



**WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM**

Memo No. 13

TO: MEMBERS OF THE SUBCOMMITTEE ON REGULATION OF WITHDRAWALS, CONSUMPTIVE USES, AND DIVERSIONS OF THE SPECIAL COMMITTEE ON GREAT LAKES WATER RESOURCES COMPACT

FROM: Rachel Letzing, Senior Staff Attorney, and John Stolzenberg, Chief of Research Services

RE: Drafting Instructions from the Subcommittee on Regulation of Withdrawals, Consumptive Uses, and Diversions - Version 3

DATE: January 10, 2007 (Revised February 15, 2007)

This Memo lists the drafting instructions provided by your subcommittee at its January 4, 8, 11, 16, and 31 2007 meetings. These instructions are for a portion of the legislation being developed by the Special Committee to implement the Great Lakes-St. Lawrence River Basin Water Resources Compact (the “compact”). The Memo also identifies issues that the subcommittee discussed and did not reach consensus on.

The last page in the Memo contains the proposed sequence of issues for consideration by the subcommittee that we presented at the subcommittee’s January 4 meeting.

DRAFTING INSTRUCTIONS

- I. Registration
 - A. Goal of Having One Uniform, Statewide Registration System
 - B. Required Information:
 - 1. Require all registrants to submit the information specified in the compact to the Department of Natural Resources (DNR) (registrant’s name and address; date of registration; locations, sources, and daily capacities of withdrawals and diversions; amount withdrawn or diverted from each source; uses made of the water; and places of use and discharge). [Proposed s. 281.343 (4) (c) in LRB-0058/P1.]

2. Registrants must also specify whether the registrant holds a WPDES permit and whether the water use (withdrawal or diversion) is continuous or intermittent.
3. Authorize DNR to request other information by rule, provided information is related to purposes of the compact. Authorize DNR to take into account homeland security concerns when determining what information regarding locations of withdrawals and diversions to release to the public.

Comment: Discussed defining “capacity” in proposed s. 281.343 (4) (c) in LRB-0058/P1 for purposes of the registration requirement as “projected service life of a facility,” or “projected total quantity of water use in a one-time period.” Decided to reconcile this capacity determination with the baseline capacity once that is determined.

C. Applicability - Amount and Location

1. Registration requirement applies to persons withdrawing or diverting the least amount of water specified in the compact (withdrawals of 100,000 gallons per day or greater average in a 30-day period, including consumptive uses, and any amount of diversion). [Proposed s. 281.343 (4) (c) in LRB-0058/P1.]
2. Registration requirement applies to statewide [i.e. to persons withdrawing or diverting water within the Great Lakes basin and also in the part of the state outside the basin].

D. Registration Deadline

1. Require existing water users to register by approximately three years after the effective date of the bill [i.e. to allow time for rule-making and then delayed implementation to allow for public education, etc.].

II. Reporting

A. Required Information

1. Require all registrants to report minimum information specified in the compact (monthly volumes of the withdrawal, consumptive use, or diversion in gallons, reported annually). [Proposed s. 281.343 (4) (d) in LRB-0058/P1.]
2. Authorize DNR to create different reporting frequencies or required information based on categories of users by administrative rule.
3. Limit DNR rule-making on other types of required information to relevant information which must be related to withdrawal, consumptive use, or diversion.

B. Applicability and Location

1. Apply the reporting requirements to persons subject to the registration requirements.

2. If in the Great Lakes basin, and current law requires reporting, will be required to report the above information. If in the basin and current law does not require reporting, and withdrawal is 100,000 gallons per day or greater average in any 30-day period, will be required to report the above information.
3. If outside the basin and current law requires reporting, will be required to report the above information. If outside the basin and current law does not require reporting, will not be required to report the above information.

Comment: “Current law” includes ch. NR 142.

III. Inventory

A. Content

1. Direct DNR to prepare the inventory containing the information specified in the compact (location, types, quantity, and use of the water resources of the state, and the location, type, and quantity of withdrawals, diversions, and consumptive uses), plus require DNR to base the inventory on information it receives from the registry. [Proposed s. 281.343 (4) (a) in LRB-0058/P1.]
2. Specify that DNR may only provide inventory information to the council from water resources and registrants with withdrawals of 100,000 gallons per day or greater average in any 30-day period in the basin.

B. Development

1. Direct DNR to develop the inventory in cooperation with the entities specified in the compact (the council and local, state, federal, tribal, and other private agencies and entities). [Proposed s. 281.343 (4) (a) in LRB-0058/P1.]

