



NATIONAL WILDLIFE FEDERATION®

Great Lakes Natural Resource Center
213 West Liberty Street, Suite 200
Ann Arbor MI 48104-1398
734-769-3351
www.nwf.org

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

With 95 percent of our nation's (and nearly 20 percent of the Earth's) fresh surface water, the Great Lakes are a vast and important resource. They are vitally important to the region's environment and economy as a center of commerce and industry, supporting agriculture, shipping, heavy manufacturing, and electricity generation. They also supply drinking water to 40 million people, support fishing and tourism, and provide a range of recreation opportunities for all the region's residents.

However, the Great Lakes are not unlimited. Only about one percent of their water is replenished each year by rainfall and snowmelt; the remaining 99 percent is finite and nonrenewable. Threats to the quality of the Lakes' water and water dependent resources have diminished the value of this resource. The impacts of climate change are predicted to reduce the amount of water available in the Great Lakes. At the same time, climate change will increase the demand for water in arid parts of our country, making diversion of Great Lakes waters a more attractive prospect to many outside the basin.

The Great Lakes are a resource worth protecting and improving, and it is clear that we need our water here at home where it can support our way of life. The carefully balanced and precedent-setting Compact will provide 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.

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.

2. The Compact Solves Deficiencies in Existing Legal Protections

Although many federal and state laws apply to the Great Lakes, none of them protects Great Lakes water supplies adequately. Regionally applicable existing laws are either insufficiently broad in their coverage (i.e. 1905 Boundary Waters Treaty, 1968 Great Lakes Basin Compact), potentially subject to legal challenge (i.e. Water Resources Development Act (WRDA)), or not binding (i.e. 1985 Great Lakes Charter and its 2001 Annex). State statutory and common law among the eight Great Lakes States is inconsistent and incomplete in its coverage and is an inadequate means of managing a resource such as the Great Lakes that crosses state borders. U.S. Supreme Court decisions have generally allowed diversions when addressing interstate water disputes (see, e.g., *Wisconsin v. Illinois*, 278 U.S. 367 (1929)). Thus, it is clear that existing laws for managing Great Lakes waters do not provide the binding, comprehensive, regionally-applicable mechanism needed to wisely manage this valuable resource. The deficiencies of several of these are discussed in more detail below.

The Compact seeks to resolve these shortcomings by providing the binding, comprehensive and regionally-applicable mechanism needed. Further, the Compact addresses the perceived legal weaknesses of WRDA by including decision-making standards, processes, public participation and enforcement mechanisms. The Compact also anticipates potential international trade law concerns related to its prohibition on diversions of water outside the basin: its in-basin management and conservation provisions seek to satisfy trade law natural resources exception requirements.

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

An interstate compact is a contract among the states that enter it. The U.S. Constitution allows states to enter into compacts as long as they obtain Congressional consent when the subject matter of the compact touches upon an area of federal jurisdiction. The Compact will require Congressional consent in order to become effective. Once Congressional consent is given, a compact becomes federal law in addition to being the law of each state that has entered into the compact. Interstate compacts are fairly common undertakings: on average a state belongs to 25 compacts. Compacts are typically used to settle boundaries between states, to create study commissions, and to regulate a particular subject matter, such as a shared resource.

An interstate compact is the best vehicle for the States to accomplish the water resources management goals needed to protect the Great Lakes. The compact mechanism's principle advantage is providing states with an effective, enforceable means of cooperating with each other that does not relinquish their authority to the federal government. Compacts provide regulatory uniformity and interstate enforceability otherwise obtainable only through federal legislation without making states submit to federal intervention or regulatory preemption. The states also gain enforceability of a shared regulatory scheme that no other state-controlled means (such as uniform statutes or good-faith agreements) can provide.

When measured against the complete loss of state authority that can result from federal preemption, most states prefer the legislative and regulatory control they jointly retain under an interstate compact. Through such agreements, states retain a measure of "collective state sovereignty" that would be lost under federal regulation. With interstate compacts, states effectively get the best of both worlds – they gain effective and 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

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.

Many have suggested that WRDA (42 USC 1962d-20) is subject to legal challenge because it contains no standards or processes for decision-making. This lack of standards and processes is also a poor means of managing a resource. In addition, as federal statute (as opposed to the federal law status of an interstate compact that is also state law and contract), it places control over Great Lakes water in the federal sphere, rather than at the level of the Great Lakes States. Because WRDA is a federal law, it can be changed at any time by Congress. As explained below at B.5, once it has consented, Congress cannot unilaterally change an interstate compact; the States would have to concur.

