The definition of public water supply purposes confirms that a straddling community must demonstrate that water diverted outside of the Great Lakes basin will serve "largely residential customers."

Based on the context in which it is used, the public water supply purposes requirement must be satisfied based on the use of the water diverted outside of the Great Lakes basin. In this case, that means examining how the water will be used in the out-of-basin portion of Mount Pleasant. The definition of public water supply purposes requires that the diverted water be distributed to "a group of largely residential customers that may also serve industrial, commercial, and other institutional operators." Compact § 1.2; Wis. Stat. § 281.346(1)(pm). Respondents' assertion—that this requirement is satisfied if the water is diverted through a system and that system serves largely residential customers in the straddling community as a whole—defies logic and the context in which this requirement is used.

The definitions of public water supply purposes are substantively the same in the Compact and Wisconsin law. The Compact defines "public water supply purposes":

> [W]ater 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. Water Withdrawn directly from the Basin and not through such a system shall not be considered to be used for Public Water Supply Purposes.

Compact § 1.2. Wisconsin law defines "public water supply":

> [W]ater distributed to the public through a physically connected system of treatment, storage, and distribution facilities that serve a group of largely residential customers and that may also serve industrial, commercial, and other institutional customers.

Wis. Stat. § 281.346(1)(pm).

The relevant portion of the exception at issue asks whether the water diverted will be "used solely for public water supply purposes in the straddling community." Wis. Stat. § 281.346(4)(c); Compact § 4.9.1. As explained above, this context illustrates that a diversion is for

public water supply purposes if all the water diverted outside of the basin is "used solely for public water supply purposes." *Id.* Thus, the Compact and Wisconsin law provide that a straddling community may divert Great Lakes water only if the water diverted outside of the basin serves "a group of largely residential customers," though it "may also serve industrial, commercial, and other institutional customers." Wis. Stat. § 281.346(1)(pm), (4)(c); Compact §§ 1.2, 4.9.1. Without "a group of largely residential customers" in the diversion area, water diverted to industrial and commercial customers is not "distributed to the public" as the term public is used in the public water supply purposes requirement.

Given the context in which it is used, the proper analysis is whether the *water diverted outside of the basin* is used to serve a group of largely residential customers. Respondents are correct that diverted water "*may also serve* industrial [and] commercial" customers, but only if the diverted water "serves a group of largely residential customers." Wis. Stat. § 281.346(1)(pm); Compact § 1.2 (emphasis added). The plain language does not lend itself to Respondents' interpretation that water may be diverted outside of the basin to serve *only* industrial and commercial customers as long as the system diverting the water serves largely residential customers (when considering all customers in- and out-of-basin).

The water use sectors for reporting purposes recognize the difference between "public," which may include some industrial users, and "industrial," which is the category for systems that serve only industrial users. *See* Ex. 212 at 3-4 (describing the water use sectors for reporting purposes). Racine attempts to attribute a different meaning to the fact that public water systems report water use overall and do not distinguish between residential or industrial customers. Racine Br. at 24-27. Specifically, the water use category for reporting purposes provides that a public water system should report industrial uses along with other uses in the "public water supply" category as long as it is the public water system supplying the water and not the industrial user itself. Racine Br. at 24. From a purely practical perspective, it is logical to divide water use reporting based on the *system* withdrawing the water because it is that *system* that is

monitoring and reporting water use. But as the phrase public water supply purposes is used in the straddling community exception, the focus is on how the water diverted outside of the basin will be used.

