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PROGRESS ON IMPLEMENTATION OF GREAT LAKES COMPACT AND AGREEMENT

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UPDATED OCTOBER 12, 2011*

Overview

Almost three years after the Compact became effective, progress on implementation of the framework continues to be mixed. All of the Great Lakes states except for Ohio have created water withdrawal permitting programs, and some are notable successes. So far, Wisconsin's consideration of the City of Waukesha's diversion proposal, the first to require approval by the states, has been thorough and responsive. But the states have made little progress on water conservation and efficiency. By December 8, 2010, the states should have implemented the three conservation requirements under the Compact. It still appears that all states have failed to comply with one or more of these requirements. The Compact Council and Regional Body have not used their oversight authority to ensure compliance.

Meanwhile, the primary requirements of the Agreement have not yet come into force. In July, Québec adopted regulations under its implementing law to effectuate the diversion provisions. When Ontario adopts its own regulations on diversions, the clock will begin to run for the Canadian provinces on baseline reporting, conservation and efficiency, and water management programs.

The requirements and their deadlines (for states) are:

- **By December 8, 2009**, a list of baseline volumes for withdrawals, consumptive uses and diversions must have been submitted to the Compact Council and Regional Body. These volumes are to be used to grandfather in existing users.
- **By December 8, 2010**, water conservation and efficiency goals and objectives must have been developed; a water conservation and efficiency program must have been implemented; and water conservation measures must have been promoted. Strong programs and measures are needed to ensure water will be used thoughtfully, and to ensure there will be enough for the future.

* This report is based on legal research as well as information gathered from governmental officials and stakeholders across the region. The report is continually being updated to reflect new information and initiatives by the states and provinces. For this reason, the report should be considered a work in progress.

- **By December 8, 2013**, withdrawals and diversions must be registered and a water management program to regulate new or increased withdrawals and consumptive uses must be developed. The registration program is necessary to know how water is being used in the region. A comprehensive water management program will protect ecosystems from the impact of new or increased withdrawals.

Illinois

Under the Compact, Illinois' water use is governed by the Supreme Court consent decree on the Chicago diversion. Thus, Illinois is only required to comply with the conservation and registration requirements. On conservation, Illinois issued state conservation goals and objectives in December 2010. Conservation practices are required for each user of Lake Michigan water from the Chicago diversion; these practices include adoption of ordinances and development of public programs. The Illinois DNR announced in August that it intends to strengthen standards for plumbing fixtures and unaccounted-for-flow, but it has not yet issued revisions to its rules. Groundwater withdrawals are not required to adopt any practices. On registration, Illinois already collects information on in-basin withdrawals through the Lake Michigan allocation program. All persons who withdraw at least 100,000 gallons per day (gpd) of surface and groundwater in the state are required to report information to the Illinois State Water Survey's Illinois Water Inventory Program.

Bottom line: While Illinois has taken steps to meet the conservation requirements, the state conservation and efficiency goals and objectives should be expanded to be more consistent with regional goals and objectives. Illinois must also update its Lake Michigan Water Allocation Rules & Regulations, improve its information and education component, and promote conservation measures beyond a once-a-year newsletter to permittees.

Indiana

When Indiana approved the Compact, it passed legislation that provided a skeletal framework for implementation. On baselines, Indiana submitted a list of baseline volumes based on the total capability reported by facilities with the capability to withdraw more than 100,000 gpd of surface and groundwater. On conservation, the Indiana Department of Natural Resources has drafted an emergency rule to create a voluntary program. On water management, thresholds have already been set for a regulatory program: in excess of 5 million gallons per day (mgd) from Lake Michigan surface water; 100,000 gpd from specified salmonid streams and other watercourses determined by rule; and 1 mgd from any other source. The DNR has drafted an emergency rule on the details of the permitting process. Both rules are expected to be finalized soon. The DNR will then solicit public input on permanent rules in the next year to two years.

Bottom line: Indiana has moved to develop emergency rules for a voluntary conservation program and for its permitting program. Once the rules become public, stakeholders will be able to assess whether these rules comply with the Compact requirements.

Michigan

When Michigan approved the Compact, it passed comprehensive implementing legislation. On baselines, Michigan submitted a baseline list using reported capacity or highest annual amount withdrawn. On conservation, registrants and permit holders must acknowledge in an annual report that they have reviewed conservation measures for their sector. An advisory council issued a report in November 2009 that included a draft conservation initiative with goals and objectives identical to the regional goals and objectives. The report recommended that the initiative be released for public review and comment. The state did not release the initiative for public comment, but did adopt the goals and objectives in December 2010. On water management, a permit is required for development of new or increased cumulative withdrawal capacity of more than 2 mgd from all waters of the state. Persons who develop capacity to withdraw in excess of 100,000 gpd from streams, rivers, or groundwater are required to use an internet-based assessment tool to determine if there is an adverse resource impact to fish populations in the local watershed. Unfortunately, the tool is severely underfunded.

