

Wednesday, October 10 2018

Great Lakes –St. Lawrence River Basin Water Resources Council
Great Lakes –St. Lawrence River Water Resources Regional Body
20 N. Wacker Drive
Suite 200
Chicago, IL 60606

Subject: Keep the Great Lakes Compact Strong: Update the Compact Council and Regional Body Procedures to Ensure the Public’s Voice Is Heard

Dear members of the Joint Great Lakes-St. Lawrence River Basin Water Resources Regional Body and Compact Council Procedures Update Team:

Introduction

We, the undersigned organizations worked, along with many others, to ensure the adoption of the Great Lakes Compact in each of the Great Lakes states and in Congress, and the Great Lakes Agreement in Ontario and Quebec. Our collective coalition represents a broad array of interest groups around the Great Lakes basin and includes at least three members of the Advisory Committee. The Great Lakes Compact/Agreement was signed into law 10 years ago to ensure that water stays within the basin. We appreciate and support the Great Lakes-St. Lawrence River Basin Water Resources Regional Body (“the Regional Body”) and Great Lakes-St. Lawrence River Basin Water Resources Council’s (“the Council”) collaborative effort to review and update regional decision-making procedures for future proposals to divert Great Lakes Basin water.

We need to make sure that the Great Lakes Compact and Agreement are vigorously defended. As you know, the Great Lakes Compact and Agreement ban water diversions outside of the Great Lakes basin. But, there are exceptions for communities and counties that straddle the Great Lakes basin divide. We need to make sure these exceptions are carefully considered and that the standards are narrowly applied. In short, a diversion is supposed to be a last resort. We submit these comments in the spirit of improving the diversion review process to allow for transparent decision-making, robust public participation, and consequently a legally defensible final decision that satisfies the underlying intent of the Great Lakes Compact.

We are requesting improvements to the published drafts: Great Lakes—St. Lawrence River Basin Water Resources Compact Rules of Practice and Procedure (“Rules”), the Regional Body Procedures as well as the draft updates to the Great Lakes—St. Lawrence River Basin Water Resources Compact Guidance (“Guidance”) and the Sequence of Events for Consideration of Proposals for Exceptions to the Prohibition on Diversions that are subject to Regional Review (“Sequence”). We appreciate that the Procedures Update Team has created a Rules document and has allowed for a public comment process for those updates. While we do see that the Procedures Update Team has created additional opportunities for the Tribes and First Nations and public to participate, additional opportunities would improve the process and the integrity of the Compact and Agreement.

In summary, we urge you to make the following changes to the draft procedures:

1. When a diversion request is under review by the Compact Council and Regional Body, every state and province should hold a public hearing to allow for robust public participation across the basin. Those meetings should be recorded and all comments forwarded to the Regional Body and Compact Council for consideration. While the current draft has improved this provision, it isn't enough to give each jurisdiction the option of hosting a hearing;
2. Members of the public should be able to comment on the Originating Party's and the Compact Council and Regional Body's modified draft declaration of findings before it is voted on by the Compact Council;
3. The administrative record created by the Regional Body and Compact Council should automatically include all comments by the public;
4. A clear, full record of the decision-making process and reasons for the decision should be public;
5. A member of the public, or a public interest organization, should not have to face the threat of huge administrative costs to appeal a decision by the Regional Body/Compact Council. The current rules call for an appellant to share the costs of the appeal, including the hearing room, travel costs and lodgings for all of the Great Lakes states' representatives, court reporter, and all other logistical costs, unless the Compact Council waives those fees. The appeal costs should be borne by the Compact Council itself, or the Originating Party seeking the diversion as an alternative, not an appellant;
6. The procedures should include a more robust 'pre-application' period that allows each jurisdiction to review and identify potential issues of concern before the state/province where the diversion is proposed submits a formal application for Regional Review. This simple step would ultimately make for a more cost-effective and legally defensible outcome;
7. Maintain Management of Modifications of Council Decisions; and
8. The procedures should include rules to govern how to review regionally significant or potentially precedent setting proposal.

The first major out-of-basin water diversion since the creation of the Great Lakes Compact and Agreement was approved, with conditions, in 2016 for Waukesha, Wisconsin. Additionally, a straddling community test came during the development of these drafts when the City of Racine applied to Wisconsin and was approved to divert water to the Village of Mount Pleasant. Both of these requests provided unique challenges, insights, and clarity for how this landmark process can be improved. As a result, it is clear that an update of the procedures is needed to ensure the public's voice is heard throughout the process. Please make these changes to the Regional Body and Compact Council's procedures to keep our Compact strong and protect our Great Lakes.

