



Michigan Section American Water Works Association

P.O. Box 16337
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PROPOSED ANNEX IMPLEMENTING AGREEMENTS (REVISED JUNE 30, 2005): SUMMARY OF KEY ISSUES OF POTENTIAL CONCERN TO MICHIGAN'S WATER UTILITIES

The Michigan Section, American Water Works Association (MI-AWWA) has performed a detailed review of the revised Annex 2001 Implementing Agreements, issued for public comment on June 30, 2005, and developed detailed comments on issues of potential concern to our State's public water supply utilities. This summary provides a brief review of the most significant issues; refer to the August 15, 2005 MI-AWWA letter to the Council of Great Lakes Governors for additional detail on these, as well as other identified issues. The proposed Agreements call for:

- Registration and reporting will be required for any water withdrawal 100,000 gals per day or greater in any 30 day period.
- A request for a new or increased consumptive use of 5 million gallons per day or greater in any 90 day period will be subject to "Regional Review".
- Within 10 years of effective date of Agreements, each State/Province will "manage and regulate" all new or increased withdrawals of 100,000 gallons per day average or greater in any 90 day period.

Averaging Periods - The previous version of the proposed Agreements included a 120 day averaging period for calculation of flows to determine most requirements for registration, reporting, regulation, etc. The June 30, 2005 revisions include a 90 day averaging period, thus affecting more public water suppliers.

Determination of Existing Capacity - Capacity of an existing system is defined as the lesser of withdrawal capacity, treatment capacity, distribution capacity, or "other capacity limiting" factor. The proposed definition of existing capacity may inhibit a community's ability to recoup capital investments in existing facilities, and may provide uncertainty in assuring new water customers, including adjacent communities, of the ability to provide adequate capacity to meet projected needs.

Conservation Requirements for Water Utilities - The proposed Agreements call for each State/Province to implement water conservation programs to "retain and restore the quantity of surface water and groundwater in the Basin", and to reduce demand for water, improve efficiency of use, and reduce losses and waste of water through supply and demand side measures. Suggested conservation measures for water utilities include "pressure management to reduce volume of water used".

Definition of Individual or Cumulative Adverse Impacts - The review of any withdrawal proposal includes assessment of individual or cumulative adverse impacts of the withdrawal. Adverse impacts are poorly defined, and the potential exists for significant cost to water supply systems in proving "no adverse impact".

Return Flow Requirements - Return flow requirements include guarantee requirements by the withdrawer if the eventual return flow discharge is by other than the withdrawer, including measurement of quantity and quality of return flow and reporting by the withdrawer.

Exposure to Additional Liability - The enforcement provisions appear to open the door for frivolous lawsuits against water withdrawers.



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August 15, 2005

Mr. David Naftzger
Executive Director
Council of Great Lakes Governors
35 East Wacker Drive, Suite 1850
Chicago, Illinois 60601

**Re: Comments on June 30, 2005 Annex 2001 Implementing Agreements
Michigan Section – American Water Works Association**

Dear Mr. Naftzger:

The Michigan Section, American Water Works Association (MI-AWWA) greatly appreciates the opportunity to review and comment on the revised Annex 2001 Implementing Agreements, issued June 30, 2005 for public comment. MI-AWWA is comprised of nearly 2,100 members, encompassing many of Michigan's water utilities, from the largest to the smallest. As stewards of the Great Lakes, we believe it is our mission to protect public health while promoting sound water use management practices within our region. We are also committed to ensuring Michigan's economic vitality. In pursuit of this mission, we have provided comment on the previous version of the proposed Implementing Agreements, and trust that our comments were found to be useful in the revision of the Agreements.

MI-AWWA is strongly opposed to water diversions outside of the Great Lakes Basin, and we believe that the newly revised proposals for the Agreements have moved toward a more agreeable approach to out of basin diversions. However, upon review of the revised Agreements, we believe that the Agreements, as revised, remain unnecessarily restrictive to Michigan's water utilities.

