

**Senate Committee on Environment
29 September 2010
411 South
State Capitol**

WDNR Statement re: Clearinghouse Rules 10-059, 10-060, and 10-061

Thank you for the opportunity to be here. My name is Eric Ebersberger and I am the Section Chief of the Water Use Section in the DNR's Bureau of Drinking Water & Groundwater. The Water Use Section is coordinating Great Lakes Compact implementation for the DNR.

Clearinghouse Rules 10-059, 10-060, and 10-061 relate to implementing the Great Lakes Compact—and associated state water use legislation in Wisconsin.

Wisconsin's Compact implementing legislation (2007 Wisconsin Act 227) specifically directed the DNR to promulgate rules related to water use registration and reporting (the subject of Clearinghouse Rule 10-059—or NR 856) and Water Conservation & Efficiency (the subject of Clearinghouse Rule 10-060—or NR 852). The 2009-11 Biennial Budget Bill (2009 Wisconsin Act 28) directed the DNR to promulgate a rule specifying a water use fee in the Great Lakes basin on withdrawals exceeding 50 million gallons per year (the subject of Clearinghouse Rule 10-061—or NR 850).

The Natural Resources Board unanimously adopted each of these three rules at its August 2010 meeting in Superior, Wisconsin.

Public Hearings: The department held five joint hearings on these rules between June 28th and June 30th, 2010—in Milwaukee, Ashland, Green Bay, Wausau and Madison. A combined total of 24 people attended the five hearings, and 3 people provided oral comments.

Great Lakes Compact Rulemaking Update: These rules are 3 of 7 Great Lakes Compact-related rules that the DNR will promulgate. Other Compact-related rules in development include:

- Water Use Permitting;
- Water Loss from Consumptive Use
- Water Supply Service Area Planning; and
- A Public Participation rule related to Diversion Proposals.

All these rules relate to implementing the Great Lakes Compact—and we have been specifically directed—in legislation—to promulgate these rules.

The Great Lakes Compact requires that states have parallel water quantity management programs—and these rules fill gaps in Wisconsin's water management program.

I'll now discuss the Compact related Clearinghouse rules before you today.

Clearinghouse Rule 10-059 NR 856 Registration & Reporting

The purpose of the rule is to clarify and further define new registration and reporting requirements for large water withdrawals—statewide.

Registration

Under the statute, any person with a water supply system with the *capacity* to *withdraw* water in amounts averaging 100,000 GPD or more in any 30-day period must register the withdrawal with the DNR.

The rule sets forth the procedures and requirements for registration.

The DNR has received questions re: what a “withdrawal” is. The statute broadly defines it as “the taking of water from surface water or groundwater”. We interpret this to include any method of taking or redirecting water from its natural course making it unavailable for other purposes, even if only temporarily. For example, we consider that operations that redirect water from its natural stream course “withdraw” the water. However, in-stream uses of water, where water may be temporarily impounded but is not redirected, is not considered a withdrawal. We have worked with—and will continue to work with persons to offer compliance assistance regarding whether their operation constitutes a “withdrawal”.

Measuring

The rule also requires persons with registered withdrawals to measure the volume of water withdrawn—at least on a monthly basis. The rule identifies a range of options for measuring withdrawals including an option that allows for tailoring a measurement process on a case-by-case basis for challenging situations. The rule does not require anyone to purchase new measuring devices.

Reporting

Under the statute, any person who actually *withdraws* an average of 100,000 GPD or more in any 30-day period—or who diverts any amount of water from the Great Lakes basin—must annually report their monthly volumes of withdrawal or diversion.

(Registration is triggered by *capacity*; reporting is triggered by actual withdrawal).
Reporting for a calendar year is required by March 1st of the following calendar year.
The DNR is developing an on-line water use registration and reporting system to facilitate compliance.

