

# **An Assessment of the Great Lakes States' Implementation of the Water Management and Conservation Provisions of the Great Lakes – St. Lawrence River Basin Water Resources Compact**



By the University of Toledo College of Law's  
Legal Institute of the Great Lakes

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## Executive Summary

The Great Lakes – St. Lawrence River Basin Water Resources Compact, which took effect in December 2008, ushered in a new era of water management for each of the eight Great Lakes states -- Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin. Recognizing that the waters of the Great Lakes basin are a precious public natural resource shared by the states, the Compact not only banned (with limited exceptions) new diversions of waters of the Great Lakes basin outside the basin, it also required the states to undertake more robust programs for management and conservation of waters within the Great Lakes basin. In order to fulfill the promise of the Compact, it is essential that the states carry out their obligations to implement its terms.

This white paper aims to independently assess each of the eight Great Lakes states' implementation of the water management and water conservation and efficiency provisions of the Compact. This project is particularly timely. This December each state is required to report on its implementation of water management and water conservation and efficiency programs under the Compact. The states' reports are subject to review by the Great Lakes – St. Lawrence River Basin Water Resources Council. The Council will determine whether each state's water management and water conservation and efficiency programs meet the provisions of the Compact, and if not make recommendations.

Overall our assessment is positive. Although programs differ among the states, each of the eight Great Lakes states is largely implementing the water management and water conservation and efficiency provisions of the Compact. But there is room for improvement for each state. While our state-by-state analyses outline the particular issues for each state, a majority of the states seem to be coming up short with respect to a few provisions:

- *Compact § 4.1.1 Water Resources Inventory.* Virtually every state is not maintaining a complete water resources inventory as required by the Compact, including information on withdrawals, consumptive uses, and diversions in the Great Lakes basin.
- *Compact §§ 4.1.3 Registration & 4.1.4 Reporting.* All states have laws mandating registration and reporting of withdrawals of 100,000 gallons per day or more, and diversions in any amount, in the Great Lakes basin as contemplated by the Compact. But in multiple states it is not clear that such registration and reporting are occurring as required.
- *Compact § 4.11.* Compact § 4.11 sets forth a Decision-Making Standard to be applied to all proposals for new or increased withdrawals and consumptive uses in the Great Lakes basin subject to management and regulation under Compact § 4.10. But some states appear to apply a different, less rigorous standard; some states apply the Decision-Making Standard only to certain regulated withdrawals and consumptive uses; and some

states define “source watershed” in a manner that may be at odds with the Decision-Making Standard.

We hope that our assessment will help inform the states as they complete their reports later this year, the Council as it reviews the state reports, and the public interested in our Great Lakes water resources.

## I. Introduction

The groundbreaking Great Lakes – St. Lawrence River Basin Water Resources Compact (Compact) took effect December 8, 2008. Parties to the Compact are the eight states bordering the Great Lakes – Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin. Following years of negotiations, the Compact was signed by the governors of all eight Great Lakes states in December 2005, was subsequently ratified by the legislatures of all Great Lakes states, was approved by Congress and signed by President George W. Bush in September 2008, and by its terms took effect 90 days later. An interstate compact under the Compact Clause of the U.S. Constitution,<sup>1</sup> the Compact is both an agreement among the eight states and binding federal law.

The Compact recognizes that the waters of the Great Lakes basin are precious natural resources shared and held in trust by the states.<sup>2</sup> A key feature of, and a major impetus for, the Compact is its ban on diversions of waters of the Great Lakes basin<sup>3</sup> to outside of the Great Lakes basin. The Compact flatly prohibits new or increased diversions of Great Lakes basin waters beyond the Great Lakes basin, subject to three specific exceptions for certain users just beyond the Great Lakes watershed. Equally important, though, are the Compact provisions that promote wiser use of Great Lakes basin waters within the basin – specifically, the provisions obliging the states to undertake programs regarding water management and water conservation and efficiency. In order to fulfill the promise of the Compact, it is essential that the states carry out their obligations to implement these provisions.

This paper aims to independently assess each of the eight Great Lakes states' implementation of the water management and water conservation and efficiency provisions of the Compact. Section 3.4.1 of the Compact requires each state (aka Party) to submit periodic reports detailing its water management and water conservation and efficiency programs that implement the Compact. These periodic reports go to the Great Lakes – St. Lawrence River Basin Water Resources Compact Council (Council), a body created by the Compact and consisting of representatives of each of the eight states.<sup>4</sup> At this point these periodic reports are due every five years, and the next round of state five-year reports is due December 2019. After reviewing the state reports, the Council must determine whether the states' water management and water conservation and efficiency programs meet the provisions of the Compact, and if not, recommend options to assist the states in meeting the Compact provisions.

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<sup>1</sup> U.S. Const. art. I, § 10.

<sup>2</sup> Compact § 1.3.1.a.

<sup>3</sup> Compact § 1.2 defines “waters of the basin” as the Great Lakes themselves plus all surface water and groundwater tributaries within the Great Lakes basin.

<sup>4</sup> The reports also go to the Regional Body, another entity created by the Compact which includes representatives of the two Canadian provinces as well as the eight members of Council.

The prime focus of this paper is to assess the states' water management and water conservation and efficiency programs that implement the Compact.<sup>5</sup> These assessments are intended to help insure that the necessary steps are being taken to preserve Great Lakes basin waters. Ideally, the assessments will help inform the states as they complete their five-year reports later this year, and the Council and the public as they review the states' reports.

Part II of this paper includes a summary of the water management and water conservation and efficiency provisions of the Compact. Part III is a state-by-state analysis of the progress by each of the eight Great Lakes states in implementing those provisions.

## **II. The Compact's Water Management and Water Conservation and Efficiency Provisions**

The water management and water conservation and efficiency provisions of the Compact are included in Article 4, titled "Water Management and Regulation." The key provisions regarding water management and water conservation and efficiency that each Party must implement are summarized below. The full Compact is attached as Appendix A.

### *Section 4.1. Water Resources Inventory, Registration and Reporting*

4.1.1. Within 5 years of the effective date of the Compact, each Party shall develop and maintain a water resources inventory concerning its water resources, including information on withdrawals, consumptive uses, and diversions.

4.1.3. Within 5 years, any person<sup>6</sup> who withdraws an average of 100,000 gallons per day (gpd) or more in any 30-day period, or who diverts water in any amount, shall register the withdrawal or diversion with the state.

4.1.4. All registrants shall annually report the monthly volumes of the withdrawal, consumptive use, or diversion to the state.

4.1.5. Each Party shall annually report the information gathered pursuant to this section to a Great Lakes water use database repository, and the aggregated data shall be made publicly available.

### *Section 4.2. Water Conservation and Efficiency Programs*

4.2.2. Within 2 years of the effective date of the Compact, each Party (a) shall develop its own water conservation and efficiency goals and objectives consistent with the basin-wide goals and objectives identified by Council; and (b) shall develop and implement a water

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<sup>5</sup> Specifically, the focus is on the water management and water conservation and efficiency programs that the states are required to report upon pursuant to Compact § 3.4.1.

<sup>6</sup> "Person" is defined to mean "a human being or a legal person, including a government or a non-governmental organization, including any scientific, professional, business, non-profit, or public interest organization or association that is neither affiliated with, nor under the direction of a government." Compact § 1.2.

conservation and efficiency program, voluntary or mandatory, based on the Party's goals and objectives.

Additionally, each Party shall annually assess its programs in meeting its goals and objectives, report to Council and the Regional Body, and make the assessment publicly available.

4.2.4. Within 2 years, the Parties commit to promote environmentally sound and economically feasible water conservation measures.

4.2.5. Each Party shall implement a voluntary or mandatory water conservation program for all basin water users.

*Section 4.3. Party Powers and Duties*

4.3.1. Each Party shall manage and regulate new or increased withdrawals, consumptive uses, and diversions in accordance with the Compact.

*Section 4.6. Proposals Subject to Prior Notice*

4.6.1. Each Party shall provide all Parties and Provinces with notice and an opportunity to comment on any proposal for a new or increased consumptive use of 5 million gpd or more average in any 90-day period.

*Section 4.8. Prohibition of New or Increased Diversions*

All new or increased diversions are prohibited, except as provided for in Article 4.

*Section 4.9. Exceptions to the Prohibition of Diversions*

4.9.1. Straddling Communities conditions.

4.9.2. Intra-Basin Transfer conditions.

4.9.3. Straddling Counties conditions.

4.9.4. Exception Standard criteria. Except for relatively small straddling community and intra-basin transfer exception proposals, proposals for exceptions must meet the Exception Standard criteria as well as the conditions applicable to the specific exception.

Straddling county exception proposals, and intra-basin transfer exception proposals for a new or increased consumptive use of 5 million gpd or more, must be approved by all members of Council.

*Section 4.10. Management & Regulation of New or Increased Withdrawals & Consumptive Uses*

4.10.1. Within 5 years of the effective date of the Compact, each Party shall create a program for the management and regulation of new or increased withdrawals and consumptive uses that exceed threshold levels set by the Party. The Party's threshold levels and management program will ensure that uses overall are reasonable and withdrawals overall will not result in significant impacts to the waters and water dependent natural resources of the basin. Each Party may determine the scope and thresholds of its program.

4.10.2. Any Party that fails to set threshold levels that comply with Section 4.10.1 within 10 years shall apply a threshold level of 100,000 gpd average in any 90-day period.

*Section 4.11. Decision-Making Standard*

Proposals subject to management and regulation in Section 4.10 may be approved only when the following criteria are met:

1. All water withdrawn is returned to the source watershed, less an allowance for consumptive use;
2. The withdrawal or consumptive use will result in no significant adverse impacts to the quantity or quality of the waters and water dependent natural resources and the source watershed;
3. The withdrawal or consumptive use will incorporate environmentally sound and economically feasible water conservation measures;
4. The withdrawal or consumptive use will comply with all laws; and
5. The proposed use is reasonable, based on a consideration of six specified factors:
  - a. Efficient use, minimizes waste of water;
  - b. Efficient use of existing water supplies, if an increased use;
  - c. Balance between proposed use and other uses sharing the water source;
  - d. Supply potential of the water source;
  - e. Adverse impacts to waters and water dependent natural resources; and
  - f. Restoration of source watershed conditions and functions, if applicable.

*Section 4.12. Applicability*

4.12.1. The Compact Decision-Making Standard is a minimum. Parties may impose a more restrictive decision-making standard.

4.12.2. Each Party shall establish a baseline for determining a new or increased diversion, consumptive use, or withdrawal. A list of existing diversions, consumptive uses, and withdrawals shall be furnished to Council and the Regional Body within 1 year of the effective date of the Compact.

*Section 4.13. Exemptions*

Withdrawals are exempt from the requirements of Article 4 for the following purposes: (1) to supply vehicles or (2) to use in a non-commercial project on a short-term basis for firefighting, humanitarian or emergency-response.

### **III. State-by-State Analysis**

Over the decade-plus since the Compact took effect, each of the eight Great Lakes states has generally taken seriously its obligations under the Compact. Management and regulation, typically via permit systems, of new or increased water withdrawals, consumptive uses, and diversions are more robust. Water conservation and efficiency programs and measures are stronger. But there is room for improvement in carrying out the water management and water conservation and efficiency provisions of the Compact.

The remainder of this Part is a state-by-state analysis of the progress each of the eight Great Lakes states has made in implementing the water management and water conservation and efficiency provisions of the Compact.

## ILLINOIS

### Introduction

The Illinois General Assembly ratified the Compact in 2008 via Public Act 095-0238 effective August 17, 2007. The legislation, codified at 45 Ill. Comp. Stat. 147/5, enacted the terms of the Compact verbatim.

Prior to the Compact, the construction of the Chicago Area Waterway System (CAWS)<sup>1</sup> circa 1900 resulted in the reversal of the direction of flow of the Chicago and Calumet Rivers away from Lake Michigan, creating a diverted watershed area of around 673 square miles.<sup>2</sup> Disputes over Illinois' diversion of Lake Michigan water led to the U.S. Supreme Court consent decree in *Wisconsin v. Illinois*.<sup>3</sup> As a result of the 1967 consent decree, as subsequently modified in 1980, Illinois is now limited in diversions of Lake Michigan water not to exceed a 40-year running average of 3,200 cubic feet per second, or 2.1 billion gallons per day.<sup>4</sup>

Illinois' treatment under the Compact is unique among the eight Great Lakes states. Compact § 4.14 provides that current, new or increased withdrawals, consumptive uses, and diversions of Great Lakes basin water by Illinois are governed by the terms of the Supreme Court consent decree, not the Compact.<sup>5</sup> Specifically, Compact sections 4.3 through 4.13 do not apply to the State of Illinois.<sup>6</sup> The remaining Compact sections, though, do apply to Illinois, including Compact sections 4.1 (Water Resources Inventory, Registration and Reporting) and 4.2 (Water Conservation and Efficiency Programs).<sup>7</sup>

Key state agencies for implementing the relevant Compact provisions are the Illinois Department of Natural Resources (IDNR) and the Illinois State Water Survey (ISWS).

In December 2014, Illinois submitted its Five-Year Review of its Water Management and Water Conservation and Efficiency Programs, pursuant to Compact § 3.4.1. Following review of the

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<sup>1</sup> The CAWS is a system of canals and natural waterways that serves as both a navigation link between Lake Michigan and the Mississippi River system and an outlet for the storm water and effluent of the City of Chicago. The canal system was originally constructed by Illinois and local governments to permit Chicago to dilute and dispose of water waste without its entering Lake Michigan. Paul M. Janicke, Lake Michigan Water Diversion: A Brief Legal History, U. Hous. L. Center, [http://www.watercases.org/LIB\\_1/Lake\\_Michigan\\_Water\\_Diversion\\_Story.pdf](http://www.watercases.org/LIB_1/Lake_Michigan_Water_Diversion_Story.pdf).

<sup>2</sup> Five Year Review of Illinois' Water Management and Conservation and Efficiency Programs (Dec. 8, 2014) p. 1.

<sup>3</sup> *Wisconsin v. Illinois*, 388 U.S. 426 (1967), as modified by 449 U.S. 48 (1980).

<sup>4</sup> *Id.*

<sup>5</sup> Compact § 4.14.1.

<sup>6</sup> Compact § 4.14.4.

<sup>7</sup> *Id.* See Five-Year Review of Illinois' Water Management and Conservation and Efficiency Programs (Dec. 8, 2014) p. 2.

report pursuant to Compact § 3.4.2, the Compact Council and Regional Body issued Resolution No. 2015-1 finding that, based on the report submitted by the State, the Illinois water management and water conservation and efficiency programs meet or exceed the current requirements of the Compact.<sup>8</sup>

## **Water Management Program (§ 4.1)**

### Water Inventory, Registration and Reporting

#### *Inventory (§ 4.1.1)*

Compact § 4.1.1 required each state to develop and maintain a water resources inventory including withdrawals, diversions, and consumptive uses within five years. Illinois incorporates this Compact requirement through its ratification of the Compact.<sup>9</sup>

Through the Water Use Act of 1983, as amended in 2010, ISWS maintains the Illinois Water Inventory Program (IWIP), described by the agency webpage as a “state-wide inventory of water use and withdrawals.”<sup>10</sup> Any person or land owner responsible for a point of withdrawal classified as a high-capacity well, high-capacity intake, or public water supply is now required to participate in IWIP.<sup>11</sup> The threshold for being a “high-capacity” well or intake, and thus being required to register and report annual water use and withdrawal information as a participant in IWIP, is a withdrawal in excess of 100,000 gpd.<sup>12</sup>

IWIP appears to go a long way toward satisfying Illinois’ inventory obligation under Compact § 4.1.1.<sup>13</sup> But Illinois in its 2014 five-year report did not explain how it was meeting the

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<sup>8</sup> <http://www.glscompactcouncil.org/Docs/DOFs/Programs/2014/Resolution%202015-1-Illinois%20Declaration%20of%20Finding.pdf>.

<sup>9</sup> 45 Ill. Comp. Stat. 147/5.

<sup>10</sup> ISWS, Illinois Water Inventory Program, <https://www.isws.illinois.edu/groundwater-science/illinois-water-inventory-program>.

<sup>11</sup> 525 Ill. Comp. Stat. 45/5.3.

<sup>12</sup> 525 Ill. Comp. Stat. 45/4 (definition of “high capacity” wells and intakes).

<sup>13</sup> The language of 525 Ill. Comp. Stat. 45/5.3 seems broad enough to encompass consumptive uses and diversions even though it speaks in terms of “withdrawals.” The statutory definition of “point of withdrawal” means “that point at which *underground water* is diverted by a person from its natural state,” 525 Ill. Comp. Stat 45/4 (emphasis added), which raises a question whether IWIP covers surface water withdrawals or just groundwater. But the inclusion of “high capacity intakes” in 525 Ill. Comp. Stat. 45/5.3 indicates IWIP reaches surface water withdrawals as well as groundwater, and Illinois’ 2014 five-year report describes ISWS’ inventory and reporting program as covering surface and groundwater use. Five Year Review of Illinois’ Water Management and Conservation and Efficiency Programs (Dec. 8, 2014) p. 2. Withdrawals with a capacity of less than 100,000 gpd are not required to participate in IWIP.

requirements of Compact § 4.1.1.<sup>14</sup> Illinois should demonstrate in its upcoming 2019 five-year report that a comprehensive water resources inventory including withdrawals, consumptive uses, and diversions in the Lake Michigan basin is being maintained as required by Compact § 4.1.1.

#### *Registration (§ 4.1.3)*

Compact § 4.1.3 requires that any person<sup>15</sup> who withdraws 100,000 gallons per day or greater over a 30-day period, or diverts any amount of water, register that use with the state. Illinois incorporates this Compact requirement through its ratification of the Compact.<sup>16</sup>

As discussed under *Inventory*, withdrawals of more than 100,000 gpd must participate in IWIP, which includes both registration and reporting obligations. IWIP seems to satisfy the Compact § 4.1.3 requirement for registration of withdrawals of 100,000 gpd or greater in the Great Lakes basin. (Illinois should consider making the registrations publicly available online, to show registration is occurring as required.)

As discussed in the *Introduction*, the U.S. Supreme Court consent decree limits diversions of Lake Michigan water by Illinois. The Illinois statute regulating the State's diversions from Lake Michigan is the Level of Lake Michigan Act (LLMA).<sup>17</sup> This pre-Compact statute designates IDNR the authority to control and regulate the diversion of Lake Michigan water and the responsibility for apportionment of water diverted from the watershed.<sup>18</sup> The LLMA prohibits any entity<sup>19</sup> from diverting water from Lake Michigan without first obtaining an allocation permit from the IDNR.<sup>20</sup> The LLMA is implemented by the IDNR's Office of Water Resources.<sup>21</sup>

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<sup>14</sup> See Five Year Review of Illinois' Water Management and Conservation and Efficiency Programs (Dec. 8, 2014).

<sup>15</sup> "Person" as defined by the Compact means a human being or a legal person, including a government or a non-governmental organization, including any scientific, professional, business, non-profit, or public interest organization or association that is neither affiliated with, nor under the direction of a government. Compact § 1.2.

<sup>16</sup> 45 Ill. Comp. Stat. 147/5.

<sup>17</sup> 615 Ill. Comp. Stat. 50/1 *et seq.*

<sup>18</sup> 615 Ill. Comp. Stat. 50/1.2.

<sup>19</sup> The act covers all regional organizations, municipalities, political subdivisions, agencies or instrumentalities, or any other organization, association or individual within the State of Illinois. 615 Ill. Comp. Stat. 50/1.2.

<sup>20</sup> 615 Ill. Comp. Stat. 50/1.2. The IDNR application for permit is available at:

<https://www.dnr.illinois.gov/WaterResources/Documents/WaterAllocationApplication.pdf>. The LLMA requires a permit for a diversion of Lake Michigan water in any amount, but other withdrawals of Lake Michigan water apparently do not require a permit, except for consumptive uses over 2 million gpd. See 615 Ill. Comp. Stat. 50/14 (permit needed for consumptive use over 2 million gpd); 615 Ill. Comp. Stat. 50/4 (requiring a metering device for all water withdrawn or diverted from the Lake Michigan watershed).

<sup>21</sup> Ill. Admin. Code tit. 17, § 3730.

The LLMA, by requiring a permit for any diversion of Lake Michigan water, effectively satisfies the Compact § 4.1.3 requirement for registration of diversions of any amount in the Great Lakes basin. (Illinois should consider making the permits publicly available online.)

*Reporting (§§ 4.1.4, 4.1.5)*

Compact § 4.1.4 requires all registrants to annually report the monthly volumes of the withdrawal, consumptive use, and diversion. Illinois incorporates this Compact requirement.<sup>22</sup>

As discussed above, LLMA permittees include all diversions of Lake Michigan water.<sup>23</sup> Permittees under the LLMA are subject to annual reporting obligations. Each person subject to the LLMA permitting requirements must submit annual reports to the IDNR regarding the total water used for the previous calendar year.<sup>24</sup> By statute, this annual report must also include, *inter alia*, average daily water use by month.<sup>25</sup>

However, apparently some LLMA permittees are not reporting monthly volumes. Permittees who withdraw water directly from Lake Michigan or are the first user in Illinois apparently report monthly volumes.<sup>26</sup> But the annual water audit form used by other LLMA permittees does not ask for monthly volume information.<sup>27</sup>

As discussed under *Inventory*, participants in IWIP must report water use annually. However, the Water Use Act does not require IWIP participants to report monthly volumes, and participants apparently do not report monthly volumes.

To comply fully with Compact § 4.1.4, all registered withdrawals, consumptive uses, and diversions in the Lake Michigan basin must report monthly volumes, not just annual totals.

Compact § 4.1.5 requires each state to annually report information gathered per section 4.1 to the regional water use database repository. Illinois incorporates this Compact requirement.<sup>28</sup> The State of Illinois from 2012 to 2017 has annually reported the information gathered to the Great

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<sup>22</sup> 45 Ill. Comp. Stat. 147.

<sup>23</sup> A consumptive use of Lake Michigan water, even if not a diversion, also needs a permit under the LLMA if it exceeds 2 million gpd. 615 Ill. Comp. Stat. 50/14.

<sup>24</sup> Ill. Admin. Code tit. 17, § 3730.309.

<sup>25</sup> *Id.* § 3730.309(a)(2).

<sup>26</sup> See *id.* § 3730.309(b)-(c).

<sup>27</sup> See IDNR Annual Water Use Audit Form (LMO-2),

[https://www.dnr.illinois.gov/WaterResources/Documents/LakeMichiganO-2Form\\_2015.pdf](https://www.dnr.illinois.gov/WaterResources/Documents/LakeMichiganO-2Form_2015.pdf).

<sup>28</sup> 45 Ill. Comp. Stat. 147/5.

Lakes Commission water use database as contemplated by Compact § 4.1.5, and the aggregated data is publicly available on the Great Lakes Regional Water Use Database website.<sup>29</sup>

Additionally, Illinois has made its water use summaries for the years 2009 to 2017 publicly available online.<sup>30</sup>

#### Diversions (§§ 4.8 – 4.9)

Compact § 4.8 flatly prohibits all new or increased diversions of water from the Great Lakes basin, except as provided for in Article 4. Compact § 4.9 sets forth three exceptions to the blanket ban on new or increased diversions: straddling communities, intra-basin transfer, and straddling counties.

Per Compact § 4.14, due to the *Wisconsin v. Illinois* consent decree, Compact sections 4.8 and 4.9 do not apply to Illinois and its water management program.<sup>31</sup> However, Compact § 4.14 makes one exception relating to diversions by Illinois: a proposal for a diversion of Great Lakes basin water for use outside the territorial boundaries of all the Great Lakes states would be subject to all the terms of the Compact.<sup>32</sup>

#### New or Increased Withdrawals and Consumptive Uses (§ 4.10)

Compact § 4.10 requires each state to create a program to manage and regulate new or increased withdrawals and consumptive uses within five years. Per Compact § 4.14, due to the *Wisconsin v. Illinois* consent decree, Compact § 4.10 does not apply to Illinois and its water management program.<sup>33</sup>

#### Decision-Making Standard (§ 4.11)

Proposals subject to management and regulation in Compact § 4.10 may be approved only if they meet the Decision-Making Standard set forth in Compact § 4.11. Per Compact § 4.14, due to the *Wisconsin v. Illinois* consent decree, the Decision-Making Standard of Compact § 4.11 does not apply to Illinois and its water management program.<sup>34</sup>

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<sup>29</sup> See

<https://waterusedata.glc.org/graph.php?type=jurisdiction&jurisdiction=5&year=2017&units=gallons>.

<sup>30</sup> See IDNR, Lake Michigan Water Allocation,

<https://www.dnr.illinois.gov/WaterResources/Pages/LakeMichiganWaterAllocation.aspx>.

<sup>31</sup> Compact § 4.14. As discussed above, Illinois has a permitting program for diversions of Lake Michigan water pursuant to the Level of Lake Michigan Act, 615 Ill. Comp. Stat. 50/1 *et seq.*

<sup>32</sup> Compact § 4.14.5.

<sup>33</sup> Compact § 4.14.

<sup>34</sup> *Id.*

## Water Conservation and Efficiency Program (§ 4.2)

Compact § 4.2 requires each Party to:

- (A) develop its own water conservation and efficiency goals and objectives consistent with basin-wide goals and objective, within two years of the effective date of the Compact (§ 4.2.2);
- (B) develop and implement a water conservation and efficiency program, either voluntary or mandatory, based on those goals and objectives, within two years (§§ 4.2.2, 4.2.5);
- (C) annually assess its programs in meeting those goals and objectives, report to Council and the Regional Body, and make the assessment publicly available (§ 4.2.2);
- (D) promote environmentally sound and economically feasible water conservation measures, within two years (§§ 4.2.4).

Illinois has been submitting annual assessment reports of its water conservation and efficiency program, in accordance with Compact § 4.2.2: the most recent annual report is dated November 20, 2018. In addition, Illinois has submitted water conservation and efficiency program review reports, pursuant to Compact § 3.4.1, every five years; the most recent five-year report is dated 2014. The annual and five-year reports are available to the public online at the Council's webpage.<sup>35</sup> These reports indicate that Illinois is carrying out its obligations under Compact § 4.2 regarding water conservation and efficiency.

Compact § 4.2.1 lists five goals. Further, Council pursuant to Compact § 4.2.1 identified five basin-wide objectives. See Council Resolution #5 – Adoption of Basin-Wide Conservation and Efficiency Objectives, Dec. 8, 2008. These objectives were re-affirmed by Council Resolution #30, June 13, 2014.

Illinois, as contemplated by Compact § 4.2.2, has developed its own water conservation and efficiency objectives consistent with the basin-wide goals and objectives. Illinois adopted the following ten objectives in 2010:<sup>36</sup>

1. Enforce the adoption of standards that require the efficient use and conservation of Lake Michigan water by the end user (homeowner, business/industry).
2. Establish standards for good water system management and leakage control by the owner/operator of a water supply system.
3. Ensure that Lake Michigan water diverted directly into the Chicago Waterway system for various purposes is kept to a minimum.
4. Collect water use data annually; monitor changes in water use patterns. Encourage public water supply systems to evaluate the effectiveness of their conservation efforts.

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<sup>35</sup> <http://www.gislcompactcouncil.org/Resolutions.aspx>.

<sup>36</sup> Illinois Five-Year Water Conservation and Efficiency Program Review (Dec. 8, 2014) p. 6-7.

5. Prepare and maintain long-term water demand forecasts.
6. Promote the adoption of water rate structures that encourage conservation and water efficiency.
7. Encourage water suppliers to invest in water infrastructure and the use of innovative technology to improve water systems management.
8. Encourage research, development and implementation of water efficient technologies. Develop linkages with organizations such as USEPA's WaterSense Program, the Alliance for Water Efficiency and others, to keep abreast of the latest conservation technologies.
9. Inform, educate and increase awareness regarding water use, conservation and efficiency via newsletters and other such means of communication.
10. Work with our Lake Michigan water allocation permittees and our Great Lakes basin partners to enhance information sharing.

Illinois' Level of Lake Michigan Act contains language directing IDNR to develop and implement a water conservation program covering allocation permittees of Lake Michigan water.<sup>37</sup> In making determinations for applications for allocation permits, IDNR takes into consideration the implementation of conservation practices by the applicant.<sup>38</sup> Additionally, IDNR must condition allocations of Lake Michigan water upon required conservation practices for permittees.<sup>39</sup>

Illinois' 2018 annual assessment report provides further evidence indicating that the State is implementing a water conservation and efficiency program, based on its goals and objectives, in accordance with Compact sections 4.2.2 and 4.2.5. Recent activities include revising the rules for the allocation of water from Lake Michigan to promote water conservation; partnering with other governmental and non-governmental organizations to further water conservation program efforts; water use and loss monitoring; and upgrading water infrastructure (e.g., water meters, pipes).<sup>40</sup>

It also should be noted that total annual Lake Michigan domestic water use in Illinois has been on a downward trend for more than 20 years, including during the past decade while the Compact has been in effect.<sup>41</sup>

In its upcoming 2019 five-year report, Illinois should consider more expressly addressing how the State is promoting environmentally sound and economically feasible water conservation measures, as contemplated by Compact § 4.2.4.

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<sup>37</sup> See 615 Ill. Comp. Stat. 50/5.

<sup>38</sup> Ill. Admin. Code tit. 17, § 3730.304.

<sup>39</sup> Ill. Admin. Code tit. 17, § 3730.307.

<sup>40</sup> See Illinois Annual Water Conservation & Efficiency Program Review (Nov. 20, 2018) p. 3-5.

<sup>41</sup> *Id.* at p. 1-2. Total domestic Lake Michigan water use in Illinois was up slightly in 2017 over 2016. *Id.* at p. 1.

## Conclusion

Illinois is largely implementing the water inventory, registration and reporting provisions of Compact § 4.1.

- Illinois should demonstrate in its upcoming 2019 five-year report that it is maintaining a comprehensive inventory of water resources including withdrawals, consumptive uses, and diversions in the Lake Michigan basin, as required by Compact § 4.1.1.
- Registered withdrawals, consumptive uses, and diversions in the Lake Michigan basin must report monthly volumes, not just annual totals.

Illinois is implementing the water conservation and efficiency provisions of Compact § 4.2. In its upcoming 2019 five-year report, Illinois should consider more expressly addressing how the state is promoting environmentally sound and economically feasible water conservation measures, as contemplated by Compact § 4.2.2.

## INDIANA

### Introduction

The Indiana General Assembly ratified the Compact in February 2008 via Senate Enrolled Act 45, which was codified at Indiana Code (IC) § 14-25-15. The bill enacted the terms of the Compact verbatim<sup>1</sup> as well as other provisions including: designating the governor as Indiana administrator of the Compact<sup>2</sup> and charging the Indiana Natural Resources Commission to adopt rules to implement the Compact.<sup>3</sup> Rule 312 IAC 6.2 was promulgated in 2014 to assist the Indiana Department of Natural Resources (IDNR) with implementation of the Compact.

The State of Indiana submitted its Water Management Program Report and Water Conservation and Efficiency Program Review in December 2014, pursuant to Compact § 3.4.1. Following review of the reports pursuant to Compact § 3.4.2, the Compact Council and Regional Body issued Resolution No. 2015-2 finding that, based on the reports submitted by the State, Indiana's Water Management Program and Water Conservation and Efficiency Program meet or exceed the current requirements of the Compact.<sup>4</sup>

Indiana's 2014 five-year report is available to the public online at the Council's webpage, as are the State's annual water conservation and efficiency program assessments.<sup>5</sup>

### Water Management Program

#### Water Resources Inventory, Registration and Reporting

##### *Inventory*

Compact § 4.1.1 required each state to develop a water resources inventory including withdrawals, diversions and consumptive uses within five years of the effective date of the Compact. The water resources inventory must include, but is not limited to: the location, type, quantity, and use of the water resources, and the location, type, and quantity of withdrawals, diversions and consumptive uses. IC § 14-25-15 incorporates this Compact requirement.

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<sup>1</sup> IC § 14-25-15-1.

<sup>2</sup> IC § 14-25-15-2.

<sup>3</sup> IC § 14-25-15-5.

<sup>4</sup> <http://www.gslcompactcouncil.org/Docs/DOFs/Programs/2014/Resolution%202015-2-Indiana%20Declaration%20of%20Finding.pdf>.

<sup>5</sup> See <http://www.gslcompactcouncil.org/Resolutions.aspx>. Indiana's preliminary 2019 five-year water management and conservation and efficiency program review, dated June 28, 2019, also is available on the Council's website, <http://www.gslcompactcouncil.org/>.

