



MEMORANDUM

September 26, 2006

To: John Stolzenberg and Rachel Letzing, Legislative Council

From: Edward J. Wilusz, Vice President, Government Relations

Subject: **Questions and Comments Regarding LRB-0058/P1**

At the end of the September 7 meeting of the Special Committee on the Great Lakes Water Resources Compact, Sen. Kedzie asked that committee members submit any questions and comments about the Compact to Legislative Council staff. The following comments were developed with the input of several other industry trade associations. We would be happy to discuss these questions and comments further, if you have any questions.

**General Comments**

The paper industry and other water using industries support conservation and practice it on a routine basis. According to national statistics, the amount of water used to make a ton of paper has dropped 49% in the last 30 years. We are sensitive to concerns about large-scale, out-of-basin diversions and the dilemma posed by the current Water Resources Development Act.

However, we are concerned about the potentially adverse economic impacts that could result from the water use regulatory system created under the standard of review and decision in the Compact. We are concerned that the Compact, in its current form, could add substantial cost to water related projects in the Great Lakes basin and could create uncertainty about whether industry will be able to get access to the water it needs to grow. Increased cost and uncertainty create significant disincentives for new investment. Unless potential cost increases and uncertainty are addressed and removed, we fear the Compact could result in adverse economic impacts within the Great Lakes basin.

There are many parts of the Compact that need clarification and such clarification will, no doubt, go a long way toward addressing our concerns. While there appears to be flexibility to deal with many issues, we are concerned that the "no significant change" requirement for Compact ratification may prevent resolution of one of our primary concerns, which is the adverse impact assessment requirement

under the standard of review and decision. We view this requirement as impractical, easily subject to legal challenge, and not easily remedied because of the restriction on the ability to substantively change the Compact language.

### **Specific Comments**

#### s.281.343(1)(o) Definition of Product; p. 7

The definition of "product" is a little confusing, particularly as it relates to bottled water. It appears that bottled water would fall under the main definition in (o)1., but "clarifiers" in (o)2. through 5. fog things up. Also, it isn't clear what "produced" means within the definition. For example, if something is grown, is it produced? If something is mined, is it produced?

#### s.281.343(3)(a)2., (c), and (d)2. & 3. Water Resources Council; p. 15-16

The Great Lakes-St. Lawrence River Basin Water Resources Council, consisting of representatives of the eight Great Lakes states, is given the power to revise the standard of review and decision "in accordance with each party's respective statutory authorities and applicable procedures." What does this mean? Can the council unilaterally change the standard of review and decision and must states then adjust their laws accordingly? Or does this mean that, while the council can change the standard, states are free to adopt the changes or not? If the standard of review and decision is subsequently changed and Wisconsin (or some other state) fails to adopt the change, what is the status of the Compact?

Related to the previous question, par. (c) provides that the council "may promulgate and enforce such rules and regulations as may be necessary for the implementation and enforcement of this compact." What is the scope of these rules and regulations? How would they apply in Wisconsin? What if Wisconsin rules differ from council rules? What enforcement authority does the council have within Wisconsin?

Par. (c) also states that any rule or regulation of the council, other than one that deals solely with the internal management of the council or its property, shall be adopted only after public notice and hearing. Does this notice and hearing requirement apply to revisions to the standard of review and decision? The standard of review and decision appears to be part of the compact, not a council rule or regulation.

The council shall review the water management and conservation and efficiency programs of the parties and make findings on whether the provisions of the compact are being met. What is the legal effect of these findings? Further, the council may make recommendations to the parties regarding implementation of

the standard of review and decision. What is the legal status of these recommendations?

The broader question here, of course, is what is the legal relationship between the council and individual states? On one hand, the Compact appears to strive to maintain law-making and enforcement authority within each state. On the other hand, the "hands off" nature of the Compact and the seemingly open-ended ability of the council to make its own rules, seems to act against state authority.

s.281.343(4b) Water Conservation and Efficiency Programs; p.19-20

One of the areas of flexibility that each state has under the Compact is to implement either a voluntary or mandatory water conservation and efficiency program. While our preference would be for a voluntary program, similar to the successful voluntary forestry water quality best management practices, this issue needs to be fully discussed by the committee.

s.281.343(4p) Management and Regulation; p. 31-32

Paragraph (a) requires the state to create a program for the management and regulation of new or increased withdrawals and consumptive uses within five years of the effective date of the Compact. The way the state is to do this is "by adopting and implementing measures *consistent with* the decision-making standard." (Emphasis added.) Further, the state "may determine the scope and thresholds of its program." This language implies flexibility for a state to differ from the Compact decision-making standard. However, such flexibility also seems to conflict with the "no substantive change" requirement for ratifying the Compact. Does this language give the state the ability to utilize a decision-making standard that is substantively different than, but consistent with, the Compact decision-making standard in s.281.343(4r)? If not, what are we to make of this language?

s.281.343(4r) Decision-Making Standard; p. 32-34

The decision-making standard applies to any new or increased water withdrawal or consumptive use above the threshold identified by the state pursuant to par. (4p). The decision-making standard establishes the regulatory framework that will apply to water-using industries in the Great Lakes basin. It is this part of the Compact that generates the most questions, and therefore the most concerns, from industry.

