



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 18

TO: MEMBERS OF THE SPECIAL COMMITTEE ON GREAT LAKES WATER
RESOURCES COMPACT

FROM: Rachel Letzing, Senior Staff Attorney and John Stolzenberg, Chief of Research Services

RE: Alternative Means of Legislative Oversight Regarding the Governor's Vote on the Great
Lakes-St. Lawrence River Basin Water Resources Compact Council

DATE: August 16, 2007

The Great Lakes-St. Lawrence River Basin Water Resources Compact (the compact) provides that the Great Lakes-St. Lawrence River Basin Water Resources Council (the council) may revise the standard of review and decision, after consultation with the provinces and upon unanimous vote of all council members, by regulation duly adopted in accordance with the council's rule-making authority and in accordance with each party's respective statutory authorities and applicable procedures. [s. 281.343 (3) (b) 2. in LRB-0058/P1.] The standard of review and decision is defined as the exception standard, the decision-making standard, and reviews as outlined in subs. (4) to (4z). [s. 281.343 (1e) (rm) in LRB-0058/P1.]

At the July 18, 2007 committee meeting, the committee discussed the provision in WLC: 0141/P1 which restricts the Governor's ability to vote on the council regarding a change to the standard of review and decision until the change is approved by the Legislature. [WLC: 0141/P1, p. 4, lines 7 to 11.] During the committee's discussion, committee members asked for alternative means for legislative oversight of the voting by the Governor on the council to revise the standard of review and decision and a list of reviews included in the standard of review and decision.

Following information on these topics, the Memo concludes with a set of decisions the committee may wish to consider in developing drafting instructions on these legislative oversight procedures.

Alternative Means for Legislative Oversight

Current law and recently introduced bills provide models for the Legislature to exercise oversight of various types of executive branch actions. These models are described below.

Indian Gaming Compacts

In past legislative sessions, a number of bills have been introduced that would require legislative approval of Indian gaming compacts negotiated by the Governor. These bills accomplish this goal in different ways. 2003 Senate Bill 41 provides that, before the Governor may enter into, amend, extend, or renew any Indian gaming compact that has been negotiated, the Governor must submit the proposed compact to the Legislature for approval. The Governor may not enter into, amend, extend, or renew any Indian gaming compact until the Legislature approves the proposed compact by joint resolution. If the Legislature does not approve the compact by joint resolution, the compact must be returned to the Governor for renegotiation.

2003 Assembly Bill 998 provides that before the Governor enters into, amends, extends, or renews any Indian gaming compact, the Governor must submit the proposed compact to the Joint Committee on Legislative Organization (JCLO). The Governor would be prohibited from finalizing a compact unless approved by the JCLO and the Legislature. If JCLO approves a proposed compact, JCLO must introduce the proposed compact as a bill and inform the Legislature that JCLO approves the proposed compact and recommends passage of the bill without change. If either JCLO or the Legislature fails to approve a proposed gaming compact, the compact is returned to the Governor for renegotiation.

Administrative Rules

Current law authorizes the Joint Committee for Administrative Rules (JCRAR) to object to an administrative rule proposed by a state agency. If JCRAR objects to a proposed rule, JCRAR must introduce a bill in each house of the Legislature upholding the objection and preventing promulgation of the proposed rule. After introduction, the bills must be referred to an appropriate committee in each house of the Legislature. If the committees make no report within 30 days after referral, the bills are considered reported without recommendation. No later than 40 days after referral to committee, the bills must be placed on the calendars of the Assembly and the Senate. A bill received in the second house after passage in the first house must be referred, reported and placed on the calendar in the same manner as the original bill. If both bills are defeated or fail to be enacted in any other manner during a regular session, the agency may promulgate the rule.

Section 13.10 Supplemental Appropriations

Under s. 13.10, Stats., among other things, an agency may ask the Joint Committee on Finance (JFC) to release supplemental agency appropriations for a specific purpose or may request that the JFC authorize a change in the agency's number of authorized positions that are funded by segregated or general fund monies. The statute requires the JFC to hold quarterly meetings to address these and other agency requests. The JFC determines which agency proposals it will consider and then schedules a meeting to vote on the proposals. At the meeting, an affirmative vote by the JFC is required to approve an agency proposal.

