S. HRG. 110–518

S.J. RES. 45, A RESOLUTION CONSENTING TO AND APPROVING THE GREAT LAKES-ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Durbin, Hon. Richard J., a U.S. Senator from the State of Illinois, prepared statement	39
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin	1
prepared statement	42
Kohl, Hon. Herb, a U.S. Senator from the State of Wisconsin	3
Schumer, Hon. Charles E., a U.S. Senator from the State of New York, prepared statement	100
Specter, Hon. Arlen Specter, a U.S. Senator from the State of Pennsylvania	2

WITNESSES

Davis, Cameron, President, Alliance for the Great Lakes, Chicago, Illinois	12
Doyle, Hon. Jim, Governor, State of Wisconsin, and Chair, Council of Great Lakes Governors, Madison, Wisconsin	6
Heartwell, George, Mayor, City of Grand Rapids, and Vice Chairman, Great Lakes-St. Lawrence, Cities Initiative Grand Rapids, Michigan	8
Nelson, Kay L., Director of Environmental Affairs, Northwest Indiana Forum, Portage, Indiana	10
Voinovich, Hon. George, a U.S. Senator from the State of Ohio	4

SUBMISSIONS FOR THE RECORD

Birkholz, Hon. Patricia, Michigan State Senator, Lansing, Michigan, statement	20
Cox, Mike, Attorney General, State of Michigan, Lansing, Michigan, letter	23
Davis, Cameron, President, Alliance for the Great Lakes, Chicago, Illinois, statement	25
Dempsey, Dave, Rosemount, Minnesota, statement	30
Doyle, Hon. Jim, Governor, State of Wisconsin, and Chair, Council of Great Lakes Governors, Madison, Wisconsin, statement	34
Environment America, Christy Leavitt, Washington, D.C., joint letter	40
Hall, Noah D., Wayne State University Law School, Executive Director, Great Lakes Environmental Law Center, Ann Arbor, Michigan, statement	45
Heartwell, Hon. George, Mayor, City of Grand Rapids, and Vice Chairman, Great Lakes-St Lawrence and Cities Initiative, Grand Rapids, Michigan, statement	72
International Bottled Water Association (IBWA), Alexandria, Virginia, statement	76
Levin, Hon. Carl, a U.S. Senator from the State of Michigan, statement	80
Nelson, Kay L., Director, Environmental Affairs, Northwest Indiana Forum, Portage, Indiana, statement	84
Olson, James M., and Michael H. Dettmer, Law Offices of Olson, Bzdok & Howard, P.C., Traverse City, Michigan, statement and attachment	86
Speck, Sam, Director, Ohio Department of Natural Resources, Ann Arbor, Michigan, memorandum and attachment	101
Stabenow, Hon. Debbie, a U.S. Senator from the State of Michigan, statement	108

VerDate Aug 31 2005 12:51 Oct 02, 2008 Jkt 044332 PO 00000 Frm 00003 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\44332.TXT SJUD1 PsN: CMORC

S.J. RES. 45, A RESOLUTION CONSENTING TO AND APPROVING THE GREAT LAKES-ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT

WEDNESDAY JULY, 30, 2008

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 1 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Russell D. Feingold, presiding.

OPENING STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Welcome to today's hearing on S.J. Res. 45, a resolution approving the Great Lakes-St. Lawrence River Basin Water Resources Compact.

And I would like to thank Chairman Leahy for allowing me to preside over this full committee hearing. I am pleased to be joined by Ranking Member Specter, a fellow Great Lakes Senator, and, of course, Senator Kohl, Senior Senator from the State of Wisconsin.

In Wisconsin, our constituents care a lot about water, both its quality and its quantity. Over the last year, Lake Superior's water levels reached record lows and Lake Michigan's levels have been on the verge of doing so, as well.

This has reminded all of us that despite the vastness of the Great Lakes, they are not an unlimited, easily replenished resource. Low water levels have a significant impact on commercial shipping, recreational boaters, coastal wetlands, fisheries, property owners, municipalities, and many other interests that rely on the Great Lakes.

By passing this compact, Congress can join the states and the Great Lakes' numerous stakeholders in defending against one of the biggest threats to low lake levels, and that is increased water withdrawals.

Pressure on the Great Lakes will only intensify with population growth, climatic changes, and contaminated or exhausted water supplies. I strongly support putting in place management practices now to safeguard the Great Lakes against future stresses.

I especially commend our Governor, Governor Jim Doyle, who will testify before us today, and his fellow Governors and their state legislatures for their hard work to get us at this point already.

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The Great Lakes Compact is the product of a long process of evolution. Over a century ago, the first treaty between Canada and the United States was put in place to jointly manage the shared resource.

Then after various proposals over the decades to siphon off Great Lakes waters to other parts of the country and the world, the Great Lakes States developed a regional plan and Congress approved it in 1968.

Nearly 20 years later, the Great Lakes States and the provinces of Ontario and Quebec completed the Great Lakes Charter, which did not allow the States or Provinces to make large diversions without the approval of all the other signatories.

However, this charter is not legally binding. In the Water Resources Development Act of 1986, Congress lent support to the charter by prohibiting diversions outside the Great Lakes Basin, unless approved by all Governors of the Great Lakes States.

But Canada was not legally bound nor was the possibility of trading Great Lakes water internationally addressed. In 1998, Ontario's issuance of a permit to ship water from Lake Superior to Asia served as a wake-up call that more was needed to protect the Great Lakes.

Several proposals emerged in Congress and, ultimately, in 2000, Congress directed the Great Lakes States to jointly develop, with the Canadian provinces, a common conservation standard for making decisions about the withdrawal and use of water from the Great Lakes Basin.

Great Lakes States have delivered on that request by ratifying the Great Lakes Compact, and now it is Congress's turn. Senators Levin and Voinovich have introduced a joint resolution to approve the Great Lakes Compact.

It enjoys bipartisan support, I am happy to say, from all 16 Great Lakes Senators, those representing Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio, Pennsylvania, and New York.

A similar measure was also introduced in the House and the President of the United States has also, yesterday, announced his support of the compact.

So I look forward to hearing today's testimony on the compact and to working with my colleagues to pass it, I hope, in the very, very near future.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Now, I turn to the ranking member, Senator Specter.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman. I am delighted to join you today on this hearing for this important compact. The issue of diversion from the Great Lakes is one of enormous importance.

Pennsylvania, of course, has Lake Erie. Looking over the rest of the Republicans on the Judiciary Committee, I believe I am the only Senator with a State which borders on one of the Great Lakes. So I thought it especially important that someone locally be present here to speak on this issue.

Lake Erie, of course, is a great tourist attraction. One of the first things I did when elected to the U.S. Senate some time ago was to work on replenishment of the sand, which is virtually an annual rite. It is a great, great tourist resort.

But this compact to ban new or increased diversion of water is really important, to create the commission, to have binding standards, review process. All of those are very important.

But, of course, as a matter of Federal law, constitutional law, there has to be a congressional action. And I have sat on quite a few matters over the course of years on this committee. I can't think of any that is as clear a slam-dunk as this one is.

So while I am not able to stay because of conflicting engagements, I am sure that it will be very well received, and I have staff here who will be studying the record.

So thank you very much, Mr. Chairman.

Senator FEINGOLD. Thank you, Senator Specter. The hearing and your appearance here should help us move this legislation along very much.

Now, I turn to my senior colleague, Senator Kohl.

STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you, Mr. Chairman. The Great Lakes-St. Lawrence River Basin Water Resources Compact before us today enjoys broad bipartisan support, including all eight Great Lake States, Canadian Provinces, Ontario and Quebec, as well as 150 business and environmental groups.

That is a tribute to the hard work of many people, especially Governor Jim Doyle of Wisconsin, who is also the chair of the Council for Great Lakes Governors. Governor Doyle's leadership is one of the main reasons that we are here today.

I would like to thank, also, Cameron Davis Miller, George Heartwell, as well as Senators Levin and Voinovich, who head the Great Lakes Task Force, for their hard work.

I would also like to thank my colleague, Senator Feingold, for chairing this important hearing today.

The Great Lakes are one of America's national treasures and one of the National Wonders of the World. Holding 20 percent of the world's fresh water, the Great Lakes play a vital role in the daily lives of the people of Wisconsin, providing drinking water, jobs, energy, shipping, as well as recreation.

Something that important to our prosperity needs to be conserved so that future generations can benefit, and the compact before us, indeed, does that. It is a binding agreement among the Great Lakes States to implement a conservation standard for regulating water withdrawals from the Great Lakes Basin.

Specifically, the compact protects the Great Lakes by banning new or increased diversions outside of the Great Lakes Basin. The compact also requires each State to implement water conservation measures, which will promote efficient water use, as well as minimize waste.

Not too long ago, we faced a specter of foreign companies exporting water out of the lakes, thereby threatening our environment.

This compact is a response to those threats, making it clear that the lakes are not to be exploited.

As a cosponsor of this resolution, I look forward to working with my colleagues in the Senate to pass this important compact.

We are so happy to be here today, and I thank you, Mr. Chairman.

Senator FEINGOLD. Thank you, Senator Kohl.

And now I would like to turn to the first panel. Senator Voinovich, you want to come forward, please? Senator Levin, I suspect, will be here at some point. Senator Levin and Senator Voinovich are the lead authors of this critical legislation. I thank them for their leadership on it.

Let me turn to you, Senator Voinovich. Senator Voinovich is co-chair of the Senate Great Lakes Task Force. You have extensive knowledge of this issue. I appreciate your joining Senator Levin in introducing the Great Lakes-St. Lawrence River Basin Water Resources Compact.

And you may proceed with your testimony. Welcome.

STATEMENT OF HON. GEORGE VOINOVICH, A U.S. SENATOR FROM THE STATE OF OHIO

Senator VOINOVICH. Well, first of all, Mr. Chairman, Senator Kohl, I am really grateful to you for having this hearing, because it is something that has been long awaited. But I was worried that we might not be able to have a hearing before we adjourned, and I am grateful for your holding this hearing.

As Senator Kohl said, the Great Lakes are a tremendous natural resource. They need to be protected for our future generations. One-fifth of the world's surface fresh water—it is hard to believe—one-fifth of the world's fresh water are in the Great Lakes.

They cover more than 94,000 square miles; 637 State parks in the region accommodate more than 250 million visitors. The Great Lakes are significant to the States and Canadian Provinces that border them, as well as for millions of other people around the country who fish the lakes, visit the parks and the surrounding lakes, or use products that are affordably shipped to them via the Great Lakes.

I understand how important the Great Lakes are, because I have been fighting the second battle of Lake Erie since my days in the State legislature 40 years ago. And some of you may be old enough to remember that Lake Erie was the poster child of a dying lake and PBC was all over, we had a river in my city that burned. And we've come a long way since that time.

When I came to Congress, one of the first things I got involved with, as former Governor of Ohio and the past Chairman of the Council of Great Lakes Governors, was to work on including language in the 2000 Water Sources Development Act directing the States to reach an agreement on how to manage the Great Lakes water, and I am very, very proud of how everyone has come together and have agreed upon the compact.

It is going to provide an effective means to safeguard water for future generations, while stimulating economic development through sustainable use and responsible management of the precious resource.

For example, the compact will ban new diversions from the basin, with certain exceptions, and those exceptions would be regulated. The States and Provinces will use a consistent standard to review proposed uses of the Great Lakes water. This is an improvement over existing law, which does not have any standard for considering those proposals.

And, additionally, regional goals for water conservation and efficiency will be developed to improve use of this resource. Two years later, all proposals for new and increased withdrawals of Great Lakes water must incorporate these water conservation and efficiency measures. This will promote efficient water use and minimize waste.

Drafting this agreement has been difficult and time-consuming. The Governors and the premiers have been working together on this issue for actually 10 years.

I applaud the efforts of your Governor, Governor Jim Doyle, my Governor, Governor Strickland of Ohio, and the other Great Lakes Governors and our two Canadian Premiers for coming together and working conscientiously to get this done.

I want to stress to the members of this committee, though, that without this compact, the Great Lakes are left vulnerable to the interests that want to deplete the lakes, and Congress should approve the compact to protect our Nation's Great Lakes.

The Great Lakes face so many threats and it will be a great step forward if we can ensure that unlimited diversions are not a threat. People can breathe easier, less stress.

Protecting the Great Lakes is not a partisan issue. All of us here today came together across party lines to protect our Great Lakes.

The Great Lakes are a centerpiece of the American and Canadian landscape. They provide drinking water to tens of millions. They are an integral part of our regional economy. They are a unique natural resource for my State and the entire region, a resource that must be protected not just for us, but for our children and for our grandchildren.

We cannot afford to neglect them and I know we will continue fighting to restore, preserve and protect our Great Lakes.

Mr. Chairman, I encourage the committee to pass this as expeditiously as possible. Hopefully, we can get a UC on it before we get out of here in this Congress.

And, again, I want to sincerely thank you, thank you, thank you for having this hearing.

Senator FEINGOLD. Thank you, Senator Voinovich. I am very pleased to be a part of this effort, and thank you for your working with Senator Levin to take a lead on this. And when he arrives, we will hear from him. I had a good conversation with him already last week about some of the strategy on this. But thanks so much, Senator Voinovich.

If there are no questions for the witness, we will excuse you and ask the second panel to come forward.

Senator VOINOVICH. Thank you.

Senator FEINGOLD. Thank you, Senator.

Would the witnesses please stand to be sworn?

[Witnesses sworn.]

Senator FEINGOLD. You may be seated. I would like to begin the second panel, of course, by welcoming Governor Jim Doyle of Wisconsin. Governor Doyle is a graduate of the University of Wisconsin-Madison and earned his law degree from Harvard Law School.

Beginning in 1990, Governor Doyle served three terms as Wisconsin's attorney general, where he distinguished himself as a national leader in aggressively prosecuting polluters.

Governor Doyle was sworn in as Wisconsin's 44th Governor on January 6, 2003. He was reelected in 2006.

We have been friends for a long time, Governor, as were our fathers, I might add, and I want to thank you very much for traveling from Wisconsin to join us today and for sharing your great expertise as the chair of the Council of Great Lakes Governors.

You may proceed.

STATEMENT OF HON. JIM DOYLE, GOVERNOR, STATE OF WISCONSIN, AND CHAIR, COUNCIL OF GREAT LAKES GOVERNORS

Governor DOYLE. Well, Senator Feingold and Senator Kohl, my two dear friends, thank you so much for all of the leadership you have shown on Great Lakes issues and, in particular, we thank you for the hearing today and the efforts that you have made to expedite this process.

So we hope that, from a State perspective, that the Congress will give its consent quickly and that we can get to work actually then implementing the provisions of the compact.

So your efforts in this regard have been just incredibly helpful.

I want to brag a little about Wisconsin first, but I am here as the chair of the council of all of the Great Lakes States. But, obviously, our State is defined geographically by the Great Lakes. Its northern border, its eastern border—if you look at the pictures from space, you can always pick Wisconsin out and it's because it is defined by the Great Lakes.

After the State of Michigan, we have the greatest amount of Great Lakes shoreline and, in fact, if the Upper Peninsula hadn't been taken away from us back in territorial days, we would have the largest shoreline.

The Great Lakes define who we are geographically, but also define much of our culture, recreational activities, and have been crucial to our commerce from the earliest days as a territory and as a State.

I want to thank the ranking member, Senator Specter, for his leadership and support of this, and, of course, Senators Levin and Voinovich, who are the primary authors and who have been instrumental in getting us to this point.

So we are here today with a great opportunity for us in the Great Lakes Region and, I believe, for the whole entire United States, and because it is one of the great world's ecosystems, for the world, as well.

And I testify today as chair of the Council of Great Lakes Governors. The Council of Great Lakes Governors is a partnership of the Governors of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin, and the Premiers of Ontario

and Quebec have also been associate members and deeply involved in this process.

The Council of Great Lakes Governors has been coordinating our shared efforts to restore and protect the Great Lakes.

There have been so many who have been instrumental. You will hear from representatives of various groups after me. But I want to thank the mayors, the environmental groups, business organizations, our trial leaders, and so many across the Great Lakes Region who have put in years of time and work and analysis and hearings to come to the point that we are at today.

We have heard a lot about the volume of the Great Lakes. The way I like to picture it, perhaps most dramatically, is if you took the Great Lakes water and spread it over the 48 contiguous States, the water would be nine-and-a-half feet deep.

That is how much fresh water is in these lakes, and our national economy depends on the Great Lakes for industrial uses, hydropower, maritime commerce, agricultural irrigation, and many other uses.

Keeping the lakes at healthy levels is also important for hydropower, maritime commerce, and many other uses.

The compact will ensure that the lakes are used sustainably in order to continue to provide benefits to all of us.

In 2005, the Great Lakes Governors, in collaboration with regional partners, completed the negotiations of the eight-State compact and on July 9, 2008, the Great Lakes States completed State ratification.

To become law, Congress must now provide its consent. And by implementing this compact, we are taking the necessary steps to protect the Great Lakes and sustainably manage this shared resource.

There is a long tradition in this country of States using compacts to work together to manage shared water resources. The Great Lakes Governors are following this long tradition.

Historically, States and the Federal Government have supported interstate compacts to address water supply, water quality and flood control issues within the hydrological context of watersheds and basins. There are currently at least 41 interstate water compacts that have been entered into, and all but five States are in such compacts.

In 2000, the U.S. Congress encouraged the Great Lakes States, in consultation with Ontario and Quebec, to provide and implement this mechanism.

And we are coming back to Congress now, 8 years later, with having satisfied, I believe, that direction that was given, and we have done it truly, I think, in the best spirit of federalism, Congress recognizing a large national action, calling the States to action.

The States have worked together. Local governments have been involved. And now we come back to our national Government for its consent of this very important agreement.

As a result of this congressional action, as well as past commitments made by Great Lakes Governors and Premiers, the Great Lakes States, Ontario and Quebec have worked aggressively to update and improve the region's water management regime.

A lot has been said about the need to protect the volume of Great Lakes water, but this compact truly gives us the first interstate method to manage this water together.

And we are pledged as a State in Wisconsin, and its implementing legislation actually enacted the most significant water management—Great Lakes Water management provisions ever enacted in the State of Wisconsin.

So, again, we thank you very much for what you have done on this very important issue, I know how much the Great Lakes have meant to both of you, and your commitment to their preservation over the years.

And I really look forward to the compact being approved by Congress and the States then really moving together, jointly together to make sure that we protect both the quantity and the quality of Great Lakes water.

Thank you very much, Senator.

[The prepared statement of Mr. Doyle appears as a submission for the record.]

Senator FEINGOLD. Thank you, Governor Doyle, very much. And after we complete this legislation, we will get together on legislation to get the UP back.

Governor DOYLE. Good.

Senator FEINGOLD. I feel safe saying that while Senator Levin isn't here. But I better be nice now, because we are turning to a Michigander now.

I will turn to Mayor George Heartwell of Grand Rapids, Michigan. Mayor Heartwell was elected Mayor of Grand Rapids in 2004.

Prior to being elected mayor, he was the director of the Community Leadership Institute at Aquinas College and currently is the president of Pilgrim Manor, a retirement community.

He earned a bachelor's degree from Albion College and a master's of divinity from Western Theological Seminary. Mayor Heartwell is currently the vice chairman of the Great Lakes and St. Lawrence Cities Initiative.

So we look forward to hearing your thoughts on this important legislation.

You may proceed, sir.

STATEMENT OF HON. GEORGE HEARTWELL, MAYOR, CITY OF GRAND RAPIDS, AND VICE CHAIRMAN, GREAT LAKES-ST. LAWRENCE CITIES INITIATIVE, GRAND RAPIDS, MICHIGAN

Mayor HEARTWELL. Thank you and good afternoon, Chairman Feingold and Senator Kohl. It is truly an honor for me to be here this afternoon on this important issue.

I am George Heartwell, Mayor of Grand Rapids, a city of 200,000 people and a metropolitan area of about 900,000, 32 miles inland from Lake Michigan. I also serve as the vice chair of the Great Lakes-St. Lawrence Cities Initiative, as the chairman mentioned.

We are a coalition of 56 cities, U.S. and Canadian cities, working together to protect and restore the resource of the Great Lakes. We like to refer to ourselves as mayors without borders, and it is truly a wonderful binational cooperation.

Water is the life blood of our cities. We have the good fortune of living in the basin of a true global fresh water treasure. There are

good reasons why the original Native American people settled in this area, why the explorers came, why people settled here and built their cities, and why the area continues to provide a very high quality of life and economic well being for millions of people.

It is all about the water.

Over the past century, our industrial, agricultural and residential activities have placed significant stress on the water resource of the Great Lakes, whether it is invasive species or industrial discharge runoffs, toxic contamination, combined sewer overflows, the list is almost endless.

Most recently, concerns over the quantity of water have grown throughout the region. Significant reductions in lake levels across the basin are creating problems for recreational boating, for commercial shipping for municipal water intake, for coastal wetland viability.

The cities of the Great Lakes and St. Lawrence River are doing our part to deal with these water quality and quantity issues.

A study that we have recently completed through the Great Lakes Inland Cities Initiative, working with the Great Lakes Commission, documented a $15 billion annual investment of local governments in the United States and Canada to protect the resource.

My own city of Grand Rapids has invested over $200 million and, by the time we are finished, we will have invested $300 million in combined sewer separation to protect the resource of the waters of Lake Michigan.

In addition, the cities of the Great Lakes and St. Lawrence Cities Initiative have launched a water conservation framework. Thirty-three cities have now joined to work toward a goal of 15 percent reduction in water consumption between 2000 and 2015.

The Great Lakes-St. Lawrence River Basin Water Resources Compact is essential for protecting the long-term integrity of the water resource.

The leadership of the Great Lakes Governors, working with the Canadian Premiers, has been exemplary in bringing us to this point.

Our organization has supported the compact and agreement with resolutions at our last three annual meetings, copies of which are included with my testimony.

More importantly, the compact represents a commitment to stewardship of the fresh water of the Great Lakes and St. Lawrence River by eight States, based on extensive in put from cities, from Native American tribes, as well as many other stakeholders.

As a resource management tool, it calls for the States to establish water conservation and efficiency programs to ensure the best use of this precious resource.

There will also be new measures in place to track and account for water use much more effectively than we have ever done before. In fact, through the work of State Senator Patty Birkholz, the Michigan legislature developed a water withdrawal assessment tool, which I believe can serve as a useful model for other States within the compact.

Establishing and managing the administration of these programs will place, we know, additional financial burdens on the States, but

we are confident that the high priority of this effort will lead to the commitment of the necessary resources to make this happen.

Our cities stand ready to work with our States to provide support in whatever way we can.

The fundamental principle underlying the compact is that regions of the country should have the right and the responsibility to manage the resources in their area. There is no resource more fundamental to the quality of life and well being of people than water.

The United States Constitution explicitly contemplates compacts of this nature and Congress, as Governor Doyle has pointed out, has provided its consent to 41 interstate compacts over the years.

Much like the States surrounding the Chesapeake Bay, those on the Colorado River and Florida with the Everglades, the Great Lakes States, working with their cities and other partners, are in the best position to ensure the long-term integrity of the resource. Working with our Canadian neighbors, we are confident that the leadership of the States and Provinces, with strong support from cities, will manage this resource wisely long into the future so that succeeding generations will have the full benefit of this global fresh water treasure.

On behalf of the people of Grand Rapids, the people of the cities of the Great Lakes and St. Lawrence Basin, and all the people of the region, I strongly urge you to pass S.J. Res. 45 for the good of the region and the country.

Thank you very much.

[The prepared statement of Mr. Heartwell appears as a submission for the record.]

Senator FEINGOLD. Thank you so much, Mayor Heartwell.

Next, I would like to welcome Ms. Kay Nelson. Ms. Nelson is the Director of Environmental Affairs at the Northwest Indiana Forum, which is a nonprofit economic development organization whose members have strong business interests in the Great Lakes.

Prior to her work at the Northwest Indiana Forum, Ms. Nelson served as the regional office director for the Indiana Department of Environmental Management. She is a graduate of Purdue University's School of Agricultural and Natural Resources and Environmental Science.

And we thank you for joining us today, and you may proceed.

STATEMENT OF KAY L. NELSON, DIRECTOR OF ENVIRONMENTAL AFFAIRS, NORTHWEST INDIANA FORUM, PORTAGE, INDIANA

Ms. NELSON. Thank you. Good afternoon, Chairman Feingold, Senator Kohl, Ranking Member Specter, and members of the committee.

My name is Kay Nelson, as you mentioned, and I serve as Director of Environmental Services, Northwest Indiana Forum, a regional economic development organization. And our member organizations represent $40 billion of commerce for the State of Indiana, including industrial and commercial businesses, hospitals, financial institutions, universities, hospitals and municipalities, all within Lake, Porter and LaPorte in Indiana.

In 2003, the Forum Environmental Committee created a working subcommittee to focus on the Compact. This committee included Jim Flannery from ArcelorMittal Steel Indiana Harbor, Doug Bley, ArcelorMittal Steel Burns Harbor, Dave Behrens, U.S. Steel Gary Works, Linda Wilson and Rees Madsen from BP Whiting Refinery, Dean McDevitt, formerly of NIPSCO, and myself, to focus on the development of Indiana legislation concerning the adoption and implementation of the Compact.

But a significant directive in the Forum's Environmental Committee's mission statement calls for us to work with our environmental community on all issues, and, as such, the subcommittee decided to expand the working group with members to include the "Lady of the Lakes," Lee Botts, who founded the Lake Michigan Federation, which is now known as the Alliance for the Great Lakes, Tom Anderson and Charlotte Read of Save the Dunes, and John Goss from the Indiana National Wildlife Federation.

As a Compact Team, we recognized and established the need for a positive discussion to allow for the recognition of the diverse viewpoints concerning the Compact as it was moving forward, where we found common ground and resolved those issues which were of uncertainty.

The Compact Team was instrumental in the formation of a Northwest Indiana Forum position paper, which supported the adoption and implementation of the Great Lakes-St. Lawrence River Compact during this 2008 Indiana legislative session.

We also worked to prepare a joint statement for the industrial and environmental community stakeholders, as a resolution supportive of the Compact process, which was read into the record at the initial meeting of the Great Lakes-St. Lawrence River Basin regional body meeting in June 2006.

Additionally, our members provided written and oral testimony at numerous public meetings and Indiana legislative committee hearings during the 2008 session.

During the course of the Compact's consideration in Indiana and other States, several questions arose regarding the meaning and interpretation of some of the key provisions, and our team recognized the importance of resolving those questions so that everyone clearly understood the intent of the Compact.

