

State Notes

TOPICS OF LEGISLATIVE INTEREST

July/August 2008



The Great Lakes-St. Lawrence River Basin Water Resources Compact By Julie Cassidy, Legislative Analyst

Introduction

On July 9, 2008, Michigan ratified the Great Lakes-St. Lawrence River Basin Water Resources Compact. The Compact is the result of many years of planning, involving all the Great Lakes states and Canadian provinces, for the increased protection of the waters of the Great Lakes Basin. Now that all of the involved states have ratified the Compact, congressional approval is required for it to take effect. This article discusses the events leading to the adoption of the Compact, its primary functions, and recent State and Federal legislation to implement it.¹

History

In 1985, the Great Lakes governors and Canadian premiers signed the Great Lakes Charter, a voluntary agreement through which the Great Lakes states and provinces cooperatively manage the waters of the Great Lakes. In June 2001, the governors and premiers signed the Great Lakes Charter Annex 2001 ("Annex 2001"), which focuses specifically on water withdrawals by outlining the basic principles that state and provincial governments should use when evaluating withdrawal proposals. Annex 2001 also calls for coordinated standards that guide water use decisions toward the common goal of protecting and enhancing the Great Lakes ecosystem. Both the original charter and the Annex were nonbinding, and required statutory authority to be implemented.

In 2005, the governors signed two documents to implement the Annex 2001 agreement and establish the decision-making standard to be used in evaluating proposals: the Great Lakes Basin Sustainable Water Resources Agreement (a good-faith agreement) and the Great Lakes Basin Water Resources Compact (a binding agreement). The Compact specifies that each party will manage and regulate new or increased withdrawals within its jurisdiction in accordance with the Compact.

In addition, the Federal 1986 Water Resources Development Act included a requirement for the approval of each Great Lakes governor for diversions outside of the Basin. Amendments enacted in 2000 prohibit Great Lakes water exports without the approval of each Great Lakes governor, and also "encourage the Great Lakes States, in consultation with the Provinces of Ontario and Quebec, to develop and implement a mechanism that provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin".

In Michigan, legislation was enacted several years ago as a result of Annex 2001; a Great Lakes Conservation Task Force report recommending the enactment of comprehensive water withdrawal laws, as well as any implementation laws arising from the Annex 2001 process; and groundwater shortages around the State. Public Act 148 of 2003 required the Department of

¹ For a detailed description of the Compact and Michigan's recently enacted legislation, please see the Senate Fiscal Agency analysis of Senate Bills 212, 723, 727, 858, 859, and 860, and House Bills 4343, 5065, 5066, 5067, and 5073 (Analysis as Enacted, 7-31-08), which may be found at www.senate.michigan.gov/sfa



Environmental Quality (DEQ) to prepare a statewide groundwater inventory and map; increased water use reporting fees for certain facilities with a capacity to pump over 100,000 gallons per day; extended the reporting requirement to farms with the same capacity; and created the Groundwater Conservation Advisory Council to study the sustainability of the State's groundwater use and monitor the implementation of and make recommendations on statutory conformance with Annex 2001.

Public Acts 33 through 36 of 2006 took the next step in implementing the provisions of the Great Lakes Charter and amending documents. Specifically, these Acts did the following: prohibited withdrawals causing adverse resource impacts to designated trout streams for two years, and, beginning February 28, 2008, prohibited all withdrawals resulting in adverse resource impacts; established a requirement that certain large-quantity water users obtain a water withdrawal permit and pay a fee; required the Groundwater Conservation Advisory Council, in consultation with several State departments, to develop an assessment tool to determine whether a proposed withdrawal will create an adverse resource impact; required each water users' sector to begin designing generally accepted water management practices or environmentally sound and economically feasible water conservation measures; authorized large-quantity users in a watershed to form a water users committee through which the DEQ can facilitate the resolution of a situation in which a withdrawal causes an adverse resource impact; and required a bottled water producer proposing a new or increased withdrawal of at least 250,000 gallons of water per day to demonstrate to the DEQ that specified criteria would be met.

In June 2007, the Advisory Council's final report was submitted to the Legislature. The report outlined a withdrawal assessment process that included both an automated screening tool for determining a withdrawal's potential impact, and a site-specific analysis for withdrawals falling into certain categories. Executive Order 2007-8 then dissolved the Council and transferred its responsibilities to the DEQ.

Under recently enacted legislation, the Compact was approved in Michigan and the State's water withdrawal registration and permitting process was increased in scope and revised to reflect the Council's recommendations. Additionally, the Council was reconstituted to facilitate the withdrawal assessment process and the implementation and future adaptation of the assessment tool.

