MEMORANDUM

TO: Senator Grendell

FROM: Rep. Bill Seitz

DATE: February 26, 2007

RE: Great Lakes Compact

I have reviewed HB574, as passed by the House. I have a number of observations and questions, in no particular order, as follows:

1. The Council is created as an agency and instrumentality of the government of the eight state Parties (lines 216-269). Is the Council subject to the open records laws of each of the eight states, or none of them? The eight states have different open records laws with different exemptions. This is nowhere addressed in the compact.

2. The Council declares its minutes to be public record (lines 1174-1175) and also its intent to "assure public accessibility to all documents relevant to an application." (lines 1186-1187). What if documents included in an application are trade secrets or otherwise proprietary? The compact makes no effort to exempt them from public disclosure.[1]

3. The compact states that all meetings of the Council shall be open to the public, except with respect to issues of personnel (lines 1171-1173). Would it not be prudent, given the Council's power to sue (lines 382-383), to provide for executive session for threatened or pending litigation?

[1] Section 8.3 of the compact does address confidentiality, but it does not answer this issue. Section 8.3 allows that nothing in the compact requires a Party to breach confidentiality obligations or requirements prohibiting disclosure, or to compromise security of commercially sensitive or proprietary information. Section 8.3 also allows "a Party" to take measures to protect confidential, proprietary or commercially sensitive information; but only "when distributing information to other Parties" or preparing information for the Council. None of this deals explicitly with whether the applicant's application materials can be protected against public disclosure when those materials arrive before the Council.

4. The compact provides at Section 7.2 that disputes between the parties regarding the compact "shall be settled by alternative dispute resolution" (lines 1205-1206), but, inconsistently, only a few lines later, Section 7.3 provides that any aggrieved Person (specifically including a state or province as an aggrieved Person – lines 1226-1228) "shall have the right to judicial review of a Party's action" in court (lines 1221-1223) and that any Party may initiate actions in federal or state court to compel compliance with the provisions of the compact (lines 1229-1237, and see also lines 1244-1250 – Party actions in the Party's courts to compel any person to comply with the compact). Which shall it be – ADR or court?

5. The compact prohibits New or Increased Diversions (lines 730-732) unless an exception is met (Section 4.9). I do not know if the exceptions are good or bad, but I do want to point out that several of the exceptions require unanimous approval by the whole Council – by saying that "Council approval shall be given unless one or more Council members vote to disapprove." (see lines 802-803, regarding exception for New or Increased Consumptive Use of 5 million gallons per day or greater average over any 90-day period; lines 828-830 regarding straddling counties).

6. I do not understand lines 1009-1015. If I read them correctly, any time somebody wishes to withdraw water and remove it from the basin in any container bigger than 5.7 gallons, that is "treated in the same manner as a Proposal for Diversion." As I understand Section 4.8, diversions are prohibited unless they meet one of the exemptions or exceptions. Does that then mean that if I take two ten gallon buckets out of Lake Erie and use it to carry my fish home to Cincinnati that I have violated the law?

7. The compact provides in Section 8.6 (lines 1340-1346) that its provisions are severable and that if any part is held void or unenforceable, the remainder shall continue in

full force and effect. However, lines 1083-1087 (part of Section 4.14) rather inconsistently provide that if Section 4.14 is ever severed, "this compact shall no longer be binding on or enforceable by or against the State of Illinois." Shouldn't this provision at least be reconciled with Section 8.6 in some manner?

8. Section 7.3 provides "any Person" aggrieved with action taken by the Council with the right to judicial review of a Council action; any aggrieved Person with a right to judicial review of a Party's action; and (under certain circumstances) any aggrieved Person with the right to sue to compel any person to comply with the compact if such person undertakes any action prohibited by or subject to approval under the compact, without approval having been given. "Person" is defined very broadly (lines 116-120). There are a number of problems here:

(a) The compact nowhere provides for the standard that a Person must meet in order to secure meaningful judicial review, nor any direction as to the weight to be accorded to the Council or a Party's action, nor whether the review is de novo or under an administrative agency review standard (e.g., "substantial evidence"), nor whether third parties must meet an enhanced burden of proof beyond mere preponderance. The language does not define what it means to be "aggrieved" or in any way limit judicial review to, for example, applicants whose applications for approval are rejected.

(b) None of the above problems are solved by the language at lines 1555-1559 of the bill, in which we added language that the General Assembly understands that the compact creates no causes of action "beyond those causes of action that are specifically authorized under Section 7.3" – because those authorized by Section 7.3 are so egregiously broad.