C. Deadline

1. Direct DNR to prepare the inventory for the Great Lakes basin by the deadline in the compact (within five years of the compact’s effective date). Direct DNR to prepare the inventory for the rest of the state by three years after the effective date of the bill. [Proposed s. 281.343 (4) (a) in LRB-0058/P1.]

IV. Diversions - Exception to Prohibition on Diversions to Straddling Communities and to Communities in Straddling Counties

- A. Define condition that the exception should not be authorized unless it can be shown that is will not “endanger the integrity of the basin ecosystem” to mean “no significant adverse impact to the basin ecosystem.” [Proposed s. 281.343 (4n) (c) e., in LRB-0058/P1.]

Comment: Examples of where the phrase “significant adverse impacts” is used in current law include s. 281.35 (5) (d) 4. and 7. c., Stats., and chs. NR 142.06 (3) (d) and (4) (c) and 216.47 (6).

- B. Define condition that “all water withdrawn from the basin shall be returned, either naturally or after use, to the source watershed less an allowance for consumptive use” to mean that “the applicant shall return water withdrawn from the basin as close as practical to the point of the initial withdrawal from the source watershed, unless it can be shown that it is not feasible, cost effective, environmentally sound, or in the interest of public health to do so.” [Proposed s. 281.343 (4n) (a) 1. in LRB-0058/P1.]

Comment: This instruction also applies to the return flow provision in the exception standard, proposed s. 281.343 (4n) (d) 3. in LRB-0058/P1.

- C. Define condition that a community in a straddling county is “without adequate supplies of potable water” to mean “not having a water supply that is economically and environmentally sustainable in the long term to meet reasonable demands for a water supply in the quantity and quality that complies with applicable drinking water standards, is protective of public health, is economically feasible, at a reasonable cost, and has no adverse environmental impacts greater than those likely to result from the diversion.” [Proposed s. 281.343 (4n) (c) 1. in LRB-0058/P1.]

- D. Clarify that “substantive consideration” means that DNR may only consider the “hydrologically interconnected” criteria in sub. (4n) (c) 2. if the applicant raises it in its diversion proposal and requests that it be considered; however, if the applicant does not raise it, DNR may not use the criteria in sub. (4n) (c) 2. In addition, the applicant may in its proposal state that it has engaged in restoration of hydrologic conditions and functions of the source watershed, and DNR may only consider restoration if the applicant raises it. If the applicant does not include restoration in its diversion proposal, the DNR may not consider or require it. [Proposed s. 281.343 (4n) (c) 2. in LRB-0058/P1.]

Comment: The subcommittee did not reach consensus on the definition of “hydrologically interconnected.”

V. Exception Standard

- A. Define “quantities that are considered reasonable for purposes of the proposal” to mean “the amount needed for the anticipated use of the service life of the project.” [Proposed s. 281.343 (4n) (d) 2., in LRB-0058/P1.]
- B. Define “precedent-setting consequences” to mean those impacts, positive and negative, on the sustainable management of the waters of the basin.” [Proposed s. 281.343 (4n) (d) 4., in LRB-0058/P1.]

VI. Definitions Relating to Diversions

- A. Define “equivalent thereof” in definition of “straddling community” and “community within a straddling county” to mean cities, villages, and towns. [Proposed s. 281.343 (1e) (d) and (t) in LRB 0058/P1.]

Comment: The subcommittee did not reach consensus on whether special purpose districts that are water utilities should be included in these definitions.

VII. General Powers and Duties - Council Revision of Standard of Review and Decision

- A. Include a provision which specifies that the Governor or Governor’s alternate must receive approval from the full Legislature before casting a vote that amends or revises the standard of review and decision. [Proposed s. 281.343 (3) (a) 2. in LRB-0058/P1.]

UNRESOLVED ISSUES FOR CONSIDERATION BY THE FULL COMMITTEE

I. Baseline Determination

A. Subcommittee consensus.

- 1. Base this determination on water intake and treatment up to the point of delivery or use and not wastewater treatment or discharge facilities.
- 2. Authorize two methods for setting a facility's baseline:
 - a. If DNR has specified an amount of withdrawal or capacity of one or more components in the facility’s water system in a permit or plan approval, direct DNR to propose the baseline using information in the permit or approval based on the to-be-determined baseline criteria (see item I. B., below) and allow the facility to request a review and modification of the proposed baseline.

