

December 28, 2018

Comments and Responses
Great Lakes-St. Lawrence River Water Resources Regional Body
Great Lakes-St. Lawrence River Water Resources Compact
December 6, 2018 Rules and Guidance Documents

I. Introduction

The Great Lakes-St. Lawrence River Water Resources Regional Body (Regional Body) and the Great Lakes-St. Lawrence River Basin Water Resources Council (Council) held a public comment period from September 10 to October 10, 2018 on Compact Council’s proposal to adopt Rules of Practice and Procedure and to amend its Interim Guidance; and, the Regional Body’s proposal to amend its Interim Procedures guidance. In addition, the Council and Regional Body under the Great Lakes-St. Lawrence River Basin Water Resources Compact (Compact) and the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement (Agreement), respectively, jointly proposed to amend their Sequence of Events guidance. The Rules and Guidances are described below (referenced collectively as the Updated Procedures Documents).

1. ***Great Lakes-St. Lawrence River Basin Water Resources Compact Rules of Practice and Procedures.*** This document, adopted by Council as a regulation, describes the process for any administrative hearing conducted by the Council pursuant to Section 7.3.1 of the Great Lakes-St. Lawrence River Basin Water Resources Compact, how modifications may be made to Council decisions, and the process to be used for Council rule making.
2. ***Great Lakes—St. Lawrence River Basin Water Resources Council Guidance.*** This guidance document mirrors the Regional Body Procedures through Parts I and II with respect to review of a diversion subject to the Great Lakes-St. Lawrence River Basin Water Resources Compact, and also includes certain provisions applicable only to the Council. This Guidance replaced and superseded the Interim Guidance adopted on June 10, 2010.
3. ***Great Lakes—St. Lawrence River Water Resources Regional Body Procedures.*** This guidance document contains the procedures that the Regional Body will follow during the review of a diversion subject to the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement through the issuance of its Declaration of Finding. This document mirrors the Compact Guidance for Parts I and II. This Guidance replaced and superseded the Interim Procedures adopted on June 10, 2010.
4. ***Sequence of Events for Consideration of Proposals for Exceptions to the Prohibition on Diversions that are Subject to Regional Review.*** This guidance document, adopted by

both Council and the Regional Body, outlines the steps for review and decision-making for a Diversion Proposal.

The Regional Body and Council received ~2517 written comments (email/mailed postcards, letters, written comments at hearing) from individuals and groups. Additionally, comments were received at a public hearing on October 3, 2018 in Indianapolis, Indiana. Eight individuals provided oral testimony at the public hearing. Comments received are grouped and summarized under topic headings. Responses are provided to the summarized comments.

II. Comments that will be addressed in Phase II of the Regional Body and Council's Procedures Update Workplan

The Regional Body and the Council have stated that there will be a Phase II of procedures updates initiated in 2019. The focus will be on issues that were raised during the public comment period on the current Updated Procedures Documents but were outside the scope of the Regional Body and Council's current workplan.

The following comments will be addressed during Phase II of procedures updates that will be initiated in 2019.

1. Summary of Comments

Comments were made that the Regional Body and Council should develop procedures for determining what is a "regionally significant" and/or "precedent setting" withdrawal.

Response

Section 200.5 of both the Regional Body Procedures and the Council Guidance has been reserved for future guidance regarding procedures for requesting Regional Review of regionally significant or potentially precedent setting Proposals. *See Compact §4.5.1.f.* The Regional Body and Council will address this issue in Phase II of their efforts to update its procedures.

2. Summary of Comments

Comments were made that the Council should develop procedures for monitoring and enforcing compliance with Council decisions made on Proposals that come before the Council for decision.

Response

The Great Lakes-St. Lawrence River Basin Water Resources Compact includes authorities for the Council to enforce its decisions. In Phase II of its efforts to update its proceedings, the Council will consider adopting procedures to better clarify how it may monitor and enforce its decisions.

3. *Summary of Comments*

Comments were made that the Council Guidance should be adopted as binding rules rather than guidance. Concerns were also raised that “[t]he Council’s more ad hoc decision-making is likely to be subject to a less deferential standard of judicial review since courts are less likely to afford the Council the deference that is typically shown to administrative agencies under the Administrative Procedures Act.” However, comments were also made that what was incorporated into the Rules of Practice and Procedure should remain as Guidance.