Bottom line: Michigan must tailor its goals and objectives to the state's needs and then expand its conservation program beyond the current focus on promoting conservation measures, based on these goals and objectives. The state must also put into place an assessment process for lake withdrawals and review the self-certification conservation requirement in its permitting program to ensure that it is applying the standard required by the Compact. Re-creating the advisory council would help with these tasks. Michigan's groundbreaking tool is at risk unless the Legislature restores general funding or ends the fee exemption for agricultural uses.

Minnesota

Minnesota did not pass separate legislation to implement the Compact and is instead relying on existing programs. On baselines, the state used information gathered through its appropriation permits, which are required for water withdrawals that exceed 10,000 gallons per day or one million gallons per year. The state reported the baseline capacity or the approval amount, whichever was higher. On conservation, the Commissioner of the Department of Natural Resources is charged with creating a conservation program for the state. The DNR requires conservation for all water users subject to the permitting program. Water conservation measures for public water suppliers serving more than 1,000 people include a requirement for a water emergency and conservation plan, adoption of a conservation rate structure, annual reporting of water use by customer categories, and the implementation of demand reduction

measures. The DNR has posted state goals and objectives that describe the state's programs. On water management, the DNR has discretion to consider a broad range of factors in determining whether to grant an appropriation permit, including the information in the Compact standard.

Bottom line: Minnesota leads the Great Lakes states in conservation requirements, particularly for public water suppliers, and in its comprehensive water management program. But the state must develop conservation and efficiency goals and objectives that include specific objectives consistent with regional objectives, and ensure that it uses its discretion so that the appropriation permits in the basin meet all of the decision-making criteria in the Compact.

New York

When New York approved the Compact, the Legislature directed an advisory council to make recommendations on implementation, including a method for establishing baseline volumes, a conservation program, and a water management program. The council's report was due in September 2009 but was not issued until October 2010. On baselines, the Department of Environmental Conservation submitted a list of facilities using information from its registration program for withdrawals in excess of 100,000 gpd. On conservation and water management, a departmental bill to create statewide programs became law on August 16, 2011. Beginning February 15, 2012, withdrawals with a threshold capacity of 100,000 gpd will be required to obtain a permit once the DEC has issued regulations. Existing withdrawals are permitted at the maximum water withdrawal capacity reported to the DEC. The DEC must develop a conservation program based on the regional conservation and efficiency goals.

Bottom line: New York finally has implementing legislation in place. The state should move quickly to develop state conservation and efficiency goals and objectives; create a conservation program; and adopt regulations on the water management program so that permitting can move forward.

Ohio

When Ohio approved the Compact, the General Assembly left most of the details to an advisory board. The board's report was initially due in June 2010, but after an extension was submitted to the General Assembly on December 15, 2010. On baselines, the Ohio Department of Natural Resources submitted a list using reported capacity information after advisory board review. On conservation, the board recommended conservation and efficiency goals and objectives as well as a voluntary conservation program. The proposed program was developed jointly by industry and environmental organizations; among the recommendations is an annual water conservation congress to share best practices. The General Assembly passed implementing legislation that removed the DNR's authority to develop a conservation program by rule and created a water management program that failed to comply with minimum Compact requirements, but the bill was vetoed by Governor Kasich in July. Revised legislation is

expected to be introduced this fall. Bills supported by the environmental-conservation community have been introduced but have not been given a hearing.

Bottom line: Ohio must finalize the state goals and objectives and create a conservation program, preferably using the ideas developed by the advisory board. The state must also create a water management program that complies with the Compact.

Ontario

Ontario passed legislation in 2007 to enable its commitments under the Agreement. In the summer of 2009, Ontario released a discussion paper (*Stewardship – Leadership – Accountability: Safeguarding and Sustaining Ontario’s Water Resources for Future Generations*) for public comment that outlines proposals relating to: (i) methods of determining baseline amounts and a screening process for establishing consumptive use; (ii) Ontario’s water conservation and efficiency strategy; and (iii) intra-basin transfer regulations, with different rules for municipal versus other types of water use. Broad public consultation was held on these proposals, but regulations have not been posted. On baselines, Ontario has done preliminary work but has not yet submitted its list. On conservation, Ontario proposed a strategy, including goals and objectives, in its 2009 discussion paper. In 2010, the “Water Opportunities and Water Conservation Act” was passed, which sets the framework to drive innovation in clean water technology, sustain water infrastructure and to conserve Ontario’s water. On water management, Ontario began a permitting program for water withdrawals greater than 50,000 liters per day (approximately 13,000 gpd) prior to 1990, which was amended significantly in 2005. Proposed regulations on the water conservation strategy and intra-basin transfers have been delayed.

