



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 9

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

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

RE: Comments on the Proposed Definition of Tributary Groundwater

DATE: December 8, 2006

At the November 13, 2006 meeting of the Special Committee on Great Lakes Water Resources Compact, committee member Dan Duchniak distributed a paper entitled *Tributary Groundwater* and proposed a definition of “tributary groundwater.”

Senator Neal Kedzie, Chair of the committee, has requested Legislative Council staff to comment on this definition of tributary groundwater and on the *Tributary Groundwater* paper. This Memo provides comments on the effects of the definition and points raised in the paper on the statutory construction and interpretation of the Great Lakes-St. Lawrence River Water Resources Compact (“compact”). The Memo does not address other topics or issues potentially raised by the definition, including the feasibility of implementing the definition.

The Memo is divided into the following sections:

- Definition of “tributary groundwater” and summary of the paper.
- Statutory construction principles.
- Use of the “tributary groundwater” term in the compact.
- Protection of existing rights under the compact.

Definition of “Tributary Groundwater” and Summary of the Paper

The definition of “tributary groundwater” proposed by Mr. Duchniak is:

“Tributary groundwater” means groundwater that naturally flows toward the Great Lakes in the absence of human activity that influences that flow.

In a conversation with Legislative Council staff after the November 13 committee meeting, Mr. Duchniak clarified that his tributary groundwater definition should be used to define the term “tributary groundwater” as it is used in the “waters of the basin” or “basin waters” definition in the compact. This definition is:

“Waters of the basin” or “basin water” mean the Great Lakes and all streams, rivers, lakes, connecting channels, and other bodies of water, including tributary groundwater, within the basin. [Proposed s. 281.343 (1) (x), as created by LRB-0058/P1]

The *Tributary Groundwater* paper argues that based upon various rules of statutory interpretation, the definition in the compact of “waters of the basin” or “basin water,” read together with the compact’s directive that the surface water divide be used for managing and regulating new or increased diversions, consumptive uses, or withdrawals of surface water or groundwater [proposed s. 281.343 (4t) (e)], should be interpreted to include tributary groundwater that is outside the surface water divide, but within the groundwater divide.

Statutory Construction Principles

Courts frequently rely on canons of statutory construction or interpretation to draw inferences about the meaning of statutory language. In addition to the general rules of statutory interpretation noted in the *Tributary Groundwater* paper, another rule of statutory interpretation is the directive that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes. Additional, but related, rules include the proposition that when the Legislature uses certain language in one part of a statute and different language in another, a court assumes different meanings were intended, and in like manner, where the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded. The use of different terms within related statutes generally implies that different meanings were intended. [*Sutherland Statutory Construction* Vol. 2A, s. 46.06 (6th Ed. 2000).]

It is important to note that canons of statutory construction are considered to be general principles or tools for drawing inferences about the meaning of statutory language, and are not treated as rules of law. As one author has noted, a difficulty with relying upon canons is that many canons may be countered by equally correct but opposing canons that lead to an opposite interpretation of a statute, which implies that judges may choose among canons to achieve whatever result is desired. [Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395 (1950).] In other words, it is possible to read and interpret statutes differently based upon different rules of statutory interpretation, and while courts may rely upon canons of construction to resolve the meaning of statutes, it is impossible to predict which canon a court may use.

Use of the “Tributary Groundwater” Term in the Compact

Application of the Term

LRB-0058/P1 does not define tributary groundwater. Mr. Duchniak proposes to amend the text of the compact by adding his definition of tributary groundwater to the compact. The only provision in the compact that contains the term “tributary groundwater” is in the definition of “waters of the basin” or “basin water.” Thus, the effect of this amendment is to apply this definition of tributary groundwater as part of each provision in the compact that uses the term “waters of the basin” or “basin water.”

