



June 20, 2011

Chairman Hall, Ranking Member Fedor, and Members of the Committee,

Thank you for the opportunity to offer additional comments on the just introduced Substitute House Bill 231 (Sub HB 231).

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.

In oral testimony before the Committee on June 15, 2011, you heard the Coalition for Sustainable Water Management witness state 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 to be 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 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.

AMENDMENT REQUEST 1: Notwithstanding the major league flip-flop detailed above, we recommend that Section 1522.07 be deleted from Sub HB 231, line 844, to reinstate the language under Section

1522.07 (B)(1) and (2) that the industry coalition so strongly advocated to be included in House Bill 416 and which is now codified in the Revised Code. In addition, the OEC recommends that lines 378 – 381 be deleted to ensure that Ohio’s program fully fulfills the requirements of the Compact.

Furthermore, requiring a river or a stream to be a named body of water 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 77% 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.

AMENDMENT REQUEST 2: In line 364, DELETE “Named”.

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.”

AMENDMENT REQUEST 3: In lines 348-351, DELETE “not later than the effective date of this section as an exceptional warm water habitat, cold water habitat, outstanding state water, or superior high-quality water”.

Substitute HB 231 also seeks to change the requirements of the Compact by only seeking to judge significant **physical** individual impacts. By stating that a consumptive use that is less than 1.5% for the Lake and rivers under the influence of the Lake (lines 471-480) and 0.75% for groundwater and rivers and streams that are not of high quality (lines 481-489) of the long-term mean annual runoff from the Ohio Lake Erie watershed, it is *irrebuttably* presumed that the withdrawal is not having an impact is leaving to interpretation that a consumptive use of 1.5% and 0.75% and above does constitute an impact. 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.

Substitute HB 231 is in direct conflict with the Compact (Section 4.10 and 4.11.2), because it:

- Measures only impacts from consumptive uses, not impacts from both withdrawals and consumptive uses;
- Does not require a demonstration that a single withdrawal will not impact the chemical or biological integrity of the source watershed;
- 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. Sub. HB 231 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.

AMENDMENT REQUEST 4: We strongly urge the General Assembly to amend the Sub. bill's definition of "facility" and "capacity abandonment" to specify that if a facility has not used the capacity in the past 10 years, the capacity is considered to be abandoned. This will ensure that we are not turning away future economic development because of tying up unused capacity, while accounting for potential cumulative impacts, as required by the Compact.

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 judging only physical individual impacts against the long-term mean annual runoff from the Ohio Lake Erie watershed has serious ramifications for those that are dependent on these water resources, including industry, agriculture, and wildlife.

Fish and other wildlife do not live in a mean amount of water, such as are used to judge an individual impact. For example, if you pulled out all the air from a room and then pumped it in again 15 minutes later, the mean amount of air that is available in that particular room would not change, but everyone in the room would be dead. The same can be said about fish. 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

AMENDMENT REQUEST 5: Every instance in Sub. HB 231 that states "this division complies with the requirements of section 4.11.2 and 4.11.3 of the great lakes-st. Lawrence river basin water resources compact" should be removed from the legislation. 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.

AMENDMENT REQUEST 6: Under Section 4.11.3 of the Compact’s Decision-Making Standard, any applicant seeking a permit must undertake “Environmentally Sound and Economically Feasible” water conservation measures. These measures must be part of an *approved* DNR program, yet the language in this legislation states that it is up to the facility as to what best management practices it may utilize. Sub. H.B. 231 should be amended to read “The owner or operator has discretion to determine which **DNR approved** practices are best management practices.” 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.

Additionally, while you have heard that 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 Sub HB 231 ties the hands of DNR and does not allow it to determine whether or not a use is reasonable. This is because Sub HB 231 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 “hit the reset button” and 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 ORC 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.”

The threshold levels proposed in Sub HB 231 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 we have heard from the Coalition for Sustainable Water Management, the proposed threshold levels are based on creating an economic advantage over the other 7 Great Lakes states. As we heard from Dr. Jeff Reutter, Ohio Sea Grant, a healthy ecosystem equates to a healthy economy, not vice versa.

AMENDMENT REQUEST 7: The thresholds proposed in Sub HB 231 should be deleted and replaced with language requiring DNR to develop thresholds 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.

Several Committee members and industry witnesses have stated that tourism and sport fishing are not the only industries that rely on Lake Erie. That is true. In fact, as we all know, power utilizes, mining operations, shipping, heavy manufacturing, municipalities and agriculture also rely on Lake Erie. While this is true, the Committee debate has largely revolved around the needs of the latter industries, with little discussion of balancing the needs of those industries with the equally legitimate needs of a healthy ecosystem, such as tourism, sportfishing, wildlife, and the 3 million people of Ohio that live and work and play in the Lake Erie basin.

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. Sub House Bill 231, 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.

We believe Sub House Bill 231 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 once again to allow hearings on Representative Dennis Murray'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 Sub HB 231 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 gets this right the first time rather be forced to do so by a court.

Thank you for giving serious considering of our perspective and amendment requests.

Sincerely,

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