

MEMORANDUM

April 9, 2007

To: Steve Stover, OSBA

FROM: Louis L. McMahon, Esq.

RE: Great Lakes Compact Legislation Analysis

You have asked that members of the Environmental Law Committee of the Ohio State Bar Association with an interest in Great Lakes issues provide a response to an inquiry from members of the Ohio General Assembly with respect to the proposed Great Lakes Compact legislation, HB574. The Environmental Law Committee surveyed its members and to date has received two brief replies supporting swift passage of the legislation.

The following analysis, therefore, should be considered solely as the comments of Louis L. McMahon and should not be imputed to the Environmental Law Committee, any of its members, or the law firm of Thompson Hine LLP.

This memorandum focuses on the proposed legislation's impact on Ohio law related to real property water rights, public trust issues, potential for takings of those property rights, miscellaneous drafting considerations, and other policy notes arising from the text of the Bill. It is not a comprehensive analysis of the policy goal of limiting diversions of water to or from the Great Lakes Basin. Nor is it a complete analysis of the implications of the Compact's implementation.

I. Short Answer: "Held in Trust" Finding Creates Unnecessary Ambiguity.

HB574 contains a proposed "legislative finding" that, on its face, contradicts Ohio law of real property water rights. The language would create a very unfortunate ambiguity between authorization regarding public and private rights related to water, despite the Compact's express savings clauses. Removing the ambiguity noted above is necessary to avoid any claim regarding a massive takings of private real property water rights in Ohio that would dwarf the budgetary tumult caused by the *RTG* decision.¹

At a minimum, Ohio should not pass the Compact legislation until each State formally acknowledges that 1) public trust rights are not created or extended to the detriment of private

¹ *State, ex rel. R.T.G., Inc., v. State*, 98 Ohio St. 3d 1 (2002).

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property rights, and 2) existing and future JEDDs in Ohio qualify as "Straddling Communities." The better course is to simply delete the unnecessary "held in trust" finding because it is superfluous.

Additional drafting comments and policy considerations also are offered.

II. A Legislative Finding That Water is "Public" and "Shared and Held in Public Trust" Can Create New Rights Today or in the Future.

A. Real Property Water Rights and Public Trust Rights in Ohio

Ohio law recognizes real property rights in riparian water,² groundwater,³ and littoral water.⁴ Ohio law recognizes that private property owners have the right to dam a non-navigable stream and to exclude the public.⁵ In Ohio, streams and water bodies that are "navigable" are open to the public; those that are considered "non-navigable" are considered private.⁶

Private riparian rights are not set in stone, but include any beneficial use of water that an owner (including the owner of riparian rights separated from the riparian fee estate) may make of the water, without injuring other users.⁷ The very nature of the "reasonable use" riparian rights system is to allow a flexible water rights regime that changes over time.⁸

In contrast to private property rights in water, Ohio law recognizes only specific "public trust" rights in "public" waters. The Fleming Act of 1917, currently codified at R.C. 1506.10-.11, declares that the waters and submerged lands of Lake Erie, to the natural shoreline, are and always have been owned by the State of Ohio in trust for the people of Ohio. Public trust rights to "navigable" waters in Ohio exclusive of Lake Erie are common law public trust rights affirmed in court decisions.⁹ Ohio statutes and the Ohio Constitution are silent on inland public trust rights in water.

² *Mansfield v. Balliett*, 65 Ohio St. 451 (1902)

³ *McNamara v. Rittman*, 107 Ohio St. 3d 243 (2005).

⁴ *State, ex rel. Squire, v. City of Cleveland*, 150 Ohio St. 303 (1943)

⁵ *Portage Cty. Bd. of Commissioners v. City of Akron*, 109 Ohio St. 3d 106 (2006); *East Bay Sporting Club v. Miller*, 118 Ohio St. 300 (1928).

⁶ *State, ex rel. McElroy, v. City of Akron*, 173 Ohio St. 189 (1962).

⁷ R.C. 1521.17; Rest. 2d, Chap. 41, Introductory Note to Topic 3.