A proposal may be approved only if it meets five criteria.

### Consumptive Use Criterion

The first criterion is that "all water withdrawn shall be returned, either naturally or after use, to the source watershed less an allowance for consumptive use." How this allowance for consumptive use is implemented appears to be completely up to the state. Is this a correct interpretation?

To the extent that determination of a consumptive use allowance is up to the state, we would have very serious concerns about establishing a bureaucratic structure charged with determining what is allowable for every utility, paper mill, food processor, et al, in the state. Conservation is important but, in most business situations, there is a financial incentive to conserve water – it costs money to use and treat. In effect, the allowance for consumptive use is self-defined. We do not want to see a system created where regulators can second-guess manufacturing decisions. This will require further discussion, but this is our general concern.

### Environmental Impact Criterion

The second criterion raises the most questions and concerns. It requires that the new or increased withdrawal or consumptive use "be implemented so as to ensure that the proposal will result in no significant individual or cumulative adverse impacts to the quantity or quality of the waters and water dependent natural resources and the applicable source watershed." This single statement involves several defined terms and raises numerous questions, so bear with us.

To "ensure" means to guarantee. The guarantee to be provided is that something won't happen. It appears to us that if an applicant must ensure that something won't happen, the applicant needs to at least assess the potential impact, no matter how small the chance for significant impact. Coupled with very broad definitions, such as "water dependent natural resources" (discussed later), we believe that this adverse impacts determination is potentially so open-ended and potentially so complex that it would be nearly impossible, from a practical standpoint, to ensure no adverse impacts.

There is no definition of "significant adverse impact." Sub. (4p)(a) states that significant impacts are to be determined on the basis of significant impacts to the physical, chemical, and biological integrity of source watersheds. That helps define the scope, but it isn't any kind of bright-line test. What is a significant adverse impact? (Regardless of what it is, the "reasonableness" test at (4r)(e)5. requires that the probable degree and duration of any adverse impact also be determined.)

"Individual impacts" is also not a defined term. However, it seems logical, based on the definition of cumulative impacts (below), to conclude that individual impacts

would be the impact on the basin ecosystem that results from the incremental effects of all aspects of the withdrawal, diversion, or consumptive use at hand. We are not advocating this definition, but it seems to be consistent with the cumulative impacts definition.

"Cumulative impacts" is defined to mean "the impact on the basin ecosystem that results from incremental effects of all aspects of a withdrawal, diversion, or consumptive use in addition to other past, present, and reasonably foreseeable future withdrawals, diversions, and consumptive uses regardless of who undertakes the other withdrawals, diversions, and consumptive uses." This definition also includes the statement that cumulative impacts "can result from individually minor but collectively significant withdrawals, diversions, and consumptive uses taking place over a period of time."

The cumulative impacts determination raises other, related issues:

- "Basin ecosystem" is defined as "the interacting components of air, land, water, and living organisms, including humankind, within the basin." The "basin" includes the watershed of the Great Lakes and the St. Lawrence River.
- There is no definition of incremental effects. Is this different than individual impacts? This needs to be clarified.
- There is no language that we are aware of that clarifies what "all aspects of a withdrawal, diversion, or consumptive use" means. One option would be to look at physical, chemical and biological aspects in order to tie in with significant adverse impacts. However, this really doesn't help much. Exactly which aspects of a project is an applicant or state agency supposed to consider when determining impacts?
- It seems possible, in concept, to identify and assess the impacts of past and present withdrawals, diversions, and consumptive uses, regardless of who undertook them. However, we doubt that this is practically feasible.
- We have no idea how reasonably foreseeable future withdrawals, diversions, and consumptive uses will be identified or how their impacts could be assessed. Again, we doubt that this is practically feasible.

Impacts on both water quantity and quality must be assessed. We recommend that existing surface water and groundwater quality regulations be used for the quality assessment and that no additional water quality assessment be required as a result of the Compact. Proposals that comply with existing regulations would be determined to meet the water quality impacts test.

The scope of the impact assessment is the waters and water dependent natural resources and the applicable source watershed. We assume that the definition of "waters of the basin" applies to "waters" in this case. Is this a correct assumption? Waters of the basin is defined to mean "the Great Lakes and all streams, rivers, lakes, and connecting channels, and other bodies of water, including tributary groundwater, within the basin." In other words, all of the water resources within the boundaries of Map 1 of Memo No. 3. Is this correct?