The Compact remedies WRDA's deficiencies by providing the standards and processes needed to withstand legal challenge. These standards and processes also ensure that diversion decisions are well-made. Once the Compact becomes effective, its protections go into effect regardless of the federal will to provide Great Lakes protections and, as a statement of regional intent to cooperatively manage these resources, would present a severe political impediment to Congress' ability to meddle with these resources.

The well-known lawsuit discussed above demonstrates how ineffective suits can be. This suit was brought only after Lake Michigan had dropped nearly six inches as a result of Illinois' diversion of water. The suit took a number of years to resolve and, after over 70 years, it is still subject to ongoing U.S. Supreme Court jurisdiction and, most importantly, has left the Lake permanently lowered by six inches. This is not an effective way to protect the Great Lakes.

People in the Great Lakes area and the waters themselves need better and more efficient protections than litigation can provide. The Compact will provide a common set of standards and processes for in-basin water use, and sets forth a means of state cooperation and communication (including public participation) in implementing these, so as to greatly reduce the potential for conflict to arise in the first place. Should conflicts arise among the States, the Compact calls for alternative dispute resolution to be used. Enforcement via lawsuits is provided, of course, but the extensive processes provided should limit the need to resort to this.

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.

The vast majority of any new or any increased water withdrawals will be completely within a State's authority to decide:

- all in-basin uses, which comprise nearly all of a State's Great Lakes water usage (sections 4.10, 4.11);
- all diversion proposals for communities that straddle the Basin divide (section 4.9.1);
- all diversion proposals for the transfer of water from one Great Lakes basin to another that result in less than 5 mgd consumptive use (sections 4.9.2.a & b).

The *only* new or increased water withdrawals not completely within a State's authority to decide will be the narrow circumstances where there is (a) a proposal to divert Great Lakes water to a community within a county that straddles the Great Lakes basin or (b) a proposal to transfer water from the basin of one Great Lake to that of another that results in more than 5 mgd consumptive use. Sections 4.9.3.g, 4.9.2.c.iv. For these situations, the Compact requires unanimous Council approval and obligates the Council members (i.e. the States) to base this approval upon the Compact's decision-making standard. Section 4.7.2. Thus, no State may unjustifiably withhold its approval.

Currently, the federal Water Resources Development Act ("WRDA"), requires all diversion proposals to receive the approval of the seven other Great Lakes States, but does not provide any decision-making standard for these States to consider and does not provide any process for seeking this approval. 42 USC 1962d-20(d) (1986, amended 2000). So the States have a substantial net gain of autonomy and authority under the Compact.

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.

The Compact is an agreement among the eight Great Lakes States only – the Canadian Provinces will not be parties to this agreement. Section 1. The binding obligations and the contractual remedies under the Compact extend only to the States. The Provinces' participation in a limited range of water use decisions is completely advisory in nature and non-binding. The States provide the Provinces these opportunities to participate because they understand the shared nature of the Great Lakes water resource and the Provinces' legitimate interest in significant Great Lakes water uses. The States have a similar opportunity to weigh in on the Provinces' water use decisions under the companion Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement. Article 205, Chapter 5. However, just like the earlier Great Lakes Charter and Annex 2001, the relationship between the States and Provinces under the Compact is merely good faith and not binding.

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.

Many of the Council's responsibilities are advisory in nature and are designed to assist the States in implementing the Compact. See sections 3.4.2 (non-binding review and comment on State programs), 4.1.2 (assist in database development), 4.1.6 (coordinate collection of information), 4.2.1 and 4.2.2 (identify and revise non-binding basin-wide conservation objectives). Other Council responsibilities and duties provide and enhance the rights of the public. See sections 5.1 (seeking Tribal participation), 6.1 and 6.2 (public participation), 7.3.1 (participate in litigation brought against the Council).