Comment Summary: The department received comments from 17 individuals and organizations related to NR 856. They included:

- Questions related to the definition of withdrawal and measurement. As referenced earlier, the DNR has worked with various groups to clarify whether their particular water use is a withdrawal, to allow flexibility in the measurement of withdrawals; and to avoid double counting when water withdrawn is reused in a process.

- Comments related to the release of information gathered through the registration and reporting process—particularly specific locational information. Some of the comments requested further protection for this information. However, we also received comments encouraging sufficient access to locational information to allow sufficient assessment of impacts of withdrawals.

The statute provides that the department may consider domestic security concerns when determining whether information regarding the locations of withdrawals may be released to the public. On the other hand, Wisconsin's Open Records law contains a strong presumption that records are open to public inspection.

The DNR worked to balance the competing statutory provisions and the concerns expressed in the comments. The rule allows for the protection of information that may impact domestic security while preserving the state's public policy in favor of the release of public information.

Clearinghouse Rule 10-060

NR 852 Water Conservation & Water Use Efficiency

Advisory Committee: As directed in statute, the DNR drafted NR 852 with the help of the Public Service Commission and the Department of Commerce. In addition, we convened a 30+ member advisory committee—with representatives from each water use sector—to help us draft a water conservation & efficiency rule.

NR 852 establishes mandatory water conservation and efficiency measures for:

- New and increased withdrawals in the Great Lakes basin that exceed an average of 100,000 GPD in any 30-day period;
- New and increased diversions of Great Lakes water; and
- Persons applying for water loss approvals under §281.35, Stats., associated with withdrawals that result in a water loss averaging 2 MGD or more in any 30-day period.

Conservation and efficiency measures are not mandatory for:

- Pre-existing withdrawals in the Great Lakes basin (i.e. those in effect on 12/8/2008—the effective date of the Great Lakes Compact)

Persons subject to the provisions of NR 852 are categorized into one of three tiers, with specific conservation & efficiency measures prescribed within each tier.

The conservation & efficiency measures are focused on understanding current water use and exploring opportunities to reduce use or gain efficiencies.

The measures in Tier 1, which are considered to be cost-effective for persons in all sectors, include, e.g.:

- Conducting a water audit (examine & document water use from point of entry into the distribution system to the end use);

- Developing a leak detection and repair program;

The conservation & efficiency measures are broken down by water use sector. There are 7 water use sectors: Public water supply; commercial & institutional; irrigation; livestock watering; industrial; power production; and “other”.

The rules do not require retrofitting. (The enabling legislation specifically prevents the department from requiring retrofitting.)

Comment Summary: We received comments from 29 individuals and organizations on the proposed NR 852, and we made several changes in response to those comments.

Also, our statutory authority to impose mandatory conservation measures statewide on withdrawals resulting in a water loss exceeding an average of 2 MGD of more in any 30-day period was questioned. Those withdrawals require a water loss approval under s. 281.35 of the Statutes—which is not part of the Great Lakes Compact. However, s. 281.35 specifies that the DNR cannot issue a water loss approval unless the applicant incorporates “reasonable conservation practices”; and the DNR is proposing the measures in NR 852 as a common and consistent standard to determine what “reasonable conservation practices” are for purposes of issuing water loss approvals.

We intend that NR 852 serve as a guideline for water conservation measures for other DNR program activities.

Clearinghouse Rule 10-061 NR 850 Water Use Fees

Origin of Fees The 2009-11 biennial budget (2009 Wisconsin Act 28)—contained fee authorization and spending authority for Great Lakes Compact implementation.

- **There are 2 Compact-related Fees**
 - 1. Statutory Base Fee (\$125)** imposed statewide on owners of water supply systems with the capacity to withdraw 100,000 gallons per day.
 - This rule clarifies that one \$125 fee will cover all water supply systems on one contiguous property – or one public water supply system (e.g. 5 high capacity wells on one contiguous property = one \$125 base fee; Madison water utility = one \$125 fee)
 - 2. Fee on Great Lakes basin withdrawals exceeding 50 million gallons per year (MGY).**
 - Includes surface water and groundwater withdrawals from anywhere within the Lake Michigan or Lake Superior basins.
 - The fee is structured in blocks of 50 million gallons (MG) and the fee per MG increases in each block e.g.

