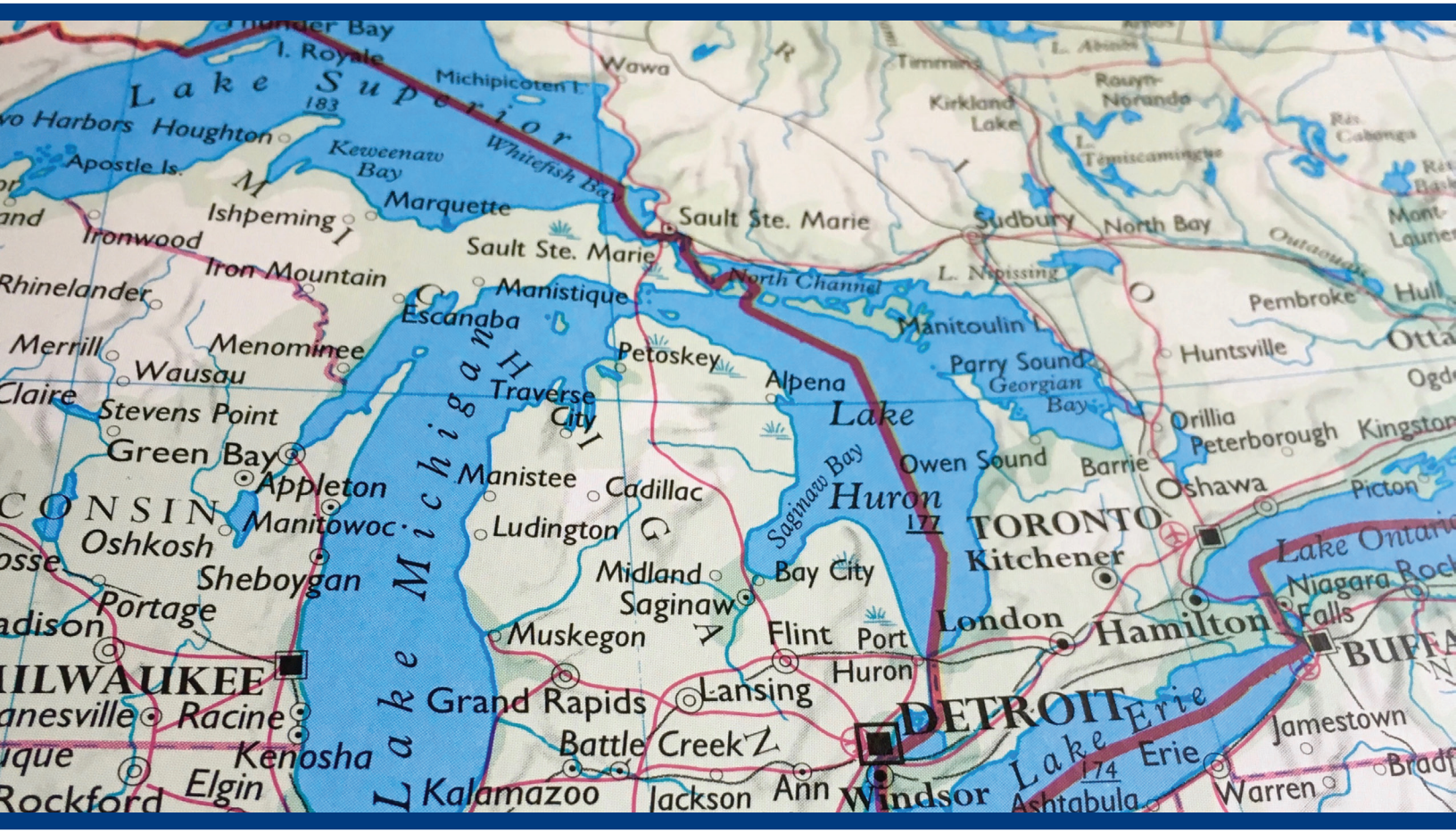
FINAL REPORT

Legal Assessment of the Great Lakes Basin Compact and Great Lakes Commission



National Center for Interstate Compacts
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THE COUNCIL OF STATE GOVERNMENTS
NATIONAL CENTER FOR INTERSTATE COMPACTS

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TABLE OF CONTENTS

ACKNOWLEDGMENTS

We recognize that our work builds on the landmark, groundbreaking, and forward thinking work of many governors, premiers, state and provincial officials, Commission members, executive directors, and staff. We do not attempt to list them, except that we specifically recognize Tom Crane, the Commission's Deputy Director and informal Commission historian. Tom's willingness to freely share his knowledge, assistance in providing resources that we requested and resources that we did not know we needed until he provided them, and patient, careful review of our work has made our work more complete, accurate, and we hope, more helpful to the Commission.

We are also grateful that the Commission selected The Council of State Governments (CSG) to conduct this Legal Assessment. We feel a sense of closing a loop and a bit of trip down memory lane. In 1954, the states chose a CSG meeting to announce their interest in a Great Lakes Basin Compact; CSG organized the meetings at which the states negotiated the Compact; and CSG facilitated the organizational meeting of the Commission and provided support and resources during the early days of the Commission. CSG, through the National Center for Interstate Compacts, is thrilled to once again be of assistance to the Great Lakes states and the Commission. We have tried to weave together CSG's long history with interstate compacts with the rich history of the Great Lakes Basin Compact and Great Lakes Commission to bring a perspective on the Compact and Commission that we don't see in existing legal and historical writings about the Great Lakes Basin.

November, 2019

EXECUTIVE SUMMARY

Imagine the attributes of a successful, relevant, and well-managed interstate commission. Would your vision have the states appoint members from the highest levels of state government, nongovernmental organization management, and industry to serve on the commission? Would the commission develop programs and policy recommendations that others celebrate? Would the federal government continue to refer to and assign new tasks to the commission in lieu of creating new federal studies and programs? Would the commission be a "go to" entity for holding and distributing federal, state and grant funds? And would the commission have a clean record of financial audits and never have been sued?

With these significant markers, why does the Great Lakes Commission need a Legal Assessment, and what more can a Legal Assessment say about the Commission that has not already been said in the five outside assessments conducted since 1982? CSG considered these questions in deciding whether to answer the Commission's call and throughout our work here.

As we studied existing writings about the Compact and Commission, we discovered that none discuss the legal structure and administrative operation of the Compact and Commission relative to the current rich body of interstate compact law, scholarly legal work, and on-the-ground experience with compact drafting, implementation, and interstate commission administration. Until now. This Legal Assessment considers how the states, provinces, and Commission can intentionally use common and developing principles of interstate compact law and interstate commission administration to continue its past successes in a world of law and agency practice that is different from and far more complex than 1955 when the first five states enacted the Compact and 1968 when Congress granted partial consent to the Compact.

CSG has helped states rewrite many older interstate compacts but quickly discarded that option here. Instead, building on a solid set of authorities, a history of successful work, and a well-managed Commission, CSG turned its focus toward how the Commission can avoid legal potential issues and manage risk as it effectively implements the Compact.

This Legal Assessment makes many recommendations. None are immediately critical to avoid catastrophe. CSG's recommendations generally involve adjustments to the Commission's policies and practices and developing supplementary agreements for the states and provinces that clarify and fill gaps in the Compact and other authorities pursuant to article VI.H of the Compact. CSG recommends five specific amendments to the Compact itself—changes that the current Compact does not permit, the states cannot make effective through a supplementary agreement, or would fundamentally alter the scope of Congress's consent. CSG offers its recommendations in the spirit of positioning the states, provinces, and Commission to be more intentional and deliberate in their implementation of the Compact and to be more effective in bringing together and collaborating with the myriad other Great Lakes Basin management laws, agreements, and entities.

This Legal Assessment uses the term "states and provinces" as a default term when referring to the Compact members and uses only the states or provinces when the context suggested just one or the other. CSG recognizes that some provisions of the Compact may not be applicable to the provinces. The Declaration of Partnership does not identify applicable or inapplicable Compact provisions.

This Legal Assessment contains the following 31 principal recommendations numbered sequentially for easy reference. The recommendations suggest four general types of actions. Some recommendations suggest more than one type of action.

- Internal Practices and Procedures—these are actions that the Commission can take on its own, but may need to consult with the states, provinces, and U.S. federal government: Recommendations 1, 3, 4, 5, 6, 7, 8, 9, 11, 12, 14, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31
- Supplementary Agreements—these are actions that the Commission can assist the states and provinces to develop supplementary agreements pursuant to section VI.H of the Compact to clarify and fill gaps in the Compact and other authorities: Recommendations 1, 10, 13, 16, 21, 24
- State and Provincial Actions—these are actions that the states and provinces should take, with the Commission's assistance

as needed, regarding their own intra-state or intra-province statutes, regulations and practices: Recommendations 1, 2, 4, 7, 8, 10, 13, 16, 17, 18, 19, 24, 28

- Amendments to the Compact or Other Congressional Action—these are actions that require an amendment to the Compact because they are not permitted by the current Compact language, cannot be legally effective through a Commission or states-only action, or would fundamentally alter the scope of Congress's consent: Recommendations 10, 17, 18, 24, 28

Section IV.A –Introduction to the Great Lakes Basin Compact and Great Lakes Commission

No recommendations.

Section IV.B – The Great Lakes Basin Compact and Great Lakes Commission Relative to Other Laws, Agreements, and Entities

1 The states and provinces should communicate when and how they have considered actions the Commission recommends that do not involve built-in state and province participation. This communication may be to each other or to the Commission, which can then disseminate that information to the other party states and provinces. The Commission should also intentionally monitor when and how the states and provinces consider actions the Commission recommends. The Commission should also consider developing feedback indicators to help it learn how the states and provinces use its analyses and recommendations to maximize the effectiveness of future Commission actions. The states, provinces and Commission may undertake this communication and monitoring without change to any legal authority, or they may choose to institutionalize communication and monitoring by enacting a supplementary agreement pursuant to article VI.H.

2 When a state or province undertakes studies, policy work, or other investments or efforts on the same subject matter as in articles VI and VII of the Compact, the state or province should engage with the Commission and ensure clear communication whether the work is independent of that state's or province's commitments to the Compact. This information sharing and communication helps ensure the states and provinces recognize

that they are working in a policy area that they have previously committed to considering the regional interest.

3 The Commission should follow the states and provinces' studies and policy work outside the Compact that are related to the subject matters in articles VI and VII and make efforts to engage with the states and provinces in that work. Active information sharing and communication will help ensure the states and provinces are considering actions the Commission recommends and the regional interest that the states and provinces committed to in the Compact.

Section IV.C – Tribes and First Nations' Participation in the Great Lakes Basin Compact

4 The Commission should convene the states, provinces, tribes, and First Nations to discuss the tribes and First Nations' interest in the governance of the Great Lakes Commission and the Commission's studies and recommendations. When designing a means for tribes and First Nations' participation in implementation of the Compact or with the Commission, the states and provinces should ensure that all tribes and First Nations that are located in, that have ceded lands, that have treaty rights or that have cultural resource, natural resource, and other interests in the Great Lakes Basin have an opportunity to participate. The large number of individual tribes complicates the direct involvement of each tribe and the Commission's ability to engage with each tribe individually.

5 The Commission should work with legal counsel, federal agencies that the Commission routinely works with, and U.S. federally recognized tribes to determine whether the Commission has a trust responsibility to the tribes, and if so, determine how to comply with that Trust responsibility.

Section IV.D – Congress's Consent to the Great Lakes Basin Compact

6 The Commission should consult with legal counsel about Congress's current practice with state-foreign agreements. The Commission, states, and provinces could

work together to develop a new or supplemental U.S. federal consent statute that (1) grants full consent to the Compact; (2) concludes that consent to the Compact is not necessary; or (3) expressly recognizes Ontario and Québec's participation as associate (or even full) members of the Compact. Any new consideration of consent would require coordination with Canada to address whether U.S. federal law could bind Canadian provincial activity through the Compact without Canada's formal approval.

7 The Commission should consult with legal counsel whether Congress's withholding of consent to the bi-national elements of the Compact, raises a legal question whether the remainder of the Compact required Congress's consent. If the Commission concludes the congressional record is ambiguous, then Congress and the states should clarify that consent was necessary for reasons required by *Virginia v. Tennessee* (increasing the political power of the compacting states which may encroach on federal supremacy) or *Cuyler v. Adams* dissent (elevating party states at the expense of non-party states). Historical documents not be part of the congressional record may be key to this question. In section V.G, this Legal Assessment recommends the Commission develop a complete (or as complete as possible) historical record of the Compact. Until the Commission and Congress address this question, the states and provinces should continue to assume that the Compact needed consent and that Ontario and Québec's participation as associate members is permissible.

Section IV.E – State Laws Implementing the Great Lakes Basin Compact

8 The Commission should work with the states and provinces to review state statutory and regulatory references to the Great Lakes Basin Compact and Great Lakes Commission and amend or repeal provisions that are incorrect, outdated, conflicting, or redundant.

Section IV.F – Amending the Great Lakes Basin Compact

9 The Commission should maintain a working document of recommended supplemental agreements and amendments to the Compact that could be used with short notice

if an opportunity arises to negotiate a supplemental agreement or amend the Compact or for Congress to address in a related bill.

10 The states should consider whether they want to amend the Compact to specify certain types of amendments that the states may make to the Compact without Congress's consent. If the states agree not to permit amendments, they may enact that agreement as a supplementary agreement pursuant to article VI.H of the Compact. If the states wish to permit amendments, they should amend the Compact text directly and obtain Congress's consent to the amendment. CSG can assist the states in this endeavor to ensure on-going uniformity for future amendments.

11 The Commission should ensure that it is regularly reviewing federal, state, and provincial bills, agency regulatory actions and programs, and other efforts that might involve the Commission or the Commission's work and priorities and bring attention to those that could conflict with the Compact, the Commission's policies, and actions the Commission recommends. Many bills, regulations, programs, and other efforts may not be targeted to the Commission or Great Lakes Basin management, but could affect the Commission and its work, so the Commission's review will need to be broad in scope. When the Commission must bring attention to potential conflicts, the Commission should use those opportunities to educate legislators and agency officials about the Commission and interstate compacts generally.

Section IV.G – Interpreting the Great Lakes Basin Compact

12 The Commission should consult with legal counsel and the states about applicable statutory interpretive standards prior to expressly interpreting the Compact or Congress's consent statute. The Commission should also consult with counsel about the applicable law in the likely judicial district when there is risk of litigation, and how the Commission can ensure compliance with that law in its decision-making.

13 To help ensure uniform interpretation of the Compact, the states, provinces, and Commission should develop a formal or informal manner of interpreting the Compact, such

as by authorizing staff to do so in consultation with the Commission or authorizing the Commission to issue advisory opinions as suggested in recommendation 16.

14 The Commission should build and maintain a record of its past and future implementation of the Compact with references to applicable provisions of the Compact and whether the Commission believed a provision to be ambiguous that required interpretation.

15 The Commission should build and maintain competency in how other interstate commissions and their party states apply similar provisions in other interstate compacts and related authorities to help the Commission intentionally interpret and apply the Compact and related authorities in a consistent or different manner.

Section IV.H – Enforcing the Great Lakes Basin Compact

16 The states and provinces should consider drafting a supplementary agreement to authorize the Commission to issue advisory opinions about the meaning of or application of a specific provision of the Compact and develop a manner of disseminating that information to the states, provinces, and other interested persons.

17 Congress and the states should amend the Compact to specify the manner in which the party states can enforce the Compact (judicial and non-judicial), and specify the types of enforcement actions that are permitted, such as actions to collect unpaid annual payments and to require consideration of actions the Commission recommends. Any new enforcement provisions in the Compact should specify that they are the exclusive remedies applicable to the Commission or to the states in their implementation of the Compact.

18 Congress and the states should amend the Compact to specify whether there are third party beneficiaries with rights to enforce the Compact, and if so, who those persons and entities are, to exclude all others, and the rights that third-party beneficiaries have under the Compact.

19 If the states or the Commission are parties in an enforcement action, they should handle the matter with a long-term perspective of maintaining the authorities in the Compact and for the Commission and intergovernmental relations rather than a narrow focus on winning a particular factual or legal claim.

Section V.A – The Great Lakes Commission is an Interstate Compact Agency, a Governmental Entity

20 The Commission should use consistent terms to refer to itself and those terms should convey an understanding that the Commission is an interstate compact agency and a government agency. Using terms that express the interstate nature of the Commission helps the public, courts and other government agencies understand that the Commission is not a state or federal agency.

Section V.B – Appointment and Removal of Commissioners

21 The Commission, in consultation with the states and provinces, should enact a bylaw or add a statement in its Guide to Operations and Procedures specifying whether and how it gives input into appointment or removal decisions. That bylaw or statement should clearly articulate that the appointing party state is the only body authorized to appoint and remove a commissioner, not the Commission itself. The Commission may want to consider making general statements about its needs and interests in adding diversity in specific areas of expertise, perspectives or backgrounds to the Commission.

Section V.C – Administrative Procedure and Transparency

22 The Commission should review its policies and practices for consistency with common principles of administrative agency action and transparency, including, but not limited to administrative procedure, public records disclosure, open public meetings, conflicts of interest, financial disclosure, and public contracting. The Commission will likely need to adjust its policies and practices through its Guide to Procedures and Operations, amendments to its bylaws, or through rulemaking pursuant to section IV.K

of the Compact. The states' laws differ on these procedures and requirements. The Commission will need to choose whether to use federal procedure and requirements; try to harmonize existing laws as best as possible; choose one state's laws to observe, or develop its own procedure and transparency standards. The Commission should work with legal counsel on addressing this recommendation.

Section V.D – Budgeting, Funding, Financial Management and Taxation of the Commission

23 The Commission should seek a private letter ruling from the Internal Revenue Service that it is exempt from federal income tax pursuant to section 115 of the Internal Revenue Code. The opinion letter that the Commission received in September 1991 is not binding on the IRS. A private letter ruling is a document that the Commission can rely on.

24 If the Commission wishes to change the manner that the states fund the Commission, it should first complete a study of the state's practices and identify the practices and precise problems that the Commission experiences. A change to the practice in which the states fund the Commission could be made in a supplementary agreement unless the change seeks to avoid an express requirement in the Compact, such as the requirement for the Commission to present a budget to the states' legislatures, in which case, an amendment to the Compact will be necessary.

25 The Commission should work with the states that still owe back annual payments to bring those states into full compliance with article V.C, the Compact's requirement for states to appropriate the Commission's recommended amounts.

Section V.E – Human Resources

26 The Commission should hire a human resources professional, either in-house, or by contract to provide human resources services in place of or as support for the Executive Director and other managers that currently fulfill this role. The human resources professional should also emphasize employee retention policies and programs because interstate commissions benefit from having long-term staff that are familiar with and are

able to train new staff on the unique nature and implementation considerations for interstate compacts. The Commission executive director, and human resources professional should review current policies and work loads to ensure long-term staff can serve this training and internal resource role.

27 The Commission should have its human resources professional and legal counsel review personnel policies and procedures on a regular basis—annually or biennially—for compliance with changes in state and federal statutory, law, federal and state regulations; federal and state agency interpretation and application of statutes and regulations, and judicial case law, and for best practices in agency personnel management in supporting employee retention, workplace health and safety, and conflict management.

Section V.F – Legal Liability and Immunity

28 Congress and the states should amend the Compact to provide several clarifications relating to legal challenges: (1) a clear statement of the Commission and states' sovereign immunity, with applicable waivers for the types of claims that might arise with Compact business that may directly affect persons and entities, including but not limited to tort claims, public contracting, enforcement of transparency laws, worker compensation, procurement, and employee protection and other employment claims; (2) justiciability requirements such as standing and ripeness; and (3) jurisdiction and venue in federal or federal and state court, preferably in one judicial district or one state court and one federal court. Many compacts specify jurisdiction and venue where the interstate commission has its primary administrative office. These clarifications require an amendment to the Compact because a supplementary agreement pursuant to article VI.H cannot bind state and federal courts to statements of sovereign immunity, justiciability requirements, and jurisdiction and venue.

29 The Commission should review the duties that it has affirmatively, or by silence, delegated to staff to determine whether the Commission has granted appropriate authority and constraints on discretion for staff decision-making. The Commission should record such delegations in one place, such as

the Guide to Operations and Procedures, the bylaws, or through rulemaking.

30 The Commission should conduct a thorough risk-management review for the Commission and staff, undertake appropriate remedial measures, and ensure appropriate insurance coverage. Appropriate insurance coverage may include insurance secured by grantees that extends benefits to the Commission. The Commission should also include a section in its Guide to Operations and Procedures on reporting and tendering claims to insurance carriers.

31 The Commission should continue to review, on a regular basis, its policies, practices, and requirements for grant award and use application criteria to ensure they are narrowly tailored and that the Commission applies them consistently and uniformly with appropriate transparency requirements. Because the criteria and transparency requirements would have an external effect on persons and entities applying for grant funding, the Commission should use its rulemaking authority in article IV.K of the Compact to adopt procedure, transparency and grant award and use application criteria as necessary.

Section V.G – Building the Commission's Legal Capacity

In this section, CSG recommends the Commission hire a legal counsel and create a legal library.

NOTES ON SOURCES, CITATIONS, AND ACRONYMS

Copies of all documents referenced in this Legal Assessment, except statutes, court decisions, books, and websites, are on file with the Great Lakes Commission. At the conclusion of this project, CSG provided to the Commission all the documents it studied for this Assessment. Statutory citations were verified using codes available on official federal and state websites as of September 15, 2019; we do not cite the year of each code. Internet citations were verified as of September 15, 2019; we did not include this date in individual citations. For citation form, we generally followed the "BlueBook" 20th ed., the most common citation manual for legal documents. Where a document contained a preferred citation, we used that citation. We cited to only state reporters for case law when available; we did not cite to parallel regional reporters.

This Legal Assessment largely avoids acronyms and short names, except for three instances. The acronym "CSG" stands for The Council of State Governments. The term "Compact" when capitalized refers to the Great Lakes Basin Compact, except when used as part of the proper name of another interstate compact. The term "Commission" when capitalized refers to the Great Lakes Commission, except when used as part of the proper name of another commission.

I. INTRODUCTION

Interstate compacts have long been a foundational element of federalism in the form of state-state and state-federal relations, and a growing element of federalism in the form of state-foreign relations. Compacts predated the U.S. Constitution, with the first agreements between colonies dating back to the 1600s. So ingrained was this concept and form of interstate cooperation and dispute resolution that the drafters of the Articles of Confederation preserved the states' sovereign authority to enter into interstate compacts.[1] In the short time that the Articles of Confederation were in place, the states enacted several compacts, leading the drafters of the U.S. Constitution to further preserve the states' authority to enter into compacts in the U.S. Constitution.[2] Since the founding of the United States, the states have enacted probably fewer than 300 formal compacts,[3] and the U.S. Supreme Court has consistently upheld compacts,[4] recommended that states use compacts,[5] and given strong legal bases for the states to protect their cooperative investments,[6] all of which suggests the seriousness of such formal endeavors within United States governance.