There are only a few limited instances where the Council may take action that the States must follow. In these limited cases the Council action either (1) does not directly infringe on any State's ability to exercise its water management authority or (2) has sufficient safeguards built in to ensure prior approval and acceptance by the affected State. Even a cursory review of Council authority demonstrates that none of these actions places a serious burden on the States. For instance:

- Section 3.1 authorizes Council revision of the Standard of Review and Decision. However, as discussed below at B.10, such Council revision cannot be approved until each State's statutory authority and procedural requirements have been satisfied.
- Section 4.1.3 authorizes the Council to set the registration date. This is a minor administrative duty designed to provide consistency across the basin. This Council duty does not negatively affect any State's water resources management authority.
- Section 7.2 authorizes the Council to establish alternative dispute resolution procedures for use by all the States. These procedures do not govern the

substance of any resolution achieved – the States maintain full authority to resolve their disputes.

- Section 7.3 authorizes the Council to initiate actions to compel compliance with the Compact. However, the final decision in any such actions will be made by a court of law, not by the Council.
- Sections 4.7.2, 4.9.2.c.iv and 4.9.3.g provide Council approval authority over certain diversion proposals and require the Council to follow the Compact’s standards when approving or denying such proposals. As discussed above at B.2, this Compact provision actually enhances existing State authority.

To accomplish its primarily advisory functions, the Council has an assortment of the normal administrative functions, powers and duties common to most governmental agencies (e.g., the power to make rules to govern its own processes, the responsibility to get budget approval, the ability to enter into contracts, own property, investigate). These kinds of administrative powers are necessary to enable the Council to fulfill its role in the Compact. See Articles 2 & 3.

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.

Federal courts have held that Congress has no express authority to withdraw its consent to an interstate compact. *Tobin v. United States*, 306 F.2d 270, 273 (D.C. Cir. 1962). While courts have not decided whether Congress may have implied authority to do so, courts have concluded that finding such implied authority “would stir up an air of uncertainty in those areas . . . affected by the existence of these compacts. . . . [and] would be damaging to the very concept of interstate compacts.” *Mineo v. Port Authority of New York and New Jersey*, 779 F.2d 939, 948 (3rd Cir. 1985), citing *Tobin v. United States* at 273. Congress would similarly be unable to unilaterally make changes to the Compact. The Compact language does not allow such changes to be effective (section 8.5); and the concerns of uncertainty and of damage to the concept of compacts apply here as well.

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

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

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.

The only Compact provision limiting what can be in a State’s implementing legislation (section 9.3) serves the purpose of simply ensuring that every State adopts the exact same Compact. The Compact itself would not be effective if each State could adopt differing versions. Such differences can be created if implementing legislation effectively changes or amends the Compact’s terms.

However, this provision does not in any way limit a State’s authority to *interpret* the Compact through its own implementing legislation, rulemaking or policy. State parties to an interstate compact regularly enact enabling legislation to address state-specific concerns related to the agreement. Implementing legislation to expand upon or further explain the Compact for purposes of applying it in a particular State will likely be required to fill in the details the Compact does not provide. 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. As long as implementation by the State is an interpretation of the Compact and not a change to the Compact itself, the implementation is well within State authority.

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.³

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.

According to the Compact, once it is effective (1) laws inconsistent with the Compact will be repealed (section 9.1), (2) the Compact *shall not be construed* to affect common law water rights or valid, existing State and federal water withdrawal rights (sections 8.1.2, 8.1.1), (3) approvals given under the Compact *shall not be construed* to grant or invade property rights (section 8.4), (4) States may continue to honor confidentiality obligations (section 8.3), and (5) the Compact *shall not be construed* to affect a State’s authority to enact or enforce additional water management requirements (section 8.4).

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.*

³ *Hinderlider v. La Plata River*, 304 U.S. 92 (1938), has been cited in support of this claim. While it is true that *Hinderlider* found state-granted water rights invalid, this was due primarily to the lack of state authority to grant these rights and not because a compact had taken a legitimate vested right. *Id.* at 108-109. Further, the Compact is distinguishable because it preserves existing water rights, which the *Hinderlider* compact did not.

In addition to the Compact's express identification of its impact on state laws, state-granted rights, state responsibilities and state authority, the Compact will become federal law once it is effective. *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U.S. 419, 427 (1940). This will elevate the status of the Compact in relation to other State law and has implications for its interpretation and application. As federal law, the Compact will preempt inconsistent state law. *Mineo v. Port Authority of New York & New Jersey*, 779 F.2d 939, 948 (1985). This relationship to other State law is necessary in order to preserve the rights of all the States that enter into the Compact. By preventing the compacting States from passing and applying inconsistent laws, each State is assured that the agreement they reached in the Compact will be upheld. While each State is free to interpret the Compact for its application in their State, this interpretation cannot extend to the creation of inconsistent State laws.

