



NATIONAL WILDLIFE FEDERATION®

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Understanding the Great Lakes Compact

National Wildlife Federation

The Great Lakes are a critical natural resource to the country, as well as to the region. They provide freshwater for more than 40 million people who live within the basin and they support the region's economy. The Great Lakes basin contains nearly 20 percent of the earth's fresh surface water. The basin is unique in its size and ecological diversity and is essential to humans and wildlife alike; providing homes, food, recreation, and economic sustainability.

It is impossible to deny the importance of the Great Lakes to the region. There are nearly 11,000 miles of coastline surrounding the Great Lakes and their connecting channels and islands. Recreation is a 6 billion dollar industry across the Great Lakes region. For those of us in the Great Lakes States (the "States"), the Lakes hold a key to our economic health, to our recreational opportunities, and to irreplaceable family experiences.

The threats of global warming are likely to paint a bull's-eye on the Great Lakes region as a potential source of freshwater for all of North America. It is imperative that we act quickly to protect the Great Lakes from the potential for such diversions.

The Great Lakes – St. Lawrence River Basin Water Resources Compact (the "Compact") is the product of over four years of negotiations among the eight Great Lakes Governors with the input of a 39-member advisory committee and thousands of citizens. The Compact was purposely designed to *maximize* State flexibility and autonomy. The Compact contains broad guidelines for management, leaving the States to fill in the details in implementation. The water management requirements are drafted in very general terms that allow each State to tailor their program as they see fit. In only extremely limited circumstances is any State decision-making subject to other States' approval, and this must be made consistent with the Compact's standards. In essence, the Compact provides as much flexibility and autonomy to the States as possible under a joint management arrangement for protecting the Great Lakes for ourselves and for future generations.

As the most recent effort in a process that began as early as the 1985 Great Lakes Charter, the Compact represents the States' best means of providing for wise management of our extraordinary Great Lakes water resource. The next step for the Compact is its adoption by the eight Great Lakes States' legislatures. This memo seeks to assist that process by addressing legal

issues related to its approval by each of the States. Once the States have adopted the Compact, Congressional consent will make the Compact effective.

Recently, a number of disingenuous and erroneous concerns have been raised about the Compact. These misleading statements include, for example: the Compact does not allow for State flexibility in its implementation (it does); the Compact puts the management of State waters in the hands of other States and Provinces (it doesn't); the Compact Council is allowed to act freely outside the Great Lakes basin (it isn't); and the Compact will somehow infringe on the property rights of citizens (it doesn't). These claims make the Compact and the Council appear to have more authority over the States than they really do and reveal a lack of understanding of the respective roles of the Council and the States.

The States are the primary actors under the Compact. States design and implement water management programs, including approval of water withdrawal applications. The Council's role is merely advisory and administrative. Misleading and inaccurate statements are deceptive and will only hinder an open and constructive dialogue about what the Compact can accomplish. There must be a clear understanding of the Compact's provisions before there can be a meaningful and honest discussion of its merits. Hopefully this memo can clarify some of the issues and misconceptions that have arisen about the Compact and its effect on the States.¹

A. The Value and Significance of the Compact

1. The Compact Provides Necessary Protections for Our Great Lakes Water Resources

The Great Lakes are a vast and important resource that is vitally important to the region's environment and economy. However, the Great Lakes are not unlimited. Threats from degraded water quality, climate change and demands to divert water to other states require us to establish protections for this resource. The Compact provides the protections needed by establishing a strong and comprehensive water management plan. The Compact will maintain the Great Lakes States' legal control over Great Lakes water, guaranteeing long-term protection and sound management of the Basin's water.

2. The Compact Solves Deficiencies in the Existing Legal Regime

Regionally applicable existing laws are either insufficiently broad in their coverage, potentially subject to legal challenge, or not binding. State law among the eight Great Lakes States is inconsistent and incomplete in its coverage and inadequate for managing the shared resource of the Great Lakes. U.S. Supreme Court decisions have generally allowed diversions in interstate water disputes.