Per the 1982 Water Resource Management Act, the Indiana Natural Resources Commission is charged with taking and maintaining a statewide inventory of “significant uses” of water withdrawn from the surface or ground.<sup>6</sup>

Further, the commission is directed to make and maintain an inventory of the “water resource” of Indiana.<sup>7</sup> The inventory must include an assessment which contains:

- Capabilities of streams to support instream and withdrawal uses and of aquifers to support withdrawal uses,
- Low stream flow characteristics,
- Existing uses and projections of beneficial use requirements,
- The potential in watersheds for managing flood waters for beneficial uses,
- Potential sources and amounts of surplus water for transfers,
- Other assessment and information considered necessary to properly define water resource availability.<sup>8</sup>

The commission also is required to prepare a mapping of all community public water supplies in Indiana that serve at least 500 customers.<sup>9</sup>

Although the law is in place to meet the inventory requirement of Compact § 4.1.1, it is not clear that Indiana is actually maintaining an inventory including withdrawals, consumptive uses and diversions in the Great Lakes basin as contemplated by Compact § 4.1.1. There was no mention of such an inventory in the State’s 2014 five-year report, and no such inventory seems to be publicly available online. Indiana in its upcoming 2019 five-year report should demonstrate how it is complying with Compact § 4.1.1.

The State previously published Water Resource Availability Report Summaries which were published between the years 1987 and 1996, before ratification of the Compact.<sup>10</sup> The Indiana Chamber of Commerce also commissioned a private contract to conduct a six-month water resource study for the state which was released in August 2014.<sup>11</sup> Although informative, neither of these reports appear to satisfy the requirements of Compact § 4.1.1.

### *Registration and Reporting*

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<sup>6</sup> IC § 14-25-7-11. Significant use is not defined within the statute, although “significant water withdrawal facility” is defined. IC § 14-15-7-15(a).

<sup>7</sup> IC § 14-25-7-13. Water resource” as defined includes all ground or surface water. IC § 14-25-7-8.

<sup>8</sup> IC § 14-25-7-13(b).

<sup>9</sup> IC § 14-25-7-13(d).

<sup>10</sup> Summaries are available at: <https://www.in.gov/dnr/water/5243.htm>.

<sup>11</sup> The water resource study is available online at: <https://www.indianachamber.com/news-resources/studies-reports/indianas-water-supply-economic-development/>.

Compact § 4.1.3 requires that any person who withdraws 100,000 gallons per day or greater over a 30-day period, or diverts any amount of water, register that use with the state within five years. Compact § 4.1.4 requires all registrants to annually report the monthly volumes of the withdrawal, consumptive use, and diversion. Indiana incorporates these Compact requirements through its ratification of the Compact,<sup>12</sup> while other state laws collectively assist in the implementation of the Compact requirement.

Prior to the Compact, the Indiana General Assembly in 1982 via the Water Resource Management Act established a statewide registration and water use reporting program.<sup>13</sup> Under the act, “significant water withdrawal facilities” must register with IDNR.<sup>14</sup> A significant water withdrawal facility (SWWF) is defined under the act as a water withdrawal facility of a person that, in the aggregate from all sources and methods, has the capability of withdrawing more than 100,000 gallons of ground water, surface water or both combined in one day.<sup>15</sup> A new SWWF must be registered within three months after the facility is completed.<sup>16</sup>

The owner of a registered SWWF must report the total amount of water withdrawn for the calendar year within three months after the end of the year.<sup>17</sup> Reporting began with calendar year 1985, and registrants now submit annual reports to the IDNR through an online software.<sup>18</sup> The Water Rights and Use Section of the IDNR maintains the registry of SWWF and reported annual water use data and records.<sup>19</sup> Data for the past five years is publicly available through the IDNR webpage.<sup>20</sup>

In 2014 the Indiana Natural Resources Commission, through the authority granted by the legislature during ratification of the Compact,<sup>21</sup> promulgated regulations which govern registration and reporting of withdrawals, consumptive uses, and diversions.<sup>22</sup> The rule covers who must register and what must be reported. Registrants are required to report annual updates to their registration information and monthly volumes of water in gallons for withdrawals, consumptive uses, and diversions.<sup>23</sup>

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<sup>12</sup> IC § 14-25-15-1.

<sup>13</sup> The Water Resource Management Act is codified as IC § 14-25-7.

<sup>14</sup> IC § 14-25-7-15(c).

<sup>15</sup> IC § 14-15-7-15(a).

<sup>16</sup> IC § 14-25-7-15(d).

<sup>17</sup> IC § 14-25-7-15(e).

<sup>18</sup> IDNR, Significant Water Withdrawal Facility Registration, <https://www.in.gov/dnr/water/4847.htm>.

<sup>19</sup> IC § 14-25-7-15(b-c).

<sup>20</sup> IDNR, Significant Water Withdrawal Facility Data, <https://www.in.gov/dnr/water/4841.htm>.

<sup>21</sup> IC § 14-25-15-1.

<sup>22</sup> 312 IAC 6.2-2-4.

<sup>23</sup> 312 IAC 6.2-2.4(g)(3).

SWWF registration and reporting, by the terms of the statewide Water Resource Management Act, do not cover diversions of less than 100,000 gpd, which is necessary under Compact sections 4.1.3 and 4.1.4. Although the Indiana rule governing registration and reporting for purposes of the Compact does cover all diversions, it is not clear that registration and reporting actually include non-SWWF diversions. Indiana in its upcoming 2019 five-year report should demonstrate that registration and reporting for all diversions in the Great Lakes basin are in compliance with Compact sections 4.1.3 and 4.1.4.

Compact § 4.1.5 requires each state to annually report information gathered per Compact § 4.1 to the regional database repository. IC § 14-25-15-1 incorporates this Compact requirement. Indiana annually reports on withdrawals, consumptive uses, and diversions from the Great Lakes basin to the regional water use data repository, and the aggregated data for Indiana is publicly available on the Great Lakes Commission's Great Lakes Regional Water Use Database webpage, as contemplated by Compact § 4.1.5.<sup>24</sup>

### Diversions

Compact § 4.8 flatly prohibits all new or increased diversions, except as provided for in Article 4. Compact § 4.9 sets forth three exceptions to the blanket ban on new or increased diversions: straddling communities, intra-basin transfer, and straddling counties. IC § 14-25-15-1 incorporates these Compact requirements.

IC § 14-25-1-11(b) states that water may not be diverted outside the Great Lakes basin within Indiana unless approved by the governor of each of the Great Lakes states under 42 U.S.C. § 1962d-20 (Water Resource Development Act of 1986) or in accordance with the Compact.

### New or Increased Withdrawals and Consumptive Uses

Compact § 4.10.1 requires each state to create a program to manage and regulate new or increased withdrawals and consumptive uses within five years. The Indiana Natural Resource Commission was charged by the Compact-enactment legislation to establish a program for the issuance of permits for withdrawal and consumptive use of water in the Great Lakes basin, and provided that a facility shall obtain a permit if it meets any of the following thresholds (based on an average over 90 days):<sup>25</sup>

- 5 million gpd from Lake Michigan;
- 100,000 gpd from a Salmonoid Stream; or

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<sup>24</sup>See

<https://waterusedata.glc.org/graph.php?type=jurisdiction&jurisdiction=5&year=2017&units=gallons>.

<sup>25</sup> IC § 14-25-15-7.

- 1 million gpd from other surface or ground waters.

By regulation Indiana divides its permit program into General permits and Individual permits. General permits are required for new or increased withdrawals or consumptive uses not exceeding the threshold amount.<sup>26</sup> Individual permits are required for withdrawals or consumptive uses that exceed the threshold amount.<sup>27</sup> Every ten years the Indiana legislature is required to revisit permitting thresholds.<sup>28</sup>

Compact § 4.13 exempts two categories of withdrawals from the requirements of Article 4, including permitting: to supply vehicles and to use short-term for firefighting, humanitarian or emergency response purposes. Indiana includes these two Compact exemptions and adds an additional exemption for testing or evaluating the ground water resource for less than 72 hours in one calendar year.<sup>29</sup>

### Decision-Making Standard

Compact § 4.11 sets forth the standard for approval of new or increased withdrawals and consumptive uses subject to Compact § 4.10. The Decision-Making Standard of Compact § 4.11 lists five criteria that must be met; the fifth criterion is that the proposed use is “reasonable,” based on consideration of six specific factors. IC § 14-25-15-1 incorporates this Compact standard. Further, Indiana by rule requires that the Decision-Making Standard of Compact § 4.11 be satisfied in order to obtain a new or increased withdrawal or consumptive use permit.<sup>30</sup>

However, Indiana’s Compact-enactment legislation includes a section that arguably diverges somewhat from the criteria in Compact § 4.11. This raises a concern that Indiana could approve a withdrawal or consumptive use that would not meet the Decision-Making Standard of Compact § 4.11.

Compact § 4.11.2 permits approval of a proposal only when the withdrawal or consumptive use will result in no significant individual or cumulative adverse impacts to the quantity or quality of the waters and water dependent natural resources “and the applicable Source Watershed.” The term “Source Watershed” is defined in Compact § 1.2 to mean the watershed from which a withdrawal originates. The definition in Compact § 1.2 goes on to say that if water is withdrawn from a direct tributary of a Great Lake, “then the Source Watershed shall be considered to be the watershed of that Great Lake ...*with a preference to the direct tributary stream watershed from which it was withdrawn.*” (emphasis added). While the Compact definition of Source Watershed

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<sup>26</sup> 312 IAC 6.2-2.6.

<sup>27</sup> 312 IAC 6.2-2-5.

<sup>28</sup> IC § 14-25-15-9.

<sup>29</sup> 312 IAC 6.2-2-5(g).

<sup>30</sup> 312 IAC 6.2-2-5(f).

is not free from ambiguity, it seems that the tributary stream watershed can be a Source Watershed for purposes of Compact § 4.11.2.

Yet IC § 14-25-15-10(a) provides that the criterion of Compact § 4.11.2 is met only if the withdrawal or consumptive use will result in no significant adverse impacts to the quantity or quality of the waters and water dependent natural resources of the Great Lakes basin “*considered as a whole* or the Lake Michigan or Lake Erie watershed *considered as a whole*.” (emphases added). Moreover, IC § 14-25-15-10(b) instructs that impacts of a withdrawal or consumptive use on “*more localized areas*” that affect less than the Great Lakes basin considered as a whole or the Lake Michigan or Lake Erie watershed considered as a whole shall be considered as part of the evaluation of whether the proposal is “reasonable” per Compact 4.11.5. (emphasis added). Taken together, IC § 14-25-15-10(a)-(b) arguably may allow permitting of a withdrawal or consumptive use from a tributary stream within the Great Lakes basin that significantly impacts the quantity or quality of the stream watershed, where the use does not significantly impact the entire Lake Erie or Lake Michigan watershed, contrary to the preference expressed in the Compact definition of Source Watershed and contrary to Compact § 4.11.2.

## **Water Conservation and Efficiency Program**

Compact § 4.2 requires each Party to:

- (A) develop its own water conservation and efficiency goals and objectives consistent with the Council’s basin-wide goals, within two years of the effective date of the Compact (§ 4.2.2);
- (B) develop and implement a water conservation and efficiency program, either voluntary or mandatory, based on those goals and objectives, within two years (§§ 4.2.2, 4.2.5);
- (C) annually assess its programs in meeting those goals and objectives, report to Council and the Regional Body, and make the assessment publicly available (§ 4.2.2);
- (D) promote environmentally sound and economically feasible water conservation measures, within two years (§ 4.2.4).

Compact § 4.2.1 lists five goals. Further, Council pursuant to section 4.2.1 identified five basin-wide objectives. See Council Resolution #5 – Adoption of Basin-Wide Conservation and Efficiency Objectives, Dec. 8, 2008. These objectives were re-affirmed by Council Resolution #30, June 13, 2014.

Indiana's 2018 Water Conservation and Efficiency Program Review identifies Indiana's water conservation and efficiency goals as those provided in Compact § 4.2.1.<sup>31</sup> Additionally, these goals are available on the IDNR's webpage.<sup>32</sup>

Previously, Indiana's conservation goals and objectives were listed by reference rather than in full in the administrative code. In response to a Petition to Change by several organizations, the commission amended 312 IAC 6.2-2-7 in 2018 to list the voluntary conservation and efficiency objectives:<sup>33</sup>

- Guiding programs toward long-term sustainable water use;
- Adopting and implementing supply and demand management to promote efficient use and conservation of water resources;
- Improving monitoring and standardizing data reporting among state and provincial water conservation and efficiency programs;
- Developing science, technology, and research; and
- Developing educational programs and information sharing for all water users.

These objectives are identical to the Council's and took effect June 2018. Accordingly, Indiana's goals and objectives are consistent with the basin-wide goals and objectives and hence are in compliance with Compact § 4.2.2.<sup>34</sup>

Indiana has been submitting annual water conservation and efficiency program assessment reports, pursuant to Compact § 4.2.2; the most recent annual report is dated December 8, 2018. In addition, Indiana has submitted water conservation and efficiency program review reports, pursuant to Compact § 3.4.1, every five years; the most recent five-year report is dated December 8, 2014. The annual and five-year reports are available online at the Council's webpage.<sup>35</sup>

The Indiana Natural Resources Commission statutorily is charged with adopting rules that implement a voluntary water conservation and efficiency program and planning.<sup>36</sup> Indiana's water conservation and efficiency program, though, does include some mandatory elements. By rule, permit applicants must undertake water conservation measures including develop and implement a water conservation plan, measure water use, and adopt best management

<sup>31</sup> Indiana Water Conservation and Efficiency Program Review (Dec. 8, 2018) p. 1.

<sup>32</sup> IDNR, Report on Water Use and Efficiency, <https://www.in.gov/dnr/water/6364.htm>.

<sup>33</sup> See Indiana Water Conservation and Efficiency Program Review (Dec. 8, 2018) p. 1, 8.

<sup>34</sup> Compact § 4.2.2 calls for each state to develop its "own" goals and objectives, so arguably a state's goals and objectives should not simply repeat the Compact's goals and the Council's objectives. Having said this, Indiana's goals and objectives are certainly consistent with the basin-wide goals and objectives.

<sup>35</sup> Council, Resolutions, Guidance, Rules & Other Documents, <http://www.gslcompactcouncil.org/Resolutions.aspx>.

<sup>36</sup> IC § 14-25-15-5 (voluntary, not mandatory).

practices.<sup>37</sup> Other users also are encouraged to develop and implement water conservation plans.<sup>38</sup> Additionally, by rule the State has committed to promote environmentally sound and economically feasible measures,<sup>39</sup> and permit applicants must demonstrate the capability to implement such measures.<sup>40</sup>

Based on its periodic assessment reports, Indiana has developed and implemented a water conservation and efficiency program and has promoted environmentally sound and economically feasible measures. Recent activities include providing a newsletter to each SWWF specific to water use types with a list of best management practices to continue to draw attention to potential new strategies available; utilizing social media to promote conservation and efficiency through a series of “Talk with an Expert” events on the IDNR Facebook page to discuss water use issues in Indiana; promotion of water conservation and efficiency utilizing the EPA *Water Sense* and *We're for Water* programming at area water related conferences, seminars, and for the three weeks of the Indiana State Fair; and performing a quality review of the water resources data compiled from the reports submitted by owners of SWWF for all calendar years since 1985, with detailed well and intake locations as well as identifying potential unregistered facilities in Indiana.<sup>41</sup>

IDNR is charged by rule with evaluating the success of the water conservation and efficiency measures, including the development of metrics for both voluntary measures and those required of permit holders.<sup>42</sup>

IC § 14-25-7-12.5, passed in 2015, provides that IDNR shall cooperate with the U.S. Geological Survey to establish a program under which volunteers monitor Indiana’s water resource and provide the monitoring data to the state and USGS.

## Conclusion

Indiana is implementing the water conservation and efficiency provisions of the Compact.

Indiana is largely implementing the water management provisions of the Compact.

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<sup>37</sup> 312 IAC 6.2-2-8.

<sup>38</sup> 312 IAC 6.2-2-7.

<sup>39</sup> 312 IAC 6.2-2-10

<sup>40</sup> 312 IAC 6.2-2-8.

<sup>41</sup> See Indiana Water Conservation and Efficiency Program Review (Dec. 8, 2018) p. 2-8.

<sup>42</sup> 312 IAC 6.2-2-11.

- Indiana should demonstrate in its upcoming 2019 five-year report that it is maintaining an inventory including withdrawals, consumptive uses, and diversions in the Great Lakes basin, as required by Compact § 4.1.1.
- Indiana should demonstrate that all diversions in the Great Lakes basin are registering and reporting, as required by Compact sections 4.1.3 and 4.1.4.
- Language in IC 14-25-15-10(a)-(b) applicable to new or increased withdrawals and consumptive uses may be inconsistent with the Decision-Making Standard of Compact § 4.11.

## MICHIGAN

### Introduction

Michigan adopted the Great Lakes-St. Lawrence River Basin Water Resources Compact verbatim on July 9, 2008.<sup>1</sup> The Compact requires each party state to implement a water use program including water management and water conservation and efficiency.<sup>2</sup> The duty of implementing Michigan's water use program was originally given to the Michigan Department of Environmental Quality (MDEQ). The MDEQ became the Michigan Department of Environment, Great Lakes, and Energy (EGLE) on April 22, 2019.<sup>3</sup>

Within EGLE, the Water Use Advisory Council (WUAC)<sup>4</sup> has been charged "to study and make recommendations . . . on Michigan's Water Use Program, which includes . . . the Great Lakes Compact [and] water withdrawal regulations . . .".<sup>5</sup> The WUAC is also responsible for the development of Michigan's water conservation and efficiency goals, objectives and measures.<sup>6</sup> Michigan submitted its Water Management Program Report and Water Conservation and Efficiency Report in December 2014, pursuant to Compact § 3.4.1. Following review of the reports pursuant to Compact § 3.4.2, the Compact Council and Regional Body issued Resolution No. 2015-3 finding that, based on the reports submitted by the State, the State of Michigan's Water Management Program and Water Conservation and Efficiency Program meet or exceed the current requirements of the Compact.

Michigan on July 29, 2019 noticed for public comment its Draft 2019 Five-Year Water Management and Water Conservation and Efficiency Program Review.<sup>7</sup> The 45-day public comment period concluded Sept. 11, 2019.

### Water Management Program

#### Water Resources Inventory, Registration and Reporting

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<sup>1</sup> MICH. COMP. LAWS § 324.34201.

<sup>2</sup> See Compact article 4.

<sup>3</sup> The press release announcing the reorganization is available at [https://www.michigan.gov/egle/0,9429,7-135-3308\\_3323-495401--,00.html](https://www.michigan.gov/egle/0,9429,7-135-3308_3323-495401--,00.html). The change is so new that Michigan Compiled Laws still refer to the MDEQ, see MICH. COMP. LAWS § 324.701(n) (definition of "Department"). For purposes of continuity, this paper will use the agency's new name.

<sup>4</sup> See MICH. COMP. LAWS § 324.32803.

<sup>5</sup> Michigan EGLE, WUAC, [https://www.michigan.gov/egle/0,9429,7-135-3313\\_3684\\_64633---,00.html](https://www.michigan.gov/egle/0,9429,7-135-3313_3684_64633---,00.html).

<sup>6</sup> *Id.*

<sup>7</sup> See Michigan EGLE, Water Use Program, Draft 2019 Five-Year Water Management and Water Conservation and Efficiency Program Review, [https://www.michigan.gov/egle/0,9429,7-135-3313\\_3684\\_45331---,00.html](https://www.michigan.gov/egle/0,9429,7-135-3313_3684_45331---,00.html).

### *Inventory*

Each party to the Compact must develop and maintain an inventory database of its water resources. The minimum information to be collected for the database is the “location, type, quantity, and use of those [water] resources and the location, type, and quantity of withdrawals, diversions, and consumptive uses.”<sup>8</sup> Although Michigan maintains multiple state-wide water use databases, Michigan has not demonstrated that it maintains an inventory as contemplated by Compact § 4.1.1.

Michigan in its 2014 five-year report described two databases of withdrawals, consumptive uses, and diversions maintained by MDEQ – one for public water supplies and another for all other large quantity withdrawals – and yet another separate database maintained by the Michigan Department of Agriculture and Rural Development (MDARD) for agricultural water users.<sup>9</sup> In its draft 2019 five-year report, Michigan points to the same three databases.<sup>10</sup>

Per Compact § 4.1.1 the inventory is for the “collection, interpretation, storage, retrieval exchange and dissemination of information.” Exactly what information is collected and maintained on each of Michigan’s databases is not clear; none of them is publicly available online.<sup>11</sup> But even if each of Michigan’s databases individually includes the requisite information, not having a single, comprehensive inventory inhibits interpretation, retrieval, exchange, and dissemination of that information, at minimum.

Michigan should demonstrate in its upcoming 2019 five-year report how its multiple databases comply with the Compact § 4.1.1 mandate to develop and maintain an inventory of its water resources including withdrawals, consumptive uses, and diversions. If not, then Michigan should develop and maintain a single, comprehensive inventory that satisfies Compact § 4.1.1. In either event, Michigan should consider making its inventory publicly available online.

### *Registration*

Compact § 4.1.3 requires that any (not only new and increased) withdrawals of 100,000 gallons per day or greater average in any 30 day period, and any diversion (no minimum threshold),

<sup>8</sup> Compact § 4.1.1.

<sup>9</sup> Michigan’s Water Management Program Report (Dec. 8, 2014) p. 3-4.

<sup>10</sup> Michigan Draft 2019 Five-Year Program Review Report (noticed for public comment on July 29, 2019) p. 5. Additionally, more than a decade ago Michigan completed a “groundwater and map” project known as GWIM, which collected and mapped information regarding groundwater use in the state. See MICH. COMP. LAWS § 324.32802; Groundwater Conservation Advisory Council, Feb. 2006 Report, [https://www.michigan.gov/egle/0,9429,7-135-3313\\_3684\\_64633-305354--,00.html](https://www.michigan.gov/egle/0,9429,7-135-3313_3684_64633-305354--,00.html).

<sup>11</sup> Aggregated annual water use data, by county and sector, is available online. Michigan EGLE, Michigan Water Use Data, [https://www.michigan.gov/egle/0,9429,7-135-3313\\_3684\\_45331-370128--,00.html](https://www.michigan.gov/egle/0,9429,7-135-3313_3684_45331-370128--,00.html).

register with the state.<sup>12</sup> Like the rest of the Compact, this registration requirement has been adopted verbatim in Michigan.<sup>13</sup>

Michigan also has a complex set of laws guiding the registration process with EGLE for new or increased large quantity withdrawals (LQWs) of 100,000 gpd average over a 30-day period.<sup>14</sup>

The registration process begins with Michigan’s innovative online Water Withdrawal Assessment Tool (WWAT) maintained by EGLE.<sup>15</sup> WWAT is a “screening system that predicts whether a large quantity withdrawal is likely to cause an adverse resource impact to nearby streams or rivers.”<sup>16</sup> Michigan law requires anyone intending to make a new or increased LQW of 100,000 gpd in a 30-day period to take the assessment.<sup>17</sup> The assessment tool determines whether the withdrawal may be simply registered or needs further review.<sup>18</sup>

Determinations made by WWAT are based on cumulative effect,<sup>19</sup> and the WWAT is updated on a continuous basis by EGLE with information from prior reports, conservation plans and permits.<sup>20</sup> It classifies an LQW into four zones ranging from a low risk of causing an adverse resource impact to a high risk.<sup>21</sup>

If the WWAT determination classifies a proposed withdrawal as in a low risk zone, the LQW may be registered via WWAT<sup>22</sup> and the property owner may begin the withdrawal without further review.<sup>23</sup> If the WWAT designates the proposed withdrawal as being in medium to high risk zones, further review is required.<sup>24</sup>

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<sup>12</sup> An estimate of the gallons per day average should accompany the registration. Compact § 4.1.3.

<sup>13</sup> MICH. COMP. LAWS § 324.34201.

<sup>14</sup> See MICH. COMP. LAWS §§ 324.32701(cc)(defining “new or increased large quantity withdrawal”), 324.32706a-c. State law also mandates EGLE to compile information from other permitting processes to be included in department regulatory assessments. MICH. COMP. LAWS § 324.32727(2). Additionally, WUAC has an initiative to identify and bring into compliance non-reported LQWs.

<sup>15</sup> WWAT can be located at

[http://www.deq.state.mi.us/wwat/\(S\(irfrdiwm0g2tpxcadia45udq\)\)/default.aspx](http://www.deq.state.mi.us/wwat/(S(irfrdiwm0g2tpxcadia45udq))/default.aspx). See MICH. COMP. LAWS §§ 324.32706a & .32706b.

<sup>16</sup> Michigan EGLE, [https://www.michigan.gov/egle/0,9429,7-135-3313\\_3684\\_45331-223443--,00.html](https://www.michigan.gov/egle/0,9429,7-135-3313_3684_45331-223443--,00.html).

<sup>17</sup> MICH. COMP. LAWS §§ 324.32701(cc), 324.32706b.

<sup>18</sup> MICH. COMP. LAWS §§ 324.32706b, 324.32706c.

<sup>19</sup> MICH. COMP. LAWS §§ 324.32706a(2), 324.32706e.

<sup>20</sup> MICH. COMP. LAWS § 324.32706a(6). Other sources of verified water data also may contribute to WWAT. *Id.*

<sup>21</sup> Detailed information regarding the science behind WWAT can be found in a report published by the Michigan Department of Natural Resources at

<http://www.michigandnr.com/PUBLICATIONS/PDFS/ifr/ifrlibra/Special/Reports/sr55/SR55.pdf/>.

<sup>22</sup> MICH. COMP. LAWS §§ 324.32706.

<sup>23</sup> MICH. COMP. LAWS § 324.32706b(2).

<sup>24</sup> <http://www.michigandnr.com/PUBLICATIONS/PDFS/ifr/ifrlibra/Special/Reports/sr55/SR55.pdf>

The further review process may be a site-specific review performed by EGLE or applicants can opt for an alternative analysis by a qualified professional.<sup>25</sup> The second option was recently added by statutory amendment in 2018,<sup>26</sup> and it is available only to proposed withdrawals with a capacity of 1 million gpd or less.<sup>27</sup>

Proposed withdrawals which fall into a medium risk zone after further review may proceed if the owner registers and “self-certifies that he or she is implementing applicable environmentally sound and economically feasible water conservations measures . . . that [he or she] considers to be reasonable.”<sup>28</sup> Proposed withdrawals which fall into higher risk zones must apply for a permit under MICH. COMP. LAWS § 324.32723.<sup>29</sup>

Michigan farmers participate in WWAT<sup>30</sup> but by law may register with the Michigan Department of Agriculture and Rural Development (MDARD) instead of through the tool.<sup>31</sup> However, the MDARD website indicates that all registrations are now performed via WWAT.<sup>32</sup>

In sum, Michigan law requires that persons who withdraw 100,000 gpd or more, or who divert water in any amount, must register with the state, by virtue of the incorporation of Compact § 4.1.3<sup>33</sup> and the registration process for LQWs described above.<sup>34</sup> Information posted on EGLE’s website indicates that registrations are indeed occurring.<sup>35</sup>

### *Reporting*

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<sup>25</sup> See [https://www.michigan.gov/egle/0,9429,7-135-3313\\_3684\\_45331-223443--,00.html](https://www.michigan.gov/egle/0,9429,7-135-3313_3684_45331-223443--,00.html).

<sup>26</sup> MICH. COMP. LAWS § 324.32706c as amended by Act 209 of 2018 effective June 22, 2018.

<sup>27</sup> MICH. COMP. LAWS §§ 324.32706c(1), 324.32723(1)(d). EGLE reviews the alternative analysis and has 20 days (or 25 days under certain circumstances) in which to approve or deny the LQW or else it is deemed to be approved. See MICH. COMP. LAWS § 324.32706c(2).

<sup>28</sup> MICH. COMP. LAWS § 324.32706c(2)(c).

<sup>29</sup> MICH. COMP. LAWS § 324.32706c(2)(d).

<sup>30</sup> See MDARD, Water Use Reporting Program, [https://www.michigan.gov/mdard/0,4610,7-125-1599\\_29980-486870--,00.html](https://www.michigan.gov/mdard/0,4610,7-125-1599_29980-486870--,00.html).

<sup>31</sup> MICH. COMP. LAWS § 324.32705(4).

<sup>32</sup> MDARD, Water Use Reporting Program, [https://www.michigan.gov/mdard/0,4610,7-125-1599\\_29980-486870--,00.html](https://www.michigan.gov/mdard/0,4610,7-125-1599_29980-486870--,00.html).

<sup>33</sup> MICH. COMP. LAWS § 324.34201.

<sup>34</sup> Although the WWAT registration process under current Michigan law focuses on new or increased withdrawals, pre-Compact state law required many existing withdrawals to register. See 2003 Mich. Pub. Acts No. 148, codified at MICH. COMP. LAWS § 324.32705(1) (requiring industrial, processing and agricultural facilities with a capacity to withdraw over 100,000 gpd in any 30-day period to register).

<sup>35</sup> See, e.g., MDEQ, 2018 Water Withdrawal Assessment Annual Report (showing 352 registrations submitted to MDEQ), [https://www.michigan.gov/documents/deq/wrd-wateruse-assessment\\_process\\_annual\\_report\\_2018\\_641091\\_7.pdf](https://www.michigan.gov/documents/deq/wrd-wateruse-assessment_process_annual_report_2018_641091_7.pdf); MDEQ, Water Withdrawal Assessment Tool, New Registered Withdrawal Information, [https://www.egle.state.mi.us/wwat/\(S\(f3jufxjh0cn5jjnuh32eztr\)\)/xmldata.aspx](https://www.egle.state.mi.us/wwat/(S(f3jufxjh0cn5jjnuh32eztr))/xmldata.aspx).

Under Compact § 4.1.4 all registrants must report annually the monthly volumes of their withdrawals, consumptive uses, and diversions to the state.<sup>36</sup> The state must report this information to the Great Lakes—St. Lawrence River Water use database repository, and the aggregated data must be made publicly available.<sup>37</sup> These reporting provisions are incorporated verbatim by Michigan’s legislation adopting the Compact.<sup>38</sup>

All registrants of Michigan’s water use management program are required to report annually, and these reports must include, *inter alia*, the amount of water withdrawn on an annual and monthly basis.<sup>39</sup> Most registrants report to EGLE, but the agricultural sector reports to MDARD.<sup>40</sup> Registrants with withdrawals of under 1.5 million gallons per year are not mandated to report their annual or monthly water volumes, however, just that the withdrawal was for less than the 1.5 million gallon annual threshold.<sup>41</sup> Not having more exact numbers for withdrawals of less than 1.5 million gallons annually could skew determinations of resource impact. Michigan should consider requiring smaller withdrawals to report actual volume numbers.

In compliance with Compact § 4.1.5, Michigan reports annual water use data to the Great Lakes Commission (GLC) for use in the regional database repository.<sup>42</sup> The most recent GLC data base report (2017) indicates Michigan has a 75 to 99 percent reporting rate for registrants depending on water use sector.<sup>43</sup>

#### New or Increased Withdrawals and Consumptive Uses

Compact § 4.10.1 requires each state to create a program to manage and regulate new or increased withdrawals and consumptive uses within five years of the effective date of the Compact. The Compact allows the states to set their own scope and threshold through a considered process of what proposals will be subject to regulation.<sup>44</sup> The default level in the Compact, should the state not set a threshold per Compact § 4.10.1, is 100,000 gpd averaged over a 90-day period.<sup>45</sup>

Michigan has chosen a higher threshold for permitting new and increased withdrawals and consumptive uses. Per MICH. COMP. LAWS § 324.32723 all new and increased LQWs with

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<sup>36</sup> Compact § 4.1.4.

<sup>37</sup> Compact § 4.1.5.

<sup>38</sup> MICH. COMP. LAWS § 324.34201.

<sup>39</sup> MICH. COMP. LAWS § 324.32707.

<sup>40</sup> MICH. COMP. LAWS § 324.32707.

<sup>41</sup> MICH. COMP. LAWS § 324.32707(8).

<sup>42</sup> <https://waterusedata.glc.org/annualreports.php>. Data from Michigan is included in GLC reports.

<sup>43</sup> <https://waterusedata.glc.org/pdf/2017-Water-Use-Report.pdf> p. 37.

<sup>44</sup> Compact § 4.10.1.

<sup>45</sup> Compact § 4.10.2.

expected capacity to withdraw more than 2 million gpd require a permit.<sup>46</sup> A 1 million gpd threshold applies to any new and increased LQW that a site-specific review has determined is in the second highest risk zone (C).<sup>47</sup> Intra-basin transfers with capacity to withdraw 100,000 gpd average over any 90-day period also need permits.<sup>48</sup>

Further, if a proposed new or increased LQW that exceeds 100,000 gpd but is less than 1 million gpd is determined to be in the highest risk zone (D), that proposed use cannot proceed without a permit under MICH. COMP LAWS § 324.32723.<sup>49</sup>

The Compact exempts just two categories of withdrawals from permitting and the other requirements of Article 4: to supply vehicles and to use in short-term non-commercial projects.<sup>50</sup> Michigan law exempts a broader array of uses from permitting.<sup>51</sup>

Michigan's relatively high thresholds combined with broader exemptions potentially raise a concern that Michigan's permitting program for new or increased withdrawals and consumptive uses may not satisfy the requirements of Compact § 4.10.1. Specifically, at some level, high thresholds and broader exemptions may be inconsistent with the Compact § 4.10.1 directive that a management program ensure uses overall are reasonable and will not result in significant impacts to the waters and water dependent natural resources of the basin or source watersheds.