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.

The language referenced is in the Findings section of the Compact (section 1.3.1.a). The States' obligations regarding Great Lakes waters under the public trust doctrine is mentioned here along with other factual findings made by the States, including that the Waters of the Basin are interconnected, that they can concurrently serve multiple uses, and that the States have a shared duty to protect them. Sections 1.3.1.b, c & f. The Findings are important indicators of the factual bases justifying the creation of the Compact. Since their presence indicates the State Parties' reasons for entering into the Compact, they may be useful in determining how to interpret the Compact. However, the Findings do not purport to create new legal obligations, nor can they.

The Compact expressly states that it is not to be construed to affect certain existing rights and common law. Sections 8.1.1, .2 & .4. Note that the Compact does not say that it "does not intend to affect" existing rights or common law: the Compact says that "*Nothing* in this Compact *shall be construed*" to affect these rights and the common law. This means that if a provision *could* be interpreted to affect such rights or common law, such an interpretation is not allowed.⁴

⁴ Two additional points are claimed: (1) section 8.1.2 applies only to existing, settled common law and not to common law as it may be interpreted in the future and so does not keep the Compact from limiting a state court's future interpretations of the public trust doctrine; and (2) section 8.1.4 only prevents injury to private property rights resulting from withdrawal approvals and so does not prevent such injury from other Compact provisions. Responses to these include: (1) Section 8.1.2 places no such limitation on when the common law is interpreted. Common law, by its nature, is "found" by the courts, construing existing common law principles in light of the facts of the case and

In fact, the reference to the public trust doctrine in the Compact reveals the States' recognition of their obligations to manage their waters under their public trust doctrines. This is one important reason why the individual States need to adopt the protections contained in the Compact. The States similarly recognized this obligation when they agreed to the 1985 Great Lakes Charter and Annex 2001 to the Charter. Both documents contain language identical to that used in the Compact. Despite the existence of this language for over twenty years (and the States' agreement to it), the dire consequences claimed have not occurred.

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.

The Council's authority to develop policies is at section 3.1: "The Council shall identify priorities and develop plans and policies relating to Basin Water resources." As discussed above at B.4, the impact of the Council's administrative actions, such as the development of policies, depends upon how the Council is empowered to apply these policies. Since the Council has no authority to require any State to follow these policies, there should be no reasonable concerns for State oversight of Council policy development.

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.

According to the Compact, Council actions outside the basin are "subject to the consent of the jurisdiction wherein it proposes to act." This limitation ensures that the Council will act only where consented to (and no conditions are placed upon the giving of this consent). By its own terms, the Compact prevents the Council from acting anywhere it is not welcome.

other relevant considerations. While the Compact might be one such consideration, this is a decision for the court. (2) The section 8.1.4 argument assumes rejection of all previous arguments made in response (i.e. public trust only in Findings, Compact may not be construed to affect existing rights and (present and future) common law). If you accept any of these previous arguments, then there is no need to consider section 8.1.4.

Briefly, other arguments in response are: (1) the limited nature of private "rights" to water, i.e. the right is to use water but not to own it; and (2) the limited nature of the public trust doctrine as it pertains to water, i.e. it does not remove all access to and use of trust waters without state permission.

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.

The Compact places four hurdles in front of any Council effort to revise the Standard of Review and Decision:

- (1) consultation with the Provinces, which recognizes their interest in management of this shared resource;
- (2) unanimous Council member vote, which means all States must agree;
- (3) the passage of a regulation adopted in accordance with the Compact, which means public notice and comment are provided; and
- (4) following each State Party's "respective statutory authorities and applicable procedures."

This last requirement invites each State legislature to determine by statute the authority given to that State's Council member to make such a revision and to establish procedures for that member to follow in the revision process. Thus, the State legislatures have as much control as they wish over their Council member's actions with respect to such revisions.

Together, these four requirements serve to ensure that no revision of the Compact's Standard of Review and Decision will occur unless the public and legislature in all eight States approve of the revision.

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.

This claim reveals 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. Sections 4.3, 4.4, 4.9, 4.10, 4.11, 8.4. The Council does review a very limited set of diversion exception applications (sections 4.9.2.c.iv, 4.9.3.g), but this review is conducted as part of a State's application approval process and, again, as the

Compact provides, the Council receives its information on the application only from the States.