The term “waters of the basin” or “basin water” is used in the following sections of the compact:

- The findings and purposes section provides that legislative bodies of the respective parties agree that the waters of the basin are precious public natural resources shared and held in trust by the states, the waters of the basin are interconnected and part of a single hydrologic system, the waters of the basin can concurrently serve multiple uses including municipal, public and industrial, future diversions and consumptive uses of basin water resources have the potential to significantly impact the environment, economy, and welfare of the Great Lakes-St. Lawrence River region, and the parties have a shared duty to protect, conserve, restore, improve, and manage the renewable but finite waters of the basin. [Proposed s. 281.343 (1m) (a).]
- The purposes of the compact include all of the following: parties acting together to protect, conserve, restore, improve, and effectively manage the water and water dependent natural resources of the basin; engaging in consultation on the potential effects of proposed withdrawals and losses on the waters and water dependent natural resources of the basin; and promoting an adaptive management approach to the conservation and management of basin water resources. [Proposed s. 281.343 (1m) (b).]
- The science section specifies that the parties commit to provide leadership for the development of a collaborative strategy with other regional partners to strengthen the scientific basis for sound water management decision-making under the compact. This section notes that the strategy must guide the collection and application of scientific information to support, among other things, improved scientific understanding of the waters of the basin and improved understanding of the role of groundwater in basin water resources management. [Proposed s. 281.343 (1s).]
- The Great Lakes-St. Lawrence River Basin Water Resources Council (“council”), as created by the compact, must identify priorities and develop plans and policies relating to basin water resources and may recommend a range of approaches to the parties to implement the standard of review and decision reflecting improved scientific understanding of the waters of the basin, including groundwater. [Proposed 281.343 (3) (a) 3. and (d) 3.]
- The water resources inventory, registration, and reporting section provides that information gathered by the parties must be used to improve the sources and applications of scientific information regarding the waters of the basin. [Proposed s. 281.343 (4) (f).]
- The water conservation and efficiency programs section specifies that the council commits to identify, in cooperation with the provinces, basin-wide water conservation and efficiency objectives, based on a list of goals. One of these goals is to ensure sustainable use of waters

of the basin. In addition, each party must implement a voluntary or mandatory water conservation program for all, including existing, basin water users. [Proposed s. 281.343 (4b) (a) 4. and (e).]

- The regional review section provides that the parties agree that the protection and integrity of the Great Lakes-St. Lawrence River basin ecosystem must be the overarching principle for reviewing proposals subject to regional review, recognizing uncertainties with respect to, among other things, demands that may be placed on basin water, including groundwater. [Proposed s. 281.343 (4h) (a) 4.]
- In the exception to the prohibition on diversions for communities in straddling counties, a diversion proposal must satisfy numerous conditions, which include meeting the exception standard, maximizing the portion of water returned to the source watershed as basin water and minimizing the surface water or groundwater from outside the basin. In addition, substantive consideration will also be given to whether or not the proposal can provide sufficient scientifically based evidence that the existing water supply is derived from groundwater that is hydrologically interconnected to waters of the basin. [Proposed s. 281.343 (4n) (c) 1. b. and 2.]
- The management and regulation of new or increased withdrawals and consumptive uses section provides that each party, within five years of the compact's effective date, must create a program for this management and regulation by adopting measures consistent with the decision-making standard. Each party must set threshold levels for the regulation of new or increased withdrawals in order to, among other things, ensure that withdrawals overall will not result in significant impacts to the waters and water dependent natural resources of the basin. This section further provides that the parties intend programs for new or increased withdrawals and consumptive uses to evolve as may be necessary to protect basin waters. [Proposed s. 281.343 (4p) (a) and (c).]
- The decision-making standard section provides that proposals for new or increased withdrawals and consumptive uses must be declared to meet this standard and may be approved only if certain criteria are met. These criteria include that the proposed use is reasonable, based on consideration of a number of factors including 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. [Proposed s. 281.343 (4r) (e) 5.]
- The assessment of cumulative impacts section directs the parties to collectively conduct within the basin, on a lake watershed and St. Lawrence River basin basis, a periodic assessment of the cumulative impacts of withdrawals, diversion, and consumptive uses from the waters of the basin every five years or each time the incremental basin water losses reach 50,000,000 gallons per day average in any 90-day period in excess of the quantity at the most recent assessment, whichever comes first, or at a party's request. This assessment must, among other things, give substantive consideration to climate change or other significant threats to basin waters, and consider adaptive management principles and approaches, recognizing, considering, and providing adjustments for the uncertainties in, and evolution of, science concerning the basin's water resources, watersheds, and ecosystems. [Proposed s. 281.343 (4z) (a) (intro.), 2., and 3.]

