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Joint Committee on Agency Rule Review

July 31, 2007

Dear Great Lakes Legislator,

PROTECT YOUR STATE AND THE WATERS OF THE GREAT LAKES!

Protecting the waters of the Great Lakes is important, but taking away private ground water rights and giving other states veto power over economic development opportunities in your state are not necessary to achieve this protection.

I am writing to share some concerns with the current proposed version of the Great Lakes Compact with you. It is unfortunate that state legislators were not more involved in the drafting of the Great Lakes Compact, but we still have time to make sure that the Compact is properly written to protect our states and our constituents.

To be clear, I strongly support the intent of the Compact – which is to prevent the mass diversion of Great Lakes waters outside of the Great Lakes Basin. However, I have several very legitimate concerns with the way in which the Compact is currently drafted. These concerns have been validated by several other professional sources.

These concerns are based not only on my role as a state senator but also as a successful constitutional and municipal lawyer for over twenty years. In addition, I've asked other legal experts to review the provisions of the Compact, including the Ohio State Bar Association's Environmental and Property Law groups. These other experts have validated my concerns and brought forward additional issues. Thus, I think it is vital that we work together to make the necessary changes to the Compact before its adoption. I welcome working with any legislators from other states to do this who would like to achieve this goal.

Preventing the diversion of Great Lakes Waters outside of the Great Lakes Basin is a laudable goal; a goal that I support. However, we need to keep in mind that the federal Water Resources Development Act already contains language preventing the out-of-basin withdrawal of water without the approval of the governors of the eight Great Lakes states. For this reason, we have ample opportunity to review carefully the contents of the Compact and fix its problems. The problems with the Compact include two major sets of concerns, which I will briefly outline in the following pages. The first set is a matter of state sovereignty, economic development and the concept of individual property rights in individual states. The second set of problems includes technical and legal problems within the structure and drafting of the Compact – most of which seem to consist of vague or conflicting terms that can be readily rectified.

I. State Sovereignty and Private Property Rights

Public Trust Language and Private Property Rights:
The language of the Compact states that "the Waters of the Basin are shared and held in trust by the states" (lines 187-188).[1] The definition of "Waters of the Basin" is written to include not only all surface waters, but also privately owned groundwater. While I realize that some states, such as Michigan, for some reason have or are attempting to move towards definitions of the public trust doctrine that include groundwater and privately held surface waters (such as drainage basins or irrigation ponds), this is not true in a number of other states, including Ohio. The concern, then, is that this provision in the Compact would effectively convert private surface and groundwater ownership rights of the citizens of these states into public trust property. This is especially troublesome in states like Ohio, where as recently as 2006 the Ohio Supreme Court held that groundwater is a compensable right for which compensation is necessary if it is taken. Some supporters of the Compact argue that Section 8.1 of the Compact addresses the private property right concerns. This argument is simply not correct as a matter of law. There are four subsections to Section 8.1. Section 8.1.1 only applies to current withdrawal rights. Section 8.1.2 disclaims any intent "to interfere with the law of the respective parties relating to common law water rights." While this may be some protection in some states, it assumes that common law is settled – and it is not settled in some states. Section 8.1.3 deals only with tribal rights. Section 8.1.4, by its very terms, deals only with "an Approval by a Party or the Council under this Compact." It therefore does not deal with the effect of the Compact itself, at all, only with regard to subsequent approvals made under its terms of, for example, new Proposed Diversions. Even if it did apply, it would not protect private water rights. If the Waters are held in trust, per Section 1.3, then saying the Compact authorizes no invasion of private rights or injury to private property likewise means little because "public trust" presumes the nonexistence of such private water rights. But, the main point is the entire section 8.1.4 only deals with the effect of approval by Parties or the Council subsequent to the Compact being entered into. It does not deal with the effect of the Compact itself. Again, this is extremely problematic in states where groundwater is considered part of the bundle of constitutionally protected private property rights.

Simple Drafting Solution: This major problem can be resolved in a rather simple way: delete the words "shared and held in trust" (lines 187-188) and instead insert the words "which shall be subject to reasonable regulation pursuant to this Compact." This simple drafting change still provides for reasonable regulation of groundwater in the Great Lakes Basin without taking that water for public ownership, as the Compact currently is drafted.