As explained in Petitioners' opening brief, the entire out-of-basin area served by the Racine diversion is either owned by Foxconn or otherwise specially zoned for industrial and commercial development. Ex. 5 at 17; *see also* Pet'rs Br. at 9-14. Any and all residential customers have been or are being displaced from the diversion area slated for the Foxconn complex and other industrial and commercial customers. *See* Ex. 33 at 11, 26; Ex. 34 at 10. Respondents do not dispute the absence of residential customers in the proposed diversion area. Instead, without precedent or textual support, they rely on the Racine Water Utility's in-basin customers in the entire straddling community, not just the out-of-basin diversion area. DNR Br. at 24-25; Racine Br. at 10-11; WMC Br. at 10-11. Respondents' emphasis on the public water supply system as a whole is entirely unsupported by the language and context of the public water supply purposes requirement and by the overall purpose of the Compact. *See supra* at 8-13.

Thus, DNR's approval of the Racine diversion establishes a misguided and dangerous precedent with far-reaching implications for the Great Lakes region. This precedent opens the door to diversions throughout the Great Lakes basin—to any customer and for any purpose—as long as the in-basin community supplying and receiving back the returned water does so through a public water system. Respondents' blatant misinterpretation of the public water supply purposes requirement will lead to comparable attempts by other municipalities to advance diversions that serve purposes entirely unrelated to "largely residential customers." It follows that in-basin communities and their public water supply systems could serve as ready conduits to any number of water-intensive industries, mining operations, or power plants located outside the basin. This result controverts a central tenet of the Great Lakes Compact: Exceptions to the ban on diversions are to be strictly limited. The Compact's restriction on

diversions is undoubtedly wise and, fortunately, clearly stated in plain language. As we continue to deplete water resources outside of the basin, more and more water-intensive industries outside of the basin will look for any means available to gain access to our Great Lakes. Given the consumptive losses resulting from such diversions,[12] their cumulative impact could pose a significant drain on the Great Lakes system—a death by a thousand straws—especially in light of the additional stresses that climate change will impose. Ex. 106 at 16. For these reasons, it is imperative that the Racine diversion and its underlying misinterpretation of the public water supply purposes requirement be reversed.

II. Other interpretative tools support our plain language interpretation and further establish that DNR's Approval is inconsistent with the Compact.

As explained above, the plain language of the straddling community exception and the public water supply purposes requirement is clear and unambiguous, so the analysis may stop there without looking to extrinsic sources. *See, e.g.*, *Robinson, 519 U.S. at 340; Kalal, 271 Wis. 2d 633, ¶ 45; M & G Polymers*, 135 S. Ct. at 938 (Ginsburg, J., concurring) (citing 11 R. LORD, WILLISTON ON CONTRACTS § 30:6, p. 98-104 (4th ed. 2012)). However, when interpreting legal documents, courts may consider extrinsic evidence even when the language is unambiguous "to confirm that the parties intended for the [language] to have its plain and ordinary meaning." *Shell Oil Co.*, 751 F.3d at 1296 (quoting *TEG-Paradigm Envt'l Inc. v. United States*, 465 F.3d 1329, 1338 (Fed Cir. 2006)); *Kalal*, 271 Wis. 2d 633, ¶ 51.

A. Legislative history confirms Petitioners' plain language interpretation.

The legislative history of the Compact and Wisconsin's implementing legislation favors Petitioners' plain language interpretation of the straddling community exception and undermines Respondents' interpretation. The drafters expressed an intent to balance the

[12] The Compact and Wisconsin's implementing legislation require that any water withdrawn from the Great Lakes be returned to the source watershed "less an allowance for consumptive use," which includes any "water lost to evaporation, incorporation into products, or other processes." Wis. Stat. § 281.346(1)(e), (4)(c)1; Compact §§ 1.2, 4.9.1.a.

protection of the Great Lakes with economic development through statements memorialized in writing leading up to the point at which these laws went into effect. Nothing in the legislative history overcomes Respondents' failure to reconcile their interpretation with the plain meaning of the straddling community exception.