- The additional provisions section specifies that nothing in the compact must be construed to affect, limit, diminish, or impair any rights validly established and existing as of the compact's effective date under state or federal law governing withdrawal of waters of the basin. [Proposed s. 281.343 (8) (a).]

Discussion

The term “waters of the basin” or “basin water” is not used in all provisions in the compact which refer to water. Throughout the compact, a variety of terms are used to refer to Great Lakes water, such as “basin,” “source watershed,” “water,” and “waters of the basin” or “basin water.” Although the compact uses different terms, the text of the compact is a coherent document because the reader can, in general, look to the definitions of each term to determine the meaning of the term that is used in a particular section of the compact. For example, in the exception to the prohibition of diversions for straddling communities, one of the criteria to qualify for the exception is that all water withdrawn from the basin must be returned, either naturally or after use, to the source watershed less an allowance for consumptive use. [Proposed s. 281.343 (4n) (a) 1.] An additional example is the baseline determination, which provides that for all purposes of the compact, volumes of diversion, consumptive uses, or withdrawals of water set forth in the lists created by each party must constitute the baseline volume. [Proposed s. 281.343 (4t) (b) 2.]

Another consideration is that the definition of tributary groundwater could create potential ambiguities or conflicts in the text of the compact. In particular, where “waters of the basin” or “basin water” is used in the compact for regulatory purposes, it is unclear how defining waters of the basin to include the new definition of tributary groundwater may affect these regulations, given the compact's directive that the surface water divide be used to manage and regulate new or increased consumptive uses and withdrawals. [Proposed s. 281.343 (4t) (e).]

For example, proposals for new or increased withdrawals and consumptive uses must meet the decision-making standard and may be approved only if certain criteria in this standard are met. One of the criterion is whether the proposed use is reasonable based on consideration of, among other things, 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. [Proposed s. 281.343 (4r) (e) 5.] If the compact is amended to include the definition of tributary groundwater, then it appears that the “adverse impacts” analysis may need to be more expansive than if waters of the basin remain as it is currently defined. The addition of the proposed tributary groundwater definition in the compact appears to require the adverse impacts analysis to include adverse impacts to groundwater between the surface water and groundwater divides. However, this interpretation conflicts with the compact's directive that the surface water divide be used to manage and regulate new or increased consumptive uses and withdrawals.

Another example of a potential conflict between the proposed definition of waters of the basin and regulatory provisions of the compact, may be in the provision regarding the exception to diversions for straddling communities. This exception provides that a diversion proposal must satisfy numerous conditions, which include maximizing the portion of water returned to the source watershed as basin water and minimizing the surface water or groundwater from outside the basin. [Proposed s. 281.343 (4n) (a) 1. c.] The term “diversion” is defined in the compact to mean a transfer of water from the basin

into another watershed, or from the watershed of one of the Great Lakes into that of another. [Proposed s. 281.343 (1e) (h).] It is unclear how the condition of maximizing the portion of water returned to the source watershed as basin water, which includes tributary groundwater, relates to a proposal to bring water from one watershed into another or move water between watersheds and to the directive in the compact that new or increased diversions are managed and regulated by the surface water divide.

If the committee chooses to adopt the tributary groundwater definition, then it should consider whether it wishes to address these potential conflicts.

Protection of Existing Rights Under the Compact

The *Tributary Groundwater* paper notes the compact provision which specifies that nothing in the compact shall be construed to affect, limit, diminish, or impair any rights validly established and existing as of the compact's effective date under state or federal law governing withdrawal of waters of the basin. [Proposed s. 281.343 (8) (a).] In interpreting the meaning of "existing rights," it is helpful to look to existing federal and state statute and case law to determine what existing rights are established or limited. For example, under the high capacity well statute, a high capacity well approval issued under current law or s. 281.17, 2001 Stats., remains in effect unless the Department of Natural Resources (DNR) modifies or rescinds the approval because the well or its use is not in conformance with standards or conditions applicable to the approval. [s. 281.34 (7), Stats.] As such, existing rights to pump water under a high capacity well approval will continue until DNR changes or revokes the approval. A more detailed analysis of existing rights would depend on the specific fact situation and approvals involved.

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