

# EASTERN WATER LAW™

## & POLICY REPORTER

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## FEATURE ARTICLE

## THE GREAT LAKES GO REGIONAL: THE NEW WATER RESOURCES COMPACT ADOPTS A UNIQUE WATER MANAGEMENT APPROACH

By Karen M. Hansen and Erica M. Zilioli

The Great Lakes constitute the largest freshwater system in the world, accounting for 90-95 percent of fresh surface water in the United States and approximately 20 percent of fresh water worldwide. The Great Lakes region is heavily populated and home to a variety of commercial interests, including agriculture, manufacturing, and tourism. Eight states border the lakes—Illinois, Indiana, Michigan, Minnesota, New York, Ohio, and Pennsylvania—and each state, along with the U.S. and Canada, has a distinct stake in managing this valuable resource. Yet despite its importance as a national water resource, the new management regime for the Great Lakes regionalizes its governance to an unprecedented degree. While the regional debate about this precious resource has been ongoing for years, this significant shift occurred with virtually no discussion of its national policy implications. This article explores the new Great Lakes Compact and its legal and policy implications.

On October 3, 2008, President Bush signed S.J. Res. 45, a congressional resolution that enacted the Great Lakes–St. Lawrence River Basin Water Resources Compact (Compact). See S.J. Res. 45, 110th Cong. (2008). The resolution was introduced by Senator Carl Levin of Michigan only a few months prior, on July 23, 2008, and earned Senate approval on August 1, 2008. The House of Representatives approved the bill on September 23, 2008. The Compact will go into effect once the eight states ratify it through concurrent legislation. For background on the events leading up to the Compact's approval, see, 1 *East. Water Law & Pol'y Rptr* 35 (Feb. 06) and 3 *East. Water Law & Pol'y Rptr* 227 (Aug. 08).

The Compact generally prohibits new diversions of water out of the Great Lakes–St. Lawrence River

Basin (Basin). It imposes strict new regulations for proposed new withdrawals of water and establishes registration and reporting requirements for existing uses. The Compact emphasizes regional cooperation by creating a council of representatives from each of the eight states to promulgate standards for management and review, while leaving the actual regulation to the states themselves, and providing a role for the affected Canadian provinces. This balance of state autonomy and regional oversight, with an international component, reflects a unique approach not seen in other interstate water management agreements. Implementation of the new requirements will phase in over the next five years.

This article explores the water management policies set forth in the Great Lakes–St. Lawrence River Basin Water Resources Compact and how its unique layering of state, regional, federal and international governance is tailored to meet the needs of the Great Lakes region.

### Background and Overview

The Compact strives to make progress on water resource management issues in the Great Lakes in the face of scientific uncertainty. A key goal of the Compact is to prevent degradation due to withdrawals and diversions of water. The Compact employs an adaptive management approach to set initial policy and respond to changes in scientific knowledge and understanding over time. The Compact seeks to “remove causes of current and future controversies” by requiring cooperation of all eight states and even the bordering Canadian provinces in some instances. The Compact creates a Great Lakes–St. Lawrence River Basin Water Resources Council (Council)

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comprised of the governors of each of the eight states. The Council's main responsibility is to oversee the management of the Basin by promulgating rules and setting a "Standard of Review and Decision" against which most requests for water use must be compared. The applicable Standard of Review and Decision varies depending on the proposed use, as discussed below, but consistently incorporates scientific principles and economic considerations in order to ensure the most efficient use of the water. The Council will review Basin-wide objectives every five years and any changes to the standards must be considered by the states in implementing their own programs.

Another cooperative feature of the Compact is that a "Regional Body," consisting of both the Council members and the premiers of Ontario and Quebec, reviews requests for certain large diversions and withdrawals. The Regional Body must hold a public hearing and consider public comments before rendering a decision on whether the proposed use meets the appropriate Standard of Review and Decision. The Regional Body must also consult with legally recognized tribes and provide notice of proposed uses as appropriate.