Response

To maintain maximum flexibility to adjust the application process to the project at issue, the Council has concluded that it is more appropriate for the Council Guidance to remain guidance at this time. The Council intends to follow the Guidance to the extent possible, as appropriate. The Council expects to engage in further discussions with tribes, advisory committee members and stakeholders regarding the suitability of using rules or guidance during Phase II of its efforts to update its procedures. However, the Council concluded that there is an advantage in adopting clear rules providing greater certainty regarding the process governing appeals, modifications of decisions and rulemaking than can be provided by guidance.

III. Perceived Weakening of Documents by not mandating that certain information be included in an Application

4. *Summary of Comments*

Comments were made expressing concern that changing the word “shall” to should in the Guidance documents weakened the Guidance documents to be adopted by the Council and Regional Body. Along those lines, comments were made expressing concern that the Regional Body Procedures and the Council Guidance no longer require that Cumulative Impact statements and information on environmentally sound and economically feasible water conservation measures “shall” be included in an Application, but rather “should” be included.

Response

Because the Guidance documents adopted by the Council and the Regional Body *are* guidance and do not establish legally binding obligations or rights, it is more legally appropriate that the word “should” is used instead of “shall” in most instances. (Exceptions arise, for example, when the Guidance recites mandatory statutory language). Regardless, it remains the intention of the Council and Regional Body to follow the Guidance to the extent possible, as appropriate. Accordingly, future Applicants will be serving their own best interests by including in their applications information such as cumulative impact assessments that have been developed, as well as information on environmentally sound and economically feasible water conservation measures. Because these criteria must be satisfied to meet the Exception Standard, see Agreement Article 201 Paragraphs 4d and e; Compact §§ 4.9.4.d and e, failure to provide information that should be included pursuant to the Regional Body Procedures and Council Guidance may make it difficult or impossible for the Regional Body and Council to reach a determination that a Proposal meets the relevant standards of the Agreement and Compact, respectively.

IV. Issues specific to U.S. Tribes, Canadian First Nations and provincially recognized Métis communities in Canada.

5. *Summary of Comments*

Comment were made that it should be recognized in the Updated Procedures Documents that water is sacred to many U.S. Tribes, Canadian First Nations and provincially recognized Métis communities in Canada.

Response

The importance of water to many U.S. Tribes, Canadian First Nations and provincially recognized Métis communities in Canada has long been recognized, and special recognition has been given in the Guidance documents to the role of U.S. Tribes, Canadian First Nations and provincially recognized Métis communities in Canada. *See e.g.*, the opening, Steps 7, 8, 10a., 13a., and 15e of the Sequence of Events; Sections 200.8 and 201.1.3 of the Regional Body Procedures; Sections 200.8, 201.1.3, 201.2.4.f, and 201.2.6 of the Council Guidance; and, Section 307.1 of the Council Rules of Practice and Procedures which are based on the special and unique role of U.S. Tribes, Canadian First Nations and provincially recognized Métis communities in Canada. Other references to U.S. Tribes, Canadian First Nations and provincially recognized Métis communities in Canada likewise acknowledge that such organizations possess a status different than the public at large.

6. *Summary of Comments*

Comments were made that the draft guidance documents and rules contravened the United Nation's Declaration on the Rights of Indigenous Peoples in Article 25, as well as Canadian Constitutional Treaty rights. Specifically, comments were made that First Nations "...have the constitutionally protected right to the decision making about new, renewed or continued water and land uses which potentially impact our Aboriginal or Treaty rights."

Response

Section 8.2 of the Compact states in part that:

1. Nothing in this Compact is intended to provide nor shall be construed to provide, directly or indirectly, to any Person any right, claim or remedy under any treaty or international agreement nor is it intended to derogate any right, claim, or remedy that already exists under any treaty or international agreement.
2. Nothing in this Compact is intended to infringe nor shall be construed to infringe upon the treaty power of the United States of America, nor shall any term hereof be construed to alter or amend any treaty or term thereof that has been or may hereafter be executed by the United States of America.

Similarly, Article 701 Paragraph 1 of the Agreement states that:

Nothing in this Agreement is intended to provide nor shall be construed to provide, directly or indirectly, to any Person any right, claim or remedy under any treaty or international agreement nor is it intended to derogate any right, claim, or remedy that already exists under any treaty or international agreement.

