



WISCONSIN LEGISLATIVE COUNCIL

GREAT LAKES WATER RESOURCES COMPACT

Room 411 South
State Capitol

December 15, 2006
9:00 a.m. – 2:20 p.m.

[The following is a summary of the December 15, 2006 meeting of the Special Committee on Great Lakes Water Resources Compact. The file copy of this summary has appended to it a copy of each document prepared for or submitted to the committee during the meeting. A digital recording of the meeting is available on our Web site at <http://www.legis.state.wi.us/lc.>]

Call to Order and Roll Call

Chair Kedzie called the meeting to order. The roll was called and it was determined that a quorum was present.

COMMITTEE MEMBERS PRESENT: Sen. Neal Kedzie, Chair; Sens. Robert Cowles, Mary Lazich, and Robert Wirch; Reps. Scott Newcomer, Jon Richards, and Karl Van Roy; and Public Members Ann Beier, Kevin Crawford, Dan Duchniak, Hallet Harris, Andrew Lisak, William Mielke, Matthew Moroney, Keith Reopelle, Jodi Habush Sinykin, James Surfus, and Edward Wilusz.

COMMITTEE MEMBERS EXCUSED: Rep. John Steinbrink.

COUNCIL STAFF PRESENT: John Stolzenberg, Chief of Research Services; and Rachel Letzing, Senior Staff Attorney.

Approval of the Minutes of the November 13, 2006 Meeting

The minutes of the committee's November 13, 2006 meeting were approved by unanimous consent.

Description of Materials Distributed

Mr. Stolzenberg described the following materials that were included in the mailing:

- Memo No. 9, *Comments on Proposed Definition of Tributary Groundwater* (December 8, 2006).
- Memo No. 10, *Differences Between Registration and Reporting Requirements Under Current Law and the Great Lakes-St. Lawrence River Basin Water Resources Compact* (December 8, 2006).
- Packet of Materials, *Recommendations and Concerns Regarding the Definition of Tributary Groundwater Submitted by Special Committee Members and Others*.
- Packet of Materials, *Recommendations and Concerns Regarding the Compact Submitted by Special Committee Members and Others*.
- Memorandum to Senator Kedzie, from Senator Lazich.

Mr. Stolzenberg noted that the following item was distributed at the meeting and would be discussed further under a subsequent agenda item.

- Memo No. 11, *Index for Recommendations and Concerns Regarding the Compact Submitted by Special Committee Members and Others* (December 14, 2006).

Briefing on Other States Recent Actions on Ratifying the Great Lakes-St. Lawrence River Basin Water Resources Compact

Ms. Letzing reported that there has been no further action in the New York Legislature on the bill ratifying the Great Lakes-St. Lawrence River Basin Water Resources Compact (the “compact”). It appears unlikely that the New York Senate would be taking up the bill this year. She noted that House Bill No. 6657 had recently been introduced in Michigan to ratify the compact, but that no further action had been taken on the bill since introduction.

Mr. Stolzenberg than described in detail the provisions implementing the compact included in substitute House Bill No. 574, as passed by the Ohio House on December 13, 2006. These implementing provisions do the following:

- Create a 28-person advisory board charged with developing recommendations for legislation to implement and effectuate the compact. This board must report its recommendations within 18 months of the bill’s effective date.
- Designate the Governor as the state’s administrator of the compact and specify the duties of the Governor in that capacity.
- Specify that the Governor shall appoint the Director of Natural Resources as the Governor’s alternate on the Great Lakes-St. Lawrence River Basin Water Resources Council (the “council”).
- Direct the Director of Natural Resources to adopt rules to implement, administer, and enforce the compact, except that these rules cannot address new or increased withdrawals or consumptive use, creation of the baseline inventory required under the compact, or mandatory water conservation measures until the Ohio General Assembly enacts additional legislation authorizing those rules.

- Specify a process for the Governor to obtain authorization from the General Assembly prior to casting a vote on the council, to amend or revise the compact's standard of review and decision.
- Establish that the Governor's power under s. 9.2 of the compact to effectuate the compact is limited to taking actions necessary for the initial organization and operation of the council.
- Specify a number of legislative intent statements relating to the following topics: incorporation of water into products in packages less than 5.7 gallons in capacity, establishment of the baseline for determining a new or increased diversion, consumptive use or withdrawal; application of the criterion in the decision-making standard in the compact relating to individual or cumulative or adverse impacts; enactment and implementation of the compact not abrogating any private property rights established by statute or common law or creating any cause of action that may be brought against any person beyond those causes of actions that are specifically authorized in the compact; establishing that by the effective date of the compact all provisions in the Ohio Revised Code inconsistent with the compact prior to the effective date shall have been amended in order to conform with the compact, and specifying existing provisions in the Ohio Revised Code that will be used to implement the compact's provisions on water resources inventory, registration, and reporting requirements.
- Specify that, if the other Great Lakes states fail to enact the compact within three years after the bill's effective date, Ohio reserves the right to reconsider its enactment of the compact, and, if necessary, repeal the compact in its entirety.

