



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 4

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

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

RE: Party State Flexibility in Implementing the Great Lakes-St. Lawrence River Basin Water Resources Compact

DATE: September 26, 2006

At its meeting on September 4, 2006, members of the committee briefly discussed ways in which the Great Lakes-St. Lawrence River Basin Water Resources Compact (hereafter, the “compact”) affords the parties to the compact flexibility in how these states implement the compact. Subsequently, Senator Neal Kedzie, chair of the committee, asked Legislative Council staff to brief the committee at its October 4, 2006 meeting on the provisions in the compact that provide this flexibility. This Memo is intended to support this briefing by identifying these provisions.

Committee members identified the following three ways that the compact provides this flexibility:

- The compact prescribes a duty of the parties and specifies that a party has discretion in how it implements the duty. Similarly, the compact also specifies specific powers of the parties, which the states then have discretion on whether and how they will implement.
- The compact specifies a standard or criterion for a particular requirement that includes a broad phrase that requires interpretation to be implemented.
- The compact specifies either the minimum measures necessary to comply with a requirement or the applicability of a requirement through a threshold, giving a party the flexibility to be more stringent and go beyond this minimum set of measures or floor.

An example of the first type of flexibility is the provision in the compact that directs each party to develop and implement a water conservation and efficiency program and that specifies that this program may be either voluntary or mandatory. [Proposed s. 281.343 (4b) (b), as created by LRB-0058/P1.] Examples of broad terms used in the compact include required measures that must be

“reasonable,” “economically feasible,” or “environmentally sound,” or implemented through “best practices” or “best efforts.” An example of the third type of flexibility is the provision that specifies that the standard of review and decision in the compact for a party’s review of a water withdrawal is a minimum standard and the parties may impose a more restrictive decision-making standard. [Proposed s. 281.343 (4t) (a), as created by LRB-0058/P1.]

The remainder of this Memo identifies provisions in the compact that provide flexibility to the parties based upon one or more of the characteristics identified above. This list is organized by subsections in s. 281.343, the text of the compact in LRB-0058/P1. The page and line references for each entry are to the first line of the provision in LRB-0058/P1.

A consideration in reviewing these provisions is that the Great Lakes-St. Lawrence River Basin Water Resources Council has the broad authority to “promulgate and enforce such rules and regulations as may be necessary for the implementation and enforcement of this compact.” See proposed s. 281.343 (3) (c), as created by LRB-0058/P1. Depending upon how the council exercises this authority, it could issue regulations that interpret many of the provisions listed below, especially those with broad language. Such interpretations could limit the flexibility of the parties identified in this Memo.

(1e) Definitions

Page 4, line 6: The definition of “adaptive management” in sub. (1e) (a) includes broad terms, such as “water resources management system” and “systematic process.”

Page 4, line 19: The definition of “basin ecosystem” in sub. (1e) (cm) includes broad terms such as “interacting components” and “living organisms.”

Page 4, line 22: The definition of “community within a straddling county” in sub. (1e) (d) includes the broad phrase “the equivalent thereof.”

Page 5, line 2: The definition of “consumptive use” in sub. (1e) (e) identifies water withdrawn from the basin that is lost or otherwise not returned due to specific mechanisms and to the broad term “other processes.”

Page 5, line 12: The definition of “cumulative impacts” in sub. (1e) (g) includes broad phrases, such as “incremental effects of all aspects of a withdrawal, diversion, or consumptive use,” “reasonably foreseeable future withdrawals, diversions, and consumptive uses,” and “collectively significant withdrawals, diversions, and consumptive uses.”

Page 6, line 4: The definition of “environmentally sound and economically feasible water conservation measures” in sub. (1e) (i) includes broad criteria, such as “environmentally sound,” “reflect best practices,” “technically feasible and available,” and “economically feasible and cost-effective.”

Page 8, line 11: The definition of “source watershed” in sub. (1e) (r) includes the broad phrase “preference to the direct tributary watershed.”

Page 8, Line 24: The definition of “straddling community” in sub. (1e) (t) includes the broad phrase “the equivalent thereof.”

Page 9, line 8: The definition of “water dependent natural resources” in sub. (1e) (w) includes broad terms, such as “interacting components” and “living organisms affected by the waters of the basin.”