Great Lakes-St. Lawrence River Basin Water Resources Compact

Public Act 190 of 2008 added the Compact to the Natural Resources and Environmental Protection Act (NREPA) as Part 342. The Compact provides for intergovernmental cooperation and consultation through which the parties intend to protect, conserve, restore, improve, and effectively manage the Basin's waters and water-dependent resources. All new or increased diversions are prohibited, subject to certain exceptions. The Compact establishes a minimum standard of review and decision for withdrawals, and allows parties to impose a more restrictive standard for withdrawals under their authority. The Compact's highlights are described below.

Great Lakes-St. Lawrence River Basin Water Resources Council. The Council consists of the all of the Great Lakes governors. The Council and the parties must use the standard of review and decision and procedures contained in or adopted pursuant to the Compact as the means to



exercise their authority under it. The Council must identify priorities and develop plans and policies relating to Basin water resources. Additionally, it must adopt and promote uniform and coordinated policies for water resources conservation and management in the Basin.

Program Review & Findings. Every five years, each party must submit to the Council and the regional body (which consists of the Council members and the premiers of Ontario and Quebec) a report detailing its water management and conservation and efficiency programs that implement the Compact. The Council, in cooperation with the provinces, must review its programs and those of the parties and make findings on whether the Compact's water management program provisions are being met, and, if not, recommend options to assist the parties in meeting them.

Inventory, Registration, & Reporting. Within five years of the Compact's effective date, each party must develop and maintain a water resources inventory. The Council must assist each party in developing a common base of data regarding the management of the Basin's water resources and in establishing systematic arrangements for the exchange of those data with other states and provinces. Within five years of the Compact's effective date, any person who withdraws at least 100,000 gallons per day average in any 30-day period (including consumptive uses) from all sources, or diverts any water, must register the withdrawal or diversion. All registrants annually must report the monthly volumes of the withdrawal, consumptive use, and diversion to the originating party (where an application or registration is made or required). Each party annually must report this information to a Great Lakes-St. Lawrence River water use data base repository, for uses specified in the Compact.

Conservation & Efficiency Programs. The Compact provides that the Council commits to identify, in cooperation with the provinces, Basin-wide water conservation and efficiency objectives to assist the parties in developing their water conservation and efficiency programs. The objectives must be based on specific goals, which include ensuring improvement of the waters and water-dependent natural resources, and protecting and restoring the Basin's hydrologic and ecosystem integrity. Within two years of the Compact's effective date, each party must develop its own goals and objectives consistent with the Basin-wide goals and objectives, and develop and implement a voluntary or mandatory water conservation and efficiency program for all Basin water users within its jurisdiction. Every five years, the Council, in cooperation with the provinces, must review and modify as appropriate the Basin-wide objectives, and the parties must consider the modifications in implementing their programs.

Party Powers & Duties. Each party, within its jurisdiction, must manage and regulate new or increased withdrawals, consumptive uses, and diversions in accordance with the Compact. No party may approve a proposal for withdrawal, diversion, or consumptive use of water that is subject to the Compact if it determines that the proposal is inconsistent with the Compact or the standard of review and decision or any implementing rules or regulations. The party may approve, approve with modifications, or disapprove any proposal depending on its consistency with the Compact and the standard of review and decision. No party may approve a proposal subject to Council and/or regional review unless it is first submitted to and reviewed by either the Council or regional body, or both, and approved by the Council, as applicable.

Originating Party Approval. No proposal subject to management and regulation under the Compact may be undertaken unless it has been approved by the originating party.

State Notes

TOPICS OF LEGISLATIVE INTEREST

July/August 2008



Regional Review. The Compact states that it is the intention of the parties to participate in regional review of proposals with the provinces. Proposals for exceptions from the Compact's diversion prohibition subject to regional review must be submitted by the originating party to the regional body for regional review, and, where applicable, to the Council for concurrent review. A majority of the members of the regional body may request regional review of a regionally significant or potentially precedent-setting proposal. The Compact prescribes the procedures for regional review, including the originating party's provision of its technical review of the proposal, and the regional body's declaration of finding that the proposal meets the standard of review and decision, does not meet the standard, or would meet the standard if certain conditions were met. The originating party and the Council must consider the declaration before making a decision on the proposal.

Proposals Subject to Prior Notice. Beginning within five years after the Compact's effective date, an originating party must give all parties and the provinces notice and an opportunity to comment on any proposal for a new or increased consumptive use of 5.0 million gallons per day or greater average in any 90-day period. Comments must address whether the proposal is consistent with the standard of review and decision.