Section 16.515 Supplemental Appropriations

Under s. 16.515, Stats., the Secretary of the Department of Administration (DOA) must request supplementation of program revenue appropriations for certain agencies under what is referred to as the

JFC “passive review” process. If the DOA Secretary recommends supplementation, the Secretary must notify the JFC of the proposed amount. The JFC has 14 working days after notification from DOA to schedule a meeting to consider the Secretary’s recommendation. In practice, if no member of the committee objects to the request within the 14-day time period, the committee co-chairs send a letter to DOA notifying them that the supplementation is approved. If, on the other hand, a committee member objects to a request, a meeting is scheduled but the 14-day time frame may not be strictly followed. If a meeting is held, affirmative action on the proposal by the committee is required before the supplementation may be authorized.

Bill and Joint Resolution

As noted at the August 7, 2007 meeting, there are differences in adoption process and effect between a bill and a joint resolution. A bill must be passed by both houses of the Legislature and signed by the Governor (and is therefore subject to the Governor’s veto), and the language in a bill is then codified in the statutes. The Legislature may subsequently amend this statutory language.

A joint resolution must be passed by both houses of the Legislature but does not require approval by the Governor. A joint resolution is an expression of an opinion, desire, direction, or authorization of the Legislature, therefore the text of joint resolution is not codified in statute and may not be amended after the Legislature approves it.

Interpretation of “Reviews”

There are different interpretations of what types of reviews are included in the compact’s definition of standard of review and decision by the phrase “reviews as outlined under subs. (4) to (4z).” A broad reading of this phrase suggests that the council may amend not only reviews conducted by the council, but also review-type processes conducted by any party state or the regional body under the referenced provisions in the compact. In support of this reading, the compact states that the waters and water dependent natural resources of the basin are subject to the sovereign right and responsibilities of the parties, and the compact’s purpose is to provide for joint exercise of such powers of sovereignty by the council in the common interests of the people of the region. [s. 281.343 (3) (a) 1. in LRB-0058/P1.] A later provision authorizes the council to promulgate and enforce such rules and regulations as may be necessary for the implementation and enforcement of this compact. [s. 281.343 (3) (c) 1. in LRB-0058/P1.] When read together, these broad grants of authority to the council suggest that the council is the preeminent body under the compact. Under this interpretation, the council’s ability to revise the reviews as outlined in subs. (4) to (4z) includes all reviews conducted by the council, the party states, and the regional body.

A list of reviews in LRB-0058/P1, which may be included under this broad interpretation, include the following list provided by Mr. Lisak:

- Section 281.343 (4b) (b) provides that each party shall develop and implement a water conservation and efficiency program, either voluntary or mandatory, within its jurisdiction based on the party’s goals and objectives.

- Section 281.343 (4b) (e) provides that each party shall implement, in accordance with par. (b), a voluntary or mandatory water conservation program for all, including existing, basin water users. Conservation programs need to adjust to new demands and the potential impacts of cumulative effects and climate.

- Section 281.343 (4h) (a) 2. provides that unless the applicant or the originating party otherwise requests, it shall be the goal of the regional body to conclude its review no later than 90 days after notice under par. (b) of such proposal is received from the originating party.

- Section 281.343 (4h) (a) 6. provides that a majority of members of the regional body may request regional review of a regionally significant or potentially precedent setting proposal. Such regional review must be conducted, to the extent possible, within the time frames set forth in this subsection.

- Section 281.343 (4h) (d) 4. provides that at the request of the majority of its members, the regional body shall make such arrangements as it considers appropriate for an independent technical review of a proposal.

- Section 281.343 (4h) (d) 5. provides that all parties shall exercise their best efforts to ensure that a technical review undertaken under subd. 3. or 4. does not unnecessarily delay the decision by the originating party on the application. Unless the applicant or the originating party otherwise requests, all technical reviews shall be complete no later than 60 days after the date the notice of the proposal was given to the regional body.