Much to its credit, though, as discussed under *Registration* above, Michigan screens proposed LQWs of 100,000 gpd or more via its WWAT and does not allow them to proceed without further review if they might result in an adverse resource impact.<sup>52</sup> Hence, although its permit thresholds are relatively high, Michigan does have a robust program for managing and regulating new or increased withdrawals and consumptive uses of 100,000 gpd or more.

It should be recognized, however, that proposed new or increased LQWs lower than Michigan's 2 million gpd permit threshold are not subject to the Decision-Making Standard of Compact §

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<sup>46</sup> MICH. COMP. LAWS § 324.32723(1)(a)-(b).

<sup>47</sup> MICH. COMP. LAWS § 324.32723(1)(c).

<sup>48</sup> MICH. COMP. LAWS § 324.32723(1)(d).

<sup>49</sup> MICH. COMP. LAWS § 324.32706c(2)(d). Because a person shall not make a new or increased LQW that causes an adverse resource impact, MICH. COMP. LAWS § 324.32721(1), such a permit could be denied or conditioned in order to avoid an adverse resource impact.

<sup>50</sup> Compact § 4.13.

<sup>51</sup> The two Compact exemptions are listed as exclusions to the definition of "diversion" of Michigan waters. MICH. COMP. LAWS § 324.32701(1)(p)(ii-iii). Other examples of Michigan permitting exemptions are activities that have been authorized under other sections of Michigan law. MICH. COMP. LAWS § 324.32727(1). Further, Michigan exempts seasonal withdrawals of up to 2 million gallons of water per day average in any consecutive 90-day period. MICH. COMP. LAWS 324.32723(13)(b).

<sup>52</sup> MICH. COMP. LAWS § 324.32706b(4).

4.11.<sup>53</sup> Rather, LQWs that do not require permits are evaluated based on Michigan’s adverse resource impact standard.<sup>54</sup> According to Compact § 4.11, proposals subject to management and regulation in Compact § 4.10 may be approved only if they meet the Decision-Making Standard of Compact § 4.11.

### Decision-Making Standard

Compact § 4.11 sets forth the standard for approval of new or increased withdrawals and consumptive uses subject to section 4.10. This Decision-Making Standard is a minimum for all party states.<sup>55</sup> The Decision-Making Standard provides that five criteria must be met;<sup>56</sup> the fifth criterion is that the proposed use must be “reasonable” based on a consideration of six listed factors.<sup>57</sup> As previously mentioned, Michigan adopted the Compact verbatim,<sup>58</sup> so the Compact § 4.11 Decision-Making Standard should apply to permit decisions regarding new or increased withdrawals and consumptive uses. However, MICH. COMP. LAWS § 324.32723 also speaks to the standard for permit approval for new or increased withdrawals, and its criteria differ somewhat from those of Compact § 4.11.

MICH. COMP. LAWS § 324.32723(6) provides that EGLE shall issue a water withdrawal permit to new or increased withdrawals if certain specified conditions are met. For the most part, those Michigan conditions track the criteria of Compact § 4.11. But they differ in two significant ways.

First, MICH. COMP. LAWS § 324.32723(6)(d) says permits will be granted if the LQW is “reasonable under common law principles of water law in Michigan.”<sup>59</sup> The section does not require consideration of the six “reasonable” factors detailed in Compact § 4.11.5. Second, MICH. COMP. LAWS § 324.32723(6)(e) allows an applicant to “self-certify” that it is in compliance with environmentally sound and economically feasible water conservations measures.<sup>60</sup> The section does not require the agency to independently determine whether the applicant is incorporating environmentally sound and economically feasible water conservation measures as contemplated by Compact § 4.11.3. Both of these differences could make the standard of MICH. COMP. LAWS § 324.32723(6) less rigorous than the Decision-Making Standard of Compact § 4.11.

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<sup>53</sup> See Michigan Draft 2019 Five-Year Program Review Report p. 5.

<sup>54</sup> *Id.*; see MICH. COMP. LAWS § 324.32721(1).

<sup>55</sup> Compact § 4.12.1.

<sup>56</sup> Compact § 4.11(1)-(5).

<sup>57</sup> Compact § 4.11.5(a-e).

<sup>58</sup> MICH. COMP. LAWS § 324.34201.

<sup>59</sup> MICH. COMP. LAWS § 324.32723(6)(d).

<sup>60</sup> MICH. COMP. LAWS § 324.32723(6)(e).

EGLE in its draft 2019 five-year program review report asserts that Michigan applies the Compact Decision-Making Standard to all new or increased withdrawals greater than 2 million gpd capacity, and that “in addition” EGLE must determine whether permit applications under MICH. COMP. LAWS § 324.32723 are reasonable under Michigan’s common law principles.<sup>61</sup> Such an approach would be consistent with the Compact, because the Decision-Making Standard is a minimum and a state can impose additional criteria beyond those of Compact § 4.11.<sup>62</sup>

However, MICH. COMP. LAWS § 324.32723 also provides that a “proposed use for which a water withdrawal permit is issued under this section shall be considered to satisfy the requirements of section 4.11 of the compact.”<sup>63</sup> Arguably, this indicates the Michigan legislature did not intend for Compact § 4.11 to play a role in permitting independent of the statutory criteria for permitting set forth in MICH. COMP. LAWS § 324.32723.

Accordingly, Michigan should consider amending its law to clarify that all permits for new withdrawals and consumptive uses will issue only where the application meets Compact § 4.11 as well as MICH. COMP. LAWS § 324.32723(6). Plus, Michigan should not rely totally on self-certification to ensure a use will be implemented to incorporate environmentally sound and economically feasible water conservation measures.

### Diversions

Compact § 4.8 broadly prohibits all new or increased diversions out of the Great Lakes basin, except as provided in Article 4. Compact § 4.9 sets forth three exceptions to the blanket ban on new or increased diversions: straddling communities, intra-basin transfers, and straddling counties. Michigan adopted the Compact verbatim, and therefore all proposed new or increased diversions should be prohibited in Michigan unless they meet one of three exceptions recognized in the Compact. Additionally, MICH. COMP. LAWS § 324.32703 prohibits diversions out of the Great Lakes basin, subject to an exception for diversions that existed as of 1985.<sup>64</sup> MICH. COMP. LAWS § 324.32723(7) provides that an intra-basin transfer must comply with Compact § 4.9.

Unlike the Compact, Michigan’s definition of “diversion” excludes certain uses, such as uses Compact § 4.13 exempts from all of Article 4.<sup>65</sup> But this does not appear to present a significant problem.

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<sup>61</sup> Michigan Draft 2019 Five-Year Program Review Report p. 4.

<sup>62</sup> See Compact § 4.12.1. Both Compact § 4.11.4 and MICH. COMP. LAWS § 324.32723(6)(c) provide that a proposed use will be implemented in compliance with all applicable federal laws as well as regional interstate agreements, which presumably include the Compact itself.

<sup>63</sup> MICH. COMP. LAWS § 324.32723(9).

<sup>64</sup> See MICH. COMP. LAWS § 324.32703, 32704.

<sup>65</sup> See MICH. COMP. LAWS § 324.32701(p); Compact § 4.13.

## Water Conservation and Efficiency Program

Compact § 4.2 requires each party state to:

- (A) develop its own water conservation and efficiency goals and objectives consistent with the Council's basin-wide goals, within two years of the Compact's effective date (§ 4.2.2);
- (B) develop and implement a water conservation and efficiency program, either voluntary or mandatory, based on those goals and objectives, within two years (§§ 4.2.2, 4.2.5);
- (C) annually assess its programs in meeting those goals and objectives, report to Council and the Regional Body, and make the assessment publicly available (§ 4.2.2);
- (D) promote environmentally sound and economically feasible water conservation measures, within two years (§ 4.2.4).

Michigan has annually assessed its water conservation and efficiency program and reported to the Council pursuant to Compact § 4.2.2. In addition, Michigan has submitted water conservation and efficiency program review reports, pursuant to Compact § 3.4.1, every five years. The most recent final five-year report is dated Dec. 8, 2014, and a draft of Michigan's 2019 five-year report recently was noticed for public comment. These periodic reports indicate that Michigan is complying with Compact § 4.2.

Compact § 4.2.1 lists five goals. Further, Council pursuant to section 4.2.1 identified five basin-wide objectives. See Council Resolution #5 – Adoption of Basin-Wide Conservation and Efficiency Objectives, Dec. 8, 2008. These objectives were re-affirmed by Council Resolution #30, June 13, 2014.

Michigan, as reflected by Appendix 1 of its draft 2019 five-year report, has adopted the same goals as Compact § 4.2.1 and the same basin-wide objectives as the Council. Appendix 1 also identifies Michigan's own sub-objectives that are consistent with the goals and objectives. Michigan is in compliance with the goals and objectives requirements of Compact § 4.2.2.

Michigan's draft 2019 five-year report does a good job of laying out how the state, consistent with the goals and objectives, is implementing its water conservation and efficiency program and promoting environmentally sound and economically feasible water conservation measures. For example, Michigan requires all major water use sectors to develop and publish their own water conservation measures.<sup>66</sup> Then owners of LQWs self-certify they have reviewed these sector specific water conservation measures in their annual reporting.<sup>67</sup> Additionally, water

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<sup>66</sup> Michigan EGLE, Water Conservation Measures, [https://www.michigan.gov/egle/0,9429,7-135-3313\\_3684\\_45331-190105--,00.html](https://www.michigan.gov/egle/0,9429,7-135-3313_3684_45331-190105--,00.html).

<sup>67</sup> MICH. COMP. LAWS § 324.32723(6)(e).

conservation measure implementation is a condition of permit approvals for withdrawals over 2 million gpd.<sup>68</sup>

Michigan does a very good job promoting science and research, which is part of the Compact's water conservation measures.<sup>69</sup> Such efforts range from ongoing research collaborations with the University Research Corridor, to making it a priority to establish training for government officials and Great Lakes Preservation curriculum in K-12.<sup>70</sup>

Michigan also has developed a comprehensive Water Strategy,<sup>71</sup> a 30-year blueprint for the state's water resources. The Water Strategy has nine action areas and five top priorities that are economic in nature as well as water conservation related.<sup>72</sup> A complete list of water conservation and efficiency recommendations from the Water Strategy is Appendix 2 of Michigan's 2019 draft five-year report.

## Conclusion

Michigan is implementing the water conservation and efficiency provisions of the Compact.

Michigan is largely implementing the water management provisions of the Compact.

- Michigan should demonstrate in its upcoming 2019 five-year report how its multiple databases comply with the Compact § 4.1.1 mandate to develop and maintain an inventory of its water resources including withdrawals, consumptive uses, and diversions.
- Michigan should consider amending its laws to clarify that all permits for new withdrawals and consumptive uses will issue only where the application meets the Decision-Making Standard of Compact § 4.11 as well as MICH. COMP. LAWS § 324.32723(6).

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<sup>68</sup> *Id.*

<sup>69</sup> Compact § 4.2.4(e).

<sup>70</sup> See also Michigan Water Strategy 2018 Annual Report,

[https://www.michigan.gov/documents/ogl/2018\\_Water\\_Strategy\\_Annual\\_Report\\_Optimized\\_641695\\_7.pdf](https://www.michigan.gov/documents/ogl/2018_Water_Strategy_Annual_Report_Optimized_641695_7.pdf).

<sup>71</sup> See Michigan Water Strategy, <https://www.michigan.gov/ogl/0,9077,7-362-85258---,00.html>; [https://www.michigan.gov/documents/deq/deq-ogl-waterstrategy\\_538161\\_7.pdf](https://www.michigan.gov/documents/deq/deq-ogl-waterstrategy_538161_7.pdf).

<sup>72</sup> *Id.*

## MINNESOTA

### Introduction

Minnesota ratified the Compact in February 2007 via legislation codified at Minn. Stat. § 103G.801, which enacts the terms of the Compact verbatim. Minnesota's Department of Natural Resources (MDNR) is tasked with administering the use, allocation and control of waters of the state.<sup>1</sup>

The Great Lakes basin in Minnesota consists of approximately 6200 square miles of the Lake Superior basin in the eastern portion of the state.<sup>2</sup>

In late 2014, Minnesota submitted its Water Management Program Five-Year Report and its 2014 Water Conservation and Efficiency Program Review, pursuant to Compact § 3.4.1.

Following review of the report pursuant to Compact § 3.4.2, the Compact Council and Regional Body issued Resolution No. 2015-4 finding that, based on the report submitted by the State, the Minnesota water management and water conservation and efficiency programs meet or exceed the current requirements of the Compact.

### Water Management Program

#### Water Resources Inventory, Registration, and Reporting

##### *Inventory*

Compact § 4.1.1 requires each party to develop and maintain an inventory of its water resources. The minimum information to be collected for the inventory is the “location, type, quantity, and use of those [water] resources and the location, type, and quantity of withdrawals, diversions, and consumptive uses.”<sup>3</sup> Minn. Stat. § 103G.801 incorporates this Compact requirement.

It is not apparent from Minnesota’s 2014 five-year report or otherwise that the State has developed and maintained such an inventory of water resources in the Lake Superior basin, including information about withdrawals, diversions, and consumptive uses. Minnesota has been maintaining a statewide inventory of “public water resources” since about 1970.<sup>4</sup> This inventory has been codified as a requirement in Minn. Stat. § 103G.201.<sup>5</sup> However, it does not appear that

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<sup>1</sup> Minn. Stat. § 103G.255(1).

<sup>2</sup> Minnesota Annual Water Conservation and Efficiency Assessment (Nov. 21, 2018) p. 3.

<sup>3</sup> Compact § 4.1.1.

<sup>4</sup> MNDNR, Public Water Inventory Program,

[https://www.dnr.state.mn.us/waters/watermgmt\\_section/pwi/index.html](https://www.dnr.state.mn.us/waters/watermgmt_section/pwi/index.html)

<sup>5</sup> The state has been converting paper maps of this information into online GIS maps. In the meantime, the inventory is available to the public for viewing at various government offices throughout the state. See

this public water resources inventory includes information regarding withdrawals, diversions, and consumptive uses as contemplated by Compact § 4.1.1. Minnesota in its upcoming 2019 five-year report should demonstrate that it is maintaining a water resources inventory including withdrawals, diversions and consumptive uses in the Lake Superior basin as required by Compact § 4.1.1.

#### *Registration*

Compact § 4.1.3 requires that any withdrawal of 100,000 gallons per day or greater average in any 30-day period, and any diversion of any amount, must be registered with the state. Minn. Stat. § 103G.801 incorporates this Compact requirement.

Minnesota does not have a registration system per se. But Minnesota's expansive statewide permitting system effectively satisfies the Compact registration requirement regarding Great Lakes basin withdrawals and, for the most part, diversions.

Minnesota requires a permit for any appropriation<sup>6</sup> of waters of the state, except for withdrawals for use at a rate not to exceed 10,000 gpd or for a total of no more than 1 million gallons in a year.<sup>7</sup> Proposed water users must submit a permit application to MDNR that includes substantial information about the user and the proposed use.<sup>8</sup> This statewide water use permitting system effectively serves as a registration system that satisfies the 100,000 gpd Compact § 4.1.3 threshold for withdrawals. However, the state permitting system may not capture diversions of less than 10,000 gpd, since that is below the permitting threshold.<sup>9</sup> Minnesota in its upcoming 2019 five-year report should demonstrate that its registration system captures all diversions of any amount in the Lake Superior basin as required by Compact § 4.1.3.

#### *Reporting*

Compact § 4.1.4 requires all registrants to report annually the monthly volumes of their water use to the state.<sup>10</sup> Minn. Stat. § 103G.801 incorporates this Compact reporting requirement.

Minnesota statewide requires all permittees (i.e., registrants) to measure and report appropriation and use volumes, including monthly volumes and annual totals.<sup>11</sup> Permitting and reporting is

MNDNR, Public Water Inventory Program,  
[https://www.dnr.state.mn.us/waters/watermgmt\\_section/pwi/maps.html](https://www.dnr.state.mn.us/waters/watermgmt_section/pwi/maps.html).

<sup>6</sup> “Appropriating” as statutorily defined means “withdrawal, removal, or transfer of water from its source regardless of how the water is used.” Minn. Stat. § 103G.005(4). The term seems broad enough to include consumptive uses and diversions as well as withdrawals.

<sup>7</sup> Minn. Rule § 6115.0620(C). The other exceptions to the need for an appropriation permit are domestic use serving less than 25 persons, test pumping of a groundwater source, agriculture field tile or open ditch system, and reuse of water already permitted. *Id.* at 6115.0620(A)(B)(D).

<sup>8</sup> Minn. Rule 6115.0660.

<sup>9</sup> Note that the Compact bans new or increased diversions but not existing diversions. See Compact § 4.8.

<sup>10</sup> Compact § 4.1.4.

<sup>11</sup> Minn. Stat. § 103G.281(3), 103.282(3); Minn. Rule 6115.0750(4).

done through an online system known as the Minnesota Permitting and Reporting System (MPARS).<sup>12</sup> The information collected from the permitting and reporting process is made available to the public on the MDNR website with links to searchable databases and maps and in water use report summaries.<sup>13</sup> Minnesota's statewide reporting system complies with the registrant reporting requirement of Compact § 4.1.4.

Compact § 4.1.5 requires each state to annually report information gathered per Compact § 4.1 to the regional water use database repository. Minnesota annually reports on withdrawals, consumptive uses and diversions from the Lake Superior basin to the Great Lakes Regional Water Use Database, and the aggregated information is available to the public online.<sup>14</sup>

### New or Increased Withdrawals and Consumptive Uses

Compact § 4.10.1 requires each state to create a program to manage and regulate new or increased withdrawals and consumptive uses within five years of the Compact's effective date. The Compact allows each state to determine the scope and thresholds of which proposals for new and increased withdrawals and consumptive uses will be subject to regulation.<sup>15</sup> The Compact's default threshold for regulation, should a state fail to set threshold levels that comply with Compact § 4.10.1, is 100,000 gpd per 90-day period.<sup>16</sup>

Minnesota statewide requires all appropriations of water to obtain a permit if the withdrawal exceeds a rate of 10,000 gpd or a total of 1 million gallons in a year.<sup>17</sup> Minnesota's threshold level for permitting withdrawals and consumptive uses is the lowest among the eight Great Lakes states and considerably lower than the Compact's default threshold. Plus, by requiring permits for existing users as well as new or increased withdrawals and consumptive uses, Minnesota's permitting system is more expansive than the Compact requires.<sup>18</sup>

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<sup>12</sup> MNDNR, Permitting and Reporting System, <https://www.dnr.state.mn.us/mpars/index.html>

<sup>13</sup> MNDNR, Water Use Data,

[https://www.dnr.state.mn.us/waters/watermgmt\\_section/appropriations/wateruse.html](https://www.dnr.state.mn.us/waters/watermgmt_section/appropriations/wateruse.html)

<sup>14</sup> See, e.g., Great Lakes Commission, Annual Report of the Great Lakes Regional Water Use Database Representing 2017 Water Use Data at 40-41 (Minnesota). See generally <https://waterusedata.glc.org/annualreports.php>.

<sup>15</sup> Compact § 4.10.1

<sup>16</sup> Compact § 4.10.2

<sup>17</sup> Minn. Stat. § 103G.271(4); Minn. Rule 6115.0620(C).

<sup>18</sup> Compact § 4.13 expressly exempts two types of withdrawals from the scope of Article 4 and its permitting requirements: to supply vehicles and to use in a non-commercial short-term purpose. Minnesota exempts a few other uses from permitting as well. See Minn. Rule 6115.0620(A), (B), (D) & (E). But Minnesota's exemptions are not particularly broad, and Compact § 4.10.1 allows a state to determine the scope of its permitting program, provided it is done through a "considered process" and will "ensure that overall uses are reasonable, that withdrawals overall will not result in significant impacts to the waters and water dependent natural resources of the basin ... and that all other objectives of the Compact are achieved."

Minnesota also has set two other thresholds which trigger additional requirements. First, a permit application for a consumptive use of 2 million gpd or greater in a 30-day period requires further consideration before approval regarding the sustainability of the use in balance with the water resource needs of the source basin over the life of the use.<sup>19</sup> Second, notice must be given to the governors, premiers, and water management agencies of the Great Lakes region and the international joint commission for any application for a consumptive use over 5 million gpd in a 30-day period.<sup>20</sup>

Minnesota meets or exceeds the requirements imposed by Compact § 4.10 for management and regulation of new and increased withdrawals and consumptive uses.

### Decision-Making Standard

Compact § 4.11 sets forth the standard for approval of new or increased withdrawals and consumptive uses subject to section 4.10. This Decision-Making Standard is a minimum for all Great Lakes states.<sup>21</sup> The Decision-Making Standard of Compact § 4.11 lists five criteria that must be met;<sup>22</sup> the fifth criterion is that the proposed use is “reasonable” based on consideration of six specific factors.<sup>23</sup>

By virtue of adopting the Compact verbatim at Minn. Stat. § 103G.801, Minnesota law includes the Compact § 4.11 Decision-Making Standard. However, the State also spells out a different decision-making standard in its administrative rules applicable to permits for appropriations of water statewide.<sup>24</sup> As a result, it is unclear which standard Minnesota applies when deciding whether to permit a new or increased withdrawal or consumptive use within the Lake Superior basin.

Minn. Rule 6115.0670 sets forth ten factors MNDNR shall “consider” when reviewing all permit applications, and then goes on to set forth additional factors for consideration for appropriations

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<sup>19</sup> Minn. Stat. § 103G.265(3).

<sup>20</sup> Minn. Stat. § 103G.265(4). This meets Compact § 4.6.1’s notice requirement.

<sup>21</sup> Compact § 4.12.1.

<sup>22</sup> The five mandatory criteria are: (1) all water withdrawn shall be returned to the source watershed less an allowance for consumptive use; (2) the use will result in no significant adverse impacts to the quantity or quality of the waters or water dependent natural resources of the applicable source watershed; (3) the use will incorporate environmentally sound and economically feasible water conservation measures; (4) the use will comply with all applicable municipal, state, federal laws as well as regional interstate and international agreements; and (5) the use is reasonable. Compact § 4.11.

<sup>23</sup> The six “reasonable” factors are: (a) efficient use, minimize waste of water; (b) for increased withdrawal or consumptive use, efficient use of existing water supplies; (c) balance economic, social and environmental aspects of proposed use with those of existing uses sharing the water source; (d) supply potential of the water source; (e) degree and duration of any adverse impacts caused by proposed use to other lawful uses of water or to the waters and water dependent natural resources of the basin; and (f) if applicable, restoration of hydrologic conditions and functions of the source watershed. Compact § 4.11.5.

<sup>24</sup> Minn. Rule 6115.0670.

from watercourses, basins, and groundwater, respectively.<sup>25</sup> The rule also provides that no permit shall be granted if any of five criteria are met, and then goes on to subject permit approval to further criteria depending upon whether it is a surface water or groundwater appropriation.<sup>26</sup>

The factors and criteria of the Minnesota regulation are in some ways similar to the Decision-Making Standard of Compact § 4.11, and in some ways may even go beyond what Compact § 4.11 requires. But it is not clear that Minn. Rule 6115.0670 includes mandatory Compact § 4.11 criteria such as all water must be returned to the source watershed less an allowance for consumptive use; no significant adverse impacts to the quality or quantity of the waters and water dependent natural resources and the source watershed; and incorporation of environmentally sound and economically feasible water conservation measures.<sup>27</sup> Plus the Minnesota rule introduces more and different factors for consideration than the six “reasonable” factors in Compact § 4.11.<sup>28</sup> Further, the Minnesota rule provides that a decision-maker shall waive any of its provisions “if it is determined that conditions are such that implementation of a provision would be unnecessary or inapplicable or if an applicant provides sufficient evidence to show just cause why such provision would not be reasonable, practical, or in the public interest.”<sup>29</sup> Hence, if the State followed Minn. Rule 6115.0670 without regard to Compact § 4.11, it is possible that a new or increased withdrawal or consumptive use in the Lake Superior basin could be approved even though it would fail to meet the Decision-Making Standard of the Compact.

Minnesota could, consistent with the Compact, apply the Decision-Making Standard of Compact § 4.11 as a floor for its appropriation permit decision-making in the Lake Superior basin, with the state rule factors and criteria serving as additional hurdles a permit applicant must surmount. Indeed, Minn. Rule 6115.0670 itself says that permit decisions also shall be based on other applicable provisions of Minn. Stat. chapter 103G,<sup>30</sup> which includes the codified Compact. But it is not clear that Minnesota is evaluating its permit applications in the Lake Superior basin using Compact § 4.11 as a mandatory floor. In its 2014 five-year report, Minnesota took the position that its requirements “are more stringent than the Compact for standards for water withdrawals or uses” and that its existing state-wide program and regulations “meet or exceed the Standard of Review.”<sup>31</sup>

Minnesota should make clear that, for new or increased withdrawals and consumptive uses in the Lake Superior basin, no permits for water appropriation will be granted unless the proposal

<sup>25</sup> Minn. Rule 6115.0670(2).

<sup>26</sup> Minn. Rule 6115.0670(3).

<sup>27</sup> Compare Minn. Rule 6115.0670(3) with Compact § 4.11.

<sup>28</sup> Compare Minn. Rule 6113.0670(2) with Compact § 4.11.5.

<sup>29</sup> Minn. Rule 6115.0670(4).

<sup>30</sup> See Minn. Rule 6116.0670(3).

<sup>31</sup> Minnesota Water Management Program Five-year Report (2014) p. 3.

meets the Decision-Making Standard of Compact § 4.11. Perhaps the best way to accomplish this would be via amendment of Minn. Rule 6115.0670.

### Diversions and Exceptions

Compact § 4.8 generally prohibits all new or increased diversions, except as provided in Article 4. Compact § 4.9 sets forth three exceptions to the general ban on new or increased diversions: straddling communities, intra-basin transfers, and straddling counties. Minnesota adopted the Compact verbatim,<sup>32</sup> and therefore all proposed new or increased diversions from the Lake Superior basin are prohibited unless they meet one of the three exceptions recognized in the Compact.

### **Water Conservation and Efficiency Program**

Compact § 4.2 requires each Party to:

- (A) develop its own water conservation and efficiency goals and objectives consistent with the Council's basin-wide goals, within two years of the Compact's effective date (§ 4.2.2);
- (B) develop and implement a water conservation and efficiency program, either voluntary or mandatory, based on those goals and objectives, within two years (§§ 4.2.2, 4.2.5);
- (C) annually assess its programs in meeting those goals and objectives, report to Council and the Regional Body, and make the assessment publicly available (§ 4.2.2);
- (D) promote environmentally sound and economically feasible water conservation measures, within two years (§ 4.2.4).

Minnesota's periodic reports to Council speak to the State's compliance with the water conservation and efficiency provisions of the Compact. Minnesota has been submitting annual assessment reports, pursuant to Compact § 4.2.2; the most recent annual report is dated Nov. 21, 2018. In addition, Minnesota has submitted water conservation and efficiency program review reports, pursuant to Compact § 3.4.1, every five years; the most recent five-year report is dated Nov. 24, 2014. The annual and five-year reports are available to the public online at the Council's webpage.<sup>33</sup>

Compact § 4.2.1 lists five goals. Further, Council pursuant to section 4.2.1 identified five basin-wide objectives. See Council Resolution #5 – Adoption of Basin-Wide Conservation and

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<sup>32</sup> Minn. Stat. § 103G.801.

<sup>33</sup> See Great Lakes-St. Lawrence River Water Resources Council, Resolutions, Guidance, Rules, and Other Documents, <http://www.gslcompactcouncil.org/Resolutions.aspx>.

Efficiency Objectives, Dec. 8, 2008. These objectives were re-affirmed by Council Resolution #30, June 13, 2014.

MDNR's Great Lakes Compact webpage contains a link to "Minnesota Water Conservation Goals and Objectives."<sup>34</sup> The linked document, dated Dec. 8, 2010, identifies Minnesota's program goals as the same as the goals listed in Compact § 4.2.1; the document does not identify objectives per se.<sup>35</sup> Minnesota's latest annual and five-year reviews of its water conservation and efficiency program do not identify specific State goals and objectives, but they are organized to show how Minnesota's program is consistent with the regional objectives adopted by Council.<sup>36</sup> Minnesota should consider expressly identifying its water conservation and efficiency program objectives in its upcoming 2019 five-year report.<sup>37</sup>

Minnesota's most recent annual assessment review provides evidence that the State has developed and is implementing a comprehensive water conservation and efficiency program consistent with those basin-wide objectives, and is promoting environmentally sound and economically feasible conservation measures.<sup>38</sup> The 2018 report summarizes mandatory and voluntary elements of the program and explains how various initiatives by MDNR and other agencies fit with these objectives and measures.<sup>39</sup>

For example, Minnesota has an initiative which is consistent with the Compact goal of "promoting the efficiency of use and reducing losses and waste of water,"<sup>40</sup> and with environmentally sound and economically feasible measures such as "[i]dentification and sharing of best management practices and state of the art conservation and efficiency technologies and the "[a]pplication of sound planning principles."<sup>41</sup> Currently only applicable to public water supply utilities that serve 1,000 or more people,<sup>42</sup> the initiative requires them to develop "water supply plans" that, among other things, provide for water conservation planning and "measures

<sup>34</sup> MNDNR, Great Lakes Compact,

[https://www.dnr.state.mn.us/waters/watermgmt\\_section/great\\_lakes\\_compact/index.html](https://www.dnr.state.mn.us/waters/watermgmt_section/great_lakes_compact/index.html).

<sup>35</sup> Minnesota Water Conservation Goals and Objectives,

[https://files.dnr.state.mn.us/waters/watermgmt\\_section/great\\_lakes\\_compact/water\\_conservation\\_goals\\_20110413.pdf](https://files.dnr.state.mn.us/waters/watermgmt_section/great_lakes_compact/water_conservation_goals_20110413.pdf).

<sup>36</sup> See Minnesota Water Management Program Five-year Report (2014); Minnesota Annual Water Conservation and Efficiency Assessment (Nov. 21, 2018).

<sup>37</sup> Compact § 4.2.2 calls for each state to develop its "own" goals and objectives, so arguably a state's goals and objectives should not simply repeat the Compact's goals and the Council's objectives. Having said this, if a state's goals and objectives are the same as the Compact's goals and the Council's objectives, the state's goals and objectives should satisfy this aspect of Compact § 4.2.2.

<sup>38</sup> See Minnesota Annual Water Conservation and Efficiency Assessment (Nov. 21, 2018), <http://www.glsregionalbody.org/Docs/ProgramReports/2018/MN%20Water%20Conservation%20and%20Efficiency%20Program%20Assesment-2018.pdf>.

<sup>39</sup> *Id.* at 4-15.

<sup>40</sup> Compact § 4.2.1(e).

<sup>41</sup> Compact § 4.2.4(b)-(c).

<sup>42</sup> Minn. Stat. § 103G.291(3).

that reduce water demand, water losses, peak water demands, and nonessential water uses.”<sup>43</sup> Water suppliers then implement these plans and report progress on Minnesota’s new online Water Conservation Reporting System.<sup>44</sup> It is Minnesota’s intention to use the data collected through this reporting system to gain a better understanding of water use trends, where to concentrate conservation efforts, and obtain information that will be helpful in guiding future policy regarding water use.<sup>45</sup> The state plans to roll this conservation reporting system out to other water use sectors in the near future.<sup>46</sup>

More broadly, Minnesota encourages voluntary water conservation for all water users statewide, and it supplies information, tips and resources on the MDNR website to assist the public in doing so.<sup>47</sup> Further, Minnesota has shown a commitment to continuous improvement of its conservation program by collaborating with other agencies on the Advancing Safe and Sustainable Water Reuse initiative to “clarify, modify, and improve water reuse codes, best practices, and health and safety guidelines,”<sup>48</sup> and assisting breweries and distilleries with reducing water use through environmentally friendly practices.<sup>49</sup>

## Conclusion

Minnesota is implementing the water conservation and efficiency provisions of the Compact. The State should consider expressly identifying its water conservation and efficiency program objectives in its upcoming 2019 five-year report.

Minnesota is largely implementing the water management provisions of the Compact.

- Minnesota should demonstrate in its upcoming 2019 five-year report that it is maintaining a water resources inventory including withdrawals, diversions, and consumptive uses in the Lake Superior basin as required by Compact § 4.1.1.

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<sup>43</sup> Minn. Stat. § 103G.291(3).

<sup>44</sup> See MNDNR, Water Conservation Reporting System, [https://www.dnr.state.mn.us/waters/watermgmt\\_section/appropriations/water-conservation-reporting-system.html](https://www.dnr.state.mn.us/waters/watermgmt_section/appropriations/water-conservation-reporting-system.html).

<sup>45</sup> MNDNR, Water Conservation Report (November 4, 2018), [https://files.dnr.state.mn.us/waters/watermgmt\\_section/water\\_conservation/2018-water-conservation-report.pdf](https://files.dnr.state.mn.us/waters/watermgmt_section/water_conservation/2018-water-conservation-report.pdf) p. 6, 10.