Neither the Compact nor the Agreement have been amended, and both of these provisions remain in force. The Regional Body and Council are unaware of any provisions of the Guidance documents or Council Rules that contravene these provisions.

7. *Summary of Comments*

Comments were made that there is a duty of consultation in Canada with First Nations and provincially recognized Métis communities in Canada prior to a Province forwarding an application to the Regional Body. Further consultation should be conducted in a manner consistent with consultation protocols and appropriate to laws and policies of Ontario and Canada. In addition, comments were made that the Communications Protocols previously adopted by the Regional Body and Council did not meet Ontario and Canada's constitutional requirements for consultation and should be changed. Finally, the result of such consultations should be part of the record forwarded to the Regional Body to incorporate into its Administrative Record.

Response

Section 8.1.3 of the 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 the federal government of the United States.”

Similarly, Article 702 of the Agreement states:

- “1. Nothing in this Agreement 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 the federal government of the United States.
2. Nothing in this Agreement is intended to abrogate or derogate from the protection provided for the existing aboriginal or treaty rights of aboriginal peoples in Ontario and Québec as recognized and affirmed by section 35 of the Constitution Act, 1982.”

Neither the Compact nor the Agreement have been amended, and both of these provisions remain in force. Accordingly, any duty to consult that may exist with regard to First Nations and provincially recognized Métis communities in Canada has not been changed by either the Compact or Agreement nor by the Guidance documents or rules that have been adopted by the Council and Regional Body.

In addition, Sections 200.6.1.8, 200.6.2.9, 200.6.3.8 of the Council Guidance and Regional Body Procedures require “any transcript or summary of any consultation that has occurred with federally recognized Tribes as well as First Nations and provincially recognized Métis communities in Canada”¹ be included in an Application forwarded to the Regional Body or Council for their review.

Further, the opening of the Sequence of Events now includes the following:

The Originating Party, within their jurisdiction...undertakes consultations with representatives of federally recognized Tribes in the U.S. as well as First Nations and provincially recognized Métis communities in Canada in the manner suitable to the individual Proposal and the laws and policies of the Originating Party, and includes any transcripts or meeting summaries of such meetings in any Application forwarded to the Regional Body and/or Council.

¹ The Council Guidance only requires transcripts of meetings from Federally recognized U.S. Tribes, as the Council is a U.S. only organization.

Finally, comments on the Tribes/First Nations Communications Protocols are outside the scope of these Procedures Updates Documents. However, the Regional Body and Compact Council will consider updating the Communications Protocols at a future date.

8. *Summary of Comments*

Comments were made that First Nations should have the right to participate in hearings and meetings by their preferred methods rather than just through the processes described in the Updated Procedures Documents.

Response

The Guidance documents provide opportunities for First Nations to submit written and oral comments on a Proposal. Both the Council and the Regional Body as well as the relevant Provinces will continue to work with First Nations to ensure their voices are heard while continuing to fulfill the terms of the Compact and Agreement, as well as consider the Regional Body and Council's guidance. The processes included in the Procedures Update Documents recognize that First Nations are not considered to be stakeholders, and special opportunities for providing input on Proposals that are subject to Regional Review are provided and expanded in the Updated Procedures Documents. In addition, nothing in the Updated Procedures Documents is intended to supersede or otherwise replace any engagement processes that may exist in the Canadian Provinces.

In addition, First Nations are provided notice of an Application (Sequence Step 10), a briefing on the Application (Sequence Step 13), an information meeting (Sequence Step 15(a)), a hearing (Sequence Step 15(f)), and notice of the Regional Body Declaration of Finding (Sequence Step 22) and Council Decision (Sequence Step 26). *See also*, Response 5 above.

9. *Summary of Comments*

Comments were made to add Tribes and First Nations to Step 15 of the Sequence of Events.

Response

Step 15(e) entitled "Meeting federally recognized Tribes as well as First Nations and provincially recognized Métis communities in Canada" has been added to the Sequence of Events.

10. *Summary of Comments*

Comments were made that the involvement of Tribal, First Nation, and Métis with regards to rulemaking procedures within the draft Rules of Practice and Procedure should

mirror their involvement with regards to the review of Applications in the Guidance. Involvement of Tribes, First Nations and Métis should be consistent throughout.

