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Opponent Testimony on Senate Bill 170, Great Lakes Compact Implementation

Ohio Senate, Agriculture, Environment and Natural Resources Committee

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Chairman Hite, Vice Chair Schaffer, Ranking Minority Member Wilson and members of the committee, I appreciate the opportunity to offer opponent testimony on Senate Bill 170, which seeks to implement the Great Lakes Compact in Ohio. My name is Kristy Meyer and I am the Director of Agricultural & Clean Water Programs for the Ohio Environmental Council. I also served on the Great Lakes Compact Advisory Board that was tasked with developing recommendations to implement the Great Lakes Compact. It is unfortunate that after two years of negotiations with the Coalition for Sustainable Water Management, 7 months of which we met bi-monthly for at least 3 hours, we could not reach a compromise.

The OEC is a network of more than 100 local and state environmental-conservation groups that advocate to secure healthy air, land, and water for all who call Ohio home.

For decades the OEC has understood the importance of balancing nature's needs with human's needs. We have understood that a healthy ecosystem equates to healthier Ohioans and a better Ohio economy. The OEC has been working on the development of the Great Lakes Compact for more than two decades as the Compact offers important water supply protections for millions of Ohioans and the wildlife and natural systems that depend on the Ohio Lake Erie basin.

The OEC was involved in negotiating the passage of House Bill 416 in the 127th General Assembly, known as the Great Lakes – St. Lawrence River Basin Compact. We negotiated the compromise with Senator Tim Grendell to amend Article 1 Section 19b of the Ohio Constitution to recognize the right of private property rights to the reasonable use of ground water, lakes and other watercourses flowing under or through their property. We agreed that protecting private property owners' right to a reasonable use of water supplies was worthy of solidifying in our Constitution.

It is important to note again that the Compact not only prohibits water diversions from leaving the Great Lakes basin, but it also requires that each state use the waters within the basin sustainably by developing programs based on science to ensure the health and safety of our Great Lakes for generations to come. This is not a secret goal of environmental-conservation leaders. It is the law of the Compact.

The Compact was not created because of a particular crisis; it was created to ward off a water crisis in the future - similar to a parent buckling up their children before riding in a car to ensure their safety and health. The Compact outlines a binding framework for which the basic principles must be met to help ensure the health and safety of the Great Lakes for decades to come.

Role of Science in Defining the Scope of Impacts and in Determining Impacts

For years after publicly testifying that Ohio should implement the Compact to consider impacts to the Lake Erie basin as a whole, the applicable source watershed as a whole, and for local impacts to be dealt with under the reasonable use criteria in the Decision-Making Standard, the industry coalition has flip flopped. Now, the industry coalition is advocating for the General Assembly to only consider impacts to the Lake Erie basin as a whole – a radical change in position that could compromise the health of individual source watersheds.

Here is the back story:

During debate over the General Assembly’s ratification of the Compact and House Bill 416 in the 126th and 127th General Assembly, the OEC had many discussions with members of the Coalition of Sustainable Water Management about the scope of impacts. The OEC wanted a more protective approach and advocated for judging impacts on individual stream segments. The Coalition for Sustainable Water Management advocated, instead, to judge impacts on the Lake Erie basin as a whole, as well as the applicable source watershed as a whole. They further advocated for local impacts to stream segments be looked at under the reasonable use balancing criteria under Section 4.11.5. See the attached testimony from November 2006.

Now the Coalition for Sustainable Water Management is stating that “impacts to the quantity or quality of the ***Waters and Water Dependent Natural Resources and the applicable Source Watershed***” of Section 4.11.2 is to be read in-conjunction with each other (Emphasis added). The industry coalition’s stated interpretation of the Compact today, four years after testifying that it interpreted the Compact in a more protective way, is that the Waters and Water Dependent Natural Resources and the applicable Source Watershed means that an impact should be judged only to the Lake Erie basin as a whole—not, as well, to the applicable source watershed, or local stream segments. In their 2006 testimony (bullet number 7), the industry coalition stated:

“This language creates a serious ambiguity as to scale of impacts that require disapproval. The plain meaning of the language strongly suggests measurable impact on flow within just a few hundred feet of stream (which occurs with many withdrawals) is enough to preclude approval of a project. Absent clear language as to the level of focus, i.e. the “waters and water dependent natural resources of what”,

this important question is left to the courts, which could apply a strict definition that would defeat almost any project on a tributary stream or watershed.

