

Council of Great Lakes Governors
Water Management Working Group Meeting Summary
January 11-13, 2005
Oak Brook Hills Conference Center
3500 Midwest Road
Oak Brook, Illinois

Water Management Working Group Meeting

Tuesday, January 11

Sam Speck, Director of the Ohio Department of Natural Resources and Chair of the Water Management Working Group, began the meeting by welcoming participants and requesting introductions. Following the introductions, the Working Group began to review outstanding issues and potential options for resolution.

Diversions

The Working Group reviewed the public comments received addressing diversions and various options for how diversions should be treated in the draft agreements. In light of the number of public comments supporting a prohibition on diversions, the Working Group discussed the option of a ban on new or increased diversions. A concern was raised that an outright ban on new or increased diversions would not be consistent with the Annex, which called for the development of a resource-based decision making standard. Potential legal issues with this type of approach were also raised.

Several participants suggested that any approach that, in effect, banned new or increased diversions would only be workable if there is sufficient flexibility for communities straddling the Basin divide. One option to provide flexibility for these communities (cities, towns or the equivalent thereof) would be to consider them to be entirely within the Great Lakes Basin provided that their wastewater discharge was in the Basin. The practical implementation of this type of an approach was next discussed. It was suggested that this approach should only apply to the boundaries of these communities at the time the agreements are signed. However, a concern was raised that such an approach may, in effect or appearance, limit growth. Alternate approaches discussed included allowing the communities some period of time to determine their boundaries for purposes of the standard or simply allowing the communities to alter their borders as needed as long as their wastewater discharge continued to be within the Great Lakes Basin. Further discussion and information on this issue is required.

Another option that was discussed was to regulate diversions using a “no net loss” approach. The definition of “no net loss” was in turn discussed. For example, the International Joint Commission’s definition of “no net loss” would require 95% of withdrawn water to be returned to the Basin. The concern was expressed that this percentage may not accurately reflect the concept of “no net loss” and, in any event, the 95% figure was not based on science or current use patterns. Concerns were also raised that this approach could result in diversions into the Basin as a result of non-Great Lakes “replacement water” comprising return flow. Another option that was discussed would

be to prohibit diversions unless there is “no net loss” and to define this concept at a later time.

The Working Group next discussed an approach under which new or increased diversions would be banned for a set number of years allowing for research to develop. After such time, depending on new scientific information, the moratorium would be extended or a minimum standard would apply. For example, after the moratorium, one option could be to require any new or increased diversions to result in “no net loss” and meet the other requirements of the standard. This proposal was discussed in the context that it would not be intended to affect historical diversions. The concern was expressed that this option could be perceived as being too weak. The question was again raised regarding whether this type of an approach would be consistent with the directive in the Annex to develop a science-based standard. On the other hand, it was argued that the Annex also called for the implementing agreements to be simple, durable and efficient, and that this type of approach could result in a standard that meets those objectives.

Another option that was discussed was a permanent ban on all new or increased diversions with some specific exceptions. The concern was raised that these exceptions could be difficult to define narrowly. Various potential exceptions were discussed. The Working Group agreed that exceptions as provided for in the draft agreements would be appropriate.

Bottled Water

Numerous public comments were received related to bottled water. Many of these comments expressed opposition to defining bottled water as a consumptive use and several suggested a complete moratorium on new bottled water operations. On the other hand, several public comments argued that bottled water, when viewed within the context of total Basin water volumes, are actually quite insignificant uses, are much less than the amount of bottled water and related products brought into the Basin, and should be treated in the same manner as other manufactured products. In light of these comments, the Working Group next discussed whether specific language should be included in the agreements pertaining to bottled water.

Several options for addressing bottled water were discussed. These included defining bottled water as a consumptive use, defining bottled water as a diversion or defining it as a bulk transfer of water.

If bottled water is defined as a bulk transfer or diversion, it was suggested that there should be some threshold under which these transfers would be defined as consumptive uses. One option could be to consider any removal of water in containers over 20 litres (5.7 gallons) as a bulk transfer or a diversion. The concern was expressed that this number may be too subjective and could be problematic for some water users. Further discussion on this issue is required.

Historical Diversions

The Working Group next discussed how historical diversions should be treated in the draft agreements. Specifically, the Working Group discussed the Illinois Diversion. It was noted that the draft Compact currently includes explicit language indicating that any future modifications to the Illinois Diversion would be solely under the jurisdiction of the United States Supreme Court decree with a mechanism for the Parties to the decree (Illinois, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin) as well as Indiana, Ontario and Québec to provide input. However, similar language was not included in the Agreement. The suggestion was made that the Compact and the Agreement should more closely mirror each other. Further discussion on this issue is required.