- A fee of \$1.50 is assessed on each MG withdrawn from 50 to 100 MG;
 - A fee of \$2 is assessed on each MG withdrawn from 100 to 150 MG
 - The fee increases by \$0.50 per MG in each block up to the point where persons pay \$6 for each MG withdrawn over 500 MGY.
 - The fee is capped at \$9,500 per year. Persons withdrawing just over 1.8 billion gallons per year will hit the cap. (approx. 9 public water systems hit the cap based on 2009 data. Also includes most power companies and some large industrial facilities, e.g. paper mills).
 - Some examples of fees paid:
 - Large Ag Irrigator withdrawing 130 MGY = \$135
 - Large dairying operation withdrawing 75 MGY = \$38
 - City of approx. 13,000 withdrawing 400 MGY = \$1,050
- **What the Fee Funds:** The fee revenue will fund all aspects of Great Lakes Compact implementation in the state, including:
- Water use registration & reporting, water use permitting, water supply service area planning; and water conservation & efficiency. Duties include technical assistance, outreach and training for registrants and permittees. (4 FTE; 2 LTE);
 - Database development and maintenance, including expenditures for a water use database; on-line registration and reporting systems; and geographic information systems (GIS) tools to help analyze water use throughout the state to help us sustainably manage the state's water resources;
 - Development of a statewide water use inventory—as directed by the Compact—that consists of information about the waters of the state including information about the location, type, quantity, and uses of the state's water resources.
 - Groundwater & surface water monitoring and mapping to provide continuous data for the water resources inventory and statewide water use management decisions.

Comment Summary: (We received 6 comments on the Water Use fee rule.)

- **Fee Cap:** We had comments on both sides of the fee cap: some argued that the cap should be raised; others argue that it should be no higher than what it is (\$9,500).

The fee was set @ \$9,500 in an attempt to balance concerns on both sides of the issue and to help avoid an undue economic impact on any individual withdrawer. We tried to be mindful of the impact on the different types of entities within the various water use sectors that would be subject to the fee.



WMC
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TO: Senate Committee on Environment

FROM: Scott Manley, Environmental Policy Director
Wisconsin Manufacturers & Commerce

DATE: September 29, 2010

RE: Clearinghouse Rule 10-060, Great Lakes Compact Water Conservation and Efficiency Rules

Wisconsin Manufacturers & Commerce (WMC) appreciates the opportunity to provide input on the DNR rules which implement the water conservation and efficiency requirements from the Great Lakes Compact legislation (2007 Act 227). Many of our members operate with groundwater or surface water withdrawal permits throughout the state, including the Great Lakes Basin, and therefore have a significant interest in this proposal. We respectfully request your attention with regard to one aspect of the rule before you today.

Before outlining our specific concern with regard to the proposed rule, WMC wishes to express our support for enhanced water conservation and efficiency. Prior to promulgation of this rule, and prior to enactment of the enabling statute, our members have already undertaken significant efforts to conserve water and use this resource efficiently. Wisconsin businesses conserve water because it is the right thing to do, and because it often makes economic sense to do so.

We appreciate the efforts of DNR staff to work with the regulated community on the development of this rule. The rulemaking process leading up to this rule has been transparent, and agency staff have made a concerted effort to keep interested parties apprised of policy developments throughout the promulgation process. Many of the concerns raised on behalf of our members were addressed in the final version of the rule.

However, a key statutory provision that confines the DNR's water conservation regulatory authority to the Great Lakes Basin was not followed in this rule. We ask the Committee to direct the Department to revise the rule such that the Tier 3 Compact-level water conservation requirements do not apply to facilities located outside of the Great Lakes Basin.

