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## WISCONSIN LEGISLATIVE COUNCIL

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### GREAT LAKES WATER RESOURCES COMPACT

411 South  
State Capitol

September 7, 2006  
9:00 a.m. - 4:30 p.m.

[The following is a summary of the September 7, 2006 meeting of the Special Committee on Great Lakes Water Resources Compact. The file copy of this summary has appended to it a copy of each document prepared for or submitted to the committee during the meeting. A digital recording of the meeting is available on our Web site at <http://www.legis.state.wi.us/lc.>]

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#### Call to Order and Roll Call

Chair Kedzie called the meeting to order. The roll was called and it was determined that a quorum was present.

**COMMITTEE MEMBERS PRESENT:** Sens. Neal Kedzie; Robert Cowles, Mary Lazich, and Robert Wirsch; Reps. Scott Newcomer, Jon Richards, John Steinbrink, and Karl Van Roy; and Public Members Ann Beier, Dan Duchniak, Hallet Harris, Andrew Lisak, William Mielke, Matthew Moroney, Keith Reopelle, Jodi Habush Sinykin, James Surfus, and Edward Wilusz.

**COMMITTEE MEMBERS EXCUSED:** Public Member Kevin Crawford.

**COUNCIL STAFF PRESENT:** John Stolzenberg, Chief of Research Services; and Rachel Letzing, Senior Staff Attorney.

**APPEARANCES:** Terry C. Anderson, Director, Legislative Council; David Naftzger, Executive Director, Council of Great Lakes Governors; Peter Johnson, Program Director, Council of Great Lakes Governors; Michael McCabe, Director, Midwestern Region, Council of State Governments; Todd Ambs, Administrator, Division of Water, Department of Natural Resources; and Charles Ledin, Director, Office of Great Lakes, Department of Natural Resources.

## Opening Remarks

**Terry C. Anderson**, Director of the Legislative Council, welcomed the committee and thanked them for their participation. He noted that the Special Committee on Great Lakes Water Resources Compact and the Special Committee on Review of State School Aid Formula received the highest number of membership requests this interim. He discussed rules for voting and described the process of reimbursement of expenses. He noted that the committee's meetings will be recorded and available on the Internet at the committee's web page.

## Introduction of Committee Members

Chair Kedzie welcomed all members to the committee and thanked them for their commitment to serve on the committee. Chair Kedzie asked committee members to introduce themselves and explain their interest in serving on the committee.

## Description of Materials Distributed

Rachel Letzing, Senior Staff Attorney, Legislative Council staff, provided a brief outline of Memo No. 1, *State Law Regarding Water Withdrawals and Diversions*, which will be used as a reference during subsequent committee deliberations. John Stolzenberg, Chief of Research Services, Legislative Council staff, explained Memo No. 2., *Overview of Party State Duties Under the Great Lakes-St. Lawrence River Basin Water Resources Compact*, and LRB-0058/P1, relating to the Great Lake-St. Lawrence River Basin Water Resources Compact ("the compact") and the committee assignment. Mr. Stolzenberg noted that Memo No. 3 may be revised to include the compact's treatment of town sanitary districts and other special purpose units of government, as well as interbasin transfers.

## Invited Speakers

**David Naftzger**, Executive Director, Council of Great Lakes Governors, provided an overview of the history of Great Lakes' state and Canadian provinces' efforts to protect and manage Great Lakes water, the federal Water Resources Development Act (WRDA), and the development of the compact. **Michael McCabe**, Director, Midwestern Region, Council of State Governments, provided an overview of interstate compact law, including the requirement that interstate compact language be substantively identical among the party states, otherwise material differences in the language adopting the compact may render it unenforceable. However, Mr. McCabe noted that the state enabling legislation may be used to condition the impact of the compact in a particular state. Mr. McCabe also described the compact ratification process and the effect of requiring Congressional consent. **Peter Johnson**, Program Director, Council of Great Lakes Governors, gave an overview of the key elements of the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement, signed by the Great Lakes state governors and the premiers of Ontario and Quebec on December 13, 2005, which is a good faith agreement among the Great Lakes states, Ontario, and Quebec, and the compact, which is a legally enforceable contract among the Great Lakes states that will be passed into law through the state legislatures and consented to by Congress.