<sup>46</sup> See MNDNR, Water Conservation Reporting System, [https://www.dnr.state.mn.us/waters/watermgmt\\_section/appropriations/water-conservation-reporting-system.html](https://www.dnr.state.mn.us/waters/watermgmt_section/appropriations/water-conservation-reporting-system.html).

<sup>47</sup> See MNDNR, Water Conservation, [https://www.dnr.state.mn.us/waters/watermgmt\\_section/appropriations/conservation.html](https://www.dnr.state.mn.us/waters/watermgmt_section/appropriations/conservation.html).

<sup>48</sup> Minnesota Annual Water Conservation and Efficiency Assessment (Nov. 21, 2018) p. 15, <http://www.glsregionalbody.org/Docs/ProgramReports/2018/MN%20Water%20Conservation%20and%20Efficiency%20Program%20Assesment-2018.pdf>.

<sup>49</sup> *Id.* at 11.

- Minnesota should demonstrate in its upcoming 2019 five-year report that its registration system captures all diversions of any amount in the Lake Superior basin as required by Compact § 4.1.3.
- Minnesota should clarify that, for new or increased withdrawals and consumptive uses in the Lake Superior basin, no permits for water appropriation will be granted unless the proposal meets the Decision-Making Standard of Compact § 4.11.

## NEW YORK

### Introduction

The State of New York General Assembly passed legislation ratifying the Compact that was signed by the governor on March 4, 2008.<sup>1</sup> New York State Environmental Conservation Law (NYS ECL) § 21-1001 mirrors the language of the Compact verbatim.<sup>2</sup> In addition, the legislation granted authority to the New York Department of Environmental Conservation (DEC) to promulgate rules necessary to implement and administer the Compact.<sup>3</sup>

Prior to the Compact, in 1988 the New York legislature passed the Great Lakes Water Conservation and Management Act, codified at NYS ECL § 15-1501 *et seq.*, which imposed certain requirements on public water supplies that withdrew large amounts of water from the Great Lakes basin.<sup>4</sup> Amendments to NYS ECL title 15 were enacted in 2011 and became effective on February 15, 2012. The amended legislation called for an expanded permitting program to cover a broader range of withdrawals of surface or groundwater of the State.<sup>5</sup> Implementing regulations took effect April 1, 2013.<sup>6</sup>

The State of New York submitted its Water Management Program Report and Water Conservation and Efficiency Program Review in December 2014, pursuant to Compact § 3.4.1. Following review of the reports pursuant to Compact § 3.4.2, the Compact Council and Regional Body issued Resolution No. 2015-5 finding that, based on the reports submitted by the State, the State of New York Water Management Program and Water Conservation and Efficiency Program meet or exceed the current requirements of the Compact.

### Water Management Program

#### Water Resources Inventory, Registration and Reporting

##### *Inventory* (§ 4.1.1)

Compact § 4.1.1 requires each state to develop a water resources inventory including withdrawals, diversions, and consumptive uses within five years of the effective date of the Compact.

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<sup>1</sup> The legislation is codified at NYS ECL §§ 21-1001 *et seq.*

<sup>2</sup> NYS ECL § 21-1001.

<sup>3</sup> NYS ECL § 21-1003.

<sup>4</sup> See DEC, Great Lakes Water Withdrawal, <https://www.dec.ny.gov/lands/25581.html>.

<sup>5</sup> See NYS ECL § 15-1501.

<sup>6</sup> See 6 NYCRR part 601.

It appears that the only water resources inventory that the State currently maintains is the DEC's Waterbody Inventory/Priority Waterbodies List (WIPWL) used "to track support (or impairment) of water uses, overall assessment water quality, causes and sources of water quality impact/impairment, and the status of restoration, protection and other water quality activities and efforts."<sup>7</sup> The focus of DEC's WIPWL is not implementation of the Compact. It does not include information on the location, type, consumptive use, or quantity of withdrawals or diversions as required by Compact § 4.1.1. To comply with the inventory requirements of Compact § 4.1.1, New York must develop and maintain a water resources inventory of withdrawals, diversions, and consumptive uses in its Great Lakes basin.

#### *Registration (§ 4.1.3)*

Compact § 4.1.3 requires that any person<sup>8</sup> who withdraws 100,000 gpd or greater over a 30-day period, or who diverts water in any amount, must register that use with the State. NYS ECL § 21-1001 incorporates this Compact requirement.

Also, New York via NYS ECL title 15 has established a regulatory regime that prohibits any person from operating a water withdrawal system<sup>9</sup> with the capacity of greater than a threshold value without first obtaining a permit.<sup>10</sup> The threshold volume is defined as a withdrawal of water of a volume of 100,000 gpd, determined by the limiting capacity of the water withdrawal, treatment, or conveyance system.<sup>11</sup> Arguably, this requirement to apply for and obtain a permit indirectly means any person meeting the threshold volume must "register" with the DEC.<sup>12</sup> But there is no language within NYS ECL title 15 that expressly mandates registration for all withdrawals of 100,000 gpd or more.

By contrast, NYS ECL title 15 does expressly require certain water withdrawals for agricultural purposes to register with the State.<sup>13</sup> Withdrawals of water for agricultural purposes in excess of

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<sup>7</sup> See DEC, Waterbody Inventory/Priority Waterbodies List, <https://www.dec.ny.gov/chemical/36730.html>.

<sup>8</sup> "Person" as defined by the Compact means a human being or a legal person, including a government or a non-governmental organization, including any scientific, professional, business, non-profit, or public interest organization or association that is neither affiliated with, nor under the direction of a government. See Compact § 1.2.

<sup>9</sup> "Water withdrawal system" is defined as any equipment or infrastructure operated or maintained for the provision or withdrawal of water including, but not limited to, collection, pumping, treatment, transportation, transmission, storage, and distribution. NYS ECL § 15-1502.15.

<sup>10</sup> NYS ECL § 15-1501.1.

<sup>11</sup> NYS ECL § 15-1502.14.

<sup>12</sup> The DEC application for a water withdrawal permit is available at: <https://www.dec.ny.gov/lands/94327.html>.

<sup>13</sup> Agricultural withdrawals are withdrawals made for an "agricultural purpose," which is defined as the practice of farming for crops, plants, vines and trees, and the keeping, grazing, or feeding of livestock for

an average of 100,000 gpd or more in any consecutive 30-day period must annually register with the DEC.<sup>14</sup> NYS ECL title 15 also expressly mandates registration for interbasin diversions of more than 1 million gpd.<sup>15</sup>

The DEC implementing regulations that took effect in 2013 included a five-year schedule for existing withdrawals that meet the threshold volume to apply for permits.<sup>16</sup> The five-year schedule for permitting existing sources reportedly was completed in 2017.<sup>17</sup>

In sum, the registration requirements of Compact § 4.1.3 are incorporated into New York law by the NYS ECL 21-1001 ratification legislation, and somewhat varying registration requirements are imposed by other New York laws. It is not clear, from New York's 2014 five-year report or otherwise, that persons are registering withdrawals and diversions as required by Compact § 4.1.3. New York should demonstrate in its upcoming 2019 five-year report that registrations are occurring as required by the Compact (e.g., make registrations publicly available online).

#### *Reporting (§§ 4.1.4, 4.1.5)*

Compact § 4.1.4 requires all registrants to annually report the monthly volumes of the withdrawals, consumptive uses, and diversions.

New York requires that all persons subject to permitting requirements must submit an annual water withdrawal report to the DEC Division of Water by March 31 every year.<sup>18</sup> The annual report must be submitted on a form prescribed by the DEC and must include:

- withdrawal source and location;
- the average and peak withdrawal amounts for the calendar year;
- actual or estimated monthly and annual volumes; and
- location and amounts of water returned and the resulting consumptive losses.<sup>19</sup>

Withdrawals of water for agricultural purposes in excess of an average of 100,000 gpd in any consecutive 30-day period also must annually report to the DEC on a form prescribed by the department.<sup>20</sup>

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sale of livestock or livestock products, and the on-farm processing of crops, livestock and livestock products. NYS ECL § 15-1502.07.

<sup>14</sup> NYS ECL § 15-1504.3(a).

<sup>15</sup> NYS ECL § 15-1505; 6 NYCRR § 601.18.

<sup>16</sup> See 6 NYCRR § 601.7(b)(2).

<sup>17</sup> See New York 2018 Water Conservation and Efficiency Program Review p. 1.

<sup>18</sup> 6 NYCRR § 601.5(a).

<sup>19</sup> *Id.*

<sup>20</sup> NYS ECL § 15-1504.4.

However, a number of categories of withdrawals, even if permitted or registered, are exempt from the reporting requirements.<sup>21</sup> These exemptions may be inconsistent with Compact § 4.1.4, which requires “[a]ll registrants” to report.

In sum, the reporting requirements of Compact § 4.1.4 are incorporated into New York law by the NYS ECL § 21-1001 ratification legislation, and reporting requirements and procedures largely consistent with Compact § 4.1.4 reporting are imposed by other New York laws as well.

Compact § 4.1.5 requires each state to annually report information gathered per section 4.1 to the regional water use data base repository. NYS ECL § 21-1001 incorporates this Compact requirement. The State of New York from 2012 to 2017 has annually reported the information gathered to the Great Lakes Commission regional water use database, and the aggregated data is publicly available online,<sup>22</sup> as contemplated by Compact § 4.1.5.

#### Diversions (§§ 4.8, 4.9)

Compact § 4.8 flatly prohibits all new or increased diversions, except as provided for in Article 4. Compact § 4.9 sets forth three exceptions to the blanket ban on new or increased diversions: straddling communities, intra-basin transfers, and straddling counties. The State of New York via NYS ECL § 21-1001 incorporates these Compact sections regarding the ban on diversions and the limited exceptions.<sup>23</sup> Additionally, NYS ECL title 15 prohibits diversions from the Great Lakes-St. Lawrence River basin.<sup>24</sup>

However, NYS ECL title 15 also provides that interbasin diversions must be registered if the capacity exceeds 1 million gpd.<sup>25</sup> This may be at odds with the intra-basin transfer exception of Compact § 4.9.2, which mandates regulation for new or increased intra-basin transfers in excess of an average of 100,000 gpd over a 90-day period. Under the Compact such an intra-basin transfer proposal must at least meet the Exception Standard of Compact § 4.9.4.<sup>26</sup> “Interbasin diversion” under NYS ECL title 15 is defined as a transfer from one major New York drainage

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<sup>21</sup> 6 NYCRR § 601.5(b). A list of DEC reporting requirements and exemptions can be found online at: <https://www.dec.ny.gov/lands/86940.html>.

<sup>22</sup> See Great Lakes Commission, Great Lakes Regional Water Use Database, <https://waterusedata.glc.org/graph.php?type=jurisdiction&jurisdiction=5&year=2017&units=gallons>.

<sup>23</sup> NYS ECL § 21-1001.

<sup>24</sup> NYS ECL § 15-1505.6. New York regulations incorporate the Compact § 4.9 exceptions. 6 NYCRR § 601.10(n).

<sup>25</sup> NYS ECL § 15-1505. The registration form for diversions outside of the Great Lakes basin is available at: [https://www.dec.ny.gov/docs/water\\_pdf/intdivreg.pdf](https://www.dec.ny.gov/docs/water_pdf/intdivreg.pdf).

<sup>26</sup> If the intra-basin transfer proposal results in a new or increased consumptive use of 5 million gpd or more averaged over a 90-day period, the proposal also must undergo Regional Review and receive Council approval. Compact § 4.9.2(c).

basin to another,<sup>27</sup> and Lake Erie and Lake Ontario are separate basins. “Intra-basin transfer” under the Compact means a transfer of water from one Great Lake watershed to another Great Lake watershed.<sup>28</sup> New York should clarify that new or increased transfers of water from the Lake Erie basin to the Lake Ontario basin, or vice versa, should be subject to the intra-basin transfer standard of Compact § 4.9.2 rather than the more lenient interbasin diversion provisions of NYS ECL title 15.

#### New or Increased Withdrawals and Consumptive Uses (§ 4.10)

Compact § 4.10.1 requires each state to create a program to manage and regulate new or increased withdrawals and consumptive uses within five years of the effective date of the Compact.

Prior to the Compact, in 1988 the New York legislature passed the Great Lakes Water Conservation and Management Act which placed certain requirements on public water supplies which withdrew large amounts of Great Lakes basin water.<sup>29</sup> As a result of amendments to NYS ECL title 15, a new permitting and registration program became effective on February 15, 2012 that required permits for withdrawals of 100,000 gallons or more per day of surface or groundwater, determined by the maximum capacity of the withdrawal system.<sup>30</sup> Because the amendments expanded regulation of water withdrawals to a broader range of facilities with existing permits, the DEC established two types of permits. “New permits” are required before a new or increased withdrawal system can be put into operation, while “initial permits” are required for any type of existing water withdrawal system having the capacity to withdraw 100,000 gpd or more.<sup>31</sup>

The DEC implementing regulations took effect on April 1, 2013 and included a five-year schedule to register and issue permits to all existing withdrawals that meet the threshold volume.<sup>32</sup> According to New York’s 2018 Water Conservation and Efficiency Report, the five-year schedule for registration and permitting of existing sources was completed in 2017.<sup>33</sup> Permits are valid for no longer than ten years from issuance.<sup>34</sup>

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<sup>27</sup> NYS ECL § 1501.10.

<sup>28</sup> Compact § 1.2.

<sup>29</sup> See DEC, Great Lakes Water Withdrawal, <https://www.dec.ny.gov/lands/25581.html>.

<sup>30</sup> NYS ECL §§ 15-1501.1, 1502.14 (definition of threshold volume).

<sup>31</sup> See New York’s Water Management Program Report (2014, updated 2015) p. 4; 6 NYCRR §§ 601.6, 601.7.

<sup>32</sup> 6 NYCRR § 601.7(b)(2).

<sup>33</sup> See New York 2018 Water Conservation and Efficiency Program Review p. 1.

<sup>34</sup> NYS ECL § 15-1503.6.

New or increased withdrawals for agricultural purposes exceeding a threshold amount also must be permitted,<sup>35</sup> but the threshold differs somewhat from the threshold for non-agricultural withdrawals. The threshold for agricultural withdrawals is 100,000 gpd based on a 30-day average, not capacity.<sup>36</sup> Water withdrawals for agricultural purposes that were registered prior to February 15, 2012, or their annual water usage was reported to DEC prior to February 15, 2012, are exempt from permitting requirements.<sup>37</sup>

NYS ECL title 15 also exempts a variety of other uses from its permitting requirements.<sup>38</sup> These exemptions are somewhat more expansive than the two exemptions set forth in Compact § 4.13 (i.e., for supplying vehicles and for short-term non-commercial projects).

While NYS ECL title 15 expressly covers water “withdrawals,” the statute does not expressly mention “consumptive uses.” “Withdrawal” under NYS ECL title 15 is defined as the removal or taking of water for any purpose from the waters of the state.<sup>39</sup> Consumptive use arguably falls within the State’s definition of withdrawal.<sup>40</sup> But New York should consider clarifying that consumptive uses also are covered by the permitting regime under NYS ECL title 15.

#### Decision-Making Standard (§ 4.11)

Compact § 4.11 sets forth the standard for approval of new or increased withdrawals and consumptive uses subject to section 4.10. The Decision-Making Standard of Compact § 4.11 lists five criteria that must be met; the fifth criterion is that the proposed use is “reasonable,” based on consideration of six specific factors. Compact 4.11 is incorporated verbatim in NYS ECL § 21-1001.<sup>41</sup>

NYS ECL title 15 adopts many of Compact § 4.11’s decision-making criteria for permit approval, including: ensure that there will be no significant or adverse impact to quantity or quality of the Waters; implement in a manner that incorporates environmentally sound and economically feasible water conservation measures; and ensure compliance with all local, state,

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<sup>35</sup> NYS ECL § 15-1501.

<sup>36</sup> See NYS ECL § 15-1502.14 (definition of threshold volume).

<sup>37</sup> NYS ECL § 15-1504.

<sup>38</sup> NYS ECL § 15-1501.7.

<sup>39</sup> NYS ECL § 15-1502.16.

<sup>40</sup> The Compact distinguishes between withdrawal and consumptive use, defining the latter as “that portion of Water Withdrawn or withheld from the Basin that is lost or otherwise not returned to the Basin due to evaporation, incorporation into products, or other processes.” Compact § 1.2.

<sup>41</sup> NYS ECL § 21-1001.

and federal laws as well as interstate and international agreements.<sup>42</sup> Presumably federal law and interstate agreements include the Compact and its Decision-Making Standard.<sup>43</sup>

However, NYS ECL title 15's list of factors for permit approval fails to include the Compact § 4.11.1 mandate that all water withdrawn be returned, either naturally or after use, to the source watershed.<sup>44</sup> Additionally, NYS ECL title 15 does not include some of the Compact § 4.11.5 factors for "reasonableness."<sup>45</sup> This raises a concern that permits may be approved under NYS ECL title 15 that do not meet the Decision-Making Standard of the Compact. New York should clarify, by amendment of NYS ECL title 15 if necessary, that a permit will be approved only if the proposed use meets the Decision-Making Standard of Compact § 4.11.

### **Water Conservation and Efficiency Program (§ 4.2)**

Compact § 4.2 requires each Party to:

- (A) develop its own water conservation and efficiency goals and objectives consistent with the Council's basin-wide goals, within two years of the Compact's effective date (§ 4.2.2);
- (B) develop and implement a water conservation and efficiency program, either voluntary or mandatory, based on those goals and objectives, within two years (§§ 4.2.2, 4.2.5);
- (C) annually assess its programs in meeting those goals and objectives, report to Council and the Regional Body, and make the assessment publicly available (§ 4.2.2);
- (D) promote environmentally sound and economically feasible water conservation measures, within two years (§ 4.2.4).

The New York State General Assembly specified that DEC shall establish a water conservation and efficiency program.<sup>46</sup> New York has been submitting annual Water Conservation and Efficiency Program Assessments, pursuant to Compact § 4.2.2; the most recent annual assessment is dated 2018. In addition, New York has submitted Water Conservation and Efficiency Program Reports, pursuant to Compact § 3.4.1, every five years; the most recent five-year report is dated December 8, 2014. The annual and five-year reports are available to the public online at the Council's webpage.<sup>47</sup>

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<sup>42</sup> NYS ECL § 15-1503.2.

<sup>43</sup> In addition, New York requires that "the protection and enhancement of the environment, human and community resources should be give appropriate weight with social and economic considerations in determining public policy, and that those factors be considered together in reaching decisions on proposed activities." 6 NYCRR § 617.1.

<sup>44</sup> Compare NYS ECL § 15-1503.2 with Compact § 4.11.1.

<sup>45</sup> Compare NYS ECL § 15-1503.2 with Compact § 4.11.5.

<sup>46</sup> NYS ECL § 15-1501.8.

<sup>47</sup> See <http://www.gslcompactcouncil.org/Resolutions.aspx>.

Compact § 4.2.1 lists five goals. Further, Council pursuant to section 4.2.1 identified five basin-wide objectives. See Council Resolution #5 – Adoption of Basin-Wide Conservation and Efficiency Objectives, Dec. 8, 2008. These objectives were re-affirmed by Council Resolution #30, June 13, 2014.

By statute the goals of New York's water conservation and efficiency program are identical to the five goals set forth in Compact § 4.2.1.<sup>48</sup> New York's objectives, based on its most recent annual (2018) and five-year (2014) assessments of its water conservation and efficiency program, are identical to those identified by the Council. Accordingly, New York's goals and objectives are consistent with the basin-wide goals and objectives as required by Compact 4.2.2.<sup>49</sup>

Since 1988, New York has required the submittal of a water conservation plan with each new application for a permit for a public water supply system. This was updated in 2011 to any type of water withdrawal system having the maximum capacity to withdraw 100,000 gpd or more of groundwater or surface water.<sup>50</sup>

DEC requires that all applications for water withdrawal permits include a Water Conservation Program that must be “environmentally sound, economically feasible and minimizes inefficiencies and water losses.”<sup>51</sup> Additionally, such measures must include, but are not limited to: source and customer metering; frequent system water auditing; system leak detection and repair; recycling and reuse; and reductions during drought.<sup>52</sup>

DEC is mandated to publish a water conservation manual for public water supply systems.<sup>53</sup> DEC also has developed a water conservation manual for non-potable uses.<sup>54</sup>

The 2018 annual assessment lists various activities indicating that New York is implementing a water conservation and efficiency program and is promoting environmentally sound and economically feasible water conservation methods.<sup>55</sup> Most of the items, though, seem to be

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<sup>48</sup> NYS ECL § 15-1501.8.

<sup>49</sup> Compact § 4.2.2 calls for each state to develop its “own” goals and objectives, so arguably a state’s goals and objectives should not simply repeat the Compact’s goals and the Council’s objectives. Having said this, New York’s goals and objectives are certainly consistent with the basin-wide goals and objectives.

<sup>50</sup> Permitting requirements were extended from just public water supply systems to all water withdrawal systems exceeding the defined threshold. NYS ECL §§ 15-1501, 1502.

<sup>51</sup> 6 NYCRR § 601.10(f).

<sup>52</sup> *Id.*

<sup>53</sup> NYS ECL § 1503.3.

<sup>54</sup> The manuals can be found at: <http://www.dec.ny.gov/lands/86945.html>.

<sup>55</sup> See New York 2018 Water Conservation & Efficiency Program Review p. 2-6.

focused on permitted users. New York should consider bolstering its water conservation and efficiency program with respect to other users and the public more generally.

## **Conclusion**

New York is implementing the water conservation and efficiency provisions of the Compact. The State should consider bolstering its water conservation and efficiency program with respect to those who are not permitted users.

New York is largely implementing the water management provisions of the Compact.

- New York must develop and maintain a water resources inventory including withdrawals, diversions, and consumptive uses in its Great Lakes basin, as required by Compact § 4.1.1.
- New York should demonstrate in its upcoming 2019 five-year report that registrations of withdrawals and diversions in the Great Lakes basin are occurring as required by Compact § 4.1.3 (e.g., by making registrations publicly available online).
- New York should clarify that proposals for new or increased transfers of water from the Lake Erie basin to the Lake Ontario basin, and vice versa, are subject to the intra-basin transfer standard of Compact § 4.9.2.
- New York should clarify that its permitting program under NYS ECL title 15 applies to consumptive uses as well as withdrawals, as contemplated by Compact § 4.10.
- New York should clarify that permits for new or increased withdrawals and consumptive uses in the Great Lakes basin are being approved only if they meet the Decision-Making Standard of Compact § 4.11.

## OHIO

### Introduction

The Ohio General Assembly ratified the Compact in 2008 via Am. HB 416, which was codified at Ohio Revised Code (ORC) §§ 1522.01 to 1522.08. The 2008 bill enacted the terms of the Compact verbatim in ORC § 1522.01 and also contained several other related provisions including: charging the Director of the Ohio Department of Natural Resources (ODNR) with enforcing the terms of the Compact and taking actions to effectuate its purpose, including adopting rules,<sup>1</sup> and authorizing ODNR to implement voluntary—but not mandatory -- water conservation and efficiency programs as contemplated by Compact § 4.2.<sup>2</sup>

In 2012 the General Assembly followed up with Am. HB 473, which principally established a permit program for regulation of withdrawals and consumptive uses of water from the Lake Erie basin, codified at ORC §§ 1522.10 to 1522.21. Most recently, in July 2019 the General Assembly passed Am. Sub. HB 166 that amended ORC chapter 1522 to, *inter alia*, require more information in a permit application for a proposed withdrawal of groundwater, and authorize ODNR to decrease a permit holder's groundwater withdrawal under certain circumstances. The new amendments are codified at ORC §§ 1522.10 to 1522.30.

ODNR is statutorily authorized to issue rules to implement the terms of the Compact, and the State represented in its 2014 Water Management Program Report that rules were being developed.<sup>3</sup> However, no rules regarding the Compact have been promulgated.<sup>4</sup>

Ohio submitted its five-year Water Management Program Report and Water Conservation and Efficient Program Review in December 2014, pursuant to Compact § 3.4.1. Following review of the reports pursuant to Compact § 3.4.2, the Compact Council and Regional Body issued Resolution No. 2015-6 finding that, based on the reports submitted by the State, the Ohio Water Management Program and Water Conservation and Efficiency Program meet or exceed the current requirements of the Compact.<sup>5</sup>

### Water Management Program

<sup>1</sup> ORC § 1522.03.

<sup>2</sup> ORC § 1522.05.

<sup>3</sup> Ohio Water Management Program Report (Dec. 8, 2014) p. 1.

<sup>4</sup> ODNR has issued rules relating to permits for diversions from the Ohio River basin, Ohio Admin. Code 1501-2, but not for withdrawals, consumptive uses or diversions from the Lake Erie basin. An Ohio statute requires a permit for a diversion of water from the Ohio River basin that exceeds 100,000 gpd. ORC § 1501.32 (re-codified July 2019 at ORC § 1521.22)

<sup>5</sup> A preliminary 2019 five-year report for Ohio was posted on the Council's website in July 2019, <http://www.gslcompactcouncil.org/>.

## Water Resources Inventory, Registration and Reporting

### *Inventory*

Compact § 4.1.1 required each state to develop a water resources inventory including withdrawals, diversions, and consumptive uses within five years of the Compact's effective date. ORC § 1522.01 incorporates this Compact requirement. Even prior to the Compact, the Ohio General Assembly gave ODNR broad authority to conduct inventories of waters in the state.<sup>6</sup> Further, since about 1990 ORC § 1521.15(A) has required ODNR to develop and maintain a water resources inventory.<sup>7</sup>

Although state law is in place for compliance with Compact § 4.1.1, it is not clear that Ohio is actually satisfying that Compact requirement to maintain a water resources inventory including withdrawals, diversions, and consumptive uses for the Lake Erie basin. There is no mention of such an inventory in Ohio's 2014 Water Management Program Report. A baseline withdrawal and consumptive use facilities list dated December 2009 is available via a link on the ODNR Diversion and Withdrawal Permits webpage.<sup>8</sup> But that baseline list, which was done per Compact § 4.12.2,<sup>9</sup> is now a decade old. Ohio in its upcoming 2019 five-year report should demonstrate that it is maintaining a comprehensive, current water resources inventory including information on withdrawals, consumptive uses, and diversions as required by Compact § 4.1.1.

### *Registration*

Compact § 4.1.3 requires that any person who withdraws an average of 100,000 gallons per day or greater over a 30-day period, or diverts any amount of water, must register that use with the state within five years. ORC § 1522.01 incorporates this Compact requirement. Additionally, since about 1990 ORC § 1521.16(A) has required the owner of a facility that has the capacity to withdraw more than 100,000 gallons per day to register with ODNR.

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<sup>6</sup> ORC § 1521.03(B).

<sup>7</sup> Although ORC § 1521.15(A) expressly refers to consumptive uses and diversions, its “including, but not limited to” language arguably encompasses withdrawals as well. “Consumptive use” as defined by Ohio law includes withdrawals except for those that do not result in a loss of water to the basin from which it is withdrawn. See ORC §§ 1521.01(A), 1501.30(A).

<sup>8</sup> See ODNR, Ohio's Baseline Withdrawal & Consumptive Use Facilities, <http://water.ohiodnr.gov/water-use-planning/diversion-withdrawal-regulation#WIT>.

<sup>9</sup> In order to establish a baseline for determining what is a new or increased withdrawal, consumptive use or diversion, Compact § 4.12.2 required each state within one year of the Compact's effective date to submit to Council a list of withdrawals existing as of the Compact's effective date and their baseline volumes. Compact § 4.12.2 does not require that baseline list to be updated.

The ODNR Diversion Permits webpage lists 13 registered existing diversions out of the Ohio portion of the Lake Erie basin.<sup>10</sup> ODNR has a Facility Registration form for withdrawals per ORC § 1521.16.<sup>11</sup> However, there are no existing withdrawals listed online. Ohio should demonstrate in its upcoming 2019 five-year report that registrations of withdrawals are occurring as required by Compact § 4.1.3 and state law (e.g., make withdrawal registrations publicly available online like the diversions, confirm withdrawals are registering and explain how the registrations can be accessed by the public, furnish granular data about the registrations).

#### *Reporting*

Compact § 4.1.4 requires all registrants to annually report the monthly volumes of the withdrawal, consumptive use, and diversion. ORC § 1522.01 incorporates this Compact requirement. Additionally, since about 1990 ORC § 1521.16(C) has required registered facilities to report annually to ODNR, *inter alia*, the amount of water withdrawn per day.

ODNR has an Annual Report form for registered withdrawals per ORC § 1521.16, and it requires volumes month by month.<sup>12</sup> It is not clear, however, that all registrants actually are reporting as contemplated by state law and Compact § 4.1.4. Ohio should demonstrate in its upcoming 2019 five-year report that reporting is occurring as required (e.g., make withdrawal reports publicly available online, confirm registrants are reporting and explain how the reports can be accessed by the public, furnish granular data about the reports).

Compact § 4.1.5 requires each state to annually report information gathered per Compact § 4.1 to the regional database repository. ORC § 1522.01 incorporates this Compact requirement. Ohio annually reports on withdrawals, consumptive uses, and diversions from the Lake Erie basin to the Great Lakes Commission water use database.<sup>13</sup> The aggregate data reflected in the database indicates Ohio is complying with Compact § 4.1.5.

#### Diversions

Compact § 4.8 flatly prohibits all new or increased diversions, except as provided for in Article 4. Compact § 4.9 sets forth three exceptions to the blanket ban on new or increased diversions: straddling communities, intra-basin transfer, and straddling counties.

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<sup>10</sup> See ODNR, Diversion Permits Under the Great Lakes Compact, <http://water.ohiodnr.gov/water-use-planning/diversion-withdrawal-regulation#DIV>.

<sup>11</sup> See ODNR, Water Withdrawal Facilities Registration Form, <http://water.ohiodnr.gov/water-use-planning/water-withdrawal-facilities-registration#FOR>.

<sup>12</sup> See ODNR, Registered Facilities Water Withdrawal Annual Reporting Form, <http://water.ohiodnr.gov/water-use-planning/water-withdrawal-facilities-registration#FOR>.

<sup>13</sup> See, e.g., Great Lakes Commission, Annual Report of the Great Lakes Regional Water Use Database Representing 2017 Water Use Data at 44-45 (Ohio), <https://waterusedata.glc.org/pdf/2017-Water-Use-Report.pdf>.

ORC § 1522.01 incorporates these Compact sections regarding diversions. Additionally, ORC § 1522.11(A) provides that no person shall make a new or increased diversion of water out of the Lake Erie watershed to another watershed without a permit issued by ODNR. ORC § 1522.11(B) further provides that such a permit shall issue only if the application meets the criteria to qualify as an exception to the prohibition against diversions established in Compact § 4.9.

### New or Increased Withdrawals and Consumptive Uses

Compact § 4.10.1 requires each state to create a program to manage and regulate new or increased withdrawals and consumptive uses within five years of the Compact's effective date. Enacted in 2012, ORC § 1522.12 required ODNR to establish a program for the issuance of permits for withdrawal and consumptive use of water from the Lake Erie watershed, and provided that a facility shall obtain a permit if it meets any of the following thresholds:

- From Lake Erie or a recognized navigation channel, new or increased capacity of at least 2 ½ million gpd;
- From any river, stream or groundwater other than high quality, new or increased capacity of at least 1 million gpd;
- From high quality river or stream, new or increased capacity of at least 100,000 gpd.<sup>14</sup>

Compact § 4.13 exempts two categories of withdrawals from the requirements of Article 4, including permitting: to supply vehicles and to use short-term for firefighting, humanitarian or emergency response purposes. ORC § 1522.14 exempts a broader array of facilities from the permitting requirement, including:

- A facility with a new or increased maximum daily withdrawal of less than the applicable threshold when averaged over any 90-day period, or for high quality waters averaged over any 45-day period (and the withdrawal is made at a point where the watershed is less than 100 square miles but greater than 50 square miles);
- An electric generating facility that increases its consumptive use due to a requirement imposed by federal regulation;
- A surface mining facility regulated under ORC chapter 1514;
- A major utility regulated under ORC chapter 4906; and
- A facility that purchases all of its water from a public water system.

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<sup>14</sup> ORC § 1522.12(A). The 100,000 gpd threshold does not apply to waters designated as outstanding due to their exceptional recreational values. *Id.* § 1522.12(A)(3).

Other than for high quality rivers and streams, the permitting thresholds established by Ohio's legislature in ORC § 1522.12 are relatively high – in comparison to other states and much higher than the default threshold of 100,000 gpd contemplated by Compact § 4.10.2.<sup>15</sup> Also, Ohio's permitting program affords more exemptions than those set forth in the Compact.<sup>16</sup> The higher thresholds along with additional exemptions may raise a concern that Ohio's permitting program for new or increased withdrawals and consumptive uses does not satisfy the requirements of Compact § 4.10.1.