One of those questions was how the impacts of withdrawal proposals were to be reviewed under section 4.11 and guided by a memorandum provided by the chair of the Governor's working group, our team worked closely with the Indiana State legislature, specifically, State Senators Beverly Gard, Karen Tallian and Ed Charbonneau, to include a provision in section 10 in Indiana's legislation declaring the legislature's intent as to the proper interpretation and application of section 4.11.2.

Other States, including Ohio and Pennsylvania, subsequently did likewise. That clarification of intent was essential to winning the support of industry, environmental, agricultural and other stakeholder groups.

We believe that that clarification provided by the State legislators and the working group is critical and, as such, have included it in my testimony today.

Mr. Chairman, I am providing to the committee a copy of the December 2005 memorandum from Sam Speck, chair of the working group referred to in my testimony, explaining the scope of the impact issue and the pertinent provisions from the three States' legislation that reflects the Speck memo and the Council of Great Lakes Governors' understanding.

I would respectfully request that these items be included in the committee record.

Senator FEINGOLD. Without objection.

Ms. NELSON. Thank you.

The Great Lakes-St. Lawrence River Basin Compact is a means to provide an enhanced water management system that is simple, durable, efficient, and retains, while respecting, water conservation initiatives in place and the authority within the basin when administering proposals for new and increased withdrawals of water.

The culmination of the innovative collaborative approach utilized and administrated by the Northwest Indiana Forum Compact Team and the many years of diligent work that we have put into it occurred this past February, February 20, 2008, when Governor Mitch Daniels, accompanied by State Senator Beverly Gard and State Representative Scott Pelath, signed Senate Enrolled Act 45, the Great Lakes Compact bill, into law as the first bill out of the session for Indiana this year.

Thank you for this opportunity to join you today and we support your passage of the resolution.

[The prepared statement of Ms. Nelson appears as a submission for the record.]

Senator FEINGOLD. Thanks so much, Ms. Nelson.

Finally, I would like to recognize Mr. Cameron Davis. Mr. Davis is the president of the Alliance for the Great Lakes. Prior to working for the Alliance for the Great Lakes, Mr. Davis was an adjunct clinical assistant professor of law at the University of Michigan Law School.

He is a graduate of Boston University and of the Chicago-Kent College of Law. Under Mr. Davis's leadership, the Alliance for Great Lakes will be receiving the American Bar Association's distinguished achievement award in environmental law and policy for 2008.

This will be the first time a citizens' environmental organization will have won this national honor. So we congratulate you and thank you for joining us, and you may proceed.

STATEMENT OF CAMERON DAVIS, PRESIDENT, ALLIANCE FOR THE GREAT LAKES, CHICAGO, ILLINOIS

Mr. DAVIS. Thank you and good afternoon, Chairman Feingold and Senator Kohl, Ranking Member Specter, and members of the committee.

My name is Cameron Davis, president of the Alliance for the Great Lakes. We were formed in 1970 as the oldest nonpartisan citizens not-for-profit Great Lakes protection organization.

Our mission is to conserve and restore the Nation's and the world's largest fresh water resource using policy, education, local efforts, to ensure a healthy Great Lakes and clean water for generations of people and wildlife.

In that capacity, I was privileged to be appointed by the Council of Great Lakes Governors to provide advice in the development in the early stages of the standards that are embodied in the legislation that is now in front of you.

I am also fortunate to serve as the co-chair of the Healing our Waters-Great Lakes Coalition, which is comprised of more than 100 organizations from the region working valiantly to restore the Great Lakes every day.

And I want to say a special thanks to the staff of the Council of Great Lakes Governors, including Dave Naftzger, Pete Johnson, and I know former Governor Taft of Ohio, with Sam Speck and Kate Bartter, did yeoman's efforts to get us to this point today.

As a boy, I used to stand on the shores of Lake Michigan during our Sunday family picnics and marvel at how Lake Michigan seemed like heaven. The blue waters mirrored the sky and the pure white sailboats floated weightlessly, reminding me of angels. Just like heaven, Lake Michigan seemed to go on forever.

To me, it was infinite. In fact, about 90 to 95 percent of the Nation's fresh surface water is in the Great Lakes.

But I was also wrong as a boy. Less than 1 percent of Great Lakes water is renewed every year through rain, through snow melt and groundwater recharge. In other words, when I stood on the beach and looked out over those waves, I couldn't have been more wrong.

The Great Lakes are essentially a nonrenewable resource.

We are entering an era of critical water conservation, and we are not alone. According to the United Nations, by 2025, some two-thirds of the world's population will be lacking ready access to fresh water. They will be water stressed.

And the only solution, that we can tell, is to live within our means. The Great Lakes are one of America's most revered national jewels and one of the natural wonders of the world. As such, just as we are privileged to enjoy them, we also have a responsibility to protect them.

Understanding this, more than a dozen Governors from three political parties called for, and 16 State legislative chambers passed, a contract among the States, the Compact that is before you now, to establish uniform, binding water use standards for the region.

In a time of skepticism, this is a remarkable sign of bipartisan or even tripartisan long-term thinking. Without this Compact, the Great Lakes States are vulnerable to depletion.

We urge you to ratify the Compact now to protect these magnificent natural treasures.

The Compact can serve as an international model for bringing parties together to reach an accord on resource protection. The longer we wait to ratify the Compact, the more we put these waterways at risk, and here is why.

In the past, when it looked like a community was running low on water, it simply turned to a new supply. Watersheds are like bank accounts. For every dollar you take out of your bank account, you have to replace it with another dollar or, over time, you will deplete your account.

Watersheds act the same way. For every gallon we take out, we have to replace it with a gallon. Otherwise, you start to deplete your watershed account.

For the first time ever, we will now have standards, including one for return flow, under the compact, that will allow the use of some of the watershed's account interest, but won't allow us to deplete the account's principal.

We need the Compact so that we can be good stewards of the resource and because there are no new magical supplies of fresh surface water waiting for us if we run low.

In 1998, a small Ontario firm called the Nova Group secured a permit to ship millions of gallons of Lake Superior water overseas. An astonished public cried foul, asking how this could possibly be.

Several of us who studied the laws and the policies on the books found that our laws and our policies were weak and, at best, not executed; at worst, nonexistent; and, most times, inconsistent from State to State.

While the Nova permit was ultimately rescinded, it shined a light on the problem I mentioned at the beginning of my testimony: it happened because many of us had perceived the Great Lakes to go on forever. We really haven't had an incentive to think that we need to conserve them.

Congress asked for water conservation standards. In partial response to the Nova incident, in 2000, Congress said to us in the region and urged the States, in consultation with the two Canadian Provinces, to establish common water withdrawal decisionmaking standards to achieve water conservation and resource improvement.

While the call for such standards was important, even more important was the fact that leaders from all around the Nation saw fit to call for the protection of the Great Lakes ecosystem. As such, the compact isn't before you for consideration simply because we inside the basin want it. It is before you because you and your colleagues from around the Nation passed a law, as you heard Governor Doyle say before, calling for it out of the belief that the Great Lakes are a national treasure deserving of national protections.

Congress asked for new standards and the States, municipalities, businesses and public interest groups delivered. The compact does exactly what Congress suggested. Now, we are asking Congress to finish the job and approve the Compact.

While, 10 years ago, the Nova Group sought a permit to send water overseas, the real need for the compact comes from within. Maybe because those of us who live, work and play in the region perceive it as limitless, we have never had much of a motivation to create uniform, binding water use standards. There never have been rules of the game to ensure that water use decisionmaking is transparent, predictable and fair.

As such, we have been profligate water wasters. The Compact puts the onus on the citizens and the governments of the Great Lakes States to prove that if we want more water from the Great Lakes, we must first show that it is needed and that conservation measures have been exhausted. That is where the onus should be.

If we are going to keep water from being shipped thousands of miles away to other parts of the globe, we should be as demanding of water conservation from ourselves as we are of others.

The Compact represents the first time in history that all jurisdictions, the States and the two Canadian Provinces, through a mirror agreement, will have rules of the game for managing the Great Lakes.

The Alliance for the Great Lakes and the Healing our Waters-Great Lakes Coalition believe that these waters don't simply provide nice neighborhood beaches, prized fishing holes or resources for local businesses. Like the Amazon rain forests, the plains of the Serengeti, or the holy Himalayan mountains, the Great Lakes are among the world's wonders.

And today, when I take my wife and 2-year-old son to the beach, I try to teach him that though the Great Lakes aren't as infinite as heaven, as I thought they were when I was boy, they still provide the solace and the inspiration of heaven. As such, preserving them isn't just a national ecologic and economic imperative. Even more important, it is a sacred imperative.

Thank you.

[The prepared statement of Mr. Davis appears as a submission for the record.]

Senator FEINGOLD. Thank you, Mr. Davis, for your beautiful remarks about the Great Lakes. I have had the good fortune this month alone to spend a fair amount of time on both Lake Superior and Lake Michigan, of course, on the Wisconsin side. I was doing some work, but some of it wasn't.

But your comments remind us of exactly what this means to all of us in all the States that are affected. I will also say I have never heard more concern when I have been in these places, having been going to them for family vacations for many years, never heard as much concern as I have heard in the last couple of years about water levels, invasive species, and the variety of issues, casual comments, as well as formal comments.

This is a critical time, which makes the timing of your great work on this especially valuable.

Let me just do a few questions.

Governor Doyle, in your testimony, you emphasized that there is already a significant reliance and demands on the Great Lakes. Of course, as a Governor, you are also looking to the future and expected increasing demands and stresses on the lakes.

Is it fair to say that taking management steps now to prevent conflicts in the future is a big reason for the States' interest in the compact? Can you say a bit about the common motivation among the Great Lakes States to get this compact in place now?

Governor DOYLE. We are truly looking forward in Wisconsin, I know this is true across the region, of joining together through what the Compact will create, the Great Lakes-St. Lawrence River Basin Water Resources Council, by which we will set up the first real data-driven research on what the effects are of various actions taken in the Great Lakes Basin so that we can operate with facts; that we will operate under a joint standard, but leaving it to each State.

The beauty of this compact is it truly recognizes federalism. We will operate under a commonly accepted standard of no harm to the water of the basin. But we allow the States, for the uses within the Great Lakes Basin, to make their own decisions about how we are going to manage and do that.

But we also recognize that on issues like—that I know you have been deeply involved in, Senator—invasive species, Wisconsin can't solve invasive species without all of the other States and Provinces working together, and Congress.

On the issue of really a long-term cleaning up of some of the old water treatment plants that surround the Great Lakes, we need to have that kind of unified effort.

On the issue of invasives and balanced water, we can't have one State have the advantage over another because their ports don't have various standards—don't have uniform standards, where their port gets greater use, while another State that has done the right thing in imposing standards on balanced water loses business.

So these are the reasons that we have to act jointly and I think that what has happened here is that the States have come to understand that we are in this together and isn't Wisconsin against Michigan or Indiana. It is all of us making sure that this incredible resource is there for us.

I would add one final point that is very important. With the cost of gasoline, I believe that shipping in the Great Lakes is going to see a great resurgence and we want to have good, clean, modern ports and we want to have good commercial activity in these lakes.

I think, once again, most of us see the—once again, we are going to see a resurgence of shipping, resurgence of economic activity.

And, finally, I would like to say this, which is, to me, one of the most interesting points of this in the long run and the importance to our region.

We believe, as we protect the Great Lakes water, that as you go down in the coming years and water becomes a scarce resource in other parts of the country and world, people are going to realize that they ought to live and work and have their businesses near areas of plentiful water and we, in the future, I believe, are going to be the center of great economic growth and renewal around the Great Lakes, as well.

So all of those reasons that we really see is coming together as States to manage these waters together and to do it effectively.

Senator FEINGOLD. Thank you, Governor.

Mayor Heartwell and Ms. Nelson, you both touched on this in your testimony and I would like you to elaborate, if you would, on the public involvement in the compact's development.

Do you feel local government, Mayor Heartwell, and your member businesses, Ms. Nelson, were given ample opportunities for input and was it a fair and sound public involvement process?

Mayor Heartwell?

Mayor HEARTWELL. Thank you, Mr. Chairman. The Governors went out of their way to include local initiatives in the cities.

From the beginning, cities were included in the discussion. It was a very open and inclusive process. I want to take this opportunity to thank and congratulate Governor Doyle and his col-

leagues, including my own great Governor, Jennifer Granholm, for opening the door so that we could be at the table with you.

And our executive director of the Great Lakes-St. Lawrence Cities Initiative, David Ullrich, who is with me here today, was at all of those meetings through the formation and development of the compact and some of the language included in the compact, specifically that relating to local municipalities, is there at the urging of Mr. Ullrich.

So we feel, from our perspective, it was a very open and inclusive process and we are grateful for that.

Senator FEINGOLD. Ms. Nelson?

Ms. NELSON. Mr. Chairman, thank you. We are very excited and proud of the public process that we had in northwest Indiana. As I mentioned in my testimony, we provided the joint industrial-environmental resolution.

We are the only State to have done that when the regional body met in 2006. We took a great deal of time and effort to identify our points of agreement and once the environmental stakeholder groups and the business stakeholder groups identified those, we then initiated a very aggressive campaign, so to speak, to utilize the various venues in northwest Indiana, the public meeting format, meeting with our cities locally, as well as businesses that were outside of our membership and folks in Indianapolis from the Department of Natural Resources, the Governor's office, and the legislators there.

We hosted probably about 15 or 20 local meetings to allow the public to participate and we are very proud of what we have accomplished in that fashion.

Senator FEINGOLD. Thank you. It was my impression that the public involvement process was pretty extensive and I appreciate your confirming that.

And just as a side note, Mayor Heartwell, I appreciated seeing reference in your testimony to the burning of the Cuyahoga River—I do, of course, remember that—which, of course, helped lead to the enactment of the Clean Water Restoration Act in 1972, I think, through the role of my predecessor, the great Senator Gaylord Nelson of Wisconsin, on this and other critical legislation.

As you may know, I am leading the Senate effort to prevent recent Supreme Court decisions from removing protections for critical wetlands and headwater streams that were granted by the Clean Water Act.

So despite progress over the last 35 years, we are facing another setback for Great Lakes water quality until Congress acts on that, as well.

Do you want to comment on that?

Mayor HEARTWELL. Thank you, Mr. Chairman. Thank you for your leadership on the Clean Water Act. That is another critical piece of legislation for us.

But I really want to add to what Ms. Nelson said, that the Governors also went out of the way to include the first nations, the tribes who were also at the table. Their fingerprints, as it were, are all over this document.

So we appreciated that, as well.

Senator FEINGOLD. Mr. Davis, certainly, a threat of continued out-of-basin withdrawals served as an impetus for the Compact, but responsible in-basin management is equally important.

Can you discuss just a bit about the Compact's provisions that have to do with the in-basin water conservation and management requirements?

Mr. DAVIS. Sure, Mr. Chairman. It's a great question.

I think one of the things that is very exciting about this Compact is it doesn't necessarily do what other compacts do, as you may see them, where it treats a water body as a pie, slices up the pie and then gives different pieces of the pie to different people.

What this really does is puts the onus on us inside the basin to help monitor, to help plan and to conserve water inside the basin.

Water can be lost in all manner of ways. It doesn't have to just be sent through big straws or pipelines outside of the basin.

And so many of the things, especially that fall under section 4.2 of the Compact, call for an overall plan with goals and objectives for the entire basin. Then the parties, meaning the States and the Provinces, have to do their own plans and then, after that, those plans have to be effectuated to help us get to water conservation, because in the end, it will help us save on energy, it will help reduce stress on our aging infrastructure, and have all manner of benefits that would be very helpful to us inside the basin.

Senator FEINGOLD. I do think this in-basin point is something that more people understand or realize the tremendous significance of it.

Thank you to all the witnesses for testifying before us today. Because of your efforts and our joint efforts, there is tremendous momentum now behind the Great Lakes Compact, and it is largely thanks to you and many other committed individuals.

Governor Doyle, you and your fellow Governors have provided great leadership on the issue. I also want to commend the State legislatures, which all ratified the compact.

And, of course, my thanks and appreciation to Mayor Heartwell, Ms. Nelson, and Mr. Davis, and all the individuals and interests you represent for being supportive of the compact and helping to get it to where it is today.

I thank you for your continued support, look forward to working with you in the final step of obtaining congressional consent and approval for the Great Lakes Compact.

This hearing was an important step and I want to again thank Chairman Leahy and Ranking Member Specter for helping make this happen.

And without objection, I will place in the record statements submitted by Dave Dempsey, Noah Hall with Wayne State University, and Environment America, and, also, the Michigan attorney general.

One final point is that the hearing record will remain open for 1 week for additional materials and written questions for the witnesses to be submitted. As usual, we will ask the witness to respond promptly to any written questions so that the record of the hearing can be completed.

Thank you all very much. And the hearing is adjourned.
[Whereupon, at 1:55 p.m. the hearing was adjourned.]
[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

August 6, 2008

To: Chairman Russ Feingold,
Senate Judiciary Committee

I am pleased to provide this written testimony as Congress considers SJR 45 ratifying the Great Lakes Basin Compact (Compact).

Michigan is in a unique position among all Great Lakes states because our borders lie almost entirely within the basin and rightly deserves the title that many people have given it as "The Great Lakes State" in large part because of that geographical distinction.

Michigan has another unique distinction among the eight Great Lakes states due not to its geographical location in the basin, but due to the incredible policymaking effort we have completed to adopt the nation's first biologically based water withdrawal assessment process.

We have taken our fair share of good natured ribbing for being the last of the states to adopt the Compact, but Michigan has accomplished what no other state in the Great Lakes basin has done -- pass the Great Lakes Basin Compact and, at the same time, adopt a new standard for evaluating large quantity withdrawals that is based in science and uses a biological marker to prohibit adverse resource impacts from ever occurring.

Michigan started this journey toward water protection over five years ago with the introduction of SB 289, which became Public Act 148 of 2003 that eventually led to the creation of the Groundwater Conservation Advisory Council and the set of recommendations that form much of the basis for our action today.

Over that time, we have had one simple mission -- to protect the waters and the water dependent natural resources and protect the rights of those who use them wisely.

I strongly believe we have done that.

I see three significant landmark achievements with the adoption of the Compact and our water-withdrawal assessment package:

1. **We protect our waters and our water-dependent natural resources for generations to come.**

   We have employed the consensus set of recommendations from the Groundwater Conservation Advisory Council that is rooted in sound science and focused on protecting both our groundwater and surface water. We will soon engage a water withdrawal assessment process that is user friendly based upon years of stream data and employs water health on a biological basis.

   But, we went further than even their set of recommendations by carving out a very conservative set of water protection zones that will permanently preserve a large majority of this state's water resources.

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Chairman Russ Feingold
Page Two
August 6, 2008

2. **We protect our wise water users and their future use of our water and directly engage the public in that effort.**

   We have wisely protected existing users and their uses to give them as much regulatory certainty as we can so that they can continue to use water wisely. We have also provided clear and science-based standards for new users that want to use our water. This effort that Michigan undertook in doing more than simply passing the Compact will yield tremendous results in the future because people now will be able to know the "ground rules" for use of our water.

   We have enlisted three clear mechanisms for the public to help us in our efforts to safeguard our waters -- through individual water user committees, public input on all permitting decisions, and through the use of water awareness and education committees.

   Finally, and just as critically, we have taken the step to affirm the existing authority of the state to protect our natural resources and the existing common law property rights of a person's right to use our water.

3. **We have shown a wary public that the Michigan Legislature can indeed produce significant public policy results for the people of this state.**

   We all know that some have said that the Michigan Legislature has not functioned to produce necessary public policy for this state. There was great skepticism that we would ever be able to reach a consensus set of recommendations for water protection because of political squabbles, the diverse nature of water interests, and the complex nature of this issue.

   Passing this package of bills is a direct testimony that we can achieve significant results. This effort was a collegial effort between the Michigan House and the Senate, between leaders of those bodies, and between Democrats and Republicans. Although it may have been easy to become distracted by the unnecessary criticism of our efforts, we never let that get in the way of our end goal.

   We have engaged the public in hundreds of hours of workgroups, engaged our citizen stewards in the efforts of the Groundwater Conservation Advisory Council and engaged the hearts and minds of people all over this state. Their efforts have a direct handprint on this 12-bill package that adopts the Compact and engages this groundbreaking water withdrawal assessment process.

   As Congress seeks to ratify the Compact and endorse the efforts that the states have made in passing individual compact legislation in each state, I want to provide further support for the quick and complete ratification of the Compact. Nothing will impact our state and region more than having the certainty of knowing that our basin water will continue to be just that -- our basin water. More and more, we are becoming aware of the fact that our environmental and economic future is directly tied to protecting our water resources.

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Chairman Russ Feingold
Page Three
August 6, 2008

Let me express my humble gratitude through this committee to the people of Michigan for giving me the opportunity to be a part of this landmark achievement in natural resources policy. I find it to be among my finest opportunities as a legislator to have been an integral part of this regional agreement to protect a precious regional resource and, thus, protect the future of out region's citizen stewards.

I await your prompt and urgent action on this most significant national effort and wish you God speed in your journey to complete the work begun by the states.

Patricia Birkholz
Michigan State Senator

44332.003

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

MIKE COX
ATTORNEY GENERAL

P.O. BOX 30212
LANSING, MICHIGAN 48909

July 30, 2008

The Honorable Patrick J. Leahy
Chairman
Judiciary Committee
United States Senate
224 Dirksen Senate Office Bldg.
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member
Judiciary Committee
United States Senate
224 Dirksen Senate Office Bldg.
Washington, DC 20510

The Honorable Russell D. Feingold
Presiding Member
Judiciary Committee
United States Senate
224 Dirksen Senate Office Bldg.
Washington, DC 20510

Dear Chairman Leahy, Ranking Member Specter, and Presiding Member Feingold:

I am writing to express my support for Senate Joint Resolution 45. The resolution would approve the Great Lakes – St. Lawrence River Basin Water Resources Compact, a comprehensive agreement among the eight Great Lakes States to manage and protect the Great Lakes Basin's water resources. The core function of the Compact is to prohibit diversions of Great Lakes water without regional consensus. In a time of increased demands on water worldwide, it is critical that the Great Lakes be protected from diversions.

The Great Lakes are a globally and nationally significant natural resource. They contain 20% of the world's fresh surface water and over 90% of the country's fresh surface water, and form a unique geographical feature with ecosystems not found anywhere else in the world. Michigan, in particular, has a special connection to the Great Lakes. It is the only state entirely within the Great Lakes Basin and has shoreline on four of the five Great Lakes. Michigan's citizens rely on the Great Lakes for their drinking water, for recreational and commercial uses, and for the other, less tangible benefits provided by this treasured resource.

This country has long recognized the importance of the Great Lakes, and by entering into the Boundary Waters Treaty of 1909 with Canada, made clear that this was a resource worth protecting. In 1955 the Great Lakes States entered into, and Congress approved, the Great Lakes Basin Compact in order to provide further protections for the Great Lakes. The 1955 Compact in turn led to further agreements - the 1985 Great Lakes Charter and 2001 Great Lakes Charter Annex, which created the foundation for the permanent and binding agreement to protect and preserve Great Lakes water that is before you today.

There is no state with a greater stake in the future of the Great Lakes. That is why I have made protection of the Great Lakes my highest priority. From keeping aquatic nuisance species out of the lakes – to keeping the water in, I have been steadfast in my commitment to preserving this resource for future generations of Michiganders. I monitored and provided input on the Compact as it was

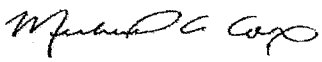
Honorable Patrick J. Leahy
Honorable Arlen Specter
Honorable Russell D. Feingold
Page 2

being negotiated, and am pleased that most of my concerns were addressed. Like all products of compromise, it is not a perfect document, but it clearly addresses the most important issue – prohibiting the diversion of Great Lakes water outside of the basin without the approval of every state affected.

The debate over the Compact will no doubt involve charges that the Great Lakes States are being "selfish" in "withholding" their water. But just as any state would no doubt object to other states "diverting" the natural resources that make it unique, Michigan and the other Great Lakes States are unwilling to allow their natural resource heritage to be appropriated.

I urge you to quickly put this resolution before the Senate and hope that you will advocate for swift passage of this resolution. Thank you for consideration of my comments.

Sincerely,



Mike Cox
Attorney General

c: Honorable Carl Levin
Honorable Debbie Stabenow

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Testimony of Cameron Davis, President & CEO, Alliance for the Great Lakes & Co-Chair, Healing Our Waters®-Great Lakes Coalition

on the Great Lakes - St Lawrence River Basin Water Resources Compact

Before the U.S. Senate Judiciary Committee
July 30, 2008

Good morning Chairman Feingold, Ranking Member Specter, Chairman Leahy and members of the Committee. My name is Cameron Davis and I serve as president & CEO of the Alliance for the Great Lakes. Formed in 1970, the Alliance is the oldest non-partisan, citizens' not-for-profit Great Lakes protection organization. Our mission is to conserve and restore the world's largest freshwater resource using policy, education and local efforts, ensuring a healthy Great Lakes and clean water for generations of people and wildlife. In that capacity, I was privileged to be appointed by the Council of Great Lakes Governors to provide advice in the development of the standards currently embodied in the legislation before you. I'm also fortunate to serve as the co-chair of the Healing Our Waters® -Great Lakes Coalition, which is made up of more than 100 organizations dedicated to Great Lakes restoration.

As a boy, I stood on the shores of Lake Michigan during our Sunday family picnics and marveled at how it seemed like heaven: the blue waters mirrored the sky and the pure white sailboats floated weightlessly, reminding me of angels. Just

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like heaven, Lake Michigan seemed to go on forever. To me, it was infinite. In fact, with up to 95 percent of the nation's and nearly 20 percent of the Earth's fresh surface water, the Great Lakes still today seem infinite.[1]

But, we know now that's not true. Less than 1 percent of their waters are renewed every year through rain, snow melt and groundwater recharge. In other words, when I stood on the beach and thought these magnificent waters went on forever, I was wrong. The Great Lakes are, essentially, a non-renewable resource.