When it comes to transmitting this information, the Compact explicitly provides: “Nothing in this Compact requires a Party [i.e. State] to breach confidentiality obligations or requirements prohibiting disclosure, or to compromise security of commercially sensitive or information.” Section 8.3.1. Further, States are authorized to “take measures . . . deemed necessary”, including deletion and redaction, to protect confidential information when communicating with the other States and, with respect to the Council, a State “shall summarize or paraphrase any such information in a manner sufficient for the Council to exercise its authorities” under the Compact. Section 8.3.2.

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.

As with any governmental entity, much of the Council’s work will take place outside of the context of official meetings where decisions are voted upon. Discussions of litigation strategy and options can take place in such an informal setting. If the decision to undertake litigation were to require a vote of Council members, the measure to be voted on can be presented in a manner that will not disclose sensitive information. Further, the Compact’s public meeting requirement could not have been intended to override the attorney-client privilege, so any discussions by the Council members with their counsel would be exempt from this requirement.

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.

As “an agency and instrumentality of” the States that has been created jointly by the Great Lakes States, the Council is only subject to the laws of the individual States if the Compact provides for this. The Compact does set forth some procedural requirements the Council must meet; for example, the Council must make its minutes publicly available (section 6.1.2). For procedures not expressly set forth, the Compact authorizes the Council to “provide for its own organization and procedure, and may adopt rules and regulations governing its meetings and transactions”. Section 2.5.

In addition to the case law holding this arrangement to be allowable, two factors make the Council's authority in these matters acceptable: the Council's composition and its jurisdiction. First, the Council is comprised of the Governors of each of the eight Great Lakes States, with its rules adopted on a majority basis and with budgets agreed by unanimous vote. Sections 2.2, 2.3, 2.4. So the States themselves will be deciding on the procedures the Council must follow. Second, as explained above at B.4, the Council's jurisdiction is quite limited. Because the Council is unable to take binding action within any of the States, there is no need for the Council to have to follow the laws of any particular State.

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).

The Compact's drafters recognized that some situations should be exempt from the water management requirements. These include (1) the use of water in crisis situations -- firefighting, humanitarian needs, emergency response -- as long as this is short-term and non-commercial and (2) the use of water for vehicles, vessels and aircraft to assist in their operation or to serve the needs of the people and animals being transported. The example in the claim falls into this latter category.

Given the multitude of potential scenarios for uses of Great Lakes water, a situation might arise that the drafters have not addressed. In such a situation, rules of interpretation would provide that the Compact be applied consistent with the spirit and intent of the document. Since the Compact provides each State with considerable flexibility in applying the Compact within its boundaries, the State where such an unanticipated situation arises will have much discretion to determine how this rule of interpretation would be applied.⁵

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.

⁵ Note that under WRDA the claim's scenario would be considered a diversion, but the States have not sought to regulate such water use under WRDA. This is because common sense dictates that such water use should not be regulated -- this is not the type of diversion the States should be concerned about regulating and regulation would be too onerous.

Section 7.2 states that “disputes between the Parties [i.e. States] regarding interpretation, application and implementation of this Compact shall be settled by alternative dispute resolution”, with the Council to establish the procedures for such ADR. Section 7.3.1 states that “Any Person aggrieved” by Council or State action “shall be entitled to” seek administrative and judicial relief, with “Persons” including the States and the Council. Section 7.3.2 states that the States and the Council “may initiate actions to compel compliance with the provisions of this Compact”

Under all three of these provisions, the dispute could be between two (or more) Great Lakes States, but only under the first provision (section 7.2) could the dispute be *only* between two (or more) Great Lakes States. Thus, the first provision governs the resolution of disputes between two (or more) Great Lakes States. Additionally, the first provision *requires* (“shall”) ADR, whereas the others are voluntary (“may”). Finally, ADR is a process undertaken prior to litigation, as a means to avoid litigation, and so it makes sense that ADR would be the first course of action available to the Great Lakes States for resolving disputes between them.

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.

The States’ authority to make these decisions derives from the language of the Compact itself as well as from general rules of interpretation. The Compact provides that “Each Party [i.e. State] . . . may adopt and enforce rules and regulations to implement and enforce this Compact” Section 3.3.2. This provision is an acknowledgement that the Compact does not provide all the details needed for a State to put it into effect and a recognition that the States will have the ability to apply the Compact’s terms to their particular factual and legal situations. The Compact also states that suits by persons aggrieved must satisfy State law requirements pertaining to administrative procedures and to time frames for judicial review of administrative decisions. Sections 7.3.1, 7.3.3.

