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Environmental Advocates of New York
Great Lakes United
Lake Michigan Federation
Michigan Environmental Council
Michigan United Conservation Clubs
National Wildlife Federation Great Lakes Office
Ohio Environmental Council
Tip of the Mitt Watershed Council
Union québécoise de la conservation de la nature
Wisconsin Wildlife Federation

Responses to Council of Great Lakes Governors' Issues for Public Comment

October 18, 2004

The International Agreement

- Would you recommend changes to the Regional Review Process, including any changes that could help ensure timely, cost-effective review of water use proposals that are subject to regional review?

We recommend subjecting withdrawals to Regional Review based on the withdrawal's potential for large-scale environmental impacts. Basing the threshold on consumptive use, rather than the actual withdrawal amount, would result in very large withdrawals avoiding regional review. For most withdrawals, actual withdrawal is a better indicator than consumptive use for potential environmental impacts to the waters of the Great Lakes. Further, consumptive use is difficult to quantify. As a system it would result in significant uncertainty for both water withdrawers and the public as to whether a given withdrawal would meet the Regional Review threshold.

- Would you recommend changes to public participation?

We recommend that the agreement allow comment not only on original proposals that rise to Regional Review but also on the Declarations of Finding that result from them.

Declarations of Finding can be heavily conditioned and in that sense dramatically different from an original proposal. Since the basic facts of the proposal and its potential ecosystem impacts should have been fully explored during the original comment period, this proposed second comment period could be very short.

The Compact

- What is your recommendation for voting on New or Increased Diversions of 1 million gallons per day or greater average over any 120-day period and New or Increased Consumptive Uses of 5 million gallons per day or greater average over any 120-day period?

The different voting standards for diversions and in-basin withdrawals (consumptive uses) could be a legal weakness unless justified logically. In short, we recommend that either the consumptive use threshold be lowered to 1 million gallons per day (averaged over 30 days, not 120 days) or the 5 million gallon per day figure be converted to withdrawal rather than consumptive use. Please see our extensive discussion on this point in our full comments.

Still, both the voting scheme and even the decision venue—jurisdictional or regional—are less important than the strength of the standards, the decision-making process, and the availability of judicial review and enforcement.

- Would you recommend changes to public participation?

The provisions for public participation in Compact Council deliberations, including participation in the development of rules for implementing the compact's provisions, would give the public appropriate access to the decision-making process.

However, the compact should ensure the same opportunities for public participation in jurisdictional decisions, since that is the forum in which the vast majority of water use decisions will be made.

In both forums, we recommend requiring:

- Public notice of amendments to water withdrawal permit applications.
 - Design and implementation of a special effort to notify First Nations and Tribes, beginning with the construction of contact list.
 - Plain-language interpretations of the environmental, cultural, and social dimensions of projects proposed in permit application, and of amendments to permit applications.
 - Response by regulators to a reasonably comprehensive list of categories of public comment
- What recommendations do you have for enforcing the terms of the Compact?

Any person should have the right to bring an enforcement action in court against any violation of the compact provisions, including:

- Failure to obtain a permit
- Violation of permit conditions
- Failure to implement adequate state programs or meet other compact responsibilities

Persons should be granted the right to recover all costs (including attorney fees and expert witness fees) in enforcement actions. This “private attorney general” right has been the best guarantee of legal enforcement of environmental laws.

Decision Making Standard (Agreement and Compact)

- Would you recommend making changes to the threshold levels for regional review?

The threshold levels for regional review should be based on the size of the withdrawal, not on the loss of the water. Withdrawal is a far better indicator of potential environmental impacts than consumptive use, and is simpler and more efficient for both water users and the public to understand and quantify.

In our analysis, the difference in threshold levels, given the identical ecosystem impacts of the category of measurement—loss—border on the discriminatory, even taking into account the region’s right to limited differential treatment.

We recommend that either the 5 million gallon per day consumptive use threshold level (averaged over 30 days, not 120 days) be measured as withdrawal rather than consumptive loss, or be lowered to 1 million gallons per day consumptive use. Please see our extensive discussion on this point in our full comments.

- Would you recommend making changes to the requirements included in the Decision Making Standard for determining the adequacy of proposed improvements to the Waters and Water-Dependent Natural Resources of the Great Lakes Basin?

The improvement standard should be applied to all withdrawals, not just diversions and the largest consumptive uses subject to Regional Review. The means for determining what improvement is appropriate for a given proposal should be dealt with in the compact by means of at least a loose reference to the detailed material on that point found in the Procedures Manual appendix to the international agreement, perhaps by declaring that the Procedures Manual “should provide general guidance” for the rules that each state and the Compact Council will write to implement the standards, including the improvement standard.

- Would you recommend making changes to the averaging period used to determine the volume of a proposed water use?

The timing of a water withdrawal can be as critical as the size of the withdrawal in preventing impacts to rivers, streams, lakes, and wetlands. Any averaging period for a threshold will result in withdrawals slipping under the system without oversight and management. Using a 120-day averaging period completely undermines the threshold levels, particularly for agricultural irrigators who operate for only a month at a time and would be able to average that use over a four-month period.

We recommend that the averaging period be 30 days.

- Would you recommend making changes to the definition of “Existing Water Users”?

Because only new or increased uses will be managed, the agreement must clearly define the limits of “existing water users.” Clear measures of capacity, permitted approval and time frame must be specified. Please see our recommendation on this point in our full comment.