The Compact seeks to resolve the shortcomings of existing law by providing a binding, comprehensive and regionally-applicable mechanism that addresses the perceived legal weaknesses of the Water Resources Development Act by including decision-making standards, processes, public participation and enforcement mechanisms. The Compact anticipates potential

¹ This paper does not attempt to respond to all of the detailed points within these misinterpretations – only those that bear on the main aspects of each concern raised. If a specific response is desired for particular detailed points not considered here, please contact the author.

international trade law concerns related to its prohibition on diversions through in-basin management provisions that seek to satisfy trade law natural resources exception requirements.

3. Interstate Compacts Enable Joint State Resources Management that Preserves Sovereignty

An interstate compact is the best vehicle for the States to accomplish the water resources management goals needed to protect the Great Lakes. Compacts allow states to retain a measure of “collective state sovereignty” that would be lost under federal regulation. With interstate compacts, states get effective, enforceable uniformity and interstate cooperation without relinquishing control to the federal government. Similarly, while an individual state may give up the ability to act unilaterally on matters addressed by a compact, it may gain the ability to weigh in on decisions by other party states that affect its own interests.

B. An Accurate Reading of the Compact

Recently a number of concerns have been raised about the Compact that are misleading and are based on inaccurate interpretations and mistaken readings of the Compact. Such misleading and inaccurate statements will only hinder an open and constructive dialogue of what the Compact can accomplish. There must be a clear understanding of the Compact’s provisions before there can be a meaningful and honest discussion of its merits. Hopefully this memo can clarify some of the issues and misconceptions that have arisen about the Compact and its effect on the States.

1. There is a Need for the Compact’s Protections

The claim has been made that the Compact is not needed because (1) existing federal law (the Water Resources Development Act or WRDA) is sufficient to protect the Great Lakes from diversions and (2) lawsuits (e.g, *Wisconsin v. Illinois*, 278 U.S. 367 (1929)) are an adequate recourse against in-basin mismanagement.

The reality is that current laws and protections are inadequate: (1) WRDA is not sufficient and (2) lawsuits are inefficient. The Compact will provide diversion protection that remedies the weaknesses of WRDA and conflict prevention and resolution mechanisms that will greatly reduce the need for litigation.

2. The Compact Enhances Local Control over Great Lakes Waters

The claim has been made that the Compact somehow gives the other Great Lakes States authority to control an individual State’s use of Great Lakes water.

The reality is that under the Compact each State actually *increases* its existing sovereignty over their use of Great Lakes waters. The Compact will eliminate the current WRDA requirement for other States’ approval of *all* diversion proposals; instead requiring such approval only for a very limited set of diversions. The slight measure of sovereignty each State gives up by agreeing to a water management program is offset by the sovereignty each State gains from the other States’ commitment to this water management program that benefits all Great Lakes States.

3. The Compact Does Not Give Control of the Great Lakes to Canada

The claim has been made that the Compact somehow gives the Canadian provinces of Ontario and Quebec authority to control the States' water use.

The reality is that the Compact does no such thing; the only involvement of the Provinces is their participation, with the U.S. Great Lakes States, in a non-binding review ("Regional Review") of certain limited diversion proposals and in an opportunity to comment on proposed consumptive uses greater than 5 mgd per day. Sections 4.9.1.c, 4.9.2.c.iii, 4.9.3.f, 4.6. In this review, the States and Provinces issue non-binding "findings" that the State considering the proposal is to "consider". Section 4.5. In the opportunity to comment, while a State must provide a response to comments received from other Great Lakes States, the State need not even respond to comments from the Provinces. Section 4.6.

4. The Compact Does Not Give the Council Control Over States' Sovereign Powers

The claim has been made that the Compact would require the States to relinquish their sovereignty over Great Lakes waters and hand it over to the Council.

The reality is that under the Compact the Council is an administrative and advisory body and has no binding authority over any State's water laws.

5. Congress Generally May Not Withdraw Its Consent or Subsequently Change the Compact

The claim has been made that after Congress has consented to the Compact, Congress can take away this consent or change the Compact.

The reality is that Congress generally may not withdraw its consent, once given, and that Congress would not be able to change the Compact. Congress' only ability to later affect the Compact would be through legislation on other topics that might touch upon areas addressed by the Compact; however, this is true of all legislation.