Respondents emphasize one of the Compact's purposes—to develop and maintain the Great Lakes basin economy—in their analysis. DNR Br. at 27-29; Racine Br. at 22-23; WMC Br. at 17-20. Petitioners agree with Respondents that one of the Compact's purposes is to promote economic development in the Great Lakes basin. Where the parties disagree is whether, in addition to promoting economic development in the Great Lakes basin, the Compact was intended to siphon Great Lakes water to surrounding areas outside the basin for economic development. It was not. The legislative history along with the structure and language of the Compact make clear that the protections for Great Lakes water, and the benefits achieved thereby, are meant for the basin. For example, when Governor Doyle testified during a Senate committee hearing, he noted that a purpose of the Compact was to promote "economic growth and renewal around the Great Lakes," implicitly referring to the Great Lakes basin, not the broader region. Ex. 107 at 20. Nothing in his testimony suggests that the Compact was meant to allow Great Lakes water to fuel economic development *outside of the basin*. The Compact's goal was to strike a balance between economic development within the basin and the preservation of the Great Lakes by banning diversions with very limited exceptions.

The Compact achieved that balance through the prohibition on any new or increased diversion unless it met "rigorous standards" and served community water supply needs. Ex. 29 at 9. When Congress took up the Compact, Representative Betty Sutton from Ohio explained, "[n]ew or increased diversions of water from the basin will be banned and community rights will be respected as long as appropriately rigorous standards are met." *Id.* The Compact's framework was intended to protect this resource for future generations, allow in-basin communities to develop and thrive, and hold the line against the demand for water from out-of-basin users.

Respondents also rely on some statements by those involved in the Compact's development that do not constitute legislative history. Racine Br. at 15; DNR Br. at 27-29. The U.S. Supreme Court has clarified what constitutes legislative history with regard to an interstate compact and what does not:

> It has often been said that, when the meaning of a treaty is not clear, recourse may be had to the negotiations, preparatory works, and diplomatic correspondence of the contracting parties to establish its meaning. But *that rule has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body*.

Arizona v. California, 292 U.S. 341, 359-60 (1934) (emphasis added) (citations omitted). For example, Professor Noah Hall's written testimony submitted to the Senate Judiciary Committee, ex. 107 at 49-74, is not legislative history because there is no indication that the committee adopted his views. *See Dist. of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (holding that legislative history "refers to the pre-enactment statements of those who drafted or voted for a law"). Similarly, later interviews of those involved in the Compact negotiations, published in PETER ANNIN, THE GREAT LAKES WATER WARS 307 (rev. ed. 2018), are not legislative history unless such statements were contemporaneously recorded in writing during Compact negotiations. Even if statements in this book were considered persuasive, Petitioners could offer equally compelling passages that support our position. For example, on the same page as the quote offered by Respondents, is a statement by a "senior Canadian official who spent years in the [Compact] discussions" regarding the straddling community exception:

> [It] was much more aimed at residential. . . . It wasn't meant that you were going to have a Tesla factory farm . . . put one toe into the Basin and that will allow them to get a pipe that would then provide them with the water that they needed. . . . For some of the environmentalists, this would be exactly the horror story.

ANNIN at 307.

Respondents further attempt to support their interpretation of the public water supply purposes requirement with a Drafter's Note to Wisconsin's implementing legislation, but that Note better supports Petitioners' interpretation than DNR's. *See* DNR Br. at 18; Racine Br. at 9.

DNR misreads the Drafters' Note when it asserts "that the 'types of customers served' (a purpose of the water) is less important than the fact that the water comes from a public water system." DNR Br. at 18. That is not what the Drafter's Note says. Rather, it provides, Wis. Stat. § 281.346(1)(pm) "omits 'purposes' from the term being defined because the compact's definition defines a substance (a type of water) rather than a purpose." Ex. 101 at 50. This makes clear that a straddling community must establish that the "substance (a type of water)" meets the public water supply purposes requirement. What this note does not say is that the definition focuses solely on a type of system or gives more import to the type of system than the use of that water.

