Mary Lazich

Wisconsin State Senator
Senate District 28

December 11, 2006

Senator Kedzie,
Room 313 South
State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Dear Senator Kedzie,

Thank you for this opportunity to address the Committee about the proposed definition of tributary groundwater and my concerns about the Compact.

POLICY ISSUES

The Great Lakes – St. Lawrence River Basin Water Resources Compact implicates conflicting public policy issues. The Great Lakes represent approximately one fifth of the world's freshwater supply. The United States' growing population has just exceeded 300 million people. It is undisputed that freshwater is a valuable resource that must be preserved for future generations. Some people may argue that water should not be removed from the Great Lakes or from the Great Lakes Basin. However, it is also undisputable that freshwater must be used now to meet current needs. For example there are communities in southeastern Wisconsin where the population and other demands on water are growing, but the sources of water are becoming depleted and contaminated. Those communities are facing the prospect of having to drill expensive new wells in search of water. A more economically efficient alternative for these communities, and the taxpayers, would be to access Lake Michigan surface water that is not contaminated.

ONE STATE VETO

Under existing law, the 1986 WRDA, one state's governor can veto an application for a diversion of Great Lakes water. 42 USC §1962d-20(d). The parties who negotiated the Compact could have remedied this twenty year old flaw but did not. Instead, it still exists in the Compact in relation to some diversions. Allowing one state to veto an application gives one state power out of proportion with that state's interests in the

State Capitol • PO Box 7882 • Madison, WI 53707-7882 • 1-800-334-1442 • 608-266-5400 • 608-267-6790 fax
Email: sen.lazich@legis.state.wi.us Web: http://www.legis.state.wi.us/senate/sen28/news/

Basin's resources. Giving dictatorial power to one state is contrary to this nation's democratic principle of majority rule. The concept of majority voting is not alien to the Compact e.g. §281.343(8)(g)2 provides that the "compact may be terminated at any time by a majority vote of the parties."

CONGRESSIONAL AUTHORITY

To be effective the Compact must be ratified through concurring legislation by the 8 states "and consented to by the U.S. Congress." If the Compact were adopted by all eight states and concurred in by Congress, could Congress pass federal law that would conflict with the Compact and threaten any protections the states sought to secure by adopting the Compact? The answer appears to be "yes, but." Generally, Congress can neither compel states to enter interstate compacts nor unilaterally impose specific language, but it has authority over compacts in two ways.

First, under Art. I, §10, cl.3 of the U.S. Constitution, "No state shall, without the consent of Congress enter into any agreement or compact with another state, or with a foreign power[.]" Congressional consent is needed only for compacts that affect a power delegated to the Federal government or alter the political balance in the federal system. Virginia v. Tennessee, 158 U.S. 267 (1895). Congress could withhold its consent to a compact unless it included certain provisions. Congress cannot enact incentives that are unduly coercive and compel states to enter into unwanted compacts. For example in New York v. United States, 505 U.S. 144 (1992) the U.S. Supreme Court invalidated compact language that was too coercive and violated the Tenth Amendment by treating the states as agents of the federal government. Once given, congressional consent may generally not be withdrawn or amended. The Supreme Court has not directly addressed this point, but the U.S. Court of Appeals for the District of Columbia held that an unlimited power to alter or repeal congressional consent would challenge the permanency of state authority to act and "would be damaging to the very concept of interstate compacts." Tobin v. United States, 306 F.2d 270, 273 (D.C. Cir. 1962). Subsequent courts have made the same conclusion about the limits of the congressional consent power. See, e.g., Mineo v. Port Authority of New York-New Jersey, 779 F.2d 939 (3rd Cir. 1985). In at least one compact, Congress expressly reserved the power to subsequently withdraw its consent; however, a court has not ruled on it.

Second, after consenting to a compact Congress can enact substantive legislation related to the compact, even significantly limiting or arguably impairing the compact's practical effect. See Arizona v. California, 373 U.S. 546 (1963). Thus, although Congressional approval of an interstate compact binds the party states to the terms of the agreement, even limiting future state legislatures, it does not similarly bind Congress or prevent future congresses from legislating in an area regulated by compact. Except for the few compacts to which the federal government is a party, congressional consent does not alone create a binding agreement between the states and the federal government. Thus, Congress may not unilaterally impose compacts or compact terms on the states (and may neither withdraw nor amend its consent to a compact once given), but it may be able to pass legislation to limit or override it.

Congress has the final legal authority to interfere with the operation of a compact. The ultimate check on Congress is political but unfortunately the eight states party to the Great Lakes Compact have a minority of seats in Congress. However, the Council of State Governments' November 8, 2006 letter opined that "experience suggests that Congress rarely does interfere with compacts to which it has consented.

LITIGATION

If the Compact is adopted by the states there will be litigation over the meaning of language and its application. The Compact gives states some flexibility in a few instances, especially regarding implementation of the Compact. Although this flexibility may seem to allow states to plan for their individual needs, it also creates uncertainty and conflicts and thus is likely to result in litigation. Also, the different definitions of tributary groundwater that have been expressed by Committee members strongly suggest that question will eventually result in litigation. Even if the courts uphold the Committee's definition, tens of thousands of dollars in legal fees will have been spent by the states and municipalities throughout the region.

