



METROPOLITAN
BUILDERS
ASSOCIATION

MEMO

To: Special Committee on the Great Lakes Water Resources Compact

From: Matt Moroney, Executive Director

Date: December 6, 2006

Re: Comments and Concerns Regarding the Compact

General Comments:

In response to Senator Kedzie's request to submit all issues concerning the Great Lakes Water Resources Compact, I am submitting this memorandum which includes a lengthy attachment that attempts to identify areas of concern for the homebuilding industry, specifically the homebuilding industry in Southeastern Wisconsin. The list is intended to be exhaustive, but quite frankly every time one reads the compact new questions emerge. I do believe however that the attached list covers the major issues.

It is important to stress that the homebuilding industry does share the sentiment of all of the Special Committee members that water, especially Great Lakes Water, is an important resource that should not be wasted and should be carefully monitored and managed, if necessary, to insure adequate supplies of water for consumption, recreation, transportation, and a healthy ecosystem. In our opinion, the Compact fails to address major environmental threats to the lake that may occur from invasive species like the Asian Carp entering the lakes through the Chicago diversion. These environmental threats pose a much more immediate and pending harm to the Great Lakes than water diversions to straddling counties.

The homebuilding industry does not believe the case has been made that it is necessary to manage the quantity of water being utilized from the Great Lakes to the extent that the compact does at this time. The compact is far too limiting in its standards and approval process for water use by straddling counties. Mr. Dahl, U.S. Army Corps of Engineers, indicated in his presentation that the Army Corps does not even factor into its forecasting of lake levels the municipal use and other "minor" diversions. Such impacts are so trivial to other factors like evaporation and temperature. As a result, it is our belief that a little more flexibility for water diversions in states that border the Great Lakes is desirable for continued economic growth.

The overall goal of preventing water being diverted to dry states is a commendable goal and a goal that the homebuilding industry wholeheartedly supports. However, the compact is far too limiting on Wisconsin residents, usurps state autonomy to accomplish Wisconsin objectives, and reaches into water quality issues when quantity was the original reason for the Compact. I have heard several arguments that being located next to the Great Lakes will become an economic advantage for Wisconsin in the years to come. However, if the water cannot be utilized for economic growth, being located next to the Great Lakes will put Wisconsin at an economic disadvantage.

Technical Issues:

1. **Definition of Environmentally and Economically Feasible Water Conservation Measures** Page 6, Lines 4 to 13 - It appears that the environmentally sound component also is used to determine the economic feasible component of this definition because of the inclusion of environmental costs in calculating feasibility. The feasible definition also includes energy impacts and other appropriate factors, which leaves a lot open to interpretation and potential disagreement. Economically feasible is also a very high standard that ignores traditional economic analysis which focuses on objective criteria of “cost effectiveness and the least costly alternative”. This focus on a proposal being economically feasible could raise costs of water use substantially.
2. **Lack of a Definition of Tributary Groundwater** Page 9, Line 12 - The term tributary groundwater is used without any definition. This has a Wisconsin impact because of the geology of SE Wisconsin. This term needs to be defined.
3. **Jurisdiction of the Council** Page 14, Lines 1 to 5 – Grants the council ability to act outside of the basin if action is necessary “or convenient” to implement its responsibilities in the basin. This action is subject to the consent of the jurisdiction wherein it proposes to act. If passed into law by the State of Wisconsin, the legislation should clearly indicate that such action by the Council is not desired in Wisconsin.
4. **Ability to Revise the Standard of Review** Page 15, Lines 11 to 14 - This provision gives the Council the authority to revise the standard of review with unanimous vote of all Council members in accordance with each party’s respective statutory authorities and applicable procedures. If passed, legislation should clearly indicate that the procedure to revise the standards includes action by the Wisconsin Legislature and not a rulemaking process or unilateral action by the Governor.
5. **Ability to Promulgate Rules and Regulations** Page 16, lines 6 to 12 – Grants the Council (it appears by majority vote) the ability to promulgate and enforce rules to implement and enforce the compact after notice and a hearing. This usurps state autonomy. If passed, legislation should clearly indicate that the Wisconsin Legislature would need to approve any rule or regulation that is not administrative in nature. Substantive acts or material changes would require legislative action.
6. **Water Conservation and Efficiency Programs** Page 19 to Page 20 – The Council will identify water conservation objectives that are to be utilized within the basin. Several goals are listed including “restoring the hydrologic ecosystem integrity of the basin; retaining the quantity of surface water and groundwater of the basin; sustainable use of the water; and reduction of water losses”. Some of these goals may contradict one another if the groundwater divide is not the same as the surface water divide. It also indicates that these goals could be mandatory state wide. This would again usurp state autonomy and should be resisted from being made statewide goals. The Council’s ability to establish policy for a State should be very limited.
7. **Cumulative Effects and Climate** Page 20, Line 22 -- This section indicates that conservation programs need to adjust to new demands and the potential impacts of cumulative effects and climate. “Cumulative effects” is a dangerous standard to analyze. At what point is the tipping point where a cumulative effect is viewed as detrimental to the ecosystem? It would appear from the presentation by the Army Corps that this tipping point is far off for municipal uses of water. Why then have something in this document that is subjective and very controversial? There is also a concern about this document being utilized to implement air regulations and other similar regulations as a result of this reference to climate, which is an undefined term. If rules are promulgated as a result of climate concerns, this would place Wisconsin’s industries at a national and global economic disadvantage. Regulations to protect the climate that are adopted only by the Great Lakes States would have virtually no impact on the global climate.
8. **Time Limit on Opportunity to Comment Needed** Page 21, Line 16 – What is a sufficient opportunity to provide comment? A specific day limitation is needed. Time is possible lost economic opportunity. On the next page it indicates a goal of 90 days, which is only a goal. A hard and fast timeline is needed. There are requirements for notices, hearings, etc. (page 23) later in the document. It is our belief this goal would never be met if it is just a goal. A hard and fast time line needs to be established.
9. **Majority of Members Can Request a Regional Review** Page 22, Lines 20 to 24 – Grants a majority of members the ability to request a regional review of a “regionally significant or potentially precedent setting proposal”. These terms are very broad and leave a lot to interpretation. It appears this regional review can occur for proposals within the basin where the state has sole regulatory authority for approval. This provision really opens the door for the Council to even further usurp local control.