Compact § 4.10.1 provides that each state “through a *considered process*, shall set and may modify threshold levels for the management and regulation of New or Increased Withdrawals... that will ensure that uses overall are reasonable, that Withdrawals overall will not result in *significant impacts* to the Waters and Water Dependent Natural Resources of the Basin....” (emphases added). Section 4.10.1 goes on to say that “[e]ach Party may determine the scope and thresholds of its program, including which New or Increased Withdrawals and Consumptive Uses will be subject to the program.”

By the express terms of Compact § 4.10.1, Ohio may establish its own thresholds that differ from the default 100,000 gpd. And arguably, because each state may determine the scope of its program, Ohio may expand upon the exemptions set forth in Compact § 4.10.2. Further, it may be difficult to characterize the enactment of a statute, passed by the General Assembly and signed by the Governor, as not a “considered process.” But at some level, high thresholds and expansive exemptions may be inconsistent with the Compact directive that a permit program ensure uses overall are reasonable and will not result in significant impacts to the waters and water dependent natural resources of the basin or source watershed. Ohio in its five-year report due December 2019 should affirmatively demonstrate that its permit program is ensuring that uses overall are reasonable and will not result in significant impacts to the waters and water dependent natural resources of the basin or source watersheds.<sup>17</sup>

Since the late 1980s Ohio also has had a statewide permit program for new or increased withdrawals resulting in a consumptive use of more than 2 million gpd (based on a 30-day average).<sup>18</sup> This statewide program was originally enacted in the wake of the Great Lakes Charter of 1985. A facility that is required to have a permit under ORC chapter 1522 is exempt

<sup>15</sup> “Any Party that fails to set threshold levels that comply with Section 4.10.1 any time before 10 years after the effective date of this Compact shall apply a threshold level for management and regulation of all New or Increased Withdrawals of 100,000 gallons per day or greater average in any 90 day period.” Compact § 4.10.2.

<sup>16</sup> Compare ORC § 1522.14 with Compact § 4.13.

<sup>17</sup> Then Council, consistent with Compact sections 3.4.2, 3.4.3 and 4.10.3, can review Ohio's demonstration and consider whether to recommend that the thresholds be lowered and/or the exemptions be tightened.

<sup>18</sup> See ORC §§ 1501.30-.35 (amended and re-codified July 2019 at ORC §§ 1521.21 to 1521.36).

from the statewide permitting program,<sup>19</sup> but there is no blanket exemption from the statewide program for Lake Erie basin withdrawals or consumptive uses. Thus, a facility withdrawing water in the Lake Erie basin that does not need a permit under ORC chapter 1522 could still need a permit under the statewide program.<sup>20</sup>

Withdrawals from the Lake Erie basin that would result in a new or increased consumptive use totaling more than 5 million gpd trigger an obligation by ODNR to notify the other Great Lakes states and provinces and solicit and consider comments from them.<sup>21</sup> This obligation is consistent with Compact § 4.6.

### Decision-Making Standard

Compact § 4.11 sets forth the standard for approval of new or increased withdrawals and consumptive uses subject to section 4.10. This Decision-Making Standard is a minimum for all Great Lakes states.<sup>22</sup> The Decision-Making Standard of Compact § 4.11 lists five criteria that must be met; the fifth criterion is that the proposed use is “reasonable,” based on consideration of six specific factors. ORC § 1522.01 incorporates Compact § 4.11. Additionally, ORC § 1522.13(A) provides that ODNR shall issue a withdrawal and consumptive use permit if the facility meets “all of the criteria established in Section 4.11 of the compact.”

However, the criteria set forth in subsections (B) and (C) of ORC § 1522.13 arguably differ somewhat from the criteria in Compact § 4.11. This raises a concern that Ohio could approve a withdrawal or consumptive use that would not meet the Decision-Making Standard of Compact § 4.11.

Compact § 4.11.2 permits approval of a proposal only when the withdrawal or consumptive use will result in no significant individual or cumulative adverse impacts to the quantity or quality of the waters and water dependent natural resources “and the applicable Source Watershed.” The term “Source Watershed” is defined in Compact § 1.2 to mean the watershed from which a withdrawal originates. The definition in Compact § 1.2 goes on to say that if water is withdrawn from a Great Lake “then the Source Watershed shall be considered to be the watershed of that Great Lake,” and if water is withdrawn from a direct tributary of a Great Lake “then the Source Watershed shall be considered to be the watershed of that Great Lake …*with a preference to the direct tributary stream watershed from which it was withdrawn.*” (emphasis added). While the Compact definition of Source Watershed is not free from ambiguity, it seems that the tributary

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<sup>19</sup> ORC § 1501.33(D).

<sup>20</sup> See Ohio 2019 preliminary five-year report p. 3 (withdrawals and consumptive uses exempt from regulation under ORC chapter 1522 are subject to the permit requirements of ORC §§ 1501.33-34).

<sup>21</sup> ORC § 1501.35 (re-codified July 2019 at ORC § 1521.231).

<sup>22</sup> Compact § 4.12.1.

stream watershed can be a Source Watershed for purposes of Compact § 4.11.2 where the withdrawal is from a direct tributary of a Great Lake.

Yet ORC § 1522.13(B) provides that in applying section 4.11.2 of the Compact, ODNR will evaluate the adverse impacts on the quantity or quality of the waters and water dependent natural resources “of the great lakes basin *considered as a whole* or of the Lake Erie source watershed *considered as a whole*.<sup>23</sup> Moreover, ORC § 1522.13(C) instructs that impacts of a withdrawal or consumptive use on “*more localized areas that affect less* than the great lakes basin considered as a whole or the Lake Erie source watershed considered as a whole” shall be considered as part of the evaluation of whether the proposal is “reasonable” per Compact § 4.11.5. (emphasis added).

Taken together, ORC § 1522.13(B) & (C) arguably may allow permitting of a withdrawal or consumptive use that significantly impacts the quantity or quality of a stream watershed, where the use does not significantly impact the entire Lake Erie watershed, contrary to the preference expressed in the Compact definition of Source Watershed and contrary to Compact § 4.11.2.<sup>24</sup> Also, to the extent ORC § 1522.13(B) & (C) could allow Ohio to choose for purposes of Compact § 4.11 to evaluate the adverse impacts upon the entire Great Lakes basin rather than upon the Lake Erie basin, those statutory sections are inconsistent with the Compact definition of Source Watershed.

An experimental use permit may be issued in lieu of a regular withdrawal and consumptive use permit, as determined appropriate by the ODNR.<sup>25</sup> Experimental use permits aim to encourage the development of innovative water use practices, ensure sustainable water use, and facilitate sustainable economic growth and jobs creation. An experimental use permit may issue if the use is reasonable; will use no more water than necessary to determine the effectiveness and economic feasibility of the experimental use; and does not reduce the protection afforded the waters and water dependent natural resources of the source watershed.<sup>26</sup> An experimental use permit, unlike regular permits, is limited to two years.<sup>27</sup>

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<sup>23</sup> See also ORC § 1522.101 (“reference to source watershed or the Lake Erie source watershed means the Lake Erie watershed considered as a whole”).

<sup>24</sup> By way of illustration, a proposed large industrial consumptive use from the Chagrin River (a direct tributary of Lake Erie) could result in significant adverse impacts to the quality or quantity of water in the river’s watershed, yet not significantly impact the quality or quantity of the water in the entire 11,700 square mile Lake Erie watershed in Ohio. In this example, per ORC § 1522.13(C) the proposed consumptive use from the Chagrin River would still need to be “reasonable” under Compact § 4.11.5 in order to be permitted under Ohio law.

<sup>25</sup> ORC § 1522.131(A).

<sup>26</sup> ORC § 1522.131(B)&(C).

<sup>27</sup> ORC § 1522.131(F).

ORC § 1522.131(C) provides that the chief “may” refuse to issue an experimental use permit if the proposed use will result in significant adverse impacts on the quantity or quality of the waters and water dependent natural resources. However, the Decision-Making Standard of Compact § 4.11.2 allows for a permit approval only where the use will result in no such significant adverse impacts. So if the “may” in ORC § 1522.131(C) is interpreted as permissive rather than mandatory, the experimental use standard may be inconsistent with the Decision-Making Standard set forth in Compact § 4.11.2.

### Other

Compact § 4.3.4 requires each state to monitor the implementation of any approved proposal to ensure consistency with the approval, and it contemplates necessary enforcement actions. Ohio did not address this topic in its 2014 five-year water management program report. ORC § 1522.12(D) requires each permitted facility once every five years to self-certify to ODNR that the facility is in compliance with its permit. While self-certification can be a useful tool for achieving permit compliance, it is insufficient standing alone. Ohio reportedly has not yet received an application for a permit under ORC chapter 1522. Ohio in its upcoming five-year report should demonstrate how it will, beyond self-certification, monitor implementation of approved proposals to ensure consistency with permit terms.

### **Water Conservation and Efficiency Program**

Compact § 4.2 requires each Party to:

- (A) develop its own water conservation and efficiency goals and objectives consistent with the Council’s basin-wide goals, within two years of the Compact’s effective date (§ 4.2.2);
- (B) develop and implement a water conservation and efficiency program, either voluntary or mandatory, based on those goals and objectives, within two years (§ 4.2.2, 4.2.5);
- (C) annually assess its programs in meeting those goals and objectives, report to Council and the Regional Body, and make the assessment publicly available (§ 4.2.2);
- (D) promote environmentally sound and economically feasible water conservation measures, within two years (§ 4.2.4).

The Ohio General Assembly in the bill ratifying the Compact in 2008 specified that no agency shall implement a mandatory program governing water conservation and efficiency, but allowed for a voluntary program.<sup>28</sup> In 2012 the General Assembly amended ORC § 1522.05 to state that ODNR shall adopt voluntary watershed-wide goals, objectives and standards for water conservation and efficiency consistent with Compact § 4.2.

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<sup>28</sup> The 2008 version of the statute was codified at ORC § 1522.05(B)(1).

Ohio's periodic reports to Council speak to Ohio's compliance with the water conservation and efficiency provisions of the Compact. Ohio has been submitting annual assessment reports, pursuant to Compact § 4.2.2; the most recent annual report is dated December 8, 2018. In addition, Ohio has submitted water conservation and efficiency program review reports, pursuant to Compact § 3.4.1, every five years; the most recent five-year report is dated December 8, 2014. The annual and five-year reports are available to the public online at the Council's webpage.<sup>29</sup>

Compact § 4.2.1 lists five goals. Further, Council pursuant to section 4.2.1 identified five basin-wide objectives. See Council Resolution #5 – Adoption of Basin-Wide Conservation and Efficiency Objectives, Dec. 8, 2008. These objectives were re-affirmed by Council Resolution #30, June 13, 2014.

According to Ohio' most recent (2018) annual assessment of its water conservation and efficiency program, Ohio's water conservation and efficiency goals are those contained in Compact § 4.2.1,<sup>30</sup> and its water conservation and efficiency objectives have been developed and are available online.<sup>31</sup> Ohio's goals are identical to those five listed in Compact § 4.2.1, and the objectives are virtually identical to the basin-wide objectives adopted by Council. Accordingly, Ohio's goals and objectives are consistent with the basin-wide goals and objectives as required by Compact § 4.2.2.<sup>32</sup>

As mentioned above, Ohio has opted for a voluntary water conservation and efficiency program. The only requirements noted by the state in its 2018 annual report are ORC § 1522.17(A), which obliges an applicant for a water withdrawal and consumptive use permit to submit to ODNR a facility water conservation plan; and the Ohio Emergency Management Agency's Emergency Operations Plan, authorized by ORC § 5502.22, which provides for mandatory water use reductions when the governor declares an extreme drought emergency. The report also mentions ORC § 1511.10, added in 2015 by Senate Bill 1, which restricts application of manure in the Lake Erie basin.<sup>33</sup>

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<sup>29</sup> Council, Resolutions, Guidance, Rules & Other Documents, <http://www.gslcompactcouncil.org/Resolutions.aspx>.

<sup>30</sup> Ohio Water Conservation & Efficiency Program Annual Assessment (Dec. 8, 2018) p. 1. *See also* Ohio Water Conservation & Efficiency Program Review (Dec. 8, 2014) p. 1.

<sup>31</sup> See ODNR, Great Lakes Compact Program, <http://water.ohiodnr.gov/water-use-planning/great-lakes-compact#WAT> (Ohio's goals and objectives).

<sup>32</sup> Compact § 4.2.2 calls for each state to develop its "own" goals and objectives, so arguably a state's goals and objectives should not simply repeat the Compact's goals and the Council's objectives. Having said this, Ohio's goals and objectives are certainly consistent with the basin-wide goals and objectives.

<sup>33</sup> Because responsibility for the Agriculture Pollution Abatement Program subsequently was transferred from ODNR to the Ohio Department of Agriculture, what was ORC § 1511.10 has been re-codified at ORC § 939.08. Senate Bill 1 also added similar restrictions to the application of fertilizer in the Lake Erie basin. *See* ORC § 905.326.

Ohio's 2018 annual water conservation and efficiency program assessment lists multiple program elements for each of the five objectives. Some elements already exist and are being implemented; others are being developed. To allow for better review of Ohio's water conservation and efficiency program, in its next report Ohio should consider providing citations or links to the various elements. Additionally, the next report to Council should provide more clarity regarding the timeline and status of the various elements of Ohio's water conservation and efficiency program.

## Conclusion

Ohio is largely implementing the water management provisions of the Compact.

- Ohio should show that it is maintaining a comprehensive, current water resources inventory including withdrawals, consumptive uses, and diversions in the Lake Erie watershed as required by Compact § 4.1.1.
- Ohio should show that persons who are withdrawing more than 100,000 gpd in the Lake Erie watershed are actually registering and reporting as required by Compact § 4.1.3 (e.g., by making withdrawal registrations and reports publicly available online).
- Because Ohio's thresholds for permitting new or increased withdrawals and consumptive uses in the Lake Erie basin are relatively high and its exemptions from permitting are relatively broad, Ohio should demonstrate in its upcoming 2019 five-year report that its permit program applicable to the Lake Erie basin is ensuring that uses overall are reasonable and will not result in significant impacts to the waters and water dependent natural resources of the basin or source watersheds, as contemplated by Compact § 4.10.
- Language in ORC § 1522.13(B) and (C) applicable to permits for new or increased withdrawals and consumptive uses may be inconsistent with the Decision-Making Standard of Compact § 4.11.

Ohio is also largely implementing the water conservation and efficiency provisions of the Compact.

- In its upcoming 2019 report, Ohio should consider providing citations or links to the various elements of its water conservation and efficiency program, as well as more clarity regarding the timeline and status of those elements.

## PENNSYLVANIA

### Introduction

The Pennsylvania General Assembly ratified the Compact in 2008 via Act No. 43, codified at 32 P.S. §§ 817.21 to 817.30, and signed by Governor Ed Rendell on July 4, 2008. The 2008 legislation enacted the terms of the Compact verbatim in 32 P.S. § 817.22. Additionally, it authorized the Pennsylvania Department of Environmental Protection (PADEP) to implement and enforce the Compact;<sup>1</sup> gave the Pennsylvania Environmental Quality Board (EQB) the power and duty to adopt necessary regulations;<sup>2</sup> specified that Pennsylvania's water conservation and efficiency program under Compact § 4.2 shall be voluntary;<sup>3</sup> and for purposes of Compact § 4.10 established thresholds for management and regulation of new or increased withdrawals, consumptive uses, and diversions.<sup>4</sup>

No other Pennsylvania statute and no Pennsylvania regulations are specific to the Compact or the Great Lakes basin. Instead, Pennsylvania relies on a variety of statewide laws to implement the Compact. Only relatively small portions of northwestern Pennsylvania are within the Great Lakes basin.

In December 2014, Pennsylvania submitted its Water Management Program five-year report and its 2014 Water Conservation and Efficiency Program Review, pursuant to Compact § 3.4.1. Following review of the reports pursuant to Compact § 3.4.2, the Compact Council and Regional Body issued Resolution No. 2015-7 finding that, based on the reports submitted by the State, the Pennsylvania water management and water conservation and efficiency programs meet or exceed the current requirements of the Compact.<sup>5</sup>

### Water Management Program

#### Water Inventory, Registration and Reporting

Per 32 P.S. § 817.25(1), PADEP is directed to administer and implement the programs for water resources inventory, registration and reporting under Compact § 4.1 through the water use registration and reporting program and regulations established pursuant to 27 Pa. C.S. § 3118, which is part of the Water Resources and Planning Act of 2002. Section 3118(a) established an interim registration program for withdrawals in any amount by a public water supply agency or

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<sup>1</sup> 32 P.S. § 817.25

<sup>2</sup> 32 P.S. § 817.26

<sup>3</sup> 32 P.S. §§ 817.25(2) & 817.26

<sup>4</sup> 32 P.S. § 817.26(1).

<sup>5</sup> A draft of Pennsylvania's Water Management Program five-year report due in December 2019 was posted in July 2019 on the Council website, <http://www.glscompactcouncil.org/index.aspx>.

hydropower facility and for withdrawals by any person in excess of 10,000 gpd (averaged over a 30-day period). Section 3118(b) called for the adoption of regulations establishing more detailed requirements for registration, reporting and recordkeeping. Regulations pursuant to section 3118 subsequently were adopted and codified at 25 Pa. Code §§ 110.1 *et seq.*<sup>6</sup>

#### *Inventory*

Compact § 4.1.1 required each state to develop and maintain a water resources inventory including withdrawals, diversions, and consumptive uses within five years of the effective date of the Compact. 32 P.S. § 817.22 incorporates this Compact requirement. No other Pennsylvania statute or regulation, however, specifically addresses a water resources inventory. Although 27 Pa. C.S. § 3118 and the regulations established thereunder at 25 Pa. Code chapter 110 cover registration, reporting, recordkeeping and monitoring, they do not mention a water resources inventory.

It does not appear that Pennsylvania is maintaining a water resources inventory including withdrawals, consumptive uses, and diversions consistent with Compact § 4.1.1. There is no mention of such an inventory in Pennsylvania's 2014 Water Management Program Report. A baseline list of existing withdrawals, consumptive uses, and diversions as of December 2008 (revised Dec. 2009), is a link on PADEP's Great Lakes Program webpage.<sup>7</sup> But that baseline, which presumably was done per Compact § 4.12.2,<sup>8</sup> is now a decade old. Pennsylvania does not seem to have a current, comprehensive inventory of water resources including information on withdrawals, consumptive uses, and diversions as required by Compact § 4.1.1.

#### *Registration*

Compact § 4.1.3 requires that any person who withdraws 100,000 gallons per day or greater over a 30-day period, or who diverts any amount, must register that use with the state within five years. 32 P.S. § 817.22 incorporates this Compact requirement, and other statewide laws go further by imposing registration upon a broader swath of withdrawals.

As mentioned above, 27 Pa. C.S. § 3118(a) in 2002 established an interim registration program that required registration for each public water supply system and each hydropower facility irrespective of the amount of withdrawal. It also required registration by each person whose withdrawal exceeds an average rate of 10,000 gpd in a 30-day period. Regulations subsequently

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<sup>6</sup> Regulations governing registration are at 25 Pa. Code §§ 110.201 to 110.26; reporting are at 25 Pa. Code §§ 110.301 to 110.305; and recordkeeping are at 25 Pa. Code §§ 110.401 to 110.402.

<sup>7</sup> Great Lakes Withdrawal, Consumptive Use, and Diversion Baseline,

<https://www.dep.pa.gov/Business/Water/Compacts%20and%20Commissions/Great%20Lakes%20Program/Pages/Baseline.aspx>.

<sup>8</sup> In order to establish a baseline for determining what is a new or increased withdrawal, consumptive use or diversion, Compact § 4.12.2 required each state within one year of the Compact's effective date to submit to Council a list of existing withdrawals and their baseline volumes.

issued set forth similar thresholds, requiring registration with PADEP by (1) each owner of a public water supply agency; (2) each owner of a hydropower facility; (3) each person whose total withdrawal (from one or multiple points) within a watershed exceeds an average rate of 10,000 gpd in any 30-day period; and (4) each person who obtains water through interconnection with another person in an amount that exceeds an average rate of 100,000 gpd in any 30-day period (or, within an area designated as a critical water planning area, the amount obtained via interconnection exceeds 10,000 gpd in any 30-day period).<sup>9</sup> Registration is required within 30 days following initiation of the water withdrawal.<sup>10</sup> The regulations also specify the content of registration – on forms prescribed by PADEP and including the name, description, location, and amount of water withdrawn.<sup>11</sup> The PADEP form for water source registration under 25 Pa. Code chapter 110, revised as of December 2018 and available online,<sup>12</sup> includes information on the location, type and quantity of use. The regulations also cover voluntary registration, transfer of registration, and termination of registration.<sup>13</sup>

In sum, Pennsylvania law mandates registration of withdrawals<sup>14</sup> and diversions as required by Compact § 4.1.3, but it is not apparent, from the 2014 five-year report or otherwise, that persons are registering withdrawals and diversions as required. Pennsylvania should demonstrate in its upcoming 2019 five-year report that registrations are occurring as required (e.g., make registrations publicly available online).

### *Reporting*

Compact § 4.1.4 requires all registrants to report the monthly volumes of the withdrawal, consumptive use, and diversion. 32 P.S. § 817.22 incorporates this requirement. Additionally, 27 Pa. C.S. § 3118(b) required the EQB to adopt regulations for periodic reporting and recordkeeping of withdrawals. Under the subsequently issued regulations, each person subject to the registration requirements must submit annual reports to PADEP regarding the withdrawal and use.<sup>15</sup> The report must include, in addition to the items required for registration, the monthly amount of consumptive and non-consumptive uses, locations and amounts of any waters returned

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<sup>9</sup> 25 Pa. Code. § 110.201.

<sup>10</sup> 25 Pa. Code § 110.202.

<sup>11</sup> 25 Pa. Code § 110.203.

<sup>12</sup> <http://www.depgreenport.state.pa.us/elibrary/GetFolder?FolderID=3541>.

<sup>13</sup> 25 Pa. Code. §§ 110.204 to 110.206.

<sup>14</sup> The registration and reporting requirements of the Water Resources and Planning Act (27 Pa. C.S. § 3118), and the regulations issued thereunder (25 Pa. Code §§ 110.201 to 110.305), do not specifically refer to consumptive uses and diversions, just withdrawals. As defined in the Pennsylvania statute and regulations, however, “withdrawal” means the removal or taking of water from any water resource, whether or not returned to the water resource. See 27 Pa. C.S. § 3102; 25 Pa. Code § 110.1. So arguably these state registration and reporting requirements encompass consumptive uses and diversions as well as withdrawals. Irrespective, as mentioned above 32 P.S. § 817.22 incorporates the Compact requirements for registration and reporting.

<sup>15</sup> 25 Pa. Code §§ 110.301 & .302.

or discharged, and amounts of water transferred between public water supply agencies by means of interconnection.<sup>16</sup> The regulations call for various additional information in the report, depending on the specific type of use – public water supply agency, power generation facility, manufacturing industry, mineral industry, bulk/vended/retail/bottled water, agriculture, golf course, or ski resort.<sup>17</sup> Water withdrawal reports are submitted electronically to PADEP via a web-based reporting system.<sup>18</sup>

Pennsylvania laws and procedures are in place for reporting as contemplated by Compact § 4.1.4. It is not readily apparent, from the 2014 five-year report or otherwise, that all registrants are reporting withdrawals and diversions as required. Pennsylvania should demonstrate in its upcoming 2019 five-year report that registrants are reporting as required (e.g., make reports publicly available online).

Compact § 4.1.5 requires each state to annually report information gathered per Compact § 4.1 to the regional water use database repository. 32 P.S. § 817.22 incorporates this Compact requirement. Pennsylvania annually reports on withdrawals, consumptive uses and diversions from the basin to the Great Lakes Commission regional water use database. The aggregated information is made publicly available by the Great Lakes Commission,<sup>19</sup> and the State is complying with Compact § 4.1.5.

### Diversions

Compact § 4.8 flatly prohibits all new or increased diversions of water from the Great Lakes basin, except as provided for in Article 4. Compact § 4.9 sets forth three exceptions to the blanket ban on new or increased diversions: straddling communities, intra-basin transfer, and straddling counties.

Pennsylvania incorporates the Compact sections regarding diversions and exceptions in 32 P.S. § 817.22. Additionally, the state's Act 43 contemplates a permit system for new or increased diversions of any amount.<sup>20</sup> Pennsylvania has no Great Lakes basin-specific permitting system for new or increased diversions. According to its 2014 five-year report, Pennsylvania has no

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<sup>16</sup> 25 Pa. Code. § 110.304.

<sup>17</sup> 25 Pa. Code § 110.305.

<sup>18</sup> See PADEP, Water Use Registration and Reporting,

[https://www.dep.pa.gov/Business/Water/PlanningConservation/State\\_Water\\_Plan/Pages/Water-Use-Registration-and-Reporting.aspx](https://www.dep.pa.gov/Business/Water/PlanningConservation/State_Water_Plan/Pages/Water-Use-Registration-and-Reporting.aspx).

<sup>19</sup> See, e.g., Great Lakes Commission, Annual Report of the Great Lakes Regional Water Use Database Representing 2017 Water Use Data at p. 48-49 (PA), <https://waterusedata.glc.org/pdf/2017-Water-Use-Report.pdf>.

<sup>20</sup> See 32 P.S. §§ 817.25(3) & 817.26(1).

existing diversions, and any proposed new diversion “would be reviewed through existing water withdrawal permitting programs.”<sup>21</sup>

As discussed in more detail under new or increased withdrawals and consumptive uses below, it is unclear how Pennsylvania would review a new or increased diversion proposal for a use other than public water supply agency or gas well.

### New or Increased Withdrawals and Consumptive Uses

Compact § 4.10.1 requires each state to create a program to manage and regulate new or increased withdrawals and consumptive uses within five years. Pennsylvania’s Act 43 contemplates a permit system for new or increased withdrawals and consumptive uses.<sup>22</sup> Further, 32 P.S. § 817.26(1) sets thresholds for management and regulation:

- any new or increased withdrawal in an amount that equals or exceeds 100,000 gpd averaged over any 90-day period;
- any new or increased consumptive use in an amount that equals or exceeds 5 million gpd averaged over any 90-day period; and
- any new or increased diversion.

Pennsylvania has no Great Lakes-specific permitting system for new or increased withdrawals or consumptive uses. Rather, Pennsylvania relies on statewide permitting programs that vary by use and industry. Water withdrawals by public water systems are permitted pursuant to the Pennsylvania Safe Drinking Water Act, 32 P.S. § 636. Water withdrawals associated with unconventional oil and natural gas well drilling and development activities are subject to approval under 58 Pa. C.S. § 3211(m). According to its 2014 five-year report, new or increased withdrawals by any other sector (e.g., agricultural, industrial, mineral) would fall under the provisions of Act 43 incorporating Compact § 4.10.<sup>23</sup>

It is not clear what procedures Pennsylvania would follow for a proposed new or increased withdrawal or consumptive use, other than for public water systems and unconventional gas wells, that exceed the thresholds set forth in 32 P.S. § 817.26(1). Pennsylvania in its upcoming 2019 report should demonstrate that it has a program and procedures for the permitting of new or increased withdrawals and consumptive uses for such other sectors, to show compliance with Compact § 4.10.

### Decision Making Standard

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<sup>21</sup> Pennsylvania Great Lakes Water Management Program Five Year Report (Dec. 8, 2014) p. 6.

<sup>22</sup> See 32 P.S. §§ 817.25(3) & 817.26(1).

<sup>23</sup> Pennsylvania Great Lakes Water Management Program Five Year Report (Dec. 8, 2014) p. 7.

Compact § 4.11 provides that proposals subject to management and regulation under section 4.10 may be approved only if they meet the Decision-Making Standard set forth in Compact § 4.11. This Decision-Making Standard is a minimum for all Great Lakes states.<sup>24</sup> Compact § 4.11 lists five criteria that must be met; the fifth criterion is that the proposed use is “reasonable,” based on consideration of six specific factors. Compact § 4.11 and its Decision-Making Standard are incorporated into Pennsylvania statutory law via 32 P.S. § 817.22.<sup>25</sup>

It should be noted that Act 43 further instructs that PADEP, in assessing the impacts of a withdrawal or consumptive use proposal under the Decision-Making Standard of Compact § 4.11.2, shall consider the impacts to the waters and water-dependent natural resources of the basin “as a whole” and the applicable source watershed to be either the watershed of Lake Erie or Lake Ontario “as a whole.”<sup>26</sup> This raises a concern that Pennsylvania’s permit standard is not as stringent as the Decision-Making Standard of Compact § 4.11.

Compact § 4.11.2 permits approval only when the proposed use will result in no significant or cumulative adverse impacts to the quantity or quality of the waters and water dependent natural resources “and the applicable Source Watershed.” The Compact defines “Source Watershed” to mean the watershed from which a withdrawal originates. The definition goes on to say that if water is withdrawn from a direct tributary of a Great Lake, “then the Source Watershed shall be considered to be the watershed of that Great Lake … *with a preference to the direct tributary stream watershed from which it was withdrawn.*”<sup>27</sup> While the Compact definition of Source Watershed is not free from ambiguity, it seems that a tributary stream watershed – a smaller geographic area than the whole watershed of a Great Lake -- can be a Source Watershed for purposes of Compact § 4.11.2. Thus, it is possible that a proposal that has a significant adverse impact on a Source Watershed that is smaller than Lake Erie or Lake Ontario as a whole – say, a tributary stream watershed – could be approved under Pennsylvania Act 43 but not under Compact § 4.11.2.

Pennsylvania law does not include any exceptions or exemptions beyond those set forth in Compact sections 4.9 (exceptions to diversion prohibition) and 4.13 (exemptions from the requirements of Compact Article 4).<sup>28</sup>

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<sup>24</sup> Compact § 4.12.1.

<sup>25</sup> Pennsylvania’s Act 43 also empowers the EQB to establish rules governing review and approval of proposals for withdrawals, consumptive uses and diversions “consistent with the standard of review and decision set forth in the Compact.” 32 P.S. § 817.26(1). Apparently, though, no such rules have been promulgated.

<sup>26</sup> 32 P.S. § 817.25(3).

<sup>27</sup> Compact § 1.2 (definition of “Source Watershed”) (emphasis added).

<sup>28</sup> See Pennsylvania Great Lakes Water Management Program Five Year Report (Dec. 8, 2014) p. 9.

## Water Conservation and Efficiency Program

Compact § 4.2 requires each Party to:

- (A) develop its own water conservation and efficiency goals and objectives consistent with the Council's basin-wide goals, within two years of the Compact's effective date (§ 4.2.2);
- (B) develop and implement a water conservation and efficiency program, either voluntary or mandatory, based on those goals and objectives, within two years (§§ 4.2.2, 4.2.5);
- (C) annually assess its programs in meeting those goals and objectives, report to Council and the Regional Body, and make the assessment publicly available (§ 4.2.2); and
- (D) promote environmentally sound and economically feasible water conservation measures, within two years (§ 4.2.4).

Pennsylvania's Act 43 gave PADEP the power and duty to administer and implement a water conservation and efficiency program as required by Compact § 4.2. The program must be voluntary, using the provisions of 27 Pa. C.S. § 3120, a pre-existing statute relating to water conservation.<sup>29</sup> Per section 3120(a), PADEP maintains a water resources technical assistance center, which is charged with a variety of duties aimed at water conservation and water use reduction.

Pennsylvania has been submitting annual assessment reports of its water conservation and efficiency program, pursuant to Compact § 4.2.2: the most recent annual report is dated December 5, 2018. In addition, Pennsylvania has submitted water conservation and efficiency program review reports, pursuant to Compact § 3.4.1, every five years; the most recent five-year report is dated 2014.<sup>30</sup> The annual and five-year reports are available to the public online at the Council's webpage.<sup>31</sup>

Compact § 4.2.1 lists five goals. Further, Council pursuant to section 4.2.1 identified five basin-wide objectives. See Council Resolution #5 – Adoption of Basin-Wide Conservation and Efficiency Objectives, Dec. 8, 2008. These objectives were re-affirmed by Council Resolution #30, June 13, 2014.

In its annual reports assessing its water conservation and efficiency program, Pennsylvania consistently lists eight goals:

1. Establish guidelines for developing voluntary water use reduction in Critical Water Planning Areas.

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<sup>29</sup> 32 P.S. § 817.25(2).

<sup>30</sup> Pennsylvania's draft 2019 five-year report recently posted on the Council website includes a section on water conservation and water efficiency.

<sup>31</sup> <http://www.gslcompactcouncil.org/Resolutions.aspx>.

2. Identify and complete principles, practices, and technologies to assist all water users in conserving water.
3. Identify and compile principles, practices, and technologies to encourage groundwater recharge.
4. Develop a statewide program to promote voluntary reduction of water loss.
5. Establish a voluntary statewide conservation program for all users.
6. Develop educational programs for households, industry, and other water users.
7. Facilitate Governor's Water Conservation and Efficiency Award Program.
8. Establish voluntary water use reduction goals for all users.<sup>32</sup>

Pennsylvania's goals are similar to and consistent with the basin-wide goals and objectives and hence are in compliance with Compact § 4.2.2.

