WMC Comments on the Great Lakes Water Resources Compact – LRB 0058/P1

General Comments

Wisconsin Manufacturers & Commerce (WMC) submits the following comments on the preliminary draft of LRB 0058/P1 to implement the Great Lakes Water Resources Compact in Wisconsin. WMC is a business trade organization with more than 4,300 members statewide in the manufacturing, energy, commercial and service sectors. Roughly one-fourth of the private sector employees in Wisconsin are employed by WMC members. Our members have a substantial interest in the outcome of the implementing legislation because it has a direct bearing on the attractiveness of our state's regulatory framework, as well as our ability to compete in a global marketplace.

Unfortunately, we believe the implementing legislation, as currently proposed, will add significant cost and uncertainty to Wisconsin's regulatory climate. If unaltered, the Compact will place our industry at a serious competitive disadvantage with forty-two other states who will not be subject to the sweeping permit requirements contemplated by this legislation. As a general matter, we believe the Compact goes way beyond the original goal of water *quantity* protection by reaching into water quality, land and air regulation, and even climate change. What began years ago as an effort to conserve the Great Lakes water resource has morphed into a complex and far-reaching web of expansive new regulation.

We are also concerned that Wisconsin loses significant autonomy as it relates to environmental regulation, including permitting and conservation programs. Many provisions of the Compact, which we comment on below, strip state decision-making away from Wisconsin regulators in favor of policies and regulation established by a regional, unelected body. This is an unacceptable loss of regulatory control which threatens Wisconsin's ability to tailor rules and regulations that are reflective of our unique circumstances. In some cases, we also believe the loss of autonomy will allow other states to second-guess the economic development plans of Wisconsin businesses and industries.

The Compact also utilizes many broad definitions and undefined terms as the basis of its regulatory framework, which in turn creates regulatory uncertainty and increases the likelihood of subjective and inconsistent application, interpretation and enforcement. This problem is compounded by the broad authority under the Compact of citizens to file unfounded but expensive lawsuits designed to block development.

The comments which follow represent our concerns and proposed solutions with respect to the Compact, as reflected in LRB 0058/P1. It is important to note that many, if not all, of these concerns have been voiced multiple times through the public hearing process in the years during which the Council of Great Lakes Governors was negotiating and drafting the final version of the Compact. Unfortunately, many of industry's concerns were ignored during that

process. Having said that, we are very appreciative of the opportunity to advance these concerns through the state legislative process.

Section 281.343(1e) Definitions

There are a number of definitions, as described below, which create problems for industry by broadly expanding the regulatory reach of the Compact to other areas of environmental regulation, including air, land and climate. Further, overly broad and poorly defined definitions promote regulatory uncertainty by leaving key aspects of the Compact open to wide interpretation and inconsistent application. WMC recommends the following changes:

- **The definition of "Basin ecosystem" or "Great Lakes-St. Lawrence River Basin ecosystem"** as proposed in sub. (cm) is overly broad, beyond the scope of simply protecting Great Lakes water, and promotes regulatory uncertainty. In addition to applying the Compact's regulatory regime to water, this definition encompasses air, land, living organisms and humankind. Because this definition is referenced in the definition of "cumulative impacts" in sub. (g), future projects subject to the decision-making standard in sub. (4r) will be required to meet a standard for cumulative impacts that includes air, land, living organisms and humankind, in addition to water. This is unfair and unacceptable.

    - **Proposed Solution:** remove the reference to this definition from the "cumulative impacts" definition under sub. (g). Alternatively, see the recommendation below with respect to cumulative impacts.

- **The Definition of "Cumulative impacts"** as proposed in sub. (g) creates an unfair, subjective and unclear regulatory standard that will serve as a serious disincentive to conduct new or increased business in Wisconsin among water users. Because meeting a cumulative impact standard is a necessary element of receiving permit approval under the decision-making standard in sub. (4r), even minor projects, by the definition in sub. (g), may be disallowed because of "*past, present or foreseeable*" future withdrawals or consumptive uses. In essence, the cumulative impacts standard allows regulators in this state or other Compact states to shut down a project based upon subjective criteria. Furthermore, sub. (4z) requires that the standards for cumulative impacts be reassessed at least every 5 years, which shall form the basis for the decision-making standard. As a result, the cumulative impacts standard will be a continually moving target, and permitting standards will be based upon the outcome of future impact assessment analyses. Businesses simply cannot operate under a regulatory paradigm that involves this degree of uncertainty, and under which regulatory approvals will be based upon factors beyond the merits and scope of the applicant's own project.

    - **Proposed Solution:** Delete the definition of "Cumulative impacts" under sub. (g), and delete all references to "cumulative impact(s)" from the Compact.

