



# Waukesha Water Utility

SERVING WAUKESHA SINCE 1886

115 DELAFIELD STREET  
WAUKESHA, WI 53188-3615

Telephone: (262) 521-5272 • Fax: (262) 521-5265 • E-mail: waukwu@execpc.com

TO: Senator Neal Kedzie, Chair  
Special Committee on the Great Lakes Water Resources Compact

FM: Dan Duchniak, General Manager  
Waukesha Water Utility

CC: Rachel Letzing  
John Stolzenberg  
Wisconsin Legislative Council

DT: December 6, 2006

RE: Summary of proposed amendments to the draft compact legislation

At your request, I have prepared a summary of the motion I made at the November meeting of the Legislative Council Special Committee on the Great Lakes Water Resources Compact. My motion was to create a definition of tributary groundwater in order to clarify the scope of the draft compact legislation. That summary is below.

However, after discussing the issue with several committee members, I wish to propose an *alternative* amendment that clarifies the application of the Water Resources Development Act (WRDA) in Wisconsin, instead of clarifying the proposed compact. I believe some members may be more comfortable with this approach, and request that the new amendment be taken up first. A summary of the alternative is attached.

Although the original amendment to clarify the proposed compact with a definition of tributary groundwater could also be adopted, it is not essential if the alternative amendment is adopted, since groundwater rights established under or prior to WRDA are recognized and grandfathered by the proposed compact.

## Summary of original amendment

The Special Committee on the Great Lakes Water Resources Compact is reviewing the proposed compact agreed to by the Great Lakes governors. However, many of the terms in this proposed compact are undefined or ambiguous, leaving it up to the Legislature to provide clarity and certainty about the proposed implementing legislation by defining terms.

One of the agreement's most important definitions is that of "waters of the basin" or "basin water." Those terms are defined to include "tributary groundwater," but

“tributary groundwater” is not defined. This is especially important for the Wisconsin Legislature to define, since the groundwater divide in southeastern Wisconsin is not in the same location as the surface water divide.

I proposed at the November meeting to create the following definition:

***“Tributary groundwater” means groundwater that would naturally flow toward the Great Lakes in the absence of human activities that influence that flow.***

**Legal analysis:**

§ 281.343(4t)(e) says the *surface* water divide is used for regulating *new or increased* diversions (only). No provision in the proposed compact says the surface water divide is used in any other circumstance.

“Waters of the basin” must be interpreted to *include tributary groundwater that is outside the surface water divide (but within the groundwater divide)*. The alternative – to interpret the proposed compact as only applying to groundwater within the surface water divide – would make § 281.343(4t)(e) and its specific limitation on the use of the surface divide to new or increased activities superfluous, violating the rules of statutory interpretation.<sup>1</sup>

**Practical analysis:**

Defining “tributary groundwater” by its natural flow (as proposed in the motion) clarifies that the boundaries of the basin will be defined by the predevelopment groundwater divide when determining *existing* withdrawals and diversions. Existing withdrawals and diversions of tributary groundwater would be listed by the state and would be grandfathered under the compact as currently drafted. See page 43, lines 4-7, § 281.343(7).

The definition does not affect the compact provisions regulating *new and increased* withdrawals and diversions. The compact is clear that the “surface water divide shall be used for the purpose of managing and regulating new or increased diversions, consumptive uses, or withdrawals of surface water and groundwater.” See page 34, lines

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<sup>1</sup> Wisconsin and U.S. Supreme Court law is well settled that in construing statutes, effect should be given to each word, clause and sentence in a statute and that a construction that would render any portion of a statute superfluous should be avoided whenever possible. See, e.g., *Kollasch v. Adamany*, 104 Wis.2d 552, 563 (1981); *State v. Dept. of Industry, Labor and Human Relations*, 101 Wis.2d 396 (1981); *Cooper v. Aviall*, 534 U.S. 157, 167 (2004); *US v. Nordic Village*, 503 U.S. 30, 35-36 (1992); *Hoffman v. Conn. Dept. of Income Maintenance*, 492 U.S. 96, 103 (1989); and *US v. Menasche*, 348 U.S. 528, 538-39 (1955).

Likewise, in interpreting various statutory sections, courts must, if it is possible, harmonize and reconcile them. *Fontana v. Fontana-On-Geneva Lake*, 69 Wis. 2d 736,742 (1975). Sections of a statute relative to the same subject should be construed to give effect to each provision. *In re Schrank's Estate*, 202 Wis. 107, 108 (1930).

19-21, § 281.343(4t)(e). Thus, the surface water divide is used for determining straddling communities, straddling counties, etc.

The amendment, then, clarifies that existing withdrawals and diversions of tributary groundwater that occur in areas *outside of the surface water divide but within the groundwater divide* are recognized and grandfathered as existing withdrawals or diversions. It has no other impact in the areas outside of the surface water divide but within the groundwater divide.

For areas *within the surface water divide*, the amendment clarifies that groundwater that naturally flows toward the Great Lakes is covered by the proposed compact, regardless of the effects of human influences on the direction of the groundwater flow. The regulation of new and increased withdrawals is based on the surface water divide.

#### **Summary of alternative amendment**

Please see the attached memo from Godfrey & Kahn describing the alternative amendment, which clarifies the application of WRDA in Wisconsin.