Water dependent natural resources is defined to mean "the interacting components of land, water, and living organisms affected by the waters of the basin." It appears that the only environmental aspects that would not fall into this analysis are air impacts. All other potential impacts within the bounds of Map 1 of Memo No. 3 would be included in the scope of the impact assessment. Is this correct?

We are puzzled by the reference to "and the applicable source watershed." Source watershed is defined to mean, in effect, the basin of the Great Lake from which the withdrawal is being made or proposed. It seems redundant and unnecessary in light of other wording in this criterion that focuses on the broader Great Lakes basin. It also seems to conflict with language in sub. (4z)(c) that refers to "of the applicable source watershed." From a practical implementation standpoint, changing the "and" to "of" in (4r)(b) would be an improvement.

Sub. (4z)(c) deserves comment here, since it relates to who must conduct the cumulative impact assessment. It states that "applicants are not required to conduct a separate cumulative impact assessment in connection with an application but shall submit information about the potential impacts of a proposal to the quantity or quality of the waters and water dependent natural resources of the applicable source watershed. An applicant may, however, provide an analysis of how the applicant's proposal meets the no significant adverse cumulative impact provision of the standard or review and decision." This could be interpreted to contradict the cumulative impact assessment requirement in (4r)(b). However, we believe that (4z)(b), which states that parties have the responsibility to conduct "this" cumulative impact assessment is intended to refer to both the periodic cumulative impact assessment required under (4z)(a) and the cumulative impact assessment associated with an individual application. This should be clarified. In any event, it appears that the applicant is responsible for the individual impacts assessment required under (4r)(b).

We will not go through the exercise of connecting all of the previously mentioned "dots" that require connecting, by either an applicant or the state, under the impact criterion. However, as mentioned previously, we fear that the analysis that is required by the plain language of the Compact could be so broad and all-encompassing as to be impractical. A relatively small project that exceeds a

100,000 gallon applicability threshold (this is the default, the state can set a different threshold) could trigger an impact assessment that costs into six or seven figures. Such a cost is a significant disincentive to both expansions at existing facilities and the creation of new facilities. Further, such an "everything under the sun" requirement, if it is interpreted to be that, would appear to be easily susceptible to legal challenge.

We are concerned that there may not be enough flexibility in the Compact ratification process to make this a workable process. We hope we are wrong and that the committee is able to develop a workable solution to these issues.

### Water Conservation Criterion

The third criterion is that the "withdrawal or consumptive use will be implemented so as to incorporate environmentally sound and economically feasible water conservation measures." Environmentally sound and economically feasible water conservation measures are defined to mean "those measures, methods, technologies, or practices for efficient water use and for reduction of water loss and waste or for reducing a withdrawal, consumptive use, or diversion that are environmentally sound, reflect best practices applicable to the water use sector, are technically feasible and available, are economically feasible and cost effective based on an analysis that considers direct and avoided economic and environmental costs, and consider the particular facilities and processes involved, taking into account the environmental impact, age of equipment and facilities involved, the processes employed, energy impacts, and other appropriate factors."

There seems to be an internal conflict between best practices applicable to a water use sector and the consideration of particular facilities and processes. One implies an industry-wide focus, while the other implies a site-specific focus. In general, we prefer a site-specific focus that includes the flexibility implied by the consideration of age of equipment, processes employed, etc. However, this should be discussed further.

We have been concerned for some time over the avoided environmental and economic cost consideration. We understand the theory, but the practical application could become a "what if" nightmare. Further, this type of analysis opens the door to legal challenges because some hypothetical avoided cost wasn't considered.

Finally, and consistent with our comments on the first criterion, we would have serious concerns about the creation of a state bureaucracy charged with determining these measures for all water users in the basin. The language of the Compact doesn't require such a bureaucracy, but the state is charged with

somehow determining that this criterion is met. Additional discussion is necessary to flesh out how this will work.

#### Compliance Criterion

The fourth criterion is that the "withdrawal or consumptive use will be implemented so as to ensure that it is in compliance with all applicable municipal, state, and federal laws, as well as regional interstate and international agreements, including the Boundary Waters Treaty of 1909." We do not have a concern with this criterion, as long as insignificant, unintentional non-compliance with minor requirements isn't grounds for failing this test. Within our current, extremely complex regulatory system, even the best companies have minor problems once in a while.

#### Reasonableness Criterion

The fifth and final criterion is that the proposed use is reasonable. There are six factors that must be considered in determining if a proposed use is reasonable.