Against this backdrop, in 1955, the eight Great Lakes states negotiated the Great Lakes Basin Compact. Still operating more than 60 years later, in 2018 the Great Lakes Commission began

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[1] Article VI of the Articles of Confederation of 1781 stated, "No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purpose for which the same is to be entered into, and how long it shall continue."

[2] U.S. CONST. art. I, § 10, cl. 3 (the "Compact Clause").

[3] Today, CSG counts approximately 200 current compacts. There is no list of defunct compacts, but based on a review of congressional consent statutes, the number is probably less than 100.

[4] *E.g.*, Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823) (concluding that new Kentucky legislation that conflicted with the Virginia-Kentucky boundary compact violated the Contracts Clause of the U.S. Constitution).

[5] *E.g.*, Vermont v. New York, 417 U.S. 270, 277–78 (1974); Nebraska v. Wyoming, 325 U.S. 589, 616 (1945); Washington v. Oregon, 214 U.S. 205, 217–18 (1909).

[6] *E.g.*, Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852) (stating the "compact, by the sanction of Congress has become a law of the Union").

discussing how it could best fulfill its charge to effectively implement the Compact and provide maximum value to the states and provinces in the Great Lakes Basin. In 2019, the Commission selected The Council of State Governments National Center for Interstate Compacts (CSG) to conduct a legal assessment as one of the first steps of an overall agency assessment. The purpose of this Legal Assessment is to create a baseline understanding of and analytical look at the Commission's existing authorities, policies, and practices, other law and policy applicable to the Commission, and gaps in the collective authority and policy so the Commission can ensure that its implementation of the Compact is complete, clear, and intentional.

Overall, CSG finds a largely successful agency that has developed effective practices for implementing the Compact and related authorities. Still, this Legal Assessment offers recommendations for how the states and provinces, Commission, and the United States government can clarify law and practice to ensure implementation of the Compact with the maximum authority, clarity, and intent, while reducing the risk of acting inconsistently with the Compact.

This Legal Assessment discusses some historical context of Great Lakes Basin management necessary to understand the legal concepts and recommendations. However, this Legal Assessment does not attempt to write any definitive history of the Compact and Commission. CSG leaves that to the scholars of the past and historians of today. Currently, those accounts generally mention the Compact and Commission in scattered form or in just a few pages reserved for non-binding state efforts. CSG hopes this Legal Assessment and the remainder of the Commission's overall assessment inspire a comprehensive historical retelling.

The Commission is not a stranger to assessing itself and seeking outside perspectives on its strengths, areas for improvement, and strategic planning. The Commission provided CSG the following prior assessments:

- A Program Assessment of the Great Lakes Commission (2012)
- A Strategic Review and Organizational Assessment of the Great Lakes Commission (2005)
- Report of the Ad Hoc Committee on Commission Operations (1992)

- Relationship Between the Council of Great Lakes Governors and the Great Lakes Commission: Summary of Legal Authority, Roles, Resources and Work Programs (1985)
- The Great Lakes Basin Compact, A Framework for Discussion (1982)

Each of these prior assessments discusses the Commission as one of many international and regional cooperative efforts, observes how new efforts at Great Lakes Basin management intersect with the Compact and Commission, and suggests the Commission needs to act immediately to retain its relevancy. Most of the prior assessments seem to assume the Commission has the necessary authority to accomplish its current work and the recommendations in those assessments. But none have explored that authority in depth. This Legal Assessment is different. This is the first comprehensive assessment of the legal efficacy of the Compact, Commission and related legal authorities.

II. METHODOLOGY AND SOURCES

In developing this Legal Assessment, CSG reviewed more than 600 current and historical Compact and Commission records, federal and state statutes and their legislative histories, scholarly articles, books, reports, and other works about the Compact and Commission; interviewed Commission staff and others; accepted recommendations from commissioners; and considered dozens of sources of interstate compact law including historical treatises, recent treatises written by the authors of this report, scholarly articles, and federal and state court decisions.[7]

CSG initially created an interim product, a *Statement of Law and Authorities of the Great Lakes Basin Compact and Great Lakes*

[7] Interstate compact law is the body of law applicable to interstate compact interpretation, implementation, and judicial challenges and interstate commission structure and administration. Two treatises of interstate compact law exist in 2019: MICHAEL L. BUENGER, ET AL., THE EVOLVING LAW AND USE OF INTERSTATE COMPACTS (Am. Bar Ass'n Publ'g 2d ed. 2016) and JEFFREY B. LITWAK, INTERSTATE COMPACT LAW: CASES AND MATERIALS (Semaphore Press 3d ed. 2018). We recommend these sources for detailed reading and citations to primary and secondary sources of leading and contrary law.

Commission, and shared it with Commission staff and the Commission's Executive Committee for feedback and to identify errors and omissions. CSG incorporated the comments and suggestions and created a final Statement of Law and Authorities. That Statement ensured CSG had a complete and accurate understanding of the law and the Commission's practice, and included some analysis and context to give the Commission a preliminary understanding of the importance of the topics of law and agency practices addressed, and the scope of the Legal Assessment. This Final Legal Assessment builds on and supersedes that Statement of Law and Authorities.

CSG analyzed the Commission's legal authorities and practices relative to three sources:

1. principles of interstate compact law and interstate commission structure and administration tested or established through federal and state court decisions;
2. best practices and common practices with interstate commission administration through our collective 50+ years of working with and studying many interstate commissions; and
3. scholarly work on interstate compact law and related law that is balanced and supported by comprehensive analysis.

III. OVERALL HEALTH AND RELEVANCE OF THE COMPACT AND COMMISSION

Overall, CSG finds the Great Lakes Commission to be a well-established, well-managed, well-respected and effective government entity, but also finds the Great Lakes Basin Compact lacks clarity and has significant gaps as compared to compacts drafted in the past 15 to 20 years. The Commission has been resilient in working with its existing authorities and has created procedures, practices, and a culture that allow it to operate effectively even without the clarity and specific terms that recently drafted interstate compacts enjoy. The Commission's strength also comes from its people. Many of its members are appointees from the highest levels of state and province government, non-governmental organization management and industry. Several current and past career staff,

the heart of any agency who carefully and patiently keep their eyes on the long term as appointees rotate on and off, have had long careers with Great Lakes Basin management and are sought-after speakers, authors, and experts.

The analysis and recommendations in this Legal Assessment should be understood as "risk management" in nature. CSG did not find any fundamental problems or concerns that the Commission must address immediately; rather the Commission should take the time to educate itself and the states and provinces of the need for clarity and filling gaps and the options for the form and substance of doing so. The states, provinces, and Commission have many models from other interstate compacts and commissions to study and use or adapt, and have wide discretion to clarify and fill the gaps in their authorities and practices.

Surprisingly, no federal or state court case has interpreted or applied the Compact or adjudicated any Commission action. Over the life of the Compact and Commission, CSG expected to find challenges common with many compacts and interstate commissions such as disputes involving the Commission's authority, the need for and interpretation of Congress's consent, and the relationship between the compact and state law. Similarly, CSG expected to find common employment, tort, and public contracting disputes. Instead of legal disputes, CSG found many indicators that the federal government, states, provinces, other Great Lakes Basin management entities, and non-governmental organizations trust the Commission as a valuable, careful, effective, fiscally responsible, and well-respected leader and partner in Great Lakes Basin management.

Several recently enacted federal statutes have referenced or assigned new work tasks directly to the Commission and the federal government uses the Commission as a pass-through entity for federal grants and for holding and distributing funds. These suggest that the federal government trusts and relies on the Commission as an effective, efficient, and competent entity among the countless Great Lakes governments and non-governmental organizations, and that the Commission is right type of entity relative to the states acting individually or to federal agencies to study and make recommendations to resolve complex policy problems in the Basin.

The states and provinces have consistently appointed members to the Commission from the highest levels of state government, non-governmental organization management, and industry. These are the people who have authority and standing within and without state and provincial government to ensure the Commission's actions and recommendations receive due consideration as required by article VII of the Compact. Additionally, Commission staff informed us that three states used the Great Lakes Commission as the holder of those states' contribution for the construction of a new lock at the Soo Locks Complex.[8] The states' actions indicate that states trust and value the work and policy contributions of the Commission and trust the Commission's financial management.

CSG found many sources celebrating the Commission's achievements, but few scholarly articles on interstate compacts and Great Lakes Basin management that use the Great Lakes Commission as an exemplar.[9] Most of the scholarly sources cited the Compact and Commission as just one of many non-binding arrangements.[10]

CSG also found a few appellate court decisions that use the Compact and Commission as examples to support their reasoning and holdings. For example, in one case, the Commonwealth Court of Pennsylvania had to decide whether an appointee to the Delaware River Port Authority required state Senate approval. In holding that Senate approval was required, the court noted that the Great Lakes Basin Compact and many other interstate compacts in Pennsylvania required such approval.[11] In another case, the Pennsylvania Supreme Court considered whether the commonwealth properly enacted the Driver License Compact when it did so by regulation instead of legislation. In holding that the commonwealth needed to enact that compact by legislation, the court listed the

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[8] Michigan's action transferring funds is at MICH. COMP. LAWS § 474.67a. CSG could not find that Illinois and Pennsylvania codified their actions.

[9] One old source that used the Compact and Commission as an exemplar is FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS, 45, 59, 64 (CSG 1976).

[10] *See, e.g.,* Noah D. Hall, *Toward A New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 423–24 (2006); Joseph W. Dellapenna, *International Law's Lessons for the Law of the Lakes*, 40 MICH. J. L. REFORM 747, 750–52 (2007).

[11] *Crisconi v. Shapp*, 5 Pa. Commw. 275, 283 (1972).

Great Lakes Basin Compact and many others as examples of compacts enacted by legislation.[12] And in another case, the Michigan Supreme Court referred to one of the Great Lakes Commission's studies, *Living with the Lakes*, written in conjunction with the Army Corps of Engineers.[13]

In our interviews and informal conversations, CSG also heard mostly positive feedback about the Commission. For example, Peter Annin, author of the seminal book, *The Great Lakes Water Wars*, reported,

> I think the Commission has done a great job of bringing the region together with a strong bipartisan and cohesive voice (most of the time), which is a significant accomplishment. It is a key reason why officials on the Hill regularly talk about how well organized the Great Lakes region is, and how effective the region is advocating for itself.
>
> But the Commission could be more and do more, but that will require more work/resources and more coordination with other fraternal/rival entities such as the Conference of Great Lakes—St. Lawrence Governors & Premiers and the IJC.[14]

CSG found subject matter overlap between the myriad Great Lakes Basin laws, agreements, and management entities, but did not investigate conflicts or duplication of efforts. CSG found that the authorities in the Compact are broader than many other subject matter-specific entities. For example, as compared to the Great Lakes—St. Lawrence River Basin Water Resources Compact, the Great Lakes Basin Compact has a broader geographic jurisdiction,[15] which gives the Commission a broader scope for addressing diversions. When CSG presented an initial approach for the Legal

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[12] *Sullivan v. DOT*, 550 Pa. 639, 648 n.7, 708 A.2d 481 (1998).
[13] *Glass v. Goeckel*, 473 Mich. 667, 740 n.84, 703 N.W.2d 58 (2005).
[14] Email from Peter Annin to Jeffrey Litwak (June 1, 2019, 3:11 PDT) (on file with author).
[15] *Compare* article III.2 of the Great Lakes Basin Compact (defining "Basin" to include tributaries "which comprise part of any watershed draining into any of [the Great Lakes) *with* article 1, section 1.2 of the Great Lakes—St. Lawrence River Basin Water Resources Compact (defining "Basin" as the watershed of the Great Lakes and St. Lawrence River . . . .").

Assessment to the Commission at its 2019 Semiannual meeting, CSG received a comment that the Legal Assessment would be helpful if it could include an assessment of the states' weakness regarding diversion.[16] This policy question is outside the scope of the Legal Assessment. The Commission could facilitate a states and provinces conversation about this subject at a later time.

IV. THE GREAT LAKES BASIN COMPACT

A. Introduction to the Great Lakes Basin Compact and Great Lakes Commission

1. Statement of Law and Authorities

The Great Lakes Basin Compact is an interstate compact between the eight Great Lakes states, and has two Canadian provinces as associate members. Through the Compact, the states created the Great Lakes Commission.

The states negotiated the Compact in 1954 and 1955 with the assistance of The Council of State Governments.[17] Article II.A of the Compact specifies it would become effective and binding when it had been enacted by the legislatures of any four of the Great Lakes states of Illinois, Indiana, Michigan, Minnesota, New York,

[16] Question from Marc E. Smith, Michigan Commissioner, Great Lakes Commission (May 23, 2019).

[17] For a brief history of early actions leading to the Compact, including a resolution requesting CSG's assistance, see *The Great Lakes Basin: Hearings on S.2688 Before a S. Subcomm. of the Comm. on Foreign Relations*, 84th Cong. 28 (Aug. 27, 1956) (Statement of Marvin Fast, acting Exec. Dir. of the Great Lakes Comm'n); Nicholas V. Olds, Statement Presented to The Council of State Governments at its meeting held in Chicago, Illinois on August 26, 1954 1 (unpublished manuscript). Unfortunately, CSG's records no longer exist; CSG believes they were most likely lost in a flood several decades ago. The historical records that CSG reviewed contain little discussion of how the Canadian provinces were involved in negotiating the Compact. The minutes from the inaugural Commission meeting indicate that the states had been in regular contact with the provinces prior to adoption, that Canadian officials were present at the organizational meeting, and that the organizational meeting minutes would be sent to Ontario and Québec immediately following the meeting. This Legal Assessment does not repeat the history of the Compact here, except as necessary to illustrate a specific point.

Ohio, Pennsylvania, and Wisconsin. Five states enacted the Compact in 1955; the remaining states enacted the Compact in 1956, 1960, and 1963.[18]

There were bills in Congress to grant consent to the Compact in 1955, 1957, 1958, 1959, 1961, 1965, 1966, and 1968. Congress granted partial consent to the Compact in 1968.[19] Congress's consent contained three conditions roughly summarized as: (1) Congress did not fully consent to the Great Lakes Commission making recommendations to or cooperating with foreign governments, and the Commission must cooperate with and send reports to U.S. federal agencies;[20] (2) nothing in the Compact affects the authority of U.S. federal agencies or any international commission;[21] and (3) Congress reserved the right to alter, amend, or repeal its consent to the Compact.[22] Consent is discussed below in section IV.D.

Despite Congress's limited consent, Ontario and Québec became associate members in 1999 after the states and provinces signed their Declaration of Partnership, which establishes and defines the provinces' participation in the Compact.[23] The Declaration of Partnership does not identify which provisions of the Compact are applicable or inapplicable to the provinces. The law applicable to this apparent conflict between Congress's consent and the states and provinces action is discussed below in section IV.D.

In article I of the Compact, the states promise joint and cooperative action relating to the "Great Lakes Basin." Article III of the Compact specifies that the Commission,

> shall exercise its powers and perform its functions in respect to the Basin which, for the purposes of this compact shall consist of so much of the following as may be within the party states:

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[18] The states' enactments of the Compact are listed at the end of the Commission's reprint of the Compact, available at https://www.glc.org/wp-content/uploads/GreatLakesBasin-Compact.pdf.
[19] Act of July 24, 1968, Pub. L. No. 90-419, 82 Stat. 414 (Granting consent of Congress to a Great Lakes Basin Compact).
[20] *Id.* at § 2.
[21] *Id.* at § 3.
[22] *Id.* at § 4.
[23] The Declaration of Partnership is available at http://www.glc.org/wp-content/uploads/2016/10/GreatLakesCommission-Declaration-of-Partnership.pdf.

1. Lakes Erie, Huron, Michigan, Ontario, St. Clair, Superior, and the St. Lawrence River, together with any and all natural or manmade water interconnections between or among them.

2. All rivers, ponds, lakes, streams, and other watercourses which, in their natural state or in their prevailing conditions, are tributary to Lakes Erie, Huron, Michigan, Ontario, St. Clair, and Superior or any of them or which comprise part of any watershed draining into any of said lakes.

The Commission's website notes that the Basin is more than 94,000 square miles in size.[24] The U.S. Fish and Wildlife Service further notes that the Basin includes 9,000 miles of shoreline, includes 5,000 tributaries, and has a drainage area of 288,000 square miles.[25] There is no legal description of the Basin and the description of the Basin in article III could be interpreted in different ways—such as whether the Basin includes the watershed or "natural state" or "prevailing condition" of a river, lake, stream, or watercourse at the time of the Compact or as the watershed or condition of a waterway changes over time, or whether the entirety of a tributary river, lake, stream or waterway is part of the Basin or only the portion of a tributary that is within a party state or the portion that is within a watershed of one of the Lakes, the St. Lawrence River and water interconnections without regard to whether it is located in a party state.[26]

2. Analysis

States enact interstate compacts to resolve specific disputes between states, such as the location of boundaries or to jointly manage a shared resource, such as the Great Lakes Basin. Interstate

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[24] https://www.glc.org/lakes/.
[25] https://www.fws.gov/midwest/fisheries/library/fact-GreatLksBasinEco.pdf.
[26] Some interstate compacts develop policy that indirectly applies in states that are not eligible to be a party to those compacts. For example, the compact creating the Northwest Power and Conservation Council specifies that three of four eligible states may enact the compact but the policy work of the Council applies wherever the Bonneville Power Administration has facilities, which is eight states. *See* LITWAK, *supra* note 7, at 67.

compacts are "sub-federal, supra state,"[27] meaning they exist within the policy gap between matters that are purely of intrastate concern and matters that the states delegated to the federal government in the U.S. Constitution.

Several times during Congress's consent hearings, witnesses explained the role of the Great Lakes Commission as the entity to coordinate the Great Lakes states' discussion and study of Great Lakes Basin issues. For example, an Assistant Secretary of Interior stated, "The Great Lakes Commission established by the compact can be expected to serve as a useful mechanism for stimulating coordinated State thinking and participation in the work of the [Great Lakes Basin Commission pursuant to title II of the Water Resources Planning Act]."[28] Similarly, the Chairman of the New York Power Authority, who opposed early attempts to obtain Congress's consent to the Compact, ended up supporting the final consent bill, stating, "Our experience has demonstrated that there are many problems which no one State can solve alone but which, nevertheless, are inappropriate for Federal action. The Great Lakes Commission throughout the 13 years of its existence has proved a useful forum for the discussion and study of such problems in the area of the Great Lakes watershed."[29]

During one of Congress's early consent hearings, in 1958, one state official referred to the states' ownership of the Great Lakes as

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[27] BUENGER, ET AL., *supra* note 7, at 1 (coining term); Note, *Charting No Man's Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts*, 111 HARV. L. R. 1991, 1996 (1998). For additional reading on why states enact compacts, see Ann O'M. Bowman & Neal D. Woods, *Strength in Numbers: Why States Join Interstate Compacts*, 7 ST. POL. & POL'Y Q. 347 (2007).

[28] Letter from Kenneth Holum, Ass't Sec'y of the Interior (Water and Power), to Thomas E. Morgan, Chairman, House Comm. on Foreign Affairs (undated) (printed in H.R. Rpt. No. 1640, 90th Cong. (1968) at 9).

[29] Memorandum from James A. FitzPatrick, Chairman, N.Y. Power Auth., to Thomas E. Morgan, Chairman, House Comm. on Foreign Affairs (undated) (printed in H.R. Rpt. No. 1640, 90th Cong. (1968) at 12).

the Public Trust.[30] Other scholars have also discussed the application of the Public Trust doctrine to the Great Lakes.[31] The Public Trust doctrine overlays statutory laws, private ownership, and other rights and restrictions to ensure common resources are managed for the public good.

All eight Great Lakes states listed in article II.A of the Compact enacted the Compact by enacting legislation. This manner of enacting the Compact is consistent with article II.A, which requires enactment by each state's legislature. This manner of enacting a compact is the most common way that states enact a compact and that scholars and courts have concluded is proper.[32]

CSG compared the party states' current Compact statutes and did not find any instances where one state has enacted terms materially different from the other states. Indiana's enactment at IC 14-25-13-4 contains the most variation in the form of added definitions and combining sentences, but those variations are not material relative to the other states' enactments. The last sentence of article IV.A of Minnesota's enactment contains a typo, using the word "commissioner" where the other states use the word "commission." In context, "commission" is the correct word. Additionally, article V.A, of the Compact uses the pronoun "he" referring to commissioners. That section should be rewritten to be gender-neutral and inclusive, such as by replacing "he" with "that commissioner." Some states already use gender-neutral terms in their enactments. For example, Michigan's enactment of the Compact uses the term "he or she." Any of the states may revise their enactments to be gender-neutral without first amending the Compact.

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[30] *Granting the Consent and Approval of Congress to a Great Lakes Basin Compact and for Related Purposes: Hearings on S.1416 Before a S. Subcomm. of the Comm. on the Judiciary*, 85th Cong. 34–35 (Mar. 26, 1958) (Statement of Nicholas V. Olds, Asst. Attorney General, State of Michigan).

[31] *E.g.*, Kendra Fogarty, et al., *Emerging Legal Issues in the Great Lakes Such as the Public Trust Doctrine, Subterranean Rights and Municipal Regulatory Arrangements*, 34 CAN.-U.S. L.J. 279 (2010); Chris A. Shafer, *Great Lakes Diversions Revisited: Legal Constraints and Opportunities for State Regulation*, 17 T. M. COOLEY L. REV. 461 (2000).

[32] *See* BUENGER, ET AL., *supra* note 7, at 272; LITWAK, *supra* note 7, at 6–9 (describing differences between compacts and administrative agreements and citing cases).

An interstate compact is a binding enforceable agreement between states.[33] The U.S. Supreme Court stated that compacts are contracts between the states in its very first interstate compact case decided in 1823,[34] and still considers compacts as binding contracts today.[35] In another decision, the U.S. Supreme Court cited several "classic indicia" of an interstate compact, including the presence of a joint organization or body; statutes that are conditioned on action by other states; a limit on whether each state is free to modify or repeal its law unilaterally; and the presence of reciprocal obligations.[36] The Compact satisfies at least three of these four indicia. The Commission is a joint organization of the states. Article VII requires the states to consider the Commission's actions and recommendations. There are reciprocal obligations in article V, which requires the states to fund the Commission, and in article VIII, which requires a six-month waiting period before a state may withdraw from the Compact. CSG did not find any state or other governing body or scholarly article that has questioned whether the Compact is a binding agreement.