In response to questions from committee members, Mr. Naftzger, Mr. McCabe, and Mr. Johnson provided the following information:

- The compact only addresses new or increased diversions. The compact includes minimum standards and requirements which states may expand upon in additional legislation which implements the compact.
- The New York State Assembly passed the compact without substantive change and the New York Senate considered a similar bill, but the State of New York has not enacted the compact, nor has any other Great Lakes state.
- The public participation provision in the compact provides party states with general guidance and some flexibility for implementing this provision.
- The compact explicitly states that it does not affect the Boundary Waters Treaty between the United States and Canada, which is primarily concerned with large volume flows and large-scale impact on Great Lakes water levels and flows. It was noted that many water uses do not reach the threshold level to be regulated by the Treaty, but these smaller uses would be affected by the compact.
- Current federal law under WRDA requires unanimous consent of the Great Lakes Governors before a state can allow a diversion out of the Great Lakes Basin; however, consent of the Canadian premiers is not required. The compact does not provide Canadian premiers with veto authority over diversions, but the premiers are part of the regional review required for certain types of diversions under the compact. The regional review is an opportunity for party states and the premiers to consult with one another, but does not provide any state or province with veto authority, and is different from the council approval described below.
- The compact does not require a specific percentage of return flow to the Great Lakes basin, but the state can decide the parameters of the return flow requirement.
- The U.S. Supreme Court decree in *Wisconsin et al. v. Illinois et al.* will remain in effect even if the party states adopt the compact. Therefore, diversions of basin water by Chicago will continue to be governed by the terms of that decree, which provides that Chicago may not divert more than 2.1 billion gallons per day, instead of by the terms of the compact. If the State of Illinois wanted to modify the 2.1 billion gallons per day cap provided in the terms of the U.S. Supreme Court decree, it would have to seek revisions through the consent decree process in court.
- The speakers agreed that although the compact itself must be adopted by the party state legislatures with virtually identical language, the compact provides states with some flexibility in the following areas: (1) places where the compact allows states to create specific policies, such as the threshold of applicability to in-basin users; (2) places where the compact is fairly broad and states are left to fill in the details, such as the water conservation and public participation provisions, while not deviating materially from the compact; and (3) places where the compact provisions function as a floor or general parameters, which state policies can go beyond but remain enforceable under the compact, such as the question of the amount of required return flow.
- The compact trumps other state law provisions which conflict with the terms of the compact.

- Under the terms of the compact, all eight Great Lakes states must approve the compact in order for it to be enacted.
- Current law regarding water diversions is controlled by the federal WRDA and the Great Lakes Charter of 1985, signed by the governors. Given WRDA's lack of detail, the governors currently have the ability to decide how they implement WRDA.
- The compact's focus is on water quantity and management issues, not water quality issues. The purposes section of the compact is intended to provide the motivations for Great Lakes states to work together.
- The operative language of the compact must be identical from state to state, otherwise material differences in language in any state statute which adopts the compact may render the compact unenforceable. Although difficult to predict in advance, if a change to a particular compact provision is likely to cause parties to argue over it, it is probably a material difference. For example, the compact uses the basin surface water divide for the purpose of managing and regulating new or increased diversions, consumptive uses, or withdrawals, and using the basin groundwater divide instead may be considered a material difference.
- The compact provides an exception to the ban on diversions outside the Great Lakes basin for communities in straddling counties. Under this exception, a diversion proposal from a community in a straddling county must satisfy a number of conditions, and the compact provides that substantive consideration will be given to whether the proposal provides sufficient scientifically based evidence that the existing water supply is derived from groundwater that is hydrologically interconnected to waters of the basin.
- The compact specifies that approval by the Great Lakes-St Lawrence River Basin Water Resources Council, which consists of the Great Lakes State Governors, is required for intrabasin transfers which result in a new or increased consumptive use over 5 million gallons per day and all community within a straddling county diversions. The compact provides that council approval must be unanimous. This veto authority is limited to these specific types of consumptive uses and diversions, in contrast to WRDA which does not define "diversion," gives each governor veto authority over all diversion proposals, and does not include a decision-making process or standard. In contrast, the compact provides standards for diversion proposals, which in turn provides more certainty to the review process, decision-making standards, and an appeal process.
- Under Article 4.12 of the compact (sub. (4t) of the LRB draft), each party state may determine its baseline for determining a new or increased diversion, consumptive use, or withdrawal based upon either or both of the following: a list of existing withdrawal approvals as of the effective date of the compact or the capacity of existing systems at the most restrictive point.
- While drafting the compact, the working group and advisory committee spent a considerable amount of time on the issue of citizen lawsuits. Article 7.3 of the compact (sub. (7r) of the LRB draft) is the provision regarding dispute resolution and enforcement, which incorporates suggestions of the industry and environmental groups involved in the drafting process. The