- Whether the proposed withdrawal or consumptive use is planned in a fashion that provides for efficient use of the water and will avoid or minimize the waste of water. This implies that the state will somehow be involved in reviewing and approving water use proposals at the planning stage. Once again, we are concerned about the potential for a government water use bureaucracy. We would like to explore options for meeting this requirement in a simple and straightforward way.
- If the proposal is for an increased withdrawal or consumptive use, whether efficient use is made of existing water supplies. We would like to discuss this issue further. On its face, this might be workable. However, this has the potential to turn into the water-quantity equivalent of the air quality new source review program – a project triggers review of an entire facility that, in turn, triggers the need for costly water conservation measures, unrelated to the project, that drive up the overall cost of the project to the point that the project is no longer economically viable. This process needs to be clarified.
- The balance between economic development, social development, and environmental protection of the proposed withdrawal and use and other existing or planned withdrawals and water uses sharing the water source. We have no idea what an applicant would be required to submit under this factor or how the state would determine that the balance is reasonable. Discussion of this process is needed.

- The supply potential of the water source, considering quantity, quality, and reliability and safe yield of hydrologically interconnected water sources. This seems to be relatively straightforward for surface waters and somewhat more complex for groundwater, but consideration of this factor appears reasonable.
- The probable degree and duration of any adverse impacts caused or expected to be caused by the proposed withdrawal and use, under foreseeable conditions, to other lawful consumptive or nonconsumptive uses of water or to the quantity or quality of the waters and water dependent natural resources of the basin, and the proposed plans and arrangements for avoidance or mitigation of such impacts. This adds to the challenge of the impact assessment by requiring a determination of the probable degree and duration of any adverse impacts. Assuming, for sake of discussion, that the impact assessment can be completed in a reasonable time and at a reasonable cost, this implies that plans for avoidance and mitigation of impacts be included in the application. Note that this requirement applies to adverse impacts while the impact assessment applies to significant adverse impacts. This could have the effect, from a practical standpoint, of eliminating the word "significant" from the impact assessment criterion.
- If a proposal includes restoration of hydrologic conditions and functions of the source watershed, the party may consider that. No comment.

What is absent in all of this is any guidance on how these six factors should be balanced in order for the state to come to a finding of reasonableness, and to do so in a way that will withstand legal challenge. Substantial discussion is needed on this criterion.

s.281.343(4t) Applicability; P.33-34

This provision specifies how a baseline is to be calculated for the purpose of calculating a new or increased diversion, consumptive use, or withdrawal. The baseline can be determined based on the existing withdrawal approval or the existing capacity of the system, as of the effective date of the Compact (December 13, 2005). Wisconsin does not have a permitting system that normally specifies a maximum withdrawal, so it appears that the state will need to use the capacity approach.

Capacity is to be "presented in terms of withdrawal capacity, treatment capacity, distribution capacity, or other capacity limiting factors." Existing capacity determinations must be based on the most restrictive capacity information.

It is not clear how capacity will be determined, particularly in a manufacturing setting. For example, a paper mill will have a water intake capacity and a

wastewater treatment capacity. There would also be a practical use capacity, but it isn't clear how this would factor in, if it factors in at all. We would appreciate examples of how capacity could be calculated under various assumptions.

Our concern is that the baseline date was an economic low point for the paper industry and other manufacturers. A paper company could have three paper machines, but only two were operational in December 2005. If the company wanted to restart the third machine, would it trigger Compact review and compliance with the decision making standard because the baseline is calculated on having two machines in operation or is there no increase in water use because the baseline is calculated on having three machines?

s.281.343(7r) Enforcement: P.41-43

S.281.343(7r)(a) provides, among other things, that "any aggrieved person shall have the right to judicial review of a party's action in the relevant party's court of competent jurisdiction. A state can be an aggrieved person. When a state is an aggrieved person, in which state is the judicial review filed? It seems that it would be the state that is not the aggrieved person, but it isn't completely clear.

Sub. (b)1. authorizes legal compliance actions to be brought in any of three jurisdictions – the relevant party/state, the U.S. district court for the District of Columbia, and district court in which the council maintains offices. Do any procedures or restrictions exist that would limit or prevent forum shopping and/or that would prevent multiple actions from being filed in different jurisdictions? Also, this raises a policy question relating to the enforcement of Wisconsin law. It appears that compliance with Wisconsin law could be enforced in federal court in Washington, DC, or some other jurisdiction outside of Wisconsin. With the council potentially able to amend the standard of review and decision and enforcement potentially outside of Wisconsin, would the state be ceding too much authority for actions that take place within Wisconsin?

The term "any aggrieved person" would seem to authorize citizen suits. Citizen suits have always been of concern to industry throughout the country. Industry comments submitted during the development of the Compact urged that any citizen suit provisions be deleted. We urge the committee to examine these citizen suit provisions and to explore options for narrowing these provisions through implementing legislation.