Pennsylvania's water conservation and efficiency program relies on multiple statewide regulatory programs, independent of the Compact.<sup>33</sup> The regulatory programs cited in the 2018 annual report include:

- Water Rights Act, 32 P.S. §§ 636-637 – Public water supply agencies must obtain water allocation permits from PADEP to use surface water resources. PADEP considers conservation of water in its review of permit applications, and permit terms can include requirements to implement water conservation measures. The majority of water use in Pennsylvania's Great Lakes basin is attributable to public water suppliers.<sup>34</sup>
- Water Resources and Planning Act, 27 Pa. C.S. §§ 3117-3120. PADEP must maintain a system to gather, process and distribute information regarding the availability, distribution, quality and use of water resources.<sup>35</sup> PADEP also must maintain a water resources technical assistance center to promote voluntary water conservation and provide technical assistance on water resources uses issues, including methods for efficient water use, reduction of unaccounted-for water loss, and replenishment and conservation of water resources.<sup>36</sup> Regulations issued per section 3118 establish requirements for registration, reporting and recordkeeping of withdrawals, in order to provide accurate information for water resources policy.<sup>37</sup>

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<sup>32</sup> E.g., Pennsylvania Great Lakes Annual Water Conservation & Efficiency Program Review (Dec. 5, 2018) p. 1; Pennsylvania 2014 Five-Year Water Conservation & Efficiency Program Review p. 1. These goals are similar, but not identical, to the eight duties specified in 27 Pa. C.S. § 3120(a) for the technical assistance center.

<sup>33</sup> Pennsylvania Great Lakes Annual Water Conservation & Efficiency Program Review (Dec. 5, 2018) p. 2.

<sup>34</sup> *Id.* at 3-4.

<sup>35</sup> 27 Pa. C.S. § 3117(a).

<sup>36</sup> *Id.* § 3120(a).

<sup>37</sup> See 25 Pa. Code chapter 110.

The 2018 annual report lists various activities indicating that Pennsylvania is implementing a water conservation and efficiency program and is promoting environmentally sound and economically feasible water conservation methods consistent with Compact sections 4.2.2 and 4.2.4.<sup>38</sup>

Two other points relevant to water conservation and efficiency bear mention:

\* Reported water withdrawals in Pennsylvania's Great Lakes watershed averaged about 37 million gpd in 2017, down from 40 million gpd in 2016. These amounts are roughly consistent with annual reported water withdrawal amounts over the past decade.<sup>39</sup>

\* The Water Resources and Planning Act calls for a State Water Plan, including a regional plan for the Great Lakes drainage area.<sup>40</sup> The plan is intended to provide tools and guidance for those making decisions regarding state water resources.<sup>41</sup> Among other things, the plan aims to reduce the amount of water withdrawals and consumptive uses, improve efficiency in water use, and provide for reuse and recycling of water.<sup>42</sup> The plan is to be updated every five years.<sup>43</sup>

The current State Water Plan dates to 2009, and an update is long overdue. The 2018 annual report states that the process to update the State Water Plan was placed on hold in 2018.<sup>44</sup> Pennsylvania should be encouraged to update its State Water Plan, including the regional plan applicable to the Great Lakes drainage area, which should benefit the state's water conservation and efficiency program.

## Conclusion

Pennsylvania is implementing the water conservation and efficiency provisions of the Compact. Pennsylvania should be encouraged to update its overdue State Water Plan.

Pennsylvania is largely implementing the water management provisions of the Compact.

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<sup>38</sup> See Pennsylvania Great Lakes Annual Water Conservation & Efficiency Program Review (Dec. 5, 2018) p. 2-6.

<sup>39</sup> *Id.* at p. 7.

<sup>40</sup> 27 Pa. C.S. § 3111.

<sup>41</sup> See PADEP, State Water Plan,

[https://www.dep.pa.gov/Business/Water/PlanningConservation/State\\_Water\\_Plan/Pages/default.aspx](https://www.dep.pa.gov/Business/Water/PlanningConservation/State_Water_Plan/Pages/default.aspx).

<sup>42</sup> See 27 Pa. C.S. § 3112(a)(11).

<sup>43</sup> *Id.* § 3115(a)(1).

<sup>44</sup> Pennsylvania Great Lakes Annual Water Conservation & Efficiency Program Review (Dec. 5, 2018) p. 2.

- Pennsylvania should develop and maintain a current, comprehensive inventory of water resources including withdrawals, diversions, and consumptive uses, as required by Compact § 4.1.
- Pennsylvania should show that persons who are withdrawing more than 100,000 gpd, or are diverting any amount, in the Great Lakes basin are registering and reporting as contemplated by Compact sections 4.1.3 and 4.1.4 (e.g., by making the registrations and reports publicly available online).
- Pennsylvania should demonstrate in its upcoming 2019 five-year report that it has a program and procedures for permitting new or increased withdrawals and consumptive uses for sectors other than public water systems and gas wells, to comply with Compact § 4.10.
- Language in 32 P.S. § 817.25(3) regarding assessment of the impacts of proposals for new or increased withdrawals and consumptive uses may be inconsistent with the Decision-Making Standard of Compact § 4.11.

## WISCONSIN

### Introduction

The Compact was ratified by Wisconsin via legislation that incorporated the terms of the Compact verbatim at Wis. Stat. § 281.343(1e)-(9)<sup>1</sup> and also included other provisions guiding the implementation of the Compact.<sup>2</sup> The responsibility of administration was given to the Wisconsin Department of Natural Resources (WDNR).<sup>3</sup>

In December 2014, Wisconsin submitted its five-year Water Management Program Review and Water Conservation and Efficiency Program Review, pursuant to Compact § 3.4.1. Following review of the reports pursuant to Compact § 3.4.2, the Compact Council and Regional Body issued Resolution No. 2015-8 finding that, based on the reports submitted by the State, the Wisconsin water management and water conservation and efficiency programs meet or exceed the current requirements of the Compact.

Wisconsin in early September 2019 noticed for public comment its draft 2019 five-year Water Management and Conservation and Efficiency Program Review. The public comment period is slated to conclude October 15, 2019.<sup>4</sup>

## Water Management Program

### Water Resources Inventory, Registration and Reporting

#### *Inventory*

Compact § 4.1.1 required each state to develop and maintain a water resources inventory including withdrawals, diversions, and consumptive uses within five years of the effective date of the Compact. Wis. Stat. § 281.343(4)(a) incorporated this Compact requirement. Additionally, Wis. Stat. § 281.346(11)(a) required WDNR within five years to create a water resource inventory database using registration and reporting information. Wisconsin has satisfied the Compact and state law inventory requirements through a searchable ArcGIS database of

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<sup>1</sup> 2007 Wis. Act 227, Wis. Stat. § 281.343.

<sup>2</sup> As referenced in Wis. Stat. § 281.343(1b), other provisions implementing and interpreting the Compact include Wis. Stat. §§ 14.95, 281.346, and 281.348.

<sup>3</sup> See Wisconsin Water Management Program Review (Dec. 3, 2014) p. 1-2; WDNR Water Use Program, <https://dnr.wi.gov/topic/wateruse/>.

<sup>4</sup> See WDNR, Great Lakes Compact and Diversions, Draft 2019 Five-year Water Management and Conservation and Efficiency Program Review, <https://dnr.wi.gov/topic/WaterUse/compact.html>.

registered and permitted water uses, as well as pending permits, which is accessible to the public on WDNR's webpage.<sup>5</sup>

### *Registration*

Compact § 4.1.3 requires that any person who withdraws 100,000 gallons per day or greater over a 30-day period, or who diverts any amount, must register that use with the state within five years. Wis. § 281.343(4)(c) incorporated that Compact requirement. Additionally, Wis. Stat. § 281.346(3) established statewide water user registration and reporting requirements to take effect post-Compact.<sup>6</sup> Specifically, all existing or new water supply systems<sup>7</sup> with a capacity to withdraw 100,000 gpd or more on average over a 30-day period, or any diversion, must register with WDNR.<sup>8</sup> WDNR's water use registration collects all of the types of information required by Compact § 4.1.3.<sup>9</sup> A searchable database of registered water withdrawals can be found on WDNR's website.<sup>10</sup> Accordingly, Wisconsin meets the Compact § 4.1.3 registration requirements.

### *Reporting*

Compact § 4.1.4 requires that all registrants must report annually the monthly volumes of their water use to the state. Per Compact § 4.1.5, the state must report this information to the Great Lakes—St. Lawrence River water use database repository, and the aggregated information must be made publicly available. Wis. Stat. § 281.343(4)(d-e) incorporated these Compact sections. Wisconsin complies with these reporting requirements.

As mentioned above under *Registration*, Wis. Stat. § 281.346(3) established statewide water user registration and reporting requirements to take effect post-Compact. Specifically, any water supply system with the capacity to withdraw 100,000 gpd or more in any 30-day period, or any

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<sup>5</sup> See WDNR, Wisconsin Water Quantity Data Viewer, [https://dnrmaps.wi.gov/H5/?viewer=Water\\_Use\\_Viewer](https://dnrmaps.wi.gov/H5/?viewer=Water_Use_Viewer). Pre-Compact existing permits, required for water supply systems with withdrawal capacity of 100,000 gpd or more in any 30-day period, were merged and registered with the new database created for compliance with the Compact. See Wisconsin Water Management Program Review (Dec. 3, 2014) p. 3.

<sup>6</sup> Wis. Stat. § 281.346(3); Wis. Admin. Code NR 856.

<sup>7</sup> While the Compact is stated in terms of “any person,” some of the sections of the Wisconsin statute Wis. Stat. § 281.346(1)(wp) refers to “any person using a water supply system.” However, Wisconsin’s definition of “water supply systems” has a broad meaning capturing more than just public water systems. Wis. Stat. § 281.346(1)(wp).

<sup>8</sup> Wis. Stat. § 281.346(3)(a)1 requires all new or increased withdrawals with *capacity* of 100,000 gpd or more in any 30 day period or any diversion to register with the WDNR.

Wis. Stat. § 281.346(3)(a)2 requires any withdrawal with *capacity* of 100,000 gpd or more in any 30 day period existing on July 1, 2009 to register with WDNR. Capacity to withdraw is typically more than the amount of water actually withdrawn.

<sup>9</sup> Wis. Stat. § 281.346(3)(b).

<sup>10</sup> WDNR, Drinking & Groundwater Use Information System, [https://dnr.wi.gov/wateruse/pub\\_v3\\_ext/source/](https://dnr.wi.gov/wateruse/pub_v3_ext/source/).

diversion, must annually report its monthly volumes of withdrawal or diversion to WDNR.<sup>11</sup> Who must report under the statute is effectively the same as who must register.

Echoing Compact § 4.1.5, Wis. Stat. § 281.346(11)(b) requires the WDNR to annually report the compiled information regarding withdrawals, consumptive uses, and diversions to the Council. WDNR annually reports the required information, and Wisconsin's aggregated data is incorporated into the Great Lakes Commission's Great Lakes Water Use Regional Database and Annual Reports and is publicly available online.<sup>12</sup>

### New or Increased Withdrawals and Consumptive Uses

Compact § 4.10.1 requires each state to create a program to manage and regulate new or increased withdrawals and consumptive uses within five years. The Compact allows the states leeway in setting their own scope and threshold of what proposals for new and increased withdrawals and consumptive uses will be subject to regulation.<sup>13</sup> States that fail to set threshold levels that comply with section 4.10.1 within ten years must use the default threshold level of 100,000 gpd averaged over a 90-day period.<sup>14</sup>

Effective December 8, 2011, Wisconsin per Wis. Stat. § 281.346 required all new and increased withdrawals from the Great Lakes basin averaging 100,000 gpd or more in any 30-day period to have a permit.<sup>15</sup> The statute created two different permitting regimes: general and individual. General permits apply to new or increased withdrawals that average 100,000 gpd or more in any 30-day period but less than 1 million gpd.<sup>16</sup> Individual permits apply to new or increased withdrawals that equal at least 1 million gpd for any 30 consecutive days.<sup>17</sup> Individual permits, rather than general permits, may also be required for withdrawals of between 100,000 and 1 million gpd if they will occur in a groundwater protection or management area.<sup>18</sup> Wisconsin adopted the same exemptions to permitting as those of Compact § 4.13.<sup>19</sup>

As discussed under *Decision-Making Standard* below, however, in making its permitting decisions Wisconsin apparently does not use the Decision-Making Standard of Compact § 4.11 when evaluating new or increased withdrawals from the Great Lakes basin (at least for those of less than 10 million gpd). Compact § 4.11 expressly provides that all proposals subject to management and regulation in section 4.10 may be approved only when they meet the criteria of the Decision-Making Standard set forth in Compact § 4.11. This raises a concern that Wisconsin

<sup>11</sup> Wis. Stat. § 281.346(3)(e). See Wis. Admin. Code NR 820.13, 856.20.

<sup>12</sup> <https://waterusedata.glc.org/annualreports.php>.

<sup>13</sup> Compact § 4.10.1

<sup>14</sup> Compact § 4.10.2

<sup>15</sup> Wis. Stat. § 281.346(4m).

<sup>16</sup> Wis. Stat. § 281.346(4s)(a).

<sup>17</sup> Wis. Stat. § 281.346(5)(a).

<sup>18</sup> Wis. Stat. § 281.346(4s)(dm).

<sup>19</sup> Wis. Stat. § 281.343(4v). See Wis. Admin. Code NR 856.11(2), 860.20(2).

has failed to create a program to manage and regulate new or increased withdrawals and consumptive uses as contemplated by Compact sections 4.10 and 4.11.

### Decision-Making Standard

Compact § 4.11 provides that proposals subject to management and regulation in Compact § 4.10 may be approved only if they meet the Decision-Making Standard set forth in Compact § 4.11. This Decision-Making Standard is a minimum for all Great Lakes states.<sup>20</sup> Compact § 4.11 lists five criteria that must be met; the fifth criterion is that the proposed use is “reasonable,” based on consideration of six specific factors. Compact § 4.11 and its Decision-Making Standard are incorporated into Wisconsin law via Wis. Stat. § 281.343(4r).

As discussed under *New or Increased Withdrawals and Consumptive Uses* above, Wis. Stat. § 281.346 mandates permits for new or increased withdrawals exceeding 100,000 gpd. According to Compact § 4.11, therefore, any proposal for a new or increased withdrawal exceeding Wisconsin’s 100,000 gpd threshold should have to meet the Compact § 4.11 Decision-Making Standard. Wis. Stat. § 281.346, though, does not provide that the Decision-Making Standard of Compact § 4.11 applies to the permit decisions. Rather, the statute sets forth multiple different standards to be used by WDNR in making permit decisions, depending on the amount of the withdrawal.

Withdrawals averaging between 100,000 gpd and 1 million gpd do not have to meet any specific standard for approval other than the requirements for a general permit.<sup>21</sup> Withdrawals of 1 million to 10 million gpd for a 30-day period must meet Wisconsin’s statutory “State Standard” to be approved for an individual permit.<sup>22</sup> Withdrawals of at least 10 million gpd in a 30-day period but resulting in a water loss of less than 5 million gpd in a 90-day period also must meet the State Standard.<sup>23</sup> It is not until a withdrawal equals at least 10 million gpd in a 30-day period with more than 5 million gpd water loss in a 90-day period that a proposal must meet the statutory “Compact Standard.”<sup>24</sup> But even the statutory Compact Standard is not identical to the Decision-Making Standard of Compact § 4.11.

The State Standard requires that the amount is needed to meet the projected needs of the user; cost-effective conservation practices have been implemented for existing uses of the water; other potential water sources have been assessed for cost-effectiveness and environmental effects;

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<sup>20</sup> Compact § 4.12.1.

<sup>21</sup> Wis. Stat. § 281.346(4s). The general permit does, *inter alia*, impose some water conservation measures, and public water supply systems must have an approved water supply service area plan. *Id.*

<sup>22</sup> See Wis. Stat. §§ 281.346(5)(e)1, 281.346(5)(f)1, 281.346(5)(h)1.

<sup>23</sup> See Wis. Stat. §§ 281.346(5)(e)2-3, 281.346(5)(f)2-3, 281.346(5)(h)2-3.

<sup>24</sup> See Wis. Stat. §§ 281.346(5)(e)2-3, 281.346(5)(f)2-3, 281.346(5)(h)2-3.

cost-effective conservation practices will be implemented; and one of four other listed criteria applies.<sup>25</sup>

The State Standard is clearly more lenient than the Decision-Making Standard of Compact § 4.11 in multiple ways. Among the criteria required by Compact § 4.11 and not by the State Standard are all water withdrawn shall be returned to the source watershed less an allowance for consumptive use; the use will be implemented to incorporate environmentally sound and economically feasible water conservation measures; and the use is reasonable.<sup>26</sup>

Compact § 4.11 and the statutory Compact Standard are similarly worded but there are some differences. One difference is that the term “consumptive uses” is left out of several of the requirements and one of the reasonableness factors of the statutory Compact Standard.<sup>27</sup> The omissions arguably could lead to an outcome in which a consumptive use would be approved under the statutory Compact Standard that would not be approved under the Compact § 4.11 Decision-Making Standard.

Another difference is in the wording of one of the reasonableness factors. Compact § 4.11.5(b) states, “If the proposal **is for an increased withdrawal or consumptive use**, whether efficient use is made of existing water supplies.”<sup>28</sup> The statutory Compact Standard states, “If the proposal **would result in an increased water loss**, whether efficient use is made of existing water supplies.”<sup>29</sup> The Wisconsin definition of “water loss” includes diversions and consumptive uses, but not withdrawals.<sup>30</sup> Hence the difference could mean that a withdrawal might be approved under the statutory Compact Standard that would not gain approval under Compact § 4.11.

In either case, the difference arguably makes the statutory Compact Standard less rigorous than the Decision-Making Standard of Compact § 4.11. But even if the statutory Compact Standard were identical to Compact § 4.11, the fact remains that it only applies to the very largest withdrawals and consumptive uses – at least 10 million gpd in a 30-day period and more than 5 million gpd water loss in a 90-day period.

Because Compact § 4.11 has been incorporated verbatim in Wisconsin law by virtue of Wis. Stat. § 281.343(4r), in theory the Compact Decision-Making Standard could be treated as a floor, with the statutory standards of Wis. Stat. § 281.346 serving as additional requirements. But that does not seem to be the case. First, there is nothing in Wis. Stat. § 281.346 so providing.

<sup>25</sup> Wis. Stat. § 281.346(5m). *See also* Wis. Admin. Code NR 860.31(a)12.

<sup>26</sup> In addition, a proposal under certain circumstances could be approved under the State Standard even if it would result in significant adverse environmental impacts to waters of the state, which is a disqualifier under Compact § 4.11. *Compare* Wis. Stat. § 281.346(5m)(e) with Compact § 4.11(2).

<sup>27</sup> See Wis. Stat. §§ 281.346(6)(b)-(d), 281.346(6)(e)1.

<sup>28</sup> Compact § 4.11.5(b) (emphasis added).

<sup>29</sup> Wis. Stat. § 281.346(6)(e)2 (emphasis added).

<sup>30</sup> Wis. Stat. § 281.346(wm).

Second, the statutory State Standard and Compact Standard are not more rigorous than Compact § 4.11. And third, Wisconsin in its 2014 five-year report and its draft 2019 five-year report referred exclusively to the statutory State and Compact Standards of Wis. Stat. § 281.346 and the regulations thereunder – and not to Compact § 4.11 – when describing how the Standards of Review and Decision were applied.<sup>31</sup>

Since December 2011, virtually all the permits issued by WDNR for new or increased withdrawals in the Great Lakes basin (282) have been general permits.<sup>32</sup> WDNR has applied the statutory State Standard to just one or two permit applications and has applied the statutory Compact Standard to zero.<sup>33</sup>

In short, Wisconsin is not applying the Compact § 4.11 Decision-Making Standard when deciding whether to permit new or increased withdrawals and consumptive uses in the Great Lakes basin. The state's similar statutory Compact Standard applies only to the very largest withdrawals and consumptive uses – a withdrawal of at least 10 million gpd in a 30-day period and more than 5 million gpd water loss in a 90-day period – a threshold that has not been met even once in eight years.<sup>34</sup>

Wisconsin is not currently complying with Compact § 4.11. Wisconsin should amend its law and its practice so that it is applying the Compact § 4.11 Decision-Making Standard in its management and regulation of new or increased withdrawals and consumptive uses in the Great Lakes basin.<sup>35</sup> If Wisconsin fails to change, the Decision-Making Standard of Compact § 4.11 should be applied to all proposals for new or increased withdrawals in the Great Lakes basin meeting the default threshold of Compact § 4.10.2 -- 100,000 gpd or greater average in any 90-day period.

#### New or Increased Diversions

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<sup>31</sup> Wisconsin Water Management Program Review (Dec. 3, 2014) p. 8-12; Wisconsin Draft 2019 Water Management and Conservation and Efficiency Program Review (June 28, 2019) p. 10-14.

<sup>32</sup> Wisconsin Draft 2019 Five-year Water Management and Conservation and Efficiency Program Review (June 28, 2019) p. 7.

<sup>33</sup> *Id.* at 12, 14.

<sup>34</sup> Although Compact § 4.10.1 allows a state leeway in setting its thresholds for managing and regulating new or increased withdrawals and consumptive uses, the thresholds must be set at levels that ensure uses overall are reasonable and that will not result in significant impacts to the waters and water dependent natural resources of the basin. At some level a threshold is too high to satisfy Compact § 4.10.1. Ten million gallons would be by far the highest permitting threshold of any Great Lakes state.

<sup>35</sup> One obvious option could be to apply the Decision-Making Standard of Compact § 4.11 to all permit decisions; perhaps another could be to apply Compact § 4.11 to individual permit decisions instead of or in addition to the statutory State or Compact Standards.

Compact § 4.8 prohibits new or increased diversions of water from the Great Lakes basin, except as provided in Article 4. Wis. Stat. §§ 281.343(4m) and 281.346(4)(a) provide the same general prohibition on any new or increased diversion.

Compact § 4.9 sets forth three specific exceptions to the blanket prohibition on new or increased diversions: straddling communities, intra-basin transfers, and straddling counties. Each exception has its own criteria. All but relatively small straddling community exceptions must meet the uniform Exception Standard of Compact § 4.9.4, and straddling county exceptions must undergo review by the Regional Body and Council. Wis. Stat. §§ 281.343(4n) and 281.346(4) are to the same effect.

Wisconsin has approved three diversions since the Compact took effect in December 2008: New Berlin in 2009, Waukesha in 2016, and Racine in 2018.<sup>36</sup> New Berlin and Racine were evaluated as fitting the “straddling community” exception, and Waukesha was evaluated as fitting the “straddling county” exception.<sup>37</sup>

#### *New Berlin Diversion*

A “straddling community” is a community with boundaries that are only partially in the Great Lakes Basin or a Great Lakes watershed. A diversion to an area of a community that lies outside the Basin or watershed may be excepted from the prohibition provided it meets certain conditions, including that all water transferred must be used solely for public water supply purposes within the straddling community, and that all water withdrawn from the Basin shall be returned to the source watershed less an allowance for consumptive use.<sup>38</sup> If a proposed diversion to a straddling community will result in a new or increased withdrawal of 100,000 gpd or greater average over any 90-day period, it must meet the Exception Standard.<sup>39</sup> If the

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<sup>36</sup> WDNR, Great Lakes Compact and Diversions, <https://dnr.wi.gov/topic/WaterUse/Compact.html>.

<sup>37</sup> *Id.*

<sup>38</sup> Compact § 4.9.1.

<sup>39</sup> Compact § 4.9.1(b). The Exception Standard criteria are generally stated as follows:

- (a) The need for the exception cannot be reasonably avoided through efficient use and conservation of existing water supplies;
- (b) The exception will be limited to quantities reasonable for the proposed purpose;
- (c) All water withdrawn shall be returned to the source watershed, less an allowance for consumptive use;
- (d) The exception will be implemented to ensure it will result in no significant adverse impacts to the quantity or quality of the waters and water dependent natural resources of the basin;
- (e) The exception will incorporate environmentally sound and economically feasible water conservation measures;
- (f) The exception will comply with all applicable laws;
- (g) All other applicable criteria of section 4.9 have also been met.

Compact § 4.9.4.

diversion results in a new or increased consumptive use of 5 million gpd or greater average over any 90-day period, it shall also undergo Regional Review.<sup>40</sup>

New Berlin straddles the sub-continental divide between the Mississippi and Great Lakes watersheds.<sup>41</sup> The portion of New Berlin in the Great Lakes Basin was already being served by Lake Michigan water through Milwaukee's public water supply system.<sup>42</sup> Naturally occurring radium contaminated the groundwater supply sources for other parts of New Berlin, making the groundwater supply a public health hazard.<sup>43</sup> After an assessment of alternatives, New Berlin determined the diversion was the most cost-effective way to meet long-term water needs and submitted a proposal to divert water from Lake Michigan to an area within the community but outside of the Great Lakes Basin.<sup>44</sup>

The WDNR held an open house and public hearing allowing the public to ask questions of officials and make comments regarding the proposed diversion.<sup>45</sup> The department also responded to the public's comments.<sup>46</sup> WDNR ultimately found that the diversion satisfied the criteria for the straddling community exception, and it was approved in May 2009.<sup>47</sup> The approval was for 2.142 million gpd averaged over a calendar year<sup>48</sup> to a specified portion of New Berlin lying just west of the divide.<sup>49</sup> More information regarding the approval process is available on the WDNR website.<sup>50</sup>

#### *Waukesha Diversion*

A proposal for a diversion to a community outside of the Great Lakes Basin but whose boundaries are wholly within a county that is partially within the Basin must meet the criteria of the "straddling county" exception. The straddling county exception criteria are even stricter than

<sup>40</sup> Compact § 4.9.1(c). Regional review is described in Compact § 4.5 and is conducted by the Regional Body, defined in Compact § 1.2 as consisting of members of the Council and the premiers of Ontario and Quebec or their designates.

<sup>41</sup> WDNR Findings of Fact, Conclusions of Law and Decision (May 21, 2009) (approving New Berlin diversion), p. 1, <https://dnr.wi.gov/topic/WaterUse/documents/NewBerlin/NewBerlinFindings2009.pdf>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 2.

<sup>46</sup> *Id.* at 2

<sup>47</sup> *Id.* at 2-3. Among the findings was that the diversion would result in no net water loss to Lake Michigan because it returns through the Milwaukee Metropolitan Sewerage District. *Id.* at 2. WDNR found that the proposal did not need to meet the Exception Standard because it fell within the City of Milwaukee's existing baseline withdrawal and therefore was not a "new or increased" withdrawal. *Id.* at 3. The amount of the diversion did not meet the 5 million gpd consumptive use threshold requiring Regional Review. *Id.*

<sup>48</sup> WDNR Water Supply Service Area Plan & Diversion Approval (May 21, 2009), p. 2,

<https://dnr.wi.gov/topic/WaterUse/documents/NewBerlin/NewBerlinWSSAPlan2009.pdf>.

<sup>49</sup> *Id.* at 1.

<sup>50</sup> <https://dnr.wi.gov/topic/WaterUse/NewBerlinDiversionApp.html>.

those for a straddling community and include that the diversion must be used solely for the public water supply of the community that is without adequate supplies of potable water, and that there is no reasonable water supply alternative within the community's home basin. A proposal for a straddling county exception is subject to the Exception Standard, regional review by the Regional Body, and Council approval.<sup>51</sup>

Waukesha's application for the diversion was submitted in May 2010<sup>52</sup> because the city's current water source, a deep aquifer, is contaminated with radium.<sup>53</sup> The radium contaminated water supply is costly to treat, and the city is under court order to comply with radium standards by 2023.<sup>54</sup>

Upon receiving the application from Waukesha, WDNR commenced a comprehensive process to evaluate the proposal, which involved a technical review and environmental impact statement, consultation with American Indian Tribes and Bands, and public comment periods.<sup>55</sup> This led Waukesha to submit an amended application in 2013,<sup>56</sup> which also went through a public comment period.<sup>57</sup>

From 2013 to 2016, WDNR analyzed the proposal through further technical review, environmental impact and alternative supply assessments, tribal consultation and public involvement until coming to the conclusion that the diversion met the Compact exception standard.<sup>58</sup> The information gathered was then sent to the Regional Body<sup>59</sup> in January 2016 for review per Compact requirements.<sup>60</sup>

The Regional Body sent their declaration of findings to the Council in May 2016,<sup>61</sup> and the Waukesha diversion was approved with conditions by the Council in June 2016.<sup>62</sup> The conditions included a reduction in the diversion area and the amount of the diversion from 10.1 million gpd

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<sup>51</sup> Compact § 4.9.3(b),(f)-(g).

<sup>52</sup> <https://dnr.wi.gov/topic/EIA/waukesha/AppRev2010.html>.

<sup>53</sup> <https://dnr.wi.gov/topic/EIA/WaukeshaDiversionApp.html>.

<sup>54</sup> <https://dnr.wi.gov/topic/EIA/WaukeshaDiversionApp.html>.

<sup>55</sup> <https://dnr.wi.gov/topic/EIA/waukesha/background.html>.

<sup>56</sup> [http://www.waukesha-water.com/downloads/1\\_City\\_of\\_Waukesha\\_Application\\_Summary.pdf](http://www.waukesha-water.com/downloads/1_City_of_Waukesha_Application_Summary.pdf): <http://www.gslcompactcouncil.org/Docs/Waukesha/Waukesha--Final%20Decision%20of%20Compact%20Council%206-21-16.pdf>.

<sup>57</sup> <https://dnr.wi.gov/topic/EIA/waukesha/DNReview.html>.

<sup>58</sup> <https://dnr.wi.gov/topic/EIA/waukesha/background.html>.

<sup>59</sup> <https://dnr.wi.gov/topic/EIA/waukesha/background.html>.

<sup>60</sup> See Compact § 4.9.3(f).

<sup>61</sup> <https://dnr.wi.gov/topic/EIA/waukesha/background.html>.

<sup>62</sup>In re Application by City of Waukesha, No. 2016-1 (Great Lakes – St. Lawrence River Basin Water Resources Compact Council, June 21, 2016) (Final Decision approving Waukesha diversion), <http://www.gslcompactcouncil.org/Docs/Waukesha/Waukesha--Final%20Decision%20of%20Compact%20Council%206-21-16.pdf>.

to 8.2 million gpd.<sup>63</sup> The Great Lakes Cities Initiative requested that Council reconsider its Waukesha diversion decision. Following an administrative hearing, Council voted not to reopen or modify its final decision approving the diversion.<sup>64</sup>

Construction on the diversion has not yet begun.<sup>65</sup> More information about the Waukesha diversion application and review process are available on WDNR's website.<sup>66</sup>

#### *Racine Diversion*

In January 2018, the City of Racine applied for a new diversion of up to 7 million gpd annual average under the straddling community exception, although Racine is wholly within the Basin.<sup>67</sup> The new diversion is actually to the village of Mount Pleasant, which is a straddling community.<sup>68</sup> Racine applied on Mount Pleasant's behalf because it operates the public water system from which about half of Mount Pleasant residents get their water.<sup>69</sup>

Unlike the public health concerns from contaminated water supplies prompting the New Berlin and Waukesha diversion proposals, the reason for the new diversion to Mount Pleasant is because of the proposed construction of a Foxconn manufacturing facility,<sup>70</sup> which will require large amounts of water for its operations.<sup>71</sup> Foxconn is a global electronics and technology manufacturing company.<sup>72</sup> The Foxconn facility would be served by the same water supply system as Mount Pleasant, but the diverted water would be used by Foxconn outside the Basin.<sup>73</sup>

Regional Review is not required for the Racine diversion exception proposal because the anticipated consumptive use is less than 5 million gpd.<sup>74</sup> Nevertheless, Wisconsin did notify the

<sup>63</sup> *Id.*

<sup>64</sup> In re City of Waukesha Diversion Hearing, No. 2016-1 (Great Lakes – St. Lawrence River Basin Water Resources Compact Council, May 4, 2017) (Opinion), <http://www.glslcompactcouncil.org/Docs/Waukesha/Compact%20Council%20Opinion%20on%20GLSLCI%20Request%20for%20Hearing%205-4-17.pdf>.

<sup>65</sup> <https://dnr.wi.gov/topic/EIA/WaukeshaDiversionApp.html>.

<sup>66</sup> *Id.*

<sup>67</sup> City of Racine Application for Water Diversion (Jan. 26, 2018), p. 1, <https://dnr.wi.gov/topic/WaterUse/documents/Racine/RacineDiversionApp20180126.pdf>.

<sup>68</sup> <https://dnr.wi.gov/topic/WaterUse/Racine/>.

<sup>69</sup> *Id.*

<sup>70</sup> City of Racine Application for Water Diversion (Jan. 26, 2018), p. 4, <https://dnr.wi.gov/topic/WaterUse/documents/Racine/RacineDiversionApp20180126.pdf>.

<sup>71</sup> *Id.* at 6 (describing a consumptive use by Foxconn as 2.1 million gpd).

