



WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

Great Lakes Compact Law (2007 Wisconsin Act 227): Summary of the Compact

2007 Wisconsin Act 227 (the “act”) contains Wisconsin's ratification of the Great Lakes-St. Lawrence River Basin Water Resources Compact (the “compact”). This memorandum summarizes the text of the compact, which is set forth in the act.

This memorandum is one of a series of memoranda summarizing Act 227. Other memoranda in this series address the following topics:

- IM-2008-03: *Executive Summary of the Act.*
- IM-2008-05: *New State Water Use Regulations.*
- IM-2008-06: *Water Supply Planning.*
- IM-2008-07: *Water Loss, Legislative Oversight, and Other Provisions.*
- IM-2008-08: *DNR Rule-Making.*

BACKGROUND

In general, a compact is basically an agreement among states to address a subject of common concern. Unlike some other compacts, a number of the provisions of the Great Lakes-St. Lawrence River Basin Water Resources Compact (the “compact”) must be implemented by further laws enacted by each of the member states. The compact sets the basic framework, and additional state laws or administrative rules are necessary to do the things that the compact requires. The compact gives the states broad choices in how to implement some of its provisions. For example, the compact allows states to determine the volume of water withdrawals from the Great Lakes basin that are the thresholds for state regulations. In other cases, the compact specifies regulatory requirements that a state may make more, but not less, restrictive.

THE GREAT LAKES-ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT

LEGISLATIVE DETERMINATION AND RATIFICATION

The act includes a legislative determination that it is in the interest of the state to ratify the compact. This determination also states that nothing in the section of the statutes containing the text of and ratifying the compact may be interpreted to change the application of the public trust doctrine under Wis. Const. art. IX, s. 1., or to create any new public trust rights. This determination is not part of the text of the compact, itself, but is set forth in this legislation.

The act states that the compact, as codified in the statutes, is ratified and approved, as implemented and interpreted in other statutory provisions summarized below. The version of the compact in the act is substantively the same as the version endorsed by the governors of the Great Lakes states on December 13, 2005.

FINDINGS AND PURPOSES

The compact sets forth a number of findings and purposes. These findings include that the “waters of the basin are precious public natural water resources shared and held in trust by the states;” and that the “parties have a shared duty to protect, conserve, restore, improve, and manage the renewable but finite waters of the basin for the use, benefit, and enjoyment of all their citizens, including generations yet to come.” As used in the compact and this report, a “party” is one of the eight Great Lakes states that is a party to the compact.

The stated purposes of the compact include that it is to facilitate consistent approaches to water management across the basin while retaining state management authority over water management decisions within the basin; to facilitate the exchange of data, strengthen the scientific information base upon which decisions are made, and engage in consultation of the potential effects of proposed withdrawals and water losses; and to promote an adaptive management approach to the conservation and management of basin water resources.

SCIENCE

The compact states 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. The compact also identifies specific elements of this strategy.

GREAT LAKES-ST. LAWRENCE RIVER BASIN WATER RESOURCES COUNCIL

The compact creates the Great Lakes-St. Lawrence River Basin Water Resources Council (the “council”) consisting of the governors of the Great Lakes states. A governor may designate an alternate to act in the governor’s absence and may appoint an advisor, who may attend all meetings of the council and its committees, but who does not have any voting power on the council. The compact also specifies how the council shall be organized and conduct its business, as well as establishing the council’s jurisdiction, status, immunities, and privileges.

The council oversees the implementation of the compact and has responsibilities that include identifying and reviewing water conservation and efficiency objectives, approving certain proposals that involve diverting water from the basin of one of the Great Lakes, and reviewing the parties' water management and water conservation and efficiency programs established under the compact.

A key component of the water use regulations in the compact is that most diversions allowed under the compact must meet the "exception standard" and withdrawals and consumptive uses exceeding state specified thresholds must meet the "decision-making standard." The compact specifies these standards and authorizes the council to revise them and other "reviews" outlined in the compact's water management and regulation provisions, after consultation with the provinces and upon unanimous vote of all council members, by regulation adopted after public notice and hearing and in accordance "with each party's respective statutory authorities and applicable procedures." The compact refers to these standards and reviews collectively as the "standard of review and decision."

The council may also promulgate and enforce other rules and regulations "as may be necessary for the implementation and enforcement of this compact." Regulations that do not revise part of the standard of review and decision require a simple majority vote of the council to be adopted.