The Declaration of Partnership is not a binding element of the Compact and is silent about which provisions of the Compact are applicable and inapplicable to the provinces. In reviewing a draft of this Legal Assessment, Ontario noted it does not believe the requirement in article VII for each party state to consider the actions the Commission recommends to apply to Ontario. The Commission could facilitate a states and provinces conversation about the legal status of the Declaration of Partnership and whether the provinces are bound by the Compact at a later time.

The Compact established the Commission as a body to make recommendations to the party states. Article VI.N states, "no action of the Commission shall have the force and effect of law in, or be binding upon, any party state." Congress's consent to the Compact states, "In carrying out its functions under this Act the Commission shall be solely a consultative and recommendatory agency which will cooperate with the agencies of the United States."[37] When CSG

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[33] BUENGER, ET AL., *supra* note 7, at 42.
[34] Green v. Biddle, 21 U.S (8 Wheat.) 1, 92 (1823).
[35] *See, e.g.*, Tarrant Reg'l Water Dist. v. Herrmann, 569 U.S. 614, 633 (2013).
[36] Ne. Bancorp v. Bd. of Governors, Fed. Reserve Sys., 472 U.S. 159, 175 (1985).
[37] Pub. L. No. 90-419, § 2, 82 Stat. 414, 419.

presented an initial approach for the Legal Assessment to the Commission at its 2019 Semiannual meeting, CSG received a comment that the Legal Assessment would be helpful if it could address why the Compact specified the Commission's authorities would be advisory only.[38] CSG reviewed the federal legislative history and the legislative histories of Illinois, Indiana, Minnesota, New York, and Wisconsin's enactments of the Compact[39] and recent and historical law review and other scholarly articles. One of these sources seems to answer this question directly—Wisconsin's historical records contain a statement by Nicholas V. Olds, a Michigan Assistant Attorney General, to The Council of State Governments in 1954. Mr. Olds reviewed Michigan's 1954 version of the Compact, stating,

> Section 3 confers upon the compact commission broad powers. It would have been difficult to have detailed these powers, particularly since any action taken by the Great Lakes compact commission cannot have any binding effect of law. In other words, this is purely a consultative compact. It would have been impossible at this time to draft a compact in relation to any one or more problems in such detail that the other states would care to adopt as a binding contract. We envisioned that this commission, after it has made an exhaustive study of any particular problem, will then recommend a solution to the Great Lakes states which may be acted upon by reciprocal legislation or by a treaty or by a detailed compact agreement among the states covering the specific subject.[40]
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> . . . .
>
> Some may ask of what value can this consultative compact be. Needless to say, we are all acquainted with many consultative treaties among nations which have served highly

[38] Question from Timothy J. Bruno, Pennsylvania Commissioner and member of Board of Directors, Great Lakes Commission (May 23, 2019).
[39] As of the date of this Legal Assessment, Michigan, Ohio and Pennsylvania had not provided their legislative histories of their enactments, and Ontario and Québec did not provide their legislative histories of their enactment of the Declaration of Partnership.
[40] Olds, *supra* note 17, at 5.

> useful purposes. A shining example of how effective and worthwhile a consultative compact among states can be is the Interstate Oil Compact. That Commission has no coercive power but its work has brought order out of chaos in a highly dynamic industry. Executives in the oil and gas industry call their compact "the most powerful powerless compact in existence."[41]

Mr. Olds believed a compact in which the Commission would create binding obligations would have been politically impossible. However, just as important, the drafters also believed that a consultative only role would successfully result in meaningful policy in the party states. The Commission seems to have believed its consultative role is one its strengths, and has long-embraced and carefully guarded that role. For example, in Congress's consent hearings in 1966, Edgar D. Whitcomb, Chairman of the Commission stated, "we have been the forerunners in recognizing problems and getting many of these problems into the proper channels and agencies local, State, and Federal . . . ."[42] Michael Donahue, a past executive director of the Commission and longtime scholar of the Great Lakes Basin, stated in one of his many scholarly articles, "I would argue, and I think those that are affiliated with the Great Lakes Fishery Commission and International Joint Commission would agree, that the absence of regulatory authority, combined with the ability to voluntarily bring our jurisdictions together to deal with common issues is probably the reason why our organizations have been so effective."[43] And similarly, two of the most prolific scholars of interstate compacts observed, "Generally speaking, the advisory bodies have been surprisingly successful."[44]

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[41] *Id.* at 6.

[42] *Granting the Consent of Congress to a Great Lakes Basin Compact and for Other Purposes: Hearing on H.R. 937, H.R. 12294, H.R. 12299, H.R. 12692, H.R. 13359, H.R. 14192, and H.R. 15042 Before the H. Comm. on Foreign Affairs*, 89th Cong. 9 (Sept. 27, 1966) (Statement of Edgar D. Whitcomb, Chairman, Great Lakes Commission).

[43] Michael J. Donahue, *The Great Lakes: A Report Card*, 28 CAN-U.S. L.J. 457, 458 (2002).

[44] FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 45 (CSG 1976) (referring to the Great Lakes Commission, the three marine fisheries commissions as they were constituted at the time, and others).

The advisory nature of the Compact is also related to the binational nature of the Compact and the states and Congress's intent to respect the role of the federal government in international relations. There is much discussion in the federal legislative history about how the Commission interacted with and made recommendations to Ontario and Québec prior to the final consent statute in 1968. For example, consider the following colloquy in the 1957 hearings involving Representative Alvin Bentley (MI) and Marvin Fast, the Commission's first Executive Director:

> MR. BENTLEY. In the case of an international situation arising, such as lamprey control, how would that be benefited by this legislation, if Canadian participation were required?
>
> MR. FAST. I would say, based on the procedure as in the past, it would be along the following line: After discussion among appropriate State officials on this side of the border and the conclusion that a formal international approach to some question was desirable, through the appropriate channels of the Federal Government—
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> MR. BENTLEY. Meaning the Department of State?
>
> MR. FAST. That is correct. This suggestion would be transmitted. The Department of State would not be compelled to act in accordance with the recommendation of the States. It would be up to the Federal Government to determine whether this was in line with its views. In the past, in several instances, such suggestions have originated with the States, have been transmitted to the Department of State, and through an appropriate procedure and technique, organization, the Department has brought the Canadians in for a joint consideration and attack on the problem concerned.
>
> MR. BENTLEY. How would the existence of the Commission expedite such an approach by the States to the Federal Government?
>
> MR. FAST. Because at the present time there is a lack of effective communication and, particularly, consultation on

a continuing basis and on a comprehensive basis among the States on these problems.[45]

Prior practice of the states was apparently to consult with each other as needed and then communicate with the federal government, which would decide whether to communicate with Canadian governments. The states seem to have intended that the Compact would change the way that they develop their policy positions prior to consulting with the federal government on Great Lakes Basin policy, not to change the role of the federal government. Ontario and Québec's participation on the Commission would have seemed natural to the states as the equivalent "state" level governments in Canada, and to help develop more compelling policy positions to encourage the U.S. federal government to adopt those positions and work to implement them through their international relations channels. A formal forensic historical search for negotiation history would be helpful to develop a more comprehensive response to this question. This Legal Assessment recommends creating a library of legal authorities, including such history, in section V.G below.

Non-regulatory interstate compacts are common; others include the Interstate Compact to Preserve Gas and Oil, and the Midwestern Regional Higher Education Compact. Importantly, the non-regulatory nature of the Compact does not affect the binding nature of the Compact. The Compact contains terms that courts have concluded as a matter of law, make the Compact binding on the parties. As a matter of law, the provision in article VII requiring a six-month waiting period to withdraw is "consideration" in contract law and sufficient to make the Compact binding. Other reciprocal obligations that indicate the binding nature of the Compact are in article V.C, in which each state agrees to fund the Commission, and article VII, in which each state agrees to consider actions that the Commission recommends.

As discussed below, many authorities and entities have a management role in the Basin. CSG did not evaluate the geographic jurisdictions of each, but notes there are many differences. The

[45] *Granting the Consent and Approval of Congress to a Great Lakes Basin Compact: Hearings on H.R. 4314, 4315, and 4316, and S. 1416 Before the H. Comm. on Foreign Affairs*, 85th Cong. 34 (July 30, 1957) (Testimony of Marvin Fast, Exec. Dir., Great Lakes Comm'n).

Commission probably does not need a legal description of the entire Basin to make effective recommendations, but it might want to do or recommend limited legal descriptions where a policy recommendation or action needs that level of precision. For example, Commission staff noted that the boundary of the Basin for the St. Lawrence River has been unclear with different opinions whether it is firm at the town of Trois-Rivieres, or more subjectively, "the freshwater extent." Legal descriptions that cross state and national lines will be complex. States may have different standards, protocols, and practices for writing legal descriptions, and Ontario and Québec have a different land description system using township surveys, so the Commission would need to work with the states and provinces to negotiate a single methodology, or be willing to accept and work with clearly defined differences.[46]

Overall, the Great Lakes Basin Compact shows its age. Interstate compacts drafted in the past 15 to 20 years have many elements and a level of clarity not found in the Great Lakes Basin Compact. The most important gaps and clarifications are discussed throughout this Assessment. CSG recommends the states, provinces, and Commission resolve these gaps and clarifications through internal practices and procedures, supplementary agreements pursuant to article VI.H of the Compact, state and province actions, and amending the compact. Section VI of this Assessment explains each of these types of actions.

B. The Great Lakes Basin Compact and Great Lakes Commission Relative to Other Laws, Agreements, and Entities

1. Statement of Law and Authorities

Articles VI and VII of the Compact contain the primary policy subjects for the Commission's work.[47] Article VII states, "Each party

[46] One of the authors of this Legal Assessment led a legal description project for the Columbia River Gorge Commission, another interstate compact agency. The Gorge Commission's jurisdiction is less than one-half percent of the Great Lakes Basin). The legal description project took more than two years and has 1654 angle points and courses. *See* Columbia River Gorge Commission Rule 350-10, available at http://www.gorgecommission.org/images/uploads/amendments/Commission_Rule_350-10_(Final,_amended_as_of_Dec._31,_2018).pdf.

[47] These are not the Commission's only tasks. Several other articles in the Compact list work tasks for the Commission, including agency administration, reporting, and budgeting.

state agrees to consider the action the Commission recommends in respect to [nine policy subjects]" Article VII.I also incorporates the policy subjects in article VI, and thus the states must consider the Commission's actions respecting those subjects too.

At the time the states enacted the Compact in 1955, there were few other formal intergovernmental agreements to manage one or more resources of the Great Lakes Basin. Today, management of the Great Lakes Basin is a complex web of federal, state, local, interlocal and multistate laws and agreements, and international treaties, and a similarly complex web of government entities, not-for-profit entities, and non-binding agreements.[48] A non-exhaustive list of significant intergovernmental actions (roughly in chronological order) includes:

- Boundary Waters Treaty of 1909 (creating the International Joint Commission).[49]
- Convention on Great Lakes Fisheries Between the United States of America and Canada (1954) (creating the Great Lakes Fishery Commission).[50]
- Great Lakes Basin Compact of 1955 (creating the Great Lakes Commission), congressional consent granted in part in 1968.[51]
- Water Resources Planning Act of 1965[52] (authorizing basin commissions); Exec. Order No. 11345[53] (creating the Great Lakes Basin Commission); Exec. Order No. 12319[54] (terminating the Great Lakes Basin Commission).

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[48] Courts and scholars periodically err when describing elements of this Great Lakes management system. *See, e.g.*, Ottawa Tribe of Okla. v. Ohio Dep't of Natural Res., 541 F. Supp. 2d 971 (N.D. Ohio W.D. 2008) (mentioning monitoring and catch limits established by the Lake Erie Committee of the Great Lakes Commission). This committee is actually a committee of the Great Lakes Fishery Commission.

[49] Treaty Relating to Boundary Waters Between the United States and Canada, U.S.-Can., Jan. 11, 1909, 36 Stat. 2448.

[50] Convention on Great Lakes Fisheries Between the United States of America and Canada, Sept. 10, 1954, 6 U.S.T. 2836.

[51] Pub. L. No. 90-419, 82 Stat. 414.

[52] 42 U.S.C. §§ 1962–1962d-22.

[53] 32 Fed. Reg. 6329 (1967).

[54] 46 Fed. Reg. 45591 (1981).

- Great Lakes Water Quality Agreement (1972); amended 1978, 1987, and 2012 (a reference of the Boundary Waters Treaty).[55]
- The Council of Great Lakes Governors (1983), now The Conference of Great Lakes and St. Lawrence Governors and Premiers.[56]
- Great Lakes Charter (1985) (negotiated through The Council of Great Lakes Governors; all eight states and two provinces signed) creating a non-binding agreement (requiring notice and consultation with each Great Lakes Governor before approving a new diversion or consumptive use greater than 5 million gallons per day, and creating a Water Resources Management Committee).[57]
- Water Resources Development Act of 1986 (WRDA 1986) (prohibiting all new diversions out of the basin unless approval is given by each of the Great Lakes Governors).[58]
- Great Lakes Toxic Substances Control Agreement of 1986.[59]
- Great Lakes Consortium for Fish Consumption Advisories (1986).[60]
- Great Lakes Protection Fund (1989).[61]
- Water Resources Development Act of 1999 (John Glenn Great Lakes Basin Program, a comprehensive assessment of U.S. federal roles in managing water resources within the Great Lakes Basin).[62]

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[55] Available at https://binational.net/glwqa-aqegl/.
[56] *See* http://gsgp.org.
[57] Available at http://www.gsgp.org/media/1366/greatlakescharter.pdf.
[58] Pub. L. No. 99-662, § 1109, 100 Stat. 4082, 4230 (1986) (codified as amended at 42 U.S.C. § 1962d-20).
[59] *See* http://www.gsgp.org/about-us/history/ (explaining this agreement was negotiated through the Council of Great Lakes Governors and led to the Governors creating the Great Lakes Protection Fund.
[60] *See* T. Bruce Lauber, et al., *Assessment of the Great Lakes States' Fish Consumption Advisory Programs*. No. 11-7, Human Dimensions Research Unit, Dept. of Nat. Res., N.Y.S. Coll. Agric. & Life Sci., Cornell Univ. (2011), http://dnr.cornell.edu/hdru/pubs/HDRUReport11-7.pdf.
[61] *See* http://glpf.org.
[62] Pub. L. No. 106-53, § 455, 113 Stat. 269, 330 (1999).

- Water Resources Development Act of 2000 (WRDA 2000) (amending WRDA 1986 to also prohibit exports of Great Lakes waters without approval of all eight governors).[63]
- Great Lakes Charter Annex (2001) (negotiated through The Council of Great Lakes Governors; committing governors and premiers to create new and more binding agreements).[64]
- Great Lakes Regional Collaboration (2003) and Great Lakes Regional Collaboration Strategy to Restore and Protect the Great Lakes (2005).[65]
- The Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement (2005) (creating the Great Lakes-St. Lawrence Water Resources Regional Body).[66]
- The Great Lakes-St. Lawrence River Basin Water Resources Compact (2005) (creating the Great Lakes-St. Lawrence River Basin Water Resources Council) (congressional consent granted 2008).[67]

The laws, entities, and non-binding agreements enacted and created after the Compact address, at least in part, nearly all of the subjects in articles VI and VII of the Compact.

Many of the subjects listed in articles VI and VII of the Compact are also managed, at least in part, under U.S. federal laws that existed when the states enacted the Compact or that Congress enacted or substantially revised after the Compact.[68] For example:

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[63] Pub. L. No. 106-541, § 504(b), 114 Stat. 2572, 2644 (2000), codified as amended at 42 U.S.C. § 1962d-20(d).

[64] Great Lakes Charter Annex: A Supplementary Agreement to the Great Lakes Charter, Directive #3, June 18, 2001, http://www.gsgp.org/media/1369/great-lakescharterannex.pdf.

[65] *See* http://www.gsgp.org/projects/protection-and-restoration/great-lakes-regional-collaboration/.

[66] Available at http://www.glslcompactcouncil.org/Docs/Agreements/Great%20Lakes-St%20Lawrence%20River%20Basin%20Sustainable%20Water%20Resources%20Agreement.pdf. The states and provinces' enactments are listed with links at http://www.glslregionalbody.org/AgreementImplementationStatus.aspx.

[67] Available at http://www.glslcompactcouncil.org/index.aspx.

[68] CSG did not research Canadian federal laws.

- Coastal Zone Management Act, 16 U.S.C. §§ 1451–1465.

  § 1452(3) declaring congressional policy "to encourage the preparation of special area management plans which provide for increased specificity in protecting significant natural resources, reasonable coastal-dependent economic growth, improved protection of life and property in hazardous areas, including those areas likely to be affected by land subsidence, sea level rise, or fluctuating water levels of the Great Lakes, and improved predictability in governmental decision making."

  § 1453(1) defining coastal zone to mean ". . . in Great Lakes waters, to the international boundary between the United States and Canada."

  § 1453(3) defining coastal waters to mean "(A) in the Great Lakes area, the waters within the territorial jurisdiction of the United States consisting of the Great Lakes, their connecting waters, harbors, roadsteads, and estuary-type areas such as bays, shallows, and marshes . . . ."

- Federal Power Act, 16 U.S.C. §§ 791–828c.

  § 797(e) (authorizing the Federal Energy Regulatory Commission to regulate hydropower).

- U.S. Coast Guard regulations for navigation (nearly 100 sections of title 33 of the Code of Federal Regulations use the term "Great Lakes." Section 401 contains regulations for the St. Lawrence Seaway.

- Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990,[69] as amended by the National Invasive Species Act of 1996,[70] and the Asian Carp Prevention and Control Act of 2010.[71]

Various past assessments and scholarly articles have evaluated or suggested policy and administrative overlaps between

[69] Pub. L. No. 101-646, 104 Stat 4761 (1990), codified at 16 U.S.C. §§ 4701–4751.
[70] Pub. L. No. 104-332, 110 Stat. 4073 (1996).
[71] Pub. L. No. 111-307, 124 Stat. 3282 (2010) (amending 18 U.S.C. § 42 to include an additional species of carp prohibited from being imported or shipped).

these entities, laws and non-binding agreements and the Compact and Commission.[72]

2. Analysis

The myriad agreements and laws enacted after the states enacted the Compact and Congress consented to the Compact do not repeal the states and Commission's responsibilities under the Compact.[73] but as discussed below in section IV.F, if Congress enacts new laws that change the work tasks of the Commission, the states and Commission become obligated to carry out those new laws.

The myriad bi-national, U.S. federal, Canadian, interstate, state, province, tribal, First Nation, local government and interlocal government laws, programs and agreements respond to the complex geopolitical region that is the Great Lakes Basin. No one entity, not even one entity at each level of government, can address, balance, and manage the intricate governance issues. Duplication and overlap to some extent promotes cross-fertilization of ideas and mutual efforts and can be a positive factor in management of complex geopolitical and physical landscapes. Most interstate compacts and interstate commissions exist within complex policy arenas and political environments. Indeed, a compact would hardly be necessary where governance is easy and without potential conflict. What this means for the Commission is that it must embrace its position as one of many entities with a role in the Great Lakes Basin. As noted above, the states deliberately created the Commission as a consultative agency with the understanding and expectation that its non-binding powers would be its unique competency. Indeed, the Com-

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[72] Past Assessments of the Great Lakes Compact and Commission are listed above in the Introduction. Examples of scholarly articles and other sources that suggest there are overlapping roles and responsibilities of the myriad Great Lakes laws, agreements, and entities include: Hall, *supra* note 10, at 424 (using term "redundant") and U.S. GOVERNMENT ACCOUNTABILITY OFFICE, NO. GAO-04-1024, GREAT LAKES: ORGANIZATIONAL LEADERSHIP AND RESTORATION GOALS NEED TO BE BETTER DEFINED FOR MONITORING RESTORATION PROGRESS 4 (2004) (stating "several organizations' goals are similar").

[73] *See* Santiago v. Port Auth. of N.Y. & N.J., 429 N.J. Super. 150 (App. Div. 2012) (new state law does not repeal compact by implication); I.B.M. v. Dep't of Treasury, 496 Mich. 642 (2014) (same). *See also* Universal Interpretive Shuttle Corp. v. Wash. Metro. Area Transit Comm'n, 393 U.S. 186, 193 (1968) (compact did not impliedly repeal prior federal law).

mission's non-regulatory role allows it to make bold recommendations and bring together other Great Lakes Basin managers in ways that those managers might not choose if the Commission mandated their participation through binding law with enforcement authority. The Commission's success thus depends in large part on having myriad strong and willing partners in the Basin.

The first sentence of article VII is the key policy implementation provision in the Compact. This provision requires that the states and provinces consider actions the Commission recommends. This article creates an implementation link between the Commission and the states—it is the way that the states and provinces implement the Compact through policy. Many, perhaps most current Commission actions, such as the Commission's administration of the Great Lakes Panel on Aquatic Nuisance Species and the Great Lakes Regional Water Use Database, have built-in state and province participation that fulfills article VII. However, for actions and recommendations that do not have built-in state and province participation, the Compact does not specify how or when the states and provinces must consider actions that the Commission recommends, and the Compact does not require the states and provinces to communicate when they consider an action that the Commission recommends.

CSG did not find records from the Commission showing that the states and provinces have intentionally communicated to the Commission or each other when they are considering an action that the Commission recommends. CSG also did not find records from the Commission showing that the Commission actively monitors how or when the states and provinces consider actions that the Commission recommends. These are missed opportunities to document the states, provinces, and Commission's implementation of the Compact, and for feedback to the Commission and Basin-wide policy learning. Knowing what types of analyses and recommendations the party states and provinces use helps the Commission craft its future work in a manner most helpful to the states and provinces. Staff reported that the Commission has tried engaging with states and provinces independent of the Compact in the past, but that the states and provinces have been reluctant to engage.[74] Similarly,

[74] Email from Victoria Pebbles, Program Director, Great Lakes Commission, to Jeffrey Litwak (Nov. 8, 2019, 3:19 pm PST) (on file with author).

CSG reviewed the Commission's current 2017–22 Strategic Plan and past strategic plans, but did not find references to the Compact provisions that the Commission is implementing through each goal and implementation measure in the strategic plans.

Transparency of the states and provinces' compliance with article VII and the Commission's express recognition that it is implementing the Compact can build public support for and understanding of the Compact and state, province, and Commission policy goals.