*The Coalition strongly urges the Ohio General Assembly to change the language of the Compact to make it perfectly clear that automatic disapproval of a proposal will occur if it cannot be demonstrated that the withdrawal or consumptive use will be implemented so as to ensure that the proposal will result in **no significant individual or cumulative adverse impacts to the quantity and quality of the Waters and Water Dependent Natural Resources of i) the basin considered as a whole, or ii) the applicable source watershed considered as a whole.***

This does not mean that impacts on a small scale will be ignored. Those small-scale impacts are already assessed under Section 4.11.5, which requires a consideration and balancing of all impacts. Thus small-scale impacts are definitely considered, but they are balanced with considerations of plans for avoidance and mitigation, and with consideration as to the needs for the withdrawal, social and economic development, conservation and other factors.”

In part because of this interpretation that the industry coalition put in writing in 2006, and also because of Department of Natural Resources (DNR) Director Sam Speck’s similar interpretation and strong advocacy that impacts to source watershed be considered, the 127th General Assembly also interpreted the scope of impacts this way and codified this interpretation in Ohio Revised Code Section 1522.07(B)(1) and (2).

Four years later, both the industry coalition and the DNR have abandoned their original interpretation and the compromise included in House Bill 416, as evidenced by Sub. HB 231 (as well as the As Introduced version of the bill) which repeals ORC Sec. 1522.07(B)(1) and (2) based on the **strong urging** of the Coalition for Sustainable Water Management.

Furthermore, requiring a river or a stream to be a named in the *Gazette of Ohio Streams* in order to be considered a river or a stream for the purposes of the Compact is like saying that our hearts and veins operate without our capillaries. This approach leaves approximately 80% of stream and river miles in Ohio unprotected – the very streams and rivers that feed our major tributaries and, ultimately, Lake Erie. The authors of the Great Lakes Compact understood how vital these capillaries are to the veins (rivers and streams) and the heart (Lake Erie). Therefore the authors of the Compact defined the Waters of the Basin or Basin Water to mean the Lake Erie watershed *as well as* all of the surface water and ground water contained within the Ohio Lake watershed. In their wisdom, they realized that the health of the Water Dependent Natural Resources relies on the health of the Waters and as such provided protection from significant individual and cumulative adverse impacts to the waters and the living resources that depend on them, including humans, fish and other wildlife.

Freezing the status of rivers and streams at the time of passage of the implementing language for the Great Lakes Compact ignores science. It ignores the fact that we know that water systems are not static – that they are consistently fluctuating. Science has advanced our world, and America in-particular, in almost every aspect of our lives. In fact, industries rely on science everyday in their related fields and happily praise science with the development of a new product or better use of water or electricity. It is unclear why on one hand science can be a great tool for businesses and citizens, yet when it comes to ensuring

our health, recreational opportunities, economy and jobs that science has all of a sudden become a “black box” or a “theoretical computer model”.

This “black box” or “theoretical computer model” would enable the State to easily determine appropriate water use thresholds based on the size and water quality of the stream, as well as the impact of a specific water withdrawal on a river or stream. This tool helps water users avoid costs by directing them to withdrawal sites that would provide sustainable water supplies, and helps them to avoid withdrawals in streams that have little to no water to serve as a reliable and higher quality source. The tool was designed using the U.S. Geological Survey’s (USGS) flow data and more than 20 years of ecological data collected by the State, which links the amount of water withdrawn to a percentage of flow-sensitive species lost within a particular river watershed. The USGS in Ohio has received some funding to begin work to develop the groundwater component of this tool.

Utilizing a science-based approach to identify appropriate water withdrawal thresholds will ensure that businesses are provided the predictability they seek, while protecting our drinking water; recreational opportunities like fishing and boating; jobs; and the tourism industry.

Senate Bill 170 also sets arbitrary numbers to judge an impact and does not direct DNR to utilize science, as directed in the Compact, to determine an impact. It is unclear how DNR will be able to judge a drop in water levels of more than 1 inch in IN, MI, NY, OH, Ontario, and PA’s waters, all of their waters within the Lake Erie basin, as well as those rivers under the influence of Lake Erie. Similarly, it is unclear how DNR will measure a drop in water level of more than ½ inch in rivers and streams not under the influence of Lake Erie. This approach does **NOT** fulfill and is in conflict with the Decision-Making Standard of the Compact, specifically Section 4.11.2 and Section 4.10, which details the Management and Regulation of New or Increased Withdrawals and Consumptive Uses.

Senate Bill 170 is in direct conflict with the Compact (Section 4.10 and 4.11.2), because it:

- Does not require a demonstration that a single withdrawal will not impact the chemical or biological integrity of the source watershed, as well as a scientifically measurable physical impact;
- Does not take into account the impact to Water Dependent Natural Resources; and
- Does not take into account cumulative impacts.