We're entering an era of critical water conservation and we're not alone. According to the United Nations, by 2025, some two-thirds of the world's population will live in "water-stressed" areas, lacking ready access to clean, fresh water.[2] The only solution is to live within our hydrological means. And, in this region, we can no longer afford to act under the myth that the Great Lakes are limitless. They are one of America's most revered national jewels, and one of the natural wonders of the world. As such, just as we are privileged to enjoy them, we have a responsibility to protect them. Understanding this, more than a dozen governors from three political parties called for, and 16 state legislative chambers recently passed, a contract among the states – the Great Lakes-St. Lawrence River Basin Water Resources Compact – to establish uniform, binding water use standards for the region. In a time of skepticism, this is a remarkable sign of bipartisan, long-term thinking. Without this Compact, the Great Lakes are vulnerable to depletion. We urge you to ratify the Compact now to protect these magnificent natural treasures. The Compact can serve as an international model

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[1] Appreciation is expressed to: Alliance for the Great Lakes (Gary Ballesteros, Kate Bartter, Joel Brammeier); Ohio Environmental Council (Kristy Meyer) for their assistance in the review of this testimony.
[2] United Nations Environment Programme, "Vital Water Graphics," http://www.unep.org/dewa/assessments/ecosystems/water/vitalwater/ (July 25, 2008)

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for bringing parties together to reach an accord on resource protection. The longer we wait to ratify the Compact, the more we put these waterways at risk. Here's why.

We Must Conserve Our Water Budget

In the past, when it looked like a community was running low on water, it simply turned to a new supply. But watersheds are like bank accounts. For every dollar you take out of your bank account, you must replace it with another dollar or over time you will deplete that account. Watersheds act the same way. For every gallon removed without being replaced, we risk the depletion of our watersheds, even watersheds as seemingly vast as the Great Lakes. For the first time ever, we will now have standards — including a requirement for "return flow" — that will allow the use of some of the watershed account's interest, but won't allow us to deplete the account's principal. We need the Compact to be good stewards of the resource and because there are no new, magical supplies to which we can turn.

Threats of Mismanagement Are Real

In 1998 a small Ontario firm called the Nova Group secured a permit to ship millions of gallons of Lake Superior water overseas. An astonished public cried foul, asking how this could possibly be. Several of us who studied the laws and policies on the books found that our laws and policies were weak, at best not executed, at worst non-existent, and most times inconsistent from state to state.

While the Nova permit was ultimately rescinded, it shined a light on the problem I mentioned at the beginning of my testimony: because many of us have perceived the

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Great Lakes as limitless, efforts to create uniform, binding water conservation standards had not been viewed as an urgent priority.

Congress Asked for Water Conservation Standards

In partial response to the Nova incident, in 2000 Congress stepped in, urging the eight Great Lakes states, in consultation with the two Canadian provinces, to establish common water withdrawal decision-making standards to achieve water conservation and resource improvement.[3]

While the call for such standards was important, even more important was the fact that leaders from all around the nation saw fit to call for the protection of the Great Lakes ecosystem. As such, the Compact isn't before you for consideration simply because we inside the region want it. It's before you because you and your colleagues from around the nation passed a law calling for it out of the belief that the Great Lakes are a national treasure deserving of national protections.

Congress asked for new standards, and the states, municipalities, businesses and public interest groups delivered. The Compact does exactly what Congress suggested. Now we're asking Congress to finish the job and approve the Compact.

The Compact Will Bolster Our Efforts to be Good Stewards

While 10 years ago the Nova Group sought a permit to send water overseas, the real need for the Compact comes from within. Maybe because those of us who live, work and play in the Great Lakes perceive it as limitless, we've never had much incentive to create uniform, binding water use standards. There never have been rules of the game

[3] Water Resources Development Act, 42 U.S.C. § 1962d-20(b)(2).

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to ensure that water use decision-making standards are transparent, predictable and fair. As such, we have been profligate water wasters. The Compact puts the onus on the citizens and governments of the Great Lakes states to prove that if we want more water from the Great Lakes, we must first prove that it's needed and that conservation measures have been exhausted. And that's where the onus should be. If we're going to keep water from being shipped thousands of miles away, we should be as demanding of water conservation from ourselves as we are of others. The Compact represents the first time in history that all jurisdictions – the states and the two Canadian provinces through a mirror "Agreement" – will now have "rules of the game" for managing the Great Lakes.

The Great Lakes are a National Treasure Worthy of National Safeguards

The Alliance for the Great Lakes and the Healing Our Waters-Great Lakes Coalition believe that these waters don't simply provide nice neighborhood beaches, prized fishing holes or resources for local businesses. Like the Amazon rainforests, plains of the Serengeti, or the holy Himalayan Mountains, the Great Lakes are among the world's wonders. And today, when I take my wife and 2-year-old son to the beach, I try to teach him that though the Great Lakes aren't as infinite as heaven, as I thought when I was a boy, they still provide the solace and inspiration of heaven. As such, preserving them is a national ecologic, economic – and even more important – a sacred imperative.

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Before the Senate Committee on the Judiciary

Presiding Chair, Senator and Honorable Russell D. Feingold

Hearing, Wednesday, July 30, 2008

In the Matter of S.J. Resolution 45

The Great Lakes– St. Lawrence River Basin Water Resources Compact

Submitted by Dave Dempsey
Rosemount, Minnesota

Thank you for the opportunity to offer written testimony on Senate Joint Resolution 45, consenting to the Great Lakes--St. Lawrence River Basin Water Resources Compact. For the record, my name is Dave Dempsey and I live in Rosemount, Minnesota. I have worked on issues related to sustainable water management of the Great Lakes since 1983. From 1983-1989, I served as environmental policy advisor to former Michigan Governor James J. Blanchard. From 1994-2001, I served as a member of the Great Lakes Fishery Commission. I have authored two books on Great Lakes environmental history and policy. The comments that follow are my opinions and observations and should not be construed as representing the opinions or positions of any organization.

I regret to say that the Great Lakes—St. Lawrence River Basin Water Resources Compact, while commendable in intent, contains at least one major flaw that could render all of its resource protections invalid. The Congress should make clear its consent to the Compact is not to be construed as legal authorization for or approval of this flaw.

The Compact contains two definitions that are crucial to an understanding of this flaw. It defines "product," in part, as follows:

"Product means something produced in the Basin by human or mechanical effort or through agricultural processes and used in manufacturing, commercial or other processes or intended for

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intermediate or end use consumers. (i) Water used as part of the packaging of a Product shall be considered to be part of the Product."

Under this definition, the "human or mechanical effort" of removing water from a spring, lake or stream and putting it in containers creates a product. The Compact prohibits most (although not all) water diversions. But the Compact defines diversions as follows:

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

In other words, this Compact defines Great Lakes Basin water sold after being placed in a container – including water that is neither adulterated or mixed with other ingredients – as a product, rather than a diversion. No matter what the total volume of water exported in such containers, it is exempt from the export and diversion ban in the Compact. Transferring the same volume of water in a "pipeline, canal, tunnel, aqueduct, channel, modification of the direction of a water course, a tanker ship, tanker truck or rail tanker" – with the same impact on the water and related resources of the Great Lakes Basin – is prohibited.

This inconsistency in treatment of water diversions or exports based on packaging volume has no basis in natural resource science or policy. It is, pure and simple, a special interest exemption and it puts the entire framework of the Compact in jeopardy.

Those who support the Compact, including representatives of the commercialized water industry, argue that water packaged and sold outside the Great Lakes Basin as a product is no

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different from water used as an ingredient in fruit juice or beer, packaged and sold outside the Great Lakes Basin as a product. That is incorrect legally and unacceptable ethically. When *water itself* is the product – as the Compact defines it – we are per se converting water from the commons to private property and alienating it from the sovereign public trust authority of the Great Lakes States. The implications are profound. Since there is no resource-based distinction between 300 million gallons of water removed from the Great Lakes in containers and 300 million gallons of water removed from the Great Lakes in pipelines or tankers, it is likely that a legal action will be brought to strike down the distinction and open the Great Lakes to wholesale, unsustainable exploitation.

Of even greater concern are the implications of this untenable inconsistency under international trade law. Once water is defined as a product, it falls under the protections of NAFTA and GATT. The same reasoning as above applies. If the out-of-Basin shipment of certain quantities of water and resulting ecological risks are acceptable for water as a product, then what is the environmental basis for prohibiting the same amount of water from leaving the basin by pipeline, tanker or truck? Such a prohibition runs the risk of being seen as discriminatory under trade law, and thus invalid. This would have the effect of nullifying the diversion prohibition or providing a taxpayer-funded bonanza for speculators investing in Great Lakes water product export. It could lead to the ruin of the Great Lakes.

It is true that the Compact also treats the bulk removal of water from the Basin in any container greater than 5.7 gallons (20 liters) as a diversion. But it specifically reopens the loophole by holding that each state "shall have the discretion, within its jurisdiction, to determine the treatment of Proposals to Withdraw Water and to remove it from the Basin in any container of 5.7 gallons or less." At this moment, no Great Lakes state has chosen to exercise its authority to treat such removals as diversions. The Compact, then, leaves open the possibility, and at this point

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sanctions the removal and export of large quantities of Great Lakes Basin water in containers of 5.7 gallons or less as a "product."

Water itself is *not* a product, no matter what the Compact says. Water belongs to the public and is held in trust for the public by the governments of the Great Lakes states. Water is the source of life. Great Lakes water should stay in its natural state within the Great Lakes Basin or be used within the Great Lakes Basin except when it is used in conformance with common and statutory law as an ingredient in a product – or when there is a humanitarian emergency which requires its use to prevent or relieve human suffering or death. Selling and exporting Great Lakes water as a consumer convenience product at highly inflated prices that profit private parties, not the public that owns the water, does not meet either of those tests.

For that reason, I urge the Senate to consent to the Compact only under the following condition:

"Nothing contained in this Act or in the compact consented to hereby shall be construed to affect or diminish the public trust powers and duties of the states relative to the conservation and protection of waters, nor shall this Act or the compact consented to hereby be construed to permit, authorize, facilitate, or support the capture and private sale of the waters of the Great Lakes Basin."

Without such a stipulation, Congress may well be consenting to a Compact that begins to take the Great Lakes out of the public domain, and increases the risk of their unsustainable use and depletion. This would be tragic mismanagement of what the President has just called "a national treasure."

Thank you.

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Testimony to the U.S. Senate Judiciary Committee
Wisconsin Governor Jim Doyle
Chair, Council of Great Lakes Governors
The Great Lakes—St. Lawrence River Basin Water Resources Compact
July 30, 2008

Good afternoon, Chairman Feingold, Ranking Member Specter, and members of the Senate Judiciary Committee. I would like to particularly recognize Senator Feingold and Senator Kohl from Wisconsin as well as the other Senators from the Great Lakes States. I am Jim Doyle, Governor of the State of Wisconsin and Chair of the Council of Great Lakes Governors. Thank you for the opportunity to submit this testimony regarding *the Great Lakes—St. Lawrence River Basin Water Resources Compact* (Compact) and Senate Joint Resolution 45 which provides Congressional consent for this historic measure to protect the Great Lakes.

The Council of Great Lakes Governors is a non-partisan partnership of Governors from each of the eight Great Lakes States--Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin. In recent years, the Premiers of Ontario and Québec have partnered with the Governors through the Council to advance the environmental health and high performance economy of the entire region.

In 2005, the Great Lakes Governors in collaboration with regional partners completed the negotiation of the eight-State Compact. And, on July 9, 2008, the Great Lakes States completed State ratification. To become law, Congress must now provide its consent. By implementing this Compact, leaders are taking the necessary steps to protect the Great Lakes and sustainably manage this shared resource.

There is a long tradition in this country of States using compacts to work together to manage shared water resources. Historically, States and the federal government have supported interstate compacts to address water supply, water quality and flood control issues within the hydrological context of watersheds and basins. There are currently at least 41 interstate water compacts that have been entered into by the party States and consented to by the U.S. Congress over a period of decades. 45 States and the District of Columbia currently belong to at least one interstate water compact and many States belong to more than one.

Interstate water compacts provide an effective means to manage shared water resources consistent with our system of constitutional federalism. As the National Governors Association policy on water resources states, "Governors urge the federal government to continue to support interstate water basin organizations and to consent in the future to similar arrangements including interstate water compacts ratified by the party states." The Great Lakes Governors appreciate the opportunity to work with you to obtain Congressional consent for this Compact.

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The Great Lakes in Perspective
The Great Lakes are a national treasure—important to our nation and the world as both an environmental and economic asset. Our national economy depends on the Great Lakes for industrial uses, hydropower, maritime commerce, agricultural irrigation and many other uses. The Great Lakes are also a globally unique and important environmental resource.

The Great Lakes contain approximately 20% of the world's surface freshwater, and 95% of North America's. One in three Canadians and one in 10 U.S. residents depend on the Great Lakes for their water. More than 35 million U.S. residents and 8 million Canadians live, work, and recreate in, on or by the waters of the Great Lakes Basin.

The Great Lakes regional economy and, indeed, our nation's depend on the Great Lakes. For example, the Great Lakes provide water for 70 percent of U.S. steel production. The Lakes provide transportation for almost 200 million tons of international and interlake cargo—indeed, the lake carriers can tell you how much transport tonnage they lose for each inch of water lost. One-third of all the boats registered in the United States are in the Great Lakes States and boating alone supports over 250,000 jobs. Overall, our region generates nearly 30% of our nation's gross domestic product and about 60% of all U.S. manufacturing. Water is also used for hydro-power on both sides of the border. All of these different uses depend on the lakes in different ways as a source for clean, abundant fresh water.

Sustainable management and use of the Great Lakes can foster economic growth while protecting our environment. Conversely, we place our water resources, our environment and our economy at risk if we do not manage the Lakes sustainably and do not keep our lakes at healthy levels. Therefore, we must be forward-looking to put in place effective policies that address today's issues and anticipate tomorrow's challenges.

At the request of the Great Lakes Congressional delegation, in 2003 the Great Lakes Governors developed priorities for Great Lakes restoration and protection:

- Promoting the sustainable use of water resources;
- Protecting human health;
- Controlling pollution from diffuse sources;
- Reducing persistent bio-accumulative toxics;
- Stopping the introduction and spread of non-native aquatic invasive species;
- Protecting coastal wetland and wildlife habitats;
- Restoring Areas of Concern;
- Improving information collection and dissemination; and,
- Adopting practices that protect the environment along with the recreational and commercial value of the Great Lakes.

Implementation of the Compact will realize the first of these nine priorities and ensure that the Lakes are used sustainably in order to continue to provide benefits to us all. This will be a historic step in our broader efforts to protect and restore the Great Lakes.

The Compact: Key Elements
The Compact includes the following points:

- Economic development will be fostered through sustainable use and responsible management of Basin waters.

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- The States will use a consistent standard to review proposed uses of Basin water. The States will have flexibility regarding their water management programs and how to apply this standard.
- Regional goals and objectives for water conservation and efficiency will be developed, and they will be reviewed every five years. Each State will develop and implement a consistent water conservation and efficiency program for all water users that may be voluntary or mandatory.
- In general, there will be a ban on new diversions of water from the Basin with limited and strictly regulated exceptions only when rigorous standards are met.
- The collection of technical data will be strengthened, and the States will share comparable information, which will improve decision-making by the governments.
- There is a strong commitment to continued public involvement in the implementation of the Compact.

The eight Great Lakes States reached a similar, good-faith agreement with Ontario and Québec in 2005 which the Provinces are using to amend their existing programs in order to provide greater regional consistency. My testimony today will focus on the Compact, however, I would be pleased to answer any questions that you may have regarding Provincial actions.

The Need for Enhanced Protections

Over the past ten years or so, it has become increasingly evident that stronger protections are needed to promote the sustainable use of the Great Lakes. In 2000 the U.S. Congress encouraged "the Great Lakes States, in consultation with the Provinces of Ontario and Quebec, to develop and implement a mechanism that provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin," when it passed amendments to the Water Resources Development Act. This Act also recognized the Governors' authority over Great Lakes diversions.

And in response in 2001, the Great Lakes Governors and Premiers signed the Great Lakes Charter Annex. In the Annex, the Governors and Premiers renewed the commitments made in the 1985 Great Lakes Charter and provided a framework for new agreements. As a result of these actions and commitments by the Great Lakes Governors and Premiers, negotiations were begun in 2001 to develop enhanced protections for the Great Lakes—St. Lawrence River Basin.

Development and Public Participation Process

An open, transparent and nearly five-year process was used to develop the Compact in order to ensure that *everyone's* interests were represented and protected. In 2001, the Great Lakes Governors and the Premiers of Ontario and Quebec appointed senior State and Provincial officials to a Water Management Working Group (Working Group). The Working Group included staff from each Governors' and Premiers' offices as well as State and Provincial agencies responsible for water management. The Working Group also worked closely with a team of State and Provincial water law experts. Under the Governors' and Premiers' direction, the Council of Great Lakes Governors facilitated the Working Group's discussions and other aspects of the development process.

We wanted the final package to reflect the perspectives of water users and other stakeholders, as well as the general public. To that end, an Advisory Committee was created, consisting of approximately 25 regional and national organizations who would share the perspective of their

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constituencies. Members of the Advisory Committee included representatives from organizations including, for example, the Alliance of Automobile Manufacturers; American Chemistry Council; American Farm Bureau Federation; American Forest and Paper Association; Association of Metropolitan Sewerage Agencies; American Water Works Association; Consumers Energy; the Council of Great Lakes Industries; Ducks Unlimited; Great Lakes and St. Lawrence Cities Initiative; Great Lakes United; Lake Carriers Association; National Association of Manufacturers; National Wildlife Federation; The Nature Conservancy; and, the New York Power Authority. As you can see, we included a broad cross-section of water users and others.

In addition to providing input to the Working Group, the Advisory Committee members provided information regarding the Working Group's progress to members of their respective organizations. The Working Group met with them on a regular basis via face-to-face meetings and conference calls as the Compact was developed. The Working Group directly incorporated specific suggestions made by the Advisory Committee.

In addition to the Advisory Committee, the Working Group relied heavily on a Resource Group and Observers. The Resource Group included staff from governmental entities in order to provide policy and technical expertise. Resource Group members included the U.S. Congressional Great Lakes Task Force, U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, U.S. Geological Survey, the National Oceanic and Atmospheric Administration, Northeast-Midwest Institute and Great Lakes Commission. Observers included representatives from the International Joint Commission, U.S. State Department, and the Canadian Department of Foreign Affairs and International Trade.

Discussions with the federally recognized Tribes in the Basin were held at the State level followed by consultations at the regional level. Council staff met with staff representing various water users and took a tour of a steel mill as well as water treatment plants, sewage treatment plants, and nuclear power facilities to obtain a better understanding of water users' needs. This was in addition to the numerous meetings that State officials had with interested parties in each of their States and in Washington, D.C.

To solicit the input of the broader public, two drafts of the Compact were released for public comment. The first public comment period began in July of 2004, and the second public comment period began in June of 2005. Over 60 public meetings around the basin were held, and over 13,000 comments were received.

Numerous other informational meetings were held as the Compact was developed, including several briefings for Congressional staff and staff from the U.S. State Department. Five regional briefings were also held for State legislators--four hosted by the Council of State Governments and one hosted by the National Caucus of Environmental Legislators. Additional briefings took place in the individual States.

In short, every opportunity was given to people interested in Great Lakes water management to have their voice heard as the Compact was developed.

Support for the Compact

The Compact has attracted broad-based and bi-partisan support at all levels of government and among stakeholders because of the protections it provides for our Great Lakes. For example:

- **Congress**—Dozens of members of Congress have publicly expressed their support for the Compact including the bi-partisan Co-Chairs of the Congressional Great Lakes Task

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Force. Senator Levin (D-Michigan), Senator Voinovich (R-Ohio), Representative Conyers (D-Michigan), Representative Oberstar (D-Minnesota), Representative Ehlers (R-Michigan) and Representative LaTourette (R-Ohio) are leading efforts to provide Congressional consent to the Compact.

- **Canada**—the Canadian federal government has encouraged Congressional consent to the Compact. The Ontario and Québec governments are similarly supportive.
- **Governors**—the Governors of the eight Great Lakes States developed and have led efforts to implement the Compact. During the negotiation and implementation of the Compact, each State has had a partisan change in the office of Governor but all States have maintained their commitment to the negotiations and enactment of the Compact.
- **State legislators**—over 1300 State legislators voted to ratify the Compact. More than 95% of all legislators who cast a vote on the Compact approved it. And, it has been endorsed by the Midwestern Legislative Conference.
- **Mayors and local governments**—The Great Lakes and St. Lawrence Cities Initiative as well as individual elected officials, City Councils, County Boards and other local governments.
- **Tribes**—the National Congress of American Indians has adopted a resolution in support of the Compact.
- **Media** including: *Chicago Sun-Times, Indianapolis Star, Detroit Free Press, Duluth News-Tribune, Buffalo News, Cleveland Plain Dealer, Erie Times-News and the Milwaukee Journal-Sentinel.*
- **Stakeholders**—More than 150 different and diverse groups representing elected officials; agriculture; business and industry; conservationists and environmentalists; and, others.

Conclusion

The Compact will ensure that water continues to be available for future use and economic growth. It represents a once-in-a-lifetime opportunity to protect one of our nation's greatest natural resources. The Compact promises to promote sustainable use and preserve and protect the Great Lakes now and for future generations.

Thank you for the opportunity to submit this testimony. Should there be questions, I would be happy to try to answer them now, or please do not hesitate to contact me in Madison or David Naftzger, Executive Director of the Council of Great Lakes Governors at 35 E. Wacker Drive, Suite 1850, Chicago, Illinois, 60601; Phone (312) 407-0177; E-mail dnaftzger@cglg.org.

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Statement
The Honorable Richard J. Durbin
U.S. Senate Committee on the Judiciary
Hearing on the Great Lakes – St. Lawrence River Basin Water Resources Compact
July 30, 2008

Thank you, Senator Feingold and Senator Specter, for holding this hearing today.

Illinois is home to just a small piece of the Great Lakes basin – about 85 square miles. The inland waterways that link Lake Michigan to our regional river system add another 25 square miles.

Those numbers may seem relatively small, but the Lake is an important part of our state's health, vitality, and sense of identity. For Northern Illinois, Lake Michigan is a critical resource for drinking water, transportation, shipping, fishing, and recreation.

The Great Lakes are a shared national treasure. And as a shared resource, they can easily fall prey to the tragedy of the commons. If everyone is responsible for their care and management, then no one is responsible for their care and management.

That's why the Great Lakes – St. Lawrence River Basin Water Resources Compact is so important.

The Compact provides the states with a legal framework for the joint management and protection of the water resources of the Great Lakes basin. In particular, the interstate Compact places strict and regulated restrictions on any new diversions of water from the basin.

The Compact also calls for the development of regional programs for water conservation and efficiency, and takes steps to track water use.

Since 2000, the Upper Great Lakes (Lakes Superior, Michigan, and Huron) have approached their lowest water levels ever. Experts tell us under continuing global warming, summers are likely to be drier and lake levels will drop further.

That will have an immediate impact on our economy, since ships will have to lighten their payloads to navigate shallower water. These changes could also do serious harm to the lakes' food chain, killing native fish populations and making it easier for invasive species to take hold.

I applaud the states and stakeholders who have worked so hard to reach this agreement to manage and protect the water resources of the Great Lakes basin.

Now that all eight Great Lakes states have enacted the Compact, Congress needs to give its approval. I am proud to have joined my fellow Senators from the Great Lakes states in co-sponsoring the Joint Resolution that will give that approval and make the Compact law.

For the forty-two million people that call the Great Lakes basin home and rely on it for clean, safe water, the Compact represents an important step toward preserving this resource.

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Washington, DC 20003
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July 29, 2008

The Honorable Patrick Leahy, Chairman
Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Arlen Specter, Ranking Member
Senate Judiciary Committee
711 Hart Senate Office Building
Washington, DC 20510

The Honorable Russ Feingold, Chairman
Senate Constitution, Civil Rights and Property Rights Subcommittee
506 Hart Senate Office Building
Washington, DC 20510

The Honorable Sam Brownback, Ranking Member
Senate Constitution, Civil Rights and Property Rights Subcommittee
303 Hart Senate Office Building
Washington, DC 20510

Re: The Great Lakes-St. Lawrence River Basin Water Resources Compact

Dear Senators,

On behalf our members in the Great Lakes states and around the country, we thank you for holding a hearing on the Great Lakes-St. Lawrence River Basin Water Resources Compact, and we urge all members of the Senate Judiciary Committee to vote to approve the Great Lakes Compact (S.J. Res. 45).

The Great Lakes are an unparalleled national treasure. Comprising more than 90 percent of the fresh surface water in North America, the Great Lakes are one of the country's greatest natural resources. Although vast, the Great Lakes are vulnerable to the removal of water at rates faster than can be replenished naturally. Each year, rainfall and snowmelt replenish only one percent of the water in the Great Lakes; the other 99 percent of the water is non-renewable.

We currently lack assurance of the long-term supply of this vital resource. The Great Lakes Compact provides that needed assurance by establishing the first region-wide standards to govern the withdrawal and use of Great Lakes water.

The Great Lakes Compact:

- Prohibits new or increased out-of-basin diversions except under special circumstances;
- Requires all Great Lakes states to develop water conservation and efficiency programs and give public notice of large proposed new water uses; and
- Establishes uniform standards across the Great Lake states for evaluating new in-basin uses of Great Lakes water.

State legislatures in each of the eight Great Lakes states, Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin, have passed the Great Lakes Compact. Environment Illinois, Environment Michigan, Environment Ohio, PennEnvironment and Wisconsin Environment worked to

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pass the Compact in their respective states. Now Congress must approve the Compact for it to become law.

We urge the Senate Judiciary Committee to move quickly to approve the Great Lakes Compact to ensure the sustainable use of Great Lakes water and help preserve one of our nation's most cherished natural resources for future generations.

Sincerely,

Christy Leavitt
Environment America

Lindsay Clarida
Environment New York

Max Muller
Environment Illinois

Amy Gomberg
Environment Ohio

Anne Kohl
Environment Michigan

David Masur
PennEnvironment

Monique Sullivan
Environment Minnesota

Dan Kohler
Wisconsin Environment

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Opening Statement of U.S. Senator Russ Feingold
Hearing on "The Great Lakes Compact"
Senate Judiciary Committee

Welcome to today's hearing on S. J. Res. 45, a resolution approving the Great Lakes-St. Lawrence River Basin Water Resources Compact. I would like to thank Chairman Leahy for allowing me to preside over this full Committee hearing. I am pleased to be joined by Ranking Member Specter, a fellow Great Lakes Senator.

In Wisconsin, my constituents care a lot about water, both its quality and its quantity. Over the last year, Lake Superior's water levels reached record lows and Lake Michigan's levels have been on the verge of doing so. This has reminded all of us that despite the vastness of the Great Lakes, they are not an unlimited, easily replenished resource. Low water levels have a significant impact on commercial shipping, recreational boaters, coastal wetlands, fisheries, property owners, municipalities, and many other interests that rely on the Great Lakes.