In-State Water Usage:
Under the Compact, new or increased water usage inside the state requires consent of the other seven states (lines 802-803, 828-830). Furthermore, approval of a state-issued permit for a new or increased withdrawal requires demonstration of no significant adverse impact on Waters and Water Dependent Natural Resources and the Applicable Source Watershed (lines 915-919). Not only does this mean that any other state can veto increased water usage in another state (lines 802-803), which will have a potential enormous impact on local economic development efforts, but this language also has creates a serious ambiguity as to the scale of impact that will preclude

[1] When noting line numbers for reference, I am referring to the line numbers of the enabling legislation that was introduced in the 126th Ohio General Assembly as SB 319. A line-numbered copy of SB 319 can be looked-up online at www.legislature.state.oh.us/search.cfm.

withdrawal approvals. Measurable impact on flow within just a few hundred feet of a stream (which occurs with many withdrawals) might be read to preclude approval of a permit. Thus, large economic development projects might not be able to obtain the required permit for in-basin water use; and the Compact could be used as a weapon to stop virtually any new economic development effort. To avoid this serious consequence the language in the compact must be revised to clarify that outright disapprovals are limited to significant impacts on the overall Source Watershed (defined as the drainage area of each Great Lake); while smaller scale impacts are considered and balanced under other provisions.

Simple Drafting Solution: These problems can be resolved by clarifying the Compact to read that a permit applicant must demonstrate no significant adverse impact on the Waters and Water Dependent Natural Resources of (1) the Basin considered as a whole and (2) the applicable Source Watershed considered as a whole, and to continue to give the state ultimate sovereignty over in-state water usage decisions.

II. Technical and Legal Problems within the Compact

There are several drafting problems and conflicts in the current version of the Great Lakes Compact. These are:

Third Party Causes of Action:
Under the Compact, any "aggrieved" third party has the right to sue to challenge actions by the Council (lines 1211-1228). This is an overly broad term and has no standard.[2] Third party lawsuits, litigated in federal court in Washington, D.C., will unduly delay the Council's approval and have a detrimental impact on state actions. In addition, this would be a departure from state jurisprudence in any state that does not permit such third party rights of action.

Simple Drafting Solution: This provision should be clarified by adding a definition for the broad term "aggrieved" or should be removed.

Public Meetings and Open Records:
The Compact requires that Council meetings be public, except personnel discussions (lines 1171-1173). This would require that Council discussions of litigation be held in an open meeting. This puts the Council at a distinct disadvantage in litigation matters. On the flip side of this issue, there is no guidance as to the public records aspect of the Council. Although the Compact implies that public records provisions apply, it is not clear what this means. Is it the public records laws of one of the states? Of all of the states? The federal FOI standard?

Simple Drafting Solution: These provisions should be amended to (at a minimum) include litigation as an exclusion from the public meetings and to provide clarification as to the requirements of the public records requirement.

Conflicting Provisions:
Legally, there are a number of conflicting provisions within the Compact. One of these relates to the severability of the Compact. The Compact explicitly states that provisions are "severable" (lines 1340-1346), but that if any provision is severed, the Compact is not binding on the State of

[2] See Seitz at paragraph 8 (copy of memo enclosed)

Illinois (1083-1087). The Compact goes on to say just the opposite: that "each provision" is material to the entire Compact (lines 1364-1365). This is a direct conflict that must be resolved. A legal document (which the Compact is) cannot be both severable and non-severable. A similar conflict arises in the provisions dealing with judicial determination. The dispute resolution provision (lines 1205-1206) conflicts with judicial review/suit rights (lines 1221-1223, 1229-1237, and 1244-1250). Which is it? ADR or judicial review? The Compact cannot mandate both. One or the other must be eliminated.

Other Select Miscellaneous Problems:

The Compact contains a number of other miscellaneous problems – too many to detail here. Among the concerns are that, once enacted, the Compact permits the Council to revise standards with no legislative oversight. This is problematic, especially in states such as Ohio, were the Ohio Constitution explicitly prohibits the delegation of legislative authority. In addition, the Compact requires each state to pay its share of the costs of the Council and administration of the Compact, but fails to explain what this means. Are all costs to be equal among the states (and is this fair to states with very little area in the Great Lakes Basin). Moreover, there is no legislative oversight of the costs – which essentially means each state legislature would be signing a blank check to the Council as each of our states would be required to pay its share of the cost. What if the legislative body of one state refused to make the appropriation?

Finally, there is one problem with the Compact that no one has mentioned. As a matter of Compact law, once each state and the US Congress has ratified the Compact, it becomes federal law. If we are being told that we must sign the Compact because Congress could change the WRDA at will, then we should do so realizing that Congress has the unfettered legislative right to change federal law to circumvent the purpose of the Compact. In other words, if the real fear is that our water will be shipped out West once the population shifts to that portion of the Country, and if the real hope is that passing the Compact will keep those Western states from getting their Congressmen and Congresswomen to change the WRDA to ship water out west, then the Compact legally accomplishes nothing because Congress can pass a law in the future permitting such diversion, despite the Compact.

It is my hope to continue to speak with other interested and similar concerned legislators over the next few weeks. I look forward to discussing the Great Lakes Compact and the need to make the changes discussed above at the Traverse City, Michigan meeting of the Council of State Governments.

Thank you for your time and willingness to consider these points. Please feel free to call me on my cell phone at (216) 904-0029 with any additional questions or comments.

Sincerely,

Tim

Timothy J. Grendell
Ohio 18th Senate District
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