The definition of facility abandonment also is particularly troublesome. Senate Bill 170 states that facility abandonment or capacity abandonment only occurs when the capacity of a facility is voluntarily and affirmatively terminated. This language assumes that an individual water withdrawal happens independently of any other circumstances. For example, if 2 nuclear power plants have sat idle for a certain period of time, this does not mean that there is more water to pull because it does not take into account the 5 other new facilities that are now pulling water from that watershed and that the International Joint Commission has started to hold back water from Lake Erie because water levels have dropped in Georgian Bay. While conditions could be good, given that those 2 power plants have been sitting idle, if one or both start operations again it could seriously harm the watershed, the businesses that believed they had a good water source and the local communities that depend on this water source for various other reasons.

Changing the scope of how impacts are judged; freezing high quality water status at the time of the bill's passage; only protecting named streams and rivers; measuring impacts from consumptive uses only; allowing a facility to sit idle for years on end without a determination of capacity abandonment; and requiring DNR to judge impacts on an arbitrary number not based on science has serious ramifications for those that are dependent on these water resources, including industry, agriculture, and wildlife. For example, if there is a large withdrawal on a particular stream, such as the Sandusky River, which typically can be walked across during August or September, this could prove to be detrimental not just to wildlife, but to industry that depends on a good source of water on this river, residents that depend on the stream for drinking water, and municipalities in terms of being able to meet their permit requirements without having to further update their infrastructure. In addition, this could damage the amount of revenue that the Cedar Point area generates as a result of algal blooms. This is because a significantly reduced flow in the Sandusky River may not be sufficient to disperse excessive nutrients out into the Lake, rather the nutrients will fall closer to the shore.

Gutting the Decision-Making Standard

Simply stating that a section complies with the Compact does not mean that the section actually complies with Section 4.11.2, conservation measure requirements, and Section 4.11.3, judging impacts to the Waters and Water Dependent Natural Resources and applicable Source Watershed.

For the purposes of meeting the cumulative adverse impacts requirement within Section 4.11.2, a report every 5 years does not satisfy the requirements under Section 4.11.2. In no way does this legislation provide direction on how to assess cumulative impacts. Rather, the legislation assumes all withdrawals occur in a vacuum. This is a backdoor attempt to gut the Decision-Making Standard and further leaves Ohio vulnerable to litigation by not upholding our binding contract with the other 7 Great Lakes states.

Under the Great Lakes Compact Section 4.11.3, an applicant seeking a permit from DNR ***must*** “be implemented so as to incorporate Environmentally Sound and Economically Feasible Water Conservation Measures”. Senate Bill 170 specifically states that the “chief of the division of soil and water resources shall establish a voluntary water conservation program that is applicable to all facilities that are the ***subjects of withdrawal and consumptive use permits***”. This is another attempt to gut the Decision-Making Standard and as stated before, the current language will leave Ohio vulnerable to litigation, which is a waste of precious and scarce taxpayer dollars.

While the Compact provides each state the authority to develop a program that works for that particular state, the Compact does not allow each state to determine what part of a binding agreement it does or does not like. Simply stating in a state's enabling legislation that a withdrawal or consumptive use is reasonable under section 4.11.5 of the great lakes-st. Lawrence river basin water resources compact unless a court determines that the use is not reasonable violates the Compact. Under the Compact, a binding agreement is determined to be “reasonable” based on 6 criteria:

- The proposed withdrawal or consumptive use will use the water efficiently, and will avoid or minimize the waste of Water;
- Whether the applicant is utilizing current water use efficiently;
- A balance between economic and social development and environmental protection;
- The supply potential of the water source;
- The degree or duration of any cumulative adverse impacts; and
- Restoration of hydrologic conditions and functions.

The language in Senate Bill 170 ties the hands of DNR and does not allow it to determine whether or not a use is reasonable. This is because Senate Bill 170 takes the determination out of DNR's hands and places it solely in the court's hands. In addition, we have heard time and time again that the reasonable use criteria conflicts with the Reasonable Use Doctrine and therefore the Compact recognizes the Reasonable Use Doctrine. There is ***absolutely nothing inconsistent or violative*** of Ohio law about requiring applicants for a permit to meet a reasonable use standard that differs from the common law standard for riparian reasonable use as codified in the ORC. Furthermore, Ohio's constitutional provisions on riparian rights, which again OEC helped to craft with Senator Tim Grendell, does not require Ohio to use the same definition of reasonableness for its permitting program. In fact, the provision acknowledges that public welfare is above the property right and that regulation may occur.