Based on our review of the June 30, 2005 proposals for the Great Lakes Water Resources Compact and the Great Lakes Basin Sustainable Water Resources Agreement (herein referred to as the Compact and Agreement, and collectively as the "Agreements"), we offer the following comments and concerns:

Status of Illinois and the Proposed Agreements

Section 4.12 of the Compact and Article 207 of the Agreement refer to US Supreme Court Decree: Wisconsin et al v. Illinois et al, and state that current, new or increased withdrawals, consumptive uses and diversions of Basin water by the State of Illinois shall be governed by the terms of this decree, and that all current, new, or increased withdrawals, consumptive uses, and diversions of Basin water within the State of Illinois shall be allowed unless prohibited by the decree. It appears that none, or possibly very few, of the proposed standards and requirements will apply to water withdrawals within Illinois, and therefore, that a separate set of standards and requirements will apply to Great Lakes water withdrawals within Illinois. The terms of the decree appear to be much more general than the terms and requirements that would apply to the other Great Lakes States/Provinces. We suggest that the Council of Great Lakes Governors provide clear and detailed information on the provisions of the referenced decree and the differences between those provisions and the provisions of the proposed Agreements. In addition, it appears that by governing withdrawals within Illinois by the terms of the referenced decree, the potential exists for diversion of Great Lakes waters outside the limits of the Great Lakes basin (but within the State of Illinois). Further, the terms of the decree appear to limit potential future diversion to a select group of counties in northeastern Illinois, while the proposed Agreements appear to extend this privilege to the

entire State of Illinois. We feel that additional investigation is due this very important change in the revised Agreements. It is not clear why the other Great Lakes States and Provinces should implement standards that differ from one of their Basin neighbors, and at this time, we do not support such an implementation concept.

Averaging Periods

The previous version of the proposed Agreements included a 120 day averaging period for calculation of flows to determine requirements for registration, reporting, regulation, etc. The June 30, 2005 revisions include a 90 day averaging period, thus capturing more water withdrawals. The reasoning for making this change, and therefore subjecting additional smaller public water supply systems to these requirements, is not clear. We are supportive of a rational averaging period that is not arbitrarily applied to all water use sectors, including the potential for different averaging periods for different water use sectors.

Determination of Existing Capacity

Capacity of an existing system is defined as the lesser of withdrawal capacity, treatment capacity, distribution capacity, or “other capacity limiting” factor (Article 207 of Agreement). In most cases, Michigan’s public water supply systems were permitted under Michigan’s Safe Drinking Water Act, based on capacities of components to meet future projected water demands. A community’s ability to finance the construction of water supply systems is also based on the utilization of these previously permitted facilities, up to their permitted capacity. In some cases, especially for intake facilities in the Great Lakes, the ultimate capacity can be much greater than current water demands and much greater than other, more easily expanded system components. The proposed definition of existing capacity may inhibit a community’s ability to recoup capital investments in existing facilities, and furthermore, provides uncertainty in assuring new water customers, including adjacent communities, of the ability to provide adequate capacity to meet projected needs. We suggest that determination of existing capacity be based on currently permitted capacity of existing withdrawal facilities.

Definition of Groundwater Divides

Article 207 of the proposed Agreement assumes that groundwater divides are the same as surface water divides. The tools and technology exist for determination of groundwater divides. In fact, Michigan’s legislature has provided for the beginnings of detailed mapping and characterization of Michigan’s groundwaters. The relation between surface and ground waters is complex, but critical. We suggest that the Council of Great Lakes Governors put effort and impetus into better understanding of the surface water and groundwater relationship before proposing standards and regulatory structures that may be ineffective for certain groundwater supplies.

Consumptive Use Coefficients

We believe that consumptive use coefficients are neither clearly defined nor justified. Appendix 1 of the proposed Agreement cites the Great Lakes Commission Spring 2002 “Consumptive Use Coefficients by Water Use Category...” report as a standard in lieu of a detailed engineering study. However, this report includes a caution regarding the unavailability of data to validate the reported coefficients. In addition, there are many other sources that can justify lower coefficients than those stated in the referenced report. We are concerned that this “fallback” standard may impart unneeded and unwarranted regulatory requirements upon systems that have lesser “consumptive use coefficients”, but may lack the necessary resources to provide detailed evaluation of actual values.

Voting Equity and Representation

Section 2.4 of the proposed Compact states that each State/Province is entitled to a single vote in matters before the Great Lakes Basin Water Resources Council (Council), and the rule of decision for most matters is by simple majority. In addition, this Section states that quorum for the transaction of business at any meeting of the Council is a majority of the members; i.e., all members need not be present and represented to render decision on an issue. While we are cognizant of the need to ensure an expeditious process for decisions by the Council, we believe that all members of the Council, i.e. representatives of all Great Lakes States and Provinces, be present to ensure equal say in all decisions before the Council.