CSG asked Commission staff whether the states have requested the Commission avoid specific topics and whether the Commission has voluntarily decided not to take up specific topics that other entities have already addressed. Staff reported a few such situations. The states asked the Commission not to prioritize climate change in the Commission's most recent strategic plan. The prior strategic plan had a program area dedicated to climate change. The current strategic plan mentions climate and climate change in several program priorities, but it is no longer its own priority.[75] Other requests came from members of the Commission rather than directly from a state. Staff reported that commissioners have requested staff not duplicate the work of the Water Resources Compact and some commissioners have steered the Commission away from studying and recommending action on acid rain and on disposal of hazardous waste.[76] CSG cautions the Commission and recommends that such direction should be discussed as formal Commission business to avoid the appearance of one or a few states attempting to unilaterally control the work of the Commission.[77]

The Commission uses memoranda of understanding to create and memorialize the administration of collaborative partnerships with federal agencies and many other governmental, and non-profit entities involved in Great Lakes Basin management. This is common practice with interstate commissions. CSG believes this is a best practice because most agencies are unassimilated with the

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[75] *Id.*
[76] Interview with Tom Crane, Deputy Director, Great Lakes Commission, Sept. 4, 2019.
[77] *See* LITWAK, *supra* note 7, at 352–59.

unique roles and attributes of interstate commissions. CSG recommends that the Commission continue to use memoranda of understanding, especially to address coordination and potential conflicts where the Commission and other entities have similar responsibilities.

3. Recommendations

1 The states and provinces should communicate when and how they have considered actions the Commission recommends that do not involve built-in state and province participation. This communication may be to each other or to the Commission, which can then disseminate that information to the other party states and provinces. The Commission should also intentionally monitor when and how the states and provinces consider actions the Commission recommends. The Commission should also consider developing feedback indicators to help it learn how the states and provinces use its analyses and recommendations to maximize the effectiveness of future Commission actions. The states, provinces and Commission may undertake this communication and monitoring without change to any legal authority, or they may choose to institutionalize communication and monitoring by enacting a supplementary agreement pursuant to article VI.H.

2 When a state or province undertakes studies, policy work, or other investments or efforts on the same subject matter as in articles VI and VII of the Compact, the state or province should engage with the Commission and ensure clear communication whether the work is independent of that state's or province's commitments to the Compact. This information sharing and communication helps ensure the states and provinces recognize that they are working in a policy area that they have previously committed to considering the regional interest.

3 The Commission should follow the states and provinces' studies and policy work outside the Compact that are related to the subject matters in articles VI and VII and make efforts to engage with the states and provinces in that work. Active information sharing and communication will help ensure the states and provinces are considering actions the Commission recommends and the regional interest that the states and provinces committed to in the Compact.

C. Tribes and First Nations Participation in the Great Lakes Basin Compact

1. Statement of Law and Authorities

The Compact does not require tribes, First Nations, or other indigenous peoples' participation on the Commission or require the Commission to consult with tribes and First Nations.[78] As of May 16, 2019, the Commission has only one tribal or First Nation observer, the Chippewa/Ottawa Resource Authority, an intertribal entity involving five tribes.[79]

The tribes and First Nations within the Great Lakes Basin are an important part of the governance and management of the Great Lakes Basin. Many tribes and First Nations have established their own Great Lakes entities and participate and coordinate with at least some of the entities, laws, and agreements listed above.[80]

In 2004, during development of the Great Lakes-St. Lawrence River Basin Water Resources Compact, nearly 150 tribes and First Nations[81] signed a tribal and First Nations Great Lakes Water Accord, which affirmed their spiritual and physical connection to the Great Lakes Basin, their treaty and other legal interests; stated that current efforts in developing that compact were flawed because the tribes did not have direct participation; and asserted,

> It is thus our right, our responsibility and our duty to insist that no plan to protect and preserve the Great Lakes Waters moves forward without the equal highest-level participation of Tribal and First Nation governments with the gov-

[78] Where CSG uses the term "tribes and First Nations," it also includes other other indigenous peoples. CSG understands the Commission's interest in this Assessment addressing tribes and First Nations as striving for inclusivity.
[79] *See* https://www.glc.org/wp-content/uploads/GLC-Observer-List-20190516.pdf.
[80] *E.g.*, Jacqueline Phelan Hand, *Protecting the World's Largest Body of Fresh Water: The Often Overlooked Role of Indian Tribes' Co-Management of the Great Lakes*, 47 NAT. RESOURCES J. 815 (2007); Noah D. Hall & Benjamin C. Houston, *Law and Governance of the Great Lakes*, 63 DEPAUL L. REV. 723, 760–61 (2014).
[81] Hand, *supra* note 80, at 832 (stating, "Signatories included the Union of Ontario Indians, representing 42 First Nations; the Association of Iroquois and Allied Indians, representing eight First Nations; and the Ninhawbc-Aski Nation, representing 53 First Nations. In addition, 44 individual tribes from Ontario, New York, Pennsylvania, Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota signed.").

ernments of the United States and Canada. Merely consulting with Tribes and First Nations is not adequate, full participation must be achieved.

2. Analysis

The Chippewa/Ottawa Resource Authority's observer status with the Commission is not representative of other tribes and First Nations generally. The five tribes that are members of the Authority are only a fraction of the tribes and First Nations that live within, that have ceded lands, that have treaty rights, or that have cultural resource, natural resource, and other interests in the Great Lakes Basin. One tribe or First Nation does not represent the interests of any other tribe or First Nation. Engagement with the Chippewa/Ottawa Resource Authority is thus limited to engagement with the members of that Authority, not with any other tribe or First Nation.

U.S. tribes participate in interstate compacts in various ways. For example, Congress's consent to the Columbia River Gorge Compact states, "Nothing in this Act shall (1) affect or modify any treaty or other rights of any Indian Tribe."[82] The consent statute further requires the Gorge Commission to exercise its responsibilities in implementing the compact in consultation with the four Columbia River Treaty Tribes.[83] The Gorge Commission thus consults with the four tribes with treaty rights within the Gorge Commission's jurisdictional individually and in an annual summit with the governing councils and other leaders of all four of the treaty tribes. The Gorge Compact does not require tribal representation on the Gorge Commission, but since 1991, the Governor of Oregon has consistently appointed one tribal representative to the Gorge Commission, and the Governor of Washington began the same in 2019, giving the Columbia River Treaty Tribes two of twelve voting positions on the Gorge Commission.

In another example, article 8.1.3 of the Great Lakes-St. Lawrence River Basin Water Resources Compact states, "Nothing in this Compact is intended to abrogate or derogate from treaty rights or rights held by any Tribe recognized by the federal government of the United States based upon its status as a Tribe recognized by

[82] 16 U.S.C. § 544o(a)(1).
[83] 16 U.S.C. § 544d(e).

the federal government of the United States." To implement this, article 5 of the Water Resources Compact specifies tribal "organized in the manner suitable to the individual Proposal and the laws and policies of the Originating Party"; notice and opportunity to comment; and mutually agreed upon mechanisms such as having tribal representatives on advisory committees.

To increase tribes and First Nations' participation with the Compact and Commission, the Commission could reach out to other tribes and First Nations or intertribal commissions to offer additional appointments as observers. The states can also affirmatively provide for tribal and First Nation representation on the Commission through a supplementary agreement. The states and provinces can exercise their appointment discretion to appoint tribal representatives to their delegations. The states could also, through a supplementary agreement, create a tribal delegation, appointed by the tribes, with associate membership status. Full member status would require an amendment to the Compact because it would significantly differ from Congress's consent. It is important to mention here that there is not one single intertribal commission for all of the tribes and First Nations in the Great Lakes Basin. There are several intertribal commissions with memberships of some tribes and First Nations,[84] and there are unaffiliated tribes. Offering each intertribal commission, tribe and First Nation to be an observer or a seat on a delegation would be practically impossible. The Commission and tribes will need to be creative in developing a manner of participation that is fair and effective.

CSG did not find that the Commission or any federal or state law or agency or scholarly work has addressed whether the Commission has a trust responsibility to U.S. federally recognized tribes. If there is a trust responsibility, it would likely come from the nature of the Compact as federal law because of Congress's consent; from federal funding that the Commission receives for its work; or because of the Commission's role as a manager of federal funds for Great Lakes Basin projects and programs. Researching this issue will help the Commission understand the scope of its obligations to and engagement with the tribes and First Nations.

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[84] *E.g.*, Great Lakes Indian Fish and Wildlife Commission in the United States and Chippewa Ottawa Resource Authority in Canada.

3. Recommendations

4 The Commission should convene the states, provinces, tribes, and First Nations to discuss the tribes and First Nations' interest in the governance of the Great Lakes Commission and the Commission's studies and recommendations. When designing a means for tribes and First Nations' participation in implementation of the Compact or with the Commission, the states and provinces should ensure that all tribes and First Nations that are located in, that have ceded lands, that have treaty rights or that have cultural resource, natural resource, and other interests in the Great Lakes Basin have an opportunity to participate. The large number of individual tribes complicates the direct involvement of each tribe and the Commission's ability to engage with each tribe individually.

5 The Commission should work with legal counsel, federal agencies that the Commission routinely works with, and U.S. federally recognized tribes to determine whether the Commission has a trust responsibility to the tribes, and if so, determine how to comply with that Trust responsibility.

D. Congress's Partial Consent to the Great Lakes Basin Compact

This section analyzes two issues. First, this section discusses the need for congressional consent to state-foreign compacts generally, the need for consent to the Great Lakes Basin Compact, and whether the Declaration of Partnership is lawful under U.S. federal law in light of Congress's express withholding of consent to the provinces participating in the Compact and the states and Commission cooperating with the provinces in the Compact. Second, this section discusses an ambiguity about why Congress withheld full consent to the Compact.

1. Statement of Law and Authorities

Congress granted partial consent to the Great Lakes Basin Compact in 1968,[85] 13 years after the states enacted the Compact and began implementing the Compact through the Commission.

[85] Act of July 24, 1968, Pub. L. No. 90-419, §§ 2, 3, 4, 82 Stat. 414.

Congress's consent contained three conditions[86] roughly summarized as: (1) Congress did not fully consent to the Great Lakes Commission making recommendations to or cooperating with foreign governments and the Commission must cooperate with and send reports to U.S. federal agencies; (2) nothing in the Compact must affect the authority of U.S. federal agencies or any international commission; and (3) Congress reserved the right to alter, amend, or repeal its consent to the Compact.

Drafters of the original Compact seemed to believe that consent would not be necessary for the Compact because it is solely consultative,[87] but that consent would be needed (and readily obtained) if it would involve a Canadian province, stating,

> I imagine that an agreement of this character would be considered of such importance by Congress that they would insist upon explicit consent being secured. . . . It would be farfetched for Congress to withhold approval of a compact of this kind through which officials of our Great Lakes states could sit around a table and talk and consult with officials of the Province of Ontario on matters which affect their common interests.[88]

Congress expressly withheld its consent to Ontario and Québec to participate as full members, stating, "The consent herein granted does not extend to paragraph B of article II or to paragraphs J, K, and M of article VI of the Compact, or to other provisions of article VI of the Compact which purport to authorize recommendations to, or cooperation with, any foreign or international governments, political subdivisions, agencies or bodies."[89] This withholding of consent is ambiguous. It contains a catch-all clause, but does not expressly cite paragraph L of article VI, which authorizes the Commission to "Cooperate with the governments of the United States and of Canada . . . ." If Congress had intended to withhold consent to paragraph L, it should have specifically mentioned paragraph L as it

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[86] There is no question that Congress has the authority to impose conditions of consent. *See* BUENGER, ET AL., *supra* note 7, at 76–86.
[87] Olds, *supra* note 17, at 8.
[88] *Id.* at 9.
[89] Pub. L. No. 90-419, § 2, 82 Stat. at 419.

mentioned paragraphs J, K, and M, but the catch-all clause would seem to prohibit the cooperation authorized in paragraph L.

Another ambiguity involves the definition of the Basin, to which Congress granted consent. Article III of the Compact directs the Commission to "exercise its powers and perform its functions in respect to the Basin . . ." Article III.1 of the Compact defines the Basin for the purpose of the Compact to include the Great Lakes, the St. Lawrence River, and "any and all water interconnections between or among them." This definition includes substantial portions of the Canadian provinces of Ontario and Québec.

The Commission should consult with legal counsel to develop a common understanding of Congress's consent. CSG recommends that the Commission must be able to work with and cooperate with the provinces and with Canada's federal government for those parts of the Basin and the waters therein that lie within the provinces to effectively implement the Compact.

There are examples of bi-national cooperation in the Great Lakes region without congressional consent, such as the Great Lakes and St. Lawrence Cities Initiative.[90] Congress has also encouraged international cooperation in the Great Lakes Basin through consultation and other non-binding means. For example, WRDA 2000 encouraged the Great Lakes states to work with Ontario and Québec, stating,

> [T]o encourage the Great Lakes States, in consultation with the Provinces of Ontario and Québec, 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.[91]

Despite Congress withholding consent to the provinces' participation in the Compact, the states and provinces signed their Declaration of Partnership in 1999.[92]

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[90] *See* https://glslcities.org.
[91] Water Resources Development Act of 2000, Pub. L. No. 106-541, § 504, 114 Stat. 2572, 2644–45 (2000), codified at 42 U.S.C. § 1962d-20(b)(2).
[92] *See supra* note 23.

2. Analysis

The need for congressional consent to interstate compacts comes from the U.S. Constitution as interpreted and applied by the U.S. Supreme Court. The Compact Clause states "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power . . . ."[93] This clause seems to require consent for all interstate compacts; however, the U.S. Supreme Court has interpreted the Constitution to require consent only when a compact could impair the federal government's supremacy or where the compact would create a disadvantage to non-compacting states.[94]

The analysis is more complex when the compact includes a foreign government. The U.S. Court of Appeals for the First Circuit explained what types of agreements with foreign governments are permissible for states under the Compact Clause:

> Federal dominion over foreign affairs does not mean that there is no role for the states. A limited role is granted by the Constitution . . . . *See* Restatement (Third) of Foreign Relations Law of the United States § 201 reporters' note 9 (commenting that "[u]nder the United States Constitution, a State of the United States may make compacts or agreements with a foreign power with the consent of Congress (Article I, Section 10, clause [3]), but such agreements are limited in scope and subject matter" and that "[a] State may make some agreements with foreign governments without the consent of Congress so long as they do not impinge

[93] U.S. CONST. art. I, § 10, cl. 3.

[94] Virginia v. Tennessee, 148 U.S. 503, 519 (1893) (application of the Compact Clause is limited to agreements that are "directed to the formation of any combination tending to increase the power of the States, which may encroach upon or interfere with the just supremacy of the United States"); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 470 (1978) (following *Virginia v. Tennessee*); Cuyler v. Adams, 449 U.S. 433, 451 (1981) (dissent noting that the compact did not elevate party states at the expense of non-members). Congress has never granted consent to a compact that would have the latter effect. An example of a compact that would benefit the compacting states at the expense of non-members might be a compact that prohibits a noxious industry or land use, thus forcing that industry or use into non-compacting states.

upon the authority or the foreign relations of the United States").[95]

The ability of states to enter into compacts that may also include foreign government parties may also be governed by the State Treaty Clause, which prohibits states from entering into "any Treaty, Alliance, or Confederation . . ." without the opportunity for Congress to grant its consent.[96]

a. Consent to State-Foreign Agreements

The Supreme Court has never determined whether the Compact Clause or the State Treaty Clause applies to an interstate compact with foreign government members. However, the State Department, the Restatement (Third) of the Foreign Relations Law of the United States, and numerous scholars assume that Congress would apply the Compact Clause if such an issue arose before the Supreme Court.[97] In the federal legislative history of the Great Lakes Basin Compact, Congress, the states, the Commission, the U.S. Department of Justice, and other participants cited the Supreme Court's jurisprudence for interstate compacts,[98] thus also apparently assuming that the Compact Clause applied to the Great Lakes Basin Compact and its foreign agreement component.

Recent scholarly legal analyses about when Congress must consent to state-foreign government agreements suggests that Congress's historical and current practice is to allow states to enact those agreements largely without any question whether consent is

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[95] National Foreign Trade Council v. Natsios, 181 F.3d 38, 50 (1st Cir. 1999); *See also* Made in the USA Found. v. U.S., 242 F.3d 1300 (11th Cir. 2001) (concluding that certain types of international commercial agreements constitutes treaties, requiring Senate ratification, but holding that the question of whether any specific agreement constitutes a treaty is a non-justiciable political question).

[96] U.S. CONST. art. I, § 10, cl. 1.

[97] Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071, 1088 (2008) (citing sources).

[98] *See, e.g., Granting the Consent and Approval of Congress to a Great Lakes Basin Compact: Hearings on H.R. 4314, 4315, and 4316, and S. 1416 Before the H. Comm. on Foreign Affairs*, 85th Cong. 37 (July 30, 1957) (statement of Rep. Barratt O'Hara (IL) (stating, "It seems to me that when the New England States, having their problems in connection with rivers that flow through the various States, get together in a compact, and the Congress approves that compact, we should follow the same rule in regard to the situation in the Great Lakes region.").

needed.[99] These analyses cite to Congress's partial withholding of consent to the Great Lakes Basin Compact and suggest that Congress has not withheld consent since the Great Lakes Basin Compact because states typically do not send their agreements to Congress and Congress has not challenged the states' practice. These scholars suggest that Congress's practice may be the result of several factors: (1) Congress may have a "legal effect" test—that is, if an agreement is non-binding, it does not require consent; (2) states and federal agencies have assumed that the U.S. Supreme Court would apply the Compact Clause; and (3) Congress has endorsed state-foreign agreements in which the federal government also participates.[100]

The Compact probably satisfies all three factors. Regarding the first factor, article VI.N of the Compact specifies that "no action of the Commission shall have the force of law, or be binding upon any party state"; many other provisions in the Compact specify the Commission has authority to "recommend"; and section 2 of the federal consent statute is Congress's condition to consent that requires the Commission is "solely a consultative and recommendatory agency. . . ." Regarding the second factor, as discussed above, all parties participating in Congress's consent hearings and Congress itself, seemed to apply the traditional Compact Clause jurisprudence. Regarding the third factor, article VI.L of the Compact requires the Commission to cooperate with the U.S. and Canada federal governments; section 2 of the consent statute require the Commission to consult and cooperate; and section 3 preserves the jurisdiction, powers, and prerogatives of the federal departments, agencies, and officers.

CSG does not opine whether Congress would have withheld consent to the bi-national elements of the Compact if the states had enacted the Compact only recently, or whether Congress might grant full consent at this time. This question involves Congress's

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[99] Hollis, *supra* note 97, at 1078. *See also* Peter R. Jennetten, *State Environmental Agreements with Foreign Powers: The Compact Clause and the Foreign Affairs Power of the States*, 8 GEO, INT'L ENVTL. L. REV. 141, 153–54 (1995) (cooperative agreements permissible without consent); Hall, *supra* note 10, at 447 (non-binding agreements permissible without consent); Herbert H. Naujoks, *Compacts and Agreements Between States and Between States and a Foreign Power*, 36 MARQ. L. REV. 219, 233–35 (1952–53) (citing cases and examples).

[100] Hollis, *supra* note 97, at 1083–97.

political judgment. Ontario's delegation noted that the Canadian government originally objected to the Compact because it perceived that U.S. federal law could bind Canadian provincial activity through the Compact without Canada's formal approval.[101] Any new consideration of consent would require coordination with Canada to address this issue.

Congress has seemed to subsequently impliedly consent to Ontario and Québec's participation as associate members of the Commission by enacting new federal legislation that assigns tasks to the Commission[102] after the states and Ontario and Québec signed the Declaration of Partnership.[103]

b. The Compact Clause

The 13-year delay in Congress granting consent to the Great Lakes Basin Compact has no legal significance or consequence. There is no timing requirement for consent. Congress may give its consent in advance of states enacting a compact or after the states enact it.[104] Congress could have, but did not attach conditions of its consent relating to the effectiveness of actions the Commission and states took pursuant to the Compact before 1968.

Understanding the scope and reasons for Congress's consent is critically important. A compact with consent and that is a proper subject for federal legislation is itself federal law.[105] However, a compact that has received consent but did not need consent under the constitutional tests may not be considered federal law.[106] When

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[101] Bill Carr, commissioner from Ontario, made this comment when CSG presented its draft report on October 11, 2019. The Commission does not have records of these concerns and CSG did not see this concern in its review of the federal legislative history of Congress's consent. CSG recommends searching for these records as part of creating the law library discussed in Section V.G below.

[102] *See infra* text at notes 127–133.

[103] The U.S. Supreme Court held that Congress may impliedly consent to an interstate compact by actions recognizing the effect of the compact. *E.g.,* Virginia v. Tennessee, 148 U.S. 503, 522 (1893). CSG is unaware of case law suggesting that implied consent cannot follow an express withholding of consent.

[104] Virginia v. Tennessee, 148 U.S. 503, 520–21 (1893) (no timing requirement, may be in advance of or after states enact the compact).

[105] Cuyler v. Adams, 449 U.S. 433, 440 (1981).

[106] *Id.* at 452 (Rehnquist, J. dissenting) (stating, "[T]he construction of a compact not requiring consent even if Congress has consented will not present a federal question.").

a compact is federal law, it has Supremacy over conflicting state laws and is equal to other federal laws in a conflict-of-laws analysis; an interstate commission's actions have the force and effect of federal law; and some courts recognize that an interstate commission's regulations are themselves also federal law.[107]

In its consent legislation, Congress did not expressly give its reason why it believed the Compact needed consent. The federal legislative history contains some doubts whether the Compact requires consent.[108] Testimony and discussion in the federal legislative history gives several reasons for obtaining consent, but only two are related to the constitutional tests. First, the U.S. Department of Justice testified that consent was necessary because the Great Lakes are a navigable waterway and because the Commission's recommendations may significantly influence the legislative actions of the party states and thus shape the future development of the Basin.[109] Second, most of the legislative history shows that the Department of State and Congress were concerned about the states'

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[107] *See* Am. Sugar Refining Co. v. Waterfront Comm'n of N.Y. Harbor, 55 N.Y.2d 11, 29–30 (1982); Lake Tahoe Watercraft Recreation Ass'n v. Tahoe Reg'l Planning Agency, 24 F. Supp. 2d 1062, 1073 (E.D. Cal. 1998); City of South Lake Tahoe v. Tahoe Reg'l Planning Agency, 664 F. Supp. 1375, 1378 (E.D. Cal. 1987)).