Response

First Nations and Métis are not referenced in the Council Guidance. They are, however referenced in both the Regional Body Procedures and the Sequence of Events.

Because the Compact is U.S. Federal and State law and does not include the Provinces as parties, the Compact generally only recognizes and references U.S. federally recognized Tribes. First Nations are referenced in the Compact only with respect to Regional Review (Section 4.5 of the Compact). Regional Review is managed by the Regional Body—the entity that includes the Provinces of Ontario and Québec.

Accordingly, in general only Tribes are referenced in the Council Guidance and the Rules of Practice and Procedure, as these are adopted under the authority of the Compact.

V. Management of the Public Comment Period, including Hearings on Diversion Proposals and Comments Received

11. *Summary of Comments*

Comments were made that a hearing (or public meeting) should be held in each jurisdiction. As part of those comments, it was emphasized that hearings (or public meetings) should be held in the jurisdiction where return flow will take place and where other municipalities will be substantively involved.

Response

Section 200.9.3 of the Council Guidance now states that:

Each Party will also take actions to ensure that the public within their jurisdiction has an opportunity to comment during the public comment period. Such actions may include providing direction to the members of that jurisdiction’s public on how to submit comments to the Council, or hosting a public meeting or public hearing pursuant to this Guidance. Therefore, each member of the Council may determine if there is sufficient public interest to hold an additional public meeting or public hearing within its jurisdiction. Based on such determination, at the request of a member the Council may also hold either a public meeting or public hearing (the format of which will be at the host jurisdiction’s discretion) within the jurisdiction. If such a meeting or hearing is organized, only a representative of the host jurisdiction will be required to participate in such event. A transcript

or summary of oral comments received should be created by the host jurisdiction. Any transcript created or, in the absence of a transcript, a written summary of comments received from the public, including oral comments or summaries drafted by Members of the Council, will be forwarded by the Secretariat to the Members of the Council and will be incorporated into the administrative record.

Similar language is included in Section 200.9.3 of the Regional Body Procedures and Step 16 of the Sequence of Events. A hearing or public meeting will be held in at least the host jurisdiction. Efforts will be made to allow for remote participation in Council information meetings via webinar or other means in addition to attendance in person, *see* Council Guidance § 201.2.g, and in public hearings. *See* Council Guidance § 201.2.4.6. If members of the public are interested in attending a hearing within any other jurisdiction other than the Originating Party's jurisdiction, they are encouraged to reach out to the Regional Body or Council member from that jurisdiction to request an additional hearing be held so that such member can make the determination that there is "sufficient public interest." The Regional Body and Council concluded that the existing provision provides a proper balance between offering opportunity for participation and mandating hearings when a Proposal generates little public interest.

12. *Summary of Comments*

Comments were made stating that the Regional Body should hold at least one hearing in Ontario.

Response

When Ontario is the Originating Party, a public meeting will be held in Ontario. *See* Article 503 paragraph 3 of the Agreement and Section 200.9.3 of the Regional Body Guidance. With respect to Proposals by other parties, the Regional Body and the Council have shared this comment with representatives from Ontario. Regardless of whether Ontario elects to hold a public meeting on all Applications involving Diversions throughout the Basin, Section 200.9.3 of the Regional Body Procedures and Council Guidance, as well as Step 16 of the Sequence of Events now states:

[E]ach member of the Regional Body [and Compact Council] may determine if there is sufficient public interest to hold an additional public meeting or public hearing within its jurisdiction. Based on such determination, at the request of a member the Regional Body and Compact Council may also hold either a public meeting or public hearing (the format of which will be at the host jurisdiction's discretion) within the jurisdiction. If such a meeting is organized, only a representative of the host jurisdiction will be required to participate in such event. A transcript or summary of oral comments received should be created by the host

jurisdiction. Any transcript created or, in the absence of a transcript, a written summary of comments received from the public, including oral comments or summaries drafted by Members of the Regional Body and Council, will be forwarded by the Secretariat to the Members of the Regional Body and Council and will be incorporated into the administrative record.

Accordingly, when a Proposal is before the Regional Body and subject to Regional Review, the public is encouraged to inform representatives from Ontario of an interest in holding a public meeting or hearing so that the Provincial government is able to properly gauge whether there is “sufficient public interest.”