1- Every state and province should hold a public hearing to allow for robust public participation across the basin, when a diversion request is under review by the Compact Council and Regional Body.

Step 16 of the Sequence states “Each member of the Regional Body and Compact Council may determine if there is sufficient public interest to hold an additional public meeting or public hearing within its jurisdiction. Based on such determination, at the request of a member the Regional Body and Compact Council may also hold either a public meeting or public hearing (the format of which will be at the host jurisdiction’s discretion) within the jurisdiction.”

Additionally in Sec 209.2 of the Guidance, it states “Each Party will also take actions to ensure that the public within their jurisdiction has an opportunity to comment during the public comment period. Such actions may include providing direction to the members of that jurisdiction’s public on how to submit comments to the Council, or hosting a public meeting or hearing.”

RECOMMENDATION: Each jurisdiction should hold a public hearing. A transcript of the public hearing should be mandatory and shared with all members of the Regional Body and Compact Council.

The current wording, which allows each jurisdiction to make a discretionary decision about whether there is sufficient interest in a hearing, without providing any guidance on how a jurisdiction would make such a determination, should be removed.

The requirement for a public meeting and hearing in each jurisdiction should be included in both the Sequence and Guidance documents.

2- Members of the public should be able to comment on the Originating Party’s and the Compact Council and Regional Body’s modified draft declaration of findings before it is voted on by the Compact Council.

The Sequence states “17. Deadline for submission of written comments from the public to the Regional Body and Compact Council secretariat(s) for the administrative record via electronic submission and hard copy.”

“18. Deadline for submission of any additional Technical Reviews by the Members (60 calendar days after submission of Application to approve a Proposal).”

“19. As appropriate, Originating Party, or another Party designated by the Chair or presiding officer if the Originating Party declines to participate, revises “Originating Party’s Proposed Declaration of Finding” based upon all input received through deadlines for submission of comments and Technical Reviews.

20. Final “Originating Party’s Proposed Declaration of Finding” posted by the Secretariat to Regional Body website 14 calendar days before public meeting of Regional Body.

21. Regional Body meeting. [Agreement, Art. 506; Compact, Sec. 4.5.5]

- a. Originating Party presents Application to approve a Proposal and Technical Review.
- b. A motion is made to adopt “Originating Party’s Proposed Declaration of Finding.” Motions to amend (including substitution motions) may be made and considered. The members of the Regional Body should endeavor to submit all such motions to amend to the other members of the Regional Body, copying the Secretariat, one week before the

meeting of the Regional Body. The Secretariat should make all such motions available to the public upon receipt.

c. The Regional Body, having considered the notice, Application to approve a Proposal, Originating Party's Technical Review, any other Independent Technical Reviews, comments, questions and objections, including comments by the public and federally recognized Tribes as well as First Nations and provincially recognized Métis communities in Canada, and all other information in the record, considers motion to adopt proposed "Originating Party's Proposed Declaration of Finding." If all members agree, then Declaration of Finding with consensus to be considered for adoption."

The Guidance states in Section 201.4(4): "The Council Chair should issue a draft Council Decision with any conditions at least 14 days prior to the meeting of the Council to issue a Council Decision. If the Chair's draft contains provisions or conditions not previously published for public comment and that are not a logical outgrowth of the subjects previously published for public comment, then the Council will hold a 30-day public comment period on such provisions or conditions included in the Chair's draft. Comments may only be submitted in writing, electronically or in hard copy."

It appears these two documents are incongruent. There is no allowance for public comment stated in the sequence between the time a modified Originating Party's Proposed Declaration of Finding is posted to the website and the Regional Body's opportunity to make a motion to vote. Furthermore, only one week transpires between the posting of a potentially modified Declaration of Finding and the requirement that a member of the Regional Body notify the body of a motion to amend. This would give little time for either the public or members of the Body to comment.

RECOMMENDATION: There should be a formal comment period for the public before a final vote is conducted on any material modifications to the draft Declaration of Finding. Advisory members, and third parties should be given a 45-day period to review the Declaration of Finding and any material amendments to ensure they have sufficient time for coordination and expert review before submitting comments.

3- The administrative record created by the Regional Body and Compact Council should include all comments made by the public.

The Sequence states in Step 16: "If such a meeting is organized, only a representative of the host jurisdiction will be required to participate in such event. If a transcript or summary of oral comments received is created, it will be shared with the other members of the Regional Body and Compact Council. Regardless, each Party will also take actions to ensure that the public within their jurisdiction has an opportunity to comment during the public comment period. Such actions may include providing direction to the members of that jurisdiction's public on how to submit comments to the Council, or hosting a public meeting or hearing as described in Step 15."

