



# Ohio Legislative Service Commission

## Final Analysis

Bill Rowland

### Sub. H.B. 231

129th General Assembly  
(As Passed by the General Assembly)

**Reps.** Wachtmann, Boose, Peterson, Beck, Blair, Blessing, Brenner, Buchy, Damschroder, Dovilla, Hackett, Hall, Hottinger, Huffman, Johnson, Kozlowski, Maag, Martin, McClain, Newbold, Roegner, Sears, Slaby, Thompson, Young, Batchelder

**Sens.** Grendell, Schaffer, Coley, Daniels, Hite, Jordan

**Vetoed:** July 15, 2011

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## ACT SUMMARY

- For purposes of implementing the Great Lakes-St. Lawrence River Basin Water Resources Compact (Compact), would have established a withdrawal and consumptive use permit program in the Lake Erie watershed, and would have required an assessment of cumulative impacts of withdrawals and consumptive uses from the Lake Erie watershed.

### Withdrawal and consumptive use permits

- Would have required the Chief of the Division of Soil and Water Resources to establish a program for the issuance of permits for withdrawals and consumptive uses of water from the Lake Erie watershed.
- Would have required an owner or operator of a facility in the Lake Erie watershed, when the facility operated under intended operating conditions, to obtain a withdrawal or consumptive use permit if the following water withdrawal or consumptive use thresholds were met:

--5 million gallons per day averaged over a 90-day period for a facility with a new or increased capacity for withdrawals or consumptive uses from Lake Erie or a river or stream under the influence of Lake Erie;

--2 million gallons per day averaged over a 90-day period for a facility with a new or increased capacity for withdrawals or consumptive uses from any river or stream other than a river or stream under the influence of Lake Erie;

--2 million gallons per day averaged over a 90-day period for a facility with a new or increased capacity for withdrawals or consumptive uses from ground water;

--300,000 gallons per day averaged over a 90-day period for a facility with a new or increased capacity for withdrawals and consumptive uses from a high quality river or stream with a drainage area of less than 100 square miles measured at the point where the withdrawal or consumptive use occurs.

- Would have specified that a withdrawal and consumptive use permit had to be issued only for the amount of withdrawal or consumptive use capacity of a facility that exceeded the threshold amounts, not amounts below those threshold amounts.
- Would have established permit application requirements, including a requirement that the applicant submit a description of environmentally sound and economically feasible water conservation methods to be utilized.
- Would have specified that a permit was valid until a facility that was the subject of the permit was the subject of facility abandonment.
- Would have required a certification of compliance with a permit every five years.
- Would have specified that a permit had to include terms and conditions restricting the withdrawal and consumptive use by a facility to amounts not exceeding the capacity of the facility.
- Would have required the Chief, in making a decision to issue or deny a permit, to apply the decision-making standard established in the Compact.
- Would have required the owner or operator of a facility for which a withdrawal and consumptive use permit had been issued to utilize environmentally sound and economically feasible water conservation measures.
- Would have provided that the owner or operator of a facility could implement those measures in the form of best management practices and that the owner or operator had discretion to determine which practices were best management practices.
- Would have established a series of irrebuttable presumptions that the Chief had to utilize when applying the decision-making standard under the Compact.

- Would have applied the irrebuttable presumptions to withdrawals from all waters in the Lake Erie watershed other than high quality water.
- For purposes of the irrebuttable presumptions, would have specified that a withdrawal and consumptive use would not cause a significant individual or cumulative adverse impact to the quantity or quality of waters and water dependent natural resources and the Lake Erie watershed if the withdrawal resulted in a consumptive use that did not exceed a specified percentage of the long-term mean annual runoff from the Ohio portion of the Lake Erie watershed.
- Would have required the Chief to establish the long-term mean annual runoff and update it every ten years.
- Would have prohibited the Chief from submitting an application for a withdrawal and consumptive use permit for regional review under the Compact unless regional review was agreed to by the permit applicant.
- Would have established 13 categories of withdrawals and consumptive uses that would have been exempt from the act's permitting requirements, including withdrawals and consumptive uses in emergency, testing, or humanitarian situations, withdrawals and consumptive uses from a baseline facility, certain major utility facilities and public water systems, a facility regulated under the Industrial Minerals Mining Law, and withdrawals and consumptive uses made to comply with federal or state requirements.
- Would have established procedures for the sale or transfer of a permit or a facility's withdrawal and consumptive use capacity.
- Would have required the Chief to remove a facility from the baseline report when the facility was subject to baseline facility abandonment.
- Would have provided that the owner or operator of a facility could petition the Chief for: (1) inclusion in the baseline report if the owner or operator believed that the facility was erroneously excluded from the report, or (2) the amendment of the amount of a withdrawal and consumptive use or other information included in the baseline report regarding the facility if the owner or operator believed that the information was incorrect.