- **The Definition of "Environmentally sound and economically feasible water conservation measures"** under sub. (i) is unclear and unworkable. The definition does not define that which constitutes "environmentally sound" or "economically feasible." The lack of clarity is particularly troubling because this definition constitutes one of the five elements that must be met to receive a permit approval under the decision-making standard in sub. (4r). The definition also references "best practices" which are not defined, and seeks to define economic feasibility based upon a comparison between economic costs and "environmental costs" which cannot be readily quantified.

    - **Proposed Solution:** Change the definition under sub. (i) as follows: *"Environmentally sound and economically feasible water conservation measures" mean those measures, methods, technologies, or practices for efficient water use that are environmentally sound, technically feasible and available, and economically feasible and cost effective based on economic costs which consider the particular facilities and processes involved, the age of equipment and facilities involved, the processes employed, and other economic cost factors that would diminish the economic feasibility of the measures.*

- **The Definition of "Product"** in sub. (o) is unclear and overly complicated. Although poorly worded, the definition in sub. (o)1. appears to be straightforward in terms its application to things that are produced, part of a production process or intended for intermediate or end use consumers. The clarifier in sub. (o)2. is also straightforward, but the provisions in sub. (o)3-5. only add uncertainty to an already muddled definition.

    - **Proposed Solution:** Delete the provisions in subs. (o)3. through (o)5.

- **The Definition of "Water dependent natural resources"** in sub. (w) is unfair and unacceptable because is expands the regulatory requirements of the Compact to "the interacting components of land, water and living organisms affected by the waters of the basin." This broad regulatory overreach is particularly troubling because it applies impacts on land and living organisms to significant regulatory areas such as the conservation and efficiency standard under sub. (4b), the exception standard for diversions under (4n), the threshold for new or increased withdrawals or consumptive uses under (4p), the decision-making standard under (4r), and the cumulative impact assessments under (4z). As a result, the regulatory scope of the Compact is dramatically expanded beyond water regulation, and into impacts on land and living organisms – an expansion sufficiently broad to include just about anything. Again, industry cannot operate under a regulatory framework with such a high degree of regulatory uncertainty.

    - **Proposed Solution:** Delete the definition under sub. (w) and delete all references to "Water dependent natural resources" from the Compact.

Section 281.343(2) Organization

The broad grant of "necessary and convenient" authority to act outside the limits of the basis under sub. (g) goes beyond what is necessary for the Council to undertake its duties.

- **Proposed Solution:** Delete the second (2nd) sentence in sub. (g) in its entirety.

Section 281.343(3) General Powers And Duties

- The provision under sub. (a)2. which allows the Council to change the standard of review and decision is an unacceptable departure from the regulatory certainty under which businesses must conduct their operations. When businesses make investments, allocate resources, and plan for their day-to-day operations, they need to know the rules of the game. Allowing something as fundamental as the decision-making standard to be revised by the Council is something industry cannot live with.
    - **Proposed Solution:** Delete the authority under sub. (a)2. which allows the Council to revise the standard of review and decision. A change of this magnitude should trigger the need to amend the Compact itself, and seek Congressional approval for that amendment.
- We are very concerned by the loss of state regulatory autonomy resulting from sub. (a)3., which contains a mandatory requirement that the Council "shall adopt and promote ***uniform and coordinated*** policies for water resources conservation and management in the basin" (emphasis added). Combined with the broad authority under sub. (c)1. to "promulgate and enforce such rules and regulations as may be necessary for the implementation and enforcement of this compact," this provision appears to take significant discretion away from individual states to enact voluntary, state-specific conservation measures.
    - **Proposed Solution:** Conservation requirements are adequately addressed in other sections of the Compact. Delete the second (2nd) sentence in sub. (a)3. in its entirety.
- Another significant concern related to state autonomy and the inappropriate consolidation of regulatory authority in the Council appears in sub. (c)1. As noted above, this provision grants the Council the authority to "promulgate and enforce such ***rules and regulations*** as may be necessary ***for the implementation and enforcement of this compact***" by simply noticing and conducting a public hearing (emphasis added). We do not believe it is appropriate to give the unelected Council the authority to promulgate "rules and regulations" with which Wisconsin businesses would be required to comply under penalty of enforcement. Adding another layer of regulation beyond existing state, federal and local government rules is unwarranted and unacceptable. Although we recognize that the Council must have the requisite authority to carryout its functions and duties, it should not have the authority to establish and enforce regulations.

- **Proposed Solution:** Delete sub. (c)1. in its entirety.