The eight states, however, bear primary responsibility for managing the waters—both ground and surface—within their jurisdiction in accordance with the principles set forth by the Compact and the Council. Within five years of the effective date of the Compact, each state is required to create a water conservation plan to promote both "environmentally sound" and "economically feasible" consumption of water. Thereafter, the states must also maintain a water resources inventory and regulate certain water uses, as specified in the Compact and discussed in more detail below.

## New Regulations and Requirements

Regulation of water use varies depending on the type of use and whether it is "new or increased" or already in existence. There are essentially three types of uses defined in the Compact: diversions, withdrawals (or consumptive uses), and bulk water transfers.

### Diversions

A *diversion* is defined as a transfer of water from the Basin into another watershed, or from the watershed of one of the Great Lakes into that of another by

any means of transfer, including but not limited to a pipeline, canal, tunnel, aqueduct, channel, modification of the direction of a water course, a tanker ship, tanker truck or rail tanker but does not apply to Water that is used in the Basin or a Great Lake watershed to manufacture or produce a product that is then transferred out of the Basin or watershed.

Under the Compact, "any person" who diverts water from the Basin must register with the state where the diversion originates by a date to be determined by the Council. These existing users must then annually report monthly volumes of their diversion to the state. To implement the Compact's goal of developing a basin-wide inventory of water use, each state will submit collective information to the Council, which will prepare and make public a combined report as part of its five-year reviews.

All "new or increased" diversions of water are generally prohibited. The Compact offers little guidance as to when this prohibition is triggered, however, defining a "new or increased diversion" unhelpfully as "a new diversion, an increase in an existing diversion, or the alteration of an existing withdrawal so that it becomes a diversion." The Compact identifies three exceptions to this prohibition. The first is for diversion of water to a "straddling community"—a city or town outside the Basin but entirely within a county sitting partially in the Basin—which are permitted if the water is used for public water supply and is returned to the watershed less an allowance for consumptive use. If the proposed use would result in consumption of at least 5 million gallons per day average over a 90-day period, review by the Regional Body is required, as discussed above, and the "exception standard" is applied. The second exception is for intra-basin transfers. Specifically, for a "New or Increased Withdrawal less than 100,000 gallons per day average over any 90-day period," the state from which the water is diverted has discretion over regulation and management. If such a withdrawal is more than 100,000 gallons per day average over any 90-day period but the consumptive use is less than 5 million gallons per day average over any 90-day period, however, it must meet the exception standard, the applicant must show that there is no cost-effective and environmentally sound means of using water within the destination watershed, and the state from which the water is removed must notify the other seven states before deciding on the proposal. The third exception is for

transferring water to a community within a “straddling county,” which, although not expressly defined, appears to mean a county outside the Basin. Such a transfer may be granted by the Council, after review by the Regional Body, only if it clearly meets the exception standard, the water will be used for public water supply, there is no reasonable supply of potable water within the straddling county’s basin, and there is a showing that the transfer “will not endanger the integrity of the Basin Ecosystem.”

All three exceptions must be applied consistent with the Council’s Standard of Review and Decision, which includes an “exception standard.” Thus, a proposed diversion must meet the specific prerequisites of one of the three exceptions noted, and demonstrate the following: (a) that the need for the exception cannot reasonably be avoided through efficient use of existing water supplies; (b) the proposed use will be limited to a reasonable quantity; (c) all water will be returned to the source watershed, less a reasonable allowance for consumptive use, although in some circumstances water from outside the Basin can be substituted if it meets the water quality standards and is treated to prevent the introduction of invasive species; (d) the proposed use would be implemented so as to not cause “significant individual or cumulative adverse impacts to the quantity or quality” of the Basin; (e) the proposed use will adopt environmentally sound and economically feasible measures; and (f) the proposed use would comply with all federal, state, regional, and international laws and agreements.