Furthermore, the exclusion of the second sentence in the Compact definition from Wis. Stat. § 281.346(1)(pm) supports Petitioners' interpretation that transmission through a public water supply system is a necessary but not sufficient condition to satisfy the public water supply purposes requirement. The comment to the Drafter's Note explained that the second sentence was omitted because "the exclusion [of diversions that do not pass through a public water supply system] is already implied by the requirement in the first sentence that the water must be distributed through the specified physically connected system." Ex. 101 at 50. This is a correct statement of one element of the public water supply purposes requirement: a diversion must be distributed through a public water supply system. The comment does not undercut Petitioners' argument that the other element of the public water supply purposes definition requires that the water diverted outside of the basin "serve a group of largely residential customers . . . that may also serve industrial, commercial, and other institutional customers." Wis. Stat. § 281.346(1)(pm).

Finally, Racine asserts that the exemption for the Illinois diversion of Great Lakes water illustrates that Wisconsin "would certainly not have agreed to a Compact provision prohibiting the use of Great Lakes resources for economic development projects in those limited number of straddling communities eligible for a diversion exception." Racine Br. at 23. This argument is entirely unsupported and untethered from the history of the Compact and the Illinois diversion.

Before Compact negotiations even began, Illinois' right to continue its diversion without returning the water to the Great Lakes was already established by U.S. Supreme Court decisions in the *Illinois v. Wisconsin* cases.[13] The states and provinces approached the Compact negotiations with a mutual interest in protecting Great Lakes waters against new threats; not settling scores or equally apportioning water among jurisdictions.[14] While Illinois' diversion was the largest, there were numerous other examples of diversions existing at the time the Compact was signed that would have violated its ban on diversions had those diversions been proposed after the Compact went into effect.[15] None of these existing diversions was ever on the table during negotiations. The purpose of the Compact was to set a new standard going forward. *See* Ex. 28 at 21. This explanation is consistent with the Compact's structure, which separates the narrow exceptions for future diversions from the Illinois diversion, making clear that it was not meant to set a precedent for diversions going forward. Compact § 4.14.

B. DNR's decisions and analysis regarding diversions of Great Lakes water are inconsistent with the Racine diversion approval.

A party's course of performance under the Compact is "highly significant" evidence of its understanding of the Compact's terms. *Tarrant*, 569 U.S. at 636; *Alabama v. North Carolina*, 560 U.S. at 346. DNR's course of performance under the Compact includes prior decisions implementing the Compact, such as the New Berlin and Waukesha diversions. These prior

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[13] *Wisconsin v. Illinois*, 449 U.S. 48 (1980) (clarifying the water use limitations imposed in the 1967 consent decree); *Wisconsin v. Illinois*, 388 U.S. 426 (1967) (setting the quantity of water that Illinois could continue to divert); *see also* Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 419-22 (2006) (describing the history of the interstate conflict over the Illinois diversion).

[14] *See* Christina L. Wabiszewski, *Diversions from the Great Lakes: Out of the Watershed and in Contravention of the Compact,* 100 MARQ. L. REV. 627, 631-38 (2016) (explaining the history of efforts to protect the Great Lakes and the parties' goals in Compact negotiations).

[15] For example, in 1990, Pleasant Prairie, WI began to divert a much smaller quantity of water from Lake Michigan and does not return the water to the Great Lakes basin. PERVAZE A. SHEIKH & CYNTHIA BROUGHER, CONG. RESEARCH SERV., RL32956, GREAT LAKES WATER WITHDRAWALS: LEGAL AND POLICY ISSUES 4 (2008), https://digital.library.unt.edu/ark:/67531/metadc94008/m1/1/high_res_d/RL32956_2008Sep04.pdf.

decisions are inconsistent with DNR's approval of the Racine diversion and demonstrate that the agency's interpretation of the Compact has been inconsistent.