In response to questions from committee members, Ms. Letzing noted that Wisconsin does not generally use intense statements in its legislation and that courts would be likely to view the property rights provision in the Ohio bill as very persuasive.

Discussion of Recommendations and Concerns Regarding the Compact Submitted by Special Committee Members and Others

Ms. Letzing described Memo No. 11, noting that it was organized by the subsections in the proposed compact in LRB-0058/P1.

She stated that the Memo identifies in italics recommendations and concerns that allow for amending the text of the compact itself. Chair Kedzie then asked committee members for questions to clarify the recommendations and concerns listed in Memo No. 11. In the ensuing discussion, the committee addressed whether the reference to waters of the basin being "held in trust by the states," in sub. (1m) in the findings and purposes, expands the applicability of the public trust doctrine in Wisconsin to groundwater. Mr. **Pete Johnson**, Council of Great Lakes Governors, provided a brief history of the development of this provision and a related provision in sub. (8) (a) 2. He indicated that the intent of these provisions was to continue to recognize state governments', as opposed to the federal governments' responsibility to manage water withdrawals and that it was the intent of the drafters of the compact to not change the legal relationships between public trust doctrines or common law rights in the party states. Mr. **Dave Naftzger**, Council of Great Lakes Governors, observed that the Ohio Legislature's implementing legislation discussed earlier in the meeting included further clarification on the relation of the compact to not effect existing property rights.

Mr. **Chuck Ledin**, Department of Natural Resources (DNR) observed that the “trust” language in the compact was comparable to the reference to waters of the state being held in trust by the state in legislation implementing the original Great Lakes charter in 1985. In particular, he referenced the legislative findings and purpose provisions in SEC. 1 in 1985 Wisconsin Act 60 which stated that “waters of the state are a valuable public natural resource held in trust by this state....” He observed that this reference to trust has been in state law for over 10 years and has not altered public trust law in Wisconsin. He also noted that the public trust concept is constitutional law in Wisconsin and is limited to surface waters and not groundwater. He offered to provide the committee an opinion from DNR on the current exclusion of groundwater and protections under the Public Trust Doctrine. Ms. Letzing observed that, since the Public Trust Doctrine is a constitutional provision, the reference to “trust” in the findings provisions in the compact would be a weak and ineffective way for the Legislature to modify a court’s interpretation of this doctrine.

Chair Kedzie requested that the DNR provide its interpretation of the applicability of the Public Trust Doctrine to groundwater to the committee, and he asked staff to include in the implementing legislation being developed for the committee’s consideration appropriate language that indicates that the compact is not intended to affect the current application of the Public Trust Doctrine in Wisconsin.

Chair Kedzie then stated that he would divide the committee into three subcommittees to facilitate the development of the implementing legislation. These three subcommittees would address respectively, the regulation of withdrawals, consumptive use and diversion; water conservation and bottled water; and public participation and dispute resolution. He stated that the subcommittees should work by consensus and report to the full committee meeting which will be held in mid-February. Any issues that a subcommittee could not reach agreement on should be referred to the full committee. Mr. Stolzenberg and Ms. Letzing stated that the subcommittee’s work would begin in January, the Open Meetings Law would apply to subcommittee meetings, and subcommittee members should avoid sending email notes to all subcommittee members, as such activity would constitute a traveling quorum in violation of the Open Meetings Law. They also suggested that they work with Chair Kedzie in addressing miscellaneous topics not covered by any of the subcommittees.

Mr. Stolzenberg observed that, as the subcommittee’s conduct their work, they may wish to consider three overarching issues: whether new regulations under the compact should be applied uniformly to all types of water users, whether these regulations should be applied statewide or only within the Great Lakes basin, and whether they should be developed as an overlay on existing regulations or set forth in a new comprehensive regulatory program on water usage.

Discussion of Registration and Reporting by Water Users and State Water Resources Inventory Required Under the Great Lakes-St. Lawrence River Basin Water Resources Compact

In light of creation of the three subcommittees by Chair Kedzie, the committee did not conduct this discussion.

Discussion of Baseline Determination Under the Great Lakes-St. Lawrence River Basin Water Resources Compact

In light of creation of the three subcommittees by Chair Kedzie, the committee did not conduct this discussion.

Other Business

There was no other business brought before the committee.

Plans for Future Meetings

The next meeting of the Special Committee will be held on *Friday, February 16, 2007, at 9:00 a.m., in Room 411 South, State Capitol.*

[Subsequently, the February 16 meeting was cancelled. The next meeting will be held at the call of the Chair.]

Adjournment

The meeting was adjourned at 2:20 p.m.

JES:tlu