### **Preclusion against mandatory water conservation program**

- Would have declared that nothing in the Great Lakes-St. Lawrence River Basin Water Resources Compact or any law implementing the Compact authorized the

Chief or the Director of Natural Resources to adopt rules requiring mandatory conservation of water resources.

- Would have prohibited the General Assembly from enacting a law requiring a mandatory water conservation program without at least a two-thirds vote of the General Assembly (see **COMMENT 1**).
- Would have precluded the Governor, the Department of Natural Resources, or any other state agency from adopting rules establishing a mandatory water conservation program without authorization from the General Assembly.

### **Assessment of cumulative impacts**

- Would have required the Chief of the Division of Soil and Water Resources to make an assessment every five years of the cumulative impacts of withdrawals and consumptive uses from the waters of the Lake Erie watershed for purposes of the Compact.
- Would have required the Chief to prepare a report of the assessment and submit a copy of it to the Governor, the Speaker of the House of Representatives, and the President of the Senate.

### **Declarations**

- Would have stated that for purposes of the act and the Compact, with respect to the definition of "source watershed" in the Compact, the General Assembly declared that "source watershed" meant the Lake Erie watershed.
- Would have declared that the act's purpose was to protect private property rights associated with surface and ground water in Ohio, to promote good stewardship of Ohio's water resources, and to promote economic development and job creation in Ohio by recognizing that abundant fresh water is a highly desirable commodity.
- Would have declared that nothing in the act limited a person's right to the reasonable use of ground water, water in a lake, or any other watercourse in contravention of the Ohio Constitution.

### **Water Resources Review Commission**

- Would have created the Water Resources Review Commission for purposes of hearing appeals of decisions of the Chief of the Division of Soil and Water Resources made under the act.

- Would have authorized a person having a direct economic interest that was or could have been adversely affected by a decision or order of the Chief to appeal the decision, and would have established appeal procedures.
- Would have authorized appeals of decisions of the Commission to be made to the applicable court of common pleas.
- Would have prohibited the awarding of attorney's fees by the Commission or a court of common pleas regarding appeals made under the act.

## **Enforcement**

- Would have established procedures for the issuance of enforcement orders by the Chief of the Division of Soil and Water Resources and injunctive actions by the Attorney General.

## **Continuing diversion permit program and the Compact**

- Would have prohibited the Director of Natural Resources from approving a permit for a diversion of water under Ohio's diversion permit program if the proposed diversion did not qualify as an exception to the prohibition against diversions established in the Compact.

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## **TABLE OF CONTENTS**

<b>BACKGROUND</b> .....	6
Great Lakes-St. Lawrence River Basin Water Resources Compact .....	6
Withdrawals and consumptive uses under the Compact .....	7
Water conservation and efficiency programs and other provisions .....	7
<b>THE ACT</b> .....	8
Withdrawal and consumptive use permits .....	8
Thresholds .....	8
Permit and application requirements .....	10
Application of Compact's decision-making standard.....	11
Presumptions concerning application of criteria under decision-making standard.....	12
Prohibition against regional review .....	14
Exemptions from permitting requirements .....	14
Sale or transfer of a permit or capacity.....	16
Removal from the baseline report .....	17
Petition for inclusion in the baseline report .....	17
Preclusion against mandatory water conservation program .....	17
Assessment of cumulative impacts .....	18
Declarations.....	18
Water Resources Review Commission .....	19
Appeals to the Commission.....	20
Appeals to the court of common pleas .....	21

Attorney's fees and other appeal provisions .....	22
Enforcement .....	22
Continuing diversion permit program and the Compact.....	23
Rules related to and enforcement of the Compact; intent statements.....	23

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## **CONTENT AND OPERATION**

The intent of the act was to provide for the implementation of portions of the Great Lakes-St. Lawrence River Basin Water Resources Compact. The act would have done so by establishing a program for the issuance of permits for withdrawals and consumptive uses of water in the Lake Erie watershed over certain thresholds and requiring an assessment of cumulative impacts of withdrawals and consumptive uses from the Lake Erie watershed.