⁸ *Id.*

⁹ Determining what waters are "navigable" and open to the public is a vexing question in Ohio. Not all waters that are capable of floating a canoe are "navigable." *Ohio Water Serv. Co. v. Ressler*, 173 Ohio St. 33 (1962); *Portage Cty v. Akron*, 109 Ohio St. 3d 106 (2006) (municipal reservoir not open to recreational navigation based on a claim

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Recognized public trust rights in Ohio waters are limited to rights to fishery, water commerce and navigation.¹⁰ Navigation includes both commercial navigation and recreational navigation.¹¹

B. Relevant Compact Provisions and Statutory Provisions Leave Open Ambiguity

1. Relevant provisions regarding public trust

The proposed Compact language declares that each state legislature finds:

Waters of the Basin are precious *public* natural resources *shared and held in trust* by the States. (Lines 187 -188) (emphasis added).

The term "Waters of the Basin" is defined as

the Great Lakes and all streams, rivers, lakes, connecting channels and other bodies of water, including tributary groundwater, within the Basin." (Lines 178-80).

On its face, this "finding" contradicts Ohio law. The term "public" with respect to water under Ohio authorities denotes that the water is open to the public and public trust rights obtain. The phrase "shared and held in trust" when applied to all water resources within the Basin is also demonstrably not an accurate reflection of Ohio law, where "held in trust" has specific connotation with respect to water resources.¹²

These two provisions, standing alone, as a finding of the Ohio General Assembly would effect a massive governmental taking of private real property rights in Ohio.

arising under public trust theory); *see also*, *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 170 Ohio St. 193 (1959) (modifying but not overruling *East Bay*).

¹⁰ R.C. 1506.10; *State, ex rel. Squire*, 150 Ohio St. 303 (1943).

¹¹ *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 170 Ohio St. 193 (1959). Occasionally, general "recreation" is asserted as a public trust right in Ohio, but there appears to be no authority for that proposition. For example, hunting is not a recognized public trust right in Ohio. Only "fishing" and "recreational boating" are expressly recognized recreational activities. R.C. 1506.10.

¹² Similar language is used in Ohio wildlife statutes to convey that the State of Ohio does indeed own wildlife in trust for the people of Ohio. R.C. 1531.02 ("The ownership of and title to all wild animals in this state...is in the state, which holds such title in trust for the benefit of all the people.").

2. Savings provisions do not provide complete assurance against a taking of private real property rights

Other provisions appear to close the door on whether the Compact takes private real property rights to "public trust" rights.

Section 8.1.1 states: Nothing in this Compact shall be construed as affecting or intending to affect or in anyway interfere with the law of the respective Parties relating to common law Water rights.

Section 8.1.4 states: "An *approval* by a Party of the Council under this Compact does not give any property rights . . . ; neither does it authorize any injury to private property or invasion of private rights. . . (emphasis added).

Note that Section 8.1.4 addresses only "approvals" and not the effect of passing the Compact itself.

The Compact also includes a provision that puts doubt into the effectiveness of any separate state expression of statutory intent, such as Section 1522.08(A).¹³ Section 9.3 provides (emphasis added):

The Parties consider this Compact to be complete and an integral whole. Each provision of this Compact is considered material to the entire Compact, and failure to implement or adhere to any provision may be considered a material breach. *Unless otherwise noted in this Compact, any change or amendment made to the Compact by any Party in its implementing legislation or by the U.S. congress when giving its consent to this Compact is not considered effective unless concurred in by all Parties.*

Because of Section 9.3., the savings clause offered in Section 1522.08(A) is of limited effect unless the other Parties formally acknowledge it.¹⁴

¹³ Section 1522.08 (A) provides, "It is the intent and understanding of the general assembly that the enactment of the Great Lakes-St. Lawrence river basin water resources compact and its implementation in this state do not and shall not in any manner abrogate any private property rights established under the Revised Code or the common law of this state."

¹⁴ Note also that passage of the Compact repeals all acts inconsistent with the Compact. Section 9.1. The Compact can be construed to repeal rights under the Revised Code that appear to be affirmed in Section 1522.08(A).

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C. "Held in Trust" Finding Should be Deleted

The "held in trust" finding is not material in any way to programs or policies that follow. The language directly contradicts Ohio law. If the savings clauses have the effect that they may be intended to have, then the finding is merely precatory and superfluous. Yet, it is unclear whether Section 8.1.1 addresses common law public trust rights, or is limited to common law real property rights while new, "statutory" public trust rights are created by the finding. It is an unnecessary ambiguity that can be a latent time bomb.