This leaves a transcript or summary of comments up to the discretion of the jurisdiction holding the public meeting or hearing. There should be a written record of these comments –as is required by the federal rulemaking process.

RECOMMENDATION: The public hearings in each jurisdiction should have transcripts compiled and submitted to the Regional Body and Compact Council, which becomes part of the full administrative record.

4- A clear, full record of the decision-making process and reasons for the decision should be public.

The Guidance states at section 201.4(5) that “where appropriate, the Council Decision will include findings of fact, conclusions of law and a “comment and response” section that provides a summary of comments received from federally recognized Tribes and the public, as well as any response to such comments.” This use of “where appropriate” is inconsistent with the rest of the guidance and it is incumbent on behalf of the Compact Council and Regional Body to document, in writing, their decision-making.

RECOMMENDATION: This documentation should be required of the Council and Regional Body to document, in writing, their decision and the reference to “Where appropriate” should be removed. The Council and Regional Body should address and respond to significant public comments that address modifications made or not made to the Declaration of Findings –as is required by the federal rulemaking process. The Council should respond to all Technical Reviews submitted by Council members. The Regional Body and Council should make the full record of their decision-making processes available to the public. The record of both bodies’ decisions should be available on the Council’s website, and paper copies should be made available upon request.

5- A member of the public, or a public interest organization, should not have to face the threat of huge administrative costs to appeal a decision by the Regional Body/Compact Council.

The Rules state in Section 323. “Assessment of Costs” that: “Whenever an Appeal Hearing is conducted under these Rules of Practice, the costs thereof, as herein defined, shall be assessed upon and apportioned equitably by the Council Chair among the Appeal Hearing Participants. No costs shall be assessed upon or apportioned to any Appeal Hearing Participant in excess of its ability to pay as demonstrated by it to the Council Chair. For purposes of this subparagraph, costs include all incremental costs and fees incurred by the Council for the Appeal Hearing, including, but not limited to, costs of the court reporter, fees and costs of the Council’s legal counsel, rental of a hearing room, transportation expenses of Council Members and Secretariat staff to the oral argument and any necessary lodging, Secretariat or Council Member time and expenses beyond that ordinarily incurred, and other related expenses.”

A key goal of the revision of the Great Lakes Compact Council and Regional Body rules and guidance should be to enable public participation in the diversion review process. Robust and fair public participation increases the legitimacy and quality of environmental decision-making.

The current proposal to require appeal hearing participants to share the costs of: (1) travel costs for eight Great Lakes state representatives, (2) lodgings for eight Great Lakes state representatives, (3) counsel for the Great Lakes Compact, (4) rental of a hearing room, (5) a court reporter, and any other incidental costs to host a hearing is a severe and inappropriate barrier to public participation. It is crucial to the integrity of the diversion review process that it is removed.

In most cases, the current rule will strongly discourage a member of the public, a non-profit organization, a small municipality, or a Tribe, First Nation or Métis Nation from appealing a diversion decision, even though the appeal hearing process is a mandatory step in reviewing a diversion decision.

The Council Chair's discretionary authority to waive fees is unsatisfactory. A waiver decision is uncertain and will only be made after the Appellant has launched an appeal. An Appellant is also being put to the additional expense of applying for a waiver and proving it cannot pay for the costs, and a potential appeal of an adverse costs decision, at the same time as it is appealing the merits of the diversion decision.

We propose the International Joint Commission's ("Commission") approach as a model for consideration. The Commission has found that in order to address the fact that certain populations are systematically excluded from key decision-making processes, the Commission has decided to make environmental justice an objective when it comes to public engagement.

Pursuant to Article 7(1)(k) of the 2012 Great Lakes Water Quality Agreement, the Commission released its inaugural triennial assessment of progress in November 2017. In the assessment, one of the Commission's key findings was that it needed to strengthen its engagement with communities that have not traditionally been at the decision-making table. In Assessment 16, the Commission acknowledges that it needs to more actively engage traditionally excluded communities by lowering the cost of participation. Minority and economically disadvantaged communities traditionally excluded from decision-making about environmental protection and resource management must already bear significant costs to participate in Compact Council hearings. Those costs include payment for their own legal and expert services, and for their own travel and lodging. Because minority and economically disadvantaged communities have been traditionally excluded from decision-making about environmental protection and resource management, any cost to participate in such decision-making will disproportionately affect them. In increasing the cost of participation by making those communities responsible for both their own costs and the Compact Council's hearing costs, the Compact Council is setting the opposite precedent than that of the Commission. The Compact Council's cost allocation scheme as currently proposed will inevitably lead to even more environmental injustice by increasing the cost burden on would-be appeal participants, which will disproportionately affect traditionally excluded would-be participant communities.