### **BACKGROUND**

#### **Great Lakes-St. Lawrence River Basin Water Resources Compact**

The eight Great Lakes states, which are Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Wisconsin, and Pennsylvania, together with the Canadian provinces of Ontario and Quebec, entered into the Great Lakes-St. Lawrence River Basin Water Resources Compact (codified in Ohio in R.C. 1522.01) for the purpose of protecting the watershed of the Great Lakes and certain portions of the St. Lawrence River. The eight Great Lakes states endorsed the Compact on December 13, 2005, and the Compact was enacted in each of the Great Lakes states in 2007 and 2008. Subsequently, in 2008, the Compact was ratified by Congress and signed by President George W. Bush. The eight Great Lakes states are considered to be parties to the Compact.

Ontario and Quebec are not parties to the Compact, but the Compact requires the states that are parties to it to consult and cooperate with those provinces concerning certain matters. In addition, the Compact provides that the premiers of Ontario and Quebec together with the governors of the Great Lakes states are to serve on a regional body that is to be responsible for receiving certain information and for approving or disapproving certain proposals regarding the withdrawal, diversion, or consumptive use of water in the Great Lakes-St. Lawrence River Basin.<sup>1</sup>

The Compact prohibits, with certain exceptions, all new or increased diversions of water resources from the watershed of the Great Lakes and certain portions of the St. Lawrence River into another watershed. In addition, it establishes a decision-making standard for the management and regulation of new or increased withdrawals and

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<sup>1</sup> R.C. 1522.01 – Section 1.2 and Section 4. (Note: R.C. 1522.01 was not in the act.)

consumptive uses of such water resources. The decision-making standard is designed to ensure that such withdrawals and consumptive uses will result in no significant individual or cumulative adverse impacts to the quantity or quality of the waters and water dependent natural resources of the source watershed.<sup>2</sup>

### **Withdrawals and consumptive uses under the Compact**

Each of the Great Lakes states must create a program for the management and regulation of new or increased withdrawals and consumptive uses by adopting and implementing measures consistent with the decision-making standard.<sup>3</sup> Each party, through a considered process, must set and may modify threshold levels for the regulation of new or increased withdrawals in order to assure an effective and efficient water management program that will ensure that uses overall are reasonable, that withdrawals overall will not result in significant impacts to the waters and water dependent natural resources of the basin, determined on the basis of significant impacts to the physical, chemical, and biological integrity of source watersheds, and that all other objectives of the Compact are achieved. Each party may determine the scope and thresholds of its program, including which new or increased withdrawals and consumptive uses will be subject to the program.

Under the Compact, consumptive use means that portion of water withdrawn or withheld from a basin (of a Great Lake or the St. Lawrence River) that is lost or otherwise not returned to the basin due to evaporation, incorporation into products, or other processes. Withdrawal means the taking of water from surface water or ground water.<sup>4</sup>

### **Water conservation and efficiency programs and other provisions**

Each state that is a party to the Compact also must develop and implement a water conservation and efficiency program, either voluntary or mandatory, within its jurisdiction. The program must be consistent with basin-wide goals and objectives.<sup>5</sup>

The Compact provides for public notice and participation in many matters. It also requires the parties to the Compact, together with the provinces of Ontario and Quebec, to conduct a periodic assessment of the cumulative impacts of withdrawals,

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<sup>2</sup> R.C. 1522.01 – Section 4.

<sup>3</sup> R.C. 1522.01 – Section 4.10.1.

<sup>4</sup> R.C. 1522.01 – Section 1.2.

<sup>5</sup> R.C. 1522.01 – Section 4.2.

diversions, and consumptive uses from waters of the Basin for purposes of future implementation of the Compact.<sup>6</sup>