Exception for Straddling Community. A proposal to transfer water to an area within a straddling community but outside the Basin or outside the source Great Lake watershed must be excepted from the prohibition against diversions and be managed and regulated by the originating party provided that all the transferred water will be used solely for public water supply purposes within the straddling community, and the following conditions are met: if the proposal results from a new or increased withdrawal of at least 100,000 gallons per day average over any 90-day period, the proposal meets the exception standard (described below); if the proposal results in a new or increased consumptive use of at least 5.0 million gallons per day average over any 90-day period, the proposal also will undergo regional review; and all water withdrawn from the Basin will be returned, either naturally or after use, to the source watershed less an allowance for consumptive use.

(The Compact defines "straddling community" as any incorporated city, town, or the equivalent of a city or town, wholly within any county that lies partly or completely within the Basin, whose corporate boundary existing as of the Compact's effective date is partly within the Basin or partly within two Great Lakes watersheds.)

Exception for Intra-Basin Transfer. A proposal for an intra-Basin transfer that would be considered a diversion under the Compact and not otherwise excepted must be excepted from the prohibition against diversions, if the following provisions apply.

If the proposal results from a new or increased withdrawal of less than 100,000 gallons per day average over any 90-day period, the proposal is subject to management and regulation at the discretion of the originating party.

If the proposal results from a new or increased withdrawal of 100,000 gallons per day or greater average over any 90-day period and if the consumptive use resulting from the withdrawal is less than 5.0 million gallons per day average over any 90-day period, the proposal must meet the



exception standard and be subject to management and regulation by the originating party, except that the water may be returned to another Great Lake watershed rather than the source watershed; and the originating party must notify the other parties before making any decision on the proposal.

If the proposal results in a new or increased consumptive use of 5.0 million gallons per day or greater average over any 90-day period, the proposal is subject to management and regulation by the originating party and must meet the exception standard, ensuring that water withdrawn will be returned to the source watershed; and the proposal must undergo regional review and be approved by the Council.

Also, except in the case of a withdrawal of less than 100,000 gallons per day, the applicant must demonstrate that there is no feasible, cost effective, and environmentally sound water supply alternative within the Great Lake watershed to which the water will be transferred, including conservation of existing water supplies.

Exception for Straddling Counties. A proposal to transfer water to a community within a straddling county that would be considered a diversion under the Compact must be excepted from the prohibition, if it satisfies all of the following conditions:

- The water will be used solely for the public water supply purposes of the community within a straddling county that is without adequate supplies of potable water.
- The proposal meets the exception standard, maximizing the portion of water returned to the source watershed as Basin water and minimizing the surface water or groundwater from outside the Basin.
- The proposal is subject to management and regulation by the originating party, regardless of its size.
- There is no reasonable water supply alternative within the Basin in which the community is located, including conservation of existing water supplies.
- Caution will be used in determining whether the proposal meets the conditions for this exception (which should not be authorized unless it can be shown that it will not endanger the integrity of the Basin ecosystem).
- The proposal undergoes regional review and is approved by the Council.

Substantive consideration also will be given to whether the proposal can provide sufficient scientifically based evidence that the existing water supply is derived from groundwater that is hydrologically interconnected to Basin waters.

Exception Standard. Proposals subject to management and regulation must be declared to meet the exception standard and may be approved as appropriate only when the following criteria are met:

- The need for all or part of the proposed exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies.
- The exception will be limited to quantities that are considered reasonable for the purposes for which it is proposed.

State Notes

TOPICS OF LEGISLATIVE INTEREST

July/August 2008



- The exception will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts on the quantity or quality of the Basin's waters and water-dependent natural resources with consideration given to the potential cumulative impacts of any associated precedent-setting consequences.
- Implementation of the exception will incorporate environmentally sound and economically feasible water conservation measures to minimize water withdrawals or consumptive use.
- Implementation will ensure that the exception is in compliance with all applicable municipal, state, and Federal laws as well as regional interstate and international agreements, including the Boundary Waters Treaty of 1909.
- All other applicable criteria have been met.
- All water withdrawn will be returned, either naturally or after use, to the source watershed less an allowance for consumptive use.

No surface water or groundwater from outside the Basin may be used to satisfy any portion of the criterion related to the return of the water unless certain conditions are met.