All persons across the Great Lakes-St. Lawrence River Basin are encouraged to participate in the general public comment period by submitting written comments or participating remotely in other public hearing(s) or meeting(s) that will be organized in the Basin.

13. *Summary of Comments*

Comments were made that the minutes of all public meetings or public hearings should be provided, and that all comments that are made throughout the review period should be incorporated into the Administrative Record. Additional comments were made that all meetings should be recorded.

Response

In accordance with Section 201.2.5 of the Council Guidance, transcripts of all Public Hearings held by the Council will be created, and will continue to be incorporated into the Administrative Record. While a recording may be made and made available, the Regional Body and Council believe that a transcript is generally of more practical value to an individual reviewing the Administrative Record. With respect to public meetings, the Regional Body and Council concluded that flexibility in how the comments at the meetings are documented would be advantageous.

Further, Section 200.9.3 of the Regional Body Procedures and Council Guidance as well as Step 16 of the Sequence of Events now states that:

[E]ach member of the Regional Body [and Compact Council] may determine if there is sufficient public interest to hold an additional public meeting or public hearing within its jurisdiction. Based on such determination, at the request of a member the Regional Body and Compact Council may also hold either a public meeting or public hearing (the format of which will be at the host jurisdiction’s discretion) within the jurisdiction. If such a meeting is organized, only a

representative of the host jurisdiction will be required to participate in such event. A transcript or summary of oral comments received should be created by the host jurisdiction. **Any transcript created or, in the absence of a transcript, a written summary of comments received from the public, including oral comments or summaries drafted by Members of the Regional Body and Council, will be forwarded by the Secretariat to the Members of the Regional Body and Council and will be incorporated into the administrative record.** [Emphasis added].

All comments submitted during the public comment period will be considered by the Regional Body pursuant to Section 200.9.6 of the Regional Body Procedures and/or by the Council pursuant to Section 200.9.5 of the Council Guidance. These comments are incorporated into the administrative record. *See* Section 308.1 of the Council Rules of Practice and Procedure. To ensure that a public comment is made part of the administrative record, it should be submitted during the public comment period. Those received outside of the public comment period may be addressed but will not be part of the official record.

14. *Summary of Comments*

Comments were made that participation in public hearings should be made available either through phone or internet.

Response

Step 15 of the Sequence of Events states that “Efforts should be made to allow federally recognized Tribes as well as First Nations and provincially recognized Métis communities in Canada as well as the public to remotely listen.” Further, Section 201.2.4.b of the Council Guidance states that “The Secretariat will endeavor to broadcast via webinar or other means any such hearing and post an electronic link to the Council’s website prior to the hearing.” Accordingly, reasonable efforts will be made to allow remote participation in any such public hearing.

15. *Summary of Comments*

Comments were made that there should be at least a 60-day public comment period on all Applications. In addition, comments were made that there should be a more robust pre-application period before the Originating Party forwards the Application to the Regional Body and Council for review and approval.

Response

Section 4.5.1.b of the Compact and Article 500 Paragraph 3 of the Agreement both state that it is the goal of the Regional Body to complete its review within 90 days after notice is given that a Proposal has been received. Extending the public comment period would conflict with that goal. Because extensive proceedings ordinarily occur in the Originating Party's jurisdiction before an Application is submitted for Regional Review, the public, the Regional Body and the Council will likely have notice of the Proposal well before an Application is submitted to the Regional Body and Council. Because the Updated Procedures Documents do not prevent any pre-application discussions from taking place before an Application is submitted for Regional Review, the Regional Body and Council may engage with the Originating Party during its review period to plan for Regional Review, including what are the likely issues to be focused on during the Regional Review process.

In addition, Section 200.7.4 of the Council Guidance and Section 200.7.4 of the Regional Body Procedures state that, "the period for technical review, as well as any corresponding public comment period, may be extended at the discretion of the [Council/Regional Body] upon request of the Applicant or the Originating Party."

VI. Comments related to the Declaration of Finding and Final Decision

16. Summary of Comments

Comments were made that noted that the Originating Party submits a draft proposed Declaration of Finding as part of its submission of an Application package to the Regional Body and the Compact Council. Several comments requested that if the Regional Body modifies the Originating Party's proposed Declaration of Finding, there should be a 45-day opportunity to provide comments on the changes that were made to the Declaration of Finding before the final Declaration of Finding is adopted.