- Sub. (d)2. gives the Council the authority to review the water conservation programs of each state, and make findings on whether these programs are meeting the terms of the Compact. Taken together with the Council's own authority to promulgate rules and regulations to enforce the Compact in sub. (c)1., we are concerned that this provision represents another instance where the Council could override state autonomy relative to water conservation requirements.

    - **Proposed Solution:** Again, we believe that water conservation issues are adequately addressed in other portions of the Compact. Delete sub. (d)2. in its entirety.

Section 281.343(4b) Water Management And Regulation; Water Conservation And Efficiency Programs

- The Compact directs the Council to identify basin-wide water conservation and efficiency objectives to assist states in writing their own water conservation programs. The Compact establishes very specific goals upon which water conservation objectives are to be based. Some of these goals simply do not make sense in the context of water conservation programs. For example, the goal in sub. (a)1. seeks to ensure, through water conservation, "the improvement of the waters and water dependent natural resources." This goal is more consistent with a water quality standard, as opposed to water conservation. As such, it is an inappropriate expansion of the water conservation mission. Similarly, the goal in sub. (a)2. seeks to ensure the protection of the ecosystem integrity. It is unclear how one would demonstrate protection of the ecosystem through efforts to conserve water use.

    - **Proposed Solution:** Delete sub. (a)1. and (a)2. as these goals are clearly beyond the scope of water conservation programs.

- Sub. (b) sets forth the duty of each state to (1) develop water conservation goals and objectives ***consistent with the goals and objectives set by the Council***; and (2) develop either a mandatory or voluntary water conservation and efficiency program based upon the state's own goals and objectives (emphasis added). At first blush, it is unclear why the Compact requires states to adopt the Council's water conservation goals and objectives, while giving each state the authority to implement their conservation program based upon their own goals and objectives. However, it becomes clear that under sub. (c), the Council will revise their own conservation and efficiency goals and objectives five (5) years later, <u>and states will be required to "regard" the Council's revised objectives when implementing their own programs.</u> Making matters worse, the Council's revised conservation goals will be based upon the nebulous and subjective cumulative impact assessment under sub. (4z), an unfair and untenable standard under which businesses could not operate with necessary regulatory certainty.

- **Proposed Solution:** Subs. (b) and (c) are another example of the erosion of state autonomy to make state-specific water conservation decisions that reflect the unique needs and characteristics of water use inherent to each state. In an effort to restore state autonomy, we propose to revise sub. (b) to read as follows *"(b) Within 2 years of the effective date of this compact, each party shall develop its own water conservation and efficiency goals and objectives, and shall develop and implement a voluntary water conservation and efficiency program 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, and make this annual assessment available to the public."* In addition, we recommend deletion of sub. (c) in its entirety.

- Sub. (e) requires states to adopt either a voluntary or mandatory water conservation program that applies to "all, including existing, basin water users." This appears to include all residential users of Basin water, as well as industrial users. This provision conveys the appearance that states have wide latitude in establishing the content of the conservation programs, inasmuch as they have the option of doing something voluntary as opposed to mandatory. However, the second sentence requires that these programs "need to adjust to new demands and the potential impacts of cumulative effects and climate." This provision is very unclear and subjective, and we have serious concerns with respect to how it will be interpreted or measured in practice. In addition, we strenuously object to the inappropriate broadening of the scope of the proposed Compact into climate issues.

    - **Proposed Solution:** Delete the second (2nd) sentence in sub. (d) in its entirety.

Section 281.343(4d) Water Management And Regulation; Party Powers And Duties

- We are concerned with the language in sub. (c), which prohibits a state from approving a permit if it "is ***inconsistent with this compact*** or the standard of review and decision ***or any implementing rules or regulations promulgated thereunder***" because it appears to dramatically expand the criteria with which a permit applicant must comply as a condition of receiving a permit. Specifically, this provision implies that in addition to meeting the decision-making standard under sub. (4r), an applicant must also comply with every provision in the Compact itself, and any rules or regulations promulgated under the Compact. Businesses need a clear definition of compliance requirements, and the benchmarks by which their applications will be approved or disapproved. However, applying the entire Compact to permit approval invites regulatory uncertainty by injecting numerous subjective terms open to wide interpretation into the permit approval process. As a result, industry is left to comply with a regulatory framework that is likely to be applied inconsistently, and that does not provide applicants with a clear definition of what is expected of them.

- **Proposed Solution:** The decision-making standard, as the name implies, should be the standard upon which permit approvals will be based. Although we believe the decision-making standard needs refinement, as described later in these comments, it should be the sole basis by which projects are judged on the basis of permitting. As such, we recommend deleting references under sub. (c) which require a basis for permit approval beyond the decision-making standard.