## THE ACT

### Withdrawal and consumptive use permits

The act would have required the Chief of the Division of Soil and Water Resources in the Department of Natural Resources to establish a program for the issuance of permits for the withdrawal and consumptive use of water from the Lake Erie watershed. The program was to be established not later than 180 days after the act's effective date for purposes of the Great Lakes-St. Lawrence River Basin Water Resources Compact. Upon establishment of the program, the owner or operator of a facility that was not otherwise exempt under the act would have been required to obtain a withdrawal and consumptive use permit from the Chief. A facility was any site, installation, or building at which water withdrawal and consumptive use activities took place that was located at a property or on contiguous properties and that was under the direction of either a private or public entity. A facility did not include any site, installation, building, or service area of a public water system at or within which water withdrawal and consumptive use activities took place. Consumptive use had the same meaning as in the Compact (see above). For purposes of determining a new or increased capacity for consumptive use, consumptive use was the use based on a coefficient of consumptive use generally accepted in the scientific community that most accurately reflected the process at a facility or the use based on facility specific data, whichever was more accurate.<sup>7</sup>

The act would have exempted facilities that were subject to the act's permitting requirements from continuing permitting requirements related to withdrawals and consumptive uses.<sup>8</sup>

### Thresholds

A facility would have been subject to the act's permit program if it met any of the following threshold criteria:

(1) The facility, when operating under intended operating conditions, had a new or increased capacity for withdrawals or consumptive uses from Lake Erie or a river or

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<sup>6</sup> R.C. 1522.01 – Section 4.15.

<sup>7</sup> R.C. 1522.11(A) and 1522.10(E) and (F).

<sup>8</sup> R.C. 1501.33(D).

stream under the influence of Lake Erie (see below) of at least 5 million gallons per day averaged over a 90-day period.

(2) Except as discussed below, the facility, when operating under intended operating conditions, had a new or increased capacity for withdrawals or consumptive uses from any river or stream other than a river or stream under the influence of Lake Erie or from ground water in the Lake Erie watershed of at least 2 million gallons per day averaged over a 90-day period.

(3) The facility, when operating under intended operating conditions, had a new or increased capacity for withdrawals or consumptive uses of at least 300,000 gallons per day averaged over a 90-day period from any river or stream to which both of the following applied:

--The river or stream was a high quality water.

--The river or stream had a drainage area of less than 100 square miles measured at the point where the withdrawal or consumptive use occurred.<sup>9</sup>

For the act's purposes, capacity was the ability of a facility's pumps, pipes, and other appurtenances to withdraw and consumptively use water. Increased capacity did not include any capacity that resulted from alterations or changes made at a facility that replaced existing capacity without increasing the capacity of the facility. A river or stream was a named body of water running or flowing, either continually or intermittently, on the earth's surface or in a channel in which such flow occurred. A river or stream under the influence of Lake Erie was that portion of any river or stream that had a bottom elevation at or below the long-term monthly mean level of Lake Erie, as designated by the United States Army Corp of Engineers, of 571.9 feet above the International Great Lakes Datum (IGLD) 1985 and: (1) the portion of the river or stream was a direct tributary of Lake Erie, and (2) the portion of the river or stream was a recognized navigational channel. The act would have specified that the definition of that term applied only to that term as it was used in the act's provisions governing the new permitting program (see **COMMENT 2**).

A recognized navigational channel was that portion of a river or stream extending from bank to bank that was, as of the act's effective date, a state or federally maintained navigational channel. High quality water was a river or stream that had been designated in rules adopted by the Environmental Protection Agency not later than the act's effective date as an exceptional warm water habitat, cold water habitat, outstanding state water, or superior high-quality water. However, high quality water

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<sup>9</sup> R.C. 1522.11(A).

did not include outstanding state waters that were designated as such due to exceptional recreational values.<sup>10</sup>

### **Permit and application requirements**

Withdrawal and consumptive use permits were to be issued under the act only for the amount of withdrawal or consumptive use capacity of a facility that exceeded the threshold amounts established by the act. A permit could neither address nor be required for the portion of the withdrawal and consumptive use capacity of the facility below that threshold amount. An applicant for a permit would have been required to submit an application to the Chief of the Division of Soil and Water Resources on a form that the Chief prescribed. The applicant would have been required to include with the application all of the following:

(1) The name and address of the applicant and of a contact person for the applicant;

(2) A nonrefundable application fee of \$1,000, the proceeds of which were to be credited to the continuing Water Management Fund. The act would have authorized money in the Fund to be used to administer the withdrawal and consumptive use permit program established under the act. Under continuing law, money in that Fund is derived from fees on permits for major increases in withdrawals of water of the state and on water diversion permits.<sup>11</sup>

(3) A description of all of the following:

--The facility's existing withdrawal capacity per day if the withdrawal was to occur at a facility already in operation;

--The total new or increased daily withdrawal capacity proposed for the facility;

--The locations and sources of water proposed to be withdrawn;

--The locations of proposed discharges or return flows;

--The locations and nature of proposed consumptive uses and the applicable consumptive use coefficient for the facility;

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<sup>10</sup> R.C. 1522.10(D), (H), (I), (K), (L), and (M).