We respectfully suggest that the Committee take a step back to fully understand the Compact on this particular issue. The Compact **does not** state that none of its terms may trump state law. Sections 8.1 & 8.2 actually are more limiting. They state that nothing in the Compact shall be construed to impair established and existing rights under state or federal law governing withdrawals or to interfere with state common law water rights, respectively. Implementing the Compact, including the reasonable use criteria under the Decision-Making Standard, **does not** impair or interfere with existing state law rights. Landowners still have the right to a reasonable use of surface and groundwater. The only thing that can change is the criteria of what constitutes a reasonable use, which the General Assembly has changed in the past. In 1988, the General Assembly changed the meaning of reasonable use when it enacted Revise Code 1501.30-.35, which was adopted to implement the Great Lakes Charter and now deals with regulating major diversions and withdrawals throughout the whole state.

Thresholds for When a Water User Must Seek a Permit

The Compact requires each state, in setting threshold levels for when a water user must seek a permit for a new or increased withdrawal or consumptive use, to use "a considered process that assures an effective and efficient Water management program that will ensure that uses overall are reasonable, that Withdrawals overall will not result in significant impacts to the Waters and Water Dependent Natural Resources of the Basin, determined on the basis of significant impacts to the physical, chemical, and biological integrity of Source Watersheds, and that all other objectives of the Compact are achieved" (Section 4.10 of the Compact).

The threshold levels proposed in Senate Bill 170 do not provide a considered process based on uses overall being reasonable and ensuring that uses will not have an impact on the ecosystem's health. Rather, as the Coalition for Sustainable Water Management has stated,

the proposed threshold levels are based on creating an economic advantage over the other 7 Great Lakes states. As Dr. Jeff Reutter, Executive Director of Ohio Sea Grant and Great Lakes Compact Advisory Board Member, a healthy ecosystem equates to a healthy economy, not vice versa. Thresholds must be based on the latest scientific information available. This approach would fulfill the requirements of the Great Lakes Compact.

Violation of Ohio's Constitution

Sub HB 231 violates the Ohio Constitution's separation of powers. This is demonstrated through a provision in the bill that would require the General Assembly to approve any rules drafted by the Division of Soil and Water Resources to implement the Compact. Under the normal rule-making process, DNR would draft rules and seek feedback from the public and stakeholders, including from members of the General Assembly. The Division then would review and consider comments before revising and adopting any rules—subject to ultimate approval under the provisions of the new Senate Bill 3, adopted this General Assembly.

Conclusion

In a 2004 Executive Order, President George W. Bush declared the Great Lakes a natural wonder and charged the U.S. EPA with developing a plan to restore the Great Lakes. President Bush realized the value of Lake Erie as a place to explore with friends and family, a source of drinking water, and an economic engine. According to the Brookings Institute, an independent think-tank, the Great Lakes supports the second largest economy in the world.

The Great Lakes Compact was created to balance the needs of all *users* and to ensure the safety and health of the basin's waters – again, *all of the waters*, not just that of Lake Erie, alone. As Senator Grendell pointed out, this includes steel, utility, pulp and paper, automobile, agriculture, horticulture, aggregate, chemical, and petroleum industries. It also includes tourism, sport fishing, municipalities, and residents that also have equally legitimate needs of a healthy ecosystem. Senate Bill 170, however, would exempt virtually every water user from the programs required under the Great Lakes Compact while violating the Compact and seeking to re-write the Compact through legally indefensible substitutes.

The OEC believes Senate Bill 170 will seriously jeopardize the health and safety of the Ohio Lake Erie watershed and the millions of people that rely on it everyday. The passage of this flawed bill unnecessarily puts at risk the surface and ground waters that drain to Ohio's portion of Lake Erie; the drinking water supply of nearly 3 million Ohioans; a \$10 billion tourism industry; 1 out of every 10 jobs in the watershed; and the wildlife that depend on the waters of the Ohio Lake Erie basin. It also may increase the number of harmful algal blooms that the northern third of the state will experience, which will cause property values to decline and increase drinking and waste water rates for local residents.

There is plenty of time to pass balanced and responsible implementing legislation. Each state has until 2013 to adopt its own program.

We respectfully urge the General Assembly to adopt a thoughtful and balanced approach to implementing the Great Lakes Compact in Ohio—as the wording of Compact, itself, requires—while creating and *sustaining* the jobs that rely on the Lake.

We also respectfully ask the Committee to allow hearings on Senator Mike Skindell's legislation which fulfills the requirements of the Great Lakes Compact, while balancing the needs of all water users.

Finally, we respectfully ask the Committee to set aside Senate Bill 170 on the grounds that it violates the Great Lakes Compact, seeks to re-write the Compact suspect backdoor provisions, violates the Ohio Constitution, and may ultimately jeopardize millions of citizens way of life.

Please, let's make sure that Ohio get's this right the first time rather be forced to do so by a court. Thank you for considering our perspective.