PARTY POWERS AND DUTIES

The compact specifies that each party, within its jurisdiction, must manage and regulate new or increased withdrawals, consumptive uses, and diversions (i.e., a "proposal"), including exceptions, in accordance with the compact. No proposal subject to the compact may be undertaken by any person unless it is approved by the party within whose jurisdiction an application for the proposal is made. The compact calls this party the "originating party." Furthermore, no party may approve a proposal if the party determines that the proposal is inconsistent with the compact, the standard review and decision, or any implementing regulations.

If a proposal is subject to council or regional review, as described in the next section, the party may not approve the proposal unless it has first been submitted to and reviewed by either the council or regional body, or both, and approved by the council, as applicable.

REGIONAL REVIEW, PRIOR NOTICE, AND COUNCIL REVIEW OF PROPOSALS

The compact provides for review of some proposals by the "regional body." This body consists of the members of the council and the premiers of Ontario and Quebec, Canada. The compact sets forth the process for the conduct of a regional review, starting with notice from the originating party to the regional body, adoption of public participation procedures by the regional body, a technical review of the proposal by the originating party, and preparation of a declaration of finding by the regional body regarding the proposal. The declaration of finding is advisory to the originating party and, if applicable, the council. However, both the originating party and the council must consider it before making a decision on the proposal. The compact specifies that it must be the goal of the regional body to conclude a regional review no later than 90 days after it receives the notice initiating the review from the

originating party, unless the applicant or the originating party request a different review period.

These regional reviews apply to specific types of proposals for diversions, as described on page 6. The compact also authorizes a majority of the members of the regional body to request regional review of a “regionally significant or potentially precedent setting proposal.”

Separate from the regional review process, the compact establishes that, beginning no later than five years after the compact’s effective date, the originating party must provide all parties and provinces and Quebec and Ontario with notice and an opportunity to comment within 90 days on any proposal for a new or increased consumptive use averaging at least 5,000,000 gallons per day (GPD) in any 90-day period. Comments under this process must address whether or not the proposal was consistent with the standard of review and decision, and the originating party must provide a response to any such comment received from another party under this provision.

In addition to the above reviews, the compact makes two types of proposals for diversions subject to council review and approval. The diversions subject to council approval are new or increased large intrabasin transfers that result in a new or increased consumptive use averaging at least 5,000,000 GPD over any 90-day period and any size new or increased diversion providing public water supply in a “community within a straddling county,” as described below. For these types of proposals, council approval must be given “unless one or more council members vote to disapprove.”

REGISTRATION, REPORTING, AND WATER RESOURCES INVENTORY

The compact requires any person who makes a withdrawal of water from the Great Lakes basin that averages 100,000 GPD or more in any 30-day period, or who diverts any amount of basin water, to register with the state and provide information about the withdrawal or diversion. Persons who are required to register must annually report information about the monthly amounts of water withdrawn, diverted, or lost through consumptive use to the state.

Each state must also develop and maintain a water resources inventory for the collection, exchange, and dissemination of information about the water resources of the state, including their location, type, and quantity, and the use of the resources.

The compact requires the states to submit an annual report to a Great Lakes-St. Lawrence River water use database. The annual report is to contain the information gathered through registration, reporting, and the inventory.

REGULATION OF DIVERSIONS

A diversion is either the transfer of water out of the Great Lakes basin or the transfer of water out of the watershed of one of the Great Lakes into the watershed of another of the Great Lakes. The transfer of a product produced in the basin or watershed using waters of the basin is not considered to be a diversion. The compact generally prohibits new diversions and prohibits increases in the amount of diversions that exist when the compact takes effect. There are three exceptions to the prohibition on diversions, described below.

The compact also requires states to treat the removal of water from the Great Lakes basin in containers larger than 5.7 gallons as a diversion. The compact gives the states discretion to determine how to regulate proposals to remove water from the basin in containers of 5.7 gallons or less (i.e., bottled water).

Straddling Communities

The first exception to the prohibition on diversions allows the transfer of water to the part of a “straddling community” that is outside of the Great Lakes basin or outside of the source Great Lakes watershed. A “straddling community” is an incorporated city, town, or the equivalent thereof, that is partly within the Great Lakes basin and partly outside of the basin when the compact takes effect, and that is wholly within a county that is partly or completely within the basin.

The accompanying map shows the Great Lakes basins in Wisconsin. Straddling communities in Wisconsin are those communities that are partly within either the Lake Superior or Lake Michigan basin, and partly within the Upper Mississippi River basin. Kenosha, Portage, and New Berlin are examples of these communities.¹

The exception for straddling communities only applies if all of the diverted water is used to supply water to the public and if an amount of water equal to the amount diverted, less an allowance for consumptive use, will be returned to the Great Lakes basin (such as through a sewage system). A consumptive use is a use of water that results in less of the water being returned to surface water or groundwater than was withdrawn (due to evaporation, for example).

The proposal must maximize the amount of water that originated in the Great Lakes basin that is returned to the basin and minimize the amount of water that originated outside of the basin that is sent to the basin. Water from outside the basin used to meet this requirement must come from a water supply or wastewater treatment system that combines water from inside and outside of the basin and must be treated to meet water quality standards and to prevent the introduction of invasive species into the basin.

If the proposed new diversion or increase in an existing diversion to a straddling community would result from a new or increased withdrawal that averages 100,000 GPD or more in any 90-day period, the diversion must also meet the exception standard, described on page 9. A



¹ More detailed maps showing the locations of straddling communities and communities within straddling counties in Wisconsin are presented in Legislative Council Staff Memo No. 3 to Members of the Special Committee on Great Lakes Water Resources Compact, *Maps of the Great Lakes Basin*, Revised October 4, 2007. This Memo is posted on the website for this study committee at the Legislative Council’s website at: www.legis.state.wi.us/lc.

proposal for a diversion to a straddling community that results in a very large new or increased water loss to the Great Lakes basin (5,000,000 GPD or greater average over 90 days) must also be reviewed by the regional body in the regional review process described above before the state decides whether to approve the diversion.

Intrabasin Transfers

The second exception to the prohibition on diversions is an “intrabasin transfer.” This is the transfer of water from the watershed of one of the Great Lakes into the watershed of another of the Great Lakes. In Wisconsin, that would mean a transfer from the Lake Superior watershed to the Lake Michigan watershed or vice versa.

The compact allows a state to decide whether and how to regulate an intrabasin transfer that averages less than 100,000 GPD in any 90-day period.

For a larger intrabasin transfer, the exception standard applies, except that the diverted water is not required to be returned to the watershed from which it was withdrawn, unless there is a very large new or increased water loss, and it must be shown that there is no feasible, cost-effective, and environmentally sound alternative for obtaining water in the watershed to which the water will be transferred. In addition, the state must notify the other states before it decides whether to approve the intrabasin transfer. An intrabasin transfer that results in a very large new or increased water loss averaging over 5,000,000 GPD in any 90-day period, must also be reviewed by the regional body in a regional review and be approved by the council with no disapproving votes. An intrabasin transfer may be for a purpose other than supplying water to the public.

Communities Within Straddling Counties

The third exception to the prohibition on new or increased diversions is to provide water to a “community within a straddling county.” A “community within a straddling county” is an incorporated city, town, or the equivalent thereof, that is located outside the Great Lakes basin, but that is wholly within a county that is partly in the Great Lakes basin and that is not a straddling community.

The map on page 5 of Great Lakes basins in Wisconsin also depicts the counties that straddle the divides between either Lake Superior or Lake Michigan and the Upper Mississippi River basin. Communities within straddling counties are communities within those counties that neither straddle the basin divide nor are entirely within the Great Lakes basin. Examples of these communities are Wausau, Beaver Dam, and Waukesha.²

A proposal for a diversion to a community in a straddling county is only allowed under the compact if all of the following apply:

² More detailed maps showing the locations of straddling communities and communities within straddling counties in Wisconsin are presented in Legislative Council Staff Memo No. 3 to Members of the Special Committee on Great Lakes Water Resources Compact, *Maps of the Great Lakes Basin*, Revised October 4, 2007. This Memo is posted on the website for this study committee at the Legislative Council’s website at: www.legis.state.wi.us/lc.

- All of the water is used solely for public water supply purposes.
- The community is otherwise without an adequate supply of potable water.
- The diversion meets the exception standard.
- The proposal maximizes the amount of water that originated in the basin that is returned to the basin and minimizes the amount of water that originated outside of the basin that is returned to the basin.
- There is no reasonable water supply alternative in the basin in which the community is located (in Wisconsin, that would be the upper Mississippi River basin), including conservation of existing water supplies.
- The proposal is subject to management and regulation by the state that is the originating party regardless of the size of the proposal.
- The proposal is reviewed by the regional body in a regional review.
- The proposal is approved by the council with no disapproving votes.