In both the New Berlin and Waukesha diversions, the water diverted outside of the Great Lakes basin served largely residential customers in addition to industrial and commercial customers, leading DNR to conclude that the diversions were "solely for the public water supply purposes" of those communities. *See generally* Pet'rs Exs. 37, 38 (DNR final decisions for Waukesha and New Berlin). There is a stark contrast between the purpose and need for the Racine diversion compared to the New Berlin and Waukesha diversions. Both of those diversions provided radium-free water to a community in need of clean drinking water. *See, e.g,* ANNIN at 260 (noting that, prior to the diversion, the out-of-basin portion of New Berlin "was getting by with water from the depleted and naturally contaminated deep aquifer—water that exceed federal limits for radium"). On the other hand, the Racine diversion is solely for commercial and industrial facilities yet to be built. Ex. 5 at 17 (specifying that 100% of the diverted water will be used for Foxconn and other industrial and commercial users). Prior approvals therefore met unavoidable and existing water needs whereas the Racine diversion is for prospective and speculative industrial and commercial development.

DNR attempts to minimize differences between the New Berlin and Waukesha diversions and the Racine diversion, but cannot explain the inconsistency in its analysis of the public water supply purposes requirement in each diversion. DNR does not argue that it considered New Berlin's *in-basin* customers as well as its out-of-basin customers when analyzing whether New Berlin's proposed diversion complied with the public water supply purposes requirement. *See* DNR Br. at 31-34. DNR even seems to concede that its analysis for the Racine diversion application differs from earlier approvals because DNR examined "distribution to the Village of Mount Pleasant as a whole" when approving the Racine diversion. *Id.* at 32. DNR asserts that this inconsistency is of no consequence because its consideration of both in-basin and out-of-basin customers nevertheless complies with the Compact. *Id.* at 32-33.

As explained above, DNR's analysis does not comply with the Compact. Nor should DNR's novel and unsupported interpretation of the public water supply purposes requirement for the Racine diversion be afforded deference, given its plain inconsistency with DNR's previous interpretation of the requirement when approving the New Berlin diversion in 2009. *See Tetra Tech*, 382 Wis. 2d 496, ¶¶ 76, 84 (providing Wisconsin courts will not give deference to agency interpretations of law, and an agency's interpretation is less persuasive when it has been inconsistent); *Tarrant*, 569 U.S. at 636 (concluding that a party's inconsistent interpretations of a compact undermined the interpretation offered by that party).

C. The Racine Diversion sets a dangerous precedent that will lead to more diversions solely for industrial and commercial customers.

Respondents attempt to minimize the legal significance of the precedent that the Racine diversion sets through several false assertions. Racine asserts that only a limited number of Wisconsin straddling communities might even apply for a diversion in the future. Racine Br. at 18-22. First, Racine neglects to consider the swath of straddling communities *throughout the basin* that may rely on the precedent the Racine diversion sets.[16] During the Racine diversion approval process, other states in the basin recognized the potential impact of this precedent throughout the basin and asked for a basin-wide analysis of straddling communities. Ex. 22 (Pennsylvania Department of Environmental Protection letter to DNR requesting that all members of the Compact consider an evaluation of all straddling communities and counties). When interpreting interstate compacts, Wisconsin courts recognize the importance of maintaining consistency between states in compact interpretation because of its application in several jurisdictions. *See Pharm*, 298 Wis. 2d 702, ¶ 15 (applying the federal rules of statutory construction to interpret an interstate compact "to accord more consistency with the . . . interpretations of other federal and state courts"). Thus, the law regarding compact

[16] There are 606 municipalities in the Great Lakes basin that qualify as straddling communities. *See* Compact Implementation Coalition, Great Lakes Basin Straddling Communities Map, https://static1.squarespace.com/static/55845d9de4b0b4466f1267b9/t/5c79a483971a1813bdd7f4ff/1551475851390/Region_2.pdf.

interpretation recognizes that decisions in one state can set a precedent for other states that are parties to the compact.