Courts are loathe to ignore legislative findings and to fail to give them some effect. As the Compact is implemented over several decades, it will be interpreted in federal courts and will not be subject solely to the interpretations of Ohio law or the intent of the Ohio General Assembly. It is possible that the Council or a court could interpret the finding to support a "public trust" right that does transgress Ohio property rights. In that instance, Ohio would be bound by the Compact and also forced to compensate Ohio property owners for any taking.¹⁵

This is no mere academic concern: the recent case of *Norwood v. Horney* amplifies the scrutiny regarding potential takings and the risks of a taking requiring compensation.

Ohio Constitution, Article 1 §19 requires that the taking be necessary for the common welfare and, to insure that principles of natural justice, that the persons deprived of their property will be compensated for every injury resulting from this act, every infringement on their property rights, and every injurious interference with the control of their property.¹⁶

Ohio carries greater risk under this scenario than any other State because of our broad recognition of private real property rights, including real property rights in use of groundwater. Even if the risk might be considered small today, the consequences can be massive. No other State would be obliged to help fund the compensation for a taking. The earthquake in Ohio's budget caused by the single decision in the *RTG* case¹⁷ would pale in comparison.

Ohio should not carry this risk for language that is superfluous. Either the finding should be deleted, or Ohio should not pass the legislation until each party expressly acknowledges that the

¹⁵ Note that even termination of the Compact would not sever any newly recognized public trust rights (Section 8.7).

¹⁶ *City of Norwood v. Horney*, 110 Ohio St. 3d 353 (2006).

¹⁷ *State, ex rel. R.T.G., Inc., v. State*, 98 Ohio St. 3d 1 (2002).

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neither the Compact nor its implementation can extend public trust rights to the detriment of any private property rights.¹⁸

Where the express purpose of the proposed Compact is "To remove causes of present and future controversies," (Line 224), the better course is to delete the unnecessary finding.

D. Finding Potentially Expands Standing in Ohio Courts and Federal Court

Section 1522.08 (B) provides:

It is the intent of the general assembly that the Great Lakes-St. Lawrence river basin water resources compact does not create any cause of action that may be brought against any person beyond those causes of action that are specifically authorized under Section 7.3 of the compact.

Section 7.3, however, does open Ohio courts and administrative processes to "any person." It is possible that the "held in trust" finding could be used as a basis for standing under existing causes of action. The savings provisions in the Compact potentially expanded standing based on the "held in trust" finding. Section 8.1 and Section 1522.08(A), quoted above, addresses private property rights but do not limit any expansion of public trust rights. At a minimum, Section 1522.08(B) should be amended to add the sentence, "nor does it extend public trust rights in this State or create any additional basis for standing under Ohio law."

Because suit can be brought in any federal court where the Council establishes offices and federal law will apply, any Ohio provision regarding standing will be of limited utility. The standing expressly granted under the Compact is expansive. If the goal of the "held in trust" finding is to provide additional standing in courts, it is unnecessary as that is adequately covered by the very broad definition of "person" and specific provisions on enforcement. Consider the potential of someone from State X claiming standing based merely on the "held in trust" finding as opposed to demonstrating injury as an "aggrieved person," suing in Federal district court in Chicago against State Y to harass or stop a competitor or disfavored project in State Y. The Council and Regional Council machinery seems check enough without creating extra potential for litigation.

Again, the "held in trust" finding creates a latent, unnecessary ambiguity and should be deleted.

¹⁸ At a minimum, all Parties should make a formal acknowledgement that comports with proposed R.C. § 1522.08(A), above.

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III. A Mandatory Conservation and Efficiency Regime Could Stress Ohio Cities, Contribute to Sprawl and Expedite Harm to Water Resources.

Ohio must remain wary of institutionalizing any stand alone, enforceable requirement for mandatory water conservation and efficiency. The Compact institutes an elaborate program, the purpose of which is to drive improved water conservation and efficiency.¹⁹ Fortunately, the Compact does not formally require mandatory plans, though the mechanism and impetus is there.²⁰

The issue is not whether water conservation or greater efficiency is bad; it is an important goal of water users and managers. The risk is that *mandatory* requirements would stand alone at a time when users face choices between spending scarce public dollars on multiple "goods."

As an example, many Ohio cities in the Basin for the foreseeable future must spend billions of public dollars under orders from US EPA and Ohio EPA to control Combined Sewer Overflows. These cities are already under severe fiscal pressure to undertake massive infrastructure projects or else face even greater penalties. The burden is 100% on local communities.