10. **Requests for Regional Review** Page 23, Lines 10 to 12 – Does Wisconsin want to ever request a regional review of an application when it is not required? Please note the recent experience of comments from Michigan on New Berlin’s request for Lake Michigan Water. Legislation may want to limit this ability.
11. **Diversions Used for Only Public Water Supply Purposes** Page 27, Line 1 and 2 and Page 29, Lines 5 and 6 – Is this the policy that Wisconsin wants to implement? What about diversions for electric generation? What about for a large industry user which would mean jobs for the region? Illinois is allowed a very large diversion where the primary purpose is not a public water supply. Do we want to foreclose options that might be necessary in the future?
12. **Governor’s Veto Authority** Page 28, Lines 24 and 25; Page 29 Lines 19 and 20 – One Governor has the ability to veto. Giving one Governor, who is not elected by the citizens of Wisconsin, the ability to veto a diversion is not reasonable. Supporters of the one-governor-veto provision will indicate that there at least standards and an alternative dispute resolution mechanism that is preferable to current practices under WRDA. However, upon closer review of the standards it appears that plausible arguments can be made to support and to oppose diversions in every situation. As we have seen in the committee, an answer can vary depending on how the question is asked or from what perspective it is answered. The science is simply not precise. In addition, it has yet to be determined how the alternative dispute resolution will work. See my comments regarding this section.
13. **Difficult Standards to Meet for Diversions in Straddling Counties** Page 29 –
 - a. Water shall be used solely for the public water supply purposes of the community that is “without adequate supplies of potable water”. This later potable water requirement could be a hurdle and subject to much debate during review.
 - b. No reasonable water supply alternatives exists “*within the basin in which the community is located*”, including conservation. What happens if there are feasible alternatives in neighboring communities, but neighboring communities don’t cooperate? This provision is very, very limiting and very difficult to meet. Costs in this standard is not a factor. If an alternative exists, no matter the cost, it appears that you would not be able to divert water from the Great Lakes.
 - c. There is also a strong caution on lines 15 to 16 that seems to indicate that there is a strong preference against this type of diversion. Once again, the Governor veto is problematic, especially when combined with the standard of review and this very strong caution within the document. The caution further states that the diversion should not be authorized “*unless it can be shown that it will not endanger the integrity of the basin ecosystem*”. Whose definition of the integrity of the basin ecosystem? This is a very tough threshold to meet depending on how you interpret it and very broad in general. This threshold also seems to place a burden of proof on the party seeking the diversion.
 - d. There is also a requirement that sufficient scientifically based evidence be produced that the existing water supply is derived from groundwater that is hydrologically interconnected to basin waters. This is also seems to place the burden of proof on the party seeking the diversion. As the committee has seen, the answer can depend on how you ask the question. Science doesn’t seem to agree on questions of connectiveness.
14. **Exception Standard Places Even Further Restrictions on Diversions** Page 30.
 - a. It must be shown that the need for all or part of the diversion can not be avoided by conservation. Who determines this? What is an acceptable standard of conservation? Is it a per person standard of water use?
 - b. The exception standard also requires that “quantities be limited to reasonable amounts for the purposes for which it is proposed”. Will this be read to stop annexations and future growth of a community? If the diversion is used to solve current water issues will a restriction be placed on a community to limit its growth.
 - c. Water withdrawn must be returned except for that which is consumed. Ideally, groundwater outside the basin would not be used in return flow. We would generally agree with this principle.
 - d. No cumulative adverse impacts to quantity or quality of waters . . . “*with consideration given to the potential cumulative impacts of any precedent-setting consequences with the proposal.*” If all of the scientific standards can be met, there is still the opportunity to veto the diversion based on precedent setting consequences.
 - e. Must incorporate economically feasible water conservation measures. Again, the focus is on feasibility and not economically practical.
15. **Standard of Review for Withdrawn or Consumptive Use Water** Page 32; lines 11 to 14 -- Two standards are troublesome.