Second, Racine asserts without factual or legal support that the cost of returning any water diverted from the Great Lakes will limit the likelihood that other straddling communities will rely on the Racine diversion as precedent. *See* Racine Br. at 18-22. There is no factual basis for Racine's assertion that it is only economically feasible for the straddling communities closest to the Great Lakes to comply with the return flow requirement. The Compact requires the return of Great Lakes water only to the "source watershed," not directly into the lake from which it was withdrawn. Compact § 4.9.1.a; Wis. Stat. § 281.346(4)(c) ("All water withdrawn from the basin shall be returned, either naturally or after use, to the source watershed less an allowance for consumptive use."). Distance from the Great Lakes is a practical consideration for a straddling community, but as water woes increase around the Great Lakes region, more straddling communities may find the cost worth the benefit.[17] Whether unforeseen or due to factors such as climate change, water shortages and water contamination may cause straddling communities to seek Great Lakes water despite the return flow requirements.[18]

None of the parties to this matter can predict with absolute accuracy the scope of precedential impacts of the Racine diversion approval. For this reason, it is reasonable to resolve any uncertainty in favor of protection of the Great Lakes. *See* Compact § 1.3.2.a; Wis. Stat. § 281.343(1m)(b)1 (identifying the precautionary principle as one of the Compact's purposes). It is also reasonable to anticipate that other states that want Great Lakes water for out-of-basin industrial development may use the Racine diversion to justify such the use of Great Lakes water for those developments.[19]

CONCLUSION

[17] *See* Noah D. Hall & Bret B. Stuntz, *Climate Change and Great Lakes Water Resources: Avoiding Future Conflicts with Conservation*, 31 HAM. L. REV. 639, 644-61 (discussing the impact of climate change on the Great Lakes region and the likely increase in demand for Great Lakes water).
[18] SHEIKH & BROUGHER, GREAT LAKES WATER WITHDRAWALS: LEGAL AND POLICY ISSUES at 6.
[19] *See* ANNIN at 271 ("History had shown that prior water diversions have always had a huge influence on how pending Great lakes diversion applications were judged.").

The Great Lakes Compact is the celebrated, historic culmination of decades-long efforts to create a legally-enforceable framework to protect the magnificent Great Lakes for present and future generations against increasing demands for water. Central to its structure and purpose is the explicit prohibition of all new or increased diversions of Great Lakes water. There are three narrow exceptions—subject to stringent requirements—for intra-basin transfers and for the public water supply needs of communities along the basin line, communities within counties along the basin line, and for intra-basin transfers. Respondents' lenient and unsupported interpretation of the public water supply purposes requirement and the straddling community exception plainly controverts the stated purpose, structure, and language of the Compact and Wisconsin's implementing legislation.

It is this failure on the part of DNR to satisfy a core provision of the Great Lakes Compact that compelled Petitioners to challenge DNR's approval of the Racine Diversion. The Compact is simply too important to the protection of the Great Lakes and the future of our region to place at risk for the perceived benefit of any one state or any one sought-after industrial project. And yet, DNR's strained interpretation of the public water supply purposes requirement risks the Compact in exactly this manner by disregarding the agreement's express language and intent. DNR's approval threatens the viability of the Compact and exposes the Great Lakes to an incalculable number of straddling community diversion requests designed to meet the needs of new industrial facilities built outside the basin, rather than limiting the resource to existing water needs of largely residential customers. It is imperative that the Great Lakes Compact's ban on diversions, with strictly limited exceptions, be upheld, not turned on its head. Because DNR's interpretation of public water supply purposes opens the door to a quantity and type of diversions that was neither anticipated nor considered by the drafters of the Compact and Wisconsin's implementing legislation, Petitioners respectfully request that the

Wisconsin Division of Hearings and Appeals grant Petitioners Motion for Summary Judgment and reverse DNR's approval of the Racine diversion.

Respectfully submitted this 4th day of March, 2019.

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