By passing this Compact, Congress can join the States and the Great Lakes' numerous stakeholders in defending against one of the biggest threats to low lake levels: increased water withdrawals. Pressures on the Great Lakes will only intensify with population growth, climatic changes, and contaminated or exhausted water supplies. I strongly support putting in place management practices now to safeguard the Great Lakes against future stresses.

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I commend Governor Doyle, who will testify before us today, and his fellow Governors and their state legislatures for their hard work to get to this point. The Great Lakes Compact is the product of a long process of evolution. Over a century ago, the first treaty between Canada and the United States was put in place to jointly manage the shared resource. Then after various proposals over the decades to siphon off Great Lakes waters to other parts of the country and world, the Great Lakes states developed a regional plan and Congress approved it in 1968. Nearly twenty years later, the Great Lakes states and the provinces of Ontario and Quebec completed the Great Lakes Charter, which did not allow the states or provinces to make large diversions without the approval of all other signatories. However, this Charter is not legally binding.

In the Water Resources Development Act of 1986, Congress lent support to the Charter by prohibiting diversions outside the Great Lakes Basin unless approved by all governors of the Great Lakes states. But Canada was not legally bound, nor was the possibility of trading Great Lakes water internationally addressed. In 1998, Ontario's issuance of a permit to ship water from Lake Superior to Asia served as a wake-up call that more was needed to protect the Great Lakes. Several proposals emerged in Congress, and ultimately in 2000, Congress directed the Great Lakes states to jointly develop with the Canadian provinces a common conservation standard for making decisions about the withdrawal and use of water from the Great Lakes Basin.

The Great Lakes states have delivered on that request by ratifying the Great Lakes Compact and now it's Congress' turn. Senators Levin and Voinovich have introduced a

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joint resolution to approve the Great Lakes Compact. It enjoys bipartisan support from all 16 Great Lakes Senators – those representing Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio, Pennsylvania, and New York. A similar measure was also introduced in the House, and the President has also announced his support of the Compact.

I look forward to hearing today's testimony on the Compact and to working with my colleagues to pass it in the very near future.

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The Great Lakes Environmental Law Center

Protecting the world's greatest freshwater resource and the communities that depend upon it

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United States Senate Committee on the Judiciary

Hearing on S.J. Res. 45
A Resolution Consenting To and Approving the
Great Lakes-St. Lawrence River Basin Water Resources Compact

Wednesday, July 30, 2008

Senator Russell D. Feingold, Presiding

Interstate Water Management and the
Great Lakes-St. Lawrence River Basin Water Resources Compact

Written Testimony of Professor Noah D. Hall
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This testimony is offered in strong support of Senate Joint Resolution 45, "Expressing the consent and approval of Congress to an interstate compact regarding water resources in the Great Lakes-St. Lawrence River Basin." In this testimony, I provide: (1) an overview of managing water resources with interstate compacts in the United States; (2) background on the existing policies and laws regarding interstate Great Lakes water management; and (3) a summary and analysis of the key provisions of the Great Lakes-St. Lawrence River Basin Water Resources Compact.

I am a member of the faculty of Wayne State University Law School in Detroit, Michigan, and have written extensively on interstate water management, Great Lakes law and policy, and U.S.-Canadian transnational law. I previously served on the Advisory Committee to the Council of Great Lakes Governors Water Management Working Group that negotiated and drafted the proposed Great Lakes-St. Lawrence River Basin Water Resources Compact. I offer this testimony in a nongovernmental capacity on behalf of the Great Lakes Environmental Law Center and am not representing any other persons or entities. My curriculum vita is attached to this testimony as Appendix A.

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I. MANAGING WATER RESOURCES WITH INTERSTATE COMPACTS IN THE UNITED STATES

Interstate compacts play a significant role in water resource management in the United States. In terms of quantity, most of the available freshwater in the United States is in rivers, lakes, and aquifers that cross state boundary lines. These interstate water resources are most often (and most effectively) managed and allocated by interstate compacts. Interstate compacts are essentially contracts between the party states, subject to federal approval as provided in the U.S. Constitution.[1] When approved by the Congress and signed by the President, interstate compacts have the full force and effect of federal law.

There are over 25 interstate compacts for managing and allocating water resources in force in the United States.[2] These compacts provide the legal framework for managing and allocating some of country's the most important freshwater resources, including the Colorado River, the Rio Grande, the Arkansas River, the Susquehanna River, and the Delaware River. The compacts vary significantly in how they allocate and manage interstate waters. Some interstate compacts, especially in the west, simply divide the waters by volume between the watershed states. Other interstate compacts, especially in the east, provide for more comprehensive regulation and management of water uses.

Most major freshwater resources in the United States are shared by two or more states. Many rivers were used as the boundaries between neighboring states, usually giving the adjacent states shared rights to use of the water. In every part of the country, the major freshwater systems cross state lines. Eight states (Illinois, Indiana, Michigan, Minnesota, Ohio, New York, Pennsylvania, and Wisconsin, as well as the provinces of Ontario and Quebec) share jurisdiction and rights over the Great Lakes, which contain over ninety

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[1] *See* U.S. CONST. art. I, § 10, cl. 3

[2] *Alabama-Coosa-Tallapoosa River Basin Compact*, Pub. L. No. 105-105, 111 Stat. 2233 (1997); *Animas - La Plata Project Compact*, Pub. L. No. 90-537, §501(c), 82 Stat. 898 (1968); *Apalachicola-Chattahoochee-Flint River Basin Compact*, Pub. L. No. 105-104, 111 Stat. 2219 (1997); *Arkansas River Compact*, Pub. L. No. 81-82, 63 Stat. 145 (1949); *Arkansas River Basin Compact of 1965*, Pub. L. No. 89-789, 80 Stat. 1409 (1966); *Arkansas River Basin Compact of 1970*, Pub. L. No. 93-152, 87 Stat. 569 (1973); *Bear River Compact*, Pub. L. No. 85-348, 72 Stat. 38 (1958); *Belle Fourche River Compact*, Pub. L. No. 78-236, 58 Stat. 94 (1944); *Big Blue River Compact*, Pub. L. No. 92-308, 86 Stat. 193 (1972); *California-Nevada Interstate Compact*, Nevada Revised Statutes §538.600 (1969); *Canadian River Compact*, Pub. L. No. 82-345, 66 Stat. 74 (1952); *Colorado River Compact*, 70 *Congressional Record* 324 (1928); *Costilla Creek Compact (Amended)*, Pub. L. No. 88-198, 77 Stat. 350 (1963); *Delaware River Basin Compact*, Pub. L. No. 87-328, 75 Stat. 688 (1961); *Klamath River Basin Compact*, Pub. L. No. 85-222, 71 Stat. 497 (1957); *La Plata River Compact*, Pub. L. No. 68-346, 43 Stat. 796 (1925); *Pecos River Compact*, Pub. L. No. 81-91, 63 Stat. 159 (1949); *Red River Compact*, Pub. L. No. 96-564, 94 Stat. 3305 (1980); *Republican River Compact*, Pub. L. No. 78-60, 57 Stat. 86 (1943); *Rio Grande Compact*, Pub. L. No. 76-96, 53 Stat. 785 (1939); *Sabine River Compact*, Pub. L. No. 83-578, 68 Stat. 690 (1954), *as amended*, Pub. L. No. 87-418, 76 Stat. 34 (1962); *Snake River Compact*, Pub. L. No. 81-464, 64 Stat. 29 (1950); *South Platte River Compact*, Pub. L. No. 69-37, 44 Stat. 195 (1926); *Susquehanna River Basin Compact*, Pub. L. No. 91-575, 84 Stat. 1509 (1970); *Upper Colorado River Basin Compact*, Pub. L. No. 81-37, 63 Stat. 31 (1949); *Upper Niobrara River Compact*, Pub. L. No. 91-52, 83 Stat. 86 (1969); *Yellowstone River Compact*, Pub. L. No. 82-231, 65 Stat. 663 (1951). In addition, there are dozens of other interstate compacts that address water quantity, flood control, and water resource information.

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percent of the fresh surface water in the United States.[3] The Colorado River watershed covers seven states (California, Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as well as Mexico) and is an extremely important water supply for these western states. The largest river on the United States' east coast, the Susquehanna, is shared by New York, Pennsylvania, and Maryland. Both the Colorado River and Susquehanna River, like many other major interstate freshwater resources, are managed by a Congressionally approved interstate compact.[4]

A. Management and Allocation of Interstate Waters in the United States

There are three ways to manage and allocate interstate waters in the United States. First, the federal government, through an act of Congress, could establish standards for the use of interstate waters or even apportion specific water resources among the states. While Congress has broad power over interstate waters, it has rarely exercised that power for managing and allocating interstate waters. Congress has taken a central role in protecting interstate water quality through the Clean Water Act,[5] but has not taken a regulatory role in managing interstate water quantity.

Second, the Supreme Court of the United States has on several occasions allocated interstate waters when a dispute between states has arisen. Pursuant to Article III of the United States Constitution, the United States Supreme Court has original jurisdiction over disputes between states.[6] The Court has invoked this jurisdiction several times over the past century to resolve disputes over allocation of interstate waters.[7] In these cases, the Supreme Court has not developed a uniform approach to interstate transboundary water allocation, instead resolving individual disputes with heavy reliance on the specific facts and circumstances. This approach has been termed "equitable apportionment," which merely provides that no single state can command an entire interstate waterway to the detriment of other riparian states. The need for equity in allocating transboundary waters was best stated by Justice Holmes in the Supreme Court's 1931 decision in *New Jersey v. New York* (1931):

> A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of

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[3] GREAT LAKES COMMISSION, TOWARD A WATER RESOURCES MANAGEMENT DECISION SUPPORT SYSTEM FOR THE GREAT LAKES-ST. LAWRENCE RIVER BASIN 9 (2003).

[4] *Colorado River Compact*, 70 *Congressional Record* 324 (1928); *Upper Colorado River Basin Compact*, Pub. L. No. 81-37, 63 Stat. 31 (1949); *Susquehanna River Basin Compact*, Pub. L. No. 91-575, 84 Stat. 1509 (1970).

[5] Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 896 (1972) (codified at 33 U.S.C. §§ 1251–1376 (2000)).

[6] *See* U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.").

[7] *See, e.g.*, New Jersey v. New York, 283 U.S. 336 (1931); Wisconsin v. Illinois, 278 U.S. 367 (1929); Wyoming v. Colorado, 259 U.S. 419 (1922); Kansas v. Colorado, 206 U.S. 46 (1907).

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> lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be.[8]

While the principle of equitable apportionment seems reasonable enough in theory, its application to specific disputes is frustrating and inconsistent. Managing an interstate water resource requires technical expertise, policy development, and cooperation – none of which are characteristic of litigation and judicial rulings. The Supreme Court, to its credit, has recognized that it is not well suited to managing interstate water resources. Instead, the Supreme Court has on numerous occasions recommended the third way of managing and allocating interstate waters – through an interstate compact. In suggesting the use of interstate compacts, the Supreme Court has stated that interstate water management problems are "more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted."[9]

B. The Interstate Compact as a Legal Authority

Interstate compacts are powerful legal tools. A compact is essentially a contract between states, subject to federal approval.[10] The compact mechanism is provided in Article I, section 10, of the U.S. Constitution, which declares that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power."[11]

Many water management compacts are between only two states, though some include up to seven or eight party states (the Colorado River Compact and Great Lakes-St. Lawrence River Basin Water Resources Compact, respectively). Water management compacts are usually negotiated by governors and state agency officials, but can only be approved through state legislation. Just like a contract, a compact has only been agreed to when all party states, through their legislatures, approve the exact same compact terms. Because interstate compacts increase the power of the states at the expense of the federal government, they must also be approved by Congress and signed by the President to take effect.[12] Once effective, interstate compacts have the full force and supremacy of federal law.[13] This allows the terms of a compact to be enforced in federal court and prevents states from ignoring their compact duties.[14]

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[8] New Jersey v. New York, 283 U.S. 336, 342-43 (1931).
[9] New York v. New Jersey, 256 U.S. 296, 313 (1921).
[10] *See* Texas v. New Mexico, 482 U.S. 124, 128 (1987).
[11] U.S. CONST. art. I, § 10, cl. 3.
[12] *See* U.S. CONST. art. I, § 10, cl. 3.
[13] *See* Culyer v. Adams, 449 U.S. 433, 438 (1981) (congressional consent "transforms an interstate compact . . . into a law of the United States").
[14] *See* Texas v. New Mexico, 482 U.S. 124, 128 (1987).

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C. Overview of Types of Interstate Water Compacts

Putting aside the Great Lakes-St. Lawrence River Basin Water Resources Compact, interstate water management and allocation compacts tend to follow one of two general models – western and eastern. (There are also some interstate water compacts that confer no substantive rights and merely provide a mechanism for sharing information and conducting joint research.[15]) Interstate compacts were first used in the west in the 1920s and provide the older model. Western water compacts, such as the Colorado River Compact[16] and the Rio Grande Compact,[17] focus on allocating water rights to a shared river among the party states. These western compacts essentially divide the proverbial pie into agreed pieces. While western compacts restrict the total amount of water available to each individual state, the compacts usually do not provide any standards or even guidance for managing individual water withdrawals within the state's total allocation.

When eastern states began to develop interstate compacts for water management in the 1960s and 1970s, they took a very different approach. The two most prominent eastern water compacts are the Delaware River Basin Compact[18] and the Susquehanna River Basin Compact.[19] These eastern water compacts create centralized interstate management authorities comprised of the party states and federal government. These authorities, termed compact commissions, have broad regulatory powers for permitting and managing individual withdrawals or diversions of all waters in the respective river basins. The commissions even set regional standards for discharges of water pollution. This centralized approach has obvious benefits for uniform management of a single resource, but requires a significant loss of state autonomy.[20]

As detailed in section III of this testimony, the Great Lakes-St. Lawrence River Basin Water Resources Compact takes a new approach to the interstate water management compact. It does not allocate specific quantities of water, nor does it give its compact commission allocation powers. Instead, it requires the party states to manage their water withdrawals with common minimum standards for water conservation and sustainable use. It also prohibits most diversions of water out of the Great Lakes basin to protect the total water supply. The Great Lakes compact creates a compact commission that evaluates very large consumptive uses and the few exceptions to the general prohibition on diversions. The compact commission also conducts research, collects data, and supports the water management work of the states.

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[15] *See, e.g.*, the Great Lakes Basin Compact, Pub. L. No. 90-419, 82 Stat. 414 (1968).
[16] *Colorado River Compact*, 70 *Congressional Record* 324 (1928).
[17] *Rio Grande Compact*, Pub. L. No. 76-96, 53 Stat. 785 (1939).
[18] *Delaware River Basin Compact*, Pub. L. No. 87-328, 75 Stat. 688 (1961).
[19] *Susquehanna River Basin Compact*, Pub. L. No. 91-575, 84 Stat. 1509 (1970).
[20] For a detailed discussion of the Delaware River Basin Compact and Susquehanna River Basin Compact, see Joseph W. Dellapenna, *Interstate Struggles Over Rivers: The Southeastern States and the Struggle Over the 'Hooch'*, 12 N.Y.U. ENVTL. L. J. 828, 837–50 (2005).

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This new federalist model for creating common state environmental standards to protect interstate natural resources has been termed "cooperative horizontal federalism."[21] Cooperative horizontal federalism is an approach in which states jointly develop common minimum legal standards (substantive and/or procedural) to manage a shared resource, but leave the individual states with the flexibility and autonomy to administer those standards under state law. In the context of Great Lakes water management, cooperative horizontal federalism provides a mechanism for the states to craft regional minimum standards to govern water withdrawals, while allowing states to develop individual programs tailored to their specific needs. The discretion given to states is not absolute; they are subject to programmatic review and enforcement by their peers. Under this approach, the regulatory standards, programmatic obligations, and enforcement mechanisms come from the states' obligations to each other.

II. GREAT LAKES WATER MANAGEMENT LAWS AND POLICIES

The Great Lakes-St. Lawrence River Basin Water Resources Compact builds on over a century of agreements and legal regimes that now constitute the law of the Great Lakes. This section surveys how the various international treaties, Supreme Court decisions, interstate compacts, handshake agreements, and federal and state statutes have set the stage for the Great Lakes-St. Lawrence River Basin Water Resources Compact.

A. Background on the Great Lakes and Great Lakes Region

To best understand Great Lakes water management law and policies, it is important to acknowledge the immense amount of freshwater in the Great Lakes system relative to regional demand and the geographic scope of the Great Lakes as it relates to political boundaries and jurisdictions. The Great Lakes are the world's largest surface freshwater system, containing ninety-five percent of the fresh surface water in the United States and twenty percent of the world's supply.[22] The five Great Lakes (Lake Superior, Lake Michigan, Lake Huron, Lake Erie, and Lake Ontario, along with the St. Lawrence River and connecting channels) contain about 5,440 cubic miles of fresh surface water, with another 1,000 cubic miles of stored ground water in the basin.[23] About 40 million Americans and Canadians rely on Great Lakes basin water for their drinking supply.[24] Simply put, more fresh water is at stake in the management of the Great Lakes than any other single freshwater resource in the world.[25]

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[21] *See* Noah D. Hall, *Toward A New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 COLORADO L. REV. 405 (2006).
[22] *See* GREAT LAKES COMMISSION, TOWARD A WATER RESOURCES MANAGEMENT DECISION SUPPORT SYSTEM FOR THE GREAT LAKES-ST. LAWRENCE RIVER BASIN 9 (2003).
[23] N.G. GRANNEMANN ET AL., THE IMPORTANCE OF GROUND WATER IN THE GREAT LAKES REGION 1 (U.S. Geological Survey Water Resources Investigations Report 00-4008 (2000)).
[24] INTERNATIONAL JOINT COMMISSION, PROTECTION OF THE WATERS OF THE GREAT LAKES: FINAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES 6 (2000), *available at* http://www.ijc.org/php/publications/html/finalreport.html.
[25] *See id.*

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The Great Lakes system covers eight states and two provinces within the United States and Canada: Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio, Pennsylvania, New York, Ontario, and Quebec. Hundreds of tribes and First Nations and thousands of local governments and municipalities also share legal responsibilities. Management of Great Lakes water is necessarily an exercise in cooperation among multiple jurisdictions and levels of government, with numerous and potentially overlapping legal regimes.

B. The Boundary Waters Treaty of 1909: United States and Canada

A summary of the existing agreements, policies, and laws regarding Great Lakes water management should begin with the Boundary Water Treaty of 1909 between the United States and Canada.[26] It has been in force for nearly a century and as an international treaty it operates as "the Supreme Law of the Land" through the Supremacy Clause of the U.S. Constitution.[27] The Boundary Waters Treaty provides for joint management and cooperation between the United States and Canada for the two countries' shared boundary waters. However, an initial limitation of the Boundary Waters Treaty is evident from the scope of its coverage. "Boundary waters" are defined as:

> the waters from main shore to main shore of the lakes and rivers and connecting waterways . . . along which the international boundary between the United States and . . . Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.[28]

While four of the five Great Lakes (Superior, Huron, Erie, and Ontario) meet the definition of "boundary waters," Lake Michigan sits entirely within the United States' borders and is thus not considered a "boundary water" under the terms of the Boundary Waters Treaty.[29] Further, the hundreds of tributary rivers and streams, as well as tributary ground water, upon which the boundary Great Lakes depend are also excluded from coverage under the Boundary Waters Treaty.[30]

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[26] Boundary Waters Treaty, Jan. 11, 1909, United States-Great Britain (for Canada), 36 Stat. 2448.

[27] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

[28] Boundary Waters Treaty, Preliminary Article, 36 Stat. at 2448–49. Of course, the Great Lakes are not the only boundary waters between the United States and Canada, nor have the Great Lakes been the only source of disputes under the Boundary Waters Treaty.

[29] While Lake Michigan is not subject to most of the treaty terms because it is not a boundary water, the Boundary Waters Treaty does extend its guarantees to the mutual right of free navigation to the waters of Lake Michigan. *See* Boundary Waters Treaty, *supra* note 9, art. I, 36 Stat. at 2449. The express extension of the Article I protections for navigation to Lake Michigan makes the exclusion of Lake Michigan from the rest of the Boundary Waters Treaty provisions more strikingly evident.

[30] Boundary Waters Treaty, art. II, 36 Stat. at 2449.

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Beyond the limited scope of coverage, the standard for protection provided by the Boundary Waters Treaty is another limitation. The respective parties may not use or divert boundary waters "affecting the natural level or flow of boundary waters on the other side of the [border]line" without the authority of the International Joint Commission,[31] an adjudicative body with equal United States and Canadian representation.[32] The most significant shortcoming of this standard relates directly to the size and scale of the Great Lakes. With their enormous volumes, it would take a massive diversion to have any measurable effect on the levels or flow of the Great Lakes.[33] The vast majority of the water uses and diversions from the boundary Great Lakes have no measurable affect on Great Lakes levels and flows, at least individually. The lack of individual effects does not mean that the withdrawals and diversions have no cumulative effect, but this concern has never led to any formal allegations of Boundary Waters Treaty violations. Ironically, individual withdrawals and diversions from tributary rivers and streams often have a measurable affect on these waters, but these waters are not protected under this provision of the Boundary Waters Treaty.

Perhaps the most significant contribution of the Boundary Waters Treaty is the International Joint Commission, which is often commended for its objectivity and leadership on environmental issues. In recent decades, the International Joint Commission has played a critically important role in studying potential threats to the waters of the Great Lakes and informing both the public and decision makers in the United States and Canada. However, the limited scope of the Boundary Waters Treaty necessitates additional protections and management programs for Great Lakes water resources on both sides of the international border. Canada has taken that step, enacting new bans on all water diversions and comprehensive water management programs, some as direct applications of the Boundary Waters Treaty.[34] Canada has also strongly supported the Great Lakes-St. Lawrence River Basin Water Resources Compact because it would provide improved protection and management of this shared international resource.

C. *Wisconsin v. Illinois*: The Great Lakes in the Supreme Court

Despite the abundant supply of water in the Great Lakes, the region has not been immune from interstate disputes over diversions. As discussed in section I, the United States Supreme Court has original jurisdiction over litigation between states. A brief summary of the Chicago diversion litigation (the series of *Wisconsin v. Illinois* cases[35])

[31] Boundary Waters Treaty, art. III, 36 Stat. at 2449–50.
[32] Boundary Waters Treaty, art. VII, 36 Stat. at 2451.
[33] The Chicago diversion at its maximum (and subsequently prohibited) level of 8500 cubic feet per second (cfs) was found to have lowered water levels in Lakes Michigan and Huron by 6 inches. Wisconsin v. Illinois, 278 U.S. 367, 407 (1929).
[34] *See* International Boundary Waters Treaty Act, R.S.C., ch. I17 (1985), *amended by* 2001 S.C. ch. 40 (Can.).
[35] Wisconsin v. Illinois, 449 U.S. 48 (1980); Wisconsin v. Illinois, 388 U.S. 426 (1967); Wisconsin v. Illinois, 289 U.S. 395 (1933); Wisconsin v. Illinois, 281 U.S. 696 (1930); Wisconsin v. Illinois, 281 U.S. 179 (1930); Wisconsin v. Illinois, 278 U.S. 367 (1929).

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demonstrates how the Supreme Court has recognized the unique challenges and interests in Great Lakes water management.

In the early 1880s, Chicago was booming and becoming one of the nation's largest cities when an outbreak of chronic water-borne illnesses threatened the health of residents. The problem, simply put, was that Chicago was disposing of its sewage into Lake Michigan (via the Chicago River), while taking its drinking water from the same source. The solution was a bit more complicated. "In an epic environmentally unsound public works project,"[36] Chicago built a canal to reverse the flow of the Chicago River, changing its output from Lake Michigan to the Illinois River, and ultimately to the Mississippi River and Gulf of Mexico. The project was bold, controversial, and ultimately successful in both protecting public health and linking the Great Lakes with the Mississippi River.[37] Missouri, now downstream from Chicago's sewage, brought an interstate nuisance action in the Supreme Court, unsuccessfully challenging Illinois's discharge of sewage into the Mississippi River system.[38]

With Missouri's challenge overcome and Chicago's population (and sewage) increasing, the city increased the diversions from Lake Michigan from 2541 cubic feet per second (cfs) in 1900 up to 8500 cfs by 1924.[39] That year, Wisconsin, Michigan, and New York (later joined by almost every other Great Lakes state) brought suit in the Supreme Court against Illinois. The complainant states alleged that the Chicago diversion had lowered levels in Lake Michigan, as well as Lakes Huron, Erie, and Ontario, by more than 6 inches, harming navigation and causing serious injury to the complainant states' citizens and property.[40] Illinois's defense was premised on the necessity and federal approval of the diversion, as well as a denial that the diversion caused any actual injury.[41]

Former Justice and Secretary of State Charles Evan Hughes was appointed by the Supreme Court to serve as special master.[42] His report found that Chicago's diversion lowered the levels of Lakes Michigan and Huron by 6 inches and Lakes Erie and Ontario by 5 inches,[43] causing damage "to navigation and commercial interests, to structures, to the convenience of summer resorts, to fishing and hunting grounds, to public parks and other enterprises, and to riparian property generally."[44] The Court adopted the special master's report, concluding that the reduced lake levels caused the complainant states and

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[36] A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated and Restated*, 56 U. COLO. L. REV. 381, 392 (1985).
[37] *See* Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717, 718–32 (2004).
[38] *See* Missouri v. Illinois, 200 U.S. 496 (1906); Missouri v. Illinois, 180 U.S. 208 (1901).
[39] *See Wisconsin v. Illinois*, 278 U.S. at 417; Sanitary Dist. of Chi. v. United States, 266 U.S. 405, 413 (1925).
[40] *See Wisconsin v. Illinois*, 278 U.S. at 399–400.
[41] *See Wisconsin v. Illinois*, 278 U.S. at 401.
[42] *See Wisconsin v. Illinois*, 278 U.S. at 399. Hughes was originally appointed to the Supreme Court in 1910, but left the Court in 1916 for an unsuccessful run for President. From 1921 to 1925, Hughes served as Secretary of State under President Warren G. Harding.
[43] *See Wisconsin v. Illinois*, 278 U.S. at 407.
[44] *See Wisconsin v. Illinois*, 278 U.S. at 408.