Conservation Requirements for Water Utilities

The proposed Agreements call for each State/Province to implement water conservation programs to “retain and restore the quantity of surface water and groundwater in the Basin” (Sections 3.5 and 3.6 of proposed Compact; Article 303 of proposed Agreement). Each State/Province is further charged with reducing demand for water, improving efficiency of use, and reducing losses and waste of water through supply and demand side measures. While we are supportive of the importance and realize the potential benefits of wise and efficient water use for public water suppliers, we caution the Council of Great Lakes Governors of the likely ineffectiveness of regulatory conservation imparted to public water suppliers. Our municipal water supply systems must provide adequate quality and quantity of water, and at sufficient pressure, to ensure safe supply to, and to ensure fire protection of, our communities. Our water supply systems are at the mercy of those to whom we supply water, and any regulated conservation must recognize that demand-side measures are likely more effective than supply-side measures. When a water utility’s customers turn on their lawn irrigation systems in the midst of a dry spell, the water utility has no choice but to keep up with that demand. Suggested conservation measures for water utilities in Appendix 1 of the proposed Agreement include “pressure management to reduce volume of water used”. Public water supply systems must provide minimum pressures to ensure adequate supply and fire flows, and to protect public health, and any attempt to arbitrarily reduce system pressures may jeopardize utilities’ ability to meet these basic goals.

Straddling Community Exception

Section 4.7.1 of the proposed Compact and Article 201 of the proposed Agreement allow for a “straddling community exception” that could allow diversion for public water supply purposes. We are concerned over how a determination will be made, and once allowed, how such an exception will be monitored, to ensure only a true “public water supply” use (no definition of “public water supply use” appears to be included in the proposed Agreements). We suggest that this language be strengthened to emphasize drinking water and fire protection uses (vs. industrial supply, irrigation, etc.). We also suggest that such proposals be subject to Regional Review (currently proposed to be regulated by individual States/Provinces).

Intra-Basin Transfer Exception

Intra-basin transfer exceptions are proposed to be allowed subject to standards and other requirements of the proposed Agreements (Section 4.7.2 of proposed Compact; Article 201 of proposed Agreement). We suggest that these situations are rare for public water supply systems, and where they exist, are done for water quality reasons (related to the return flow), and therefore, should not be defined as a diversion under the terms of the proposed Agreements.

Straddling County Exception

The “straddling county exception” referenced by Section 4.7.3 of the proposed Compact and Article 201 of the proposed Agreement allows diversion of water within a straddling county for public water supply purposes. This provision appears to provide precedent for an ever-expanding definition of area where Great Lakes waters can be diverted, and therefore, we believe that such diversions should be prohibited in all cases. Should this exception remain in any future version of the proposed Agreements, please reference our concerns for the straddling community exception.

Definition of Individual or Cumulative Adverse Impacts

Section 4.9 of the proposed Compact and Article 203 of the proposed Agreement includes an outline of the proposed decision making standard for review of withdrawal proposals, including reference to “individual or cumulative adverse impacts”. We are concerned about how adverse impacts will be specifically defined, and the potential cost to water supply systems in proving “no adverse impact” if not specifically defined. The proposed Agreements also include consideration of “potential Cumulative Impacts of any precedent-setting consequences”; this language seems sufficiently vague to eliminate the possibility of any regulatory certainty in water withdrawal proposals. Application requirements referenced in Appendix 1 of the proposed Agreement for showing no adverse impact include documenting of baseline conditions, provision of a projected withdrawal schedule, description of anticipated changes in water quality and water dependent natural resources, description of mitigation measures, and a

“statement of how the Proposal would relate to other existing Withdrawals, Diversions and Consumptive Uses for purposes of enabling the Parties [States/Provinces] to collectively evaluate Cumulative Impacts from this Proposal”. These application requirements have the potential to impart a significant financial burden upon a water supply system. We also question how realistic it may be for a Great Lake withdrawal to comply with the excerpted requirement, based on the multitude of other withdrawals within any single Great Lake.

Lake Watershed Assessments of Cumulative Impacts

The required Lake watershed assessments of cumulative impacts in Section 4.13 of the proposed Compact and Article 209 of the proposed Agreement refer to an “incremental Basin water loss” of 50 million gallons per day over a 90 day period, which then triggers the need for such assessments. This criteria appears to assume that water is continually leaving or disappearing from the Basin and not being replenished. We believe that a long-term water balance on a Lake watershed basis would show no net loss of water volume or quantity, other than that associated with short-term lowering of lake levels. For example, a 50 million gallon loss of water from Lake Michigan equates to a lowering of the level of the lake of approximately 3.3 microns. Water is continually leaving and entering the Basin, and any “use” is not resulting in a net loss of water from the Basin. This also calls into question the validity of the concept of “consumptive uses” in regard to the concept of loss of water from the Basin.

Return Flow Requirements

Appendix 1 of the proposed Agreement describes return flow requirements, including guarantee requirements by the withdrawer if the eventual return flow discharge is by other than the withdrawer. This appears to require measurement of quantity and quality of return flow and reporting by the withdrawer. To achieve this in the case of public water supply systems would require detailed intergovernmental agreements when water supply is provided to adjacent communities via wholesale or retail contracts. In addition, we question the feasibility of metering and measuring all return flows, e.g. infiltration return flows via irrigation, septic system seepage, etc. In reviewing proposed withdrawals, the Procedures Manual included in Appendix 1 of the proposed Agreement indicates that the withdrawer must certify that return flow consists of only water withdrawn from the Great Lakes Basin. We suggest that it is impossible for any public water supply system to guarantee that no water from outside of the Basin is included in their return flow (the majority of which would typically be returned through a wastewater treatment facility). A public water supply system has very limited control over what is poured down a drain (or what may be spilled on a lawn and infiltrate into a sewer system, or what may be contained in the rain that falls on the ground and may infiltrate into a sewer system) and from where it may have originated.

Bottled Water Issues

Article 207 of the proposed Agreement indicates that a proposal to withdraw water and remove it from the Basin in a container greater than 5.7 gallons/20 liters is considered a proposal for diversion, and that a proposal to withdraw water and package it within the Basin for human consumption in containers 5.7 gallons/20 liters or less is considered a proposal for consumptive use (which is then managed/regulated by the State/Province). The issue of bottled water is a controversial one in Michigan. We caution close analysis of the intended target of the proposed language, and also caution careful consideration of impacts to public water supplies that may coordinate bottled water programs for the purposes of emergency preparedness.

Exposure to Additional Liability

The enforcement provisions of Section 7.3 of the proposed Compact, especially Paragraph 4 of Section 7.3, appear to open the door for frivolous lawsuits against water withdrawers.

Avoidance of Redundant Regulatory Programs

We caution the Council of Great Lakes Governors, as well as the States and Provinces which may be developing companion legislation to support the eventually adopted Agreements, to pay close attention to existing regulatory programs for public water supply systems. Michigan’s drinking water utilities are already heavily, and effectively, regulated, and pay significant fees to the state regulatory agency in support of these existing programs (over \$111,000 per year for the largest systems). Even if any new

regulatory programs are able to avoid redundancy with existing regulatory requirements, any additional requirements applied to public water supplies will place an additional burden upon those utilities.

Details to be Developed at a Later Date

The regulatory provisions of the proposed Agreements in many cases are intended to be detailed by the individual States/Provinces as they enact legislation to implement the general provisions of the proposed Agreements. This leaves open the potential for varying regulations among the States/Provinces, as well as the potential for any State or Province to enact legislation that may be stricter than may have been envisioned or contemplated by the proposed Agreements. We make this statement in recognition that our comments herein may be better served at the time of the Michigan legislature's development of legislation to align our State with the eventual outcome of the Annex process, and in committing MI-AWWA to participation in this process. However, we also make this statement in order to caution the Council of Great Lakes Governors in leaving too many details subject to later decision.

As stated in our September 21, 2004 comments on the previous versions of the proposed Agreements, we believe that the abundance of renewable water sources in our region and in our State provides Michigan, as well as those portions of other States and Provinces within the Great Lakes Basin, with a unique economic advantage in attracting industry and ensuring economic vitality of our communities. The proposed Agreements have the potential to inhibit the ability of our public water supply systems to contribute to the ability of our State and region to attract new industries as well as retain existing industry by requiring lengthy and costly permitting procedures. In addition, we believe that it makes little sense for Michigan to agree to allow other States and Provinces to control our water use needs and eliminate one of our few competitive advantages.

We have prepared our comments herein specifically toward issues affecting the municipal water utility sector, and caution that these comments may not necessarily be applicable to other affected water use sectors. This suggests that a "one size fits all framework for all water use sectors may not be appropriate. MI-AWWA is fully committed to the stewardship of our valuable resources, and is in support of the underlying principles of the Great Lakes Annex. However, we also believe that the Agreements as revised and currently proposed, pose serious concern to many of our water utilities and municipalities, and Michigan in total. We appreciate the opportunity to comment on the latest revision of the proposed Agreements, and are available to discuss our comments and concerns in more detail if desired.

Respectfully,

Michigan Section AWWA

Jim Van De Wege, Chair

cc: Ken DeBeaussiaert, Office of the Great Lakes, State of Michigan
Governor's Office, State of Michigan
Michigan Water Utilities