<sup>72</sup> <https://www.foxconn.com/en/GroupProfile.html>.

<sup>73</sup> City of Racine Application for Water Diversion (Jan. 26, 2018), p. 5, <https://dnr.wi.gov/topic/WaterUse/documents/Racine/RacineDiversionApp20180126.pdf>. See also <https://dnr.wi.gov/Business/Foxconn.html>.

<sup>74</sup> Compact § 4.9.1(c) (stating Regional Review is required only if the diversion would result in a new or increased consumptive use of 5 million gpd average or greater over a 90 day period).

Regional Body and Council of the application and held a public comment period.<sup>75</sup> Comments and questions were submitted by Illinois and New York as well as by individual citizens and environmental groups.<sup>76</sup> The comments/questions had two main themes: (1) Is Racine the proper entity to apply for this diversion exception; and (2) Is this diversion solely for a public water supply purpose – a necessary condition for a straddling community exception per Compact 4.9.1 -- since the quantity being diverted is going to privately owned Foxconn?<sup>77</sup>

The WDNR responded that Racine was the proper applicant because Mount Pleasant does not own a public water supply system and Wisconsin law requires a diversion applicant to be one.<sup>78</sup> WDNR also stated that the diversion was for public water supply purposes, noting that 88% of Racine's customers in Mount Pleasant are residential and only 12% are industrial or commercial users.<sup>79</sup> The WDNR approved the new diversion in April 2018, less than four months after Racine submitted the application.<sup>80</sup>

Michigan and Pennsylvania wrote letters in response to the approval questioning WDNR's interpretation of Compact terms. They questioned (1) why Racine was the applicant since it is not a straddling community, and (2) whether the diversion fit the Compact § 4.9.1 requirement to be "solely for public water supply purposes" inasmuch as the amount being diverted would be used solely for industrial purposes.<sup>81</sup> The Racine application provides that all 7 million gpd of the diversion will be for industrial use with 5.8 million gpd specifically for Foxconn.<sup>82</sup> Foxconn operations will also account for the bulk of the consumptive use at 2.1 million gpd of the estimated 2.7 million gpd.<sup>83</sup> After a response from Wisconsin addressing the states' concerns, the states did not challenge WDNR's approval. But Pennsylvania in May 2018 called for the Regional Body to discuss certain concepts raised by the Racine application, including applicant eligibility and whether public water supply purposes should be defined by using the

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<sup>75</sup> <https://dnr.wi.gov/topic/WaterUse/Racine/>.

<sup>76</sup> *Id.*

<sup>77</sup> See WDNR Response to Comments (April 2018),

<https://dnr.wi.gov/topic/WaterUse/documents/Racine/DNRRResponseComments20180425.pdf>.

<sup>78</sup> *Id.* at 1 (referring to Wis. Stat. § 281.346 (4)(b) which provides: "A person may apply ... for approval of a new or increased diversion ... only if the person operates a public water supply system that receives or would receive water from the new or increased diversion."). The Compact has no similar restriction on who can propose a diversion exception.

<sup>79</sup> WDNR Response to Comments (April 2018), p. 2,

<https://dnr.wi.gov/topic/WaterUse/documents/Racine/DNRRResponseComments20180425.pdf>.

<sup>80</sup> WDNR Approval for City of Racine Diversion Request (April 25, 2018),

<https://dnr.wi.gov/topic/WaterUse/documents/Racine/RacineDiversionApproval20180425.pdf>.

<sup>81</sup> <https://dnr.wi.gov/topic/WaterUse/documents/Racine/LetterfromMI.PDF>;

<https://dnr.wi.gov/topic/WaterUse/documents/Racine/LetterfromPA5.1.18.PDF>

<sup>82</sup> City of Racine Application for Water Diversion (Jan. 26, 2018), p. 17,

<https://dnr.wi.gov/topic/WaterUse/documents/Racine/RacineDiversionApp20180126.pdf>.

<sup>83</sup> *Id.* at 6.

conglomerated customer base versus the specific uses and customers to which a diversion will be directed.<sup>84</sup>

Petitioners represented by Midwest Environmental Advocates administratively challenged the WDNR's approval of the Racine diversion,<sup>85</sup> but a Wisconsin Administrative Law Judge in June 2019 upheld the WDNR approval.<sup>86</sup> The ALJ found that the diversion was solely for public water supply purposes within the straddling community, and that Racine as a public water system serving Mount Pleasant was a proper applicant.<sup>87</sup> Petitioners have decided not to seek judicial review.<sup>88</sup>

While some of Wisconsin's interpretations of certain Compact § 4.9 exception terms may have been questionable,<sup>89</sup> overall Wisconsin appears to have followed Compact sections 4.8 and 4.9 with respect to all three diversion proposals to date.

## **Water Conservation and Efficiency Program**

Compact § 4.2 requires each Party to:

- (A) develop its own water conservation and efficiency goals and objectives consistent with the Council's basin-wide goals, within two years of the Compact's effective date (§ 4.2.2);
- (B) develop and implement a water conservation and efficiency program, either voluntary or mandatory, based on those goals and objectives, within two years (§§ 4.2.2, 4.2.5);
- (C) annually assess its programs in meeting those goals and objectives, report to Council and the Regional Body, and make the assessment publicly available (§ 4.2.2); and
- (D) promote environmentally sound and economically feasible water conservation measures, within two years (§ 4.2.4).

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<sup>84</sup> <https://dnr.wi.gov/topic/WaterUse/documents/Racine/LetterfromPA5.24.18.PDF>. Pennsylvania also said it thought WDNR's approval of the Racine diversion complies with the straddling county exception. *Id.*

<sup>85</sup> <http://midwestadvocates.org/issues-actions/actions/city-of-racine-diversion-challenge-1/>.

<sup>86</sup> Wisconsin ALJ Decision, Case No. 18-0006 (June 7, 2009),

<https://dnr.wi.gov/topic/WaterUse/documents/Racine/CityofRacineDNR180006Decision.pdf>.

<sup>87</sup> *Id.* The ALJ Decision stated “[T]his is not a case interpreting the Compact. It is a challenge to the interpretation of statutes that were drafted to implement the Compact ....” *Id.* at 7.

<sup>88</sup> Midwest Environmental Advocates still maintains that WDNR's “approval of the [Racine] diversion was premised on a misinterpretation of the Compact and the Wisconsin law that implements it.”

[https://midwestadvocates.org/issues-actions/actions/city-of-racine-diversion-challenge-1/](http://midwestadvocates.org/issues-actions/actions/city-of-racine-diversion-challenge-1/).

<sup>89</sup> E.g., whether the New Berlin diversion needed to meet the Exception Standard, whether the City of Racine was a proper applicant for a straddling community exception, whether the Racine diversion was solely for a public water supply purpose.

Wisconsin has been submitting annual assessment reports of its water conservation and efficiency program, in accordance with Compact § 4.2.2: the most recent annual report is dated Nov. 21, 2018. In addition, Wisconsin has submitted water conservation and efficiency program review reports, pursuant to Compact § 3.4.1, every five years; the most recent five-year report is dated Dec. 3, 2014.<sup>90</sup> The annual and five-year reports are available to the public online at the Council's webpage.<sup>91</sup>

Compact § 4.2.1 lists five goals. Further, Council pursuant to section 4.2.1 identified five basin-wide objectives. See Council Resolution #5 – Adoption of Basin-Wide Conservation and Efficiency Objectives, Dec. 8, 2008. These objectives were re-affirmed by Council Resolution #30, June 13, 2014.

Wisconsin has adopted the same goals as stated in Compact § 4.2.1, and its objectives are the same as the basin-wide objectives identified by Council, although the state has added sub-objectives.<sup>92</sup> Accordingly, Wisconsin's goals and objectives are consistent with the basin-wide goals and objectives as required by Compact § 4.2.2.

Wisconsin has implemented a water conservation and efficiency program with both mandatory and voluntary aspects.<sup>93</sup> Any new or increased diversion in the Basin has mandatory conservation and efficiency measures, as do new or increased withdrawals over 100,000 gpd anywhere in the state.<sup>94</sup> There are three tiers of progressively more rigorous conservation and efficiency measures required as the amount of a new or increased withdrawal rises.<sup>95</sup> The top tier is for withdrawals that will result in a water loss averaging more than 2 million gpd in any 30-day period.<sup>96</sup> This top tier also applies to any diversion in the Basin.<sup>97</sup>

All other water users are encouraged to conserve water through tips and educational materials provided on a WDNR website dedicated to water conservation and efficiency.<sup>98</sup>

Compact § 4.2.4 lists five “environmentally sound and economically feasible water conservation measures”<sup>99</sup> which the states must commit to promoting. This commitment includes promulgating best management practices and fostering scientific research to support water conservation in the Basin. Based on its annual and five-year reports regarding its water conservation and efficiency programs, Wisconsin seems committed to promoting these measures.

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<sup>90</sup> The Wisconsin draft 2019 five-year report recently noticed for public comment includes a section on water conservation and water efficiency, p. 17-21.

<sup>91</sup> <http://www.gslcompactcouncil.org/Resolutions.aspx>.

<sup>92</sup> [https://dnr.wi.gov/topic/WaterUse/documents/WDNR\\_Statewide\\_WCE\\_Objectives\\_2011.pdf](https://dnr.wi.gov/topic/WaterUse/documents/WDNR_Statewide_WCE_Objectives_2011.pdf).

<sup>93</sup> See Wis. Stat. § 281.346(8); Wis. Admin. Code NR chapter 852.

<sup>94</sup> Wis. Admin. Code NR 852.02.

<sup>95</sup> *Id.*

<sup>96</sup> Wis. Admin. Code NR 852.02(3).

<sup>97</sup> Wis. Admin. Code NR 852.02.

<sup>98</sup> See WDNR, Water Conservation and Efficiency, <https://dnr.wi.gov/topic/WaterUse/conservation.html>.

<sup>99</sup> Compact § 4.2.4.

Examples include benchmarking programs, conducting scientific studies, funding projects regarding water use and resources, promoting EPA WaterSense Fix-a-Leak via the internet, promotional videos, radio ads, and TV interview appearances.<sup>100</sup>

### Other

The Racine diversion was exempted from the requirement under Wisconsin law to submit a water supply service area plan. Water supply service area plans require public water supply systems to consider water conservation alternatives,<sup>101</sup> and they are touted in Wisconsin's draft 2019 five-year report regarding water conservation and efficiency.<sup>102</sup> Water supply service area plans generally are required for public water systems seeking new or increased withdrawals or diversions.<sup>103</sup> But the Wisconsin legislature, via a 2017 bill, created an exemption to cover a diversion to serve Foxconn in Mount Pleasant.

Specifically, 2017 Wis. Act 58 created an Electronics and Information Technology Manufacturing (EITM) Zone in the Mount Pleasant straddling community; it also amended Wis. Stat. § 281.346 to exempt proposals to provide water to a straddling community that includes an EITM Zone from the mandate to have a water supply service area plan.<sup>104</sup> Shortly after Act 58 was enacted, Foxconn announced its intention to locate its new facility in the Mount Pleasant EITM Zone.<sup>105</sup>

### **Conclusion**

Wisconsin is implementing the water conservation and efficiency provisions of the Compact.

Wisconsin is largely implementing the water management provisions of the Compact.

- Wisconsin is not applying the Decision-Making Standard of Compact § 4.11 when deciding whether to permit new or increased withdrawals and consumptive uses in the Great Lakes basin. Wisconsin should amend its law and its practice so that it is applying the Compact § 4.11 Decision-Making Standard in its management and regulation of new or increased withdrawals and consumptive uses in the Great Lakes basin. If Wisconsin

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<sup>100</sup> Wisconsin Draft 2019 Five-Year Water Management and Conservation and Efficiency Program Review (June 28, 2019), p. 20, <http://www.gislregionalbody.org/Docs/2019%20ProgramReports/Preliminary%20Draft%20Reports/Wisconsin%20Preliminary%20Draft%20Program%20Report%207-19.pdf>.

<sup>101</sup> See Wis. Stat. § 281.348.

<sup>102</sup> Wisconsin Draft 2019 Five-Year Water Management and Conservation and Efficiency Program Review (June 28, 2019), p. 10.

<sup>103</sup> Wis. Stat. §§ 281.346(5e), 281.348.

<sup>104</sup> See 2017 Wis. Act 58; <https://dnr.wi.gov/Business/Foxconn.html>.

<sup>105</sup> <https://dnr.wi.gov/Business/Foxconn.html>.

fails to change, the Decision-Making Standard of Compact § 4.11 should be applied to all proposals for new or increased withdrawals in the Great Lakes basin meeting the default threshold of Compact § 4.10.2 – 100,000 gpd or greater average in any 90-day period.

## APPENDIX

### **Great Lakes – St. Lawrence River Basin Water Resources Compact**

Signed by the Governors of all eight Great Lakes states on December 13, 2005.

Ratified by the eight state legislatures during 2007-2008.

Passed by the U.S. Senate on August 1, 2008.

Passed by the U.S. House of Representatives on September 23, 2008.

Signed by President George W. Bush on October 3, 2008.

Effective date December 8, 2008.

**DECEMBER 13, 2005**

**AGREEMENT**

**Section 1.** The states of Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Wisconsin and the Commonwealth of Pennsylvania hereby solemnly covenant and agree with each other, upon enactment of concurrent legislation by the respective state legislatures and consent by the Congress of the United States as follows:

**GREAT LAKES—ST. LAWRENCE RIVER BASIN WATER RESOURCES  
COMPACT**

**ARTICLE 1  
SHORT TITLE, DEFINITIONS, PURPOSES AND DURATION**

**Section 1.1. Short Title.** This act shall be known and may be cited as the “Great Lakes—St. Lawrence River Basin Water Resources Compact.”

**Section 1.2. Definitions.** For the purposes of this Compact, and of any supplemental or concurring legislation enacted pursuant thereto, except as may be otherwise required by the context:

**Adaptive Management** means a Water resources management system that provides a systematic process for evaluation, monitoring and learning from the outcomes of operational programs and adjustment of policies, plans and programs based on experience and the evolution of scientific knowledge concerning Water resources and Water Dependent Natural Resources.

**Agreement** means the Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement.

**Applicant** means a Person who is required to submit a Proposal that is subject to management and regulation under this Compact. **Application** has a corresponding meaning.

**Basin or Great Lakes—St. Lawrence River Basin** means the watershed of the Great Lakes and the St. Lawrence River upstream from Trois-Rivières, Québec within the jurisdiction of the Parties.

**Basin Ecosystem or Great Lakes—St. Lawrence River Basin Ecosystem** means the interacting components of air, land, Water and living organisms, including humankind, within the Basin.

**Community within a Straddling County** means any incorporated city, town or the equivalent thereof, that is located outside the Basin but wholly within a County that lies partly within the Basin and that is not a Straddling Community.

**Compact** means this Compact.

**Consumptive Use** means that portion of the Water Withdrawn or withheld from the Basin that is lost or otherwise not returned to the Basin due to evaporation, incorporation into Products, or other processes.

**Council** means the Great Lakes—St. Lawrence River Basin Water Resources Council, created by this Compact.

**Council Review** means the collective review by the Council members as described in Article 4 of this Compact.

**County** means the largest territorial division for local government in a State. The County boundaries shall be defined as those boundaries that exist as of December 13, 2005.

**Cumulative Impacts** mean the impact on the Basin Ecosystem that results from incremental effects of all aspects of a Withdrawal, Diversion or Consumptive Use in addition to other past, present, and reasonably foreseeable future Withdrawals, Diversions and Consumptive Uses regardless of who undertakes the other Withdrawals, Diversions and Consumptive Uses. Cumulative Impacts can result from individually minor but collectively significant Withdrawals, Diversions and Consumptive Uses taking place over a period of time.

**Decision-Making Standard** means the decision-making standard established by Section 4.11 for Proposals subject to management and regulation in Section 4.10.

**Diversion** means a transfer of Water from the Basin into another watershed, or from the watershed of one of the Great Lakes into that of another by any means of transfer, including but not limited to a pipeline, canal, tunnel, aqueduct, channel, modification of the direction of a water course, a tanker ship, tanker truck or rail tanker but does not apply to Water that is used in the Basin or a Great Lake watershed to manufacture or produce a Product that is then transferred out of the Basin or watershed. **Divert** has a corresponding meaning.

**Environmentally Sound and Economically Feasible Water Conservation Measures** mean those measures, methods, technologies or practices for efficient water use and for reduction of water loss and waste or for reducing a Withdrawal, Consumptive Use or Diversion that i) are environmentally sound, ii) reflect best practices applicable to the water use sector, iii) are technically feasible and available, iv) are economically feasible and cost effective based on an analysis that considers direct and avoided economic and environmental costs and v) consider the particular facilities and processes involved, taking into account the environmental impact, age of equipment and facilities involved, the processes employed, energy impacts and other appropriate factors.

**Exception** means a transfer of Water that is excepted under Section 4.9 from the prohibition against Diversions in Section 4.8.

**Exception Standard** means the standard for Exceptions established in Section 4.9.4.

**Intra-Basin Transfer** means the transfer of Water from the watershed of one of the Great Lakes into the watershed of another Great Lake.

**Measures** means any legislation, law, regulation, directive, requirement, guideline, program, policy, administrative practice or other procedure.

**New or Increased Diversion** means a new Diversion, an increase in an existing Diversion, or the alteration of an existing Withdrawal so that it becomes a Diversion.

**New or Increased Withdrawal or Consumptive Use** means a new Withdrawal or Consumptive Use or an increase in an existing Withdrawal or Consumptive Use.

**Originating Party** means the Party within whose jurisdiction an Application or registration is made or required.

**Party** means a State party to this Compact.

**Person** means a human being or a legal person, including a government or a non-governmental organization, including any scientific, professional, business, non-profit, or public interest organization or association that is neither affiliated with, nor under the direction of a government.

**Product** means something produced in the Basin by human or mechanical effort or through agricultural processes and used in manufacturing, commercial or other processes or intended for intermediate or end use consumers. (i) Water used as part of the packaging of a Product shall be considered to be part of the Product. (ii) Other than Water used as part of the packaging of a Product, Water that is used primarily to transport materials in or out of the Basin is not a Product or part of a Product. (iii) Except as provided in (i) above, Water which is transferred as part of a public or private supply is not a Product or part of a Product. (iv) Water in its natural state such as in lakes, rivers, reservoirs, aquifers, or water basins is not a Product.

**Proposal** means a Withdrawal, Diversion or Consumptive Use of Water that is subject to this Compact.

**Province** means Ontario or Québec.

**Public Water Supply Purposes** means water distributed to the public through a physically connected system of treatment, storage and distribution facilities serving a group of largely residential customers that may also serve industrial, commercial, and other institutional operators. Water Withdrawn directly from the Basin and not through such a system shall not be considered to be used for Public Water Supply Purposes.

**Regional Body** means the members of the Council and the Premiers of Ontario and Québec or their designee as established by the Agreement.

**Regional Review** means the collective review by the Regional Body as described in Article 4 of this Compact.

**Source Watershed** means the watershed from which a Withdrawal originates. If Water is Withdrawn directly from a Great Lake or from the St. Lawrence River, then the Source Watershed shall be considered to be the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively. If Water is Withdrawn from the watershed of a stream that is a direct tributary to a Great Lake or a direct tributary to the St. Lawrence River, then the Source Watershed shall be considered to be the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively, with a preference to the direct tributary stream watershed from which it was Withdrawn.

**Standard of Review and Decision** means the Exception Standard, Decision-Making Standard and reviews as outlined in Article 4 of this Compact.

**State** means one of the states of Illinois, Indiana, Michigan, Minnesota, New York, Ohio or Wisconsin or the Commonwealth of Pennsylvania.

**Straddling Community** means any incorporated city, town or the equivalent thereof, wholly within any County that lies partly or completely within the Basin, whose corporate boundary existing as of the effective date of this Compact, is partly within the Basin or partly within two Great Lakes watersheds.

**Technical Review** means a detailed review conducted to determine whether or not a Proposal that requires Regional Review under this Compact meets the Standard of Review and Decision following procedures and guidelines as set out in this Compact.

**Water** means ground or surface water contained within the Basin.

**Water Dependent Natural Resources** means the interacting components of land, Water and living organisms affected by the Waters of the Basin.

**Waters of the Basin or Basin Water** means the Great Lakes and all streams, rivers, lakes, connecting channels and other bodies of water, including tributary groundwater, within the Basin.

**Withdrawal** means the taking of water from surface water or groundwater. **Withdraw** has a corresponding meaning.

### **Section 1.3. Findings and Purposes.**

The legislative bodies of the respective Parties hereby find and declare:

1. Findings:
  - a. The Waters of the Basin are precious public natural resources shared and held in trust by the States;
  - b. The Waters of the Basin are interconnected and part of a single hydrologic system;
  - c. The Waters of the Basin can concurrently serve multiple uses. Such multiple uses include municipal, public, industrial, commercial, agriculture, mining, navigation, energy development and production, recreation, the subsistence, economic and cultural activities of native peoples, Water quality maintenance, and the maintenance of fish and wildlife habitat and a balanced ecosystem. And, other purposes are encouraged, recognizing that such uses are interdependent and must be balanced;
  - d. Future Diversions and Consumptive Uses of Basin Water resources have the potential to significantly impact the environment, economy and welfare of the Great Lakes—St. Lawrence River region;
  - e. Continued sustainable, accessible and adequate Water supplies for the people and economy of the Basin are of vital importance; and,
  - f. 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. The most effective means of protecting, conserving, restoring, improving and managing the Basin Waters is through the joint pursuit of unified and cooperative principles, policies and programs mutually agreed upon, enacted and adhered to by all Parties.
2. Purposes:
  - a. To act together to protect, conserve, restore, improve and effectively manage the Waters and Water Dependent Natural Resources of the Basin under appropriate arrangements for intergovernmental cooperation and consultation because current lack of full scientific certainty should not be used as a reason for postponing measures to protect the Basin Ecosystem;
  - b. To remove causes of present and future controversies;
  - c. To provide for cooperative planning and action by the Parties with respect to such Water resources;
  - d. To facilitate consistent approaches to Water management across the Basin while retaining State management authority over Water management decisions within the Basin;
  - e. To facilitate the exchange of data, strengthen the scientific information base upon which decisions are made and engage in consultation on the potential effects of proposed Withdrawals and losses on the Waters and Water Dependent Natural Resources of the Basin;
  - f. To prevent significant adverse impacts of Withdrawals and losses on the Basin's ecosystems and watersheds;
  - g. To promote interstate and State-Provincial comity; and,
  - h. To promote an Adaptive Management approach to the conservation and management of Basin Water resources, which recognizes, considers and provides

adjustments for the uncertainties in, and evolution of, scientific knowledge concerning the Basin's Waters and Water Dependent Natural Resources.

#### **Section 1.4. Science.**

1. 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 this Compact.
2. The strategy shall guide the collection and application of scientific information to support:
  - a. An improved understanding of the individual and Cumulative Impacts of Withdrawals from various locations and Water sources on the Basin Ecosystem and to develop a mechanism by which impacts of Withdrawals may be assessed;
  - b. The periodic assessment of Cumulative Impacts of Withdrawals, Diversions and Consumptive Uses on a Great Lake and St. Lawrence River watershed basis;
  - c. Improved scientific understanding of the Waters of the Basin;
  - d. Improved understanding of the role of groundwater in Basin Water resources management; and,
  - e. The development, transfer and application of science and research related to Water conservation and Water use efficiency.

## **ARTICLE 2 ORGANIZATION**

#### **Section 2.1. Council Created.**

The Great Lakes—St. Lawrence River Basin Water Resources Council is hereby created as a body politic and corporate, with succession for the duration of this Compact, as an agency and instrumentality of the governments of the respective Parties.

#### **Section 2.2. Council Membership.**

The Council shall consist of the Governors of the Parties, ex officio.

#### **Section 2.3. Alternates.**

Each member of the Council shall appoint at least one alternate who may act in his or her place and stead, with authority to attend all meetings of the Council and with power to vote in the absence of the member. Unless otherwise provided by law of the Party for which he or she is appointed, each alternate shall serve during the term of the member appointing him or her, subject to removal at the pleasure of the member. In the event of a vacancy in the office of alternate, it shall be filled in the same manner as an original appointment for the unexpired term only.

#### **Section 2.4. Voting.**

1. Each member is entitled to one vote on all matters that may come before the Council.
2. Unless otherwise stated, the rule of decision shall be by a simple majority.
3. The Council shall annually adopt a budget for each fiscal year and the amount required to balance the budget shall be apportioned equitably among the Parties by

unanimous vote of the Council. The appropriation of such amounts shall be subject to such review and approval as may be required by the budgetary processes of the respective Parties.

4. The participation of Council members from a majority of the Parties shall constitute a quorum for the transaction of business at any meeting of the Council.

### **Section 2.5. Organization and Procedure.**

The Council shall provide for its own organization and procedure, and may adopt rules and regulations governing its meetings and transactions, as well as the procedures and timeline for submission, review and consideration of Proposals that come before the Council for its review and action. The Council shall organize, annually, by the election of a Chair and Vice Chair from among its members. Each member may appoint an advisor, who may attend all meetings of the Council and its committees, but shall not have voting power. The Council may employ or appoint professional and administrative personnel, including an Executive Director, as it may deem advisable, to carry out the purposes of this Compact.

### **Section 2.6. Use of Existing Offices and Agencies.**

It is the policy of the Parties to preserve and utilize the functions, powers and duties of existing offices and agencies of government to the extent consistent with this Compact. Further, the Council shall promote and aid the coordination of the activities and programs of the Parties concerned with Water resources management in the Basin. To this end, but without limitation, the Council may:

1. Advise, consult, contract, assist or otherwise cooperate with any and all such agencies;
2. Employ any other agency or instrumentality of any of the Parties for any purpose; and,
3. Develop and adopt plans consistent with the Water resources plans of the Parties.

### **Section 2.7. Jurisdiction.**

The Council shall have, exercise and discharge its functions, powers and duties within the limits of the Basin. Outside the Basin, it may act in its discretion, but only to the extent such action may be necessary or convenient to effectuate or implement its powers or responsibilities within the Basin and subject to the consent of the jurisdiction wherein it proposes to act.

### **Section 2.8. Status, Immunities and Privileges.**

1. The Council, its members and personnel in their official capacity and when engaged directly in the affairs of the Council, its property and its assets, wherever located and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by the Parties, except to the extent that the Council may expressly waive its immunity for the purposes of any proceedings or by the terms of any contract.
2. The property and assets of the Council, wherever located and by whomsoever held, shall be considered public property and shall be immune from search, requisition,

confiscation, expropriation or any other form of taking or foreclosure by executive or legislative action.

3. The Council, its property and its assets, income and the operations it carries out pursuant to this Compact shall be immune from all taxation by or under the authority of any of the Parties or any political subdivision thereof; provided, however, that in lieu of property taxes the Council may make reasonable payments to local taxing districts in annual amounts which shall approximate the taxes lawfully assessed upon similar property.

### **Section 2.9. Advisory Committees.**

The Council may constitute and empower advisory committees, which may be comprised of representatives of the public and of federal, State, tribal, county and local governments, water resources agencies, water-using industries and sectors, water-interest groups and academic experts in related fields.

## **ARTICLE 3** **GENERAL POWERS AND DUTIES**

### **Section 3.1. General.**

The Waters and Water Dependent Natural Resources of the Basin are subject to the sovereign right and responsibilities of the Parties, and it is the purpose of this Compact to provide for joint exercise of such powers of sovereignty by the Council in the common interests of the people of the region, in the manner and to the extent provided in this Compact. The Council and the Parties shall use the Standard of Review and Decision and procedures contained in or adopted pursuant to this Compact as the means to exercise their authority under this Compact.

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 Section 3.3 of this Compact and in accordance with each Party's respective statutory authorities and applicable procedures.

The Council shall identify priorities and develop plans and policies relating to Basin Water resources. It shall adopt and promote uniform and coordinated policies for Water resources conservation and management in the Basin.

### **Section 3.2. Council Powers.**

The Council may: plan; conduct research and collect, compile, analyze, interpret, report and disseminate data on Water resources and uses; forecast Water levels; conduct investigations; institute court actions; design, acquire, construct, reconstruct, own, operate, maintain, control, sell and convey real and personal property and any interest therein as it may deem necessary, useful or convenient to carry out the purposes of this Compact; make contracts; receive and accept such payments, appropriations, grants, gifts, loans, advances and other funds, properties and services as may be transferred or made available to it by any Party or by any other public or private agency, corporation or

individual; and, exercise such other and different powers as may be delegated to it by this Compact or otherwise pursuant to law, and have and exercise all powers necessary or convenient to carry out its express powers or which may be reasonably implied therefrom.

### **Section 3.3. Rules and Regulations.**

1. The Council may promulgate and enforce such rules and regulations as may be necessary for the implementation and enforcement of this Compact. The Council may adopt by regulation, after public notice and public hearing, reasonable Application fees with respect to those Proposals for Exceptions that are subject to Council review under Section 4.9. Any rule or regulation of the Council, other than one which deals solely with the internal management of the Council or its property, shall be adopted only after public notice and hearing.
2. Each Party, in accordance with its respective statutory authorities and applicable procedures, may adopt and enforce rules and regulations to implement and enforce this Compact and the programs adopted by such Party to carry out the management programs contemplated by this Compact.

### **Section 3.4. Program Review and Findings.**

1. Each Party shall submit a report to the Council and the Regional Body detailing its Water management and conservation and efficiency programs that implement this Compact. The report shall set out the manner in which Water Withdrawals are managed by sector, Water source, quantity or any other means, and how the provisions of the Standard of Review and Decision and conservation and efficiency programs are implemented. The first report shall be provided by each Party one year from the effective date of this Compact and thereafter every 5 years.
2. The Council, in cooperation with the Provinces, shall review its Water management and conservation and efficiency programs and those of the Parties that are established in this Compact and make findings on whether the Water management program provisions in this Compact are being met, and if not, recommend options to assist the Parties in meeting the provisions of this Compact. Such review shall take place:
  - a. 30 days after the first report is submitted by all Parties; and,
  - b. Every five years after the effective date of this Compact; and,
  - c. At any other time at the request of one of the Parties.
3. As one of its duties and responsibilities, the Council may recommend a range of approaches to the Parties with respect to the development, enhancement and application of Water management and conservation and efficiency programs to implement the Standard of Review and Decision reflecting improved scientific understanding of the Waters of the Basin, including groundwater, and the impacts of Withdrawals on the Basin Ecosystem.

## ARTICLE 4

### WATER MANAGEMENT AND REGULATION

#### **Section 4.1. Water Resources Inventory, Registration and Reporting.**

1. Within five years of the effective date of this Compact, each Party shall develop and maintain a Water resources inventory for the collection, interpretation, storage, retrieval exchange, and dissemination of information concerning the Water resources of the Party, including, but not limited to, information on the location, type, quantity, and use of those resources and the location, type, and quantity of Withdrawals, Diversions and Consumptive Uses. To the extent feasible, the Water resources inventory shall be developed in cooperation with local, State, federal, tribal and other private agencies and entities, as well as the Council. Each Party's agencies shall cooperate with that Party in the development and maintenance of the inventory.
2. The Council shall assist each Party to develop a common base of data regarding the management of the Water Resources of the Basin and to establish systematic arrangements for the exchange of those data with other States and Provinces.
3. To develop and maintain a compatible base of Water use information, within five years of the effective date of this Compact any Person who Withdraws Water in an amount of 100,000 gallons per day or greater average in any 30-day period (including Consumptive Uses) from all sources, or Diverts Water of any amount, shall register the Withdrawal or Diversion by a date set by the Council unless the Person has previously registered in accordance with an existing State program. The Person shall register the Withdrawal or Diversion with the Originating Party using a form prescribed by the Originating Party that shall include, at a minimum and without limitation: the name and address of the registrant and date of registration; the locations and sources of the Withdrawal or Diversion; the capacity of the Withdrawal or Diversion per day and the amount Withdrawn or Diverted from each source; the uses made of the Water; places of use and places of discharge; and, such other information as the Originating Party may require. All registrations shall include an estimate of the volume of the Withdrawal or Diversion in terms of gallons per day average in any 30-day period.
4. All registrants shall annually report the monthly volumes of the Withdrawal, Consumptive Use and Diversion in gallons to the Originating Party and any other information requested by the Originating Party.
5. Each Party shall annually report the information gathered pursuant to this Section to a Great Lakes—St. Lawrence River Water use data base repository and aggregated information shall be made publicly available, consistent with the confidentiality requirements in Section 8.3.
6. Information gathered by the Parties pursuant to this Section shall be used to improve the sources and applications of scientific information regarding the Waters of the Basin and the impacts of the Withdrawals and Diversions from various locations and Water sources on the Basin Ecosystem, and to better understand the role of groundwater in the Basin. The Council and the Parties shall coordinate the collection and application of scientific information to further develop a mechanism by which individual and Cumulative Impacts of Withdrawals, Consumptive Uses and Diversions shall be assessed.