[108] *E.g., Granting the Consent and Approval of Congress to a Great Lakes Basin Compact: Hearings on H.R. 4314, 4315, and 4316, and S. 1416 Before the H. Comm. on Foreign Affairs*, 85th Cong. 36 (July 30, 1957) (statement of Rep. Dante B. Fascell (FL)). Representative Fascell stated,

> . . . I can't see anything in the law, Mr. Chairman, that requires prior consent of Congress to the formulation of a compact. In fact, standard procedure, it seems to me, has been that the compact is organized, ratified by the States, and then congressional approval by way of ratification is sought.
>
> From that standpoint, I don't see anything out of the way. Neither do I see any interference in this legislation or in the compact with the treatymaking powers of the President, because in the legislation it specifically provides that that part of the compact dealing with international situations is not approved by Congress, and it delineates specifically the limitations by which any international action shall be taken in this legislation.).

[109] Letter from Nicholas deB. Katzenbach, Deputy Attorney General, to Clinton P. Anderson, Chairman, Senate Committee on Interior and Insular Affairs (undated) (printed in *Granting the Consent of Congress to a Great Lakes Basin Compact and for Other Purposes: Hearing on H.R. 937, H.R. 12294, H.R. 12299, H.R. 12692, H.R. 13359, H.R. 14192, and H.R. 15042 Before the H. Comm. on Foreign Affairs*, 89th Cong. 10–13 (Sept. 27, 1966)).

and Commission's communications with Ontario and Québec interfering with existing treaties and bi-national entities (at tht time, the Boundary Waters Treaty and the International Joint Commission, and the Convention on Great Lakes Fisheries and the Great Lakes Fishery Commission) and future federal negotiations and cooperative efforts with the Canadian federal government and provinces. These reasons are related to the potential impact on federal supremacy, one of the constitutional tests from *Virginia v. Tennessee* and *U.S. Steel v. Multistate Tax Commission* cases.[110] Testimony and discussion also mentioned other reasons, such as consent was necessary for the Commission to participate on the Great Lakes Basin Commission established by the Water Resources Planning Act.[111] Consent for the purpose of participating on the Basin Commission does not satisfy the constitutional tests in the *Virginia v. Tennessee* and *U.S. Steel v. Multistate Tax Commission* cases.

If Congress's reason for requiring consent was principally the potential impact to existing treaties, bi-national entities, and future federal negotiations and cooperative efforts, then there is a potential legal question whether the remainder of the Compact would need Congress's consent under the constitutional tests. There is no case law that guides this potential legal question. It is an important question because only if consent was necessary would the Compact would be considered federal law and the Commission's actions could likewise have some federal character.[112]

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[110] *See supra* note 94.

[111] *Granting the Consent of Congress to a Great Lakes Basin Compact and for Other Purposes: Hearing on H.R. 937, H.R. 12294, H.R. 12299, H.R. 12692, H.R. 13359, H.R. 14192, and H.R. 15042 Before the H. Comm. on Foreign Affairs*, 89th Cong. 18 (Sept. 27, 1966) (Testimony of John W. Van Ness, Commissioner on the Great Lakes Commission, stating "Now, why are we asking consent? True, in the past this matter has been up. It has never been pushed very hard until this time. The main reason for this is the 1965 Water Resources Planning Act which says in effect that an interstate compact body may have membership on this if it is approved by Congress.").

[112] However, the federal character of the Compact may not have much effect because article VI.N of the Compact, which states "no action of the Commission shall have the force of law, or be binding upon, any party state," suggests that even if the Compact would be considered federal law, the Commission's actions would not supersede state law and state actions. Likewise, section 3 of Congress's consent statute, which specifies that nothing in the Compact affects the jurisdiction, powers or prerogatives of the federal government, suggests that in the event of a

3. Recommendations

6 The Commission should consult with legal counsel about Congress's current practice with state-foreign agreements. The Commission, states, and provinces could work together to develop a new or supplemental U.S. federal consent statute that (1) grants full consent to the Compact; (2) concludes that consent to the Compact is not necessary; or (3) expressly recognizes Ontario and Québec's participation as associate (or even full) members of the Compact. Any new consideration of consent would require coordination with Canada to address whether U.S. federal law could bind Canadian provincial activity through the Compact without Canada's formal approval.

7 The Commission should consult with legal counsel whether Congress's withholding of consent to the bi-national elements of the Compact, raises a legal question whether the remainder of the Compact required Congress's consent. If the Commission concludes the congressional record is ambiguous, then Congress and the states should clarify that consent was necessary for reasons required by *Virginia v. Tennessee* (increasing the political power of the compacting states which may encroach on federal supremacy) or *Cuyler v. Adams* dissent (elevating party states at the expense of non-party states). Historical documents not be part of the congressional record may be key to this question. In section V.G, this Legal Assessment recommends the Commission develop a complete (or as complete as possible) historical record of the Compact. Until the Commission and Congress address this question, the states and provinces should continue to assume that the Compact needed consent and that Ontario and Québec's participation as associate members is permissible.

E. State Laws Implementing the Great Lakes Basin Compact

1. Statement of Law and Authorities

The Great Lakes Basin Compact does not expressly authorize states to enact unilateral supplementary laws relating to their implementation of the Compact; however, this is a common practice with

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conflict between the Compact and other federal law, the other federal law will likely be the applicable law.

most compacts. There are few state statutes that directly implement the Great Lakes Basin Compact other than those statutes relating to appointment of Commission members. State statutes that directly implement the Compact are:

WIS. STAT. § 14.78 establishes a Great Lakes Compact Commission to represent Wisconsin on the Great Lakes Basin Compact and MICH. COMP. LAWS § 324.32903 establishes an Office of the Great Lakes. Minnesota had an intrastate Great Lakes Compact Commission to facilitate its early implementation, but that commission no longer exists.[113] In addition to these statutory intrastate commissions, Wisconsin has established an Office of Great Waters within its Department of Natural Resources,[114] and Pennsylvania has established an Office of the Great Lakes within its Department of Environmental Protection.[115]

N.Y. ENVTL. CONSERV. LAW § 21-0913 requires that every four years "the Commissioner of Environmental Conservation shall evaluate the role of the Great Lakes Commission with respect to the interests of this state in the Great Lakes."

MICH. COMP. LAWS § 324.3112(6) (ballast water statute requiring Michigan's cooperation with the Great Lakes Commission and other Great Lakes regional entities to develop ballast water standards).[116]

N.Y. ENVTL. CONSERV. LAW § 21-0911 states, "No provision of the Conservation Law, and no provision of the Environmental Conservation Law, if such provision of the Environmental Conservation Law was derived from a provision of the Conservation Law, which is inconsistent with the provisions of the Great Lakes Basin Compact shall be applicable to the Great Lakes Commission or to any matter governed by the Great Lakes Basin Compact."

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[113] Interview with Tom Crane, Deputy Director, Great Lakes Commission, Aug. 5, 2019.

[114] *See* https://dnr.wi.gov/topic/greatlakes/.

[115] *See* https://www.dep.pa.gov/Business/Water/Compacts%20and%20Commissions/Great%20Lakes%20Program/Pages/default.aspx.

[116] A federal court concluded this statute was not preempted by federal law. Fednav, Ltd. v. Chester, 505 F. Supp. 2d 381 (E.D. Mich. S.D. 2007). This court decision enjoyed substantial attention, being the direct subject of or cited in nearly 20 law review articles. *See, e.g.,* Jason G. Howe, *Fednav, Ltd. v. Chester: Ballast Water and the Battle to Balance State and Federal Regulatory Interests*, 15 OCEAN & COASTAL L.J. 381 (2010).

Other statutes seem outdated or do not accurately reflect the Commission's authorities.

OHIO REV. CODE § 6161.011 specifies, "Any instrument by which real property is acquired pursuant to [the compact] shall identify any agency of the state that has the use and benefit of the real property." The Great Lakes Basin Compact, art. IV.A authorizes the Commission to acquire and hold real property and requires that transactions must conform to the law of the state where the property is located; however, the Compact does not require the Commission to give use and benefit of Commission-owned real property to state agencies. This Ohio law appears to be inconsistent with the Compact.

58 PA. CONS. STAT. § 3211(m)(3) specifies that the Pennsylvania Department of Environmental Protection, which grants oil well permits must presume that water management plans associated with withdrawals meet the statutory criteria "if the proposed water withdrawal has been approved by and is operated in accordance with conditions established by the Susquehanna River Basin Commission, the Delaware River Basin Commission or the Great Lakes Commission, as applicable." The Great Lakes Commission has not established water withdrawal conditions. The reference to the Great Lakes Commission in this statute may be an erroneous understanding of the Commission's authorities, or the term "conditions" in the statute might include Great Lakes Commission recommendations, defined terms or best practices established in a manner compelling action by another agency.[117]

2. Analysis

State statutes specifically administering a compact may be treated as if they are part of the compact when a compact expressly authorizes such supplemental state laws.[118] The Great Lakes Basin Compact does not expressly authorize states to enact unilateral

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[117] This statute was enacted in 2012 (2012 Pa. Laws 13), so it would not have referred to the prior Great Lakes Basin Commission, established by the Water Resources Act in 1965 and terminated in 1981.

[118] *See* DeVeau v. Braisted, 363 U.S. 144, 153–55 (1960) (supplemental state statute not preempted because of compact particulars and Congress was aware of statute when it enacted consent statute); Bush v. Muncy, 659 F.2d 402, 410–13 (4th Cir. 1981) (supplementary provisions to Interstate Agreement on Detainers authorized in compact interpreted as federal law as if part of the compact).

supplemental laws relating to their implementation of the Compact so such state laws would probably not be treated as part of the Compact and thus would be interpreted as other state law.

Even where a compact does not expressly authorize supplemental state laws, states frequently enact such laws to help their internal implementation of interstate compacts.[119] Each of the state statutes cited above that implement the Compact is consistent with best practices in state implementation of interstate compacts.

Establishing a state commission to support, assist, and evaluate a state's implementation of a compact is a common approach to ensuring effective state participation in a compact. For example, the Interstate Compact for the Supervision of Adult Offenders, the Interstate Compact for Juveniles, and the Interstate Compact for Educational Opportunity for Military Children, which have been enacted by all fifty (50) states, each require the party states to establish an intra-state council.[120]

States often review their participation in interstate compacts, and such review can be a valuable tool to ensuring on-going state education, support, participation, and implementation of a compact, but must not be used a means to attempt to unilaterally influence or manage an interstate commission's actions.[121]

Provisions ensuring that a compact is superior to state law are common and a recommended practice in drafting compacts and related state law.[122]

A lack of state legislator familiarity with interstate compacts and interstate commission is a common problem. Interstate compacts and commissions need different attention than typical state law and state agencies. For example, interstate commissions typically must spend significant time educating legislators about their unique na-

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[119] *See* LITWAK, *supra* note 7, at 160.

[120] *See, e.g.,* Article IV of the Interstate Compact for the Supervision of Adult Offenders, which requires, ". . . In addition to appointment of its commissioner to the National Interstate Commission, each state council shall exercise oversight and advocacy concerning its participation in Interstate Commission activities and other duties as may be determined by each party state including but not limited to, development of policy concerning operations and procedures of the compact within that state."

[121] *See* LITWAK, *supra* note 7, at 352, 366.

[122] BUENGER, ET AL., *supra* note 7, at 55, 233.

ture and about restrictions on a single state's actions that could affect the compact and commission. Interstate commissions can also usually boast a high rate of return on a single state's investment—most simply, for a compact that involves two states that equally fund a commission, each state's investment is matched by the other state's investment.

3. Recommendations

8 The Commission should work with the states and provinces to review state statutory and regulatory references to the Great Lakes Basin Compact and Great Lakes Commission and amend or repeal provisions that are incorrect, outdated, conflicting, or redundant.

F. Amending the Great Lakes Basin Compact

1. Statement of Law and Authorities

The Compact is silent regarding whether or how the states may amend it. None of the states have substantially amended their enactment of the Compact since first enacting it.[123]

Article VI.H of the Compact authorizes the Commission to recommend amendments to the Compact and supplementary agreements and to assist in formulating and drafting them. Some of the Commission's work has implemented article VI.H; however, that work does not expressly state that the Commission was implementing that provision. For example, arguably, the Memorandum of Understanding Between the Great Lakes Commission and the Council of Great Lakes Governors on Behalf of the Great Lakes - St. Lawrence River Water Resources Regional Body and the Great Lakes-St. Lawrence River Basin Water Resources Council, supplemented the authority of the Commission to enforce reporting requirements on water users in the party states.[124] The Commission's Declaration of Indiana and Ecosystem Charter projects are examples of the Commission assisting in formulating and drafting supplemental

[123] Some of the states have recodified their state codes enacting the Compact. Recodification does not amend a compact.

[124] Memorandum of Understanding Between the Great Lakes Commission and the Council of Great Lakes Governors on Behalf of the Great Lakes - St. Lawrence River Water Resources Regional Body and the Great Lakes-St. Lawrence River Basin Water Resources Council, § V (2010).

agreements.[125] Additionally, the Conference of Great Lakes and St. Lawrence Governors and Premiers (and its former Council of Great Lakes Governors) has created agreements in which the Commission partnered to facilitate state input on those agreements; the Commission was involved in drafting the Water Resources Development Act of 1986 and the Water Resources Development Act of 1999 (authorizing the John Glenn Great Lakes Basin study); and the Commission has consulted in drafting other laws, entities and agreements that make up the governance of the Great Lakes Basin.[126] These examples are policies and programs. Article VI.H can also be used to clarify ambiguities in the Compact and to facilitate administration of the Compact.

Congress has not expressly amended its consent to the Compact, but it has enacted new legislation several times relating to the same subject matter that the Commission has authority to study and make recommendations. In some instances, new federal law directs the Commission to undertake specific work or cooperate with federal agencies. Commission staff provided the following recent federal laws that impose specific work on the Commission:

- Frank LoBiondo Coast Guard Authorization Act of 2018[127] (authorizing a Great Lakes state governor to request an enhanced ballast water standard, and potentially requiring the Great Lakes Commission to study and make a recommendation on such a request).[128] Notwithstanding this provision, the Act states "Nothing in this subsection limits, alters, or amends the Great Lakes Basin Compact."[129]
- Farm Security and Rural Investment Act of 2008[130] (requiring the U.S. Secretary of Agriculture to carry out a Great Lakes Basin program for soil erosion and sediment control in consultation with the Great Lakes Commission and to implement the

[125] Thomas R. Crane, *Great Lakes - Great Responsibilities: History of and Lessons in Participatory Governance, in* VELMA I. GROVER & GAIL KRANTZBERG, EDS., GREAT LAKES: LESSONS IN PARTICIPATORY GOVERNANCE 22–23 (CRC Press 2012).
[126] Interview with Tom Crane, Deputy Director, Great Lakes Commission, Aug. 5, 2019.
[127] Pub. L. No. 115-282, 132 Stat. 4192 (2018).
[128] *Id.* at § 903(a)(1), codified at 33 U.S.C. § 1322(p)(10)(B).
[129] *Id.* at § 903(a)(1), codified at 33 U.S.C. § 1322(p)(10)(B)(iii)(VIII).
[130] Pub. L. No. 110-234, 122 Stat. 923 (2008).

Great Lakes Regional Collaboration Strategy to Restore and Protect the Great Lakes (2005)).[131]

- Farm Security and Rural Investment Act of 2002[132] (requiring the Secretary of Agriculture to carry out a Great Lakes Basin program for soil erosion and sediment control in consultation with the Great Lakes Commission).[133]

The Commission's Guide to Operations and Procedures contains a section on supporting and endorsing federal programs and legislation, stating that the Commission communicates on federal programs, policies and legislation based on adopted resolutions and its annual suite of federal priorities; the Commission conveys support for specific provisions rather than endorsing bills in their entirety; the Commission may partner with other entities on joint communications; and when staff meets with members of Congress, federal, state, and provincial officials, it follows the guideline on communication of written priorities.[134] Staff also explained that the Commission currently uses GLRI Fact Sheets[135] and Drop Packets with information that the Commission prepares to inform legislators about the work of the Commission.[136] Having and using such materials to inform and educate legislators is a best practice and CSG recommends the Commission continue or enhance its educational efforts.

2. Analysis

Many older compacts contain no provision for their amendment. A best practice for modern compact drafting is to include a

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[131] *Id.* at § 2604, codified at 16 U.S.C. § 3839bb-3, repealed, Pub. L. No. 113-79, tit. II, § 2708, 128 Stat. 770 (2014).
[132] Pub. L. No. 107-171, 116 Stat. 134 (2002).
[133] *Id.* at § 2502, codified at 16 U.S.C. § 3839bb-3.
[134] Great Lakes Comm'n, A Guide to Great Lakes Commission Operations and Procedures 30–31 (Mar. 2017).
[135] The 2019 GLRI Fact Sheet is available on the Commission's website, https://www.glc.org/wp-content/uploads/GLC-GLRI-FactSheet-March2019-FINAL.pdf;
[136] Interview with Tom Crane, Deputy Director, Joe Bertram, Financial Operations Manager, and Laura Kaminski, Grants and Contracts Manager, Great Lakes Commission, Sept. 4, 2019.

provision for whether and how states may amend a compact and whether Congress must consent to the amendment.

a. State Amendment of the Compact

Unless a compact specifies otherwise, all party states must enact an amendment to a compact for that amendment to be effective.[137] The states need not amend a compact at the same time. State enactments of an amendment should specify when the amendment becomes effective. If the amendment is inconsistent with Congress's consent, then Congress must consent to the amendment.[138]

Amendment of the Great Lakes Basin Compact could be more complex than the basic principles outlined above because article II.A of the Compact specifies that only four of the eight Great Lakes states are necessary to enact the Compact. In theory, if exactly four states enact the same amendment to the Compact, those states would be effectively enacting a new Great Lakes Basin Compact, while the other four states would still be members of the original Great Lakes Basin Compact.

A state that unilaterally amends its enacting statute, thereby substantively changing that state's obligations under the Compact or imposing a new burden on the other states or the Commission's implementation of the Compact would be in breach of the Compact and that state would be acting outside the scope of Congress's consent.[139]

b. Federal Government Amendment of the Compact

There are three legal perspectives for considering whether federal laws enacted after a compact are effective to that compact and any commission that compact creates. First, in the Great Lakes Basin Compact, Congress reserved, as a condition of its consent, the

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[137] *See* BUENGER, ET AL., *supra* note 7, at 262–65.
[138] *See Id.* at 264 (citing cases); LITWAK, *supra* note 7, at 114 (citing cases).
[139] *See* BUENGER, ET AL., *supra* note 7, at 61–64; LITWAK, *supra* note 7, at 278–83; Waterfront Comm'n of N.Y. Harbor v. Murphy, No. 2:18-cv-00650-SDW-LDW, 2018 U.S. Dist. LEXIS 92148 (D.N.J. June 1, 2018) (preliminary injunction issued, 2019 U.S. Dist. LEXIS 89956 (May 29 2019) (permanent injunction issued); *appeals filed* Nos.19-2458, 19-2459 (3d Cir. June 25, 2019) (consolidated cases).

authority to alter, amend, or repeal its consent.[140] In this perspective, the new federal laws would be new or amended conditions of Congress's consent. Warren Christopher, Deputy Attorney General, U.S. Dept. of Justice, stated in the legislative history of the Compact that "Section 4 of the compact is a customary provision in compact consent legislation, reserving to Congress the right to alter, amend, or repeal such legislation."[141] This was not a correct statement; Congress only haphazardly imposes such a condition,[142] and the U.S. Supreme Court has never resolved the effectiveness of such a condition. Two United States courts of appeals have opined that there is no express power in the U.S. Constitution for Congress to alter, amend, or repeal its consent, and thus Congress's power to do so must be an implied power.[143] Those courts did not resolve whether Congress has such an implied power; thus, one could argue that the laws may not be effective to the Compact and Commission.

The second perspective is that Congress has plenary power in the U.S. Constitution to enact federal law. Long ago, the U.S. Supreme Court held that an interstate compact does not affect Congress's plenary power to enact law.[144]

The third perspective is that new federal law is not effective until the states act to amend the compact. While this seems logical, it creates an analytical conundrum in which the compact would be

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[140] Pub. L. No. 90-419, § 4, 82 Stat. at 419.

[141] S. Rpt. No. 1178, 90th Cong. (1968) at 11.

[142] *See* LITWAK, *supra* note 7, at 357 (stating "In the 15 years after Tobin, Congress granted consent to 19 compacts (not including general consent statutes that did not result in a compact), but Congress only reserved its rights to oversee and amend or repeal the compact in four of those 19 consent actions." (citing Ross Caldwell, untitled, unpublished manuscript 7 (May 6, 2012)).

[143] Tobin v. U.S., 306 F.2d 270, 273–74 (D.C. Cir. 1962); Mineo v. Port Auth. of N.Y. & N.J., 779 F.2d 939, 948 (3d Cir. 1985).

[144] Pennsylvania v. Wheeling Bridge Co., 59 U.S. (18 How.) 421, 433 (1856) (holding, "The question here is, whether or not the compact can operate as a restriction upon the power of congress under the constitution to regulate commerce among the several states? Clearly not. Otherwise congress and the two States would possess the power to modify and alter the constitution itself."). In contrast, one U.S. district court held that Congress could not enact a new law expressly targeting an interstate compact, but could enact new laws that have general applicability, even if those laws of general applicability could affect an interstate compact, Riverside Irrigation Dist. v. Andrews, 568 F. Supp. 583 (D. Colo. 1983), but no other court has used such reasoning.

ineffective in the interim period until the states amend it because the compact would be in violation of the terms of Congress's consent until the states amend it. No reported case has addressed this potential issue. One possible resolution of this issue is that a court could consider that the states impliedly amended the compact upon complying with the new federal law.[145]

CSG recommends that unless a court concludes otherwise, the Commission should treat new federal laws that assign new tasks to the Commission as effective to the Commission. As discussed in the introduction to this Legal Assessment, CSG also believes that new federal law that refers to or assigns new tasks for the Commission is an indicator that Congress continues to value the role and the work of the Commission.

CSG concurs with the Commission's current statement of how it participates in federal legislation. What is not clear is how the Commission learns of bills, agency actions and programs, and other federal, state, and provincial efforts that might involve the Commission or the Commission's work and priorities. Tracking this for two federal governments and ten states and provinces is time-consuming, even with modern search and tracking tools. The Commission should ensure this effort is intentional and appropriately resourced.

3. Recommendations

9 The Commission should maintain a working document of recommended supplemental agreements and amendments to the Compact that could be used with short notice if an opportunity arises to negotiate a supplemental agreement or amend the Compact or for Congress to address in a related bill.