FISCAL IMPACT

In Wisconsin a Fiscal Estimate for the potential legislation has not yet been prepared. Compact legislation has been introduced in Ohio and a Fiscal Note was done. The Note predicted the Compact would generate no revenue for the state or local governments. However, the Compact was projected to impose a potential increase in administrative costs to assist in implementing the Compact and Council activities. Courts were anticipated to incur minimal expenditures to adjudicate cases related to the Compact, but these expenditures are likely to be offset by revenues from litigants such as court costs and fees.

NO OTHER STATE HAS YET ADOPTED THE COMPACT

The governors of the eight states and the premiers of the two Canadian provinces signed the Compact in 2005, but no state has yet adopted the Compact. Legislation to adopt the Compact has been introduced in both legislative houses in New York, Ohio, and Illinois. It has gone the farthest in New York, where the Assembly passed it in June, 2006 but it has languished in the Senate Rules Committee since then.

Other states' reluctance to consider and adopt the Compact indicates that it is not of importance to their citizens and legislators. The fact that it will take several years for the other states to adopt the Compact means it is not urgent for Wisconsin to adopt the Compact. Wisconsin should wait and learn from other states.

PUBLIC TRUST DOCTRINE

Adopting the Compact will have the consequence of extending the Public Trust Doctrine to all waters, including groundwater. This result has been recognized by the Municipal Drinking Water division of the Municipal Environmental Group and Midwest Environmental Advocates. Specifically, the draft legislation at §281.343(1m)(a)1 reads "The waters of the basin are precious public natural resources shared and held in trust by

the states." Under current law, the Public Trust Doctrine has applied to only navigable waters, not groundwater. Currently, a property-owner can use groundwater unless the State explicitly forbids it.

Subjecting groundwater to the Public Trust Doctrine would have two negative consequences. It would place an affirmative duty on the State to prohibit the use of groundwater unless the State explicitly authorizes it. More ominously, a private person could sue a property owner for using the groundwater. Already citizens have used the Public Trust Doctrine to restrict or stop acts done by the State regarding navigable waters, alleging they violated the Public Trust Doctrine. Gillen v. City of Neenah, 96-2470 ¶¶40-57; 219 Wis.2d 806; 580 N.W.2d 628 (1998).

It may be possible to avert this problem by amending the Compact to remove the words "and held in trust." Unfortunately, Legislative Council Memo 4 on Party State Flexibility in Implementing the Great Lakes-St. Lawrence Basin Water Resources Compact did not identify this provision as one that could be modified by the states, probably because it is arguably more substantive than implementing.

CHANGES TO COMPACT

If the Compact is adopted by all eight states and concurred in by Congress, could the party states change it? For better or for worse, the answer is "yes" but it would probably take as much time as the initial approval of the Compact because under §281.343(8)(e) it would remain in effect until the amendments were adopted by the states and consented to by Congress. For example, the Compact was signed in 2005, but several of the states have not yet even introduced legislation to adopt it.

Also, the Compact is only a threshold because §281.343(8)(d) provides that "Nothing in this compact shall be construed to repeal, modify, or qualify the authority of any party to enact legislation or enforce any additional conditions and restrictions regarding the management and regulation of waters within its jurisdiction."

IMPLEMENTATION

Addressing the details of implementing the Compact almost presupposes that the Compact will be adopted, but the fact that these issues are being raised shows that it is too soon to predict the Compact will be adopted.

The most important issue of implementation, the balance of power between the governor and the legislature when implementing the Compact, is not addressed in Wisconsin preliminary draft LRB-0058/P1. A committee of the Ohio House of Representatives just recommended passage of the Compact (Substitute House Bill 574). The Ohio bill spells out the Legislature's role in implementing the Compact. The Ohio Governor must obtain authorization from the state legislature in the form of a resolution or an enacted bill before casting a vote under the Compact regarding changing the standard of review and decision. If the Council changes the standard of decision and review, it does not become effective unless and until the change is approved by the state legislature. Also, the governor and the Department of Natural Resources cannot adopt rules or programs about the use, withdrawal, consumptive use, or diversion of water unless the legislature passes legislation authorizing the change.

As of what date should the boundaries of "Communities within a Straddling County" and "Straddling Communities" be determined? §281.343(1e)(fm) defines a county as having the boundaries as of December 13, 2005. Under §281.343(1e)(t) a Straddling community is determined by its "corporate boundary as of the effective date of this compact. §281.343(9)(d) "Effective date and execution" provides that the Compact will become binding and effective when it has been ratified by the eight states and consented to by Congress. The effective date will not occur for several more years so those future boundaries are the ones that will apply for purposes of the Compact. The Compact lacks a date for determining the boundaries of only a "Community within a Straddling County" §281.343(1e). Because Communities within Straddling Counties are entitled to an exception from certain requirements of the Compact, as are Straddling Communities, it would be equitable to use the same date for determining boundaries, i.e. the Compact's effective date. Moreover, the effective date should be used, because until then the Compact will not be the law anyway.

Again, thank you for the opportunity to express my position to the Committee. If you have questions, comments, concerns, or advice, please contact me.

Sincerely,

Mary Lazich

Mary Lazich
State Senator
Senate District 28

cc: Members of the Special Committee on Great Lakes Water Resources Compact,
Chief of Research Services Stolzenberg
Senior Staff Attorney Letzing: