

March 22, 2010

Mr. David L. Phippen
Chair, Regional Body
Policy Director, Office of Governor Daniels
Indianapolis, Indiana

Ken DeBeaussaert
Chair, Compact Council
Office of the Great Lakes
Lansing, Michigan

RE: Regional Review Process - Diversion Exceptions

Dear Mr. Phippen and Mr. DeBeaussaert:

As you are no doubt aware, the City of Waukesha, Wisconsin is considering a diversion of water from Lake Michigan. Under the Great Lakes-St. Lawrence River Basin Water Resources Compact (Compact) and the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement (Agreement), the City must meet the requirements for a community within a straddling county. These requirements include regional review by the Regional Body and approval by the Compact Council.

It is not unreasonable to expect the City's application to come before the Regional Body and Compact Council yet this year. In January the City released a draft preliminary application and announced a schedule of public meetings that are to lead to a vote by the City's Common Council on April 8 to file its application with the Wisconsin Department of Natural Resources. At this time that vote is still anticipated to occur as scheduled and filing of the application is anticipated to be approved.

The Alliance for the Great Lakes, the National Wildlife Federation and Great Lakes United feel that it is critical to the long-term success of the Compact and Agreement that the Regional Body and Compact Council put in place all appropriate rules, regulations and procedures related to review of such a diversion exception before considering the City's application.

While the Interim Guidance adopted by the Compact Council on December 8, 2008 does include a part on review and approval of diversion exceptions, the provisions do not address a number of significant issues. The Procedures, Rules & Regulations Committee has been considering the contents of diversion exception applications. We understand that the Committee is currently making revisions to the draft requirements, dated July 28, 2009.

We offer the following preliminary considerations for the Council and Regional Body.

The Form of Review Procedures

Section 3.3.1. of the Compact specifically provides that the Council may promulgate rules and regulations necessary for the implementation of the Compact. Except for rules and regulations dealing with internal

management or Council property, these rules and regulations must be adopted only after public notice and hearing.

Under Article 400 of the Agreement, the Regional Body has a duty to ensure a "formalized process" for proposals that require regional review and to develop guidance for review of such proposals. Article 401(1) of the Agreement provides that the Regional Body may establish its own administrative practices and procedures.

While issuing guidance without a formal notice and hearing may be appropriate in certain situations, we feel strongly that the review and approval of exception proposals is not one of them. The public interest in diversions as well as the potential impact these diversions could have on the Great Lakes Basin argue in favor of providing a full and considered process. Therefore, the Council should use its authority to promulgate rules on the exception proposals. While the Agreement does not provide the Regional Body with explicit rulemaking authority, the Body could provide a similar opportunity for public comment before issuing its own procedures. Because such public participation will take time, the Council and Regional Body must act quickly to draft rules and procedures.

Application Requirements

The requirements for diversion exception applications drafted by the Procedures, Rules & Regulations Committee and dated July 28, 2009 are sound. But based on our knowledge of the current content of Waukesha's draft application, we believe that additional issues should be addressed, such as:

First, Waukesha is proposing a preferred location of withdrawal and two alternative locations. The same level of information prepared for the preferred location has not been prepared for the alternatives. Can an applicant propose options for the diversion source? If yes, what if any conditions should apply?

Second, all three withdrawal locations are from the distribution systems of other public water suppliers. The baselines of one or more of these suppliers might be affected by Waukesha's increased demand. Under what circumstances must the applicant in this situation demonstrate that it has an agreement with the utility, and what generally is the role of the withdrawer in such a proposal?

Third, Wisconsin is planning to prepare an environmental impact statement on Waukesha's proposal. To what extent should this type of environmental review be considered in the regional examination of adverse impacts?

Application Fee, Independent Review

Section 3.3.1. of the Compact gives the Compact Council the authority to charge a reasonable application fee for exception applications, subject to being adopted by regulation after public notice and hearing. Section 4.5.4.d. of the Compact, as well as Article 505(4) of the Agreement, provides for an independent technical review of a proposal by the Regional Body if a majority of the members request one.

An independent review is especially important for Waukesha because this will be the first exception application to undergo regional review and

Council consideration and because it is critical that the decision, regardless of its outcome, be seen as based on fact and not on politics. Such an independent review would not only inform the Regional Body, but would also help the Compact Council decide whether to approve or disapprove a proposal.

In light of the States' and Provinces' limited resources, fees should be established, perhaps in tiers, at levels sufficient to defray the cost of such an independent review. Some rules may be appropriate regarding processing, uses, potential refund or other issues related to the application fee.

Rules and regulations should be also developed regarding the process of an independent review, including such issues as how the members determine whether to request such a review, how to conduct the review, the availability of review results, and the ability of the public to comment on such reviews.

Public Participation

Section 4.5.3.a. of the Compact and Article 503(1) of the Agreement require the Regional Body to adopt procedures for regional review of proposals in order to ensure adequate public participation. The same section and article also specify certain public participation measures for the regional review process, including public notice and an opportunity to comment, as well as a public meeting.

Under Section 6.2 of the Compact, the Council also must provide public notice and a reasonable opportunity for public comment on applications, ensure public accessibility to documents, and provide the final record of decision. The Compact also specifically states in Section 6.2.3 that the Council must provide guidance on whether to conduct a public hearing and the procedures for such a hearing.

While the Council's Interim Guidance specifies the manner in which the originating party is to give notice, this guidance applies only to the Council and has not been finalized in a rule. Rules and procedures are needed regarding at least the nature and extent of notice and the location and conduct of public meetings.

Technical Review

Section 4.5.4.a. of the Compact and Article 505(1) of the Agreement require the originating party to provide its technical review of the application under consideration. Section 4.5.4.b. of the Compact and Article 505(2) of the Agreement require that review to "thoroughly analyze" the application and provide sufficient "evaluation" to determine if the application meets the standard. Rules and procedures should be issued to provide standards so that the originating party's technical review is both thorough and sufficient.

Consideration of Regional Body's Findings

Sections 4.5.5.i. and 4.7.2. of the Compact require the Council to "consider" the findings from the Regional Body before taking action on a proposal. Rules are needed regarding timing, processing and notice of such findings. For instance, there should be adequate opportunity for public review and comment on such findings prior to Council action. Such public participation would preclude the Council acting immediately

following the receipt of the Regional Body's findings, a circumstance we would find to be unacceptable.

We think these are critical issues and are necessary to the successful implementation of the Compact and Agreement. We appreciate your timely consideration and, of course, look forward to providing assistance.

If you have any questions or comment, please contact Ed Glatfelter, Alliance for the Great Lakes at (312) 939-0838, X 235 or eglatfelter@greatlakes.org.

Sincerely,

Ed Glatfelter
Water Conservation Director
Alliance for the Great Lakes

Mark Smith
Great Lakes State Policy Manager
National Wildlife Federation

John Jackson
Program Director
Great Lakes United

cc: Body/Council designees
David Naftzger
Pete Johnson