In addition, comments were made that there should be an additional opportunity for public comment on a Proposal if the Council modifies the Proposal and that such modification is a "substantial change" to the Proposal.

Finally, comments were made that a response to comments should be prepared following each opportunity to comment throughout the Regional Review process and the Council deliberations.

Response

The Regional Body Procedures and Compact Guidance allow for public comment if material provisions are added to the Chair's draft Council Final Decision that were not previously noticed for public comment. Specifically, Section 201.4.4 of the Council Guidance states that if "the Chair's draft contains provisions or conditions not previously published for public comment and that are not a logical outgrowth of the subjects previously published for public comment, then the Council will hold at least a 30-day public comment period on such provisions or conditions included in the Chair's draft." Accordingly, any legally binding decision on a Proposal is made only after the public has been afforded notice and an opportunity to comment.

See also, step 23 of the Sequence of Events. The "logical outgrowth" doctrine is grounded in existing case law, allowing for a more predictable test as to whether an additional public comment period is necessary. *See, e.g., NE Md. Waste Disposal Auth. v. EPA*, 358 F. 3d 936, 951-52 (D.C. Cir. 2004); *NRDC v. EPA*, 279 F. 3d 1180 (9th Cir. 2002); *Am. Med. Ass'n v. United States*, 887 F. 2d 760 (7th Cir. 1987); *In re Town of Concord*, NPDES Appeal No. 13-08 (EAB Aug. 28, 2014); *In re District of Columbia Water and Sewer Authority*, 13 E.A.D. (EAB 2018). If additional or modified conditions or other changes to the Council Final Decision were a logical outgrowth of the subject matters available for public comment during the regular public comment period, it would be unnecessary to engage in a second public comment period. Council concluded that substituting a "substantial change" standard would make the standard less clear and potentially delay the process unnecessarily and therefore was not warranted.

In addition, it should be noted that neither the Regional Body nor the Council modify Proposals. Rather, the Regional Body issues a Declaration of Finding that may, among other things, find the Proposal would be consistent with the relevant standards of the Agreement if certain conditions were met, and the Council may find a Proposal consistent with the relevant standards of the Compact if certain conditions are incorporated into any permits or other approvals issued by the Originating Party.

Finally, the Council will include in its Final Decision a response to all comments when a final decision is made and becomes part of the Administrative Record. Responding to comments before the Final Decision is issued would be unnecessary, intrude on the Council's deliberative process, and necessarily be only preliminary until a Final Decision is issued.

17. Summary of Comments

Comments were made that the Guidance states at section 201.4.5 that "where appropriate, the Council Final Decision will include findings of fact, conclusions of law

and a “comment and response” section that provides a summary of comments received from federally recognized Tribes and the public, as well as any response to such comments.” This use of “where appropriate” is inconsistent with the rest of the guidance and it is incumbent on behalf of the Compact Council and Regional Body to document, in writing, their decision-making.

Response

Because the Guidance documents adopted by the Council and the Regional Body *are* guidance and do not establish legally binding obligations or rights, it is more legally appropriate to contain phrases such as this. (Exceptions arise, for example, when the Guidance recites mandatory statutory language). Regardless, it remains the intention of the Council and Regional Body to follow the Guidance to the extent possible, as appropriate.

VII. Comments on the Rules of Practice and Procedure

18. *Summary of Comments*

Comments were made that the cost of an Administrative Hearing should be paid by a fund established by the Council, or be paid by the Applicant rather than the Petitioner. The concern was raised that even though the draft Rules provided a process for the Petitioner to request a waiver of costs due to its inability to pay, the possibility of an assessment of substantial administrative appeal costs would deter or prevent primarily vulnerable communities from commencing an administrative appeal. The concern was also raised that placing such a large financial burden on potential petitioners could thwart environmental justice goals.

Response

Section 323 of the Rules has been modified to remove the requirement that Petitioner pay an equitable share of hearing costs. Instead, Petitioner will be required to pay only a filing fee of \$500. This filing fee may still be waived based on the Petitioner’s inability to pay. The Council believes that this is a reasonable fee.

19. *Summary of Comments*

Comments were made that there is an assumption that the Council will exhibit flexibility and efficiency through the minor modification process to address technical or engineering clarifications or corrections. Comments were also made that there should be no changes made to the Proposal or to the Final Decision after it has been issued.