Exception Standard

As noted above, some diversions that are approvable under the compact are subject to what the compact calls the “exception standard.” A proposal for a diversion meets the exception standard if it satisfies several criteria, including the following:

- The need for the diversion cannot be reasonably avoided through the efficient use and conservation of existing water supplies.
- The amount of water diverted will be limited to quantities that are considered reasonable for the purposes for which it is proposed.
- An amount of water equal to the amount diverted, less an allowance for consumptive use, will be returned to the watershed from which it was withdrawn. No water from outside of the Great Lakes basin may be used to satisfy this criterion, unless it:
 - Comes from a water supply or wastewater treatment system that combines water from inside and outside of that watershed.
 - Is treated to satisfy water quality standards and to prevent the introduction of invasive species in the basin.
- The diversion will result in no significant individual or cumulative adverse impacts to the quantity or quality of the water of the Great Lakes basin or related natural resources.
- “Environmentally sound and economically feasible water conservation measures” will be used to minimize the amount of water withdrawn from, and the amount of water lost to, the Great Lakes basin.

REGULATION OF WITHDRAWALS AND CONSUMPTIVE USES

The compact requires each state to regulate new and increased withdrawals and consumptive uses of water from the Great Lakes basin. Each state is required to set thresholds for these regulations and, subject to some guidance, is given considerable discretion in determining the scope of its regulations and the values of its thresholds. If a state fails to set threshold levels that comply with the compact's guidance by 10 years after the compact's effective date, then the compact requires that the state apply a threshold level for the management and regulation of new and increased withdrawals that average 100,000 GPD or more in any 90-day period.

Decision-Making Standard

A withdrawal that exceeds the threshold set by a state is subject to what the compact calls the "decision-making standard." The decision-making standard consists of several requirements, including the following:

- All water withdrawn will be returned to the source watershed less an allowance for consumptive use.
- The withdrawal will result in no significant individual or cumulative adverse impacts to the quantity or quality of the waters of the Great Lakes basin or to related natural resources.
- Environmentally sound and economically feasible water conservation measures will be used in implementing the withdrawal or consumptive use.
- The proposed use of the water is reasonable, based on a consideration of factors specified in the compact.

Exemptions

The compact exempts from its requirements withdrawals from the Great Lakes basin for the following purposes:

- To supply water to vehicles, including boats and aircraft, for needs such as ballast water or for the needs of persons or animals being transported.
- To use in a noncommercial project on a short-term basis for firefighting, humanitarian, or emergency response services.

BASELINES AND OTHER APPLICABILITY PROVISIONS

Baselines

The compact requires states to establish baselines for existing withdrawals, consumptive uses, and diversions. The effect of a baseline is to "grandfather" (i.e., allow to continue) the volume of each use that exists when the compact takes effect. For example, the decision-making standard applies when the increase in an existing withdrawal over its baseline, during a 10-year

period, exceeds the threshold amount set by the state. If a withdrawal never exceeds the baseline by the threshold amount, the decision-making standard is never applied to that withdrawal.

Under the compact, baselines may be set in only one of two ways: (1) on the basis of the actual capacity of the water withdrawal system when the compact takes effect, based on its most restrictive component; or (2) on the basis of existing withdrawal approvals (such as permits) issued by the state before the compact takes effect. The act requires the DNR to issue water use permits before the compact's effective date in order to use the second method of setting baselines.

Each state must furnish its list of baselines to the regional body and the council within one year after the compact's effective date.

Minimum Standards

The compact establishes that the standard of review and decision (i.e., the exception standard, decision-making standard, and reviews under the compact's water management and regulation provisions) must be used as a minimum standard and that states may impose more restrictive standards for withdrawals under their authority.

Timing of Additional Applications

The compact specifies that in an application for a new or increased withdrawal, consumptive use, or diversion whether the amount of the withdrawal, consumptive use, or diversion exceeds a regulatory threshold must be based on the cumulative amount within 10 years prior to any application for the proposal.

Change of Ownership

The compact specifies that the change in ownership of a project in and of itself does not require regional review or council approval unless the new owner proposes a project that results in a proposal for a new or increased diversion or consumptive use that is subject to regional review or council approval.

Hydrologic Considerations

The compact specifies that the basin surface water divide shall be used for managing or regulating new or increased diversions, consumptive use, or withdrawals of surface water and groundwater under the compact; the watershed of each Great Lake shall include its upstream and downstream connecting channels; and the Lake Michigan and Lake Huron watersheds shall be considered to be a single hydrologic unit and watershed.