10 The states should consider whether they want to amend the Compact to specify certain types of amendments that the states may make to the Compact without Congress's consent. If the states agree not to permit amendments, they may

[145] Courts could consider this as the states' "course of performance" of a compact. Course of performance is a principle that courts use to interpret contracts, in which a court interprets an ambiguous term in accordance with the manner in which the parties to the contract have applied that term over time. Courts apply "course of performance" and other contract interpretation principles to interstate compacts. *See, e.g.*, Alabama v. North Carolina, 560 U.S. 330, 346 (2010); New Jersey v. New York, 523 U.S. 767, 831 (1998) (Scalia, J. dissenting).

enact that agreement as a supplementary agreement pursuant to article VI.H of the Compact. If the states wish to permit amendments, they should amend the Compact text directly and obtain Congress's consent to the amendment. CSG can assist the states in this endeavor to ensure on-going uniformity for future amendments.

11 The Commission should ensure that it is regularly reviewing federal, state, and provincial bills, agency regulatory actions and programs, and other efforts that might involve the Commission or the Commission's work and priorities and bring attention to those that could conflict with the Compact, the Commission's policies, and actions the Commission recommends. Many bills, regulations, programs, and other efforts may not be targeted to the Commission or Great Lakes Basin management, but could affect the Commission and its work, so the Commission's review will need to be broad in scope. When the Commission must bring attention to potential conflicts, the Commission should use those opportunities to educate legislators and agency officials about the Commission and interstate compacts generally.

G. Interpreting the Great Lakes Basin Compact

1. Statement of Law and Authorities

A compact is a contract and a statute.[146] When interpreting an ambiguous provision in a compact, courts use either a statutory construction analysis or a contract interpretation analysis; the cases do not explain when a court would use one versus the other. In one recent case, the U.S. Court of Appeals for the Third Circuit concluded that it must use a contract law analysis,[147] but other cases have suggested that courts should not simply apply contract law.[148]

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[146] Green v. Biddle, 21 U.S. (8 Wheat.) 1, 92 (1823) (compact is a contract); BUENGER, ET AL., *supra* note 7, at 35–36; LITWAK, *supra* note 7, at 25.

[147] Wayne Land & Mineral Group, LLC v. Delaware River Basin Comm'n, 894 F.3d 509, 527–28 (3d Cir. 2018).

[148] *See, e.g.*, Alabama v. North Carolina, 560 U.S. 330, 351–52 (2010) (concluding, "But an interstate compact is not just a contract; it is a federal statute enacted by Congress. If courts were authorized to add a fairness requirement to the implementation of federal statutes, judges would be potent lawmakers indeed. We do not—we cannot—add provisions to a federal statute. And in that regard a statute which is a valid interstate compact is no different.").

When interpreting a compact as a contract, courts have applied common contract interpretation principles, including considering negotiation history of the compact,[149] course of performance (i.e., how the party states have interpreted and applied the compact),[150] and usage of trade (i.e., terms and parties' performance of other similar compacts).[151] When interpreting a compact as a statute, courts use standard statutory construction principles.[152] Section V.F below discusses the complexity of multiple courts having jurisdiction to resolve interstate compact disputes, which often involve interpretation of a compact.

2. Analysis

Ordinary litigation involving tort, employment, and contract claims involve fundamental questions requiring interpretation of a compact, such as whether a specific federal or state law applies to a compact commission. Because the Commission has not been involved in litigation, no court has had to interpret the Compact. This Legal Assessment thus focuses on the states, provinces, and Commission's interpretation of the Compact.

The Commission interprets the Compact when it or the staff applies the Compact and related authorities in the normal course of work. Similarly, the states and provinces interpret the Compact in their routine implementation of the Compact—when appointing new

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[149] *See, e.g.*, Oklahoma v. New Mexico, 501 U.S. 221, 235 n.5 (1991) (stating "We agree with the Master that it is appropriate to look to extrinsic evidence of the negotiation history of the Compact in order to interpret Art. IV" because a compact is both a contract and a statute and the Court looks to legislative history and other extrinsic evidence when required to interpret an ambiguous statute).

[150] Alabama v. North Carolina, 560 U.S. 330, 346 (2010) (applying course of performance where compact was ambiguous); Tarrant Reg'l Water Dist. v. Herrmann, 569 U.S. 614, 633 (2013) (same); Reply Brief of Defendant and Respondent at 16–21, Gillette v. Franchise Tax Bd., No. S206587 (Cal. Sept. 20, 2013) (raising course of performance).

[151] Alabama v. North Carolina, 560 U.S. 330, 341–42 (2010) (applying usage of trade where compact was ambiguous, considering other compacts that received consent contemporaneously); Tarrant Reg'l Water Dist. v. Herrmann, 569 U.S. 614, 633 (2013) (considering compacts that did not receive contemporaneous congressional consent when determining usage of trade).

[152] *See, e.g.*, Pievsky v. Ridge, 98 F.3d 730 (3d Cir. 1996) (expressly stating the use of statutory construction); Friends of the Columbia Gorge v. Columbia River Gorge Comm'n, 346 Or. 366, 377–84, 213 P.3d 1164 (2009) (state court applying federal "Chevron" method of statutory construction to interstate commission).

commissioners or considering Commission recommendations and actions, and through state and province officials that interact with the Commission as part of the normal course of their state or province work. Recognizing these moments of Compact implementation is critically important to uniform implementation of the Compact. Interstate commissions commonly develop ways to coordinate among the myriad interstate commission staff, state officials, and others that implement a compact to help ensure uniform application of the compact, such as with periodic interagency meetings, training, written communications, and authorizing the interstate commission to issue advisory opinions. Section IV.H of this Legal Assessment discusses such advisory opinions.

3. Recommendations

12 The Commission should consult with legal counsel and the states about applicable statutory interpretive standards prior to expressly interpreting the Compact or Congress's consent statute. The Commission should also consult with counsel about the applicable law in the likely judicial district when there is risk of litigation, and how the Commission can ensure compliance with that law in its decision-making.

13 To help ensure uniform interpretation of the Compact, the states, provinces, and Commission should develop a formal or informal manner of interpreting the Compact, such as by authorizing staff to do so in consultation with the Commission or authorizing the Commission to issue advisory opinions as suggested in recommendation 16.

14 The Commission should build and maintain a record of its past and future implementation of the Compact with references to applicable provisions of the Compact and whether the Commission believed a provision to be ambiguous that required interpretation.

15 The Commission should build and maintain competency in how other interstate commissions and their party states apply similar provisions in other interstate compacts and related authorities to help the Commission intentionally interpret and apply the Compact and related authorities in a consistent or different manner.

H. Enforcing the Great Lakes Basin Compact

1. Statement of Law and Authorities

The Compact does not contain any provision for its enforcement. Article VI.N, which specifies that "no action of the Commission shall have the force of law in, or be binding upon, any party state," is a limitation on the ability of the Commission to enforce the Compact. There have been no formal legal actions from a state or a third-party to enforce the Compact. The lack of litigation and other legal actions, however, does not necessarily indicate that the Compact and its specific authorities are not binding and enforceable.

2. Analysis

Enforcement of interstate compacts may occur in multiple ways—in state-versus-state litigation; by third party beneficiaries (persons who are not parties, but directly or indirectly benefit from the agreement); by an interstate commission; and by ordinary litigation involving common tort, employment, and judicial review claims.

State-versus-state litigation must be brought as an original action in the U.S. Supreme Court.[153] A state wanting to bring such a claim must petition the Supreme Court to file its claim. Often this requires extensive briefing and oral argument to a Special Master, with possible argument to the Court on objection to a Special Master report before the substantive litigation may begin.[154] Original jurisdiction cases typically last many years and are very costly, and often the Court addresses only tangential issues that resolve a particular claim without resolving the underlying dispute.

Third party beneficiary enforcement involves a non-party to a compact claiming that it has a right or interest in the implementation of the compact. For example, a fishing industry consortium might seek to enforce article VII against a state by claiming that the state failed to consider an action the Commission recommended. Third-party beneficiary litigation to enforce a compact often begins with a question whether a party is a third-party beneficiary. These cases

[153] U.S. CONST., art. III, § 2; 28 U.S.C. § 1251(a).
[154] Sup. Ct. R. 17.

are highly specific to the terms of the compact and the legal position of the person or entity claiming they are a third-party beneficiary.[155]

Interstate commissions may also seek to enforce the compact against a state. These claims are uncommon, but one recent example illustrates the potential effectiveness of such claims. In 2018, the Waterfront Commission of New York Harbor sought and received an injunction against New Jersey prohibiting it from unilaterally withdrawing from the bi-state compact and transferring the interstate commission's funding, personnel and other resources to the New Jersey State Police.[156]

A common issue with compact enforcement cases is whether specific types of claims and specific remedies are available to a plaintiff. The typical rule is that a court cannot impose a remedy that is not specified in a compact.[157] However, most compacts do not specify that the remedies contained in the compact are exclusive.

Some new interstate compacts, such as the Interstate Compact for the Supervision of Adult Offenders and the Interstate Compact for Juveniles, have compliance committees that developed self-assessment tools for states, do random audits, and require compliance and remedial actions plans.[158] Article VI.N of the Compact specifies that "no action of the Commission shall have the force of law in, or be binding upon, any party state" so these compliance approaches may not be appropriate for the Great Lakes states, provinces, and Commission.

Most interstate compacts drafted in the past 15 to 20 years include some provision for the interstate commission to issue advisory opinions about the meaning of a provision of the compact or how the compact might apply in a particular situation. Those opinions are not binding on the party states, but the party states generally follow them and courts routinely refer to them, giving them

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[155] *See, e.g.*, Doe v. Pa. Bd. of Parole & Prob., 513 F.3d 95 (3d Cir. 2008).
[156] Waterfront Comm'n of N.Y. Harbor v. Murphy, No. 2:18-cv-00650-SDW-LDW, 2018 U.S. Dist. LEXIS 92148 (D.N.J. June 1, 2018) (preliminary injunction issued, 2019 U.S. Dist. LEXIS 89956 (May 29 2019) (permanent injunction issued); *appeals filed* Nos.19-2458, 19-2459 (3d Cir. June 25, 2019) (consolidated cases).
[157] *E.g.*, Texas v. New Mexico, 462 U.S. 554 (1983); Broughton Lumber Co. v. Columbia River Gorge Comm'n, 975 F.2d 616 (9th Cir. 1992).
[158] *See* https://www.juvenilecompact.org/committees/compliance (Juveniles Compact; https://www.interstatecompact.org/committees/compliance (Adult Offender Compact).

highly persuasive effect.[159] Examples of this are the Interstate Commission for Adult Offender Supervision and the Interstate Commission for Juveniles.[160] This type of compact provision offers party states and interstate commissions an opportunity to clarify the meaning and context of specific compact provisions and often avoids the need for litigation. If there is litigation, the opinions help ensure a uniform interpretation of a compact. Article VI.N of the Compact does not permit the Commission to issue binding opinions, but the states could authorize advisory opinions.

3. Recommendations

16 The states and provinces should consider drafting a supplementary agreement to authorize the Commission to issue advisory opinions about the meaning of or application of a specific provision of the Compact and develop a manner of disseminating that information to the states, provinces, and other interested persons.

17 Congress and the states should amend the Compact to specify the manner in which the party states can enforce the Compact (judicial and non-judicial), and specify the types of enforcement actions that are permitted, such as actions to collect unpaid annual payments and to require consideration of actions the Commission recommends. Any new enforcement provisions in the Compact should specify that they are the exclusive remedies applicable to the Commission or to the states in their implementation of the Compact.

18 Congress and the states should amend the Compact to specify whether there are third party beneficiaries with rights to enforce the Compact, and if so, who those persons and entities are, to exclude all others, and the rights that third-party beneficiaries have under the Compact.

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[159] *E.g.*, State v. Brown, 140 A.3d 768, 776, 777 n.5 (R.I. 2016).
[160] Interstate Compact for the Supervision of Adult Offenders, art. XIV.B; Interstate Compact for Juveniles, art. XIII.B.3 (both stating, "Upon the request of a party to a conflict over meaning or interpretation of Interstate Commission actions, and upon a majority vote of the Compacting States, the Interstate Commission may issue advisory opinions regarding such meaning or interpretation").

19 If the states or the Commission are parties in an enforcement action, they should handle the matter with a long-term perspective of maintaining the authorities in the Compact and for the Commission and intergovernmental relations rather than a narrow focus on winning a particular factual or legal claim.

V. THE GREAT LAKES COMMISSION

A. The Great Lakes Commission is an Interstate Compact Agency, a Governmental Entity

1. Statement of Law and Authorities

Article IV.A of the Great Lakes Basin Compact states, "There is hereby created an agency of the party states to be known as The Great Lakes Commission."

The Commission uses other terms to describe itself in addition to "Commission." For example, the Commission's Guide to Operations and Procedures uses the terms "organization" and "institution."[161] Similarly, in recently signed MOUs, the Commission has described itself as a "501(c)(1) non-profit compact agency."[162] None of these other terms give an immediate understanding that the Commission is a government agency.

2. Analysis

Article IV.A clearly creates the Commission, but is ambiguous about whether the Commission is a joint agency of all of the states or an agency of each of the states.

The nature of the Commission arose in the legislative history of Congress's consent. In Congress's first hearings on consent legislation in 1956, Marvin Fast, the Commission's acting Executive Director, described the Commission as a "joint interstate agency."[163] This is an accurate description of the Commission.

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[161] Great Lakes Comm'n, A Guide to Great Lakes Commission Operations and Procedures 1, 23, 24 (Mar. 2017).
[162] *See* discussion in section V.D. below
[163] *The Great Lakes Basin: Hearings on S.2688 Before a S. Subcomm. of the Comm. on Foreign Relations*, 84th Cong. 27 (Aug. 27, 1956) (Statement of Marvin Fast, acting Exec. Dir. of the Great Lakes Comm'n).

However, in hearings 10 years later, Congressman Leonard Farbstein from New York asked James Fitzpatrick, Chairman of the Power Authority of the State of New York, whether the Commission is "basically a voluntary association, it is not a public official body?" Mr. Fitzpatrick answered, "No question about it. Further, no State has to act on its recommendations. . . . "[164] This colloquy suggesting the Commission is not a government entity is incorrect. Agencies created by interstate compacts are government agencies unless specifically created otherwise.[165]

Unless a compact specifies otherwise, interstate commissions are separate, independent, and different from state and federal agencies;[166] however, compact texts differ in how they describe interstate commissions, and that description can affect how the public, states, and courts treat those commissions.

Courts must sometimes determine whether to treat an interstate commission as a state agency when considering whether to apply a specific state law to that commission. These cases are fact and law-specific; there is no well-established test; and there is no pattern in the case law.[167]

Courts must also sometimes determine whether to treat an interstate commission as a federal agency when determining whether a specific federal law applies to that commission. Courts use different factors, some of which come from long-standing jurisprudence. For example, in one case, a court considered five factors to determine whether the Port Authority of New York and New Jersey must apply the National Environmental Policy Act (NEPA): (1) whether there is federal participation in the compact; (2) whether the compact agency receives federal financial support; (3) the ability for the

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[164] *Granting the Consent of Congress to a Great Lakes Basin Compact and for Other Purposes: Hearing on H.R. 937, H.R. 12294, H.R. 12299, H.R. 12692, H.R. 13359, H.R. 14192, and H.R. 15042 Before the H. Comm. on Foreign Affairs*, 89th Cong. 92–93 (Oct. 4, 1966).

[165] Mr. Fitzpatrick's statement that the states do not have to act on the Commission's recommendations is also misleading; article VII requires the states to consider actions the Commission recommends.

[166] LITWAK, *supra* note 7, at 116–21; Hess v. Port Auth. Trans-Hudson, 513 U.S. 30, 40 (1994) ("Bistate entities occupy a significantly different position in our federal system than do the States themselves . . . [and are] 'independently functioning parts of a regional polity and of a national union.'").

[167] *See* LITWAK, *supra* note 7, at 121–28.

states to amend the obligations of the agency without further federal action; (4) whether the compact agency may develop plans without consulting or seeking approval from the federal government; and (5) whether there is a requirement to submit reports to Congress.[168] The Commission satisfies three or four of these factors—the bylaws allow, but do not require, federal participation;[169] the Commission receives some federal financial support in the form of pass through federal grant money (discussed below in section V.D); article VI.H of the Compact allows the states to enact supplementary agreements without the consent of Congress; and Section 2 of Congress's consent statute requires that the Commission must cooperate with federal agencies and submit its reports to Congress.[170] Without clear language in the Compact, courts may consider the Commission to be a state or federal agency for the purpose of applying state or federal law that the Compact does not require.

3. Recommendations

20 The Commission should use consistent terms to refer to itself and those terms should convey an understanding that the Commission is an interstate compact agency and a government agency. Using terms that express the interstate nature of the Commission helps the public, courts and other government agencies understand that the Commission is not a state or federal agency.

B. Appointment and Removal of Commissioners

1. Statement of Law and Authorities

Article IV.B of the Great Lakes Basin Compact authorizes each party state to appoint between three and five commissioners and

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[168] Brooklyn Bridge Park Coal. v. Port Auth. of N.Y. & N.J., 951 F. Supp. 383 (E.D.N.Y. 1997).

[169] Article II, section 4 of the bylaws states, "The Commission shall be permitted to designate observers representing the United States and Canadian federal governments . . . ."

[170] Pub. L. No. 90-419, § 2, 82 Stat. at 419. As an aside, the Commission does not currently apply NEPA or require grant recipients to apply NEPA; however, an amendment to the Compact could clarify that NEPA does not apply. For example, Congress has abrogated NEPA in other consent actions. *See, e.g.*, 16 U.S.C. § 544o(f)(1) (consent statute for Columbia River Gorge Compact), and could do so in an amendment to the Great Lakes Basin Compact.

specifies that commissioners are appointed in accordance with the law of the state which they represent and are subject to removal in accordance with the same state law. Ontario and Québec may appoint delegations under the same terms. CSG is aware that some appointing authorities for some compacts seek interstate commission input when making appointing decisions, such as through interviews with commission staff, but is not aware of examples where that input is codified in a compact or an interstate commission's internal authorities. The Great Lakes Commission's bylaws and Guide to Operations and Procedures are silent on whether it may give input in state appointment and removal decisions.

The Compact distinguishes between a majority vote of members of the Commission and a majority vote of the party states, and the states are entitled to only three votes even if they have more than three appointees. The Commission's Guide to Operations and Procedures does a good job explaining voting requirements and this Legal Assessment does not repeat it here.[171]

The Commission's authorities are also silent on whether persons appointed to the Commission serve in their personal or official capacity, whether they are independent of the governors or serve their appointing authority, how much latitude commissioners have for decision-making, and how to address potential conflicts between Commission business and their principal and other affiliations. Potential conflicts are addressed in section V.C below in discussions involving transparency.

2. Analysis

The appointments and removal provision in article IV.B of the Compact is clear and follows the common approach for interstate commissions: appointments are handled through the standard processes of the appointing authority.[172] Typically, state appointments to an interstate commission are at the discretion of the appointing authority. In the few cases where an interstate commissioner has challenged his removal, courts have reached different decisions about whether an appointee to an interstate commission is removable at will or serves a specified term and may only be removed for

[171] Great Lakes Comm'n, A Guide to Great Lakes Commission Operations and Procedures 16–17 (Mar. 2017).
[172] *See* BUENGER, ET AL., *supra* note 7, at 130.

cause.[173] Because the Compact defers to state law for appointment and removal, this question will arise under state law and not involve the operation of the Compact.

By deferring to state law for appointments and removals, the Compact anticipates variations in the states' and provinces' appointment and removal processes. This is common with other interstate compacts; states have their own laws, policies, and practices, and different administrations may adjust those requirements. Variations in appointment and removal requirements do not typically affect the implementation of a compact as long as appointments and removals are clearly, consistently and timely communicated to the Commission.

3. Recommendations

21 The Commission, in consultation with the states and provinces, should enact a bylaw or add a statement in its Guide to Operations and Procedures specifying whether and how it gives input into appointment or removal decisions. That bylaw or statement should clearly articulate that the appointing party state is the only body authorized to appoint and remove a commissioner, not the Commission itself. The Commission may want to consider making general statements about its needs and interests in adding diversity in specific areas of expertise, perspectives or backgrounds to the Commission.

C. Administrative Procedure and Transparency

1. Statement of Law and Authorities

The Compact and other authorities contain little text concerning the application of common administrative procedure and transparency principles. Article IV.K of the Compact authorizes the Commission to do rulemaking for the conduct of its business but does not specify what rulemaking procedures to use. Article IV.M of the Compact contains some direction about public records, stating, "The Commission and its Executive Director shall make available to

[173] *Compare* Pievsky v. Ridge, 98 F.3d 730 (3d Cir. 1996) (compact official removable at will because officials must be accountable to the administration in office in order for the compact agency to function properly), *with* Alcorn v. Wolfe, 827 F. Supp. 47 (D.D.C. 1993) (compact official not removable at will because the need for independence from political influence is implicit in a compact).

the party states any information within its possession and shall always provide free access to its records by duly authorized representatives of such party states." This provision is not a clear statement that the Commission is subject to disclosure of records to the public. This provision could be interpreted to require that a person must request Commission records through one of the party states. Article IV.N of the Compact requires a written record of meetings and proceedings.

Article IV of the Commission's bylaws specify notice requirements for the Commission's regular and special meetings. Regular meetings require 60 days notice to each member of the Commission; special meetings are held at times that the Chair calls the meeting. The bylaws do not specify any notice requirement for meetings and actions of the Board or for other committees of the Commission.

The Commission's Guide to Operations and Procedures discusses notice, opportunity for public participation and minutes,[174] but overall, CSG did not find Commission rules, bylaws, or policies relating to common administrative procedure and transparency requirements in federal and state government.

In 2007, the U.S. General Accountability Office issued a report studying the structure and governance of environment and natural resource interstate compacts and commissions.[175] The study focused on the use of well-established procedure and transparency laws or their equivalent. The GAO reviewed the Great Lakes Basin Compact and Commission practices, but did not feature the Commission in the body of the report. CSG recommends the report as an introduction to the type of procedure and transparency that the GAO evaluated as good practice for interstate commissions.

2. Analysis

The federal government and all states have myriad requirements in well-established administrative procedure and government transparency laws that have general applicability to nearly all

[174] Great Lakes Comm'n, A Guide to Great Lakes Commission Operations and Procedures 14–18 (Mar. 2017).