### Withdrawals and Consumptive Uses

A *withdrawal* is defined simply as the “taking of water from surface water or groundwater.” A *consumptive use* is that portion of a withdrawal that is not returned to the watershed. Consumptive uses are regulated the same as withdrawals. Users who withdraw more than 100,000 gallons per day average over a 30-day period must register with the state in which the withdrawal is to occur by a date to be determined by the Council. These existing users must also submit annual reports to the state containing the monthly volumes withdrawn.

Each state must create a program to manage and regulate “new or increased withdrawals,” specifically setting forth “threshold levels for the regulation” of such withdrawals. Note that “new or increased” withdrawals, like diversions, are unhelpfully defined

as withdrawals that are “new” or “increased.” The threshold levels of regulation must take into account the goals of effective water management, reasonable use of water, minimal adverse impact on “the physical, chemical, and biological integrity” of the Basin, and the overall objectives of the Compact. If a state fails to set such threshold levels within ten years of the date the Compact goes into effect, the default threshold of 100,000 gallons per day average in any 90-day period applies.

States’ plans to regulate new and increased withdrawals must be consistent with the Council’s Standard of Review and Decision, which in this case is called the “decision-making standard.” Under this standard, which is similar to that applied to requests for new or increased diversions, discussed above.

Two categories of withdrawals are exempt from regulation whether existing or new or increased. The first exemption is for water used:

[t]o supply vehicles, including vessels and aircraft, whether for the needs of the persons or animals being transported or for ballast or other needs related to the operation of vehicles.

The second is for water “use[d] in a non-commercial project on a short-term basis for firefighting, humanitarian, or emergency response purposes.”

### Bulk Water Transfers

A bulk water transfer, while not defined, refers to the withdrawal and subsequent removal of water in containers. Bulk water transfers in containers holding more than 5.7 gallons are treated the same as diversions and regulated as described above. Bulk water transfers in containers 5.7 gallons or smaller, however, are simply to be regulated by the individual states.

The provision relating to bulk water transfers is a response to the ongoing regional concern with the bottling and sale of Great Lakes water. Commercial withdrawals of water in Michigan to produce bottled water have been the subject of heated ongoing litigation. In November of 2004, a Michigan court ruled in favor of a citizen group that sued to stop such withdrawals from a local water source out of concern that the withdrawals were harming a nearby stream and surrounding properties. The court ordered the commercial production to cease. Before the injunction was to go into effect, however, the Michigan Court

of Appeals lifted the stay and permitted operations to proceed during the appellate process. The decision was based largely on economic concerns, as the commercial operation is both profitable and the source of many jobs. The Michigan Department of Environmental Quality submitted a brief in support of allowing the plant to continue operations, largely in recognition of these concerns.

The Compact avoided the issue of whether withdrawals for bottled water production are a “diversion” and instead created a new category of water use called bulk water transfers, leaving regulation of such uses up to the states’ discretion. As noted above, the Compact’s definition of a diversion expressly excludes “Water that is used in the Basin or a Great Lake watershed to manufacture or produce a product that is then transferred out of the Basin or watershed.” Nestlé maintains that it uses water inside the Basin for the production of a product that is shipped out of state, just like soda or beer. This interpretation has received much criticism from citizen groups who argue that this framework allows for the private sale of a public resource. The Compact, however, gives the states the authority to regulate the export of bottled water rather than considering it a diversion subject to the Council or Regional Body’s oversight. Whether Michigan and the other states actually choose to restrict such water use will likely be closely watched and presents potential interstate commerce issues.

