

Water Withdrawal Regulation

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Subject: Issues Related to the Compact's Water Withdrawal Regulation Commitments

Attached is the above-referenced document for your review. The general public is invited to email their comments to: compactcoordinator@dnr.state.oh.us

ISSUES RELATED TO THE COMPACT'S WATER WITHDRAWAL REGULATION COMMITMENTS

Developed by staff with the ODNR, Division of Water
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REVIEW OF WATER WITHDRAWAL REGULATION COMMITMENTS

Section 4.10 of the Compact requires that each state will, by December 2013, 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. By implementing Section 4.10 of the Compact, the state will meet the requirement of Section 4.3 to manage and regulate new or increased withdrawals within its jurisdiction in accordance with the Compact. Section 4.3 also prohibits the state from approving a withdrawal proposal subject to regulation if it is inconsistent with the Compact or the decision-making standard, and until regional review requirements have been met (regional review is required only if the proposal results in a new or increased consumptive use greater than 5 mgd). Section 4.4 of the Compact prohibits any proposed withdrawal subject to regulation from being undertaken unless it has been approved by the state.

Section 4.11 of the Compact describes the decision-making standard by which proposals are to be considered. Proposals subject to regulation under Section 4.10 will be approved only when: (1) all water withdrawn will be returned, either naturally or after use, to the source watershed less an allowance for consumptive use; (2) the withdrawal will be implemented so that it will result in no significant individual or cumulative adverse impacts to the waters and water dependent natural resources and the applicable source watershed [for Ohio, the Lake Erie Basin]; (3) the withdrawal will be implemented so as to incorporate environmentally sound and economically feasible water conservation measures; (4) the withdrawal will be implemented so that it is in compliance with all applicable municipal, state and federal laws and regional, interstate, and international agreements; (5) the proposed use is reasonable.

Reasonability under Section 4.11 requires consideration of whether: (a) the proposed withdrawal is planned in a fashion that provides for the efficient use of the water; (b) efficient use is made of existing water supplies; (c) there is a balance between the economic development, social development, and environmental protection aspects of the proposed withdrawal and other existing or planned withdrawals sharing the water source; (d) the supply potential of the water source is adequate, considering quantity, quality, reliability, and safe yield of interconnected water sources; (e) the probable adverse impacts caused by the proposed withdrawal to other uses of water or to the waters the Basin are appropriately avoided or mitigated. If the proposal includes restoration of hydrologic conditions and functions of the source watershed, these factors may also be considered.

Certain withdrawals are exempted from regulation pursuant to Section 4.13 of the Compact: (1) those made 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; and (2) those for use in a non-commercial project on a short-term basis for firefighting, humanitarian, or emergency response purposes.

Section 4.12 of the Compact requires that applications for new or increased withdrawals and consumptive uses be considered cumulatively within ten years of any application, instructs that the surface water basin divide will be used in regulating new or increased withdrawals and consumptive uses of ground water as well as surface water, and indicates that withdrawers will be defined in terms of the distribution system served rather than by each individual source of water.

Under Section 4.10 of the Compact, each state sets its own threshold levels for regulating new or increased withdrawals. The threshold levels are to be set so as to assure an effective and efficient water management program and ensure that (1) uses overall are reasonable; (2) withdrawals overall will not result in significant impacts to the physical, chemical, and biological integrity of source watersheds (in Ohio, the Lake Erie Basin); and (3) all other objectives of the Compact are achieved. In addition, each state may determine the scope of its program, including which new or increased withdrawals and consumptive uses will be subject to the program.

§1522.05(B) prohibits the governor, the ODNR, or any other state agency from adopting rules or implementing any program regulating the use, withdrawal, consumptive use, or diversion of water pursuant to Sections 4.10 and 4.12.2 of the compact unless the general assembly enacts legislation authorizing the implementation of the program or adoption of rules. This does not prohibit the continued implementation and enforcement of other existing laws, rules, or programs regulating the use, withdrawal, or consumptive use of water.

The General Assembly provided additional guidance as to its intended interpretation of several Compact provisions related to water withdrawal regulation: (1) that the Compact and its implementation do not abrogate any private property rights established under the ORC or the common law of Ohio (§1522.08); that the enactment of the Compact does not confer or extend any public trust rights and does not confer any proprietary ownership rights over water to the state or any public entity in the state (§1522.08); that Section 4.11.2 of the Compact will be interpreted to require that a withdrawal or consumptive use will be implemented so as to ensure that the withdrawal or consumptive use will result in no significant individual or cumulative adverse impacts on the quantity or quality of the waters and water dependent natural resources of the basin considered as a whole; or the applicable source watershed of Lake Erie considered as a whole (§1522.07); and that impacts of a withdrawal or consumptive use on the quantity or quality of waters and water dependent natural resources of more localized areas that affect less than the basin or an applicable source watershed as a whole are to be considered a part of the evaluation of reasonable use as provided in Section 4.11.5 of the Compact (§1522.07).

The Advisory Board, created pursuant to Section 3 of Am. HB 416, has been convened for the purpose of developing recommendations for legislation necessary to implement and effectuate the requirements and purposes of the Compact. The Board's recommendations are to address (among other things) the evaluation and recommendation of the threshold levels to be included in the implementing legislation for regulating new or increased water withdrawals in the state, considering at least all of the following: (a) the number of withdrawals that will be regulated; (b) the relative impact of those withdrawals; (c) the practicality of regulating those withdrawals; and (d) the alternatives that are available in the establishment of a permitting program in order to meet the water management objectives of this state.