Intra-Basin Transfers

Next, the Working Group discussed whether transfers of water from one Great Lake watershed to another should be treated as a diversion. One option could be to define these types of transfers as consumptive uses for the purposes of the agreements, although several concerns were expressed with this approach.

Another option that was discussed would be to consider intra-basin transfers as diversions but with provisions included to provide some flexibility interconnecting channels and communities straddling watershed boundaries. Concerns were expressed related to how interconnecting channels would be considered and further discussion is required. The Working Group continued to lean toward treating Lakes Huron and Michigan as one hydrologic unit.

Consumptive Uses

The Working Group discussed what type of collective review mechanism, if any, should be required for new or increased consumptive use proposals. Various options for a collective review mechanism were discussed including: a Prior Notice and Consultation (PNC) procedure; a PNC procedure with an option for some projects to be submitted for a more comprehensive regional review; or, regional review as described in the draft implementing agreements. However, a large number of public comments received indicated the regional review process described in the draft implementing agreements was not consistent with the Annex goals for simple, durable and efficient.

Next, assuming that some new or increased consumptive use proposals would be reviewed collectively, the Working Group discussed how to differentiate which proposals should be forwarded for this type of review. One option would be to use a volume-based threshold as envisioned in the draft agreements.

Participants then discussed whether, under a volume-based option, review thresholds should be based on the amount of the consumptive use or the withdrawal. Numerous public comments were received on this issue. For example, several groups commented that withdrawal amounts could be more accurate than consumptive use amounts. It was also suggested that withdrawal amounts could be simpler to calculate than consumptive use amounts. On the other hand, several public comments indicated support for an

approach based on consumptive use amounts. One option that was discussed would be to allow each jurisdiction the option of determining whether to use a consumptive use or withdrawal figure. Several concerns were raised with this approach.

Other approaches to differentiate which proposals should be forwarded for collective review were then discussed. These options could include forwarding proposals upon the request of a certain number of jurisdictions. Other options were also discussed. Further discussion on this issue is required.

Wednesday, January 12

Groundwater

Jim Nicholas of the U.S. Geological Survey (USGS) provided an overview on new federal funding to map water availability in the Great Lakes region. Following his overview, the Working Group discussed how USGS efforts could be directed in support of Annex implementation. Additional information is available from the USGS or Council staff upon request.

Consumptive Uses (Continued)

The Working Group continued to discuss collective review for new or increased in-Basin uses. It was suggested that if the jurisdictions have consistent programs in place for managing new or increased consumptive uses using a commonly adopted standard, there would be no need for collective review of individual projects. Therefore, one option would be to have a process that would not include a collective review but, rather, would include enforcement mechanisms that could be used to ensure that proposals meet the requirements of the decision making standard. It was argued that this type of approach should be avoided because it would be based in litigation instead of a cooperative, collaborative joint exercise of sovereignty. It was argued that a collective review could be useful in providing better information regarding proposals and also in ensuring that the decision making standard is being implemented consistently.

The Working Group next discussed the means for public participation in decision making on new or increased consumptive use proposals subject to collective review. It was suggested that the public should be provided with notice as well as the opportunity to provide comments. To ensure sufficient notification, it was suggested that the jurisdiction in which a proposal originates could post notice of proposals to a common Web site that would be accessible by the other jurisdictions as well as members of the general public.

It was further suggested that once notice is posted, 90 calendar days should be provided to allow for comments on the proposal. Under this proposed arrangement, the public would then have the opportunity to submit their comments to their jurisdiction of residence as well as to the jurisdiction in which the proposal originates. The other jurisdictions would also have the opportunity to collectively submit their comments to the jurisdiction in which the proposal originates if desired. The jurisdiction in which the proposal originates could then provide a summary of the comments received.

It was recognized that all comments would need to be focused on the proposal's consistency with the decision making standard, which would in turn inform the originating jurisdiction in its decision-making. Further discussion on this option is necessary.

Averaging Periods

Next, the Working Group discussed averaging periods used to trigger jurisdictional or regional management action. Although public comments on the draft agreements included some support for the proposed 120-day averaging period, many public comments called for changes. These comments ranged from suggesting that the period be lowered to 30 days to suggesting that it be increased up to one year. Options the Working Group discussed included 30 days, 90 days, 120 days or different averaging periods for each water use sector.

Another option that was discussed would be an agreed upon time period (e.g. 30 days) unless the water user adopts generally accepted conservation measures. In these cases, a longer time period could be used (e.g. 120 days). Another option could be an averaging period that would recognize seasonal uses (e.g. based on both the 30 day and the seasonal average, or both the 30 day and the annual average).