Bottom line: Under the Agreement, Ontario does not have to meet the primary deadlines until it finalizes implementing measures on diversions. Once regulations are finalized, Ontario must submit its baseline list within one year; ensure compliance with the conservation requirements within two years; and ensure its existing water management program satisfies the Agreement within five years.

Pennsylvania

When Pennsylvania approved the Compact, it passed legislation that provided a skeletal framework for implementation. On baselines, the General Assembly directed that baseline volumes be based on either permit limitations or the physical capacity of existing systems. Pennsylvania has submitted its baseline list. On conservation, the Department of Environmental Protection is administering its voluntary water conservation program through an online water resources technical assistance center. The center, operated by Save Water PA, was developed by the Pennsylvania Environmental Council and Pennsylvania Organization for Watersheds and Rivers. The goal of the center is to promote voluntary water conservation and to provide technical assistance on water resource issues. The center is tasked with developing state goals

and objectives. On water management, the General Assembly set the thresholds for the regulatory program at 100,000 gpd for withdrawals and 5 mgd for consumptive uses. The criteria and procedures for review and approval of proposals are to be adopted through rule.

Bottom line: Pennsylvania's online technical assistance center is an innovative approach to promoting water conservation. But the state is ultimately responsible for adopting conservation and efficiency goals and objectives and expanding its conservation program beyond the center to reach those objectives. DEP must also issue rules to flesh out the requirements for the permitting process.

Québec

In 2009, Québec passed legislation that enables the implementation of the Agreement: *An Act to affirm the collective nature of water resources and provide for increased water resource protection* (Water Act). Québec adopted regulations on diversions, baseline reporting and registration on July 8, 2011. On baselines, Québec has not yet submitted its list. On conservation, Québec is working on developing water conservation and efficiency goals and objectives; it is anticipated that these will be completed soon. A program is expected by 2013. A strategy on the conservation and wise use of drinking water may be ready before then. Québec adopted a National Water Policy in 2002, which includes some conservation and efficiency measures. On water management, the 2009 legislation requires permits for new or increased withdrawals and consumptive uses of at least 379,000 liters per day (approximately 100,000 gpd), or another threshold set by regulation. Québec has created an online reporting system. In 2010, a regulation was passed to collect fees for water use.

Bottom line: Québec has finalized implementing measures on diversions. Once Ontario finalizes its own regulations, Québec must then submit its baseline list within one year; ensure compliance with the conservation requirements within two years; and ensure its water management program satisfies the Agreement within five years.

Wisconsin

When Wisconsin approved the Compact, it passed comprehensive state implementing legislation. On baselines, the Legislature directed that the amount be the maximum hydraulic capacity of the most restrictive component of the water supply system, or the approval limit under other statutes governing water withdrawals. Wisconsin compiled and submitted its baseline list for large in-basin water users within the statutory time period. On conservation, Wisconsin was the first to develop conservation and efficiency goals and objectives and has adopted statewide goals and objectives. Per the state's implementing legislation, the Department of Natural Resources is required to develop a voluntary statewide water conservation and efficiency program as well as a voluntary and mandatory basin program, to be implemented by rule. To date, the DNR has finalized rules on mandatory conservation measures for new or

increased withdrawals in the basin and for diversion exceptions. The DNR is working on aspects of a voluntary statewide program, including funding research on best management practices. On water management, beginning December 8, 2011, a general permit will be required under the implementing legislation for withdrawals that average 100,000 gpd or more in any 30-day period and an individual permit will be required for withdrawals that equal 1 mgd or greater for any 30 consecutive days. Proposed general permits have been released for public comment. New or increased withdrawals equaling at least 10 mgd for any 30 consecutive days must meet the Compact decision-making standard, unless the applicant demonstrates that the withdrawal will have an average water loss of less than 5 mgd in every 90-day period, in which case the withdrawal must meet a state decision-making standard. The remaining new or increased withdrawals exceeding 1 mgd for any 30 consecutive days must meet the state standard. Rules have been proposed to implement related permitting requirements, but they have not been finalized. Finally, the DNR is currently considering an application by the City of Waukesha to divert water from Lake Michigan. As a community within a "straddling county," Waukesha must not only seek approval from Wisconsin, but must also obtain regional review and approval by all of the Great Lakes states.

Bottom line: Wisconsin was the first to establish water conservation and efficiency goals and objectives, and has successfully issued rules on mandatory conservation requirements, registration and reporting, and fees. The DNR must still implement a water conservation program for existing users; finalize rules on permitting and public water systems; and develop rules on water loss and the public participation process for diversions. It is critical that the permitting rule be finalized before users are required to obtain permits on December 8th. A public participation rule is also important because the DNR is currently considering a diversion proposal by Waukesha.