<sup>11</sup> R.C. 1501.32, 1501.33, and 1521.04.

- The estimated average annual and monthly volumes and rates of withdrawal;
- The estimated average annual and monthly volumes and rates of consumptive use;
- The environmentally sound and economically feasible water conservation measures to be undertaken by the applicant; and
- Other ways the applicant's need for water would be satisfied if the application was denied or modified.<sup>12</sup>

The Chief could not have required an applicant to submit any other information with an application. A permit would have been valid until the facility to which the permit applied was the subject of facility abandonment, which was the voluntary and affirmative termination of a facility's withdrawal and consumptive use capacity as listed in a permit issued under the act. Facility abandonment did not include the nonuse or the transfer of a facility's withdrawal and consumptive use capacity.<sup>13</sup>

Once every five years, the owner or operator of a facility would have been required to certify to the Chief that the facility was in compliance with the permit that had been issued for the facility. No person that was required to do so could fail to apply for and receive a withdrawal and consumptive use permit. A permit issued under the act would have been required to include terms and conditions restricting the withdrawal and consumptive use by a facility to amounts not exceeding the facility's capacity.<sup>14</sup>

### **Application of Compact's decision-making standard**

In making the decision to issue or deny a withdrawal and consumptive use permit, the Chief would have been required to apply the decision-making standard established in the Great Lakes-St. Lawrence River Basin Water Resources Compact.<sup>15</sup> That decision-making standard establishes certain criteria to be applied when deciding to approve or disapprove a new or increased withdrawal or consumptive use. Those criteria specify that: (1) all water withdrawn must be returned to the source watershed less an allowance for consumptive use, (2) the withdrawal or consumptive use will be

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<sup>12</sup> R.C. 1522.11(B) and (C).

<sup>13</sup> R.C. 1522.10(G) and 1522.11(C) and (D).

<sup>14</sup> R.C. 1522.11(D) to (F).

<sup>15</sup> R.C. 1522.12(A).

implemented so as to ensure no significant individual or cumulative adverse impacts to the quantity or quality of the waters and water dependent natural resources and the applicable source watershed, (3) the withdrawal or consumptive use will be implemented so as to incorporate environmentally sound and economically feasible water conservation measures, (4) the withdrawal or consumptive use will be implemented so as to ensure that it is in compliance with all applicable municipal, state, and federal laws as well as regional interstate and international agreements, and (5) the proposed use is reasonable, based on certain factors.<sup>16</sup>

The Chief would have been required to issue a withdrawal and consumptive use permit for a facility only if the Chief determined that a facility met all of the criteria established in the decision-making standard.<sup>17</sup>

The act would have required the owner or operator of a facility for which a withdrawal and consumptive use permit had been issued to utilize environmentally sound and economically feasible water conservation measures in compliance with the Compact. The owner or operator could implement those measures in the form of best management practices that were applicable to the facility. The owner or operator had discretion to determine which practices were best management practices. An owner or operator that implemented such measures would have been deemed to be in compliance with applicable provisions of the Compact. Any reporting that would have been required by the Chief of the Division of Soil and Water Resources for purposes of implementing the act's provisions governing water conservation measures was proprietary and confidential and not subject to the Public Records Law. The act would have declared that those provisions complied with the Compact's requirements that states implement a water conservation program (see "**Preclusion against mandatory water conservation program**," below).<sup>18</sup>

#### **Presumptions concerning application of criteria under decision-making standard**

Under the act, for purposes of applying the criteria established under the decision-making standard, all of the following would have applied:

(1) If a withdrawal by a facility from Lake Erie or a river or stream under the influence of Lake Erie resulted in a consumptive use that was less than 1.5% of the long-term mean annual runoff from the Ohio portion of the Lake Erie watershed, it would have been irrebuttably presumed that the withdrawal and consumptive use would not

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<sup>16</sup> R.C. 1522.01 – Section 4.11.

<sup>17</sup> R.C. 1522.12(C).

<sup>18</sup> R.C. 1522.17(A).

cause a significant individual or cumulative adverse impact to the quantity or quality of waters and water dependent natural resources and the Lake Erie watershed. This provision would not would have applied to high quality water.