(1s) Science

Page 11, line 15: The parties’ duty in sub. (1s) (a) to “commit to provide leadership” for the development of the specified collaborative strategy provides discretion to the states in how they implement this duty.

(2) Organization [of the Great Lakes-St. Lawrence River Basin Water Resources Council]

Page 12, line 11: The provision on alternate council members in sub. (2) (c) directs each council member (i.e., the Governor) to appoint at least one alternate. This provision also authorizes a party to specify by law the term and removal policy for the alternate or attendees. In addition, a party could specify minimum qualifications for its alternate or alternates and the process for appointing its alternate or alternates.

Page 13, line 3: Under sub. (2) (e), each member of the council may appoint an advisor who shall not have voting power. A party may specify the process for appointing and removing this advisor and minimum qualifications for the advisor.

Page 14, line 1: The council may act in its discretion outside the Great Lakes Basin under sub. (2) (g) if necessary to implement its powers and responsibilities within the basin and “subject to the consent of the jurisdiction wherein it proposes to act.”

(3) General powers and duties

Page 15, line 11: Under sub. (3) (a) 2., the council may revise the standard of review and decision used to review and approve a withdrawal, or diversion allowed under the compact, by regulations adopted by the council and “in accordance with each party’s respective statutory authorities and applicable procedures.”

Page 16, line 13: The compact states in sub. (3) (c) 2. that each party has the power to adopt and enforce rules and regulations to implement and enforce the compact and programs adopted by the party to implement the compact.

(4) Water management and regulation; water resources inventory, registration, and reporting

Page 17, line 17: In directing each party to develop and maintain the specified water resources inventory in sub. (4) (a), within five years of the compact’s effective date, this provision gives each party discretion to choose when it will develop its inventory within that period. This provision explicitly authorizes a party to include additional information not listed in the provision in the inventory through the use of the “including but not limited to” phrase. This provision also uses the broad phrase “to the extent feasible” in its directive to the parties on how they should develop the inventory in cooperation with other entities.

Page 18, line 7: Under sub. (4) (c), any person who withdraws water in the amount of 100,000 per day or greater average in any 30-day period or diverts water of any amount must, in general, register the withdrawal or diversion with the originating party by a date set by the council. A party could choose to be more stringent and require this registration for withdrawal in amounts less than 100,000 gallons per day. This provision also specifies the minimum content of this registration and explicitly authorizes an originating party to require other information.

Page 18, line 21: In the requirement in sub. (4) (d) that registrants annually report the monthly volumes of their withdrawal, consumptive use, or diversion, originating parties are also authorized to request other information in these reports.

(4b) Water management and regulation; water conservation and efficiency programs

Page 19, line 22: Each party must develop its own water conservation efficiency goals and objectives under sub. (4b) (b) within two years of the compact's effective date. A party has discretion on when in this period it develops its goals and objectives. Also, this provision directs each party to develop and implement a water conservation efficiency program, either "voluntary or mandatory," within its jurisdiction based on the party's goals and objectives. In addition to its discretion in designing this program, a party could choose to apply this program outside of the Great Lakes basin. This provision also directs each party to annually assess its water conservation and efficiency program but does not specify the elements of an adequate or complete assessment.

Page 20, line 4: The directive in sub. (4b) (c) regarding the parties' consideration of basin-wide objectives modified by the council uses the broad phrase "shall have regard for."

Page 20, line 10: The duty of the parties in sub. (4b) (d) to commit to promote specified water conservation measures includes broad terms such as "environmentally sound," "economically feasible," and "sound planning principles."

Page 20, line 19: The phrase "need to adjust" in the parties' duty to revise their water conservation programs in sub. (4b) (e) provides discretion to the parties in how they implement this requirement.

(4d) Water management and regulation; party powers and duties

Page 21, line 13: The process for a party to review and approve a proposal subject to council or regional review under sub. (4d) (e) contains broad phrases such as "sufficient opportunity" shall be provided for the specified comment and a party must take "into consideration" any of the comments received under this provision.

(4h) Water management and regulation; regional review

Page 22, line 20: The authority of a majority of the members of the regional body to request regional review of a proposal in sub. (4h) (a) 6. includes broad phrases such as "regionally significant" and "potentially precedent setting proposal."

