



## WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 16

TO: MEMBERS OF THE SPECIAL COMMITTEE ON GREAT LAKES WATER RESOURCES COMPACT

FROM: Rachel Letzing and Mark C. Patronsky, Senior Staff Attorneys

RE: Administrative Hearing and Judicial Review Under the Compact and the Committee Draft

DATE: August 14, 2007

This Memo contains a description of the proposed right to an administrative hearing and proposed right to judicial review that applies to decisions of the council (the Great Lakes-St. Lawrence River Basin Water Resources Council, as created by the compact), and decisions of the parties (any state that is a party to the compact). In particular, at the request of committee members, this Memo describes the use of the term “person aggrieved” in the draft of the compact (LRB-0058/P1) and the committee draft (WLC: 0141/P2) and the current Wisconsin law that relates to the use of the term “person aggrieved” in the right to administrative hearings and judicial review of agency decisions.

In summary, the compact provides a right to an administrative hearing on and a right to judicial review of a council decision or a decision of a party state. The hearing and judicial review of decisions by a party state are based on the current laws of each state. It is difficult to anticipate the fact situations that will give rise to a request for a hearing or for judicial review, or who might pursue such an action. However, it is clear that the request for a hearing or the commencement of an action for judicial review will be based on familiar provisions of Wisconsin law.

### **Persons Aggrieved by a Party Action**

The draft of the compact addresses the right to both administrative hearings on and judicial review of the decisions of a party. The compact provides as follows:

Any person aggrieved by a party action shall be entitled to a hearing pursuant to the relevant party’s administrative procedures and laws. After exhaustion of such administrative remedies ... any aggrieved person shall have the right to judicial review of a party’s action in the relevant party’s court of competent jurisdiction, provided that an action or proceeding for

such review is commenced within the time frames provided for by the party's law. [Page 41, lines 7 to 14, of LRB-0058/P1.]

The committee draft defines "aggrieved" for purposes of administrative hearings and judicial review under the compact, to mean that "substantial interests are adversely affected by a determination of an agency." As noted above, the compact directs that the right to an administrative hearing on and judicial review of a party decision are to be based on that party's law.

The Wisconsin administrative procedures provide a *right to a hearing* under s. 227.42, Stats. Under the statute, the hearing is treated as a contested case (judicial-type) hearing if specific conditions are met. Under this statute, one of the requirements that a person must satisfy in order to have the right to a hearing is that a "substantial interest of the person is injured in fact or threatened with injury by agency action or inaction ...." The "substantial interest" requirement of the current statute is similar to, and appears to be substantively the same as the definition of "aggrieved" in the committee draft. Section 227.42 (1), Stats., contains several other requirements that a person must satisfy in order to have a right to a hearing. These other requirements are made applicable to any request for a hearing regarding a party's decision by the language in the compact that requires use of the party's laws, as noted above.

The concept of a "person aggrieved" is used for two purposes in the Wisconsin statutes regarding *judicial review* of final agency decision (which will also apply to party decisions under the compact), and the committee draft uses the same definition (...substantial interests are adversely affected by a determination of an agency).

First, the statutory elements of a reviewable decision require that the administrative decision must "adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form ...." [s. 227.52, Stats.] Although this does not use the term "person aggrieved," it is also similar to, and appears to be substantively the same as the definition of that term in the committee draft.

Second, the term "person aggrieved" is used as part of the requirements for the party to have standing (a sufficient interest in the legal controversy) to be qualified for the right to judicial review. [s. 227.53, Stats.] The Wisconsin Supreme Court has established a test for standing for judicial review of an agency decision, which requires that the administrative decision must cause injury to the interests of the petitioner and the interest must be one which is within the interests intended to be protected or regulated by the statute in question. [*Waste Management of Wisconsin v. Department of Natural Resources*, 144 Wis. 2d 499, 424 N.W.2d 685 (Wis. 1988).] The courts use a two-part test to determine whether a party is aggrieved under the holding in *Waste Management*. First, the petitioner must show actual injury resulting from the agency's decision--the injury may not be hypothetical. Second, the petitioner must show that the injury is to an interest that is recognized by law or that is regulated or protected by law. [*In re Delevan Lake Sanitary District*, 466 N.W. 2d 227, 160 Wis. 2d 403 (Wis. App. 1991).]

The compact provides that the aggrieved person has a right to judicial review of a party's action in the party's courts. Although the compact does not expressly state that the party's laws apply to the judicial review, this is clearly implied and obviously necessary for the right of judicial review of a party decision to be effective.

**Persons Aggrieved by a Council Action**

The compact (LRB-0058/P1) provides that any person aggrieved by a council action is entitled to a hearing before the council [page 41, lines 3 to 5]. The compact does not specify the administrative procedures that apply to this hearing and that apply to determining whether a person is an aggrieved person. However, the compact does provide that the council “may adopt rules and regulations governing its meetings and transactions...” [page 13, lines 3 to 7] which could include administrative procedures.

The compact also provides that after exhaustion of administrative remedies, any aggrieved person has the right to judicial review of a council action in the U.S. District Court for the District of Columbia or the district court in which the council maintains its offices. It appears reasonable to assume that the applicable law for judicial review of a council action will be the federal law, and that the definition of “aggrieved” in the committee draft will not be applicable.

**Civil Action to Compel Compliance**

The compact provides that any person aggrieved, as well as a party or the council, may commence a civil action to compel compliance with the compact regarding a new or increased withdrawal, consumptive use, or diversion that is either prohibited or subject to approval, if the approval is not given. The definition in the committee draft of “aggrieved” applies to this provision of the compact. Thus, that person must be an aggrieved person in order to have standing to commence such a civil action.

REL:MCP:ty