Because the States have the obligation to implement the Compact, general rules of interpretation would allow the States to determine the meaning of undefined terms, and to flesh out the details of generally-worded provisions, where the Compact does not indicate this is outside of the States’ authority and as long as the State’s interpretation is not inconsistent with the rest of the Compact. As discussed above at B.4, the Compact Council cannot interfere with each State’s authority to take such action because the Council’s authority does not extend this far.

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.

The language found in sections 4.14.6, 8.6 and 9.3 is standard contract language commonly used in many types of agreements among governmental entities, corporations and businesses, and individuals. Along with the other provisions of Articles 8 and 9, such as existing rights, confidentiality, amendment and effectiveness, the Compact's provisions concerning severability and materiality are standard, boilerplate contract provisions familiar to any lawyer and judge who works with contracts.

(1) Section 8.6 provides that, if a court were to declare any Compact provision void or unenforceable, the rest of the Compact's provisions will continue in effect to the extent possible in the absence of the voided or unenforceable provision. Section 4.14.6 provides that, for Illinois, if a court were to declare any part of section 4.14 void or unenforceable, the rest of the Compact's provisions would not continue to apply to Illinois.

While different from each other, these provisions are not inconsistent. Rules of interpretation provide that the specific takes precedence over the general. Since section 4.14.6 is more specific (applying only to Illinois and only to section 4.14) and section 8.6 is more general (applying to all States and all Compact provisions), section 8.6 would not apply to the situation contemplated by section 4.14.6. If a court finds any part of section 4.14 void or unenforceable, then Illinois is no longer bound by the Compact; but if any other provision of the Compact is found void or unenforceable, the remainder of the Compact will continue to apply to all the States, to the extent it can be applied in the absence of the voided/unenforceable provision.

(2) Section 9.3 provides that each provision of the Compact is considered material to the entire Compact and that failure to implement or adhere to any provision may be considered a material breach. The purpose of this section is to clarify each State's obligation to implement the Compact. "Material" provisions are those that are important to the functioning of the entire agreement, making the failure to implement them a breach of the agreement. By declaring every provision "material", the States agree that they will implement every provision (or suffer a breach of contract claim).

There is nothing inconsistent between the States' desire that all provisions be implemented (section 9.3) and their providing a backup plan should a court find one of those provisions void or unenforceable (section 8.6). In fact, the two provisions reinforce one another. All Parties want every part of the Compact to be considered valid and effective. But if a court finds otherwise, the severability provision protects the rest of the agreement. By requiring the rest of the agreement to continue in effect, to the extent

possible, the severability provision reinforces the materiality provision concept that every provision is important.

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.

The waters of the Great Lakes are interconnected and a shared resource that all eight Great Lakes States share responsibility for managing properly. The Compact provides a means for these States to have meaningful and effective shared management of this invaluable resource. It is the binding nature of the Compact that will make it work – the knowledge that each State has committed to do its part in the joint effort to properly manage these precious waters.

If one State were allowed to unilaterally abandon this commitment, the meaning and purpose of the Compact would be undermined. While unilateral withdrawal might be appropriate for interstate compacts that don't seek to govern a resource that crosses state jurisdictions and that is shared among states, such withdrawal would contravene the proper management of a shared resource such as the Great Lakes.

The Compact allows the States to later amend its terms if they determine a change is needed. Section 8.5. This is done in the same manner as the Compact becomes effective, i.e. all eight State legislatures and Congress must approve. The Compact also allows the States to terminate its effectiveness if they decide, for whatever reason, that the Compact is no longer needed or no longer appropriate. Section 8.7. This is done by majority vote of the States, which is a far less onerous process than initially adopting or amending the Compact.

Once all the States have made the commitment to provide for the shared management of our Great Lakes and the Compact becomes effective, each State should be obliged to uphold this commitment unless it can convince at least four other States that the Compact should be terminated. To allow otherwise would make illusory the protections the Compact seeks to provide the Great Lakes.

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.

Mary C. Ericson
Great Lakes Water Resources Attorney
National Wildlife Federation
213 W. Liberty, Suite 200
Ann Arbor, MI 48104
734-769-3351
ericsonm@nwf.org

May 18, 2007