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their citizens and property owners "great losses."[45] The Court also rejected Illinois's defense that the diversion was authorized by Congress, concluding that the federal permit was merely a response to the public health threat of the sewage and not a federal decision regarding management of the navigable waters of the Great Lakes.[46]

While generally supporting the claims of the complainant states, the Court recognized the public health implications and economic costs that would come with immediately halting the entire Chicago diversion.[47] The Court thus referred the matter back to the special master for determination of the proper relief.[48] The master's report recommended a phased reduction in the Chicago diversion, allowing the city time to build adequate sewage treatment. The Court adopted the master's recommendations and by 1939 the allowable diversion was limited to 1500 cfs (plus domestic pumping).[49] Subsequent litigation in the Supreme Court continued over several decades regarding Illinois's compliance with the diversion reduction schedule and the amount of water allowed for domestic pumping, with the ultimate result being that the total allowable diversion was increased to 3200 cfs, the level at which it is now capped.[50]

It is notable that the Supreme Court's opinions in the Chicago diversion dispute make only minor references to the Court's previous (primarily western) equitable apportionment cases. The Court's equitable apportionment doctrine began to evolve in the prior cases *Kansas v. Colorado*[51] and *Wyoming v. Colorado*,[52] yet the only references to these decisions were in a string citation regarding the Supreme Court's jurisdiction and a comment regarding the possibility that Congress could take action on the matter.[53] Further, there is no discussion of the various water use doctrines in the relevant states. Nor does the Court establish any rule of law for allocating the waters of the Great Lakes among the states of region. These elements are typically central to the Supreme Court's handling of western equitable apportionment cases.[54]

The Supreme Court's lack of reliance on its previous equitable apportionment cases may have been intentional. Perhaps the Court recognized that Great Lakes water management was less an issue of apportionment of water rights and more an issue of defining the bounds of the states' shared reasonable use duties. While the relatively short opinions do not advance this proposition directly, it is worth noting that the primary Chicago diversion opinion was authored by Chief Justice William Howard Taft, the former

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[45] *See Wisconsin v. Illinois*, 278 U.S. at 409.
[46] *See Wisconsin v. Illinois*, 278 U.S. at 415-18.
[47] *See Wisconsin v. Illinois*, 278 U.S. at 420-21.
[48] *See Wisconsin v. Illinois*, 278 U.S. at 421.
[49] *See* Wisconsin v. Illinois, 281 U.S. 179, 198, 201 (1930); *see also* Wisconsin v. Illinois, 281 U.S. 696, 697 (1930).
[50] *See* Wisconsin v. Illinois, 449 U.S. 48 (1980); Wisconsin v. Illinois, 388 U.S. 426, 427 (1967); Wisconsin v. Illinois, 289 U.S. 395 (1933).
[51] 206 U.S. 46 (1907).
[52] 259 U.S. 419 (1922).
[53] *See* Wisconsin v. Illinois, 281 U.S. at 197–98; Wisconsin v. Illinois, 278 U.S. 367, 409 (1929).
[54] *See generally* Robert H. Abrams, *Interstate Water Allocation: A Contemporary Primer for Eastern States*, 25 U. ARK. LITTLE ROCK L. REV. 155 (2002) and A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated and Restated*, 56 U. COLO. L. REV. 381 (1985).

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President whose administration had negotiated the Boundary Waters Treaty of 1909 between the United States and Canada. Taft was an Ohioan, and may have instinctively appreciated both the abundance of Great Lakes water that made allocation unnecessary and the shared importance of the resource among two countries and eight states that made protection of all of its values (navigation, drinking supply, fishing, recreation, etc.) critical.

Speculation about the Court's motivations aside, the Chicago diversion litigation leaves two key legacies in shaping the law of the lakes. First, the Chicago diversion, authorized at 3200 cfs, remains the largest diversion of Great Lakes water out of the basin.[55] Second, while the Court's decisions stop short of an absolute prohibition on diversions, they demonstrate a general preference for protecting the demonstrated interests of other states and in preserving the integrity of the Great Lakes system. Both of these legacies are incorporated into the Great Lakes-St. Lawrence River Basin Water Resources Compact.

D. The First Great Lakes Basin Compact: Coordination and Cooperation

The first Great Lakes Basin Compact[56] (not to be confused with the Great Lakes-St. Lawrence River Basin Water Resources Compact that is currently being considered) created an institution for interstate cooperation and coordination but does not directly shape the law of the lakes or have any substantive impact on water rights in the basin.[57] The Great Lakes Basin Compact was approved by Congress in 1968, although it was negotiated by the Great Lakes states and provinces two decades earlier. The Great Lakes Basin Compact includes each of the eight Great Lakes states as members and creates a Great Lakes Commission comprised of representatives from the member states.[58]

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[55] INTERNATIONAL JOINT COMMISSION, PROTECTION OF THE WATERS OF THE GREAT LAKES: FINAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES 13 (2000), *available at* http://www.ijc.org/php/publications/html/finalreport.html.

[56] Pub. L. No. 90-419, 82 Stat. 414 (1968) [hereinafter Great Lakes Basin Compact]. Joseph W. Dellapenna, *Interstate Struggles Over Rivers: The Southeastern States and the Struggle Over the 'Hooch'*, 12 N.Y.U. ENVTL. L. J. 828, 837–50 (2005).

[57] Prof. Joseph W. Dellapenna has characterized the Great Lakes Basin Compact as typical of the "we'll keep in touch" approach used in many interstate water compacts in the eastern U.S. *See* Joseph W. Dellapenna, *Interstate Struggles Over Rivers: The Southeastern States and the Struggle Over the 'Hooch'*, 12 N.Y.U. ENVTL. L. J. 828, 838-39 (2005).

[58] *See* Great Lakes Basin Compact, art. II, IV, 82 Stat. 414–16. As negotiated by the states, the Great Lakes Basin Compact included a provision to allow the provinces of Ontario and Quebec to join as parties. *See* Great Lakes Basin Compact, art. II.B, 82 Stat. at 414. However, Congress explicitly refused to consent to that provision. *See* Great Lakes Basic Compact, art. IX, 82 Stat. at 419. Nonetheless, the Canadian provinces of Ontario and Quebec have recently been added as associate members.

VerDate Aug 31 2005 12:51 Oct 02, 2008 Jkt 044332 PO 00000 Frm 00059 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44332.TXT SJUD1 PsN: CMORC

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E. The Great Lakes Charter: A Handshake Agreement

While the Great Lakes Basin Compact is currently the only congressionally-approved interstate compact, it is not the only interstate agreement regarding the management of Great Lakes water. In 1985, the Great Lakes states and provinces signed the Great Lakes Charter.[59] While only a good faith agreement, the Great Lakes Charter contains individual commitments and a cooperative process for Great Lakes water management. However, handshake agreements such as the Great Lakes Charter are not sanctioned by the Constitution,[60] and thus have limited legal value.

The Great Lakes Charter has three key components integrated throughout the agreement: (1) the commitment of the states and provinces to manage and regulate new or increased consumptive uses or diversions of Great Lakes water greater than 2,000,000 gallons per day ("gpd");[61] (2) the prior notice and consultation procedure with all of the states and provinces for new or increased consumptive uses or diversions of Great Lakes water greater than 5,000,000 gpd;[62] and (3) the commitment of the states and provinces to gather and report comparable information on all new or increased withdrawals of Great Lakes water greater than 100,000 gpd.[63]

The Great Lakes Charter's shortcomings are not in its terms, but in its status. If the Great Lakes Charter's terms were incorporated into a binding and enforceable compact, it would have been an important first step toward comprehensive water management of the Great Lakes. Without the legal authority of a binding compact, the Great Lakes Charter's terms have had little impact. The Great Lakes Charter, while cooperative in nature, did not utilize the constitutional compact process, and thus did not obtain the legal status necessary to bring about effective interstate water management. However, many of the Great Lakes Charter's components have been incorporated into the Great Lakes-St. Lawrence River Basin Water Resources Compact now under consideration.

F. State Common Law and Statutory Law: An Overview

While a comprehensive discussion of state-by-state water law in the Great Lakes region is beyond the scope of this testimony, it is important to provide a brief summary of both the common law rules and varying statutory schemes, especially in light of the commitments made by the states in the Great Lakes Charter. The summary shows both the common legal principles that can serve as a foundation for a regional policy.

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[59] The Great Lakes Charter, Feb. 11, 1985, *reprinted in* Great Lakes Governors' Task Force, Council of Great Lakes Governors, Final Report and Recommendation on Water Diversion and Great Lakes Institutions (1985) at app. III, http://www.cglg.org/pub/charter/index.html (last visited Nov. 20, 2005) [hereinafter Great Lakes Charter].

[60] U.S. CONST. art. I, § 10, cl. 3. Unlike a compact, which is approved by Congress pursuant to Article I of the Constitution, the Charter lacks congressional approval and thus has no force of law.

[61] *See* Great Lakes Charter, Progress Toward Implementation (4).

[62] *See* Great Lakes Charter, Consultation Procedures.

[63] *See* Great Lakes Charter, Progress Toward Implementation (3), (4).

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All of the Great Lakes states follow the common law of riparian rights for surface water use.[64] Riparian law is premised on the principle that all riparians have correlative rights in shared water bodies.[65] Conflicts regarding these rights are adjudicated according to the concept of reasonable use,[66] as opposed to capture or prior appropriation (as has been traditional in the western states). However, the historical abundance of surface water in the Great Lakes region has produced relatively few conflicts and controversies over surface water allocation and use. As a result, the common law of riparian water rights has produced little guidance to concrete controversies. This legal uncertainty creates at least a theoretical restraint on water users as they make decisions to invest in water-dependent projects.

The common law rules regarding ground water rights in the Great Lakes states are generally less progressive and less uniform than for surface water rights. Historically, ground water and surface water in the Great Lakes states were subject to different rights and rules for allocation.[67] Further, while all of the Great Lakes states generally follow some form of traditional riparian rules for surface waters, the states differ in their common law ground water rules, drawing on doctrines as varied as a modified rule of capture to a reasonable use standard.[68]

In every Great Lakes state, the common law rules for water use and allocation have been altered, to varying degrees, by statute. While a few states had statutory authority regarding water use before the Great Lakes Charter in 1985, the commitments made in the Great Lakes Charter have prompted most states to take some steps toward regulating Great Lakes water withdrawals. Minnesota has the most comprehensive water management and regulatory system in the region, requiring permits for use of any public waters (ground or surface) within the state.[69] Other states have far less comprehensive

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[64] The term "riparian" generally refers to rights associated with rivers, while the term "littoral" refers to rights associated with lakes. Substantively, "the operative legal rules are virtually identical and go by the general name of riparianism." JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 21 (3d ed. 2000). The Great Lakes system contains both lakes and rivers, and in this article, the term "riparian" refers to both sets of rights.

[65] *See* State v. Zawistowski, 290 N.W.2d 303, 309 (Wis. 1980).

[66] *See* State v. Zawistowski, 290 N.W.2d 303, 309 (Wis. 1980) ("The common law rights of riparian owners to the use of water is limited by the reasonable use doctrine. '[E]very . . . right which a riparian owner acquires, as such, to the waters of the stream flowing through or by his land, is restricted always to that which is a . . . reasonable use, and these terms are to be measured and determined by the extent and capacity of the stream, the uses to which it has been put, and the rights that other riparian owners on the same stream also have.'" (quoting Alfelbacker v. State, 167 N.W. 244, 245 (Wis. 1918))).

[67] *See* JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 344 (3d ed. 2000) ("While the dichotomy between the legal regimes applicable to groundwater and surface water is breaking down, some degree of separation continues to be the rule in a majority of American states.")

[68] *Compare* Wiggins v. Brazil Coal and Clay Corp., 452 N.E.2d 958, 964 (Ind. 1983) (establishing a modified rule of capture for ground water use in Indiana: "Ground water is part of the land in which it is present and belongs to the owner of that land. It may be put to use to the fullest extent to further enjoyment of the land, however this right does not extend to causing injury gratuitously or maliciously to nearby lands and their owners.") *with* Smith v. Summit County, 721 N.E.2d 482, 485–86 (Ohio Ct. App. 1998) (adopting the Restatement (Second) of Torts "reasonable use" approach for ground water use in Ohio).

[69] *See* MINN. STAT. § 103G.271 (2004).

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regulatory authority.[70] Michigan, which is almost entirely within the Great Lakes basin, has just passed a comprehensive and innovative new statute, in part to comply with the requirements of the Great Lakes-St. Lawrence River Basin Water Resources Compact.[71] Still, such individual state efforts do not protect the entire resource from abuse by one jurisdiction. The Great Lakes-St. Lawrence River Basin Water Resources Compact would achieve more comprehensive protection that builds upon (but does not undermine) individual state efforts.

G. 1986 Water Resources Development Act: The Diversion Veto

Congress provided strong statutory authority for Great Lakes water management in 1986, enacting section 1109 of the Water Resources Development Act, typically referred to as 1986 WRDA.[72] The statute provides:

> No water shall be diverted or exported from any portion of the Great Lakes within the United States, or from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion or export is approved by the Governor of each of the Great Lake [sic] States.[73]

Thus, any of the Great Lakes governors can veto a proposed diversion of Great Lakes water out of the basin. The statute not only requires the unanimous approval of the governors for a proposed diversion, but further requires unanimous approval of the governors before any federal agency can even study the feasibility of a Great Lakes diversion.[74] While 1986 WRDA is remarkable as a clear statement of Congress' intent to protect the Great Lakes through management,[75] it suffers from several limitations.

1986 WRDA contains no standards to guide the governors in deciding to approve or deny a proposed diversion or diversion study. Nor does it provide any judicial remedy to challenge a governor's decision, even by another Great Lakes state. From a citizens' perspective, 1986 WRDA is fatally limited by its lack of a private right of action to enforce compliance.[76] These omissions may be explained by understanding the threat that 1986 WRDA was intended to address. At the time, the Great Lakes states shared a common concern about the threat of proposed water diversions to other parts of the

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[70] *See* IND. CODE §§ 14-25-1-1 to -13-9 (2004).
[71] *See* MICH. COMP. LAWS § 324.32701, *et seq.* (2008)
[72] Pub. L. No. 99-662, § 1109, 100 Stat. 4082, 4230 (codified as amended at 42 U.S.C. § 1962d-20 (2000)).
[73] 42 U.S.C. § 1962d-20(d) (2000). This section only applies to new diversions; diversions authorized before 1986 are not covered by the veto. *Id.* § 1962d-20(f).
[74] *Id.* § 1962d-20(e).
[75] 1986 WRDA was enacted only a few years after the Supreme Court's decision in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), which limited a state's ability to restrict export of ground water under the dormant commerce clause. As federal legislation authorizing the states to restrict diversions of water, 1986 WRDA creates a shield to a dormant commerce clause challenge.
[76] *See* Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of Am., Inc., 203 F.Supp.2d 853 (W.D. Mich. 2002).

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country. The federal statute was thus meant to create a barrier to water diversions that would harm the region as a whole, as 1986 WRDA provides clear federal authority for preventing Great Lakes diversions.[77]

In 2000, Congress encouraged the states to be more proactive and comprehensive in how they use their authority when it amended 1986 WRDA to include the following provision:

> [T]o encourage the Great Lakes States, in consultation with the Provinces of Ontario and Quebec, to develop and implement a mechanism that provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin.[78]

The Great Lakes-St. Lawrence River Basin Water Resources Compact is a direct result of this Congressional directive.

H. Annex 2001: Setting the Table for a New Great Lakes Compact

To begin the process encouraged by Congress in 2000, the region's governors and premiers signed an Annex to the Great Lakes Charter Agreement in 2001.[79] Popularly referred to as "Annex 2001," it reaffirmed the commitments in the Great Lakes Charter and contained a new commitment to:

> [F]urther implementing the principles of the [Great Lakes] Charter by developing an enhanced water management system that is simple, durable, efficient, retains and respects authority within the [Great Lakes] Basin, and, most importantly, protects, conserves, restores, and improves the Waters and Water-Dependent Natural Resources of the Great Lakes Basin.
>
> . . . [I]n order to adequately protect the water resources of the Great Lakes and the Great Lakes ecosystem, the Governors and Premiers commit to develop and implement a new common, resource-based conservation standard and apply it to new water withdrawal proposals from the Waters of the Great Lakes Basin. The standard will also address proposed increases to existing water withdrawals and existing withdrawal capacity from the Waters of the Great Lakes Basin.[80]

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[77] 42 U.S.C. § 1962d-20(d) (2000).
[78] *See* Water Resources Development Act of 2000, Pub. L. No. 106-541, § 504, 114 Stat. 2572, 2644–45 (codified as amended at 42 U.S.C. § 1962d-20(b)(2) (2000)).
[79] Annex to the Great Lakes Charter, June 18, 2001, http://www.cglg.org/projects/water/docs/GreatLakesCharterAnnex.pdf [hereinafter Annex 2001].
[80] Annex 2001 at 1.

VerDate Aug 31 2005 12:51 Oct 02, 2008 Jkt 044332 PO 00000 Frm 00063 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44332.TXT SJUD1 PsN: CMORC

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To achieve these lofty commitments, Annex 2001 provides a number of directives. The first is to develop "Basin-wide binding agreement(s), such as an interstate compact" to implement Annex 2001.[81] Second, is a commitment to a public process and development of technical information to guide the compact process.[82] Third, Annex 2001 proposes several principles to guide the establishment of the new standards for reviewing water withdrawal proposals.[83] These standards have been incorporated into the Great Lakes-St. Lawrence River Basin Water Resources Compact.

To implement the Annex 2001 directives, the governors and premiers (working through the Council of Great Lakes Governors) established a Water Management Working Group and Advisory Committee, comprised of state officials and representatives of various water user sectors, local and federal governments, and conservation organizations.[84] The Water Management Working Group, chaired by Ohio Department of Natural Resources Director Dr. Sam Speck, released a first draft of the proposed agreements on July 19, 2004.[85] The proposal received significant attention during a ninety-day public comment period, with over thirty public meetings and hearings throughout the region and over ten thousand written comments. Many of the comments demonstrated an opposition to diversions and concerns regarding the balance of state and regional control of Great Lakes water.[86] Following the initial public comment period, the Water Management Working Group continued negotiating and drafting the proposed agreements, resolving numerous interstate and interprovincial issues as well as addressing concerns raised by the public and various stakeholders. The result of these negotiations, influenced by the Advisory Committee and public comment process, is the Great Lakes-St. Lawrence River Basin Water Resources Compact and companion Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement.

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[81] Annex 2001 at 2.
[82] Annex 2001 at 2-3.
[83] Annex 2001 at 2.
[84] *See* Council of Great Lakes Governors, "Great Lakes-St. Lawrence River Basin Water Resources Compact Project Background, Organization and Road to Development," http://www.cglg.org/projects/water/CompactEducation/Project_Background_Organization_and_Road_to_Development.pdf.
[85] For a summary of the first draft of the proposed Great Lakes Basin Water Resources Compact and Great Lakes Basin Sustainable Water Resources Agreement released in 2004, *see* Noah D. Hall, *Great Lakes Governors Propose Historic Water Resources Compact*, 36 TRENDS, A.B.A. SEC. OF ENV'T, ENERGY, & NAT. RESOURCES NEWSL., No. 2 (2004).
[86] *See* Council of Great Lakes Governors, "Great Lakes-St. Lawrence River Basin Water Resources Compact Project Background, Organization and Road to Development," http://www.cglg.org/projects/water/CompactEducation/Project_Background_Organization_and_Road_to_Development.pdf.

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III. GREAT LAKES-ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT: SUMMARY AND ANALYSIS OF KEY PROVISIONS

This section summarizes and analyzes the key provisions of the Great Lakes-St. Lawrence River Basin Water Resources Compact (hereinafter "Great Lakes Compact")[87] and companion Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement (hereinafter "Great Lakes Agreement").[88] The Great Lakes Agreement is a non-binding policy between the American states and the Canadian provinces, implemented in Canada by the provinces and in the United States through the Great Lakes Compact. The Great Lakes Compact is a binding agreement between the eight American states that have jurisdiction over the Great Lakes. Under the Great Lakes Compact, the world's largest freshwater resource would be protected and managed pursuant to minimum standards administered primarily under the authority of individual states. The Great Lakes Compact puts riparian water use rules and environmental protection standards into a proactive public law regime. The standards represent numerous advances in the development of water use law, including uniform treatment for ground and surface water withdrawals, water conservation, return flow, and prevention of environmental impacts.

This section's analysis of the Great Lakes Compact and Great Lakes Agreement is organized into three parts. Part A begins with the substantive standards for new water withdrawals under the Great Lakes Compact. The standards, anchored in common law riparian principles and incorporating advances in the public law of water management, are the foundation of a sustainable water use policy. Part B of the analysis is the management regime in which the standards will be applied, utilizing both state implementation and regional cooperation and enforcement. Part C of the analysis focuses on the companion agreement, which provides for sub-treaty cooperation between the states and Canadian provinces.

A. The Compact's Decision Making Standard: An Evolution of Riparian Law

At the core of the Great Lakes Compact is the common standards (referred to as the "decision making standard"[89]) for new or increased water withdrawals of Great Lakes basin water. The applicability of these standards is not limited to water taken directly from one of the Great Lakes. Rather, the Great Lakes Compact broadly defines the waters of the Great Lakes to include all tributary surface and ground waters.[90] Just this initial recognition of connected ground water and surface water as a single resource to be

[87] Great Lakes-St. Lawrence River Basin Water Resources Compact, Dec. 13, 2005, text incorporated into S.J. Res 45[hereinafter Great Lakes Compact].
[88] Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement, Dec. 13, 2005, http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf [hereinafter Great Lakes Agreement].
[89] Great Lakes Compact § 4.11.
[90] Great Lakes Compact § 1.2 (defining "Waters of the Basin" or "Basin Water").

VerDate Aug 31 2005 12:51 Oct 02, 2008 Jkt 044332 PO 00000 Frm 00065 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44332.TXT SJUD1 PsN: CMORC

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managed uniformly is a long overdue advancement in water law. Addressing both ground and surface water is also critical to the eventual success of any Great Lakes water policy, since ground water comprises over fifteen percent of the total water supply in the Great Lakes basin.[91]

While the decision making standard applies broadly to all waters, it only applies to new or increased withdrawals of water.[92] This follows the express scope of Annex 2001. Existing uses are not grandfathered or protected by the compact; individual jurisdictions are simply free to regulate (or not regulate) existing uses as they see fit. While existing withdrawals are not regulated under the Great Lakes Compact, states are required to implement "a voluntary or mandatory" water conservation program with state-specific goals and objectives for all water users, including existing users.[93]

The decision making standard contains the following criteria for new or increased water withdrawals:

1) All Water Withdrawn shall be returned, either naturally or after use, to the Source Watershed less an allowance for Consumptive Use;
2) The Withdrawal . . . will be implemented so as to ensure that [it] will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources [of the Great Lakes Basin] and the applicable Source Watershed;
3) The Withdrawal . . . will be implemented so as to incorporate Environmentally Sound and Economically Feasible Water Conservation Measures;
4) The Withdrawal . . . will be implemented so as to ensure that it is in compliance with all applicable municipal, State and federal laws as well as regional interstate and international agreements, including the Boundary Waters Treaty of 1909;
5) The proposed use is reasonable, based upon a consideration of the following factors:
    a. Whether the proposed Withdrawal . . . is planned in a fashion that provides for efficient use of the water, and will avoid or minimize the waste of Water;
    b. If the Proposal is for an increased Withdrawal . . ., whether efficient use is made of existing supplies;
    c. The balance between economic development, social development and environmental protection of the proposed Withdrawal and use and other existing or planned withdrawals and water uses sharing the water source;

[91] N.G. GRANNEMANN ET AL., THE IMPORTANCE OF GROUND WATER IN THE GREAT LAKES REGION 1 (U.S. Geological Survey Water Resources Investigations Report 00-4008 (2000)).
[92] Great Lakes Compact § 4.10(1). The Proposed Compact does require registration and reporting for all withdrawals (existing and new or increased) over 100,000 gpd, averaged over any thirty-day period. *See* Great Lakes Compact § 4.10(3). This may facilitate management of existing water withdrawals in the future.
[93] Great Lakes Compact § 4.12(2), (5).

VerDate Aug 31 2005 12:51 Oct 02, 2008 Jkt 044332 PO 00000 Frm 00066 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44332.TXT SJUD1 PsN: CMORC

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d. The supply potential of the water source, considering quantity, quality, and reliability and safe yield of hydrologically interconnected water sources;
e. The probable degree and duration of any adverse impacts caused or expected to be caused by the proposed Withdrawal and use under foreseeable conditions, to other lawful consumptive or non-consumptive uses of water or to the quantity or quality of the Waters and Water Dependent Natural Resources of the Basin, and the proposed plans and arrangements for avoiding or mitigation of such impacts; and,
f. If a Proposal includes restoration of hydrologic conditions and functions of the Source Watershed, the Party may consider that.[94]

These criteria have discernable roots in common law riparian rules and the doctrine of reasonable use.[95] Criteria (5)(a)–(e) follow closely the factors for determining reasonable use as described in section 850A of the Restatement (Second) of Torts.[96] Further, water conservation—criterion (3)—has long been recognized as a factor in determining the reasonableness of water use under riparian law.[97] Even criterion (2), which prevents a water withdrawal from having "significant" adverse environmental impacts, has a base in common law riparian rules.[98]

Despite the Great Lakes Compact's generally limited focus on managing and regulating only new or increased water uses, criterion (5)(b) requires consideration of "efficient use . . . of existing water supplies."[99] If applied strictly, a community could not obtain approval for an increase in its water withdrawal to meet the needs of a growing population without first implementing conservation measures for its existing uses. Similarly, a manufacturer or irrigator that wishes to expand and increase its water use must first take measures to reasonably reduce its current water use through conservation practices. Through this criterion, the compact could force efficiency improvements and water conservation on many existing users as they expand, encouraging a "hard look" at existing water use practices and methods. Finally, criterion (5)(f) allows consideration of proposals to restore "hydrologic conditions and functions" in the source watershed.[100] Thus, watershed improvements are not strictly required, but can be considered in the overall determination regarding the reasonableness of the proposed use. Water users can

[94] Great Lakes Compact § 4.11.
[95] Grounding the criteria in common law riparian rules as "background principles" gives the Great Lakes states a solid defense against potential takings claims relating to the enforcement of the Compact standards. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992); *see also* Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257 (1990).
[96] Restatement (second) of Torts § 850A(a) (1977).
[97] Restatement (second) of Torts § 850A(f) (considering "the practicality of avoiding the harm by adjusting the use or method of use" in determining the reasonableness of a water use). The comments to clause (f) note that "[t]he law requires reasonable efficiency in facilities for and methods of using water." Restatement (second) of Torts § 850A(f) cmt. f.
[98] Restatement (second) of Torts § 850A(e) (considering "the extent or amount of harm" caused by a water use in determining its reasonableness).
[99] Great Lakes Compact § 4.11(5)(b).
[100] Great Lakes Compact § 4.11(5)(f).