Page 23, line 7: Subsection (4h) (b) 3. (intro.) provides discretion to take one of the specified actions relating to regional review of a proposal through the use of the phrase "an originating party may."

Page 23, line 13: An originating party has the discretion under sub. (4h) (b) 4. to provide or not provide a preliminary notice of a potential proposal.

Page 24, line 5: The provision on the originating party's technical review of a proposal subject to regional review in sub. (4h) (d) 2. includes the broad directive that the review must "thoroughly" analyze the proposal.

Page 24, line 8: The compact authorizes any member of the regional body to conduct its own technical review of any proposal subject to regional review in sub. (4h) (d) 3.

Page 24, line 13: The provision in sub. (4h) (d) 5. on the conduct of a technical review of a proposal subject to regional review includes the broad phrases "exercise their best efforts" so as to "not unnecessarily delay" the decision by the originating party on the application.

(4j) Water management and regulation; proposals subject to prior notice

Page 25, line 23: The provision requiring an originating party to provide all parties and provinces with notice and opportunity to comment on proposals for a new or increased consumptive use in sub. (4j) (a) states that this notice must be given beginning no later than five years after the effective date of the compact. A party can chose when to implement this provision within this period. This notice provision applies to proposals for a new or increased consumptive use of five million gallons per day or greater averaged in any 90-day period. A party could chose to apply this notice requirement to proposals with a smaller quantity of consumptive use.

(4m) Water management and regulation; prohibition of new or increased diversions

Page 26, line 17: Subsection (4m) specifies that all new or increased diversions are prohibited, except as provided for in sub. (4n). A party could choose to be more stringent and not authorize the exceptions in sub. (4n).

(4n) Water management and regulation; exceptions to the prohibition of diversions

Page 27, line 3: In the criteria for the exception for the prohibition of diversions for a proposal to transfer water to an area within a straddling community, sub. (4n) (a) 1. (intro.), states that all water withdrawn from the basin must be returned to the source watershed less "an allowance for consumptive use." The compact does not specify how this allowance should be determined.

Page 27, line 11: In identifying surface water or groundwater from outside the basin that may be used to satisfy the return flow requirement, the condition in sub. (4n) (a) 1. c. uses the broad terms "maximizes" and "minimizes."

Page 27, line 13: Subsection (4n) (a) 2. identifies which exceptions to the prohibition on a diversion to a straddling community must also meet the exception standard. A party could establish a more stringent threshold and apply this requirement to new or increased withdrawals less than the 100,000 gallons per day threshold specified in this provision.

Page 27, line 16: Subsection (4n) (a) 3. identifies which exceptions to the prohibition on a diversion to a straddling community must also undergo the regional review. A party could establish a more stringent threshold and apply this requirement to new or increased withdrawals less than the five million gallons per day threshold specified in this provision.

Page 27, line 22: Under sub. (4n) (b) 1., a diversion that is an intra-basin transfer of less than 100,000 gallons per day shall be subject to management and regulation “at the discretion of the originating party.” In addition, a party could lower this threshold to an amount less than 100,000 gallons per day in conjunction with lowering the thresholds for intra-basin transfers subject to the exception standard and other requirements under sub. (4n) (b) 2.

Page 28, Line 8: The duty of an applicant for an intra-basin transfer to make the specified demonstration on water supply alternatives in sub. (4n) (b) 2. b. contains broad terms such as “no feasible” and “no environmentally sound” water supply alternative.

Page 28, line 14: Subsection (4n) (b) 3. specifies that intra-basin transfers with a new or increased consumptive use of five million gallons per day or greater are subject to the specified regulation. A party could be more stringent and apply these requirements to a proposal with a lesser amount of consumptive use.

Page 28, line 19: The duty of an applicant for an intra-basin transfer to make the specified demonstration on water supply alternatives in sub. (4n) (b) 3. b., contains broad terms such as “no feasible” and “no environmentally sound” water supply alternative.

Page 29, line 8: The criteria for a proposal to transfer water to a community within a straddling county in sub. (4n) (c) 1. b. contains broad terms such as “maximizing” and “minimizing.”

Page 29, line 13: The criteria for a proposal to transfer water to a community within a straddling county in sub. (4n) (c) 1. d. contains broad terms such as “reasonable water supply alternative.”