The current landscape already invites sprawl as people move to newer areas which do not have the same expenses to retrofit historical systems. Any mandatory efficiency program coupled with the Compact's enforcement mechanism would stress central cities and further invite sprawl. The primary goal of water managers should be to reduce out-migration and sprawl in order to reduce stress on wetlands and other water related resources throughout watersheds.

The focus should be on *sustainable infrastructure and use* for economic development, which is mentioned but seriously understated in the Compact. "Sustainable use" incorporates efficiency, conservation and ecosystem protection, but it also recognizes the need for economic development based on use. The single best way to protect and improve water quality in the Great Lakes is to support the existing cities and their sustainable and efficient use of existing and retrofitted infrastructure. Avoiding additional burdens force cities to spend money on

¹⁹ Section 4.2.1 contains a drafting error, in that it recites that "The Council commits to identify. . ." The Council is not created. The Council can not in this Compact that creates the Council commit to anything. The Parties can commit, or the Compact can mandate that "the Council shall identify. . ."

²⁰ See Section 4.2.

infrastructure, as opposed to allowing cities to weigh the inherent cost-benefit of such salutary projects, is an important pillar of supporting water quality restoration in the Great Lakes.²¹

Taking a longer perspective, consider climate change, a factor the Compact also notes. Commonly proffered effects of global warming point toward a future where the nation will rely on the Great Lakes region as a primary sustainable population center. The Great Lakes region has the water, transportation, food, human and other resources to serve that mission. We should and must be preparing the infrastructure that can support the future of our country as population moves into the Basin from increasingly arid, stormy or flooded regions. Cities undertaking CSO abatement are at the forefront of restoring water quality and developing sustainable infrastructure. These cities need support to complete this pre-eminent task. They cannot afford additional unfunded mandates.

As noted above, mandatory requirements are not an obligatory part of the Compact but the impetus toward that scenario is present. Ohio must remain vigilant to avoid "mission creep" whereby beneficial conservation and efficiency programs grow out of proportion to their priority.

IV. Miscellaneous Comments and Observations.

Other commentators have raised a series of questions and suggestions regarding the bill's language. Miscellaneous additional comments are offered here to complement other analyses.

1. *Office Location.* Careful consideration should be given to where the Council offices are located, because that location will become the jurisdiction of the relevant federal court (along with the D.C. Circuit). (Lines 1219-1220). With Ohio's singular property rights issues, it would be better to have a federal court in Ohio that is more familiar with Ohio property law as the jurisdictional court. This would be preferable to, for example, offices in Chicago creating jurisdiction in Illinois, the state that is exempted from almost the entire Compact. (Section 4.14).

2. *Judicial Review.* Section 7.2 requiring "ADR" to resolve disputes is too vague. It is unclear how it relates to any process for judicial review.

²¹ According to the USGS, water use in this country has stabilized since 1985, varying less than 3% of 408 billion gallons per day, despite groundwater withdrawals increasing 14% since 2000 and population increase (<http://water/usgs.gov/watuse>). For many large cities in the Basin, a larger scale threat than efficiency is the loss of customers and the resulting loss of revenue with which to make basic infrastructure replacements. Local revenue for project funding is primarily how new efficiencies can be realized.

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3. *JEDD Acknowledgement.* The Ohio legislation should include an express acknowledgement by the General Assembly that Joint Economic Development Districts (JEDDs) are an "equivalent" to incorporated towns and cities for purposes of the definition of "Straddling Communities."²² In light of Section 9.3 of the Compact, each state should also expressly acknowledge that Ohio JEDDs are a qualifying "equivalent" of towns and cities, and supply of water to a JEDD constitutes a qualifying "public water supply." If service to JEDDs are excluded from those definitions, the statutory mechanism to avoid annexation battles while making optimum use of infrastructure that the JEDDs compromise represents will be lost. This is highly significant for Ohio, which has the greatest population in communities that straddle the Basin boundary of any state subject to the Compact requirements.

4. *Council Funding.* The Council budget shall be "apportioned equitably" among the Parties by unanimous vote. Section 2.4.3. This has great potential for mischief. Will the Council close its doors when one Party declines in good faith to accept a budget as "inequitable," thereby forestalling the opportunity for approval that a project in another Party might require?

L.L.M.

²² Lines 165-66.