Since §1522.05(B) prohibits the state from implementing Section 4.10 of the Compact unless the General Assembly enacts legislation authorizing its implementation, one of the main tasks of the Advisory Board is to make recommendations for legislation to fulfill the water withdrawal regulation requirements.

ISSUES THAT NEED TO BE ADDRESSED IN THE LEGISLATION

Issue 1: Recommendations regarding threshold levels for regulating new or increased withdrawals need to be developed

The Compact allows the states latitude in setting the threshold levels for their withdrawal regulation programs. Threshold levels will be consistent with the Compact if they: (1) assure an effective and efficient water management program, (2) ensure that uses overall are reasonable; (3) ensure that withdrawals overall will not result in significant impacts to the physical, chemical, and biological integrity of the source watershed [for Ohio, the Lake Erie Basin]; and (4) do not interfere with the objectives of the Compact (Section 4.10.1).

Activities in the other Great Lakes states relevant to setting threshold levels may be of interest. Following is an informal summary of the threshold levels that have been set.

Indiana: A permit is required for new or increased 90-day average withdrawals greater than 5.0 mgd from Lake Michigan, 100,000 gpd from specified salmonid streams and other watercourses determined by rule, and 1.0 mgd from any other source. The permitting process applies the Compact decision-making standard.

Michigan: Prohibition on new or increased "large quantity withdrawals" that cause adverse resource impacts (i.e., one or more cumulative total withdrawals supplying a common distribution system greater than 100,000 gpd average in any consecutive 30-day period). Property owners who intend to develop such capacity are required to use an internet-based assessment tool that helps determine whether a withdrawal causes an adverse resource impact. Depending on the severity of the impact and the withdrawal capacity, withdrawers may be required to self-certify implementation of reasonable water conservation measures or obtain a permit. A permit is required for the development of

any new or increased withdrawal capacity greater than 2.0 mgd. A permit is granted if the withdrawal meets the Compact decision-making standard.

Minnesota: A water appropriation permit is required for withdrawals greater than 10,000 gpd or 1.0 mg/year, except for domestic uses serving less than 25 persons for general residential purposes. A broad range of factors is considered in determining whether to grant a permit, but specific requirements apply only to agricultural irrigation, public water supplies, water level maintenance, dewatering, and mining. It is not clear that the Compact's decision-making standard is part of permit consideration.

New York: An Advisory Council will recommend threshold levels for regulating new or increased withdrawals and the establishment of a permitting program or other alternative programs to meet the water management objectives of the state by September 2009.

Pennsylvania: The Environmental Quality Board is authorized to adopt regulations governing the criteria and procedures for review and approval of proposals for withdrawals and consumptive uses consistent with the decision-making standard in the Compact. The threshold levels for the Great Lakes Basin: new or increased 90-day average withdrawals greater than 100,000 gpd, or new or increased 90-day consumptive uses greater than 5.0 mgd.

Wisconsin: A general permit, granted if applicable water regulation approvals are obtained, is required for new or increased 30-day average withdrawals between 100,000 gpd and 1.0 mgd. An individual permit is required for new or increased 30-day average withdrawals greater than 1.0 mgd. Withdrawals up to 10 mgd with consumptive use less than 5.0 mgd must meet a state decision-making standard. Withdrawals greater than 10.0 mgd with an average consumptive use greater than 5 mgd must meet the Compact's decision-making standard.

Issue 2: The withdrawal rights of existing withdrawers as well as small withdrawers with capacities less than the threshold levels triggering regulation may need to be clarified & protected.

Existing withdrawers as well as new or increased withdrawers with capacities less than the threshold levels set by the legislation will be excluded from regulation. However, it may be appropriate to include a provision that explicitly protects their withdrawal rights under Ohio common law (i.e., stating that, even though they will not be permitted withdrawals, their right to withdraw and use water is not inferior to the rights of those who are permit holders).

Section 4.11 of the Compact contains criteria to be used in considering the reasonability of withdrawals and consumptive uses pursuant to the decision-making standard. While these criteria appear to be generally compatible with the criteria listed in ORC 1521.17 (which the courts use to make reasonability determinations under Ohio common law), it

may be appropriate to harmonize and clarify how these two sets of criteria will be coordinated.

Issue 3: New and increased withdrawals implemented after the effective date of the Compact but before the effective date of the state's withdrawal regulation legislation need to be addressed.

There are sure to be new or increased withdrawals undertaken after the effective date of the Compact but before the enactment of Ohio's water withdrawal regulation legislation. These withdrawals will be legal (assuming they are reasonable under Ohio common law) because Ohio will not yet have regulatory authority over withdrawals. And they will be allowable under the Compact, which does not require the states to regulate withdrawals until five years after its effective date (i.e., by December 2013). However, the new withdrawals and the increased withdrawal capacities won't be reflected on the Baseline List. So, the legislation will need to acknowledge that withdrawals that exist at the time the state legislation becomes effective are to be exempted from regulation as existing withdrawals, even though they are not on the Baseline List.

Issue 4: A means for providing credit for the withdrawal capacities of small existing withdrawals not on the Baseline List needs to be included in the legislation

Concern has been expressed that existing withdrawals that are excluded from the Baseline List will not get "credit" for their existing capacities later, when a future increase in capacity may trigger regulation. A provision can be added to the legislation to provide for existing withdrawals too small to be on the Baseline List to have their existing capacities acknowledged (by providing appropriate documentation) for purposes of determining the quantity of their increased capacity under the regulatory program.