[175] U.S. GOV'T ACCOUNTABILITY OFFICE, NO. GAO-07-519, INTERSTATE COMPACTS: AN OVERVIEW OF THE STRUCTURE AND GOVERNANCE OF ENVIRONMENT AND NATURAL RESOURCE COMPACTS (2007).

their agencies. In contrast, there is no uniform set of administrative procedure and transparency requirements for interstate compact agencies (i.e., no interstate compact administrative procedure act and no transparency laws just for interstate commissions). In some cases, compacts will specify applicable procedure and transparency requirements; in some cases, Congress's consent to an interstate compact will require specific procedure and transparency requirements; in some cases, interstate commissions will establish their own requirements; and in some cases, interstate commissions choose to establish few or no procedure and transparency requirements.[176]

Typically, interstate commissions are not subject to the law of any one state unless the compact creating the commission specifically preserves state law to the commission.[177] There are many variations on this standard rule that generally have the same effect.[178] Several court decisions have held that an interstate compact with consent may also supersede conflicting restrictions or authorities in a state's constitution.[179] Those decisions will not apply to the Great Lakes Basin Compact because article IX states that any provision in the Compact that is contrary to the U.S. Constitution or a state constitution is severable. The Compact specifically preserves some state law, such as for real property transactions in article IV.A, but the Compact does not preserve the states' administrative procedure or transparency laws.[180]

Without a clear statement of such procedure and transparency requirements in the Compact, the Commission is at risk of being subject to different and conflicting requirements. In CSG's experience, state courts will typically default to applying their own intra-

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[176] *See generally* BUENGER, ET AL., *supra* note 7, at 139–61; LITWAK, *supra* note 7, at 378–97.
[177] Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Cons. Planning Council, 786 F.2d 1359, 1371 (9th Cir. 1986).
[178] *See* BUENGER, ET AL., *supra* note 7, at 61–65; LITWAK, *supra* note 7, at 278–83.
[179] *See* LITWAK, *supra* note 7, at 102–05 (citing cases).
[180] Article VI.N of the Compact specifies, "no action of the Commission shall have the force and effect of law in, or be binding upon, any party state." This provision seems aimed at ensuring the Commission is a recommendatory body. This provision does not preserve state law generally for the Commission to use for procedure and transparency.

state requirements to an interstate commission unless the commission has its own requirements. The Commission can reduce the risk of claims that the Commission has violated federal or a state administrative procedure or transparency requirement by enacting its own administrative procedure and transparency requirements.

To illustrate the extent that the eight party states' laws would conflict if each would be applied to the Commission, CSG summarizes below the statutory law of the party states for five administrative procedure and transparency issues that are common to interstate compact agencies.[181] This comparison of law also illustrates that the Commission has multiple bases when choosing how to act. CSG did not research judicial decisions that have interpreted the statutory law. State common law (i.e., law established in judicial decisions) is also subject to the same restrictions as state statutory law in its application to interstate compacts.[182]

(1) *whether rules of internal procedure (rules that apply just to the agency itself, not the public) are subject to state rulemaking requirements*: Six states' administrative procedure acts do not require agencies to use rulemaking requirements for rules of internal procedure; Michigan and Pennsylvania statutory law do not expressly exempt rules of internal procedure from rulemaking requirements.

(2) *open public meeting requirements relating to restrictions on meeting locations and executive (or closed) sessions*: The eight states' laws are not materially different concerning where government entities may hold meetings. There are many differences between the states' requirements for how government entities must give notice of executive sessions, procedures for going into executive sessions and permissible subjects for executive sessions. For example, Indiana law prohibits closed sessions during an otherwise open meeting, but Pennsylvania allows closed sessions at any time. In another example, Michigan law requires a two-thirds vote of a commission's members to enter executive session, but Illinois and Ohio law require only a majority vote of a quorum and Wisconsin law requires a majority of voting members.

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[181] CSG recognizes and appreciates Professor Nicholas Schroek at University of Detroit Mercy Law School who expressed interest in this Legal Assessment and Nathan Wilson, a law student at University of Detroit Mercy Law School who conducted this research under Professor Schroek's guidance.

[182] *See* BUENGER, ET AL., *supra* note 7, at 65–66; LITWAK, *supra* note 7, at 283–88.

(3) *public records disclosure laws relating to time to respond to requests, recovery of costs, and method of enforcement*: There are many differences in the states' public records disclosure laws. For example, no two states' laws are alike in search and copying fees that agencies may charge to recover their costs, ranging from no fee for the first 50 pages, to 25 cents per page if the request involves fewer than 100 pages, to "reasonable cost" to "actual cost."

(4) *public contracting requirements for no-bid contracts and contracts extending longer than a single fiscal year or biennium*: There are many differences in the states' public contracting laws. For example, Michigan and Pennsylvania allows no-bid contracts for contracts under $10,000; Minnesota, New York, Ohio, and Wisconsin allow no-bid contracts for contracts under $50,000; Indiana allows no-bid contracts for contracts under $75,000; Illinois allows no-bid contracts for contracts under $100,000.

(5) *conflict of interest restrictions on individuals serving on two or more boards with overlapping authority (including duties of loyalty and disclosure prior to substantive votes)*: There is no express statutory law on this subject; the Commission should consult with legal counsel about researching case law and other sources.

CSG did a deeper dive into the Compact requirements and the Commission's legal authorities, practices, procedures, and past experiences related to open meetings and public records disclosures. The Commission should consult with legal counsel about similar analyses for other elements of these transparency subjects and other common administrative procedure and transparency requirements that could apply to the Commission.

a. Open Meetings

The Commission's website is well-populated with current and past meeting agendas, meeting minutes and documents considered at Commission meetings.[183] CSG reviewed recent annual and semi-annual Commission meeting agendas for compliance with common requirements of open meeting requirements under the federal Government in the Sunshine Act and state open public meetings laws. Commission meetings are divided into Work Sessions, which the agendas advertise as open to commissioners and staff only, and the "Annual" or "Semiannual" Meeting, which is open

[183] *See* https://www.glc.org/about/meetings/.

to all. CSG is concerned that the Commission may discuss topics in closed work sessions that it should discuss in open sessions. CSG is not offering a legal opinion about this. The Commission should consult with legal counsel for a legal opinion.

Typically, a public body must conduct all its discussions and make all its decisions in portions of meetings open to the public, unless there is a specific exemption for that body or for a specific subject matter. For example, Michigan's Open Meetings Act defines meeting as "the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy."[184] Another provision of Michigan's law requires, "All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public except as provided in this section and sections 7 and 8."[185] Section 8 of Michigan's law specifies the permissible subjects for closed sessions.[186]

CSG also reviewed recent Board of Directors' meeting agendas. Most states' open public meetings laws specify that committees of a governing body are subject to open public meeting requirements. For example, Michigan's Open Meetings Act defines "public body" as "any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, ..."[187] Article V of the Commission's bylaws describe the powers, duties, and operation of the Board but does not mention notice and other common requirements of open public meetings laws and Board meetings are not advertised as public meetings. The Commission's Board of Directors meets monthly by phone. States' open public meeting laws commonly require that the Board must provide a manner for the public to listen to telephonic meetings.[188]

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[184] MICH. COMP. LAWS § 15.262(b).
[185] MICH. COMP. LAWS § 15.263(3).
[186] MICH. COMP. LAWS § 15.268.
[187] MICH. COMP. LAWS § 15.262(a).
[188] *See, e.g.,* STATE OF MICHIGAN ATTORNEY GENERAL, OPEN MEETINGS ACT HANDBOOK at 9 (stating, "Moreover, the use of electronic communications for discussions or deliberations, which are not, at a minimum, able to be heard by the public in attendance at an open meeting are contrary to the OMA's core purpose" and citing cases), https://www.michigan.gov/documents/ag/OMA_handbook_287134_7.pdf.

b. Disclosure of Public Records

The Commission has received only two public records requests in the past approximately 20 years.[189] One of those requests illustrates the problem of not having Commission-specific administrative procedure and transparency requirements. In 2005, a commissioner from Illinois requested certain Commission records. The attorney representing the commissioner stated that he believed the Commission was subject to the federal and Illinois freedom of information acts. Technically, the Commission is not subject to either,[190] but without a specific policy in place, a court would likely conclude that the Commission must follow some established public records disclosure law and could apply the law of the state in which a public record disclosure enforcement suit is filed.

A common issue that arises with trying to apply more than one public records disclosure law to interstate commissions is how to address conflicts between documents that are disclosable under one state's law, but that are exempt under a different state's law. If an interstate commission must disclose those documents, then a requestor could obtain records from the Commission that are protected from disclosure from the state. In this situation, the state or other public body that must protect the document would be unable to share that document with the Commission. Where this issue has arisen, interstate commissions commonly specify that a record will be protected from disclosure if one party state's law protects the record from disclosure.

3. Recommendations

22 The Commission should review its policies and practices for consistency with common principles of administrative agency action and transparency, including, but not limited to administrative procedure, public records disclosure, open public

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[189] Interview with Tom Crane, Deputy Director, Great Lakes Commission, May 23, 2019.

[190] The Commission is not a federal agency subject to the federal FOIA (see 5 U.S.C. § 552 applying the federal FOIA to "agencies" and 5 U.S.C. § 551(1) defining "agency" as an "authority of the United States"). The Commission is similarly not subject to the Illinois FOIA because it is not an Illinois agency and the standard rule about the application of state law discussed above, *supra* text at notes 177–179.

meetings, conflicts of interest, financial disclosure, and public contracting. The Commission will likely need to adjust its policies and practices through its Guide to Procedures and Operations, amendments to its bylaws, or through rulemaking pursuant to section IV.K of the Compact. The states' laws differ on these procedures and requirements. The Commission will need to choose whether to use federal procedure and requirements; try to harmonize existing laws as best as possible; choose one state's laws to observe, or develop its own procedure and transparency standards. The Commission should work with legal counsel on addressing this recommendation.

D. Budgeting, Funding, Financial Management, and Taxation of the Commission

1. Statement of Law and Authorities

The Compact contains many provisions relating to the budgeting and funding of the Commission. Article V.A of the Compact requires each state to pay the expenses of its commissioners in accordance with that state's law. Articles V.B and V.C require the Commission to develop and present to each state's executive head or designated officer a budget of the Commission's estimated expenditures, with recommendations for the amount of funding for each state within the time frames set by the states' legislatures. Article V.D prohibits the Commission from pledging the credit of any party state and prohibits the Commission from "incur[ring] obligations prior to the allotment of funds by the party states adequate to meet the same." Article IV.H authorizes the Executive Director to receive funds from "any state or government of any subdivision thereof . . . or from any institution, person, firm or corporation . . . ."

State annual payments in 2019 are $60,000 per year. This is the same amount since 2002. In some years, some states have not provided the Commission with their full assessed annual payment and some states have provided more than their assessed annual payment. In 2019, all states funded the Commission at the full annual payment level; however, collectively, the states have a $148,000 deficit in their annual payments, not accounting for inflation.[191]

[191] Great Lakes Commission Annual Payment History 1966–2019 (unpublished undated document available from Great Lakes Commission staff).

The Commission maintains financial reserves that are used to support the operations of the organization. These funds are also available to address identified priorities or issues considered to be of high importance to the Commission including items not normally or easily covered by the states' annual payments or other traditional revenue streams. The Executive Director or his or her designee, under the direction of the Board of Directors, is responsible for the investment and management of the Commission's reserve funds for long-term stewardship and approved uses. Reserves allow the Commission to enter in contracts that exceed the length of each fiscal year, which helps ensure the Commission's compliance with the prohibition in article V.D against incurring obligations prior to the states allotting funds.[192]

Revenues for the Commission's operations are drawn from two primary sources. Unrestricted General funds are drawn primarily from annual state payments (historically paid by only the states, not the provinces) and indirect cost recovery on grants and contracts (covering overhead costs). Restricted Funds comprise the balance of total annual revenues and are drawn primarily from grants, contracts and agreements from public agencies and foundations. These funds are generally directed at specific programs and projects (finite term and ongoing). Since 1993, restricted funds comprise the majority of revenue to the Commission, upwards of 90% of the total budget in FY 2018.[193]

Article V.E requires a public accountant to annually audit the Commission's receipts and disbursements, and to publish the results of the audit in the Commission's annual report. Article V.E requires the Commission to allow the states to inspect the Commission's accounts. The Commission uses an independent auditor. The audit report for the years ending June 30 2018 and 2017 noted that the Commission has had 12 straight years of clean audits.[194] CSG does not recommend the Commission needs additional controls for managing its finances.

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[192] Interview with Tom Crane, Deputy Director, Great Lakes Commission, May 23, 2019.
[193] *Id.*
[194] REHMANN ROBSON LLC, FINANCIAL STATEMENTS AND SUPPLEMENTARY INFORMATION (Jan. 4, 2019), https://harvester.census.gov/facweb/ (search for Great Lakes Commission).

In 1956, the IRS determined that the Commission is exempt from "payment of taxes normally granted to States or political subdivisions thereof."[195] However, later opinions and documents have suggested different rationales for the Commission's tax-exempt status. A 1988 letter from a certified public accountant concluded that the Commission is tax exempt pursuant to section 501(c)(1) of the Internal Revenue Code.[196] A 1991 letter from the Commission to the IRS requested a letter stating that the Commission is a 501(c)(1) organization.[197] The IRS responded that it has no record of a prior determination, but stated that the Commission's letter to the IRS requesting a determination indicates that the Commission is a governmental instrumentality or political subdivision of a state and stated, "Governmental instrumentalities and political subdivisions of states are not subject to federal income text because they are described in section 115 of the Internal Revenue Code."[198] However, the Commission seems to currently rely on section 501(c)(1) to express itself as exempt from federal income tax. Staff provided copies of four recent memoranda of understanding and in each one, the Commission states that it is a "501(c)(1) non-profit compact agency."[199]

Article IV.J of the Great Lakes Basin Compact states, "No tax levied or imposed by any party state or any political subdivision thereof shall be deemed to apply to property, transactions, or in-

[195] Letter from D.J. Luippold, Acting District Director, IRS, to Marvin Fast, Acting Executive Director, Great Lakes Comm'n (Mar. 9, 1956) (on file with Great Lakes Commission) (File No. AUD:OA:CKV-15W).

[196] Letter from Robert C. Raham, St. John, Raham & Weidmayer, CPAs, to Michael J. Donahue, Executive Director, Great Lakes Commission (May 6, 1988) (on file with the Great Lakes Commission) (relying on Congress's consent and concluding that the Commission is an agency of the United States).

[197] Letter from Marsha Reesman, Manager, Special Projects, Great Lakes Commission, to IRS (July 21, 1991) (on file with Great Lakes Commission).

[198] Letter from Harold M. Browning, District Director, IRS, to Great Lakes Commission (Sept. 27, 1991) (on file with the Great Lakes Commission). The Commission's files also include other versions of the same letter (with errors) dated September 23 1991 and September 30, 1991.

[199] *E.g.*, Memorandum of Understanding between the Great Lakes Commission and the U.S. Geological Survey, § 1 (Sept. 29, 2017) (on file with Great Lakes Comm'n) (stating "This Memorandum of Understanding (MOU) is between the Great Lakes Commission (hereafter GLC), a 501(c)(1) non-profit agency . . . .")

come of the Commission." The Commission's records include several determinations from the party states that the Commission is exempt from certain state taxes, consistent with article IV.J. CSG did not research state tax exemption beyond these letters. If the Commission has questions about exemption from state taxation, it should consult with tax professionals and if necessary, engage legal counsel to explain article IV.J to any state seeking to impose a prohibited tax on the Commission.

2. Analysis

Articles V.B and V.C could be interpreted to require the Commission to submit a budget to each state in the manner required by each legislature for a direct appropriation, or it could be interpreted to allow the Commission to submit a budget to a state agency and have that agency pay the annual payment on behalf of the state. The Commission and states use the latter approach. No matter which approach the Commission and states use, there is a possibility that the states will not provide complete funding for their recommended annual payments.

Variations in state funding are common with interstate compacts because different states have different revenues and expenses and different funding priorities from year to year. To ensure necessary funding, some interstate commissions use a formula specified in the compact or by rule with enforcement authority. For example, the Interstate Commission for Adult Offender Supervision and the Interstate Commission for Juveniles, which have been enacted in all 50 states, D.C. and most U.S. territories, are funded through dues payments appropriated by the states based upon formulas specified by rule.[200] Regardless of the manner in which the states fund an interstate compact, if a compact requires the states to fund the compact, then funding is a binding obligation on the states. States may not use limitations in their own state constitutions, laws, regulations, or other authority to fail to pay an interstate

[200] Interstate Commission for Adult Offender Supervision Rule 2.103 establishes the authority for the Commission to determine a formula to establish dues and Commission Policy 05-2004 addresses dues enforcement; Interstate Commission for Juveniles Rule 2-101 authorizes the Commission to determine the formula for dues and Commission Policy 08-2009 addresses dues enforcement.

compact funding obligation.[201] States must also not use funding, or the imposition of limits on funding, to unilaterally control an interstate commission.[202]

When CSG presented its initial approach for a Legal Assessment at the Commission's 2019 Semiannual meeting, CSG received a comment that the Legal Assessment would be helpful if it could address how the states should best pay for the Commission.[203] The Commission believes there are numerous problems with the manner the states use, and with the process the Commission has historically used. CSG understands that this is an item for follow up in a subsequent phase of the overall Commission assessment. CSG does not have an opinion about the best way for states to structure their annual payments to the Commission. State budgeting, appropriation, and expenditure is complex and specific to each state. States may choose to budget and appropriate money for different interstate commissions differently and different states within the same compact may choose to budget and appropriate money for an interstate commission differently. Some states may prefer to use a direct appropriation to an interstate commission. Other states may appropriate money to a state agency with instruction to use that amount for the interstate commission. Still other states may appropriate money to a state agency's grant pool with instruction that the state agency must grant the money to the interstate commission. Each of these ways that states pay their financial obligations to interstate commissions is consistent with article V.B of the Compact. The complexity and burdens do not end with the submission of a budget. For compacts that receive a direct appropriation, states may also have expenditure requirements, such as requiring permission for spending authority in excess of a state appropriation, which may require seeking permission from multiple states. Many interstate commissions that regulate persons or maintain infrastructure (such as bridges) charge fees to cover their costs. Some interstate commissions have the power to tax or buy and use or sell land for economic development, becoming self-sustaining

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[201] See West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951).
[202] *See* BUENGER, ET AL., *supra* note 7, at 254–55.
[203] Question from John Linc Stine, Minnesota Commissioner and Chair, Great Lakes Commission (May 23, 2019).

without state funds. Article V.B specifically mentions that the Commission must present a budget to the states' legislatures, so if the Commission or states want to develop a new manner of funding the Commission that avoids the states' budgeting processes, they will likely need to amend the Compact.

CSG recommends that the Commission is exempt from federal income tax pursuant to section 115 of the Internal Revenue Code and the Commission should not rely on section 501(c)(1). Section 501(c)(1) designation is for "Any corporation organized under Act of Congress which is an instrumentality of the United States . . . ." As discussed above, the Compact does not designate the Commission an instrumentality of the United States. Many other interstate commissions use section 115, and some of those commissions have sought and received a private letter ruling from the IRS. Private letter rulings are determinations that the recipient may rely on so long as the recipient acts consistently with the letter ruling.

3. Recommendations

23 The Commission should seek a private letter ruling from the Internal Revenue Service that it is exempt from federal income tax pursuant to section 115 of the Internal Revenue Code. The opinion letter that the Commission received in September 1991 is not binding on the IRS. A private letter ruling is a document that the Commission can rely on.

24 If the Commission wishes to change the manner that the states fund the Commission, it should first complete a study of the state's practices and identify the practices and precise problems that the Commission experiences. A change to the practice in which the states fund the Commission could be made in a supplementary agreement unless the change seeks to avoid an express requirement in the Compact, such as the requirement for the Commission to present a budget to the states' legislatures, in which case, an amendment to the Compact will be necessary.

25 The Commission should work with the states that still owe back annual payments to bring those states into full compliance with article V.C, the Compact's requirement for states to appropriate the Commission's recommended amounts.

E. Human Resources

1. Statement of Law and Authorities

Article IV.G of the Compact states that, subject to the Commission's by-laws, the Executive Director shall appoint and remove personnel as needed to perform the Commission's function and may set compensation and define duties for those personnel. The Commission's Guide to Operations and Procedures states,

> All staff members are "at-will" employees and serve at the discretion of the executive director, who is responsible for hiring, firing, promotions and any disciplinary action. The GLC maintains a detailed set of personnel policies and procedures that address matters of employment consistent with Michigan and federal employment law."[204]

The Commission does not have a human resources professional on staff or contract. Existing managers on the staff provide human resources services, including among many functions, the development of position descriptions; posting, recruiting and onboarding personnel; managing, training and disciplinary actions; professional development planning and delivery; setting salary and benefits packages; and much more. This has generally worked from a legal perspective because the Commission has never had a significant human resources legal issue. Staff has expressed concern that a human resources professional would be necessary to handle a significant human resources problem.[205]

2. Analysis

This legal assessment does not review the Commission's policies and procedures for compliance with Michigan and federal employment law and does not evaluate the Commission's compensation scale, benefits, retirement program and personnel policies. This is something the Commission should do in consultation with a human resources professional and legal counsel.

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[204] Great Lakes Comm'n, A Guide to Great Lakes Commission Operations and Procedures 13 (Mar. 2017).
[205] Interview with Tom Crane, Deputy Director, Great Lakes Commission, Aug. 5, 2019.

Interstate commissions obtain human resources services in many different ways. Some interstate commissions have in-house human resources professionals. Some interstate commissions contract with human resources firms that provide outside human resources counsel to multiple clients. Some interstate commissions contract with one party state for partial or full human resources services, including the administration of payroll and benefits.[206] However, contracting with one state's human resources system may limit an interstate commission's flexibility in determining its staffing, compensation, and benefits. Some larger interstate commissions have collective bargaining agreements with employees. Some interstate commissions, such as the Interstate Commission for Adult Offender Supervision, the Interstate Commission for Juveniles, and Military Interstate Children's Compact Commission have adopted their own rules and policies governing the human resources functions including compensation and benefits as well as employment discrimination and worker compensation issues, but contract with secretariat organizations to provide such services on an outsourced basis.

3. Recommendations

26 The Commission should hire a human resources professional, either in-house, or by contract to provide human resources services in place of or as support for the Executive Director and other managers that currently fulfill this role. The human resources professional should also emphasize employee retention policies and programs because interstate commissions benefit from having long-term staff that are familiar with and are able to train new staff on the unique nature and implementation considerations for interstate compacts. The Commission executive director, and human resources professional should review current policies and work loads to ensure long-term staff can serve this training and internal resource role.

[206] Examples include the Columbia River Gorge Commission (contracts with the State of Washington for human resources and financial management services) and Northwest Interstate Compact on Low-Level Radioactive Waste Management (housed within the Washington State Department of Health).