Section 281.343(4h) Water Management And Regulation; Regional Review

- Regional review of permit applications has often been portrayed as applying only in limited circumstances, to very large scale projects or diversions. However, it is clear from sub. (a)6. that the regional body may, by a simple majority vote, conduct a regional review of any project that it determines to be "regionally significant" or "potentially precedent setting." Neither of these criteria are defined, nor is the regional body required to demonstrate that a proposal meets either criteria before conducting a regional review. As such, this provision essentially allows the regional body to review any proposal it sees fit, simply by casting a majority vote. Because the state is not allowed to issue a decision on a permit until after the regional review is complete, this provision could add substantial and costly delay to the permit approval process.

    - **Proposed Solution:** We do not believe it is desirable to allow other states to review Wisconsin projects that would not otherwise trigger regional review, nor do we think it is helpful to have other states (or Canadian provinces) who compete with Wisconsin for job creation to be in the position of reviewing the details of a project, or second-guessing our regulators. Furthermore, the provision is sub. (a)6. is in apparent conflict with sub. (b), which reserves the determination on whether a proposal is subject to regional review to the originating party. For these reasons, we suggest deleting sub. (a)6. in its entirety.

- Sub. (b)3.b. would allow the DNR to request regional review of any application, even if regional review is not required. For the same reasons mentioned above, we do not believe this is good public policy, nor do we believe it is warranted from a regulatory standpoint.

    - **Proposed Solution:** Delete sub. (b)3.b. in its entirety.

- Taken together, subs. (d)3. and (d)4. allow individual members of the regional body, or the regional body as a whole, to conduct their own technical review of a proposal to determine whether it meets the decision-making standard. Again, we are concerned that this process would result in unnecessary delays in the permit approval process, and we do not believe it is helpful to have other states second-guessing Wisconsin regulators.

    - **Proposed Solution:** Delete subs. (d)3. and (d)4. in their entirety.

Section 281.343(4p) Water Management And Regulation; Management And Regulation of New or Increased Withdrawals and Consumptive Uses.

- The language in sub. (a) is intended to establish the duty of each state to create a program to manage new or increased withdrawals and consumptive uses. However, the language is unnecessarily broad to the extent that we believe it inappropriately expands the scope of regulation and fosters confusion by adding undefined and subjective terms as the basis upon which states are required to establish threshold levels.

    - **Proposed Solution:** In order to add clarity to this section, and remove seemingly conflicting provisions, we suggest the following change: *(a) Within 5 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. 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.*

Section 281.343(4r) Water Management And Regulation; Decision-Making Standard.

The decision-making standard forms the basis upon which each state will determine whether a proposed new or increased withdrawal or consumptive use may be approved. In order to receive a permit approval, an applicant must meet each of five (5) specific criteria. These criteria have considerable significance to the regulated community because failure to meet *any* of the five criteria would result in failure to meet the decision-making standard as a whole. We address each of the five approval criteria below.

- The criteria in sub. (a) is unambiguous and makes clear what is expected of applicants from a regulatory standpoint. We suggest no changes.

- The language in sub. (b) presents substantial regulatory uncertainty, and increases the likelihood of inconsistent application by utilizing subjective and poorly defined terms and standards. Please see our comments above on the definition of "cumulative impacts" and "water dependent natural resources" for illustration. **Proposed Solution:** In order to add clarity and consistency to the application of this criteria, we suggest modifying it to read "*(b) The withdrawal or consumptive use will be implemented so as to ensure that the proposal will result in no significant individual adverse impact to the quantity of the waters of the applicable source watershed;"*

- Our comments in the "definitions" section above reflect our concerns with the term "environmentally sound and economically feasible water conservation measures," and those same concerns apply to the use of that term in the approval criteria under sub. (c).

Furthermore, we object to the insertion of a site-specific water conservation requirement as the basis of permit approval. The Compact already contemplates conservation goals applicable to all users, so adding another layer of conservation requirements to the permit approval process is duplicative. It also ignores the fact that cost drivers present a significant incentive for water users to conserve water. Market forces and profitability considerations will drive water conservation and efficiency programs without the need for a "command and control" conservation requirement that forms the basis of a permit condition. **Proposed Solution:** Delete the approval criteria under sub. (c) in its entirety.

- The language in the approval criteria for sub. (d) is clear on its face. However, it is unclear what authority the Wisconsin DNR has to make determinations with regard to whether a withdrawal or consumptive use complies with applicable municipal or federal laws. **Proposed Solution:** Consider refining this language such that DNR will review projects based upon only those aspects of the law that the agency has the authority to enforce and interpret.