## Enforcement and Compliance

The states have the authority to create enforcement and compliance procedures as part of their water management plans. Theoretically, each state could adopt completely different enforcement mechanisms and priorities. There are provisions in place, however, to ensure that individuals and entities aggrieved by a state’s actions—or the actions of the Council—have the opportunity for review. Specifically, “[a]ny Person aggrieved by any action” taken by the Council is entitled to a hearing before the Council and can subsequently bring a lawsuit in the U.S. District Court for the District of Columbia or “the District Court where the Council maintains offices” within 90 days of an adverse decision. Any person aggrieved by a state’s action must follow the administrative process within that state and, if unsuccessful, can seek review by that state’s “relevant . . . court of competent jurisdiction”

within the amount of time determined by that state’s laws. A state can even be an aggrieved person with respect to another state’s action.

Both the states and the Council can initiate legal action to enforce the new requirements in the U.S. District Court for the District of Columbia or “the District Court where the Council maintains offices” and seek equitable relief or civil penalties. In addition, pursuant to a citizen-suit provision, “any aggrieved Person may commence a civil action in the relevant [state’s] courts and administrative systems” to enforce a user’s compliance with the Compact and seek both equitable relief and the costs of litigation if successful. In keeping with this theme of public involvement, proposals subject to the Standard of Review and Decision are required to go through a notice and comment period, and all meetings of the Council and minutes thereof are publicly accessible.

Any disputes among the eight states over the interpretation and implementation of the Compact must be settled by alternative dispute resolution.

Notably, the Compact does not affect any rights, pursuant to state or federal law, in existence as of its effective date. This could have interesting repercussions in the enforcement context. One would assume that, in the process of drafting legislation to ratify—and creating water management plans pursuant to—the Compact, the states will incorporate or amend their own laws regulating the Basin resources to avoid conflicts. However, there are also several federal statutes that overlap, most notably the Clean Water Act (CWA), the Water Resources Development Act (WRDA) and the Endangered Species Act (ESA), among others. Consider a hypothetical scenario where a body of water within the Basin exhibited poor water quality because a company is withdrawing water and returning it to the Basin untreated, in violation of permits issued under both the CWA and the Compact. Lawsuits could potentially be brought at both the federal and state/regional levels to enforce these permits. A citizen group seeking to bring a compliance action could theoretically proceed in one or more forums. Situations where such concurrent enforcement actions could take place would probably be rare, though. In addition, as the scope of federal jurisdictional waters under the CWA continues to be debated, there are at least some areas of regulation, such as water quantity, that will be governed by state law and the Compact.

### Analysis: Significance of the Compact

The Great Lakes Compact is unique from other interstate water management compacts, which tend to fall into one of two main categories: (1) “Western” compacts that generally divide and allocate water among states, such as the Colorado River Compact and the Rio Grande Compact; and (2) “Eastern” compacts that generally create a centralized regulatory body with management authority over the entire watershed, such as the Delaware River Basin Compact and the Susquehanna River Basin Compact. Western compacts are motivated by water scarcity and over-allocation, so setting caps on water use ensures continued access by each state and its users. Eastern compacts have traditionally been motivated by politics and litigation over water use, such that a central regulatory authority is necessary to manage the watershed. *See generally*, Noah D. Hall, “Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region,” 77 *U. Colo. L. Rev.* 405 (2006).

Neither of the traditional approaches to interstate water management would be highly effective in the Great Lakes region. In contrast to states adopting Western compacts, the Great Lakes region does not face water scarcity, so setting a cap would be impractical; if the cap were too high, regulation would become difficult and there would be no incentive to conserve water resources, but if the cap were too low, the water would not be used in an efficient manner. Likewise, the Great Lakes region does not have the same level of pressure—either political or from litigation—to defer state authority to a centralized body as in Eastern compacts. Moreover, a state like Michigan that is entirely within the Basin could not reasonably be expected to cede control to a regional authority of the vast majority of its water resources.

