
TO: Dan Duchniak - Waukesha Water Utility
FROM: John Clancy
CC: Art Harrington
DATE: December 6, 2006
RE: Amendment to Clarify that Water Resources Development Act Covers Tributary Groundwater

I. Introduction.

This memorandum describes a recommended amendment to the draft legislation to enact the Great Lakes-St. Lawrence River Basin Water Resources Compact. This amendment can be considered as an alternative to the tributary groundwater amendment distributed to the Legislative Council Special Committee on the Great Lake Water Resources Compact at the November 2nd meeting. However, the tributary groundwater amendment could also be adopted by the committee.

The intent of the amendment is to make no substantive changes to the proposed compact. The amendment makes no changes to the compact bill's provisions regarding regulation of new or increased diversions. Rather, it adds provisions clarifying the application of the Water Resources Development Act (WRDA) in Wisconsin. The amendment clarifies that WRDA covers tributary groundwater. In the section of the draft compact legislation that requires the state to list existing withdrawals of Great Lakes water, the amendment directs the Department of Natural Resources to include the approval dates and capacities of withdrawals and associated diversions of tributary groundwater, including the withdrawals of the City of Waukesha and the City of New Berlin.

WRDA grandfathers diversions that existed on its effective date. In accordance with the agreement of the Great Lakes Governors, the proposed compact bill already recognizes and protects pre-compact rights, such as those established under WRDA or prior to WRDA. See Section 281.343(8)(a)1.¹

In effect, communities that diverted Great Lakes tributary groundwater prior to the effective date of WRDA may continue to divert their authorized capacities of Great Lakes water

¹ Section 281.343(8)(a)1. provides:

(8) ADDITIONAL PROVISIONS. (a) *Effect on existing rights.* 1. Nothing in this compact shall be construed to affect, limit, diminish, or impair any rights validly established and existing as of the effective date of this compact under state or federal law governing the withdrawal of waters of the basin.

under both WRDA and the proposed compact. Switching from groundwater to surface water would not alter that right.

II. Proposed Amendment Language.

A. Proposed Statutory Change. The proposed amendment would amend Section 281.343(4t)(b) as follows:

281.343(4t) – (b) *Baseline.* 1. To establish a baseline for determining a new or increased diversion, consumptive use, or withdrawal, ~~each party shall develop either or~~ the Department of Natural Resources shall develop within six months of the effective date of this subsection and again within six months of the effective date of the Great Lakes-St. Lawrence River Basin Water Resources Compact, both of the following lists ~~for the party's jurisdiction:~~

a. ~~A list of existing withdrawal approvals as of the effective date of the compact and associated diversions, including the dates of the approvals, from any surface or groundwater that would naturally flow toward the Great Lakes in the absence of human activity, including all withdrawal approvals east of the basin surface water divide and all groundwater withdrawals, including the withdrawals of the City of Waukesha and the City of New Berlin, from the deep sandstone aquifer west of the basin surface water divide but east of the basin deep groundwater divide.~~

b. ~~A list of the capacity withdrawal and diversion capacities of existing systems as of the dates of the withdrawal approvals and as~~ of the effective date of this ~~the~~ compact. The capacity of the existing systems ~~should~~ shall be presented in terms of withdrawal capacity, treatment capacity, distribution capacity, or other capacity limiting factors. The capacity of the existing systems must represent the state of the systems. Existing withdrawal and diversion capacity determinations shall be based upon approval limits or the most restrictive capacity information.

2. ~~For all purposes of this compact, the compact and any diversion or exportation determination under the Water Resources Department Act of 1986, 42 U.S.C. Section 1962d-20,~~ volumes of diversions, consumptive uses, or withdrawals of water set forth in the lists prepared by ~~each party~~ the Department of Natural Resources in accordance with ~~this paragraph~~ subsection 1. shall constitute the ~~baseline volume~~ authorized baseline volumes as of the effective date of the compact or as of the dates of the withdrawal approvals, as applicable.

3. The lists shall be furnished to the regional body and the council within one year of the effective date of ~~this~~ the compact.

B. Proposed Non-Statutory Change. The following non-statutory provision would be created:

Section 281.343(4t)(b) takes effect on the day after publication.

III. Discussion of Proposed Modifications.

The following modifications are proposed to Section 281.343(4t)(b)1. for the following reasons:

- Change reference from “each party” to Department of Natural Resources. The draft legislation, which would implement the compact in Wisconsin, cannot require that states other than Wisconsin develop baseline lists. Accordingly, the modification proposes to state that the Department of Natural Resources (“DNR”) as opposed to “each party” shall develop the list of existing withdrawal approvals.
- Require DNR to create the lists under both Sections 281.343(4t)(b)1.a and b. The list identified in Section 281.343(4t)(b)1.a. does not provide for an identification of the *capacities* of the existing withdrawal approvals. Accordingly, that list would not be useful for determining whether increased diversions, consumptive uses, or withdrawals occur. Likewise, the list of the capacity of existing systems identified in Section 281.343(4t)(b)1.b. does not necessarily require that those existing systems be *approved*. Accordingly, that list would not be useful for determining approved withdrawal capacities. For these reasons, the proposed modification requires that DNR create lists that contain both approvals and capacities.
- Add requirement to list dates of approved withdrawals and associated diversions and capacities as of those dates. The proposed modification requires identification of the dates of the approvals and determination of the capacity of the systems as of the date of the approvals as well as the effective date of the legislation, so that there will be a clear record of when those approvals occurred and their related capacities, and so that DNR can develop the initial list of withdrawal approvals within a reasonable period of time after enactment of the legislation. This is especially important in light of the fact it is unclear when the compact will be made effective.

The following modifications are proposed to Section 281.343(4t)(b)2. for the following reasons:

- Reference to the Water Resources Development Act added. A reference to WRDA is added, so that the existing authorized baseline volumes can be used for determinations under that act until the compact is fully implemented.
- Clarify that the Water Resources Development Act covers tributary groundwater and surface water. The compact and the draft legislation provide that the basin includes tributary groundwater as well as surface water. See e.g., Section 281.343(1)(x) (defining waters of the basin or basin water to include tributary groundwater). The proposal clarifies that the WRDA similarly covers tributary surface and groundwater, and the proposal provides a mechanism for determining the authorized baseline rights under the act. As discussed above, WRDA and pre-WRDA rights are already recognized and protected by the compact and the draft legislation. See Section 281.343(8)(a)1.

The following modification is proposed to Section 281.343(4t)(b)3. for the following reason:

- Replacement of “this compact” with “the compact”. Since the implementing legislation is not the compact itself, the proposed modification replaces “this compact” with “the compact.”

JLC:alm
mw1241213_+2