(2) If a withdrawal by a facility from ground water or a river or stream that was not a river or stream under the influence of Lake Erie resulted in a consumptive use that was less than .75% of the long-term mean annual runoff from the Ohio portion of the Lake Erie watershed, it would have been irrebuttably presumed that the withdrawal and consumptive use would not cause a significant individual or cumulative adverse impact to the quantity or quality of waters and water dependent natural resources and the Lake Erie watershed. This provision would not have applied to high quality water.

(3) A withdrawal and consumptive use from any river or stream that was a high quality water with a drainage area of less than 100 square miles would have had or would have no significant individual or cumulative adverse impacts on the Lake Erie watershed unless the withdrawal and consumptive use adversely impacted the high quality water as determined by the Chief in accordance with rules. The Chief would have been required to adopt rules in accordance with the Administrative Procedure Act governing the regulation of withdrawals and consumptive uses from a high quality water with a drainage area of less than 100 square miles. The rules would have been required to establish standards for what constituted significant individual or cumulative adverse impact to such a high quality water.<sup>19</sup> For purposes of adopting the rules, the Chief would have been required to convene an advisory group consisting of interested parties and ensure that at least one member of the advisory group represented The Nature Conservancy.<sup>20</sup>

(4) A withdrawal or consumptive use would have been reasonable under the Compact's decision-making standard unless a determination was made that the withdrawal or consumptive use was not reasonable by a court of competent jurisdiction in Ohio pursuant to the continuing statute governing the determination of the reasonableness of a use of water. The act would have declared that this provision did not provide standing to the Department of Natural Resources to bring suit under the reasonable use doctrine.<sup>21</sup>

Within 180 days of the act's effective date and for purposes of making the calculations required under items (1) and (2) above, the Chief would have been required to establish the long-term mean annual runoff from the Ohio portion of the Lake Erie watershed.

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<sup>19</sup> R.C. 1522.14.

<sup>20</sup> Section 3.

<sup>21</sup> R.C. 1522.12(A) and (D).

Beginning ten years after the act's effective date and every ten years thereafter, the Chief would have been required to update the long-term mean annual runoff utilizing the best available published hydrologic data collected over the previous 20 years.

### **Prohibition against regional review**

Under the act, the Chief would not have been permitted to submit an application for a withdrawal and consumptive use permit for regional review to the regional body under the Compact unless regional review was agreed to by the applicant for the permit. Regional review is conducted under the Compact by the Great Lakes-St. Lawrence River Basin Water Resources Council and the premiers of Ontario and Quebec, Canada. The Council consists of the governor of each state that is a party to the Compact or the governor's alternate. The Compact authorizes a party to request regional review of an application and provides that the regional review must be undertaken only after consulting the applicant.<sup>22</sup>

### **Exemptions from permitting requirements**

Under the act, the following would have been exempt from the requirement to obtain a withdrawal and consumptive use permit:

(1) A facility or proposed facility that had a withdrawal and consumptive use capacity or proposed capacity below the threshold amounts established by the act (see above);

(2) A baseline facility that had not increased its withdrawal and consumptive use capacity beyond the capacity listed in the baseline report and beyond the thresholds established by the act. Under the act, a baseline facility was a facility identified in the baseline report, a facility added to the baseline report under the act (see below), or any other facility that had commenced withdrawal and consumptive use activities since the submission of the baseline report and prior to the act's effective date. The baseline report is a list of the withdrawal and consumptive use capacities of facilities that was developed for purposes of the Compact by the Department of Natural Resources and submitted to the Great Lakes-St. Lawrence River Basin Water Resources Council on December 8, 2009 (see also "**Petition for inclusion in baseline report**," below).<sup>23</sup>

(3) A facility that was required to increase its withdrawal and consumptive use capacity as a result of federal or state requirements;

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<sup>22</sup> R.C. 1522.12(B) and 1522.01 – Sections 2.2 and 4.5.

<sup>23</sup> R.C. 1522.10(A) and (C).

(4) A facility that made a withdrawal and consumptive use from nonchannelized surface water that was not a river or stream or from an impoundment of water that was isolated and did not depend entirely on ground water for replenishment such as a farm pond, golf course pond, or other similar retention pond. The exemption would not have applied to a facility making a withdrawal and consumptive use for industrial purposes or for public water supply purposes.