- Section 281.343 (4h) (e) 6. provides that in the event that the members [of the regional body] cannot agree, the regional body shall make every reasonable effort to achieve consensus within 25 days.

- Section 281.343 (4j) (a) provides that beginning no later than five years after the compact's effective date, and every five years thereafter, the originating party shall provide all parties and the provinces with detailed and timely notice and an opportunity to comment within 90 days on any proposal for a new or increased consumptive use of five million gallons per day or greater average in any 90-day period. Comments shall address whether the proposal is consistent with the standard or review and decision.

- Section 281.343 (4v) (a) provides that withdrawals from the basin for the following purposes are exempt from the requirements of subs. (4) to (4z): to supply vehicles, including vessels and aircraft, whether for the needs of the persons or animals being transported, or for ballast or other needs related to the operation of the vehicles.

- Section 281.343 (4z) (a) provides that the parties in cooperation with the provinces shall collectively conduct within the basin, on a lake watershed and St. Lawrence River basin basis, a periodic assessment of the cumulative impacts of withdrawals, diversions, and consumptive uses from the waters of the basin, every five years or each time the incremental basin water losses reach 50,000,000 gallons per day average in any 90-day period in excess of the quantity at the time of the most recent assessment, whichever comes first, or at the request of one or more of the parties. The assessment shall form the

basis for a review of the standard of review and decision, council and party regulations, and their application.

An alternative interpretation suggests that the broad interpretation of the council's review authority is not intended. The intent of the drafters of the compact was to enable the council to revise only the exception standard and the decision-making standard, and not other types of reviews provided in the compact. Read literally, however, the text of the compact does not state this. An argument can be made that a council revision of "reviews as outlined in sub. (4) to (4z)," under s. 281.343 (3) (a) 2. in LRB-0058/P1 only refers to reviews and review-type processes that the council conducts under the compact. Examples of these types of council reviews under the compact include the following:

- Section 281.343 (4b) (c) provides that beginning five years after the compact's effective date, and every five years thereafter, the council, in cooperation with the provinces, shall review and modify as appropriate the basin-wide water conservation and efficiency objectives, and the parties shall have regard for any such modifications in implementing their [water conservation] programs.
- Section 281.343 (4L) (b) provides that the council shall review and take action on proposals [for exceptions subject to council review] in accordance with this compact and the standard of review and decision.
- Section 281.343 (4p) (c) provides that pursuant to sub. (3) (d), the council, in cooperation with the provinces, shall periodically assess the water management programs of the parties. Such assessments may produce recommendations for the strengthening of the programs, including, without limitation, establishing lower thresholds for management and regulation in accordance with the decision-making standard.

Options

Decisions that the committee may wish to address in developing drafting instructions on the legislative oversight procedures addressed in this Memo include the following:

- Should the Governor submit any revision or amendment request to the full Legislature or to a legislative committee, such as the JCLO?
- Should legislative action be required within a certain timeframe, i.e., 14 days, 30 days, 40 days, 60 days, 90 days or some other timeframe?
- What does legislative action or inaction mean, i.e., is passage by a vote of the full Legislature required in order for the Governor to vote according to his or her request? Or is legislative passive review sufficient to allow the Governor to vote according to his or her request? What is the default if the Legislature does not act: approval or disapproval of the Governor's request?
- Should the Legislature be able to modify the Governor's request or should the Legislature be required to take an "up or down" vote?
- Should the Governor's request be in the form of a bill or a joint resolution?

- Should the phrase “reviews as outlined in subs. (4) to (4z)” in the standard of review and decision be interpreted broadly to include reviews by the council, the party state, and the regional body; more narrowly interpreted to only include reviews by the council, or interpreted according to the compact drafter’s intent that council amendment or revision of the standard of review and decision is only intended to include council review of the exception standard and the decision-making standard? If the first or second interpretation is adopted, which reviews should be included in the legislative oversight procedure?

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