



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 5

TO: MEMBERS OF THE SPECIAL COMMITTEE ON GREAT LAKES WATER RESOURCES COMPACT

FROM: Rachel E. Letzing, Senior Staff Attorney, and John Stolzenberg, Chief of Research Services

RE: Comparison of Review and Approval Authorities for New or Increased Withdrawals and Diversions

DATE: September 26, 2006 (Revised October 10, 2006)

The enclosed table identifies the authorities which have jurisdiction to review and approve different types of new or increased water withdrawals and diversions under current law versus under the Great Lakes-St. Lawrence River Basin Water Resources Compact (hereafter, the “compact”). This table does not address or compare the review and approval procedures for new or increased withdrawals and diversions, or the standards used to determine whether to approve or deny a proposed withdrawal or diversion.

At the September 7, 2006 meeting, committee members began discussion of the differences between approval authority for certain types of projects under current law and under the compact. This Memo and the enclosed table build on that discussion and are intended to provide a broad overview of review and approval authority for specific types of projects. As such they do not provide a detailed legal or policy analysis of the various authorities under which approvals are given. Further, the table does not present an exhaustive list of projects which may require review or approval under current law and the compact.

The revised version of the Memo includes a row in the table for a diversion for a public water supply to straddling communities under 100,000 gpd, with return flow and corrections in other table entries.

The table does not address large diversions reviewed under the Boundary Waters Treaty of 1909.

Current Law

The current law addressed in the table focuses on relevant laws in the Wisconsin statutes and the federal Water Resources Development Act (WRDA).

Current Wisconsin laws regarding water withdrawals and diversions identified in the table are summarized in Memo No. 1, *State Law Regarding Water Withdrawals and Diversions* (August 31, 2006).

The U.S. Congress enacted WRDA in 1986 and subsequently amended it in 2000. WRDA grants each Great Lakes Governor the power to veto any proposal that would remove water from the basin:

No water shall be diverted or exported from any portion of the Great Lakes within the United States, or from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion or export is approved by the Governor of each of the Great Lake States. [42 U.S.C. s. 1962d-20 (d).]

WRDA further requires unanimous approval of the Governors before any federal agency can study the feasibility of diverting water for use outside the Great Lakes basin.

WRDA provides minimal standards and has had minimal case law interpreting it. For example, WRDA does not set forth standards for how the gubernatorial approval process should be conducted or enforced; nor does it delegate oversight of that process to a federal agency. WRDA does not provide a judicial remedy for Great Lakes states to challenge a Governor's decision. Further, WRDA lacks an express or implied private right of action to enforce compliance with its terms. [*Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of America, Inc.*, 203 F.Supp.2d 853 (W.D. Mich. 2002).] WRDA also "contains no quantity requirement for triggering a need for member approval." [*Id.* at 858.] On its face, WRDA is silent on whether it applies to consumptive uses within the basin and whether it applies to groundwater. Since WRDA was enacted, there has been disagreement among the states about whether WRDA applies to both surface water and groundwater.

At the committee's first meeting on September 7, 2006, DNR staff expressed their view that given WRDA's lack of detail regarding the definition of "diversion," or a standard for determining when WRDA applies, and the absence of a decision-making process, the Great Lakes Governors currently have the ability to decide how and under what circumstances to implement WRDA. DNR staff have interpreted WRDA to apply only to surface water from the Great Lakes or tributaries and to any amount taken out of the basin which is not returned. However, there is no unity among the Great Lakes Governors on how WRDA does or does not apply. For example, proposals including return flows have been approved and others with return flows have been denied under WRDA. Until there is further guidance from Congress or the courts on the applicability of WRDA, it is difficult to assert with certainty if WRDA applies to future proposals with return flow.

Great Lakes-St. Lawrence River Basin Water Resources Compact (“the compact”)

The authorities identified in the table having review or approval authority under the compact are based on provisions in the compact, as set forth in LRB-0058/P1. The table does not address which state statutes would be used to implement the compact.

Legend for the Comparison Table

An “X” means that review or approval by the specified authority or authorities is required or authorized under the specified state statute, WRDA, or the compact.

A blank cell means review or approval is not required or authorized under the specified state statute, WRDA, or the compact.

A “?” means it is unclear whether an approval under WRDA is required.

A “P” means the withdrawal or diversion is prohibited under state statute, WRDA, or the compact.

An “S” means there is a decision-making standard specified in the statute or the compact.

An “R” means there is a standard review process specified in the statute or the compact.

REL:JES:tlu

Enclosure