After much discussion, the group was leaning toward using a 90-day averaging period. It was noted that this averaging period is closer to the 30-day averaging period specified in the Great Lakes Charter than the 120-day averaging period included in the draft agreements. It was suggested that this averaging period would also better capture the seasonality of some uses than a 30-day averaging period.

Resource Improvement

Next, the Working Group discussed what changes, if any, should be made to the resource improvement component of the standard that was included in the draft agreements. Although several public comments were submitted indicating support for the improvement component, many comments expressed concerns. These concerns included the potential for the perceived commodification of water and the complexity of the proposed improvement requirements.

The Working Group discussed various options for modifying the improvement requirement. One option that was discussed would be remove the responsibility for meeting improvement requirements from the individual applicant. In this approach, a jurisdictional or regional improvement program would be developed that would guide decision making on individual proposals. An alternative approach would be to incorporate the concept of improvement into conservation requirements. It was recognized that this approach would be consistent with the Annex and a number of public comments that were received on the draft agreements. Further discussion of this issue is required.

Conservation

The Working Group next discussed conservation. Several public comments suggested that a conservation plan should be required from all applicants. The Working Group

discussed concerns with this type of an approach. For example, the requirement of a plan could unnecessarily burden limited resources without having the intended effect of ensuring more comprehensive conservation.

Another option that was discussed was to require each jurisdiction to develop a conservation program. The jurisdictions would then have discretion regarding the requirements placed on individual applicants. The suggestion was made that conservation requirements should focus on the economic benefits available to users who conserve water. It was also suggested that jurisdictional conservation programs could include provisions for existing users and specific requirements for new and increased uses.

The suggestion was also made that the agreements should include a broad commitment to conservation with a regional conservation plan to be developed collectively by all the States and Provinces over time. However, concerns were expressed with creating a regional plan rather than focusing on conservation locally.

Another suggestion included focusing more on increasing water use efficiency. This approach was included in a number of public comments on the draft agreements. It was also suggested that the agreements should commit to specific water conservation principles. These principles could then be applied in a manner appropriate to each jurisdiction's conservation programs. Further discussion on this issue is required.

Tribes/First Nations

Leith Hunter and John Wernet, Co-Chairs of the Tribes/First Nations Team, led the Working Group in a discussion of issues related to the Tribes and First Nations. It was noted that the Annex implementing agreements are not intended to infringe on Tribal or First Nation sovereignty. Rather, the draft agreements are intended to provide a mechanism for the Governors and Premiers to collectively manage the water uses under their own jurisdiction in order to ensure the continued health of the Great Lakes Basin for future generations.

Peter Johnson then provided an overview of the agenda for the upcoming January 31-February 1 meeting with the Tribes and First Nations. He noted that several representatives from the Tribes and First Nations have been involved in the development of the agenda and have been helpful in ensuring that invitations were sent to the appropriate leaders.

Federal Government and the International Joint Commission

It was noted that public comments had been received from the U.S. State Department and the Government of Canada on the draft agreements. Specifically, the U.S. State Department submitted language that they proposed to be included in the draft Compact. This proposed language seeks to clarify the legal relationship between the Compact and the International Boundary Waters Treaty of 1909 (IBWT) which created the International Joint Commission (IJC). The Working Group agreed that it was not its intention to alter or amend the IBWT nor change the role of the IJC via the implementing agreements.

The proposed language from the State Department has been referred to the Legal Team for its consideration and recommendation. Conference calls will be scheduled as appropriate to discuss changes to the draft agreements.

Cumulative Impacts

The Working Group next discussed potential changes related to how cumulative impacts are addressed in the agreements. It was suggested that no changes should be made at this time but that flexibility was important to enable alterations at a later date. It was recognized that there is a lack of scientific understanding related to cumulative impacts. It was also suggested that climate changes and a precautionary approach should be expressly taken into consideration when reviewing collectively cumulative impacts. Further discussion on this issue is required.

Groundwater

The Working Group discussed the assumption included in the draft implementing agreements that the surface water and groundwater divides are coterminous, and the meaning of tributary groundwater. The question was raised whether the agreements should explicitly include direction to revisit these definitions as science develops further. It was suggested that any change to the definition of the Great Lakes Basin should be based on new scientific data and that this should be done through the amendment process. This process would require unanimity among the jurisdictions. Further discussion on this issue is required.

Thursday, January 13

Voting and Enforcement

The Working Group next considered how the implementing agreements should be enforced to ensure that the standard is implemented across the region in a consistent manner. One option that was discussed would be to provide a mechanism for the jurisdictions to seek judicial review of water use decisions in the courts of the jurisdiction in which the proposal originated. To that end, it was suggested that in the United States, standing could be granted to any aggrieved party through statute.