Page 29, line 15: The criteria for a proposal to transfer water to a community within a straddling county in sub. (4n) (c) 1. e. uses broad language including the proposal will not “endanger the integrity” of the basin ecosystem and that “caution” must be used in determining whether the proposal meets the specified conditions for the exception.

Page 29, line 21: As part of the review of a proposal to transfer water to a community within a straddling county, sub. (4n) (c) 2. states that “substantive consideration” will also be given to whether or not the proposal provides the specified evidence that an existing groundwater based water supply is hydrologically interconnected to waters of the basin.

Page 30, line 4: The criterion in sub. (4n) (d) 1. for approval of exceptions to the diversion prohibition includes the broad phrase “cannot be reasonably avoided.”

Page 30, line 6: The criterion in sub. (4n) (d) 2. for approval of exceptions to the diversion prohibition includes the broad phrase “quantities that are considered reasonable.”

Page 30, line 8: The criterion in sub. (4n) (d) 3. for approval of exceptions to the diversion prohibition states that all water withdrawn from the basin must be returned to the source watershed less “an

allowance for consumptive use.” The compact does not specify how this allowance should be determined.

Page 30, line 16: The criterion in sub. (4n) (d) 4. for approval of exceptions to the diversion prohibition includes the broad phrases “no significant individual or cumulative adverse impacts” and “precedent-setting consequences.”

Page 30, line 21: The criterion in sub. (4n) (d) 4. for approval of exceptions to the diversion prohibition includes the broad phrases such as “environmentally sound” and “economically feasible” water conservation measures that “minimize” water withdrawals or consumptive use.

(4p) Water management and regulation; management and regulation of new or increased withdrawals and consumptive uses

Page 31, line 6: Subsection (4p) (a) directs each party 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. A party could chose to implement this program in less than five years. This provision also authorizes each party to set threshold levels for the withdrawals that will be regulated under these programs and uses broad terms such as the withdrawals must be “reasonable” and will not result in “significant impacts.” This provision also gives each party explicit authority to determine the scope and thresholds of these programs, though under sub. (4p) (b) these thresholds must be set before 10 years after the effective date of the compact or the default threshold of 100,000 gallons per day must be used.

(4r) Water management and regulation; decision-making standard

Page 32, line 9: The criterion in the decision-making standard in sub. (4r) (a) includes the broad phrase “allowance for consumptive use.”

Page 32, line 11: The criterion in the decision-making standard in sub. (4r) (b) includes the broad phrase “no significant individual or cumulative adverse impacts.”

Page 32, line 15: The criterion in the decision-making standard in sub. (4r) (c) includes the broad phrases “environmentally sound” and “economically feasible.”

Page 32, line 21: The criterion in the decision-making standard in sub. (4r) (e) (intro.) includes the broad phrase “proposed use is reasonable” based upon consideration of the specified factors, including those noted below.

Page 32, line 3: The factor in the decision-making standard in sub. (4r) (e) 1. includes the broad phrase “minimize the waste of water.”

Page 33, line 1: The factor in the decision-making standard in sub. (4r) (e) 2. includes the broad phrase “efficient use is made of existing water supplies.”

Page 33, line 3: The factor in the decision-making standard in sub. (4r) (e) 3. includes the broad phrase “balance between economic development, social development, and environmental protection.”

Page 33, line 8: The factor in the decision-making standard in sub. (4r) (e) 5. includes the broad phrases “probable degree and duration of any adverse impacts” and “foreseeable conditions.”

(4t) Water management and regulation; applicability

Page 33, line 15: Subsection (4t) (a) states that a party may impose a more restrictive decision-making standard for withdrawals under their authority rather than the standard specified in the compact.

Page 34, line 1: In specifying the list of the capacity of existing systems that each party is to develop as part of its establishment of a baseline for determining a new or increased diversion, consumptive use, or withdrawal, s. (4t) (b) 1. b. includes the broad phrase “should be presented.” This provision also authorizes a party to expand on these descriptions in this list by stating that the capacity can be identified in terms of the specified capacities “or other capacity limiting factors.”

Page 34, line 12: Subsection (4t) (c) states that applications for new or increased withdrawals, consumptive uses, or exceptions must be considered cumulatively within 10 years of any application. A party could be more stringent and specify a longer period.

Page 35, line 8: Subsection (4t) (j) authorizes each party to determine within its jurisdiction the treatment of proposals to withdraw water and to remove it from the basin in any container of 5.7 gallons or less.