## **Section 4.2. Water Conservation and Efficiency Programs.**

1. 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 program. These objectives are based on the goals of:
  - a. Ensuring improvement of the Waters and Water Dependent Natural Resources;
  - b. Protecting and restoring the hydrologic and ecosystem integrity of the Basin;
  - c. Retaining the quantity of surface water and groundwater in the Basin;
  - d. Ensuring sustainable use of Waters of the Basin; and,
  - e. Promoting the efficiency of use and reducing losses and waste of Water.
2. Within two years of the effective date of this Compact, each Party shall develop its own Water conservation and efficiency goals and objectives consistent with the Basin-wide goals and objectives, and 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. Each Party shall annually assess its programs in meeting the Party's goals and objectives, report to the Council and the Regional Body and make this annual assessment available to the public.
3. Beginning five years after the effective date of this Compact, and every five years thereafter, the Council, in cooperation with the Provinces, shall review and modify as appropriate the Basin-wide objectives, and the Parties shall have regard for any such modifications in implementing their programs. This assessment will be based on examining new technologies, new patterns of Water use, new resource demands and threats, and Cumulative Impact assessment under Section 4.15.
4. Within two years of the effective date of this Compact, the Parties commit to promote Environmentally Sound and Economically Feasible Water Conservation Measures such as:
  - a. Measures that promote efficient use of Water;
  - b. Identification and sharing of best management practices and state of the art conservation and efficiency technologies;
  - c. Application of sound planning principles;
  - d. Demand-side and supply-side Measures or incentives; and,
  - e. Development, transfer and application of science and research.
5. Each Party shall implement in accordance with paragraph 2 above 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 4.3. Party Powers and Duties.**

1. Each Party, within its jurisdiction, shall manage and regulate New or Increased Withdrawals, Consumptive Uses and Diversions, including Exceptions, in accordance with this Compact.
2. Each Party shall require an Applicant to submit an Application in such manner and with such accompanying information as the Party shall prescribe.
3. No Party may approve a Proposal if the Party determines that the Proposal is inconsistent with this Compact or the Standard of Review and Decision or any

implementing rules or regulations promulgated thereunder. The Party may approve, approve with modifications or disapprove any Proposal depending on the Proposal's consistency with this Compact and the Standard of Review and Decision.

4. Each Party shall monitor the implementation of any approved Proposal to ensure consistency with the approval and may take all necessary enforcement actions.
5. No Party shall approve a Proposal subject to Council or Regional Review, or both, pursuant to this Compact unless it shall have been first submitted to and reviewed by either the Council or Regional Body, or both, and approved by the Council, as applicable. Sufficient opportunity shall be provided for comment on the Proposal's consistency with this Compact and the Standard of Review and Decision. All such comments shall become part of the Party's formal record of decision, and the Party shall take into consideration any such comments received.

#### **Section 4.4. Requirement for Originating Party Approval.**

No Proposal subject to management and regulation under this Compact shall hereafter be undertaken by any Person unless it shall have been approved by the Originating Party.

#### **Section 4.5. Regional Review.**

1. General.
  - a. It is the intention of the Parties to participate in Regional Review of Proposals with the Provinces, as described in this Compact and the Agreement.
  - b. 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 Section 4.5.2 of such Proposal is received from the Originating Party.
  - c. Proposals for Exceptions subject to Regional Review shall be submitted by the Originating Party to the Regional Body for Regional Review, and where applicable, to the Council for concurrent review.
  - d. The Parties agree that the protection of the integrity of the Great Lakes – St. Lawrence River Basin Ecosystem shall be the overarching principle for reviewing Proposals subject to Regional Review, recognizing uncertainties with respect to demands that may be placed on Basin Water, including groundwater, levels and flows of the Great Lakes and the St. Lawrence River, future changes in environmental conditions, the reliability of existing data and the extent to which Diversions may harm the integrity of the Basin Ecosystem.
  - e. The Originating Party shall have lead responsibility for coordinating information for resolution of issues related to evaluation of a Proposal, and shall consult with the Applicant throughout the Regional Review Process.
  - f. A majority of the 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 Section. Any such Regional Review shall be undertaken only after consulting the Applicant.

2. Notice from Originating Party to the Regional Body.
  - a. The Originating Party shall determine if a Proposal is subject to Regional Review. If so, the Originating Party shall provide timely notice to the Regional Body and the public.
  - b. Such notice shall not be given unless and until all information, documents and the Originating Party's Technical Review needed to evaluate whether the Proposal meets the Standard of Review and Decision have been provided.
  - c. An Originating Party may:
    - i. Provide notice to the Regional Body of an Application, even if notification is not required; or,
    - ii. Request Regional Review of an application, even if Regional Review is not required. Any such Regional Review shall be undertaken only after consulting the Applicant.
  - d. An Originating Party may provide preliminary notice of a potential Proposal.
3. Public Participation.
  - a. To ensure adequate public participation, the Regional Body shall adopt procedures for the review of Proposals that are subject to Regional Review in accordance with this Article.
  - b. The Regional Body shall provide notice to the public of a Proposal undergoing Regional Review. Such notice shall indicate that the public has an opportunity to comment in writing to the Regional Body on whether the Proposal meets the Standard of Review and Decision.
  - c. The Regional Body shall hold a public meeting in the State or Province of the Originating Party in order to receive public comment on the issue of whether the Proposal under consideration meets the Standard of Review and Decision.
  - d. The Regional Body shall consider the comments received before issuing a Declaration of Finding.
  - e. The Regional Body shall forward the comments it receives to the Originating Party.
4. Technical Review.
  - a. The Originating Party shall provide the Regional Body with its Technical Review of the Proposal under consideration.
  - b. The Originating Party's Technical Review shall thoroughly analyze the Proposal and provide an evaluation of the Proposal sufficient for a determination of whether the Proposal meets the Standard of Review and Decision.
  - c. Any member of the Regional Body may conduct their own Technical Review of any Proposal subject to Regional Review.
  - d. 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.
  - e. All Parties shall exercise their best efforts to ensure that a Technical Review undertaken under Sections 4.5.4.c and 4.5.4.d 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 completed no later than 60 days after the date the notice of the Proposal was given to the Regional Body.

5. **Declaration of Finding.**
  - a. The Regional Body shall meet to consider a Proposal. The Applicant shall be provided with an opportunity to present the Proposal to the Regional Body at such time.
  - b. The Regional Body, having considered the notice, the Originating Party's Technical Review, any other independent Technical Review that is made, any comments or objections including the analysis of comments made by the public, First Nations and federally recognized Tribes, and any other information that is provided under this Compact shall issue a Declaration of Finding that the Proposal under consideration:
    - i. Meets the Standard of Review and Decision;
    - ii. Does not meet the Standard of Review and Decision; or,
    - iii. Would meet the Standard of Review and Decision if certain conditions were met.
  - c. An Originating Party may decline to participate in a Declaration of Finding made by the Regional Body.
  - d. The Parties recognize and affirm that it is preferable for all members of the Regional Body to agree whether the Proposal meets the Standard of Review and Decision.
  - e. If the members of the Regional Body who participate in the Declaration of Finding all agree, they shall issue a written Declaration of Finding with consensus.
  - f. In the event that the members cannot agree, the Regional Body shall make every reasonable effort to achieve consensus within 25 days.
  - g. Should consensus not be achieved, the Regional Body may issue a Declaration of Finding that presents different points of view and indicates each Party's conclusions.
  - h. The Regional Body shall release the Declarations of Finding to the public.
  - i. The Originating Party and the Council shall consider the Declaration of Finding before making a decision on the Proposal.

#### **Section 4.6. Proposals Subject to Prior Notice.**

1. Beginning no later than five years of the effective date of this Compact, 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 5 million gallons per day or greater average in any 90-day period. Comments shall address whether or not the Proposal is consistent with the Standard of Review and Decision. The Originating Party shall provide a response to any such comment received from another Party.
2. A Party may provide notice, an opportunity to comment and a response to comments even if this is not required under paragraph 1 of this Section. Any provision of such notice and opportunity to comment shall be undertaken only after consulting the Applicant.

#### **Section 4.7. Council Actions.**

1. Proposals for Exceptions subject to Council Review shall be submitted by the Originating Party to the Council for Council Review, and where applicable, to the Regional Body for concurrent review.
2. The Council shall review and take action on Proposals in accordance with this Compact and the Standard of Review and Decision. The Council shall not take action on a Proposal subject to Regional Review pursuant to this Compact unless the Proposal shall have been first submitted to and reviewed by the Regional Body. The Council shall consider any findings resulting from such review.

#### **Section 4.8. Prohibition of New or Increased Diversions.**

All New or Increased Diversions are prohibited, except as provided for in this Article.

#### **Section 4.9. Exceptions to the Prohibition of Diversions.**

1. Straddling Communities. A Proposal to transfer Water to an area within a Straddling Community but outside the Basin or outside the source Great Lake Watershed shall be excepted from the prohibition against Diversions and be managed and regulated by the Originating Party provided that, regardless of the volume of Water transferred, all the Water so transferred shall be used solely for Public Water Supply Purposes within the Straddling Community, and:
  - a. All Water Withdrawn from the Basin shall 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 this criterion except if it:
    - i. Is part of a water supply or wastewater treatment system that combines water from inside and outside of the Basin;
    - ii. Is treated to meet applicable water quality discharge standards and to prevent the introduction of invasive species into the Basin;
    - iii. Maximizes the portion of water returned to the Source Watershed as Basin Water and minimizes the surface water or groundwater from outside the Basin;
  - b. If the Proposal results from a New or Increased Withdrawal of 100,000 gallons per day or greater average over any 90-day period, the Proposal shall also meet the Exception Standard; and,
  - c. If the Proposal results in a New or Increased Consumptive Use of 5 million gallons per day or greater average over any 90-day period, the Proposal shall also undergo Regional Review.
2. Intra-Basin Transfer. A Proposal for an Intra-Basin Transfer that would be considered a Diversion under this Compact, and not already excepted pursuant to paragraph 1 of this Section, shall be excepted from the prohibition against Diversions, provided that:
  - a. If the Proposal results from a New or Increased Withdrawal less than 100,000 gallons per day average over any 90-day period, the Proposal shall be subject to management and regulation at the discretion of the Originating Party.
  - b. If the Proposal results from a New or Increased Withdrawal 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 million gallons per day average over any 90-day period:

- i. The Proposal shall 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;
  - ii. The Applicant shall 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; and,
  - iii. The Originating Party shall provide notice to the other Parties prior to making any decision with respect to the Proposal.
- c. If the Proposal results in a New or Increased Consumptive Use of 5 million gallons per day or greater average over any 90-day period:
    - i. The Proposal shall be subject to management and regulation by the Originating Party and shall meet the Exception Standard, ensuring that Water Withdrawn shall be returned to the Source Watershed;
    - ii. The Applicant shall 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;
    - iii. The Proposal undergoes Regional Review; and,
    - iv. The Proposal is approved by the Council. Council approval shall be given unless one or more Council Members vote to disapprove.
3. Straddling Counties. A Proposal to transfer Water to a Community within a Straddling County that would be considered a Diversion under this Compact shall be excepted from the prohibition against Diversions, provided that it satisfies all of the following conditions:
    - a. The Water shall be used solely for the Public Water Supply Purposes of the Community within a Straddling County that is without adequate supplies of potable water;
    - b. 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;
    - c. The Proposal shall be subject to management and regulation by the Originating Party, regardless of its size;
    - d. There is no reasonable water supply alternative within the basin in which the community is located, including conservation of existing water supplies;
    - e. Caution shall be used in determining whether or not the Proposal meets the conditions for this Exception. This Exception should not be authorized unless it can be shown that it will not endanger the integrity of the Basin Ecosystem;
    - f. The Proposal undergoes Regional Review; and,
    - g. The Proposal is approved by the Council. Council approval shall be given unless one or more Council Members vote to disapprove.

A Proposal must satisfy all of the conditions listed above. Further, substantive consideration will also be given to whether or not the Proposal can provide sufficient

scientifically based evidence that the existing water supply is derived from groundwater that is hydrologically interconnected to Waters of the Basin.

4. **Exception Standard.** Proposals subject to management and regulation in this Section shall be declared to meet this Exception Standard and may be approved as appropriate only when the following criteria are met:
  - a. The need for all or part of the proposed Exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies;
  - b. The Exception will be limited to quantities that are considered reasonable for the purposes for which it is proposed;
  - c. All Water Withdrawn shall be returned, either naturally or after use, to the Source Watershed less an allowance for Consumptive Use. No surface water or groundwater from the outside the Basin may be used to satisfy any portion of this criterion except if it:
    - i. Is part of a water supply or wastewater treatment system that combines water from inside and outside of the Basin;
    - ii. Is treated to meet applicable water quality discharge standards and to prevent the introduction of invasive species into the Basin;
  - d. The Exception will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Basin with consideration given to the potential Cumulative Impacts of any precedent-setting consequences associated with the Proposal;
  - e. The Exception will be implemented so as to incorporate Environmentally Sound and Economically Feasible Water Conservation Measures to minimize Water Withdrawals or Consumptive Use;
  - f. The Exception will be implemented so as to ensure that it 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; and,
  - g. All other applicable criteria in Section 4.9 have also been met.

#### **Section 4.10. Management and Regulation of New or Increased Withdrawals and Consumptive Uses.**

1. Within five years of the effective date of this Compact, each Party shall 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, through a considered process, shall set and may modify threshold levels for the regulation of New or Increased Withdrawals in order to assure an effective and efficient Water management program that will ensure that uses overall are reasonable, that Withdrawals overall will not result in significant impacts to the Waters and Water Dependent Natural Resources of the Basin, determined on the basis of significant impacts to the physical, chemical, and biological integrity of Source Watersheds, and that all other objectives of the Compact are achieved. Each Party may determine the scope and thresholds of its program, including which New or Increased Withdrawals and Consumptive Uses will be subject to the program.

2. Any Party that fails to set threshold levels that comply with Section 4.10.1 any time before 10 years after the effective date of this Compact shall apply a threshold level for management and regulation of all New or Increased Withdrawals of 100,000 gallons per day or greater average in any 90 day period.
3. The Parties intend programs for New or Increased Withdrawals and Consumptive Uses to evolve as may be necessary to protect Basin Waters. Pursuant to Section 3.4, 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.

#### **Section 4.11. Decision-Making Standard.**

Proposals subject to management and regulation in Section 4.10 shall be declared to meet this Decision-Making Standard and may be approved as appropriate only when the following criteria are met:

1. All Water Withdrawn shall be returned, either naturally or after use, to the Source Watershed less an allowance for Consumptive Use;
2. 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 to the quantity or quality of the Waters and Water Dependent Natural Resources and the applicable Source Watershed;
3. The Withdrawal or Consumptive Use will be implemented so as to incorporate Environmentally Sound and Economically Feasible Water Conservation Measures;
4. The Withdrawal or Consumptive Use will be implemented so as to ensure that it 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;
5. The proposed use is reasonable, based upon a consideration of the following factors:
  - a. Whether the proposed Withdrawal or Consumptive Use is planned in a fashion that provides for efficient use of the water, and will avoid or minimize the waste of Water;
  - b. If the Proposal is for an increased Withdrawal or Consumptive use, whether efficient use is made of existing water supplies;
  - c. 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;
  - d. The supply potential of the water source, considering quantity, quality, and reliability and safe yield of hydrologically interconnected water sources;
  - e. 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 non-consumptive 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; and,

- f. If a Proposal includes restoration of hydrologic conditions and functions of the Source Watershed, the Party may consider that.

#### **Section 4.12. Applicability.**

1. **Minimum Standard.** This Standard of Review and Decision shall be used as a minimum standard. Parties may impose a more restrictive decision-making standard for Withdrawals under their authority. It is also acknowledged that although a Proposal meets the Standard of Review and Decision it may not be approved under the laws of the Originating Party that has implemented more restrictive Measures.
2. **Baseline.**
  - a. To establish a baseline for determining a New or Increased Diversion, Consumptive Use or Withdrawal, each Party shall develop either or both of the following lists for their jurisdiction:
    - i. A list of existing Withdrawal approvals as of the effective date of the Compact;
    - ii. A list of the capacity of existing systems as of the effective date of this Compact. The capacity of the existing systems should be presented in terms of Withdrawal capacity, treatment capacity, distribution capacity, or other capacity limiting factors. The capacity of the existing systems must represent the state of the systems. Existing capacity determinations shall be based upon approval limits or the most restrictive capacity information.
  - b. For all purposes of this Compact, volumes of Diversions, Consumptive Uses, or Withdrawals of Water set forth in the list(s) prepared by each Party in accordance with this Section, shall constitute the baseline volume.
  - c. The list(s) shall be furnished to the Regional Body and the Council within one year of the effective date of this Compact.
3. **Timing of Additional Applications.** Applications for New or Increased Withdrawals, Consumptive Uses or Exceptions shall be considered cumulatively within ten years of any application.
4. **Change of Ownership.** Unless a new owner proposes a project that shall result in a Proposal for a New or Increased Diversion or Consumptive Use subject to Regional Review or Council approval, the change of ownership in and of itself shall not require Regional Review or Council approval.
5. **Groundwater.** The Basin surface water divide shall be used for the purpose of managing and regulating New or Increased Diversions, Consumptive Uses or Withdrawals of surface water and groundwater.
6. **Withdrawal Systems.** The total volume of surface water and groundwater resources that supply a common distribution system shall determine the volume of a Withdrawal, Consumptive Use or Diversion.
7. **Connecting Channels.** The watershed of each Great Lake shall include its upstream and downstream connecting channels.
8. **Transmission in Water Lines.** Transmission of Water within a line that extends outside the Basin as it conveys Water from one point to another within the Basin shall not be considered a Diversion if none of the Water is used outside the Basin.
9. **Hydrologic Units.** The Lake Michigan and Lake Huron watersheds shall be considered to be a single hydrologic unit and watershed.

10. **Bulk Water Transfer.** A Proposal to Withdraw Water and to remove it from the Basin in any container greater than 5.7 gallons shall be treated under this Compact in the same manner as a Proposal for a Diversion. Each Party shall have the discretion, within its jurisdiction, to determine the treatment of Proposals to Withdraw Water and to remove it from the Basin in any container of 5.7 gallons or less.

#### **Section 4.13. Exemptions.**

Withdrawals from the Basin for the following purposes are exempt from the requirements of Article 4.

1. 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.
2. To use in a non-commercial project on a short-term basis for firefighting, humanitarian, or emergency response purposes.

#### **Section 4.14. U.S. Supreme Court Decree: Wisconsin et al. v. Illinois et al.**

1. Notwithstanding any terms of this Compact to the contrary, with the exception of Paragraph 5 of this Section, current, New or Increased Withdrawals, Consumptive Uses and Diversions of Basin Water by the State of Illinois shall be governed by the terms of the United States Supreme Court decree in Wisconsin et al. v. Illinois et al. and shall not be subject to the terms of this Compact nor any rules or regulations promulgated pursuant to this Compact. This means that, with the exception of Paragraph 5 of this Section, for purposes of this Compact, current, New or Increased Withdrawals, Consumptive Uses and Diversions of Basin Water within the State of Illinois shall be allowed unless prohibited by the terms of the United States Supreme Court decree in Wisconsin et al. v. Illinois et al..
2. The Parties acknowledge that the United States Supreme Court decree in Wisconsin et al. v. Illinois et al. shall continue in full force and effect, that this Compact shall not modify any terms thereof, and that this Compact shall grant the parties no additional rights, obligations, remedies or defenses thereto. The Parties specifically acknowledge that this Compact shall not prohibit or limit the State of Illinois in any manner from seeking additional Basin Water as allowed under the terms of the United States Supreme Court decree in Wisconsin et al. v. Illinois et al., any other party from objecting to any request by the State of Illinois for additional Basin Water under the terms of said decree, or any party from seeking any other type of modification to said decree. If an application is made by any party to the Supreme Court of the United States to modify said decree, the Parties to this Compact who are also parties to the decree shall seek formal input from the Canadian Provinces of Ontario and Québec, with respect to the proposed modification, use best efforts to facilitate the appropriate participation of said Provinces in the proceedings to modify the decree, and shall not unreasonably impede or restrict such participation.
3. With the exception of Paragraph 5 of this Section, because current, New or Increased Withdrawals, Consumptive Uses and Diversions of Basin Water by the State of Illinois are not subject to the terms of this Compact, the State of Illinois is prohibited from using any term of this Compact, including Section 4.9, to seek New or Increased Withdrawals, Consumptive Uses or Diversions of Basin Water.

4. With the exception of Paragraph 5 of this Section, because Sections 4.3, 4.4, 4.5, 4.6, 4.7, 4.8, 4.9, 4.10, 4.11, 4.12 (Paragraphs 1, 2, 3, 4, 6 and 10 only), and 4.13 of this Compact all relate to current, New or Increased Withdrawals, Consumptive Uses and Diversions of Basin Waters, said provisions do not apply to the State of Illinois. All other provisions of this Compact not listed in the preceding sentence shall apply to the State of Illinois, including the Water Conservation Programs provision of Section 4.2.
5. In the event of a Proposal for a Diversion of Basin Water for use outside the territorial boundaries of the Parties to this Compact, decisions by the State of Illinois regarding such a Proposal would be subject to all terms of this Compact, except Paragraphs 1, 3 and 4 of this Section.
6. For purposes of the State of Illinois' participation in this Compact, the entirety of this Section 4.14 is necessary for the continued implementation of this Compact and, if severed, this Compact shall no longer be binding on or enforceable by or against the State of Illinois.

#### **Section 4.15. Assessment of Cumulative Impacts.**

1. 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 5 years or each time the incremental Basin Water losses reach 50 million 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. This assessment shall:
  - a. Utilize the most current and appropriate guidelines for such a review, which may include but not be limited to Council on Environmental Quality and Environment Canada guidelines;
  - b. Give substantive consideration to climate change or other significant threats to Basin Waters and take into account the current state of scientific knowledge, or uncertainty, and appropriate Measures to exercise caution in cases of uncertainty if serious damage may result;
  - c. Consider adaptive management principles and approaches, recognizing, considering and providing adjustments for the uncertainties in, and evolution of science concerning the Basin's water resources, watersheds and ecosystems, including potential changes to Basin-wide processes, such as lake level cycles and climate.
2. The Parties have the responsibility of conducting this Cumulative Impact assessment. Applicants are not required to participate in this assessment.
3. Unless required by other statutes, Applicants are not required to conduct a separate cumulative impact assessment in connection with an Application but shall submit information about the potential impacts of a Proposal to the quantity or quality of the Waters and Water Dependent Natural Resources of the applicable Source Watershed. An Applicant may, however, provide an analysis of how their Proposal meets the no

significant adverse Cumulative Impact provision of the Standard of Review and Decision.

## **ARTICLE 5** **TRIBAL CONSULTATION**

### **Section 5.1. Consultation with Tribes**

1. In addition to all other opportunities to comment pursuant to Section 6.2, appropriate consultations shall occur with federally recognized Tribes in the Originating Party for all Proposals subject to Council or Regional Review pursuant to this Compact. Such consultations shall be organized in the manner suitable to the individual Proposal and the laws and policies of the Originating Party.
2. All federally recognized Tribes within the Basin shall receive reasonable notice indicating that they have an opportunity to comment in writing to the Council or the Regional Body, or both, and other relevant organizations on whether the Proposal meets the requirements of the Standard of Review and Decision when a Proposal is subject to Regional Review or Council approval. Any notice from the Council shall inform the Tribes of any meeting or hearing that is to be held under Section 6.2 and invite them to attend. The Parties and the Council shall consider the comments received under this Section before approving, approving with modifications or disapproving any Proposal subject to Council or Regional Review.
3. In addition to the specific consultation mechanisms described above, the Council shall seek to establish mutually agreed upon mechanisms or processes to facilitate dialogue with, and input from federally recognized Tribes on matters to be dealt with by the Council; and, the Council shall seek to establish mechanisms and processes with federally recognized Tribes designed to facilitate on-going scientific and technical interaction and data exchange regarding matters falling within the scope of this Compact. This may include participation of tribal representatives on advisory committees established under this Compact or such other processes that are mutually-agreed upon with federally recognized Tribes individually or through duly-authorized intertribal agencies or bodies.

## **ARTICLE 6** **PUBLIC PARTICIPATION**

### **Section 6.1. Meetings, Public Hearings and Records.**

1. The Parties recognize the importance and necessity of public participation in promoting management of the Water Resources of the Basin. Consequently, all meetings of the Council shall be open to the public, except with respect to issues of personnel.
2. The minutes of the Council shall be a public record open to inspection at its offices during regular business hours.

## **Section 6.2. Public Participation.**

It is the intent of the Council to conduct public participation processes concurrently and jointly with processes undertaken by the Parties and through Regional Review. To ensure adequate public participation, each Party or the Council shall ensure procedures for the review of Proposals subject to the Standard of Review and Decision consistent with the following requirements:

1. Provide public notification of receipt of all Applications and a reasonable opportunity for the public to submit comments before Applications are acted upon.
2. Assure public accessibility to all documents relevant to an Application, including public comment received.
3. Provide guidance on standards for determining whether to conduct a public meeting or hearing for an Application, time and place of such a meeting(s) or hearing(s), and procedures for conducting of the same.
4. Provide the record of decision for public inspection including comments, objections, responses and approvals, approvals with conditions and disapprovals.

# **ARTICLE 7**

## **DISPUTE RESOLUTION AND ENFORCEMENT**

### **Section 7.1. Good Faith Implementation.**

Each of the Parties pledges to support implementation of all provisions of this Compact, and covenants that its officers and agencies shall not hinder, impair, or prevent any other Party carrying out any provision of this Compact.

### **Section 7.2. Alternative Dispute Resolution.**

1. Desiring that this Compact be carried out in full, the Parties agree that disputes between the Parties regarding interpretation, application and implementation of this Compact shall be settled by alternative dispute resolution.
2. The Council, in consultation with the Provinces, shall provide by rule procedures for the resolution of disputes pursuant to this section.

### **Section 7.3. Enforcement.**

1. Any Person aggrieved by any action taken by the Council pursuant to the authorities contained in this Compact shall be entitled to a hearing before the Council. Any Person aggrieved by a Party action shall be entitled to a hearing pursuant to the relevant Party's administrative procedures and laws. After exhaustion of such administrative remedies, (i) any aggrieved Person shall have the right to judicial review of a Council action in the United States District Courts for the District of Columbia or the District Court in which the Council maintains offices, provided such action is commenced within 90 days; and, (ii) any aggrieved Person shall have the right to judicial review of a Party's action in the relevant Party's court of competent jurisdiction, provided that an action or proceeding for such review is commenced within the time frames provided for by the Party's law. For the purposes of this paragraph, a State or Province is deemed to be an aggrieved Person with respect to any Party action pursuant to this Compact.

- a. Any Party or the Council may initiate actions to compel compliance with the provisions of this Compact, and the rules and regulations promulgated hereunder by the Council. Jurisdiction over such actions is granted to the court of the relevant Party, as well as the United States District Courts for the District of Columbia and the District Court in which the Council maintains offices. The remedies available to any such court shall include, but not be limited to, equitable relief and civil penalties.
  - b. Each Party may issue orders within its respective jurisdiction and may initiate actions to compel compliance with the provisions of its respective statutes and regulations adopted to implement the authorities contemplated by this Compact in accordance with the provisions of the laws adopted in each Party's jurisdiction.
3. Any aggrieved Person, Party or the Council may commence a civil action in the relevant Party's courts and administrative systems to compel any Person to comply with this Compact should any such Person, without approval having been given, undertake a New or Increased Withdrawal, Consumptive Use or Diversion that is prohibited or subject to approval pursuant to this Compact.
  - a. No action under this subsection may be commenced if:
    - i. The Originating Party or Council approval for the New or Increased Withdrawal, Consumptive Use or Diversion has been granted; or,
    - ii. The Originating Party or Council has found that the New or Increased Withdrawal, Consumptive Use or Diversion is not subject to approval pursuant to this Compact.
  - b. No action under this subsection may be commenced unless:
    - i. A Person commencing such action has first given 60 days prior notice to the Originating Party, the Council and Person alleged to be in noncompliance; and,
    - ii. Neither the Originating Party nor the Council has commenced and is diligently prosecuting appropriate enforcement actions to compel compliance with this Compact.
4. Each of the Parties may adopt provisions providing additional enforcement mechanisms and remedies including equitable relief and civil penalties applicable within its jurisdiction to assist in the implementation of this Compact.

## **ARTICLE 8** **ADDITIONAL PROVISIONS**

### **Section 8.1. Effect on Existing Rights.**

1. Nothing in this Compact shall be construed to affect, limit, diminish or impair any rights validly established and existing as of the effective date of this Compact under State or federal law governing the Withdrawal of Waters of the Basin.
2. Nothing contained in this Compact shall be construed as affecting or intending to

affect or in any way to interfere with the law of the respective Parties relating to common law Water rights.

3. Nothing in this Compact is intended to abrogate or derogate from treaty rights or rights held by any Tribe recognized by the federal government of the United States based upon its status as a Tribe recognized by the federal government of the United States.
4. An approval by a Party or the Council under this Compact does not give any property rights, nor any exclusive privileges, nor shall it be construed to grant or confer any right, title, easement, or interest in, to or over any land belonging to or held in trust by a Party; neither does it authorize any injury to private property or invasion of private rights, nor infringement of federal, State or local laws or regulations; nor does it obviate the necessity of obtaining federal assent when necessary.

### **Section 8.2. Relationship to Agreements Concluded by the United States of America.**

1. Nothing in this Compact is intended to provide nor shall be construed to provide, directly or indirectly, to any Person any right, claim or remedy under any treaty or international agreement nor is it intended to derogate any right, claim, or remedy that already exists under any treaty or international agreement.
2. Nothing in this Compact is intended to infringe nor shall be construed to infringe upon the treaty power of the United States of America, nor shall any term hereof be construed to alter or amend any treaty or term thereof that has been or may hereafter be executed by the United States of America.
3. Nothing in this Compact is intended to affect nor shall be construed to affect the application of the Boundary Waters Treaty of 1909 whose requirements continue to apply in addition to the requirements of this Compact.

### **Section 8.3. Confidentiality.**

1. Nothing in this Compact requires a Party to breach confidentiality obligations or requirements prohibiting disclosure, or to compromise security of commercially sensitive or proprietary information.
2. A Party may take measures, including but not limited to deletion and redaction, deemed necessary to protect any confidential, proprietary or commercially sensitive information when distributing information to other Parties. The Party shall summarize or paraphrase any such information in a manner sufficient for the Council to exercise its authorities contained in this Compact.

### **Section 8.4. Additional Laws.**

Nothing in this Compact shall be construed to repeal, modify or qualify the authority of any Party to enact any legislation or enforce any additional conditions and restrictions regarding the management and regulation of Waters within its jurisdiction.

### **Section 8.5. Amendments and Supplements.**

The provisions of this Compact shall remain in full force and effect until amended by action of the governing bodies of the Parties and consented to and approved by any other

necessary authority in the same manner as this Compact is required to be ratified to become effective.

**Section 8.6. Severability.**

Should a court of competent jurisdiction hold any part of this Compact to be void or unenforceable, it shall be considered severable from those portions of the Compact capable of continued implementation in the absence of the voided provisions. All other provisions capable of continued implementation shall continue in full force and effect.

**Section 8.7. Duration of Compact and Termination.**

Once effective, the Compact shall continue in force and remain binding upon each and every Party unless terminated.

This Compact may be terminated at any time by a majority vote of the Parties. In the event of such termination, all rights established under it shall continue unimpaired.

**ARTICLE 9**  
**EFFECTUATION**

**Section 9.1. Repealer.**

All acts and parts of acts inconsistent with this act are to the extent of such inconsistency hereby repealed.

**Section 9.2. Effectuation by Chief Executive.**

The Governor is authorized to take such action as may be necessary and proper in his or her discretion to effectuate the Compact and the initial organization and operation thereunder.

**Section 9.3. Entire Agreement.**

The Parties consider this Compact to be complete and an integral whole. Each provision of this Compact is considered material to the entire Compact, and failure to implement or adhere to any provision may be considered a material breach. Unless otherwise noted in this Compact, any change or amendment made to the Compact by any Party in its implementing legislation or by the U.S. Congress when giving its consent to this Compact is not considered effective unless concurred in by all Parties.

**Section 9.4. Effective Date and Execution.**

This Compact shall become binding and effective when ratified through concurring legislation by the states of Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Wisconsin and the Commonwealth of Pennsylvania and consented to by the Congress of the United States. This Compact shall be signed and sealed in nine identical original copies by the respective chief executives of the signatory Parties. One such copy shall be filed with the Secretary of State of each of the signatory Parties or in accordance with the laws of the state in which the filing is made, and one copy shall be filed and retained in

the archives of the Council upon its organization. The signatures shall be affixed and attested under the following form:

In Witness Whereof, and in evidence of the adoption and enactment into law of this Compact by the legislatures of the signatory parties and consent by the Congress of the United States, the respective Governors do hereby, in accordance with the authority conferred by law, sign this Compact in nine duplicate original copies, attested by the respective Secretaries of State, and have caused the seals of the respective states to be hereunto affixed this        day of (month), (year).