Withdrawal Systems

The compact specifies that, if multiple inputs of surface water or groundwater supply a common water distribution system, the total volume of these inputs shall be used to determine the volume of a withdrawal, consumptive use, or diversion.

WATER CONSERVATION AND EFFICIENCY

The compact specifies water conservation and efficiency goals for the Great Lakes basin and directs the council to identify water conservation and efficiency objectives for the basin based on these goals. The compact also requires each state: (1) to develop its own water conservation and efficiency goals and objectives, consistent with the goals and objectives for the Great Lakes basin; and (2) to develop and implement a water conservation and efficiency program based on its own goals and objectives. This program may be voluntary or mandatory. The compact also requires states to promote environmentally sound and economically feasible water conservation measures, such as demand-side and supply-side incentives for water conservation.

ASSESSMENT OF CUMULATIVE IMPACTS

The compact establishes that the parties, in cooperation with Quebec and Ontario, will collectively conduct a periodic assessment of the cumulative impacts of withdrawals, diversions, and consumptive uses from waters of the Great Lakes basin. This assessment is to be done on the basis of the watersheds of the individual Great Lakes and the St. Lawrence River basins every five years or each time that the incremental basin water loss reaches an average of 50,000,000 GPD in any 90-day period over the quantity of water loss at the time of the most recent assessment, whichever comes first, or at the request of one or more of the states. This assessment forms the basis for a review of the standard of review and decision, council and state regulations, and their application. The review must be based upon the guidance provided in the compact.

The compact specifies that the states have the responsibility for conducting this cumulative impact assessment. Applicants for proposals are not required to participate in this assessment and, unless required by other statutes, are not required to conduct a separate cumulative impact assessment in connection with their application. Applicants are required to submit information about the potential impact of their proposals to the quantity or quality of the waters and related natural resources of the source watershed.

U.S. SUPREME COURT DECREE IN WISCONSIN ET AL. V. ILLINOIS ET AL.

The compact specifies that, in general, withdrawals, consumptive uses, and diversions of Great Lakes water within Illinois are governed by the terms of the U.S. Supreme Court decree in *Wisconsin et al. v. Illinois et al.* and are not subject to regulation under the compact.

Illinois is subject to the compact's provisions on registration, reporting and water resource inventory, and on water conservation and efficiency programs. In addition, decisions by the State of Illinois regarding a proposal for a diversion of Great Lakes basin water for use outside of the State of Illinois are subject to the water management and regulations in the compact.

PUBLIC PARTICIPATION

The compact requires the states and the council to have specified procedures that facilitate public participation in the review of proposals for diversions, consumptive uses, and withdrawals that are regulated under the compact. The compact also requires states, the

regional body, and the council to consult with federally recognized American Indian tribes concerning proposals for which council approval or regional review is required. The council must also seek to establish mutually agreed upon processes to facilitate dialogue with, and input from the tribes.

DISPUTE RESOLUTION

The compact includes procedures for appealing decisions made by the council and by the states under the compact, including alternative dispute resolution for disputes among the parties, and procedures to compel compliance with the compact's regulation of new or increased withdrawals, consumptive uses, and diversions.

RELATION TO OTHER RIGHTS, LAWS, AND AGREEMENTS

The compact lists the relationship of the compact and approvals under it to other rights, laws, treaties, and international agreements. These provisions include that nothing in the compact must be construed to impair any rights validly established before the compact's effective date under state or federal law governing the withdrawal of waters of the Great Lakes basin or to affect or interfere with a party's law relating to common law water rights. Also, an approval by a state or the council under the compact does not give any property rights or exclusive privileges.

In addition, the compact states that nothing in it must be construed to repeal, modify, or qualify the authority of a state to enact any legislation or enforce additional conditions or restrictions regarding the management and regulation of waters within its jurisdiction.

AMENDMENTS AND DURATION

The compact states that its provisions remain in full force and effect until amended by action by the governing bodies of the parties and consented to and approved by any other necessary authority (i.e., the U.S. Congress) in the same manner as the compact is required to be ratified to become effective.

Once effective the compact continues in force and remains binding upon each party unless terminated. The compact may be terminated by a majority vote of the parties. If it is terminated, all rights established under it continue unimpaired.

EFFECTUATION AND EFFECTIVE DATE

The governor is authorized to take such action as may be necessary and proper to effectuate the compact and the initial organization and operation of it, consistent with the post-compact implementation statute, described below, created by the act.

The compact becomes effective when ratified through concurring legislation by the Great Lakes states and consented to by the U.S. Congress.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

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