New or Increased Withdrawals & Consumptive Uses. Within five years of the Compact's effective date, each party must create a program for the management and regulation of new or increased withdrawals and consumptive uses by adopting and implementing measures consistent with the decision-making standard. Each party must set and may modify threshold levels for the regulation of new or increased withdrawals to assure an effective and efficient water management program. Any party that fails to set threshold levels that comply with the Compact within 10 years must apply a threshold level of 100,000 gallons per day or greater average in any 90-day period.

Decision-Making Standard. Proposals subject to management and regulation must be declared to meet the decision-making standard and may be approved as appropriate only when the following criteria are met:

- All water withdrawn will be returned, either naturally or after use, to the source watershed less an allowance for consumptive use.
- The withdrawal or consumptive use will be implemented so as to ensure that the proposal will result in no significant individual or cumulative adverse impacts on the quantity or quality of the waters and water-dependent natural resources and the applicable source watershed.
- Implementation of the withdrawal or consumptive use will incorporate environmentally sound and economically feasible water conservation measures.
- Implementation will ensure that that the withdrawal or use is in compliance with all applicable municipal, state, and Federal laws, as well as regional interstate and international agreements, including the Boundary Waters Treaty.

Additionally, the proposed use must be reasonable, based upon a consideration of specified factors. These include the balance between economic development, social development, and environmental protection of the proposed withdrawal and use and other existing or planned withdrawals and water uses sharing the water source. Another factor is the probable degree and duration of any adverse impacts caused or expected to be caused by the proposed withdrawal and use under foreseeable conditions, to other lawful consumptive or nonconsumptive uses of water or to the quantity or quality of the waters and water-dependent



natural resources of the Basin, and the proposed plans and arrangements for avoidance or mitigation of such impacts.

Applicability. A proposal to withdraw water and to remove it from the Basin in any container greater than 5.7 gallons must be treated in the same manner as a proposal for a diversion.

Assessment of Cumulative Impacts. The parties, in cooperation with the provinces, must conduct collectively within the Basin an 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 50.0 million gallons per day average in any 90-day period in excess of the quantity at the time of the most recent assessment, whichever occurs first, or at the request of one or more of the parties. The assessment will form the basis for a review of the review and decision standard, Council and party regulations, and their application.

Enforcement. The Compact prescribes procedures for a person aggrieved by any Council or party action, including administrative procedures and judicial review. The Compact also prescribes procedures by which the Council or any party may compel compliance, as well as remedies for a prevailing party in an action, including equitable relief and recovery of litigation costs. Each of the parties may adopt provisions for additional enforcement mechanisms and remedies including equitable relief and civil penalties applicable within its jurisdiction.

Michigan's Implementation Legislation

Public Acts 179 through 189 of 2008 amended NREPA and the Safe Drinking Water Act to bring the State's water withdrawal registration and permitting system into conformity with the Compact.

Public Act 189 reestablished the former Advisory Council as the Water Resources Conservation Advisory Council, revised its membership, and gave it new duties related to the testing and evaluation of the assessment tool, recommendations for updates to the withdrawal assessment process, and recommendations on the State's compliance with certain aspects of the Compact.

Previously, a person who proposed to engage in producing bottled drinking water from a new or increased large-quantity withdrawal of more than 250,000 gallons per day had to demonstrate to the DEQ that certain conditions would be met. Under Public Act 188, the conditions apply to a withdrawal of more than 200,000 gallons per day, as well as an intra-Basin transfer of more than 100,000 gallons per day average over a 90-day period.

Public Act 187 requires the DEQ to use the assessment tool to evaluate a new or increased large-quantity withdrawal for a proposed waterworks system by a community supply. If the proposal falls into a particular category, the community supply must certify that it is implementing applicable environmentally sound and economically feasible water conservation measures. The Act also expanded the withdrawals subject to a requirement that the DEQ evaluate the impact of a proposed system for a community supply.

The current penalty for knowingly making a new or increased large-quantity withdrawal that causes an adverse resource impact or violating a withdrawal permit requirement or term is a

State Notes

TOPICS OF LEGISLATIVE INTEREST

July/August 2008



civil fine of up to \$5,000 per day. Public Act 186 increases the maximum fine to \$10,000 per day, beginning October 7, 2008.

Public Act 185 requires the DEQ to make the internet-based withdrawal assessment tool available for testing and evaluation on October 1, 2008, and to implement it on July 9, 2009. The tool must assign each withdrawal to one of four categories based upon its potential to cause an adverse resource impact. Public Act 184 requires the DEQ to notify certain entities by e-mail if a proposed withdrawal falls into a particular category; and allows the entities to form a water resources assessment and education committee in order to assess water use trends in the withdrawal's vicinity and educate water users. Public Act 183 creates a rebuttable presumption that a proposed withdrawal will not cause an adverse resource impact, under certain circumstances.