(c) I do not know why the compact should not be rewritten to provide that only its signatories, and persons whose applications have been denied or granted only in part, are the only persons that can go to court to challenge any action by a Party or by the Council; and to provide that only the Council and the Parties should have the right to force persons who have not complied with the compact to comply with it. We simply do not need such an unlimited stable of private attorneys general to litigate over the broad and expansive principles announced in the compact.

9. Section 9.3 (lines 1362-1370) provides that "unless otherwise stated in the 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." Given this statement, Ohio's efforts in Sections 1522.06-1522.08 to add statements of intent and understanding may not mean very much. Section 8.5 (lines 1334-1339) give me pause on this score as well (provisions of compact effective until amended by action of the governing bodies of the Parties). If we really want to ensure that our intent and understanding on these points is "part of the deal", then we should either seek to amend the compact itself or wait until the other jurisdictions enact legislation agreeing with us on these points.

10. Lines 1482-1486, part of 1522.06, seem to me to be wholly duplicative of lines 1009-1012. Why did we feel the need to restate this in our "intent" section?

11. Section 4 of the bill (lines 1674-1680) provides that Ohio "reserves the right to re consider its enactment of the compact and if necessary, repeal the compact in its entirety" if the other states do not enact it within three years. I am not sure what this adds. I thought we were going to condition our approval of the compact on the other states having

enacted it within 3 years by providing that the act would automatically sunset if the other states had not so acted. The General Assembly always "reserves the right" to amend its prior enactments, so Section 4 adds little and places the burden on a future General Assembly to take affirmative action to repeal the compact or "reconsider" the issue.

12. Perhaps the most difficult question is whether the provisions of Section 8.1 (lines 1276-1299) adequately resolve the issues created by the finding in Section 1.3 (lines 187-188) that "Waters of the Basin are precious public natural resources shared and held in trust by the States." Of course, all the problems could be remedied by simply deleting "held in trust" from Section 1.3 of the compact. There are four subsections to Section 8.1. Section 8.1.1 protects "rights validly established and existing. . .under state or federal law governing" Withdrawal. I suppose this might protect the beneficiaries of the Ohio Supreme Court's decision on groundwater under private property. Section 8.1.2 disclaims any intent "to interfere with the law of the respective parties relating to common law water rights." While this is some protection, it assumes that common law is settled – and isn't it unsettled, at least with respect to the issues surrounding your Lake Erie property owners rights bill? Section 8.1.3 deals with tribal rights only. Section 8.1.4, in its terms, deals only with "an Approval by a Party or the Council under this compact." It therefore does not deal with the effect of the compact <u>itself</u> at all, only with regard to <u>subsequent</u> <u>approvals</u> made under its terms of, for example, new Proposed Diversions. But even if this section said "this compact does not give any property rights, nor any exclusive privileges, nor shall it be construed to grant or confer any right. . .in, to, or over any land belonging to or held in trust by a Party; neither does it authorize any injury to private property or invasion of private rights", I'm not sure that solves the problem. If the "Waters" are held in trust, per Section 1.3, then saying the compact confers no rights on lands "held in trust" is

a tautology – it prevents any claim of right to such waters. If the Waters are held in trust, per Section 1.3, then saying the compact authorizes no invasion of private rights or injury to private property likewise means little – because "public trust" presumes the nonexistence of such private rights. But the main point I would make is the first one – this entire section 8.1.4 only deals with the effect of approvals by Parties or the Council subsequent to the compact being entered into. It doesn't deal with the effect of the compact itself. My conclusion, therefore, is that the only rights clearly protected in Section 8.1 are existing and established rights concerning Withdrawals, and settled state law regarding common law water rights. Otherwise, the finding in Section 1.3 that the "Waters" (broadly defined) are held in public trust would seem to prevail over and could be used to defeat any unsettled private property rights questions.

I believe that it would be prudent for the state to secure careful legal review of the provisions of the compact, and of our previously enacted House bill, before proceeding further. It would not be prudent to rely merely on legal counsel for the compact itself. In addition, I believe it would be prudent for us to ask the Ohio State Bar Association, through its real property committee or environmental law committee, or both, to take a close look at these issues and see if they have suggestions that would either confirm or allay our reservations about the language in the compact.

Once you have digested this, please give me a call and we will discuss next steps.

WJS:mad