- We have serious concerns with the implications of the approval criteria under sub. (e), which requires applicants to demonstrate that their project is "reasonable." It would be difficult to imagine a more broad and subjective permit condition than a showing that something is "reasonable." The six-part "reasonableness" test listed within sub. (e) does absolutely nothing to help define what is necessary to meet the "reasonable" criteria. In fact, by adding absurd conditions such as balancing "social development" as a reasonableness factor, the provision broadens the interpretation to infinite possibilities. The entire "reasonable" permit criteria under sub. (e) appears to have been added to the Compact as a back door that allows state regulators to deny any project that would otherwise meet the decision-making standard by simply stating the proposal is not "reasonable." This is patently unfair, and creates a subjective and uncertain regulatory environment in which businesses cannot operate. **Proposed Solution:** Delete the approval criteria under sub. (e) in its entirety.

Section 281.343(4t) Water Management And Regulation; Applicability.

- The baseline determination factors listed under sub. (b) have significant bearing on whether an existing facility is actually grandfathered for permitting purposes under the Compact. Although many interested parties have often portrayed the Compact as grandfathering existing water users, the language used in the baseline determination section under sub. (b) is unclear, and raises significant doubt. Capacity factors for existing facilities may be considered when establishing the baseline for permitting triggers relative to new or increased withdrawals or consumptive uses. However, the language under sub. (b)1.b. seeks to arbitrarily restrict a facility's capacity to "the most restrictive capacity information." We are concerned that this restriction will force existing users to sacrifice existing capacity based upon water usage during this snapshot in time. In other words, facilities that are currently operating below capacity (either because of economic or conservation-related factors) would be forced to surrender their capacity under the terms of the proposed Compact. This is unfair, and punishes

facilities that currently find themselves in an economic downtown, or who have chosen to limit their own water consumption for conservation purposes.

- **Proposed Solution:** Modify the baseline determination factors under sub. (b) such that facilities will be grandfathered based upon a baseline that reflects the facility's maximum capacity.

Section 281.343(4z) Water Management And Regulation; Assessment of Cumulative Impacts.

- We have already discussed in other sections of these comments our concerns with respect to the unfair, subjective and adverse policy implications of cumulative impact assessments. Our concerns regarding the impact of this nebulous regulatory policy, and the corresponding impact on regulatory uncertainty, are illustrated in the language of sub. (a). This provision requires a periodic assessment of the cumulative impacts associated with withdrawals, consumptive uses and diversions at least every 5-years, but perhaps even more often. This periodic assessment, according to the Compact, "shall form the basis for a review of the standard of review and decision, council and party regulations, and their application." In other words, the application of cumulative impacts on the decision-making standard and state regulations is likely to be a moving target that redefines itself at least every five years. The periodic assessment also constitutes a back-door process for expanding the scope of regulation to include items such as "climate change" and the undefined but infinitely broad "significant threats to basin waters."

  - **Proposed Solution:** Consistent with prior comments, we suggest deleting the cumulative impact assessment provision under sub. (4z), and all references thereto, in its entirety.

Section 281.343(7r) Dispute Resolution and Enforcement; Enforcement.

- This section of the Compact confers broad citizen suit authority to litigate various decisions made by state permitting authorities, and to sue employers merely based upon the allegation that a permit should have been required for a given activity. For example, citizens, other states, and Canadian provinces are allowed to sue under, sub. (a) through administrative law procedures, as well as judicial review in circuit court. The types of actions that we believe could be litigated under this provision include decisions on the scope or thresholds applicable to new or increased withdrawals or consumptive uses, or whether the establishment of conservation programs meet the terms of the Compact. We believe litigation in these areas is unwarranted and undesirable.

  - **Proposed Solution:** Delete sub. (a) in its entirety.

- Sub. (c)1. allows citizens to sue employers based upon an allegation that a new or increased withdrawal or consumptive use is prohibited, or required regulatory approval. This authority to litigate opens the door to costly and time-consuming lawsuits, which, in all likelihood, may be without merit. A law-abiding business who is complying with all applicable regulations could find itself in the position of having to spend time and money defending a decision to undertake a withdrawal, for example. Wisconsin businesses should not be forced to spend money to clear their good name in the context of lawsuits lacking merit. We believe the DNR is fully capable of enforcing the law against a bad actor without the need to expand the growing trend of lawsuit abuse by creating a brand new standing to sue businesses.

    - **Proposed Solution:** Restrict the applicability of the standing to sue under sub. (c)1. by removing references to "aggrieved person." Correspondingly, delete the provisions in (c)3. which apply to lawsuits filed by an aggrieved person.