(5) A facility that was establishing a new or increasing its withdrawal and consumptive use capacity as a result of an emergency condition that, without the new or increased capacity, would result in imminent harm to human health or property;

(6) A facility that was establishing a new or increasing its withdrawal and consumptive use capacity for testing purposes only if the testing period would last not longer than 24 months;

(7) A facility that was establishing a new or increasing its withdrawal and consumptive use capacity in order to respond to a humanitarian crisis if the new or increased capacity was necessary to assist in the management of that crisis;

(8) A major utility facility or a public water system that withdrew waters of the state in an amount that would result in a new or increased consumptive use of more than 2 million gallons per day;

(9) A facility that was subject to regulation under the Industrial Minerals Mining Law;

(10) A facility that purchased all of its water from a public water system;

(11) A facility with ground water or surface water withdrawals or consumptive uses that were subject to regulation under a state or federal law other than under the act. However, the exemption from regulation under a state law would not have applied with respect to state law governing: (a) a permit issued under the Water Pollution Control Law, and (b) a permit issued for a withdrawal under the Department of Natural Resources' continuing withdrawal program.

(12) A facility that was withdrawing or consumptively using water from an off-stream impoundment that had been substantially filled by a withdrawal from a baseline facility or from a facility for which a withdrawal and consumptive use permit had been issued;

(13) A facility that was a public water system that was increasing its withdrawal or consumptive use capacity and the increase was directly related to supplying a major public utility that was subject to regulation under the Power Siting Law.<sup>24</sup>

### **Sale or transfer of a permit or capacity**

Under the act, a permittee could transfer a withdrawal and consumptive use permit upon the sale or transfer of a facility. In addition, the owner of a baseline facility could transfer the withdrawal and consumptive use capacity of the baseline facility upon the sale or transfer of that facility. Transferred capacity of a baseline facility did not require a withdrawal and consumptive use permit. Notice of a transfer had to be provided to the Chief of the Division of Soil and Water Resources in a manner prescribed by the Chief.<sup>25</sup>

If a permittee sold or transferred a portion of a facility for which a withdrawal and consumptive use permit had been issued, the permittee could transfer the applicable portion of the withdrawal and consumptive use capacity authorized by the permit. The permittee had to provide notice of the transfer to the Chief in a manner prescribed by the Chief. Upon receipt of the notice and if a permit was required based on the threshold amounts established by the act, the Chief would have been required to issue a new permit to the permittee who transferred the portion of the facility and a new permit to the transferee. Any new permits had to reflect the transfer of the portion of the withdrawal and consumptive use capacity.<sup>26</sup>

If the owner of a baseline facility sold a portion of that facility, the owner could transfer the applicable portion of the withdrawal and consumptive use capacity listed in the baseline report for that facility. The owner had to provide notice of such a transfer to the Chief in a manner prescribed by the Chief. The Chief would have been required to update the baseline report to reflect the transfer rather than require the owner of the baseline facility or the transferee to obtain a withdrawal and consumptive use permit.<sup>27</sup>

The act would have prohibited anyone from selling or transferring a withdrawal and consumptive use permit for purposes of evading the act's requirements.<sup>28</sup>

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<sup>24</sup> R.C. 1522.13.

<sup>25</sup> R.C. 1522.15(A)(1).

<sup>26</sup> R.C. 1522.15(A)(2).

<sup>27</sup> R.C. 1522.15(A)(3).

<sup>28</sup> R.C. 1522.15(A)(4).

## **Removal from the baseline report**

The Chief would have been required to remove a facility from the baseline report when the facility was subject to baseline facility abandonment. However, a baseline facility could not be removed from the baseline report for the nonuse or the transfer of the facility's baseline capacity.<sup>29</sup> Baseline facility abandonment was the voluntary and affirmative termination of a baseline facility's withdrawal and consumptive use capacity as listed in the baseline report. It did not include the nonuse or the transfer of a baseline facility's withdrawal and consumptive use capacity.<sup>30</sup>