(4x) Water management and regulation; U.S. Supreme Court decree in *Wisconsin et al. v. Illinois et al*

Page 36, line 18: In the consideration of a proposed modification under the U.S. Supreme Court decree in *Wisconsin et al v. Illinois et al*, sub. (4x) (b) directs parties to the compact who are also parties to the decree to seek the input from the Canadian provinces of Ontario and Quebec with respect to the proposed modification. This duty includes broad language such as “best efforts to facilitate the appropriate participation” and “shall not unreasonably impede or restrict such participation.”

(4z) Water management and regulation; assessment of cumulative impacts

Page 38, line 1: The required content of the assessment of cumulative impacts prepared collectively by the parties under sub. (4z) (a) 1. contains the broad phrase “most current and appropriate guidelines for such reviews.”

Page 38, line 4: The required content of the assessment of cumulative impacts prepared collectively by the parties under sub. (4z) (a) 2. contains broad phrases such as “other significant threats to basin waters” and “appropriate measures to exercise caution in cases of uncertainty if serious damage may result.”

Page 38, line 8: The required content of the assessment of cumulative impacts prepared collectively by the parties under sub. (4z) (a) 3. contains broad phrases such as “consider adaptive management [a defined term] principles and approaches.”

Page 38, line 15: Subsection (4z) (c) gives parties the discretion to require an applicant to conduct a separate cumulative impact assessment in connection with an application for a withdrawal, diversion, or consumptive use, by use of the phrase “unless required by other statutes.”

(5) Consultation with tribes

Page 38, line 22: Subsection (5) (a) calls for “appropriate consultations” to occur with federally recognized tribes in the originating party for all proposals subject to council or regional review pursuant to the compact. A party could go beyond this requirement and establish these consultations for other types of water withdrawal, diversion, or consumptive use proposals.

Page 39, line 3: The notice requirement in sub. (5) (b) includes the broad phrase “reasonable notice.”

(6) Public participation

Page 40, line 8: The requirement to ensure adequate public participation in sub. (6) (b) 1. includes the broad phrase “reasonable opportunity.”

(7r) Dispute resolution and enforcement; enforcement

Page 41, line 3: In specifying the procedures for an aggrieved person to seek judicial review of a party’s action in the relevant party’s court of jurisdiction, sub. (7r) (a) states that this review must be commenced “within the timeframes” provided for by the party’s law.

Page 41, line 17: Subsection (7r) (b) 1., authorizes any party to initiate actions to compel compliance with the compact and the council’s rules and regulations. This provision also specifies the minimum remedies available to a court hearing such actions and authorizes a party to prescribe additional remedies.

Page 41, line 23: Subsection (7r) (b) 2. authorizes each party to issue orders and initiate actions to compel compliance with its statutes and regulations implementing the compact.

Page 42, line 3: Subsection (7r) (c) 1. authorizes any party, and others, to commence the specified civil action to compel any person to comply with the compact under the specified conditions.

Page 42, line 20: Subsection (7r) (d) specifies the minimum available remedies in enforcement actions implied under sub. (7r) and authorizes a party to include other remedies through the use of terms “shall include” and “including.”

Page 43, line 1: Subsection (7r) (e) authorizes each party to adopt additional enforcement mechanisms and remedies.

(8) Additional provisions

Page 44, line 10: Subsection (8) (c) 1. establishes that nothing in the compact requires a party to breach confidentiality obligations or requirements prohibiting disclosure or to compromise security of

commercially sensitive or proprietary information, thus, allowing a party to have a more stringent confidentiality policy than that specified in the compact.

Page 44, line 13: Subsection (8) (c) 2. specifies the minimum measures that a party may take to protect a confidential, proprietary, or commercially sensitive information and authorizes parties to take other measures.

Page 44, line 18: Subsection (8) (d) provides discretion to parties by stating that nothing in the compact shall be construed to repeal, modify, or qualify the authority of any party to enact any legislation or enforce any additional conditions or restrictions regarding the management and regulation of waters within its jurisdiction.

(9) Effectuation

Page 46, line 11: Subsection (9) (b) authorizes the Governor to take such actions as may be necessary and proper to “effectuate the compact and the initial organization and operation thereunder.”

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