The Compact legislation was very clear that water conservation and efficiency measures were to be voluntary outside of the Great Lakes Basin. Section 281.346(8) establishes goals and objectives for the newly-created water conservation and efficiency program. The statute is clear that water conservation and efficiency measures outside of the Great Lakes Basin are to be voluntary only. Specifically, s. 281.346(b)(1) defines the statewide program to require "promotion of environmentally sound and economically feasible water conservation measures through a *voluntary statewide program*." (emphasis added).

By contrast, s. 281.346(b)(1m) prescribes "*Mandatory and voluntary conservation and efficiency measures for the waters of the Great Lakes basin* that are necessary to implement subs. (4), (4s), (5), (5m), and (6) and s. 281.348" (emphasis added). The statute clearly limits mandatory conservation requirements to projects occurring in the Great Lakes Basin for purposes of implementing the conservation requirements embedded in the permitting framework enacted in the Compact legislation.

The concept that water conservation and efficiency measures would be voluntary statewide and mandatory within the Great Lakes Basin was a point of agreement throughout the negotiations on the Compact legislation, and was an important factor leading to WMC's support of 2007 Act 227.

Contrary to this statutory directive, the rule proposes to require statewide water conservation and efficiency requirements under NR 852.02(1)(c)4. to new or increased withdrawals statewide of 2,000,000 gallons per day or more in a 30-day period. These withdrawal thresholds apply to permitting actions arising from the requirements of s. 281.35(4) – a statute that was first enacted in 1985, many years prior to enactment of the Compact legislation. The Legislature never intended to apply the very robust (Tier 3) conservation requirements applicable in the Great Lakes Basin under the Compact to withdrawals on a statewide basis. Indeed, the enabling legislation plainly describes statewide conservation requirements to be voluntary.

Withdrawals that are subject to the permitting requirements under s. 281.35 require an applicant to provide "a description of the conservation practices the applicant intends to follow" (see s. 281.35(5)(15)). Similarly, s. NR 142.06(2)(n), which implements the permitting requirements of s. 281.35, requires an applicant to provide "a description of the conservation practices the applicant intends to follow." Both the statute and the administrative code provision provide that the applicant lists conservation practices that he or she intends to follow. This is a very different regulatory construct than what is proposed in NR 852.02(1)(c)(4), which requires adherence to a very prescriptive list of Conservation and Efficiency Measures (CEMS) as defined by the Department, and implementation of "environmentally sound and economically feasible conservation measures" – a term of art that didn't exist when s. 281.35 was enacted.

If the Legislature had intended for a prescriptive water conservation regime to apply to permits regulated under s. 281.35, it would have amended the statute to cross-reference the conservation requirements established in s. 281.346(8) in the Compact legislation. The legislature did not do so. On the contrary, the Legislature left in tact the statutory framework in s. 281.35(5) that simply requires applicants to list conservation measure with which they intend to comply.

In summary, the Legislature never intended for the robust, mandatory water conservation and efficiency measures applicable in the Great Lakes Compact to apply on a statewide basis. In fact, s. 281.346(8) very specifically limits statewide conservation and efficiency measures under the Compact legislation to be voluntary. Furthermore, the applicability of conservation requirements to projects regulated under s. 281.35 is confined only to those conservation practices the applicant intends to follow. That is, the conservation requirements are driven by

measures *proposed by the applicant*, not a prescriptive list of measures mandated by the Department (i.e. the mandatory CEMS appearing in Table 2 of the rule).

For these reasons, WMC believes it is clear that DNR lacks the statutory authority to require mandatory Compact-level water conservation and efficiency measures outside the Great Lakes Basin, and the proposed Tier 3 requirements of the rule should be limited to projects occurring in the Great Lakes Basin only. We do not believe the Legislature intended mandatory water conservation measures to apply outside the Great Lakes Basin, and we respectfully ask the Committee to request a revision to the rule accordingly.