Response

Section 401.2 has been modified so that it now states in part:

“Examples [of Minor Modifications] include technical implementation issues, typographical errors or changes to background information contained in the Council Decision that Council did not consider important when making its decision.”

The Council also believes as a practical matter that there must be a process to make minor or immaterial modifications (as defined in Section 401) to Final Decisions in a relatively expedited manner. This is consistent with the practice of most governmental agencies (*see, e.g.,* regulations authorizing minor modifications to NPDES permits issued pursuant to the Clean Water Act, 40 C.F.R. § 122.63). Major modifications will still need to undergo a form of Regional Review before they are approved.

20. *Summary of Comments*

Comments were made that the Council should follow the U.S. Federal Rules of Appellate Procedure in the appeal process. Specifically, that the Administrative Record of any decision being challenged should be certified before a Notice of Appeal is filed. A commenter stated that it was important that the contents of the Administrative Record be known so that when the Petitioner files briefs it will assist the Petitioner identify relevant facts to address in their brief, as well provide time for motions to be submitted. Further, the commenter stated that if the Administrative Record is not created before notice is given, it is impossible to request that the Administrative Record be supplemented.

Response

The Secretariat for the Council and Regional Body maintains a public website of documents intended to be included in the Administrative Record. Because these documents may be cited in briefs before the administrative record is formally certified, Council concluded that delaying the initial stages of the appeal process pending formal certification of the administrative record is not warranted.

21. *Summary of Comments*

Several comments were made on technical issues on the Council’s Rules of Practice and Procedure. Specifically, the following comments were made:

- A. Rule 302(3) of the Council Rules of Practice and Procedure provided an inconsistent event to start the period for filing a petition.
- B. Rule 307(6) should expressly state that amicus briefs should be 16,500 [sic] words or 15 pages.
- C. Rule 309 should divide a-f and g-l and use numbers instead of letters.

- D. Rule 316 should renumber subsection 6-7 as 3-4.
- E. Ensure the draft Rules are specific regarding the type of U.S. mail that is sufficient for service.

Response

- A. Section 302(3) has been revised to address this concern so that it now reads that “A petition for review must be filed with the Secretariat within thirty (30) days following the date on which notice of the Council Decision is published on the Council’s website. A petition is filed when it is received by the Secretariat at the address specified for the appropriate method of delivery as provided in Section 310.3 of these Rules of Practice.”
- B. Section 307(6) states that “... an amicus brief may be no more than one-half the maximum length authorized by Section 304.3 of these Rules of Practice for an Appeal Hearing Participant’s principal brief...” Section 304.3 states that petitioner’s principal brief and response briefs may not exceed 13,000 words... [and] [i]n lieu of a word limitation, filers may comply with a 30-page limit for petitioner’s principal brief.” The Council believes that the limitations on the lengths of briefs are already clear—that amicus briefs may only be 6,500 words or 15 pages.
- C. Section 309 has been revised to use numbers instead of letters. However, the Council has decided to keep all motions under Section 309.
- D. Section 316 has been corrected so that the sub-sections are 3-4 rather than 6-7.
- E. Changes were made throughout the Rules of Practice and Procedure so that service may be made by “U.S. mail or Canadian Postal Service.”

22. *Summary of Comments*

A comment was made regarding: “the treatment of the United States, Canada, provinces, and federally recognized tribes, First Nations, and Métis communities in Canada throughout the draft Rules. As currently drafted, certain rules specifically call out these governments and their ability to engage in the process. The draft Rules are not consistent in which governments they recognize, and we would ask that these governments be treated uniformly, or appropriate to their sovereign and legal distinctions, throughout the draft Rules.” Reference was made to Sections 307(1) and 309(8)(b) as examples of inconsistent treatment.

Response

Section 7.3.1 of the Compact states that “a State or Province is deemed to be an aggrieved Person with respect to any Party action pursuant to this Compact.” In short, because the Agreement is an agreement between the Party U.S. States and Canadian Provinces of Ontario and Québec, special status is afforded to those Provinces to standing

in proceedings. No other level of government is afforded those rights, whether it be the U.S. Government, the Canadian government, Tribal governments or any other governments or organizations.

However, recognizing the potential special interest of the U.S. Government, the Canadian government and Tribes and First Nations, they have been granted the right to file an amicus brief without requiring permission by the Council.