VerDate Aug 31 2005 12:51 Oct 02, 2008 Jkt 044332 PO 00000 Frm 00067 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44332.TXT SJUD1 PsN: CMORC

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propose a restoration or improvement as a way of making their water use more compatible with the resources and limitations in the watershed.

The Great Lakes Compact makes clear that the common decision making standard is only a minimum standard.[101] States may impose more restrictive standards for water withdrawals under their authority.[102] Some jurisdictions (such as Michigan and Minnesota) already have permitting standards in place, and this ensures that the compact in no way requires a weakening of state regulatory programs.

The Great Lakes Compact's decision making standard is a major evolution in eastern water law. While it represents historic progress in the advancement of water resources law, it is also grounded in common law riparian rules and various environmental statutes. However, environmental standards are only as good as the management and enforcement systems by which they are applied. Fortunately for the Great Lakes, the Great Lakes Compact provides a meaningful system of interstate water management and enforcement to ensure that the standards are applied across the Great Lakes basin.

B. State and Interstate Management: Consumptive Uses and Diversions

The Great Lakes Compact creates two separate approaches to managing new or increased water withdrawals in the Great Lakes basin. The differentiation is based almost entirely on whether the water is used inside or outside of the Great Lakes basin surface watershed boundary. Water use inside of the Great Lakes basin is managed solely by the individual state, with limited advisory input from other states for very large consumptive uses.[103] Water use outside of the basin (a diversion) is subject to a spectrum of collective rules and approval processes, including a general prohibition on most diversions.[104]

1. State Management of In-Basin Consumptive Uses

The Great Lakes Compact requires the states to "create a program for the management and regulation of New or Increased Withdrawals . . . by adopting and implementing Measures consistent with the Decision-Making Standard" within five years.[105] States must set the threshold levels for regulation of water withdrawals to "ensure that uses overall are reasonable, that Withdrawals overall will not result in significant impacts . . . and that all other objectives of the Compact are achieved."[106] If states fail to establish thresholds that comply with these requirements, a default threshold of regulating all new or increased withdrawals of 100,000 gpd or greater (averaged over any ninety-day

[101] Great Lakes Compact § 4.12(1).
[102] Great Lakes Compact § 4.12(1).
[103] Great Lakes Compact § 4.3 and § 4.6.
[104] Great Lakes Compact § 4.8 and § 4.9.
[105] Great Lakes Compact § 4.10(1).
[106] Great Lakes Compact § 4.10(1).

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period) is imposed.[107] The states must make reports to the Compact Council, which is comprised of the governor of each party state, regarding their implementation.[108] The Compact Council must then review the state programs and make findings regarding their adequacy and compliance with the Great Lakes Compact.[109]

The states must further develop and promote water conservation programs in cooperation with the Compact Council within two years of the effective date of the Great Lakes Compact.[110] While not specifically regulatory, the state programs are intended to advance the Great Lakes Compact's goals, including protecting and restoring Great Lakes hydrologic and ecosystem integrity.[111] Through their respective conservation programs, states must promote water conservation measures such as "[d]emand-side and supply-side [m]easures or incentives."[112]

Finally, the states are required to develop and maintain a water resources inventory with information regarding both available water resources and water withdrawals within the state.[113] As part of this requirement, all water users (both existing and new) making water withdrawals greater than 100,000 gpd (averaged over any ninety-day period) must register with their state and report the details of their water use.[114] The information gathered by the individual states will create a regional common base of data for interstate information exchange.[115] This information is critical to both state and interstate management of the Great Lakes, especially with regards to cumulative impacts of water withdrawals.[116]

2. Interstate Management of Diversions

The simplest form of interstate management under the Great Lakes Compact is the general prohibition on new or increased diversions of Great Lakes water.[117] Diversions are defined to include both the transfer of Great Lakes basin water into another watershed (interbasin diversion) as well as diversions from one Great Lake watershed into another Great Lake watershed (intrabasin diversion).[118] However, this broad definition belies one of the three major exceptions to the prohibition on diversions: intrabasin transfers.

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[107] Great Lakes Compact § 4.10(2). 100,000 gpd would supply approximately 158 typical households in the Great Lakes region. *See* U.S. Dep't of the Interior, Estimated Use of Water in the United States in 1990 (1993); U.S. Census Bureau, Current Populations Survey, Annual Social and Economic Supplement (2003), http://www.bls.census.gov/cps/asec/adsmain.htm.
[108] Great Lakes Compact § 3.4(1).
[109] Great Lakes Compact § 3.4(2).
[110] Great Lakes Compact § 3.4(2).
[111] Great Lakes Compact § 4.2(2).
[112] Great Lakes Compact § 4.2(4)(d).
[113] Great Lakes Compact § 4.1(1).
[114] Great Lakes Compact § 4.1(3).
[115] Great Lakes Compact § 4.1(2).
[116] Great Lakes Compact § 4.1(6).
[117] Great Lakes Compact § 4.8.
[118] Great Lakes Compact § 1.2 (defining "Diversion").

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While not subject to the prohibition on diversions, intrabasin transfers are subject to the "exception standard"[119] and varying state approvals and additional requirements based on the amount of the withdrawal and consumptive use.[120] Intrabasin transfers below 100,000 gpd (averaged over any 90-day period) are left solely to the discretion of the individual state.[121] Intrabasin transfers above the 100,000 gpd threshold but with a consumptive use[122] below 5 million gpd are subject to state management and regulation based on the exception standard,[123] as well as the prior notice process for comments by other states (discussed below).[124] Intrabasin transfers with a consumptive use above 5 million gpd are subject not only to state regulation pursuant to the exception standard and a non-binding regional review process, but also to the unanimous approval of the Compact Council (comprised of each of the governors).[125]

The other two exceptions to the prohibition on diversions involve communities and counties that straddle the surface water basin divide. Sprawling metro areas that have expanded beyond the Great Lakes watershed are a contentious issue in the region. For example, while the city of Milwaukee sits on the shores of Lake Michigan, its suburbs now go beyond the Lake Michigan surface watershed, which is only a few miles from the lakeshore in some areas of Wisconsin.[126] It is important to recognize, however, that the communities just outside the surface watershed are often still within the ground watershed, and may in fact be using ground water connected to the Great Lakes.[127] Thus, both socially and scientifically, these communities could be fairly considered part of the Great Lakes basin.

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[119] The "exception standard" is substantively similar to the decision-making standard. However, instead of requiring a multi-factor reasonable use determination, the exception standard requires that both "[t]he need for all or part of the proposed Exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies" and that "[t]he Exception will be limited to quantities that are considered reasonable for the purposes for which it is proposed." Great Lakes Compact § 4.9(4).

[120] Great Lakes Compact § 4.9(2).

[121] Great Lakes Compact § 4.9(2)(a).

[122] It should be noted that the amount of consumptive use can be far less than the total withdrawal. Consumptive Use is defined in the proposed compact as the portion of the water withdrawn "that is lost or otherwise not returned to the [b]asin due to evaporation, incorporation into products, or other processes." Great Lakes Compact § 1.2 (defining "Consumptive Use"). Estimated consumptive use rates vary by water use sector, but can range from one to two percent for many power plants, to ten to fifteen percent for public water supplies, to seventy to ninety percent for agricultural irrigation. *See* GREAT LAKES COMMISSION, TOWARD A WATER RESOURCES MANAGEMENT DECISION SUPPORT SYSTEM FOR THE GREAT LAKES-ST. LAWRENCE RIVER BASIN 60 (2003). So, for example, a public water supply that operates an intrabasin diversion could withdraw 40 million gpd but only have a consumptive use of 4 million gpd.

[123] Great Lakes Compact § 4.9(2)(b)(i).

[124] Great Lakes Compact § 4.9(2)(b)(iii); *see also* Great Lakes Compact § 4.6 (proposals subject to prior notice).

[125] Great Lakes Compact § 4.9(2)(c). The unanimous approval may include abstentions. Great Lakes Compact § 4.9(2)(c)(iv) ("Council approval shall be given unless one or more Council Members vote to disapprove.").

[126] *See* Dan Egan, Water Pressures Divide a Great Lakes State, Milwaukee J. Sentinel, Nov. 23, 2003, at A1.

[127] *See* Dan Egan, Water Pressures Divide a Great Lakes State, Milwaukee J. Sentinel, Nov. 23, 2003, at A1; N.G. GRANNEMANN ET AL., THE IMPORTANCE OF GROUND WATER IN THE GREAT LAKES REGION 2 (U.S. Geological Survey Water Resources Investigations Report 00-4008 (2000)).

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The Great Lakes Compact addresses this issue by bringing straddling communities and counties that use Great Lakes surface water for public water supply purposes into the management regime. A straddling community, defined as an incorporated city or town[128] that uses Great Lakes water for public supply purposes both inside and outside of the surface water basin, is treated similarly to an in-basin withdrawal, subject to state regulation pursuant to the exception standard.[129] To prevent exploitation of this exception by growing incorporated cities and towns through mergers and annexations, the Great Lakes Compact limits the defined straddling community to the boundaries existing as of the effective date of the compact.[130]

A proposal for a diversion in a straddling county, which encompasses a far greater area than a "community," is subject to additional standards and regional approval. First, the water can be used solely for the public water supply purposes of a community that is without "adequate supplies of potable water."[131] Second, the proposal is subject to an additional "cautionary" standard, requiring a showing that the proposal "will not endanger the integrity of the Basin Ecosystem."[132] Finally, the proposal is subject to both non-binding regional review and the unanimous approval of the Compact Council.[133]

The question of whether bottled water shipped out of the basin constitutes a diversion has been an emotional political topic in recent years.[134] Some environmental activists view bottled water as no different from a tanker or pipeline that sends water to distant markets for private profit. The bottled water industry views itself as an in-basin consumptive use, creating a product (bottled water) from a natural resource. Both arguments are perched on slippery slopes. Environmental activists view bottled water as opening the door to massive private sale of the Great Lakes. Industry sees no difference between bottles filled with pure water and bottles filled with water and a little sugar, corn syrup or artificial flavor (also known as soft drinks, or "pop" in the Midwest). The question of whether bottled water constitutes a diversion is so loaded with political controversy that the governors decided not to conclusively address it in the Great Lakes Compact. While the Great Lakes Compact defines water in containers greater than 5.7 gallons (20 liters) as a diversion, it leaves the decision of how to treat water in containers of 5.7 gallons or less to the individual states.[135]

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[128] Great Lakes Compact § 1.2 (defining "Straddling Community").
[129] Great Lakes Compact § 4.9(1).
[130] Great Lakes Compact § 1.2 (defining "Straddling Community").
[131] Great Lakes Compact § 4.9(3)(a).
[132] Great Lakes Compact § 4.9(3)(e).
[133] Great Lakes Compact § 4.9(3)(f)–(g). The unanimous approval may include abstentions. Great Lakes Compact § 4.7(3)(g) ("Council approval shall be given unless one or more Council Members vote to disapprove.").
[134] *See* Noah D. Hall, "Federal and State Laws Regarding Bottled Water," Testimony Before the House Oversight and Government Reform Committee, Domestic Policy Subcommittee (December 12, 2007), available at http://domesticpolicy.oversight.house.gov/documents/20071212195927.pdf and http://works.bepress.com/noahhall/8/.
[135] Great Lakes Compact § 4.12(10).

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3. The Compact Council, Enforcement, and Public Process

In addition to providing a mechanism for unanimous approval of the diversion exceptions, the Compact Council has numerous other powers and duties. Comprised of the governors of each party state (or their designated alternates), it can promulgate and enforce rules to implement its duties under the Great Lakes Compact.[136] The Compact Council also has broad authority to plan, conduct research, prepare reports on water use, and forecast water levels.[137] Perhaps most importantly, it can conduct special investigations and institute court actions, including enforcement.[138]

Enforcement is not the sole domain of the Compact Council, however. The Great Lakes Compact contains broad and comprehensive enforcement provisions at both the state and interstate levels. Any aggrieved person can commence a civil enforcement action in the relevant state court against a water user that has failed to obtain a required permit or is violating the prohibition on diversions.[139] Remedies include equitable relief and the prevailing party may recover reasonable attorney and expert witness fees.[140] Any person, including another state or province, can challenge a state action under the Great Lakes Compact (such as issuance of a permit) pursuant to state administrative law, with an express right of judicial review in state court.[141]

The broad enforcement provisions are complemented by similarly progressive public participation provisions. As with the minimum substantive decision making standard, the compact provides minimum procedural public process requirements for the party states and Compact Council. These include: public notification of applications with a reasonable time for comments; public accessibility to all documents (including comments); standards for determining whether to hold a public meeting or hearing on an application; and allowing open public inspection of all records relating to decisions.[142] The Great Lakes Compact also requires additional formal consultation with federally recognized Tribes in the relevant state.[143] In recognition of the Tribes' status as sovereigns, such consultation is handled primarily through either the Compact Council or Regional Body (discussed below).[144]

The Great Lakes Compact becomes effective once ratified through concurring legislation in each party state (which has now occurred) and consented to by Congress.[145] The Great Lakes Compact has no termination date; it remains in force unless terminated by a majority of the party states (five of the eight).[146] As is typical for interstate water

[136] Great Lakes Compact §§ 2.1–2.3, 3.3(1).
[137] Great Lakes Compact § 3.2.
[138] Great Lakes Compact § 3.2.
[139] Great Lakes Compact § 7.3(3).
[140] Great Lakes Compact § 7.3(3).
[141] Great Lakes Compact § 7.3(1).
[142] Great Lakes Compact § 6.2.
[143] Great Lakes Compact § 5.1.
[144] Great Lakes Compact § 5.1.
[145] Great Lakes Compact § 9.4.
[146] Great Lakes Compact § 8.7.

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compacts, it is very difficult to amend once enacted. Amendments would require unanimous approval by all state legislative bodies and the consent of Congress.[147]

C. Sub-Treaty State-Provincial Cooperation and the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement

State-provincial cooperation has been a regional goal for decades, implicitly promised by the Great Lakes Charter and the 2001 Annex to the Great Lakes Charter and expressly encouraged by Congress in its 2000 amendments to WRDA.[148] However, including the Canadian provinces in the Great Lakes Compact could bring political and legal challenges. In an attempt to meet the goal of state-provincial cooperation without running afoul of constitutional treaty limitations, the Council of Great Lakes Governors proposed a companion non-binding good faith agreement that includes the provinces of Ontario and Quebec, the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement ("Great Lakes Agreement"). This dual structure creates a legally and politically acceptable mechanism for cooperation with Canadian provinces.

State cooperation with Canadian provinces in the Great Lakes region has obvious ecological and policy benefits, but raises fundamental legal and political concerns. The Compact Clause of the Constitution, included in Article I, section 10, provides that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power."[149] The same constitutional section also provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation."[150] Thus, the prohibition on states entering into a "Treaty, Alliance, or Confederation" is absolute, while the prohibition on states entering into an "Agreement or Compact," even with a foreign government, is limited only by the political decision of Congress to consent.

The question of what constitutes a "Treaty, Alliance, or Confederation" versus an "Agreement or Compact" can in theory open the door to major constitutional issues of separation of powers and federalism.[151] In the case of the Great Lakes, there is a sensible answer. Congress has already exercised its treaty powers in this area through the Boundary Waters Treaty of 1909, in its 2000 amendments to WRDA it stated a desire for the states to work "in consultation with" the provinces to develop a Great Lakes water

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[147] Great Lakes Compact § 8.5.
[148] *See* Water Resources Development Act of 2000, Pub. L. No. 106-541, § 504, 114 Stat. 2572, 2644–45 (codified as amended at 42 U.S.C. § 1962d-20(b)(2) (2000)).
[149] U.S. Const. art. I, § 10, cl. 3.
[150] U.S. Const. art. I, § 10, cl. 1.
[151] According to former Supreme Court Justice Felix Frankfurter, it is left to Congress to determine whether a proposed arrangement is a prohibited "Treaty, Alliance, or Confederation" or a permissible "Agreement or Compact." *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustment*, 34 YALE L.J. 685, 694-95 (1925). This determination may elude a rigid legal analysis since it is "in a field in which political judgment is, to say the least, one of the important factors." *Id.* at 695, n.37.

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management agreement.[152] The states are wise to interpret this congressional encouragement not as permission to negotiate a compact with the provinces, but rather to develop a non-binding cooperative approach to Great Lakes water management that involves the provinces.

The Great Lakes Compact incorporates the provinces through the "Regional Body," comprised of representatives from each state and province.[153] The primary mechanism for achieving this purpose is the "Regional Review" procedure conducted by the Regional Body. The Regional Body's authority could be fairly described as procedural rather than substantive; and its determinations described as advisory rather than final. The Regional Body's role includes notice, consultation, and public participation, but stops short of final decision making.[154] The parties and Compact Council need only "consider" (but not follow) Regional Review findings.[155] The Regional Review process is also limited to "regionally significant or potentially precedent setting" proposals (as determined by a majority of the members of the Regional Body) and the exceptions to the prohibition on diversions discussed above.[156] The Regional Review process avoids infringing on federal treaty powers, but still gives the provinces an evaluative and procedural role that may prove useful for affecting major decisions.

CONCLUSION

The Great Lakes Compact represents an historic step forward in Great Lakes water policy. The decision-making standard alone is a major evolution in water law. The unified management of surface and ground water brings some scientific reality to the law. And the provisions for enforcement, public process, and cooperation with Canadian provinces ensure more accountable and participatory decision making. However, the mechanism through which these standards and provisions are applied may be the most important advancement. The Great Lakes Compact introduces a new cooperative horizontal federalism approach for crafting multi-state water resource and environmental policy that could be a model for future environmental policy efforts.

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[152] Water Resources Development Act of 2000, Pub. L. No. 106-541, § 504, 114 Stat. 2572, 2644–45 (codified as amended at 42 U.S.C. § 1962d-20(b)(2) (2000)).
[153] Great Lakes Compact § 1.2 (defining "Regional Body").
[154] Great Lakes Compact § 4.5(5).
[155] Great Lakes Compact § 4.5(5)(i).
[156] Great Lakes Compact §§ 4.5(1)(c), 4.5(1)(f). A state may, at its discretion and after consulting with the proposal applicant, seek Regional Review for any other proposal within its jurisdiction. *See* Great Lakes Compact § 4.5(2)(c)(ii).

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ADDITIONAL RESOURCES:

- Noah D. Hall, *Toward A New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 COLORADO LAW REVIEW 405 (2006) (available online at http://www.greatlakeslaw.org/glelc/files/Hall_Colorado.pdf)

- Noah D. Hall and Bret B. Stuntz, "Climate Change and Great Lakes Water Resources" report prepared for the National Wildlife Federation (2007) (available online at http://online.nwf.org/site/DocServer/Climate_Change_and_Great_Lakes_Water_Resources_Report_FI.pdf?docID=2442)

- Council of Great Lakes Governors, Great Lakes-St. Lawrence River Basin Water Resources Compact Implementation Resources (numerous resources including state legislation, background materials, and resources on interstate compacts prepared by the Council of State Governments--National Center for Interstate Compacts), http://www.cglg.org/projects/water/CompactImplementation.asp.

- For an excellent history of the conflicts regarding Great Lakes water under the existing legal regime, see Peter Annin's recent book, *Great Lakes Water Wars* (Island Press, 2006).

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UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

S.J. Resolution 45	)	
	)	
A Resolution Consenting To and	)	Testimony of:
Approving the Great Lakes –	)	The Honorable George Heartwell
St. Lawrence River Basin Water	)	Mayor of Grand Rapids, Michigan
Resources Compact	)	Vice Chair, Great Lakes and
	)	St. Lawrence Cities Initiative
Wednesday, July 30, 2008, 1:00 pm	)	
Dirksen Senate Office Building	)	
Room 226	)	

Good afternoon Chairman Feingold and Ranking Member Specter. Thank you for providing me this opportunity to testify on a matter of utmost importance to all the people of the Great Lakes and St. Lawrence community. My name is George Heartwell, and I am the mayor of Grand Rapids, Michigan, a city of almost 200,000 and part of a metropolitan area with almost 900,000 people. I also serve as Vice Chair of the Great Lakes and St. Lawrence Cities Initiative, a coalition of 56 United States and Canadian cities with a combined population of over 12 million people who are working together to protect and restore this resource.

Water is the lifeblood of our cities. We have the good fortune of living in the basin of a true, global freshwater treasure. The waters of the Great Lakes and St. Lawrence nourish over 40 million people, provide a place for recreation to millions of residents and visitors, are the highways for commercial shipping, irrigate the crops for agriculture, feed the industries that employ our residents, warm and cool our air and influence our weather, and serve us in many other ways. There are good reasons why the original Native American tribes settled in the area, why the explorers came, why people settled here and built their cities, and why the area continues to provide a very high quality of life and economic well being to millions of people. It's all about the water.

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Over the past century, our industrial, agricultural, and residential activities have placed significant stress on the water resource of the Great Lakes. Invasive species, industrial discharges, runoff, toxic contamination, combined sewer overflows, wetland destruction, and many other threats have degraded the quality of the resource. The problems became so serious that one of the Great Lakes – Erie – was declared dead and a major river – the Cuyahoga – caught on fire. Fortunately, major efforts over the past 30 years have resulted in some significant improvements, but major threats remain.

More recently, concerns over the quantity of water have grown in the area. Significant reductions in lake levels across the basin are creating problems for recreational boating, commercial shipping, municipal water intakes, coastal wetland viability, and many other uses. Although heavy rains this summer have brought levels up in several of the lakes, recent experience has demonstrated how significantly changes in lake levels can affect our economy and environment. And, the effects of climate change and many other factors pose long-term challenges.

We in the cities are doing our part to deal with these water quality and quantity problems. A study we completed earlier this year with the Great Lakes Commission documented over $15 billion in investments annually by local governments in the United States and Canada to protect and restore the resource. In addition, the cities of the Great Lakes and St. Lawrence Cities Initiative have launched a water conservation framework which 33 cities have joined to work toward a goal of a 15% reduction in water consumption between 2000 and 2015.

The Great Lakes-St. Lawrence River Basin Water Resources Compact (the Compact) is essential for protecting the long term integrity of the resource. The leadership of the Great Lakes Governors, working with the Canadian Premiers on the parallel Agreement with our neighbors to the North, has been exemplary in bringing us to this point. The Governors ensured that local government had a voice in the development of the Compact, and also included a broad range of stakeholders in the

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deliberations. The result is a document that has received broad support as it worked its way through the state legislatures and received the signatures of the eight governors. Many of our member cities of the Great Lakes and St. Lawrence Cities Initiative provided support to the Compact as it was considered in the state legislatures, and I was honored to have the opportunity to testify for it in the Michigan legislature. Our organization has supported the Compact and Agreement with resolutions at several of our annual meetings, and has distributed them widely. Those resolutions are attached to my testimony for your information.

Most importantly, the Compact represents a commitment to stewardship by eight states, based on extensive input from cities, Native American tribes, as well as many stakeholders, of the fresh water of the Great Lakes and St. Lawrence. As a resource management tool, it calls for the states to establish water conservation and efficiency programs to ensure the best use of this precious resource. There will also be new measures in place to track and account for water use much more effectively than ever before. Establishing and managing the administration of these programs will place added financial burdens on the states, but we are confident that the high priority nature of this effort will lead to the commitment of the necessary resources to make it a success. Cities stand ready to provide support to the states in whatever way we can.

The fundamental principle underlying the Compact is that regions of the country should have the right and the responsibility to manage the resources in the area. There is no resource more fundamental to the quality of life and well being of people than water. The United States Constitution explicitly contemplates compacts of this nature, and Congress has provided its consent to 41 interstate compacts over the years that involve 45 states and the District of Columbia. Much like the states surrounding the Chesapeake Bay, those on the Colorado River, and Florida with the Everglades, the Great Lakes States, working with their cities and other partners, are in the best position to ensure the long term integrity of the resource. Working with our Canadian neighbors, we are confident that the leadership of the states and provinces, with strong support

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from the cities, will manage this resource wisely long into the future so that succeeding generations will have the full benefit of this global freshwater treasure.

On behalf of the people of Grand Rapids, the people of the cities of the Great Lakes and St. Lawrence Basin, and all the people in the region, I strongly urge you to pass Senate Joint Resolution 45 for the good of the region and of the country.

Thank you very much, and I will be happy to answer any questions.

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Written Statement
Submitted by the
International Bottled Water Association

Senate Committee on the Judiciary
Hearing on S.J. Res 45

August 6, 2008

The International Bottled Water Association (IBWA)[1] respectfully submits this statement for inclusion in the July 30, 2008, Senate Judiciary Committee hearing record on S. J. Res. 45, a resolution expressing consent and approval of the Great Lakes – St. Lawrence Basin Water Resources Compact (Annex 2001).

IBWA supports the Compact as currently drafted and urges Congress to expeditiously approve the Compact. The Great Lakes – St. Lawrence Basin Water Resources Compact was negotiated by the governors of the eight Great Lakes Basin states. The work of the governors, through the Council of Great Lakes Governors, was then adopted by the individual state legislatures in all eight states.

Throughout this process, the impact of this Compact on bottled water was expressly considered within the state legislatures, particularly the legislatures of Michigan and Wisconsin. The Compact allows for the bottling of water within the Great Lakes Basin for sale in interstate commerce outside the Basin, but disallows the transport of large volumes of water for bottling outside of the Basin. IBWA has worked with the Council of Great Lakes Governors, state legislatures and interested stakeholders to support ratification of the Compact and implementing legislation that provides for the sustainability of water resources in the Great Lakes Basin, while preserving the ability to use the resource as a continued economic engine for the Basin.

[1] International Bottled Water Association (IBWA) is the trade association representing all segments of the bottled water industry. Founded in 1958, IBWA member companies include United States and international bottlers, distributors and suppliers. IBWA and its members are committed to working with state and federal governments to set and implement stringent standards for assuring safe, high-quality bottled water products. In furtherance of this objective, IBWA has developed and published a Code of Practice (available at IBWA's website: http://www.bottledwater.org/public/policies_main.html) which sets forth standards for bottled water production, quality, and distribution by IBWA members. In several cases the IBWA Code of Practice is more stringent than state and federal regulations. As a condition of membership, IBWA bottlers must submit to an annual, unannounced, independent third party inspection to assure compliance with the Code of Practice.

1700 Diagonal Road, Suite 650, Alexandria, Virginia 22314 Tel (703) 683-5213 Fax (703) 683-4074 www.bottledwater.org

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Accordingly, the final Compact is a fair compromise that is consistent with sound stewardship of water resources in the Great Lakes.[2]

Annex 2001 addresses the bottled water issue in two important places: in the definitions of "product" and "consumptive use"; and under the bulk water transfer provision. The definitions include the following sections which apply to bottled water:

> "Product" means something produced in the Basin by human or mechanical effort or through agricultural processes and used in manufacturing, commercial or other processes or intended for intermediate or end use consumers. (i) Water used as part of the packaging of a Product shall be considered to be part of the Product. (ii) Other than Water used as part of the packaging of a Product, Water that is used primarily to transport materials in or out of the Basin is not a Product or part of a Product. (iii) Except as provided in (i) above, Water which is transferred as part of a public or private supply is not a Product or part of a Product. (iv) Water in its natural state such as in lakes, rivers, reservoirs, aquifers or water basins is not a Product.

Bottled water is a ***processed food product***, and as such is comprehensively and stringently regulated in the United States by the Food and Drug Administration (FDA) and by Illinois, Indiana, Michigan, Minnesota, Ohio, Pennsylvania and Wisconsin in order to help ensure the safety and quality of the bottled water sold. It must meet general food regulations, as well as standards of identity, standards of quality, and labeling requirements specifically promulgated for bottled water. At the federal level, bottled water is regulated by the FDA under the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. §§ 301 *et seq.*, and several parts of Title 21 of the Code of Federal Regulations (CFR). The FFDCA defines "food" as "articles used for food ***or drink*** for man or other animals ...."[3] The FFDCA further defines a "processed food" as "any food other than a raw agricultural commodity and includes any raw agricultural commodity that has been subject to processing, such as canning, cooking, freezing, dehydration, or milling."[4] As a result, bottled water is subject to the general Good Manufacturing Practices (GMP) and labeling regulations for all food products,[5] as well as the specific bottled water GMPs in 21 CFR 129, and the FDA-established Standards of Quality and Identity in 21 CFR Part 165. Bottled water is one of only a few food products which must follow additional, product-specific GMPs.

Additionally, Section 410 of FFDCA requires FDA to review all U.S. Environmental Protection Agency (EPA) National Primary Drinking Water Standards (NPDWS) for their applicability to bottled water. FDA is required under this section to establish standards of quality for bottled water that are no less stringent or protective of public health than the EPA's standards for public drinking water. Failure of the FDA to act within 180 days of the effective date of any new

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[2]Note that, according to the International Joint Commission, the Great Lakes Basin is a net importer of bottled water (it imports more bottled water than it exports) by 14 times. Moreover, in the year 2001, bottled water withdrawals in the Great Lakes was 0.002% of all 1995 groundwater withdrawals in the Great Lakes Basin, according to Dr. Keith Eshelman. *Bottled Water Production in the United States: How Much Groundwater Is Actually Being Used?* http://www.lulu.com/items/volume_62/957000/957317/9/print/957317.pdf

[3] 21 U.S.C. § 321(f) (emphasis added).

[4] 21 U.S.C. § 321(gg).

[5] 21 C.F.R. § 110.3 et seq.

NPDWS from the EPA results in the FDA applying the new NPDWS to bottled water. This last provision is commonly known as the "hammer provision."

Under 21 CFR Part 165.110 (a), strict standards of identity are established for bottled water. These standards of identity are divided into two fundamentally distinct classes of product: natural waters and processed waters. Natural waters include: artesian water, groundwater, mineral water, sparkling water, spring water, and well water. Processed waters must meet either the United States Pharmacopoeia 23rd Revision standards for purified water or sterile water. They may use the following processes to achieve compliance with the standard: distillation, deionization, de-mineralization, or reverse osmosis.

Only products that meet these and the state requirements of the Great Lakes Basin states can be produced in the Basin. Failure to comply with laws and regulations results in enforcement action by FDA and the state agencies. Bottled water clearly falls within the definition of a ***product*** that is produced in the Basin because it is produced "by human or mechanical effort" and is intended for "end use consumers."

> "Consumptive Use" means that portion of Water Withdrawn or withheld from the Basin that is lost or otherwise not returned to the Basin due to evaporation, incorporation into Products, or other processes.

Bottled water also clearly constitutes ***consumptive use***. The water is not returned to the Basin due to "incorporation into Product."

Accordingly, by the express terms of Annex 2001, as passed by all eight states in the Great Lakes Region, bottled water processed within the Great Lakes Region clearly meets the requirements for allowable withdrawals in the Compact. This is consistent with the fact that bottled water has been produced in the Great Lakes Basin and sold outside the Basin for over 100 years.

In addition, the Bulk Water Transfer provisions found in § 4.12 (10) of the Compact address the removal of water from the Great Lakes Basin in containers greater than 5.7 gallons. The provision reads as follows:

> A Proposal to Withdraw Water and to remove it from the Basin in any container greater than 5.7 gallons (20 liters) shall be treated under this Agreement in the same manner as a Proposal for a Diversion. Each Party shall have the discretion, within its jurisdiction, to determine the treatment of Proposals to Withdraw Water and to remove it from the Basin in any container of 5.7 gallons (20 liters) or less.

This provision essentially prohibits the use of tanker trucks or ships to supply water from sources within the Basin to bottling plants outside the Basin.

This provision has been mischaracterized as a possible "bottled water loophole" by some critics, even though it ***expands*** the restrictions of the Compact to prohibit the use of large containers to transfer water.

The treatment of bottled water under the terms of the Compact, while not ideal, provides protection and predictability to the bottled water industry, like others in the food industry. Although the Compact prohibits the use of tankers to remove water sourced in the Basin to bottling plants outside the Basin, this is a reasonable compromise because processing of bottled water within the Basin is clearly permitted.

Some critics of bottled water have advocated for completely reclassifying bottled water that is produced in the Basin and sold outside the Basin as a diversion. This is contrary to the express language of the Compact. If the Compact were modified to classify bottled water as a diversion, this position would devastate a long-standing industry in the Basin which has created thousands of jobs. This would be discriminatory and would unfairly restrict trade for a single product in the food industry. In addition, it would establish an extremely bad precedent for other regions that may be considering changes in water law.

IBWA respectfully urges Congress to expeditiously approve the Great Lakes – St. Lawrence Basin Water Resources Compact as approved by the eight Great Lakes state legislatures.

Statement of Senator Carl Levin
Judiciary Committee
July 30, 2008

Good afternoon, Chairman Feingold and Members of the Judiciary Committee. Thank you for holding today's hearing. I have enjoyed working with many of my fellow Great Lakes delegation members to protect the Great Lakes, including the Chairman of this Committee.

The Great Lakes are unique in the world and our region. The sheer size of the Great Lakes is impressed upon anyone who has stood on their shores, or who has seen the outline of the Michigan mitten, which the Great Lakes make one of the most distinctive shapes and the most recognizable shape on maps or satellite photographs of the earth. They provide habitat to countless species of fish and wildlife and provide a unique recreational experience. It is our solemn responsibility to protect the lakes for future generations.

Alexis de Tocqueville, the great chronicler of early America who explored the Great Lakes, said it best when he passed through Lake Huron. "This lake without sails, this shore which does not yet show any trace of the passage of man, this eternal forest which borders it; all that, I assure you, is not grand in poetry only; it's the most extraordinary spectacle that I have seen in my life."

Nearly two centuries later, the Great Lakes remain one of the most extraordinary spectacles in the world, and I am pleased that there is so much enthusiasm to protect Great Lakes water. In 2005, the Great Lakes Governors finalized the Great Lakes-St. Lawrence River Water Resources Compact, and all eight Great Lakes states have passed this interstate compact into law. I am

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pleased to join my colleagues in sponsoring a joint resolution to ratify this historic agreement to manage Great Lakes water.

The Compact will enhance the existing authority in law. The Compact will ban new diversions from the Basin with certain limited exceptions, and those exceptions would be regulated.

While the existing Water Resources Development Act law provides protection and authority to prevent diversions, the Great Lakes Compact will provide an effective means for Great Lakes states jointly to safeguard water for future generations. While it is clear that current law is sufficient to stop diversions, the Compact creates a better means to manage the water. Current law (WRDA) gives each Great Lakes governor veto power over certain types of diversions of surface water by any Great Lakes state. While this authority is clear, additional safeguards and standards will be helpful in the years ahead to give us a solid defense against WTO challenges and a solid basis to regulate groundwater.

The Compact states that "the protection of the integrity of the Great Lakes Ecosystem shall be the overarching principle for reviewing proposals." For the first time, water conservation goals will be developed to deal with any water diversion proposals.

The Compact would specifically address withdrawals and diversions of both ground and surface water. This would represent an improvement over existing law because there are differing opinions on whether the current law addresses ground water diversions.

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Additionally, because the Compact would provide a scientific method for determining whether to allow a proposal to use water from the Great Lakes, it makes our efforts to protect the lakes more clearly compliant with international trade agreements and invulnerable to challenges under international trade agreements.

This interstate agreement has been in the making for close to decade, following the mistaken issuance of a permit for bulk water diversion by the Province of Ontario which was in violation of the non-binding Great Lakes Charter which had been agreed to by the 8 Great Lakes states and 2 Canadian provinces. In the 2000 WRDA, Congress directed the governors to negotiate a water management policy, and in 2005, the eight Great Lakes Governors and two Canadian Premiers came to an agreement.

I have heard that some people believe that there is a water bottle "loophole." The Compact prohibits water in a container larger than 5.7 gallons to be diverted outside the Great Lakes basin. Though the Compact would not prohibit water withdrawals in containers less than 5.7 gallons, individual states would retain their authority to regulate bottled water in any size container. Again current WRDA (i.e. the status quo) arguably has no constraints over groundwater diversions.

The Great Lakes Compact is beneficial and will provide greater protections for the Great Lakes than the status quo. As of today, 45 States and the District of Columbia currently belong to at least one interstate water compact and many States belong to more than one. Interstate compacts provide an effective means to manage shared water resources.

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I appreciate the work of Governor Doyle who is here representing the Council of Great Lakes Governors, Governor Jennifer Granholm of Michigan, and the state legislators, and the hundreds of interested parties who helped get this agreement to where it is today. We need to take this important step to pass the Great Lakes Water Compact so as to make sure that we conserve this precious resource, ensuring sensible use now so that future generations can benefit from the Great Lakes as we do.

Thank you.

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Testimony by Kay L. Nelson

Director, Environmental Affairs

Northwest Indiana Forum

On behalf of the

Business & Environmental Stakeholders of the State of Indiana

Before the

Senate Judiciary Committee

July 30, 2008

Good afternoon Chairman Feingold, Ranking Member Specter and members of the Committee. Thank you for this exciting opportunity to appear before you this afternoon on Senate Joint Resolution 45 expressing the consent and approval of Congress to an interstate compact regarding water resources in the Great Lakes – St. Lawrence River Basin.

My name is Kay Nelson. I serve as the Director of Environmental Affairs for the Northwest Indiana Forum, a non-profit regional economic development organization. Our member-organizations representing over $40 Billion in commerce include industrial and commercial businesses, financial entities, universities, hospitals and municipalities within Lake, Porter and LaPorte counties in Indiana.

In 2003, the Forum Environmental Committee created a working subcommittee that included Jim Flannery, ArcelorMittal Steel Indiana Harbor, Doug Bley, ArcelorMittal Steel Burns Harbor, Dave Behrens, U.S. Steel Gary Works; Rees Madsen and Linda Wilson, BP Whiting Refinery; Dean McDevitt, formerly of NISPCO, and myself to focus on the development of Indiana legislation on the adoption and implementation of the Great Lakes Compact. A significant directive in the Forum's Environmental Committee Mission Statement recognizes the importance of collaboration with the environmental community on all issues. As such, the subcommittee expanded the working members of the Compact Team to include "Lady of the Lakes" Lee Botts, founder of the Lake Michigan Federation currently known as the Alliance for the Great Lakes and Tom Anderson and Charlotte Read of the Save the Dunes Council, and John Goss with the Indiana National Wildlife Federation.

As a Compact team, we established a positive discussion process to allow for the recognition of diverse viewpoints through an open dialogue where common ground was identified and areas of uncertainty were identified and resolved.

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The Compact team was instrumental in:

- Formulation of a Northwest Indiana Forum Position paper which supported the adoption and implementation of the Great Lakes/St. Lawrence River Basin Compact during the 2008 Legislative Session.
- Preparation of a joint Industrial and Environmental Stakeholders resolution supportive of the Compact process which was read into the record at the initial meeting of the Great Lakes/St. Lawrence River Basin Regional Body on June 6, 2006.
- Providing written and oral testimony at numerous public meetings and Indiana legislative committee hearings during the 2008 Indiana Legislative Session.

During the course of the Compact's consideration in Indiana and other states, several questions arose regarding the meaning and interpretation of some of the key provisions. Our Team recognized the importance of resolving those questions so that everyone clearly understood the intent of the Compact.

One of those questions was how the impacts of withdrawal proposals were to be reviewed under Section 4.11. Guided by a memorandum provided by the Chair of the Governors' Working Group, our Team worked closely with the Indiana State Legislature specifically, State Senators Beverly Gard, Karen Tallian and Ed Charbonneau to include a provision in Section 10 of Indiana's legislation declaring the legislature's intent as to the proper interpretation and application of Section 4.11.2. Other states (including Ohio and Pennsylvania) subsequently did likewise. That clarification of intent was essential to winning the support of industry, environmental, agriculture and other stakeholders. We believe that the clarification provided by the State legislatures and the Working Group is critical and as such is included in this testimony.

The Great Lakes/St. Lawrence River Basin Compact is a means to provide an enhanced water management system that is simple, durable, and efficient and retains and respects water conservation initiatives in place and the authority within the Basin when administering proposals for new or increase withdrawals of water.

The culmination of the innovative collaborative approach initiated by the Northwest Indiana Forum Compact Team and many years of diligent work occurred on February 20, 2008 when Governor Mitch Daniels accompanied by State Senator Beverly Gard and State Representative Scott Pelath signed Senate Enrolled Act 45, Great Lakes Compact Bill, as the first bill of the 2008 Indiana Legislative Session.

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Before the Senate Committee on the Judiciary

Presiding Chair, Senator and Honorable Russell D. Feingold

Testimony before the Senate Judiciary Committee

Hearing, Wednesday, July 30, 2008

In the Matter of Senate Journal Resolution 45

The Great Lakes– St. Lawrence River Basin Water Resources Compact

Submitted by James M. Olson and Michael H. Dettmer

We appreciate the opportunity to submit this testimony on Senate Joint Resolution 45 – the Great Lakes – St. Lawrence River Basin Compact. For the record, our names are James M. Olson and Michael H. Dettmer. Mr. Olson has worked and authored books, articles, and papers on environmental, water and public trust for over 30 years.[1] Mr. Dettmer is a past president of the State Bar of Michigan, 1993 to1994, and former United States Attorney for the Western District of Michigan, 1994 to 2001. [2] We submit this testimony on behalf of Food and Water Watch, the Canadian Council, Michigan Citizens for Water Conservation, and the public trust of all citizens in the waters of the Great Lakes Basin.

The Great Lakes Basin is home to 40 million people and 20 percent of the world's freshwater lakes and streams. The Great Lakes are fed by clean, cold tributary groundwater that, together with the Great Lakes, represent over 90 percent of the freshwater in the Nation. These

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[1]LL.M., Univesity of Michigan; J.D. Michigan State University College of Law (formerly Detroit College of Law); B.A., Business, Michigan State University. Mr. Olson has presented and authored articles and papers on the Great Lakes Compact for the Woodrow Wilson Center in Washington, D.C., the Munk Center, University of Toronto, and at conferences at University of Michigan, Michigan State University, and University of Toledo.

[2]J.D., Wayne State University; B.A., Michigan State University, Of Counsel, Olson, Bzdok & Howard, P.C., Traverse City, Michigan.

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magnificent lakes, streams, and groundwater endow the North America, the Nation, and states and people of the Great Lakes region with a rich, diverse heritage of wildlife, environment, commerce, recreation, and community unparalleled in the world. Yet their very magnificence could spell their doom if this heritage is not protected with a level of integrity that matches or exceeds its importance. The demands for water throughout North America and around the world, accelerated by climate change, will place tremendous demands on these waters and the life and endeavors that depends on them.[3] In a view of earth from space, it is easily seen that the Great Lakes and their tributary waters form the heart of North America.

The Great Lake-St. Lawrence River Basin Compact[4] laudably seeks to prevent major diversions of water out of the Basin. The diversion ban is premised on environmental impact and conservation standards intended to safeguard the diversion ban from attack under international trade agreements, such as NAFTA and GATT, or the commerce clause of the United States Constitution.

However, at the same time, the Compact also excepts "water produced as a product" from the definition of "diversion"[5] and defines a "product" as "water produced ... for ... the intermediate or end-use consumer."[6]

Besides the definitional problem, the Compact also fails to incorporate the public trust doctrine in the Great Lakes and its tributary waters as a standard of protection. The United States Supreme Court and various state supreme courts have recognized the water of the Great

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[3]George Monbiot, *The Water Boom is Over,* Guardian, Oct. 10, 2006; Fred Pierce, When the Rivers Run Dry: Water – The Defining Crisis of the Twenty-First Century (2006); Jared Diamond, Collapse: How Societies Choose to Fail or Succeed (2004); *Global Water Crisis,* Newsweek, June 4, 2007;

[4]Referred to hereafter as "Great Lakes Compact" or "Compact."

[5]Art 1, Sec. 1.2. Definitions.

[6]Art 1, Sec. 1.2. Definitions.

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Lakes, and its tributaries, are owned by the states subject to a public trust that prohibits not only their material physical impairment, but their subordination to private control or interests for private gain.[7]

These exceptions and omissions will likely undermine the Compact's diversion ban, the purpose of the Compact, and create a "product" exception to the Compact, that will, essentially allow the commercialization or sale of water out of the Basin without limit if the water is in a container or package.

This testimony and the attached article, *Navigating the Great Lakes Compact: Water, Public Trust, and International Trade Agreements*,[8] point out the flaws and defects in the Compact that must be cured or addressed before Congress approves the Compact. If this is not done in a proper and thorough manner, the purposes of the Compact's protection of the Great Lakes will be seriously eroded. Former Michigan Governors William G. Milliken and James E. Blanchard have called upon elected officials to honor the public trust doctrine in enacting the Great Lakes Compact.[9]

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[7]*Illinois Central Railroad v Illinois*; 146 US 387 (1892); Sax, Joseph L., *The Public Trust Doctrine in Natural Resources Law*, 68 Mich. L. Rev. 471, 489-490 (1968); *People ex re Scott v Chicago Scott Dist.*, 360 NE 2d 773 (Ill. 1976); *Obrecht v National Gypsum*, 105 NW2d 143 (Mich. 1960). Olson, James M., *Navigating the Great Lakes Compact*, FN 8, infra, at1113-1116.

[8] Attached **Ex 1**; 2006 Mich St. Law Rev 1103 (2007). The article is part of a symposium in Chicago, Illinois, on the Great Lakes Compact entitled Great Lakes Water Basin: International Law and Policy at a Cross Roads, the Second Conference on Trade and Investment in the Americas, Michigan State University College of Law, Dec. 1-2, 2006.

[9]**Ex 2.** Joint Statement of Governors William G. Milliken and James E. Blanchard, June 11, 2008.

VerDate Aug 31 2005 12:51 Oct 02, 2008 Jkt 044332 PO 00000 Frm 00092 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44332.TXT SJUD1 PsN: CMORC

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This testimony does not oppose the Compact. It supports the Compact subject to simple, straightforward conditions that can be imposed by Congress under its broad authority vested in it by the compact clause of the United States Constitution.[10]

The "Product" Exception

The Compact bans diversions[11] with a few narrow exceptions[12] and one broad exception buried in the definition of "diversion:"

> " Diversion ... *does not apply to Water* that is used in the Basin or a Great Lake watershed *to ... produce a Product* that is then *transferred out of the Basin* or watershed."[13]

In water parlance, the term "produce" means to withdraw water by human or mechanical means. Given the plain meaning rule courts apply to the interpret the meaning of words in contracts, such as the Compact between the party states, the exception buried in the definition means that diversion does not include "water produced as a Product." While the term is quite broad, it would include raw water in containers labeled and sold as a Product. Hence, the diversion ban does not apply to water that is contained or packaged as a product. As matter of definition, there is no limit on the size of container or package or the amount of water that can be transferred as Product.

The "Product" Definition

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[10]Art 1, Sec. 10, U.S. Constitution.

[11]Art, 4, Sec. 4.8. There are also "exemptions" for transportation, ballast water or other needs related to vehicles, and for the U.S. Supreme Court decree in *Wisconsin et al. v Illinois et al.* Art 4, Sec. 4.13.

[12]Art. 4, Sec. 4.9. E.g, Straddling communities, intra-basin transfers, and straddling counties.

[13]Art 1 , Sec. 1.2, Definitions. Italics added.

VerDate Aug 31 2005 12:51 Oct 02, 2008 Jkt 044332 PO 00000 Frm 00093 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44332.TXT SJUD1 PsN: CMORC

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The word "Product" is then defined:

> "Product means *something produced* in the Basin by human or mechanical effort or ...through agricultural processes and used in manufacturing, commercial or other processes *or intended for intermediate or end use consumers.*"[14]

Water is "something" and "produced" when it is extracted by human or mechanical effort. And once produced this includes water that is "intended for intermediate or end use consumers." Again, like the Product exception within the definition of diversion, there is no limitation on amount and no mention of size of a container or package.

Reading the two provisions together, water in a container or produced and intended for intermediate or end use consumers is a Product. Since the word "diversion" does not apply to water that is a Product, water transferred out of the Basin or a watershed is not a diversion and would not be prohibited by the diversion ban in Sec. 4.8 of the Compact.[15]

The Bulk Water Transfer Provision

Some may argue that despite the broad exception for transport of water out of the Basin as a "product," the Bulk Water provision closes the loop-hole. However, given the plain meaning and basic analysis of the provision, the argument does not "hold water." The Bulk Water provision was added as an attempt to dampen the effect of the definitions of "diversion" and "product:"

> "10. A Proposal to Withdraw Water and to remove it from the Basin in any container greater than 5.7 gallons (20 litres) shall be treated under this Compact in the same manner as a Proposal for a Diversion." Each party shall have the

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[14]Art 1, Sec. 1.2, Definitions. Italics added.

[15] This meaning of "diversion" and "product" is supported by Scott Slater, a California water law lawyer and professor, who also appeared and presented testimony for Nestlé Waters North America Inc. at a legislative hearing in Michigan. See Slater, Scott, *State Water Resource Administration in the Free Trade Agreement Era: As Strong As Ever*, 53 Wayne L. Rev. 649.

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discretion, within its jurisdiction, to determine the treatment of Proposals to Withdraw Water and to remove from the Basin in any container of 5.7 gallons or less."[16]

The first sentence of the Bulk Water provision proves the exception to diversion that water in a container or package is a product that is not subject to the diversion ban. If that is not the case, then the Bulk Water provision would be unnecessary. Moreover, since it is admittedly a product, the Bulk Water provision is not a definitional limitation, but a regulatory one; that is, it calls for water products in large containers to be "treated" as if it were a diversion. As such, the provision regulates water products, not diversion, and subjects them to the prohibition in Sec. 4.8. As will be seen in the next section of testimony, once water is a product it falls within the protections of products or goods produced and placed into the stream of commerce under NAFTA and GATT - international trade agreements. In turn, this means that the "treated" or regulation provision of large water containers must be defended under the more difficult hurdles of environmental or health, safety and welfare exceptions to the damage and anti-discrimination provisions of these trade laws.

The second sentence of the Bulk Water provision expressly allows containers of water less than 5.7 gallons, and again affirms the definition that water in containers of any size is a product. Moreover, there is no limitation as to the amount of water than can be removed. This creates a problem in enforcing the diversion ban against any-sized containers of water that are products under the Compact and trade laws.

For example, it will be difficult to defend on environmental grounds a prohibition of ten 10,000-gallon containers as opposed to 20,000 5-gallon containers produced from the same or similar water source. In each case, the withdrawal is 100,000 gallons per day. Two products that are nothing other than containers of water are treated or classified differently, even though their

[16]Art 4, Sec. 4.12.10.

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risks and intended end use (drinking water) are the same. In other words, there is likely no health, safety, welfare or environmental justification for the 5.7 gallon limit.

As another example, in Michigan Nestlé transports water from a water source in Evart, Michigan 30 miles south to a bottling plant in Stanwood, Michigan. The water is transported in tanker trucks, clearly more than 5.7gallons on an interstate highway. The trucks are a means of "diversion" under Sec. 1.2 Definition of the Compact, but do not leave the Basin. However, if the intended use of water transported by a tanker truck is for bottled water or containers less than 5.7 gallons, what difference does it make that the same amount of water from the same water source is trucked down the interstate highway and bottled in Indianapolis, which is outside of the Basin. The source, amount, and intended or end use are the same.

Finally, what is the difference between trucking or piping 100,000 gallons a day outside of the Basin as opposed to putting the same amount of water in a 5.7 gallon container and shipping it out of the Basin? The point is that over time the Product exception to the diversion ban will undermine the diversion ban itself . If the quantities of water and risks are acceptable for water as a product, then what is the environmental justification for prohibiting the water from leaving the basin by pipeline, ship or truck?

International Trade Laws

The GATT Harmonizing Code System states that a "good" includes water, and all water other than the sea, whether or not clarified or purified.[17] NAFTA is less direct. Nothing in NAFTA itself declares water a "good" similar to GATT. In fact, the 1993 Statement of Governments of Canada, Mexico, and the Untied States declares "unless water, an any form, has entered into commerce or produced, it is not covered by the provisions of any trade

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[17]Harmonized Tariff Schedule of the United States, ch. 22 (2007) (rev 1); http//:hotdocs.ustr/gov/docs/tata/hts/bychapter/0701C22.pdf

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agreement."[18] But here is the conundrum: Water is not subject to trade agreements "unless ... entered into commerce or produced." The Compact definitions of diversion and product consider water "produced" and put in a container or package to be a product. Once it is a product or entered into commerce – shipped out of the Basin or in the Basin – it is covered by NAFTA. In effect, the Compact definitions create an exception of water itself as a product, and protect the product, in any size or container, by NAFTA and GATT.

The Public Trust

The Great Lakes and all of their tributary watercourses have been recognized as a public resource subject to a public trust. The public trust doctrine is central to water law and policy for present and future generations. The Great Lakes states received title to the waters of the Great Lakes, connecting waters, and their inland lakes and streams, as part of their admission to the Union, subject only to a reservation of navigational easement or servitude by the United States.[19]

Under the public trust doctrine, each state is a trustee of these waters for the benefit of their citizens for purposes of navigation for commerce and pleasure, boating, fishing, hunting, fowling, swimming, bathing, and drinking or other uses recognized as basic and essential for individuals and the community.