6. The States Have Considerable Authority to Interpret and Apply the Compact

The claim has been made that by making ineffective any State implementing legislation that changes or amends the Compact, the Compact prohibits a State from including statements of intent or understanding in its implementing legislation.²

The reality is that while the Compact does not allow a State to change or amend the terms of the Compact *itself* through implementing legislation, a State is free to adopt implementing legislation that *interprets* the Compact for purposes of its application in that State. The Compact has been drafted specifically to allow each State considerable flexibility in implementing its terms so that each State may respond to its particular needs and circumstances.

² *Dyer v. Sims*, 341 U.S. 22 (1951) has been cited in support of this claim. It is unclear why; perhaps it is the Court's statement that "an organ of one of the contracting states" cannot give "final meaning" to a compact. 341 U.S. at 28. This statement does not speak at all to a state's ability to interpret a compact. Rather, the Court here is referring to conflicts between compact parties, noting that it, the Supreme Court, has the authority to give this "final meaning": "[a] State cannot be its own ultimate judge in a controversy with a sister State." *Id.*

7. The Compact Does Not Affect Existing State Water Rights

The claim has been made that the Compact will abridge, override and impede the rights of the States' citizens under State common law, statutes and constitutions.

The reality is that both the Compact itself and federal case law clearly set forth which laws are and are not affected by the Compact. In Articles 8 and 9 the Compact specifies how it relates to existing State laws, rights and responsibilities. While federal courts have explained that, as federal law, an interstate compact preempts inconsistent state laws, the Compact expressly provides that it does not so preempt certain rights. Specifically, the Compact *shall not be construed* to "affect, limit, diminish or impair" common law water rights and valid, existing State or federal water withdrawal rights. Sections 8.1.1 & 8.1.2.

8. The Compact Does Not Alter States' Public Trust Law

The claim has been made that the Compact's reference to the waters of the basin being held in trust by the States will convert water that is currently private property into public waters. Further, *it has been claimed* that Compact provisions stating that the Compact does not alter existing rights have no effect on this interpretation of the public trust provision.

The reality is that the Compact's reference to the States' public trust obligations is simply an acknowledgement of existing law and *does not have the effect of changing that law*; the Compact expressly states its intent not to change existing rights by stating that the Compact *shall not be construed to affect* any validly established rights related to water withdrawals *or* common law water rights.

9. Council Water Management Policies are Only Advisory in Nature

The claim has been made that the Council's water management policies are mandatory and so need to be reviewed and approved of by the State legislatures.

The reality is that there is no need for such review and approval because the Council's policies are only advisory in nature and are not laws, nor are they binding on any State.

10. Council Action Outside the Basin Boundary Requires Jurisdiction Approval

The claim has been made that the Compact authorizes the Council to act outside of the basin boundary without defining the limits of that authority.

The reality is that the Compact places clear and sufficient limits on this authority that require, among other things, that Council actions outside the basin are consented to by the jurisdiction where the Council wants to act. Section 2.7.

11. State Legislatures May Control Whether and How the Council Revises the Standard

The claim has been made that the Council may revise the Standard of Review and Decision without any control or oversight by the State legislatures.

The reality is that the Compact prohibits any such revision unless it has satisfied each State's statutorily-provided limitations on its Council member's authority and procedural requirements. "The Council may revise the Standard of Review and Decision . . . by regulation duly adopted . . . in accordance with each Party's respective statutory authorities and applicable procedures."

Section 3.1. Thus, the State legislatures have the ability to control whether and how such a revision is made. The Compact also requires such revisions to be unanimously approved and adopted after public notice and comment.

12. The Council Will Not Receive Confidential Information

The claim has been made that the Compact is faulty because it does not provide for the Council to keep confidential the information it receives in permit applications.

The reality is that the Compact need not provide for this because no applicant will be required to give information directly to the Council; all application information will go first to the States, which are fully authorized to honor their own confidentiality obligations (section 8.3). The Compact expressly provides that permit applications the Council reviews shall be submitted to the Council by the State where the withdrawal would take place. Section 4.7.1.