It was also suggested that a commitment could be included in the Agreement to seek to provide standing to all of the States and Provinces. This type of provision could allow the jurisdictions to use the various court systems to ensure that the Agreement is consistently implemented. It was also suggested that administrative procedures, where they exist, could be used as well. The Legal Team was directed to investigate the feasibility of these alternatives.

Public Participation

The Working Group next discussed provisions for public participation in the process. It was noted that public participation relates to one of the directives of the Annex, and the importance of strong provisions was recognized. It was suggested that a central repository could be created for making publicly available all applications and decisions

on water use proposals. Beyond this, individual jurisdictions would follow notice provisions in their own laws.

If such a public notice approach is taken, it was noted that several jurisdictions would need to modify their administrative procedures. Accordingly, reasonable efforts would need to be made to provide the public throughout the region with the same access to information as the citizens of that jurisdiction.

Next Steps and Workplan

The Working Group discussed its next steps and workplan moving forward. Several conference calls were scheduled to further discuss the various issues raised throughout the meeting. The Working Group will meet with representatives from the Tribes and First Nations on January 31-February 1. The Working Group will then meet again March 8-10. Both of these meetings will be held in Oak Brook, Illinois. The goal that the Working Group continues to pursue is the release of final agreements by the Governors and Premiers during the summer of 2005.

**Water Management Working Group Meeting
Attendee List**

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WATER MANAGEMENT WORKING GROUP

Illinois

Mr. Dan Injerd, Manager, Lake Michigan Management Section
Department of Natural Resources

Mr. Robert Mool, Assistant Chief Counsel
Department of Natural Resources

Indiana

Mr. Jim Hebenstreit, Assistant Director, Division of Water
Department of Natural Resources

Michigan

Mr. Jim Bredin, Assistant to the Director
Office of the Great Lakes

Mr. Ken DeBeaussaert, Director
Office of the Great Lakes

Ms. Dana Debel, Environmental Policy Advisor
Office of Governor Granholm

Mr. John Wernet, Deputy Legal Counsel
Office of Governor Granholm

Minnesota

Mr. Jim Japs, Supervisor, Water Permit Programs
Department of Natural Resources

Mr. Kent Lokkesmoe, Director, Division of Water
Department of Natural Resources

New York

Mr. Mike Elmendorf, Director of Intergovernmental Affairs
Office of Governor George E. Pataki

Mr. Gerald Mikol, Regional Director
Department of Environmental Conservation

Mr. Don Zelazny, Great Lakes Programs Coordinator
Department of Environmental Conservation

Ohio

Mr. Dick Bartz, Chief, Division of Water
Department of Natural Resources

Mr. Charles Rowan, Legal Counsel
Department of Natural Resources

Dr. Samuel Speck, Director
Department of Natural Resources
Great Lakes Water Management Initiative Chairman

Ontario

Mr. Babak Abbaszadeh, Senior Policy Advisor, Office of the Minister
Ministry of Natural Resources

Mr. Bill Carr, Team Leader, Western Hemisphere
Office of International Relations and Protocol, Ministry of Intergovernmental Affairs

Mr. David de Launay, Assistant Deputy Minister, Corporate Management Division
Ministry of Natural Resources

Ms. Leith Hunter, Legal Counsel
Ministry of Natural Resources—Legal Services Branch

Mr. Rob Messervey, Manager, Water Resources Section, Lands and Waters Branch
Ministry of Natural Resources

Ms. Paula Thompson, Senior Policy Advisor, Water Resources Section, Lands and
Waters Branch
Ministry of Natural Resources

Mr. Kevin Wilson, Assistant Deputy Minister, Natural Resource Management Division
Ministry of Natural Resources

Pennsylvania

Ms. Pam Bishop, Esq., Bureau of Regulatory Counsel
Department of Environmental Protection

Mr. Bill Gast, Chief, Division of Water Use Planning, Bureau of Watershed Management
Department of Environmental Protection

Québec

Ms. Lucie Bouchard, Direction des politiques du secteur municipal
Ministry of Environment

Ms. Louise Lapierre, Direction des affaires intergouvernementales
Ministry of Environment

Mr. Jerome Faivre, Direction des affaires intergouvernementales
Ministry of Environment

Wisconsin

Mr. Todd Ambs, Administrator for Water
Department of Natural Resources

Mr. Chuck Ledin, Bureau Director, Office of the Great Lakes
Department of Natural Resources

Mr. Charles Hammer, Legal Services Attorney
Department of Natural Resources

Council of Great Lakes Governors

Mr. Peter Johnson, Senior Program Manager

Ms. Carol Knowles, Consultant

Ms. Zoe Munro, Program Associate

Mr. David Naftzger, Executive Director

Mr. Peter Wise, Senior Associate Director
The Delta Institute

Ms. Lisa Wojnarowski, Program Associate