Further, the Council believes that it is more appropriate to grant broader amicus rights to consider the views of various governments than it is to automatically allow them party status.

23. Summary of Comments

A comment was made that as currently drafted, it appears time-sensitive motions must be decided by the full Council. The commenter went on to state that in light of the time-sensitive nature of these motions, the Executive Director should be allowed to make such decisions.

Response to Comments

Revisions have been made to Sections 304.3, 307.4, 307.6, 307.7, 307.8, 309.3, 309.4, 309.5, 309.7, 309.8, 311.2 and 319.2 to allow for decisions to be made by the Council or Council Chair. Although it is not the Executive Director that will be making such decisions, it is believed that these changes will address the underlying concerns that were expressed.

24. Summary of Comments

A comment was made that having the Council serve as the forum for hearing Administrative Appeals was inherently biased, as the Council was the same entity that had made the decision that was being appealed.

Response to Comments

Section 7.3.1 of the Compact states in part that “Any Person aggrieved by any action taken by the Council pursuant to the authorities contained in this Compact shall be entitled to a hearing before the Council.” Accordingly, the Compact requires that such Administrative Appeal take place before the Council. In addition, the “bias” referenced results from the fact that Council is the proper body to issue the Council Decision. As the decision-making authority under the Compact, Council is also the proper body to render the Final Council Action. That the highest decisionmaker within the Council makes the Council Decision and the Final Council Action does not create “bias.”

VIII. Additional Comments received

25. Summary of Comments

Comments were made that the Regional Body and Council should better define the terms “Public Water Supply Purposes” and “aggrieved person.”

Response

These subject areas were outside of the scope of this procedures update workplan for the Regional Body and Council.

26. Summary of Comments

Comments were made that the Compact and Agreement should be vigorously defended and the standards to be used for reviewing diversion Proposals should be narrowly applied.

Response

The standards are located in Section 4.9 of the Compact and Article 201 of the Agreement. The Regional Body and the Council are applying and will continue to apply the Agreement and the Compact in accordance with their terms and purposes.

27. Summary of Comments

Comments were made objecting to the Council’s proposal to eliminate from Section 200.5 [now numbered Section 200.6] of the Guidance the requirement that Diversion Applicants provide an estimate of how much water they are proposing to divert from the Basin on a monthly basis. The concern is that the removal of this estimate will create a “blind-spot” in the Regional Body and Council’s ability to accurately determine the potential environmental impacts of a proposed Diversion. That is, a heavy increase in an Applicant’s volume of withdrawal during certain months could result in a negative ecological impact from the increased volume of the Applicant’s return flow. This impact would be impossible to identify without requiring a Diversion Applicant to accurately estimate its usage rate on a monthly basis. This concern is precisely why EPA requires applicants provide monthly usage rates in the context of permitting considerations. *See e.g. U.S. EPA, NPDES Permit Writers’ Manual* (September 2010).

Response

The revised Section 200.6.b. now asks that the Application include “...[i]nformation regarding whether the proposed use of water transferred across the basin or watershed boundary solely for Public Water Supply Purposes would be continuous, seasonal or temporary.” In other words, the focus is on obtaining information that would directly

address the concern raised about potential heavy increases that may result in negative ecological impacts. Monthly estimates may or may not accurately reveal whether planned uses will be continuous, seasonal or temporary, resulting in a negative ecological impact.

28. *Summary of Comments*

A comment was made that the Originating Party should notify the Regional Body of all Diversion applications.

Response

Section 200.3.2 of the Council Guidance and the Regional Body Procedures requires the Originating Party to notify the Regional Body of all Diversion applications.

29. Summary of Comment

A comment was made that “After 2 "studies" and \$40,000 later, the water levels on the St. Lawrence are getting worse every year LOWER! I read with great anticipation, in the Watertown newspaper, that Lake Erie is very high so 'we' have to lower the river so that flooding will not occur on Lake Ontario. Those individuals that built on the flood plains on Lake Ontario are getting just that, 'flooding', now the rest of us, the majority, are expected to bail them out. I am sick of listening to the feeble excuses and "studies" that only cost, we the tax payers, more money with zero results.”

Response

This was not a comment on the Updated Procedures Documents and is therefore outside the scope of this Comment and Response document.