13. The Council Will Be Able to Keep Sensitive Litigation Information from Public Disclosure

The claim has made that the Compact's requirement for Council meetings (except for personnel matters) to be open to the public will prevent the Council from private discussions of litigation matters. Section 6.1.1.

The reality is that the Council can certainly manage its work so that the information disclosed during official meetings where votes are taken does not hinder litigation strategies and objectives.

14. The Compact Itself Determines How the Council Will Operate

The claim has been made that the Compact fails to identify which States' open meeting laws apply to the Council, which is identified in the Compact as "an agency and instrumentality of" the Great Lakes States.

The reality is that the Compact does identify what laws the Council must follow. In addition, the Council has authority to adopt its own rules and procedures, so where the Compact does not expressly speak, the Council (comprised of members from each State and with no binding authority on any State) will adopt appropriate rules.

15. The Compact Provides an Exemption for Water Used to Transport Animals

The claim has been made that the transport out of the Basin of fish caught in the Great Lakes in containers greater than 5.7 gallons would be subject to the diversion prohibition and would therefore be a Compact violation.

The reality is that the Compact provides an exemption for the use of water to supply the needs of animals being transported (section 4.13.1).

16. The Compact Clearly Sets Forth How States and the Council Resolve Their Disputes

The claim has been made that the Compact's provisions concerning alternative dispute resolution (section 7.2) and enforcement (section 7.3) present an inconsistency and are unclear about when each provision applies to disputes between the Great Lakes States.

The reality is that the provisions are not inconsistent and that well-known rules of interpretation make clear that disputes between the Great Lakes States are governed (1) by the ADR provision when the dispute concerns the interpretation, application and implementation of the Compact and (2) by the enforcement provision when concerning something other than this.

17. The Compact Allows Each State to Determine the Nature of Persons "Aggrieved"

The claim has been made that the Compact provides a right of action given to "any Person aggrieved" but fails to sufficiently define who is "aggrieved" or the standards and procedures to follow in such suits.

The reality is that the Compact has left these decisions to each Great Lakes State in its implementation of the Compact: each State will decide who qualifies as "aggrieved", what is the burden of proof and what is the standard of review under its own laws.

18. The Compact's Severability and Materiality Provisions Are Standard and Necessary

The claim has been made that (1) section 8.6 concerning the severability of Compact provisions in general (i.e. if one provision is severed the rest continues in effect) and section 4.14.6 concerning the severability of section 4.14 (i.e. if any part of 4.14 is severed, the Compact doesn't apply to Illinois) are inconsistent and (2) section 8.6 is inconsistent with the section 9.3 materiality provision (i.e. each Compact provision is material to the entire agreement).

The reality is that all of these provisions are consistent with one another and all are capable of interpretation and application: (1) the more specific provision of 4.14.6 applies to its limited situation and the more general provision of section 8.6 applies in all other instances; and (2) the materiality and severability provisions serve different, but complementary, purposes.

19. The Compact's Majority Termination Provision Protects All Participants

The claim has been made that the Compact's requirement that it remains binding on all States unless terminated by a majority of States (section 8.7) should be changed to allow any State to unilaterally withdraw from the Compact.

The reality is that the management of our shared Great Lakes resource is only meaningful and effective if all States participate. The ability of an individual State to unilaterally abandon or avoid its obligations under the Compact would have the effect of allowing one State to impose its demands upon the other seven. Once committed, all eight States will be expected to honor their responsibilities unless and until at least a majority of the States determine the Compact is no longer suitable.

Conclusion

The management of our shared Great Lakes resource will be successful and effective only if all of the Great Lakes States participate in its protection and management. The Compact provides the region with an opportunity to effectively and jointly manage this significant resource.

The Compact before us has been subjected to a painstaking and thorough review. While the Compact reflects many legal and policy compromises, it has been carefully reviewed from all sides for its accuracy and practicality. The Compact is not a simple document to read and consider. Thus, it is important that questions, misunderstandings and confusion about the Compact are properly explained so that we can make wise decisions on the future of one of the world's most important natural resources.

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