Recognizing these and other shortcomings of the two traditional types of interstate compacts, the Utton Transboundary Resources Center at the University of New Mexico School of Law proposed a Model Interstate Water Compact (Model Compact) two years ago that blended the best features of each. Jerome C. Muys et al., “Utton Transboundary Resources Center Model Interstate Water Compact,” 47 *Nat. Res. J.* 17 (2007). This Model Compact contains ten primary concepts:

(1) inclusion of a broad and robust enunciation of the purposes of the compact, (2) use of adaptive management for decision-making, (3) development of meaningful water monitoring programs and use of good science, (4) adoption of a regional focus, or, put another way, an emphasis on basin-wide systems and management, (5) inclusion of a strong statement of State and joint compact powers, subject to political conditions where warranted, (6) emphasis on an organizational structure that supports decision-making by top-level policy makers with meaningful technical support, (7) inclusion of a dispute resolution mechanism to promote consensus where needed, (8) evidence of meaningful compact buy-in via visible and reliable funding and participation by members, (9) duration of a reasonable length that can be prolonged or sun-setted as warranted by the parties, and (10) inclusion of a means for federal agencies to (among other things) align federal water management programs with compact programs that are ‘not in conflict with non-discretionary mandates of federal statutes.’

*See* “The Evolution of Interstate Water Disputes into Regional Cooperative Management Regimes: Launching a New Model Compact for Interstate Water Issues,” 1 *East. Water Law & Pol’y Rptr* 131, 133 (May 2006). The focus on a basin-wide approach to management that allows for flexibility and adaptation based on changes in scientific understanding breaks away from the traditional Eastern and Western compacts which focus on centralized regulation and strict allocation of water, respectively. *Id.* at 133-34.

The cooperative approach embodied by the Great Lakes–St. Lawrence River Basin Water Resources Management Compact incorporates several of the key concepts set forth in the Model Compact. For example, the Compact maintains a basin-wide management approach by making a council composed of the governors of the eight states be responsible for setting standards and providing oversight, while leaving the individual states in control of managing their own waters in accordance with local environmental and economic priorities. This appeals to the states’ desire to maintain autonomy to address individual goals and concerns, but also recognizes that some regional oversight is necessary to ensure that basin-wide goals and

standards are met. The inclusion of the premiers of Ontario and Quebec in the Regional Body provides further assurance that any major decisions concerning diversions or consumptions of water are made by the entire Basin.

In addition, the Compact includes several provisions to ensure that management of the Basin will not only take into account existing scientific data about the Basin but also adapt to reflect changes or developments in scientific knowledge. For example, the Great Lakes region has been highly susceptible to invasive species, including fast-growing weeds and other aquatic plants, 25 species of fish, and, most notably, the zebra mussel. The Compact addresses this concern by requiring that all diverted waters returned to the Basin must be treated to prevent introduction or spread of invasive species. The Compact also requires new users to demonstrate that the proposed uses will not compromise the “quantity or quality” of both the water itself and “water dependent natural resources.”

The Compact also emphasizes adaptation in the sense that it requires a balance between environmental and economic considerations. That balance is a recurring theme throughout the Compact, which frequently requires water use to be “environmentally sound and economically feasible.” The Great Lakes region is heavily populated and supports a number of commercial interests that provide jobs and income.

The Compact recognizes the interplay between the needs of the Great Lakes ecosystem as a whole and the needs of the people living within it, and correspondingly requires consideration of both sets of needs.

### **Conclusion and Implications**

The Great Lakes–St. Lawrence River Basin Water Resources Compact represents a new approach to interstate water resource management. Its management approach depends on cooperation by the Basin-wide Great Lakes–St. Lawrence River Basin Water Resources Council and the individual states on water management, environmental and economic goals. It places responsibility for a significant national resource in regional hands. Because regulation under the Compact will phase in over the first five years after ratification, there is ample time for the Council to consider the abundance of scientific research on the largest freshwater system in the United States and monitor the changing economic conditions of the country and the Great Lakes region to create the new Standards of Review and Decision. The states, too, have time to fully consider the same issues in developing their respective management plans. In light of its novel approach, and depending on its perceived success, the Compact may serve as a model interstate water management agreement in the future.

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