Department of Natural Resources (DNR) will continue to issue orders and initiate actions to enforce the statutes and regulations adopted to implement the compact. If an individual jurisdiction is not handling a problem as required under the compact and state statute, any party state also has the ability to report the problem to the council.

The committee also heard presentations from **Todd Ambs**, Administrator, Division of Water, DNR and **Charles Ledin**, Director, Office of Great Lakes, DNR, regarding DNR's view of current law regarding Great Lakes water diversions, the development of the compact, and the state issues raised by the compact. Mr. Ambs stated that the compact is designed to protect the most significant freshwater resource in the western hemisphere and is a better alternative to WRDA, which provides no process or decision-making standards for diversions and is considered to be vulnerable to legal challenge on various grounds and amendment by Congress. Mr. Ambs noted that the compact is not only about diversions, but also includes important provisions about consumptive water use within the Great Lakes basin. He stated that the compact has the potential to benefit both the state economy and environment.

Mr. Ambs said that the compact is not self-executing, and that there is need for additional state legislation to address issues such as state water conservations programs, whether mandatory or voluntary, determine threshold levels for consumptive use within the basin, and the regulation of bulk water transfers in containers less than 5.7 gallons. Mr. Ledin provided a historical overview of Wisconsin's involvement in Great Lakes water agreements and Wisconsin's experience under WRDA, including the Pleasant Prairie and Kenosha diversions.

In response to questions from committee members, Mr. Ambs and Mr. Ledin provided the following information:

- The issue of giving one governor on the council the authority to veto a proposed diversion was a topic of great discussion when the compact was drafted. It was ultimately decided that this veto authority would only apply to diversions across the surface water divide or a very large consumptive use within the basin. The council has a process it must follow and a governor must articulate why they vote no on a particular proposal within 90 days.
- It is uncertain what a groundwater boundary map would look like except that it would be larger than the surface water boundary. Scientists are not exactly sure where the groundwater boundary is or how deep it is for the entire Great Lakes basin. The U.S. Geologic Survey recently began a study related to this issue.
- Waiting to enact the compact until Wisconsin knows what other Great Lakes states are doing may provide Congress with an opportunity to step in and control Great Lakes water management on the federal level.
- In order for a party state or governor to amend the compact, any amendment must be approved by all the party states for it to be enforceable.
- The State of Michigan issued its veto of the New Berlin diversion proposal earlier this summer through a press release. Under the compact, however, party states do not have veto authority over diversions to straddling communities such as New Berlin's proposal.

- Regarding the New Berlin water diversion proposal, DNR is attempting to determine whether it is possible to satisfy WRDA and the spirit of the compact. DNR wants to move toward the more deliberative process outlined in the compact, so that is the process it is following. The experience with Michigan indicates that even if DNR approves the proposal under WRDA, another Great Lakes state will challenge DNR's authority to approve the diversion.

At the conclusion of the meeting, Senators Cowles and Wirch requested that a hydrologist knowledgeable on the Great Lakes speak at the next meeting. Chair Kedzie asked for information regarding New York and Ohio's views of issues raised in the compact and those states' efforts to adopt the compact. Committee members also requested information regarding the provisions in the compact which allow states some flexibility in its implementation.

### **Other Business**

There was no other business brought before the committee.

### **Plans for Future Meetings**

The next meeting of the Special Committee will be held on *Wednesday, October 4, 2006, at 9:00 a.m., in the Legislative Council Conference Room, 1 East Main St., Suite 401, Madison, Wisconsin.*

### **Adjournment**

The meeting was adjourned at 4:30 p.m.

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