As trustee, each state has a "high, solemn, and perpetual duty"[20] to manage these public treasures for a public purpose or common good, to assure they will not be impaired, and to assure they will not be disposed of in whole or part or possessed exclusively for private gain. Under principles long enshrined by the U.S. and state supreme courts, the public trust and the

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[18]Jon R. Johnson, *The North American Free Trade Agreement: A Comprehensive Guide*, 109 (1994).

[19]*Illinois Central Railroad v Illinois*, 146 US 387 (1892).

[20]*E.g, Collins v Gerhardt*, 237 Mich 38, 211 NW 115 (MI Sup. Ct., 1926).

VerDate Aug 31 2005 12:51 Oct 02, 2008 Jkt 044332 PO 00000 Frm 00097 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44332.TXT SJUD1 PsN: CMORC

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public's title in these waters for these public uses and needs are inviolate. The public trust cannot be transferred or reallocated unless it complies with the following standards:

1. An express legislative authorization and adherence to the above standards and principles;
2. A clear legislative determination that the principle that these magnificent natural advantages may not be impaired. Significantly, the cumulative effects of small repetitive impairments, small or nibbling effects together constitute impairment because of the unguarded precedent that would impair the public trust and undercut its protected uses.[21]

The question for Congress, and for the 40 million citizens of the Great Lakes Basin, is whether the Great Lakes Compact, as introduced in Congress, incorporates the public trust and these paramount standards or principles.

In the Findings and Purposes, Sec. 1.3.1.a the Compact states, "The Waters of the Basin are precious public natural resources shared and held in trust by the States."[22] Thus, the Compact recognizes the general finding of public waters and a trust, but does not use the words "public trust," and more importantly does not incorporate the standards and principles that protect Great Lakes, connecting, and tributary navigable or other waters in Sections 4.9. 4.10, 4.11, 4.12, and 4.13. It also is omitted from 4.14. Exceptions to diversion, that is diversions, and consumptive uses, including transfer of water as products, are not subject to any public trust principles and standards.

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[21]*E.g., People v Broedell*, 365 Mich 201, 112 NW2d 517 (MI Sup Ct. 1961).

[22]Compact, Art 1, Sec. 1.3.1.a.

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The Federal Water Resources Act ("WRDA"), amended in 2000,[23] prohibits diversions or exports unless consented to by all 8 Great Lake states governors. The WRDA required a mechanism and standard for deciding when a diversion or export would be allowed. The Compact applies to all Great Lakes, surface waters, and the groundwaters that help nourish and form them. However, there is no public trust standard for either diversions or shipments of water as products, which are included in the notion of export.

Consequences

In order to fulfill the perpetual and high responsibility to protect the public trust and title in these waters from appropriation and harm from claims that will assuredly be asserted under the NAFTA, GATT, and other international trade agreements, Congress, at the moment it approves or enacts the Compact, must also incorporate conditions to assure and affirm the protection of the public trust and the national interests of navigation and commerce over in these waters.

Failure to do so will expose Great Lakes' water to exploitation and export, and put our citizens, businesses, farms, industries, tourism, and quality of life at a serious disadvantage when it comes time to compete against powerful outside interests, particularly when it comes time to further regulate water withdrawals or exports because of future needs, risks, or unforeseen circumstances. Uncorrected, current water law and the Compact, in effect, would subject Great Lakes Basin waters to private control for private sale as a product. In addition, such a wide exposure to private sale could undermine the otherwise justified and much needed ban on diversions. Once the floodgate is opened or the bottle uncorked, international trade law will make it difficult if not impossible to close.

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[23] 42 USC 1962d-20 (Sept. 2000).

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In addition, failure to incorporate conditions that address the shortcomings in the Compact will establish a federal policy toward the privatization of water as a product nationwide at a time when water provides the basis for stability, quality of life, and economic survival.

Conditions for Approval of Great Lakes Compact

Compacts have been used throughout history and are approved, more frequently, to address matters of national concern by allowing states as sovereign powers to act on issues while avoiding federal interference. Historically, these issues have included natural resources and water.[24] Compacts have been used to promote the management of water and natural resource issues by two or more states.[25] As a basic principle, Congress has broad authority to add conditions to assure that a Compact achieves it goals, unifies principles, and protects broader regional and national interests.[26]

In order to correct or address these problems in the Compact so that it merits approval by the United States Congress consistent with the solemn duties imposed by the public trust doctrine in these waters and the oversight purposes of the compact clause of the Constitution, the following conditions are recommended as additions to the Compact:

1. Nothing in this Compact impairs or diminishes the public trust doctrine or its application by the states or parties to this Compact; and further, nothing in this Compact creates, increases, or enlarges any private rights in water as a public

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[24]E.g., Great Lakes Basin Compact, Pub. L. 90-419, 82 Stat. 414 (1968); others have included the Columbian River, Colorado River, Delaware River Basin Compacts.

[25]Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 Yale L.J.6 85 (1925); Buenger, Michael, and Masters, Richard L., *Interstate Compact: Using Old Tools to Solve New Problems*, 9 Roger Williams U. L. Rev 71 (2003).

[26]*Id.*

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resource or public trust against the states or parties to this Compact or their citizens protected by this public trust.

2. Any decision regarding an exception or exemption to a Proposal for Diversion or a Proposal to Withdraw Water by the Regional body, any state or party shall comply with the principles and standards under the public trust doctrine for a withdrawal from a water source in any state or states that are parties to the Compact.

3. The definition of "diversion" includes any water that is produced in the Basin but removed from or transferred outside the Great Lakes Basin or watershed, including water that is a Product; provided however that water that is a Product in a container 5.7 gallons or less is not a diversion but a consumptive if it is authorized or licensed for such purpose under Constitution, laws, and regulations of the state or states from which the water is withdrawn.

Conclusion

The Great Lakes Compact's major features prohibit diversion of waters outside of the Great Lakes Basin. However, the integrity and strength of the diversion ban is premised on a showing by the states that they are committed to standards for conservation and the protection of the environment, public health, and general welfare imposed by the states that are equal to or greater than the standards contained in the Compact. Failure to expressly protect, by conditions to the Compact, would announce to the world that the diversion ban is superfluous since quantities of water that cannot be piped out of the Great Lakes can be shipped as a product without limit.

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PRESS RELEASE

EXHIBIT 2

To: News Media

From: Hon. William G. Milliken Contact: 231-946-0660
Hon. James E. Blanchard Contact: 202-799-4303
(Former Governors of Michigan)

Traverse City and Detroit, Michigan, June 11, 2008. Former Governors William Milliken and James Blanchard released a bipartisan, joint statement today, urging Michigan legislative leaders to protect the public trust in Michigan's waters when debating and voting on water law reforms in the House and Senate this week.

Both Governor Milliken and Blanchard signed laws during their administrations in the 1970s and 1980s that put into place protections against impairment and diversion of the State's precious water and related resources. These protections included provisions that recognized the public trust in Michigan waters. Under the public trust doctrine, the State has an obligation to manage and prevent harm to the state's water, fish, and other aquatic resources from harm or improper disposition.

"We in Michigan have a long tradition of appreciation and conservation of our incomparable Great Lakes, lakes and streams, and the groundwater that feeds them.," Governor Milliken said. "This tradition embodies the public trust principle – a principle of strong stewardship for the benefit of our citizens, businesses, and communities, and future generations. The state must be required to consider the public interest for any large withdrawals – especially private taking of water for sale. Without protecting the public trust in our waters, Michigan's sovereign power to safeguard our vital interests against outside forces will be diminished."

"When the eight Great Lakes state governors signed the Great Lakes Charter in 1985, Michigan committed to protecting water as a 'public resource held in trust,'" said Governor Blanchard, referring to the Great Lakes Preservation Act passed into law when he was governor in 1985. "The public trust is about more than public access to our navigable waters for boating, fishing, and commerce. The world is facing a monumental water crisis, made worse by the effects of global warming. We need to establish a solid legal and policy public trust framework that will stand up in the face of these realities."

"Michigan can ill afford to pass a law weak on safeguards against exports and sale," Governor Milliken added. "If we do not enact a strong water law that strongly protects the public trust in our waters, future shifts in

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population and political power will seize on these weaknesses and we will lose control of our most valuable natural heritage."

Both Governors agreed that the water law now debated in the legislature must accomplish four things.

Recognize and protect the public trust in all of our waters. The public trust standard does not interfere with the reasonable use of our waters by Michigan businesses, farmers, and citizens. In fact, it's quite the opposite. The public trust protects these reasonable uses against claims by outside interests under NAFTA, other trade agreements, or federal laws that may be passed in the future.

Close the "product" exemption to the diversion ban. The water law already recognizes consumptive or reasonable uses by Michiganians, so it is not necessary to tell the world that our water can be put in containers and exported.

Tighten the adverse impact standard and tie it to a reduction in stream flows, not reductions in fish populations. Fish are a public resource subject to the public trust doctrine. Reduction of flows and aquatic habitat should be regulated to avoid sacrifice of public trust resources like fish.

Require individual permits for all withdrawals that are likely to cause an adverse impact or that exceed 1 million gallons per day. The current 2 million gallons per day threshold largely ignores major withdrawals.

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Statement of Senator Charles E. Schumer
July 30, 2008
"S.J. Res. 45, A Resolution Consenting To and Approving the Great Lakes-St. Lawrence River Basin Water Resource Compact"

Thank you, Senator Feingold, for holding this hearing today. I think I speak for all of us in New York when I say that we are very excited that the Great Lakes Compact is coming before Congress for ratification. This has been a long process, and I want to commend the members of the Great Lakes Commission for their dedication to protecting this amazing natural resource. I would particularly like to thank Senators Levin and Voinovich for their hard work on this issue.

The Great Lakes are one of the most significant resources America has. This system of lakes is a huge economic driver and is absolutely critical to our health and environment. The Lakes provide jobs, transportation, and inexpensive hydroelectric energy. One study by the EPA estimated that in 1995, over 10% of all jobs in the United States and Canada were directly supported by the Great Lakes. Tourism and recreation on the Lakes also contribute billions of dollars to the economy every year.

Healthy lakes are essential to the continued health of our people, environment, and economy. If increased diversions away from the Great Lakes lead to dropping water levels, we will see huge economic losses in shipping and hydroelectric power generation. And we are already seeing the impact of changing water levels on ecosystems in New York. Many of our coastal wetlands have disappeared or been overrun by invasive species as lake levels have changed over the years. This has been a huge blow to the recreational fishing industry, which relies on the wetlands as spawning habitat.

The coming years will present ever more demands on the Great Lakes – more people, new types of manufacturing, new energy needs. We don't know what these changes will mean for the Lakes, but we do know how important it is to keep them healthy.

That is why I am strongly in favor of the Compact, which will take important steps to safeguard the long-term health of this vital resource. Congress should ratify this Compact as soon as possible.

Thank you, Senator Feingold, for the opportunity to speak today. And again, thank you to Senators Levin and Voinovich for their strong leadership on this and so many issues that are vital to the Great Lakes.

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December 5, 2005

To: George Kuper
President and CEO
Council of Great Lakes Industries

From: Sam Speck
Director, Ohio Department of Natural Resources.
Chair, Great Lakes Governors' and Premiers' Water Management Working Group

You and other stakeholder representatives have raised concerns regarding three specific sections of the November 10 drafts of the *Great Lakes—St. Lawrence River Basin Water Resources Compact* (Compact). On behalf of the Working Group, I would like to provide you with a description of our intent with respect to these sections. Please share this memo with other interested parties.

CONCERNS AND RESPONSES

Please note that all Section references below are to the November 10 drafts of the Compact and "your submission" mean the joint submission from the Council of Great Lakes Industries and the National Wildlife Federation dated October 9, 2005. Each "concern" below is the text that you submitted to us and the "response" is on behalf of the Working Group.

1. CONCERN: The "grandfathering" of existing users.

The "grandfathering" issue has been known – and industry widely believes agreed to - since the beginning of the deliberations. But, there are major problems with current language:

a.) The current baseline from which "new" or "increased" will be determined is unnecessarily unclear/imprecise and potentially constraining (Section 4.12.2 ii). An industrial capital investment made in any part of a facility's water withdrawal system must be permitted to operate at the capacity for which it was designed and built, no matter if other parts of the water treatment or distribution system may require enlargement. Above all, this section will generate wide dissatisfaction and a decided lack of support if it is not clarified.

b.) There is no provision for challenging/correcting the list of existing withdrawers - and the grandfathered withdrawal quantities – that will be created by each Party which may omit users or cite incorrect quantities. Some will believe that if they are inadvertently left off such a list they will not be considered for an existing use at some point in the future.

VerDate Aug 31 2005 12:51 Oct 02, 2008 Jkt 044332 PO 00000 Frm 00105 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44332.TXT SJUD1 PsN: CMORC

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Response

a.) In your submission to the Working Group, you proposed that existing Withdrawals would be determined as follows:

> "The existing Withdrawal will be determined by the [larger][1] of either the applicable Withdrawal limitation in any permit authorizing the Withdrawal; or, the physical capacity of the withdrawal system facility (which includes Withdrawal capacity, treatment capacity, and other capacity limiting factors) as of the effective date of the Compact."

The Working Group's intent and effect of Section 4.12.2 of the Compact is consistent with your submission. Each State will have the flexibility of choosing either to use the permitted amount or capacity limiting factors for determining existing withdrawals.

We encourage interested stakeholders to work with the individual States to help them determine which approach to use when identifying existing water withdrawals.

b.) The individual States will have the authority to create the process for developing and maintaining lists of existing water withdrawals. It is our understanding that States intend to use processes similar to those that have been used for other management and regulatory initiatives with opportunities for public participation, appeals and due process. All interested stakeholders are encouraged to work with the individual States as they develop these processes to ensure that the lists are accurate.

2. CONCERN: Change to a mandatory requirement not understood.

A very recent change to a decision-making standard (Section 4.11.2) - a substitution of "*and*" instead of "*of*" as the conjunctive in the last phrase – changes the entire meaning of the provision and sets up a situation where a significant impact on a few feet of a stream could be viewed as a bar to permitting. Hopefully this is just a 'typo. If not, this constitutes a considerable and unsupportable change in intent of the section.

Response

The Working Group's intent is consistent with your submission regarding the scope of evaluating "no significant adverse impacts." To clarify, a "Source Watershed" is the watershed of a Great Lake or the St. Lawrence River. Therefore, requiring that there be no significant adverse impacts to a Source Watershed means that, for example, there be no significant adverse impacts to the Lake Michigan watershed.

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[1] The original submission actually used the word "smaller," but the clear intention was to use the word "larger."

VerDate Aug 31 2005 12:51 Oct 02, 2008 Jkt 044332 PO 00000 Frm 00106 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44332.TXT SJUD1 PsN: CMORC

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In your submission to the Working Group, your proposed criterion included in your Section 4.9.2 read as follows:

> "The Consumptive Use [or] Withdrawal...will be implemented so as to ensure that the Proposal....will result in no significant individual or cumulative adverse impacts to the quantity or quality of the *Waters and Water Dependent Natural Resources of the applicable Source Watershed.*" [Emphasis added.]

With this language and the corresponding definitions, your submission would require that there be no significant individual or cumulative adverse impacts at both the Basin-wide and Source Watershed (e.g. Lake Michigan watershed) scale.

In the Compact, the definition of "Water and Water Dependent Natural Resources" (Section 1.2) reads as follows:

> "**Water Dependent Natural Resources** means the interacting components of land, Water and living organisms affected by the *Waters of the Basin.*" [Emphasis added.]

And the definition "Waters of the Basin" reads in the Compact as follows (Section 1.2):

> "**Waters of the Basin or Basin Water** means the Great Lakes and *all* streams, rivers, lakes, connecting channels and other bodies of water, including tributary groundwater, within the Basin." [Emphasis added.]

Accordingly, when a reference is made to the "Water Dependent Natural Resources," a reference is effectively made to all of the water of the Great Lakes Basin. Therefore, in Section 4.11.2 of the Compact, the use of the word "and" in place of "of" simply clarifies that, in addition to your explicit requirement that there be no significant adverse impacts to the Water Dependent Natural Resources of the Source Watershed, there be no significant adverse impacts to the Great Lakes—St. Lawrence River Basin as a whole.

In conclusion, the intent and effect of the language included by the Working Group is consistent with the intent and effect of the language provided in your submission.

3. CONCERN: Inappropriate unilateral Council authority.

As currently drafted, it appears that the Council can revise all the carefully crafted provisions of this Compact (Section 3.1, 2nd Para.) without any public or State legislative review. This threatens the stability of secure access which is so critical to industry. The odds are legislators would not appreciate this delegation of legislative authority either. At best there are significant differences of opinion as to how this section reads. At worse, the Council has reserved the right to change, by unanimous vote and without affirmative legislative action of the Parties, the Standard. We suspect it is a lack of clarity and can easily be remedied.

VerDate Aug 31 2005 12:51 Oct 02, 2008 Jkt 044332 PO 00000 Frm 00107 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44332.TXT SJUD1 PsN: CMORC

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Response

This is an incorrect interpretation of the referenced paragraph. The second paragraph of Section 3.1 of the Compact does not allow the Compact Council to "unilaterally" revise the Standard of Review and Decision without any public or State legislative review. The second paragraph of Section 3.1 states that:

> The Council may revise the Standard of Review and Decision, after consultation with the Provinces and upon *(1)* unanimous vote of all Council members, *(2)* by regulation duly adopted in accordance with Section 3.3 of this Compact and *(3)* in accordance with each Party's respective statutory authorities and applicable procedures. [Italicized numbers added]

Therefore, before any revision can be made to the Standard of Review and Decision, **ALL** of the following steps must take place:

(1) **Unanimous vote of all Council members.**
The Council consists of all eight Great Lakes Governors (see Section 2.2). Therefore, all eight Governors must approve any proposed revision to the Standard of Review and Decision. Any single Governor may veto a proposed revision to the Standard of Review and Decision.

(2) **Regulation duly adopted in accordance with Section 3.3 of this Compact.**
Section 3.3.1 states in part that:

> Any rule or regulation of the Council...shall be adopted *only after public notice and hearing*. [Emphasis added]

A contention that changes can be made without public notice and hearing is incorrect.

(3) **In accordance with each Party's respective statutory authorities and applicable procedures.**
Any proposed revision must be done in accordance with the appropriate statutes, rules and regulations in each and every State. Each State will have the opportunity to determine what the appropriate rules may be.

It is difficult to envision a case where there would be no public hearings or input in *any* of the States on a proposed revision to the Standard of Review and Decision. All of the States currently have in place procedures that must be followed before regulations can come into force. In some instances, these procedures include legislative review of the proposed regulations.

Therefore, an interpretation that there could be a "unilateral" revision to the Standard or Review and Decision is erroneous. Each State legislature has significant ability to decide under what circumstances the Standard of Review and

VerDate Aug 31 2005 12:51 Oct 02, 2008 Jkt 044332 PO 00000 Frm 00108 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44332.TXT SJUD1 PsN: CMORC

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Decision may be revised because of the requirement that the revision be adopted in accordance with each Party's respective statutory authorities and applicable procedures.

CONCLUSION

We appreciate your concerns and we hope that this clarification regarding the Working Group's intent is helpful. As always, if there are questions please do not hesitate to contact me or other Working Group members. We appreciate your continued partnership in our shared efforts to protect the Great Lakes—St. Lawrence River Basin.

VerDate Aug 31 2005 12:51 Oct 02, 2008 Jkt 044332 PO 00000 Frm 00109 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\44332.TXT SJUD1 PsN: CMORC

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State Legislation Reflecting the Speck Memo

- The Indiana legislation (Senate Enrolled Act No. 45 of 2008) states in Section 10:

> Sec. 10. (a) The criterion of section 4.11.2 of the compact is met only if the withdrawal or consumptive use will be implemented so as to ensure that the proposal will result in no significant individual or cumulative adverse impacts to the quantity or quality of the waters and water dependent natural resources of either:
>
> (1) The basin considered as a whole; or
>
> (2) The Lake Michigan or Lake Erie watershed considered as a whole.
>
> (b) Impacts of a withdrawal or consumptive use on the quantity or quality of waters and water dependent natural resources of more localized areas that affect less than:
>
> (1) the basin considered as a whole; or
>
> (2) the Lake Michigan or Lake Erie watershed considered as a whole;
>
> are considered a part of the evaluation of reasonable use under section 4.11.5 of the compact.
>
> (c) When determining whether there will be significant individual or cumulative adverse impacts under this section:
>
> (1) consideration shall be given to the impacts incurred in a particular tributary or stream reach where those impacts are important to:
>
> (A) the basin; or
>
> (B) the Lake Michigan or Lake Erie watershed as a whole; and
>
> (2) a judgment shall be made of the nature, degree, scope, and materiality of the impacts and the regional importance of those impacts to:
>
> (A) the basin; and
>
> (B) the Lake Michigan or Lake Erie watershed.

- The Ohio legislation (H.B. 416, Act ___ of 2008) declares the Legislature's intent in Section 1522.07(B), which states:

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(B)(1) It is the understanding and intent of the general assembly that Section 4.11.2 of the Great Lakes-St. Lawrence River Basin Water Resources Compact as enacted in section 1522.01 of the Revised Code shall be interpreted to require that a withdrawal or consumptive use will be implemented so as to ensure that the withdrawal or consumptive use will result in no significant individual or cumulative adverse impacts on the quantity or quality of the waters and water dependent natural resources of either of the following:

(a) The basin considered as a whole;

(b) The applicable source watershed of lake Erie considered as a whole.

(2) In addition, it is the understanding and intent of the general assembly that impacts of a withdrawal or consumptive use on the quantity or quality of waters and water dependent natural resources of more localized areas that affect less than the basin or an applicable source watershed as a whole are to be considered a part of the evaluation of reasonable use as provided in Section 4.11.5 of the compact.

The governor and the governor's alternate on the Great Lakes-St. Lawrence River Basin Water Resources Council shall advise the council, the other states that are proposed parties to the compact, and the United States Congress with respect to the understanding and statement of legislative intent set forth in division (B) of this section and shall inform them that such understanding and intent are a material consideration to the general assembly's concurrence in the Great Lakes-St. Lawrence River Basin Water Resources Compact. Prior to seeking the consent of the United States Congress to the compact, the governor and the governor's alternate on the council shall actively seek the concurrence of the council and the other state parties to the compact with respect to the understanding and legislative intent set forth in division (B) of this section, and the governor shall report to the general assembly periodically concerning those efforts.

- The Pennsylvania legislation (Act 43 of 2008) declares in Section 5(3):

  In assessing the impacts of a withdrawal or consumptive use proposal under the decision-making standard in section 4.11(2) of the Compact, the Department shall consider the impacts to the waters and water-dependent natural resources of the basin as a whole and the applicable source watershed to be either the watershed of Lake Erie or Lake Ontario, as a whole, whichever is the watershed from which water is proposed to be withdrawn.

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Testimony of Senator Debbie Stabenow, Michigan

Before the Judiciary Committee of the United States Senate

The Great Lakes—St. Lawrence River Basin Water Resources Compact

July 30, 2008

Thank you Chairman Feingold and Ranking Member Specter for holding a hearing on this critical Great Lakes issues. The Great Lakes are truly one of the world's most cherished natural resources, and as a Senator from Michigan, I am proud to be a strong supporter of the Great Lakes–St. Lawrence River Basin Water Resources Compact.

There are many important issues facing the Great Lakes that are vital for their long term protection, and this Compact is the number one piece of the puzzle in regards to the governance of the quantity of water in the basin.

The use of a compact is a common federal legal mechanism to allow States the ability to govern themselves for interstate purposes. Water agreements represent a common policy for compacts as there are already 41 state compacts approved by Congress allocating interstate water management to States. In this case, the governors and state legislators have all agreed to the terms–in fact 95% of the legislators voted in favor of the Compact in each state. Now it is the Constitutional obligation of this United States Congress to approve this compact.

In 2000, Congress, via the Water Resource Development Act, tasked Great Lakes States to develop new rules to govern Great Lakes water. The States set about doing this and after a long and thoughtful process, the governors and the state legislators have agreed upon a set of rules for the first time. It sets in place water management laws for each of the Great Lakes states, while at the same time maintaining the federal ban on diversions. This Compact is the Great Lakes region's answer to Congress to take responsibility for its water resources.

There are a multitude of reasons to manage Great Lakes water use. For example, both climate change and an increase in demand for water threaten the water supply in the Lakes. The compact is the right legal mechanism to provide residents and governments of the Great Lakes the management tools they need. I want to lay out the unique reasons why a Great Lakes compact is important.

First, the geography of the Great Lakes makes an interstate compact an appropriate arrangement to manage water use. With 8 States occupying the basin, the action of one state ultimately affects everyone else. It would be far more efficient for the States within the basin to manage individual cases then the federal government and it should be the right of neighboring States to have a say in how everyone's water is used. Political lines cannot separate the rights of others who share this water.

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Second, the ecological characteristics of the Great Lakes Basin demand delicate management. This is a finite resource even though it is a vast one. While it is the world's largest system of fresh water, and the lakes themselves store nearly one-fifth of the world's surface freshwater, less than 1% of Great Lakes' water, on average, is renewed annually. Increasing demand for water, whether in the basin or from outside the basin, can greatly impact the features of the region.

Third, the Great Lakes are an important part of our culture and our way of life. It's a resource we want to protect for our children and our grandchildren.

Fourth, our local economies rely on the health and abundance of the Lakes. Whether its tourism, shipping, sport and commercial fishing, or land values, the Great Lakes are the centerpiece of commerce in the basin. For example, fishing, hunting, and wildlife watching generate about $18 billion in the Great Lakes region's annual revenue and the Great Lakes shipping industry includes annual revenue of $7 billion. These are just a few examples that rely directly on the quality and abundance of water in the Great Lakes Basin.

Finally, the federal government through many different means has a long standing practice of protecting our natural wonders with significant national importance. This ban protects the Great Lakes from being sold-off or diverted from the residents that live there while protecting them for the use and enjoyment of the entire nation. We would never allow other natural wonders such as the Everglades, Yellowstone Park or the Grand Canyon to be sectioned off and sold to the highest bidder, so this Compact also recognizes the needed protection of the Great Lakes. It is the federal protection that our region deserves.

Thank you again, Mr. Chairman for holding this important hearing. I look forward to working with the Committee to pass this important legislation.

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