27 The Commission should have its human resources professional and legal counsel review personnel policies and procedures on a regular basis—annually or biennially—for compliance with changes in state and federal statutory, law, federal and state regulations; federal and state agency interpretation and application of statutes and regulations, and judicial case law, and for best practices in agency personnel management in supporting employee retention, workplace health and safety, and conflict management.

F. Legal Liability and Immunity

1. Statement of Law and Authorities

Article IV.A of the Compact authorizes the Commission to "sue and be sued." This bare "sue and be sued" provision raises two issues. First, it is a broad waiver of sovereign immunity, whereas most government entities have limited waivers that authorize only specific types of claims. Second, this clause does not address whether the Commission may be sued in federal court because it is not a waiver of Eleventh Amendment immunity.[207]

The federal legislative history discusses the sue and be sued provision, questioning whether it is necessary for a compact that only has advisory power. Marvin Fast, the Commission's first Executive Director, stated to Congress that pursuant to this provision, the Commission might want to appear before appropriate federal agencies in the interest of the states,[208] and it is necessary for the Commission to enter into contracts, such as for office supplies and equipment, for the Commission to protect itself from damage, destruction, or theft of Commission property, and because suit in or by each of the party states in lieu of the Commission would be cumbersome and unworkable.[209] Additional discussion considered whether a claim would be against the individual parties to the compact; or against the Commission as an entity, and whether a person

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[207] *See Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) (holding that a "sue and be sued clause" is not sufficient to authorize suit in federal court).
[208] G*ranting the Consent and Approval of Congress to a Great Lakes Basin Compact: Hearings on H.R. 4314, 4315, and 4316, and S. 1416 Before the H. Comm. on Foreign Affairs*, 85th Cong. 17 (July 30, 1957) (Supplemental Statement of Marvin Fast, Exec. Dir., Great Lakes Comm'n).
[209] *Id.* at 51 (oral statement of Marvin Fast, Exec. Dir., Great Lakes Comm'n).

could collect on a judgment.[210] Commission staff stated there has been no past litigation against the Commission, but that a few persons have threatened litigation against the Commission.[211]

Article IV.F. of the Compact requires the Executive Director to be bonded in such an amount as the Commission may require. The Commission has liability insurance for the Executive Director instead. This probably complies with the Compact.

The Compact is silent on court jurisdiction, venue, and legal immunities. Jurisdiction refers to the court system where a lawsuit will be resolved (a particular type of federal or state court) and venue refers to which court within the system with jurisdiction will handle the lawsuit. Within the Great Lakes Basin, there are ten U.S. district courts (federal courts of general jurisdiction) and more than 150 state trial courts or districts (typically the state courts of general jurisdiction). These courts' decisions may be appealed into five U.S. courts of appeals and 18 state intermediate appellate courts and may be further appealed to nine highest courts.[212]

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[210] *Id.* at 32.

[211] Interview with Tom Crane, Deputy Director, Great Lakes Commission, May 23, 2019.

[212] These counts come from comparing maps of the Great Lakes Basin with state and federal judicial district maps and may be imprecise; the exact number may differ depending on the make-up of courts, the type of claim and other factors. The precise number is not important to illustrate the point that the Commission may sue or be sued in many different courts. Our count is based on the following:

- Indiana: 13 trial courts (each county is a "circuit"); 1 Court of Appeals
- Illinois: 2 trial courts (19th and Cook circuits); 2 Court of Appeals districts (1st and 2nd Appellate Districts)
- Michigan: 57 trial courts (each county is a "circuit"); 1 Court of Appeals
- Minnesota: 1 trial court (6th judicial district); 1 Court of Appeals
- New York: 32 trial court branches (each county is a branch of the single Supreme Court); 2 appellate courts (3rd and 4th Departments of the Appellate Division)
- Ohio: 37 trial courts (each county is court of common pleas, possibly Court of Claims); 5 courts of appeals: (3rd, 6th, 8th, 9th, 11th appellate districts)
- Pennsylvania: 3 trial courts (Crawford, Erie, and Potter counties courts of common pleas); 2 appellate courts (Superior Court, Commonwealth Court)
- Wisconsin: 6 trial courts (1st, 2nd, 3rd, 4th, 8th, 9th judicial districts); 4 Court of Appeals districts (all four Districts of the Court of Appeals)
- Federal: 10 U.S. District Courts (D. Minn., W.D. Wisc., E.D. Wisc., N.D. Ill., N.D. Ind., W.D. Mich., E.D. Mich., N.D. Ohio, W.D. Penn., W.D.N.Y.); 5 Courts of Appeals (2nd, 3rd, 6th, 7th, and 8th Circuits).

CSG inquired into insurance coverage for damages, and defense costs. Commission staff confirmed that the Commission's insurance coverage does not provide for directors and officers/errors and omissions coverage.[213] It is common practice for other interstate commissions, such as the Interstate Commission for Adult Offender Supervision, Interstate Commission for Juveniles, and Military Interstate Children's Compacts, to have such a policy in force.

2. Analysis

Mindful that the Commission has never been sued, CSG identified four issues involving possible risks for litigation and legal liability.

First, the Compact does not address jurisdiction and venue for litigation. Different courts have different procedures and different substantive standards that could be applicable to litigation involving the Compact or Commission. This situation almost guarantees inconsistent application and interpretation of the Compact and treatment of the Commission. Additionally, with the myriad different procedures and substantive standards that might be applicable, the Commission cannot know what law it should apply to any particular action it takes and thus cannot know how to act in a manner that would be affirmed in accordance with the different procedures and substantive standards. The differences in law also matter to persons wanting to contest an action of the Commission because those persons must know what law applies, including justiciability requirements such as standing and ripeness, before deciding whether to contest an action and choosing where to file suit, or choosing to file suit in multiple courts to ensure at least one suit can go forward. Finally, there are similar issues and concerns for claims that might arise before state administrative boards. Most interstate compacts do not expressly mention state regulatory programs and standards applicable to the interstate commission.[214]

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[213] Interview with Tom Crane, Deputy Director, Great Lakes Commission, Sept. 4, 2019.

[214] For an example of states applying conflicting collective bargaining laws to an interstate commission and attempts at administrative and judicial enforcement and restraint in both party states, see Coyle v. Port Auth. Transit Corp., 438 Pa. 99, 263 A.2d 739 (1970).

Second, the Commission and states should have the option to use federal court where issues of interpretation of the Compact or the application of state law may arise. Jurisdiction in federal court for these particular issues is critically important because it can help ensure a more uniform interpretation and application of the Compact based on a fewer number of courts, separation from the states that in CSG's experience are more likely to lean toward applying state law, and the current national body of interstate compact law. The Eleventh Amendment, as interpreted by the Supreme Court, prohibits suit against a state in federal court. For interstate commissions, Eleventh Amendment immunity depends on whether the court believes the Commission is like a state agency and whether the states have expressly or impliedly consented to suit in federal court.[215] One of the most important factors in this consideration is whether the states are liable for satisfying the Commission's debts and financial obligations.[216] If the states are ultimately liable, then the Supreme Court has concluded that an interstate commission is more likely to enjoy Eleventh Amendment immunity. Courts should consider article V.D of the Compact, which prohibits the Commission from pledging the credit of any party state and prohibits the Commission from "incur[ring] obligations prior to the allotment of funds by the party states adequate to meet the same." The U.S. Supreme Court has concluded that similar provisions suggest the states are not ultimately liable and thus an interstate commission does not enjoy the states' Eleventh Amendment immunity.[217] The Commission should consult with legal counsel to determine whether jurisdiction may be proper in federal court.

Third, CSG observes that the Commission is appropriately managing its grant/use application notification and award procedures. Commission staff reported that the Commission has not received any complaints about its procedures.[218] The Commission does not need additional controls or to revise its practices at this time, but should regularly review its procedures and practices.

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[215] *See* BUENGER, ET AL., *supra* note 7, at 182–84.
[216] Hess v. Port Auth. of N.Y. & N.J., 513 U.S. 30, 39 (1994).
[217] *Id*. at 46.
[218] Interview with Tom Crane, Deputy Director, Joe Bertram, Financial Operations Manager, and Laura Kaminski, Grants and Contracts Manager, Great Lakes Commission, Sept. 4, 2019.

Commission staff confirmed that some government funded awards have predetermined criteria and the Commission, through its staff, merely acts in an administrative/fiduciary manner to pass along these funds.[219] The Commission is currently giving notice of the availability of these awards at least thirty days in advance of application deadlines and gives the notice on its website, via a listserv, and through press releases. Commission staff further states that staff does not act outside of its delegated authority and merely provides administrative review and support to a commissioner-appointed task force that oversees and determines award grants affiliated with the Sediment Nutrient Reduction Program and has successfully undergone federal audit with this and other programs. The Commission also conducts review and audits of programs receiving funds through the Commission and provides "close-out" reports that are summarized on the Commission's website and mentioned in annual state invoice letters.[220]

Fourth, a growing trend in agency litigation is challenges based on questions whether a commission has delegated decision-making authority to staff with appropriate constraints on discretion. CSG found instances where the Commission has expressly delegated powers,[221] but raises this as a risk management consideration.

3. Recommendations

28 Congress and the states should amend the Compact to provide several clarifications relating to legal challenges: (1) a clear statement of the Commission and states' sovereign immunity, with applicable waivers for the types of claims that

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[219] *Id.*

[220] *Id.*

[221] Commission records contain instances where the Commission expressly delegated powers to the Board of Directors. *See, e.g.,* Memorandum of Understanding between the Great Lakes Commission and the U.S. Geological Survey, § VI.C (Sept. 29, 2017) (on file with Great Lakes Comm'n) (stating "The GLC's efforts undertaken pursuant to this MOU shall be established through consultation with the GLC Board of Directors . . . ."); Memorandum of Understanding Between the Great Lakes Commission and the Council of Great Lakes Governors on Behalf of the Great Lakes - St. Lawrence River Water Resources Regional Body and the Great Lakes-St. Lawrence River Basin Water Resources Council, § VI (2010) (on file with Great Lakes Comm'n) (stating, " the CLCG, on behalf of the Regional Body and Compact Council, shall work with the executive committee of the GLC to ensure adequate funding . . . .").

might arise with Compact business that may directly affect persons and entities, including but not limited to tort claims, public contracting, enforcement of transparency laws, worker compensation, procurement, and employee protection and other employment claims; (2) justiciability requirements such as standing and ripeness; and (3) jurisdiction and venue in federal or federal and state court, preferably in one judicial district or one state court and one federal court. Many compacts specify jurisdiction and venue where the interstate commission has its primary administrative office. These clarifications require an amendment to the Compact because a supplementary agreement pursuant to article VI.H cannot bind state and federal courts to statements of sovereign immunity, justiciability requirements, and jurisdiction and venue.

29 The Commission should review the duties that it has affirmatively, or by silence, delegated to staff to determine whether the Commission has granted appropriate authority and constraints on discretion for staff decision-making. The Commission should record such delegations in one place, such as the Guide to Operations and Procedures, the bylaws, or through rulemaking.

30 The Commission should conduct a thorough risk-management review for the Commission and staff, undertake appropriate remedial measures, and ensure appropriate insurance coverage. Appropriate insurance coverage may include insurance secured by grantees that extends benefits to the Commission. The Commission should also include a section in its Guide to Operations and Procedures on reporting and tendering claims to insurance carriers.

31 The Commission should continue to review, on a regular basis, its policies, practices, and requirements for grant award and use application criteria to ensure they are narrowly tailored and that the Commission applies them consistently and uniformly with appropriate transparency requirements. Because the criteria and transparency requirements would have an external effect on persons and entities applying for grant funding, the Commission should use its rulemaking authority in article IV.K of the Compact to adopt procedure, transparency and grant award and use application criteria as necessary.

G. Building the Commission's Legal Capacity

1. Recommendation for Legal Counsel

CSG heard from Commission staff that the lack of legal counsel may have affected the Commission's ability to participate or have meaningful input into development of regional policy, new law, and binding and non-binding agreements.[222] In addition to this staff concern, CSG recommends the Commission hire an in-house general counsel to assist the Commission and its staff with strategic planning, human resources, rulemaking, reviewing and drafting contracts, reviewing and drafting memoranda of understanding with partners, developing and ensuring compliance with administrative procedure and transparency requirements, tracking state and federal legislation,[223] working with states to develop supplementary agreements pursuant to article VI.H. of the Compact, and advising the Commission on applicable statutory and regulatory interpretation principles prior to the Commission interpreting its authorities, including policies, practices, and bylaws. CSG recommends an in-house general counsel, as compared to outside counsel, is a better model for the Commission for several reasons.

The general counsel must have intimate knowledge of the inner workings of the Commission and staff. Having a dedicated full-time presence allows the general counsel to have direct and indirect access to conduct strategic reconnaissance to anticipate demands and potential legal issues in advance rather than waiting for staff to determine when to contact outside counsel after a legal issue arises.

The general counsel must build rapport with commissioners and staff so that they are comfortable approaching counsel with questions and problems. That rapport comes from familiarity.

Advising the Commission requires a knowledge of a unique set of law, which outside counsel would need to become familiar with and maintain competency. The Commission's general counsel will

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[222] Interview with Tom Crane, Deputy Director, Great Lakes Commission, May 23, 2019.

[223] Commission staff reported that they track federal laws that benefit the regions affected by the Compact and state legislation that would directly affect the work of the Compact, not necessarily potentially conflicting legislation. Interview with Tom Crane, Deputy Director, Great Lakes Commission, Sept. 4, 2019.

need to be adept with federal and the party states' administrative procedure and transparency laws, federal and state public contracting, interstate compact law, government law, international relations, constitutional law, and law governing the substantive policy areas of Commission actions and recommendations. That level of competence will require continual monitoring of pending and recent legislative, administrative, and judicial developments, and careful study of how long-standing law and recent and pending developments affect the Great Lakes Basin, the Compact, the Commission and the party states and provinces.

The general counsel will need to monitor dynamics within the Great Lakes Basin and communicate with relevant parties as necessary. Specifically, the general counsel would serve as the principal point of contact between the states' attorneys general, other state and provincial agencies' counsels, and the Commission and staff.

The general counsel must educate the Commission and staff and ensure that they are equipped with the necessary information and legal supports that they are likely to need to handle their daily work and long-term actions and policy recommendations. Similarly, the general counsel should assist the Commission and staff in educating the myriad cooperating governments, tribes, observers, nongovernmental organizations, academic institutes, citizens, and businesses. Such education can help to develop public support by building a foundation of aware citizens. The general counsel can help translate the technically complex legal basis that is at the heart of the law of the Great Lakes Basin and Commission's actions into language that the Commission's many constituencies can understand and relate to matters that count in their complementary and parallel work and their quality of life.

Some compact agencies use one state's Attorney General for legal services. One issue that arises with this model is that an interstate commission must often take positions that may cause a legal conflict, such as when an interstate commission must assert that state law does not apply to the interstate commission or when an interstate commission seeks advice contrary to a state agency client of the Attorney General. Another issue that arises is that one state's Attorney General is most familiar with that state's own law

and may unconsciously favor that law in giving advice to the interstate commission.

2. Recommendation for a Legal Library

The Commission maintains a library in its office that contains many records of the Commission and its work over the years. One of the most valuable legal resources in the library is the Commission's collection of its meeting minutes. The Commission should enhance its existing library to include complete records of the Compact and Commission's history[224]; legal authorities and their legislative histories; Commission policies and rules, including past policies and rules; and records of the states' implementation of the Compact. The library should be indexed and electronically searchable as much as possible for staff and researchers to easily locate and use the records. As mentioned above, early records of The Council of State Governments relating to negotiation of the Compact and the states' adoption were destroyed in a flood. The Commission should consider engaging a professional historian to assist with searching for records[225] and creating this library. A beginning list of records for the Legal Library is:

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[224] For example, CSG heard from Commission staff that stakeholders have questioned why the Commission works in Québec, but not in Vermont. The legislative history that was available to CSG did not address this question.

[225] Early Commission records might be found in:

- Archived media;
- Papers of governors, premiers, legislators, state attorneys general; and state agencies from the 1954-56 era;
- Papers of compact negotiators, early commission staff and members that may be available in university libraries and historical societies or with family members (for example, a quick internet search revealed the papers of Lawrence Yetka, a Minnesota commissioner in 1959 and 1960, are stored at the Minnesota Historical Society, and the papers of George M. Leader, a Pennsylvania commissioner in 1956 to 1958, are stored with the Pennsylvania Historical and Museum Commission);
- Records of other organizations, including the International Joint Commission and Great Lakes Fishery Commission, and papers of early staff and members of those commissions;
- Papers from Presidents Eisenhower, Kennedy, and Johnson (covering 1954 through consent in 1968);
- Papers from U.S. representatives and senators from 1954 to 1968 from Great Lakes states and members of congressional committees that held the consent hearings

- Great Lakes Basin Compact;
- Negotiation history of the Compact;
- Copies and legislative history of Congress's consent statutes and hearings;
- Copies and legislative histories of other federal laws that mention or affect the Compact and Commission;
- Legislative history of each state's enactment and any subsequent amendments, recodifications, hearings, etc.;
- Copies of and legislative histories of state legislation implementing or affecting the Compact or Commission;
- Copies and regulatory histories of state rulemaking actions implementing or affecting the Compact or Commission;
- MOUs with other significant contracts implementing the Compact;
- State considerations of Commission studies and recommendations;
- Media about the Compact and Commission, including historical newspaper articles; and
- Scholarly and professional articles about the Compact and Commission, including law review, government, science, and environmental policy journals.

The Commission's historical meeting minutes are contained in bound books. The Commission should scan these historical meeting minutes into searchable electronic form. Professional scanning companies can do so without damaging the books and bindings.

VI. Implementing the Recommendations in this Legal Assessment

This Legal Assessment makes recommendations for (1) the Commission's internal practices and procedures, (2) supplementary agreements between the states and provinces pursuant to article VI.H of the Compact, (3) state and provincial actions and (4) amendments to the Compact or other congressional involvement.

This section discusses general considerations for implementing these recommendations. This section does not discuss specific intra-state legislative or administrative processes that the states and provinces may need to use to implement the recommendations or legal and political evaluation about the implications of the recommended outcomes.

Internal Practices and Procedures (Recommendations 1, 3, 4, 5, 6, 7, 8, 9, 11, 12, 14, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31)

Most of the recommendations in this Legal Assessment suggest changes to Commission policies and practices; specific topics for the Commission to consult with legal counsel; hiring a legal counsel and human resources professional; and rulemaking. These are recommendations that the staff and Commission can do on its own, but may need to consult with the states, provinces, and U.S. federal government about the scope and implications of the Commission's implementation of the recommendations. The Commission has four principal tools for implementing recommendations for internal practices and policies:

1. One-time actions, such as consulting with legal counsel or review of Commission records for a specific purpose, such as reviewing the Commission's express and implied delegations of authority, may be accomplished without any revision to any authorities.

2. Changes to Commission and staff practices should be adopted into the Commission's Guide to Operations and Procedures. The Commission adopted the Guide in 2017 and can amend it as necessary. Article III.5 of the bylaws addresses current Commission procedure for adopting Commission policies.

3. Changes or clarifications relating to provisions in the existing bylaws should be adopted into the bylaws. Article VIII of the bylaws specifies that the bylaws may be amended by a majority vote of the Commission at any time at a regular meeting of the Commission.

4. The Commission also has authority for rulemaking to guide the conduct of its business in article IV.K of the Compact. CSG recommends the Commission use rulemaking when the Commission's business could have an external effect. For example, adopting transparency standards affects who may attend Commission meet-

ings and what Commission records are available for public inspection. Before engaging in rulemaking, the Commission must consider what standards it will use for rulemaking, such as designating federal or one state's laws and requirements (which would need some adjustment to apply to an interstate commission) or developing its own standards. CSG or the Commission's legal counsel can assist the Commission in this task.

Supplementary Agreements (Recommendations 1, 10, 13, 16, 21, 24)

Several recommendations suggest that the Commission can assist the states and provinces to develop supplementary agreements to make clarifications and fill gaps in the Compact or other authorities as authorized in article VI.H of the Compact. Article VI.H expressly authorizes the Commission to "Consider and recommend amendments or agreements supplementary to this compact to the party states or any of them, and assist in the formulation and drafting or such amendments or supplementary agreements." Just as any administrative agency must interpret and determine how to apply an organic statute, the Commission has implicit authority to clarify and fill gaps in the Compact and related authorities related to the implementation of the Compact. Using supplementary agreements to clarify and fill gaps in the Compact is not an amendment to the Compact and does not require Congress's consent unless the agreement is not permitted by the terms of the Compact.

The Compact does not say how the states and provinces must adopt a supplementary agreement. The states and provinces may adopt them in any manner that would make them effective, such as by legislative action, intergovernmental or interlocal agreement between governors or agencies, or memoranda of understanding.

State and Provincial Actions (Recommendations 1, 2, 4, 7, 8, 10, 13, 16, 17, 18, 19, 24, 28)

Some of the recommendations suggest the party states and provinces take specific actions, such as communicating with each other and with the Commission, reviewing state and province statutes, regulations, and practices, and cooperating with the Commission to create supplementary agreements and amendments to the Compact.

CSG does not recommend whether the legislative or executive branch should act on the recommendations. The states and provinces can make this decision on their own. Many of the recommendations will likely involve both branches of government; for example, review of legislation may be done by executive officials for legislative action.

CSG does not make recommendations to the judiciaries. The recommendations in this Legal Assessment for clarifications and filling gaps in authorities involve legislating rules for the judiciaries to use, educating state officials (which could include the judiciary), and suggestions for arguing legal questions in judicial matters. This Legal Assessment does not make direct recommendations to the judiciaries for how to decide questions of law.

Formal consultation with tribes and First Nations may require the Commission to seek guidance from state and province officials, which may have established protocols for such consultation or ongoing dialogue that Commission consultation must not disrupt.

Amendments to the Compact or Other Congressional Action (Recommendations 10, 17, 18, 24, 28)

This Legal Assessment makes five recommendations for amendments to the Compact. These recommendations involve subjects that the current Compact does not permit or that the states cannot make effective through a supplementary agreement, such as specifying court jurisdiction, venue, and the Commission's immunities. CSG does not intend that the states must make all of the recommended amendments at once. The states can amend the Compact with one or more amendments at any time.

Amending the Compact is a time-consuming and complex political undertaking because it must involve eight state legislatures enacting the same amendment text, communication with provinces, and seeking Congress's consent. CSG has assisted states and other compact promoters in drafting and shepherding amendments through the states' legislative processes. A good summary of CSG's proven approach to enacting new and revised compacts is contained in the book, THE EVOLVING LAW AND USE OF INTERSTATE COMPACTS.[226]

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[226] BUENGER, ET AL., *supra* note 7, at 225–32.