Comment: The subcommittee did not address the grounds for modifying the baseline in this process. The subcommittee discussed this method in the context of establishing baselines for municipal water utilities.

- b. If item a. does not apply, direct the facility to propose its baseline to DNR and require DNR to review and accept or modify the proposed baseline.

Comment: The subcommittee did not address the grounds for modifying the baseline in this process. The subcommittee discussed this method in the context of establishing baselines for industrial facilities.

B. No consensus on the following issue:

- 1. The criteria for establishing the baseline.

Comment: The subcommittee developed the following options regarding these criteria:

- a. Determine baseline by evaluating the design capacity of all components in a system, determining the peak daily flow for each component, and using the maximum capacity of the most restrictive component in the system.
- b. Determine baseline by evaluating the design capacity of all components in a system, determining the peak daily flow for each component, and using the maximum capacity of the largest component in the system.
- c. Determine baseline by evaluating the maximum capacities of “brick and mortar” components at intake point of a system.
- d. Determine baseline by evaluating the capacities of individual components (peak daily flows) of a system, taking the maximum capacity of the most restrictive component, and establishing this as the “biggest average day.” Then, if at least one other component in the system has a capacity above the biggest average day, the baseline would be the lessor of double the biggest average day capacity or the capacity of the largest system component. This baseline would reflect the “biggest peak day.”
- e. Determine baseline by evaluating the capacities of all components in a system, taking the component that has the maximum capacity, and assigning it as the “biggest peak day.” Then, take one-half of the biggest peak day to be the baseline. This baseline would reflect the “biggest average day.”
- f. Use option a. and specify that: “The capacity of existing systems shall be presented in terms of annual capacity of the existing system.”

II. Boundaries of “Straddling Community” and “Community Within a Straddling County”

A. No consensus on the following issue:

1. The date on which the boundaries of a “straddling community” and a “community within a straddling county” are established for purposes of new or increased diversions. [Proposed s. 281.343 (1e) (d) and (t) in LRB-0058/P1.]

III. Definitions of “Straddling Community” and “Community Within a Straddling County”

A. No consensus on the following issue:

1. Whether special purpose districts that are water utilities should be included in the definition of “straddling community” and “community within a straddling county.” [Proposed s. 281.343 (1e) (d) and (t) in LRB-0058/P1.]

IV. Diversions – Exception to Prohibition on Diversions to Communities Within Straddling Counties

A. No consensus on the following issue:

1. Meaning of “hydrologically interconnected.” [Proposed s. 281.343 (4n) (c) 2. in LRB-0058/P1.]

Comment: Public Member Dan Duchniak has proposed the following language for the implementing legislation:

“Hydrologically interconnected” means surface or groundwater that is physically connected to other surface or groundwater so as to affect its level, flow, or recharge. This includes but is not limited to, circumstances in which the historic use of groundwater by municipalities within the Great Lakes surface divide has contributed to the drawdown of the groundwater supply of a municipality outside the surface water divide that is making the proposal.

V. Regulation of New or Increased Withdrawals and Consumptive Uses

A. No consensus on the following issues:

1. Threshold level or levels for determining which new or increased withdrawals and consumptive uses are subject to the decision-making standard. [Proposed s. 281.343 (4p) (a) and (b) in LRB 0058/P1.]
2. Interpretation of the requirement that state programs for regulating new or increased withdrawals and consumptive uses must be “consistent” with the decision-making standard. [Proposed s. 281.343 (4p) (a) in LRB 0058/P1.]

VI. Decision-Making Standard

A. No consensus on the following issue:

1. Interpretation and application of the tests in the decision making standard, especially the no significant cumulative adverse impacts test. [Proposed s. 281.343 (4r) (a) to (e) in LRB 0058/P1.]

Subcommittee on Regulation of Withdrawals, Consumptive Uses and Diversions

*Proposed Sequence of Issues**

[Citations to applicable provisions in LRB-0058/P1 in brackets]

- Registration and reporting by existing and new water users.
- State water resources inventory.
- Baseline determination.
- Exceptions to the prohibition on new or increased diversions, including the exception standard.
- Regulation of new withdrawals subject to the decision-making standard, including interpretation of the standard.
- Council revision of the exception standard or decision-making standard (“standard of review and decision”).
- Assessment of cumulative impacts.
- Other issues.

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* Includes applicable definitions in the compact.