- a. The withdrawal or consumptive use will be implemented to “*result in no significant individual or cumulative adverse impacts to the quantity or quality of the waters and water dependent natural resources and the applicable water shed*”. The problem with this standard is that it creates ambiguity as to the scale of the impacts that would preclude withdrawal approvals. Is the significance of the impacts to be judged based on the impacts upon the overall Source Watershed (which is defined as the drainage area of each Great Lake) or can measurable impacts on flow within just a few hundred feet of stream be enough to preclude a withdrawal. Clarifying this provision to note the “applicable water shed as a whole” and the basin “as a whole” is essential.
 - b. Economically feasible water conservation measures are required. Once again economically feasible is not the same as cost effective, which could place Wisconsin industries at a competitive disadvantage.
16. **Surface Water Divide to Be Used to Determine the Area of the Basin** Page 34 Lines 19 through 21 - This provision explicitly indicates that the surface water divide will be used to determine the basin waters. This provision prohibits any arguments about the location of the groundwater divide being utilized to determine straddling communities or straddling counties.
 17. **Ability to Change the Standard of Review** Page 37 and Page 38 - This provision requires continued review of the standards if incremental losses reach 50,000,000 gallons per day average during any 90 day period from the last assessment, every 5 years, or the request of one of the parties, whichever occurs first. If enacted as written, this language will represent wholesale delegation of regulatory authority by the Legislature to what amounts to unelected staff members representing the governors of the 8 states. A requirement that the legislature must approve any new standards needs to be made clear.
 18. **Role of Climate** Page 38 lines 4 through 7 – This provision seems to give much more weight for climate considerations to become an even larger factor in the review of the standards. The scientific community can’t even agree on climate issues, so why should this become a larger factor.
 19. **Alternative Dispute Resolution Services** Page 40 and 41 --The alternative dispute resolution section is extremely vague. The decision on how this would proceed is yet to be determined by the Council. The main questions would be who will conduct the alternative dispute resolution? Who would have the burden of proof, if anyone? In a veto situation, it would ideally fall to the party issuing the veto. However, it appears by the language of the standards of approval that the burden would be on the submitting party. Is there a standard of proof being required? What will be the standard of proof? Beyond a reasonable doubt, preponderance of the scientific evidence, more likely than not? How quickly will this process occur? Time is likely lost economic opportunity.
 20. **Aggrieved Persons Ability to File Suit** Page 41 – An aggrieved person is not defined and this section seems to allow the ability of almost anyone to file lawsuits to challenge a decision.
 21. **Common Law Water Rights** Page 43 -- There is a reference to common law water rights. What are common law water rights in Wisconsin? Are these rights the same in all of the states and provinces?

Questions:

1. What communities in the Great Lakes Region have diversions already in place; what is the amount of water being diverted for each of these communities; and how much of the water is being returned to the basin?
2. What communities in Wisconsin can be identified to be located in Straddling Counties that might be eligible for Great Lakes water and what is their current water usage?
3. Are there other large water users in the Straddling Counties and what is the water usage?
4. It appears that the any such diversions would have a fractional impact on the Great Lakes if return flow is required. Why should the compact be so limiting on Straddling Counties if this is the case? What percentage of possible water being diverted are we really talking about? What is the percentage after a return flow is required?
5. Can we have a map showing the surface divide, straddling counties, and, if possible, the groundwater divide for each state and Canadian province.
6. Are there any protections in place to ensure that the **diverted water into** the basin continue into the future? Or is this being left to other authorities? Specifically, are the large diversions from Canada into Lake Superior guaranteed into the future?
7. It appears that an imminent and potential substantial threat to the basin’s ecosystem is on the horizon from an invasive species called the Asian carp. Why in this document is the issue about protecting the lakes from this invasive species, as well as other invasive species that can decimate

the ecosystem, not a part of the compact. It appears that there is no requirement for the State of Illinois to address this issue as a condition of their continued, very large diversion.

8. How are annexations and efforts for regional consolidation of services effected by the compact? In approving a diversion, the council can establish conditions. Will a standard condition be adopted to limit further growth by a community?
9. It appears that even if the compact is enacted, it doesn't necessarily prevent Congress from overriding the compact. Is this understanding correct?