Public Act 182 requires the DEQ, by March 31, 2009, to prepare a set of generic water conservation measures applicable to all large-quantity water users. Then, the DEQ must review conservation measures submitted by a specific water user's sector and approve them as a replacement for the generic measures for that sector. The Act also requires a registrant or permit holder to certify that he or she has reviewed environmentally sound and economically feasible water conservation measures; and requires the DEQ, upon receiving a registration falling into a particular category, to notify other registrants and permit holders using water from the same sources so that they can consider implementing water conservation measures.

Public Act 181 requires a property owner to request the DEQ to conduct a site-specific review if the assessment tool indicates that a proposed withdrawal falls into a particular category; and requires a property owner to obtain a withdrawal permit and DEQ authorization in order to register and make a withdrawal, under certain circumstances. Public Act 180 revised requirements for a property owner to register with the DEQ before making a large-quantity withdrawal, and revised water withdrawal permit requirements.

Public Act 179 added various definitions and revised several definitions used in Part 327 (Great Lakes Preservation) of NREPA, including the definition of "adverse resource impact". Until February 1, 2009, the term means decreasing the flow of a river or stream by part of the index flow so that its ability to support characteristic fish populations is functionally impaired. Beginning on that date, the definition will depend on the type and size of the river or stream involved, or the impact on the level of surface water.

Congressional Action

The U.S. Congress recently has taken action on a pair of bills to approve the Compact. The House Judiciary Committee voted to report H.R. 6577 in July 2008, and the Senate passed Senate Joint Resolution 45 unanimously in August. Reportedly, President Bush has indicated that he will sign the Compact into law once both chambers have approved it.

Debate Surrounding the Compact

According to the Compact's proponents, unmanaged diversions of Great Lakes water, as well as large-quantity in-Basin uses, could result in groundwater shortages, reduce the flow of rivers

State Notes

TOPICS OF LEGISLATIVE INTEREST

July/August 2008



and streams, lower lake levels, and harm natural resources. The State's economy is reliant upon an abundance of water, especially with regard to three of its major industries: manufacturing, agriculture, and tourism. While the Great Lakes states have individual state laws in place and agreed under the nonbinding Great Lakes Charter to regulate large withdrawals, monitor water use, and consult with one another before approving large diversions, a cooperative, binding agreement is considered necessary to ensure that sustainable water use practices are implemented on a Basin-wide basis.

With Public Act 190 of 2008, Michigan became the eighth, and final, state to ratify the Compact. If approved by Congress, the Compact will provide a framework for management of the waters of the Basin by all of the affected states and provinces and facilitate environmentally responsible economic development in the Great Lakes region. The establishment of the Compact's decision-making standard will ensure consistency in water use determinations throughout the Basin.

The provisions of the State legislation regarding the assessment tool, the withdrawal review process, and water conservation measures satisfy the Compact's requirement for each state to implement a water conservation program. Michigan's assessment tool is unique in that it is the only science-based mechanism for evaluating withdrawals to be adopted by any party to the Compact. By reestablishing the Advisory Council and requiring it to examine new scientific data and recommend changes to the assessment process and statutory definitions, the legislation will result in the continued responsiveness and accuracy of the State's system for evaluating withdrawals. The user-friendly assessment tool will provide certainty for water users, and the site-specific review process for specified withdrawals and the local committee provisions will ensure that proposals undergo multiple levels of review involving all stakeholders.

Some questions have been raised, however, regarding the benefits of the Compact. Under the Federal Water Resources Development Act (WRDA), any Great Lakes governor may veto a proposed diversion out of the Basin. There are concerns that under the Compact, Michigan could lose some of its sovereignty regarding intra-Basin water use decisions. Some people believe that the fact that Michigan's Governor has used this veto power to prevent diversions in the past demonstrates that the Act is sufficient to protect the State's water resources.

On the other hand, the gubernatorial veto power is not guaranteed, as Congress could amend the WRDA in the future. If Michigan loses congressional seats due to a declining population, the influence it could exercise with regard to this issue is questionable. Furthermore, the power to veto under the WRDA applies only to the transfer of water out of the Basin. The Compact establishes a framework for decision-making with regard to in-Basin uses. Additionally, many people believe that the Compact would be more likely to withstand a legal challenge than the WRDA.

What everyone agrees upon, presumably, is the need to safeguard the future of a resource that contains approximately 84% of North America's fresh surface water, and about 21% of the world's supply.