We understand that the Compact Council has used the rule regarding appeal costs at the Delaware River Basin Commission as a precedent. That rule appears to act as a bar to access and stymies public participation, and should not be considered as a model. We are unable to locate any other tribunal or compact tribunal, which imposes this type of severe costs burden on members of the public.

The requirement for the parties to share the logistical costs of the appeal hearing is akin to arrangements agreed to by commercial parties in a commercial arbitration agreement, wherein two parties with more equal bargaining power may agree in advance to pay for dispute resolution. That type of arrangement is unfair in a situation where the public has not had the opportunity to negotiate the terms of sharing this cost.

A diversion application is supposed to be a last resort and an exception to the ban on diversions. Appeals will be rare if the Great Lakes Compact is fulfilling its intended purpose. In that context, it is fair for the Compact Council to fund the costs of a hearing. Alternatively, the originating party could be required to pay for the logistical costs of a hearing process through its conclusion. We note that the Originating Party was responsible for the costs of the diversion application in the Waukeshsha diversion review. The Great Lakes Compact Council and Regional Body passed a joint resolution that Wisconsin would pay US\$261,668 for the review and the other states and provinces would bear their own costs. That approach could be extended to the appeal hearing process.

We therefore strongly urge the Compact Council to amend Rule 323 to provide that the originating party pay for the logistical costs of the appeal and the parties to the appeal bear their own costs, as follows:

RECOMMENDATION: (1) Whenever an Appeal Hearing is conducted under these Rules of Practice, the costs thereof, as herein defined, shall be incurred by the Council. For purposes of this subparagraph, costs include all incremental costs and fees incurred by the Council for the Appeal Hearing, including, but not limited to, costs of the court reporter, fees and costs of the Council's legal counsel, rental of a hearing room, transportation expenses of Council Members and Secretariat staff to the oral argument and any necessary lodging, Secretariat or Council Member time and expenses beyond that ordinarily incurred, and other related expenses

(2) The Appeal Hearing Participants shall bear their own costs for participating in the Appeal Hearing.

6- The procedures should include a more robust 'pre-application' period.

The Sequence states in Step 4 that "State/Provincial staff conference call meeting/web presentation with Applicant and Originating Party to review tentative schedules of official notices, briefings and meetings, and to receive technical briefing on the Application."

While this does provide for the sharing of a technical briefing, it does not provide for specified time to review the material or discuss it. Allowing the Regional Body and Compact Council to identify potential issues of concern before the state/province where the diversion is proposed submits a formal application for Regional Review would ultimately make for a more cost-effective and legally defensible outcome.

RECOMMENDATION: The Sequence should include time in the pre-application briefing process to allow for each jurisdiction to review the information provided. The Council should make its pre-application review and any technical comments or questions submitted by jurisdictions publicly available on its website. This adaptive step would help address any major

concerns, questions and streamline the review process during the formal application review process.

7- Maintain Management of Modifications of Council Decisions.

We appreciate the robust and well-thought-out tiered approach, outlined in Part IV (Sections 401-404) of the proposed Rules, to managing requested modifications of Council decisions with appropriate, proportionate regional procedures and timelines depending on the magnitude of the requested modification. We would strongly urge you to not change these sections of the proposal. As currently written, the proposed rules provide a reasonable and flexible mechanism for an approved diversion applicant to request a modification. Modifications to regional diversion decisions must be carefully considered and should not be made automatically without appropriate Regional Body and Compact Council oversight or the entire regional review process would be undermined.

8- The procedures should include rules to govern how to review regionally significant or potentially precedent setting proposal.

In addition, we acknowledge that the Compact Council has included Section 200.5 that states: “Consideration of regionally significant or potentially precedent setting Proposals. RESERVED.” We understand that this will be considered in a revision process to be conducted in 2019. We recognize that this procedural process is not currently laid out in the Sequence, Guidance or Rules and feel it is important in the event that a jurisdiction would like to ask for Regional Review on a straddling community diversion request. Jurisdictions should know how to request Regional Review and the appropriate timeline for initiating.

RECOMMENDATION: Include language beyond “RESERVED” that indicates how and when this procedural consideration will take place.

Conclusion

Our collective organizations are committed to ensuring the integrity of the Compact and Agreement and of this Regional Review process. Again, we appreciate your serious review and consideration of our comments and we look forward to working with you throughout this process. If you have any questions, please contact Todd Brennan with the Alliance for the Great Lakes at tbrennan@greatlakes.org or 414-599-0317.

Sincerely,

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