## **Petition for inclusion in the baseline report**

As stated above, a baseline facility would have been exempt from the requirement to obtain a withdrawal and consumptive use permit under the act. The act would have provided that the owner or operator of a facility could petition the Chief for: (1) inclusion in the baseline report if the owner or operator believed that the facility was erroneously excluded from the report, or (2) the amendment of the amount of a withdrawal and consumptive use or other information included in the baseline report regarding the facility if the owner or operator believed that the information was incorrect. The Chief would have been required to issue an order either approving or disapproving a petition and to base the order on a thorough examination of the circumstances concerning the petition. An order of the Chief could have been appealed under the act. Finally, the Chief would have been required to adopt rules in accordance with the Administrative Procedure Act establishing procedures for the submission of the petitions.<sup>31</sup>

## **Preclusion against mandatory water conservation program**

The act would have declared that nothing in the Great Lakes-St. Lawrence River Basin Water Resources Compact or in any provisions of law implementing the Compact authorized the Chief or the Director of Natural Resources to adopt rules requiring mandatory conservation of water resources. The Compact requires states to at least implement a voluntary water conservation program.<sup>32</sup> Thus, because the act would have precluded only a mandatory program, the Chief would have had the authority under the act to implement a voluntary water conservation program. The act also would have declared that the General Assembly could not enact any law that would

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<sup>29</sup> R.C. 1522.15(B).

<sup>30</sup> R.C. 1522.10(B).

<sup>31</sup> R.C. 1522.16.

<sup>32</sup> R.C. 1522.01 – Section 4.2.2.

require a mandatory water conservation program without at least a two-thirds majority vote of the Senate and House of Representatives (see **COMMENT 1**). The act then would have declared that the act's water conservation provisions complied with the requirements of the Compact requiring states to implement a water conservation program.<sup>33</sup>

The act would have precluded the Governor, the Department of Natural Resources, or any other state agency from adopting rules establishing a mandatory water conservation program without authorization from the General Assembly. Continuing law precludes the Governor, the Department of Natural Resources, or any other state agency from adopting rules or implementing any mandatory program governing water conservation and efficiency under the Compact unless the General Assembly enacts legislation authorizing the program or rules. However, under continuing law, the Governor, the Department of Natural Resources, or any other state agency may adopt rules concerning and may implement voluntary water conservation and efficiency programs without authorization from the General Assembly.<sup>34</sup>

### **Assessment of cumulative impacts**

Under the act, every five years, the Chief of the Division of Soil and Water Resources would have been required to make an assessment of the cumulative impacts of withdrawals and consumptive uses from the waters of the Lake Erie watershed for purposes of the Compact. The assessment had to be based on information relating directly to withdrawals and consumptive uses by facilities that had received a withdrawal and consumptive use permit. The Chief would have been required to prepare a report of the assessment and submit a copy of it to the Governor, the Speaker of the House of Representatives, and the President of the Senate. The act would have declared that the above provisions complied with the requirements of the Compact as they relate to the assessment of significant cumulative adverse impacts.<sup>35</sup>

### **Declarations**

The act would have stated that for purposes of the act and the Compact, with respect to the definition of "source watershed" in the Compact, the General Assembly declared that "source watershed" meant the Lake Erie watershed.<sup>36</sup>

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<sup>33</sup> R.C. 1522.17(B).

<sup>34</sup> R.C. 1522.05(B).

<sup>35</sup> R.C. 1522.17(C).

<sup>36</sup> R.C. 1522.101(A).

In addition, the act would have stated that the General Assembly declared that the act's purpose was to protect private property rights associated with surface and ground water in Ohio, to promote good stewardship of Ohio's water resources, and to promote economic development and job creation in Ohio by recognizing that abundant fresh water is a highly desirable commodity.<sup>37</sup>

The act also would have declared that nothing in the act limited a person's right to the reasonable use of ground water, water in a lake, or any other watercourse in contravention of Section 19b of Article I, Ohio Constitution.<sup>38</sup>

## **Water Resources Review Commission**

The act would have created the Water Resources Review Commission for purposes of hearing appeals of decisions of the Chief made under the act. The Commission was to consist of five members appointed by the Governor with the advice and consent of the Senate. The act would have established standard appointment procedures. Commission members were to serve staggered five-year terms. Two of the appointees had to be experts in economic development, two experts in water resource management, and one a member of the public who was an attorney admitted to practice in Ohio and familiar with the laws related to water resources. Not more than three members could be members of the same political party.<sup>39</sup>

Three members of the Commission would have constituted a quorum, and no action of the Commission would have been valid unless it had the concurrence of at least a majority of the members. The Commission was to keep a record of its proceedings. Annually one member was to be elected chairperson and another member vice-chairperson. The Commission would have been required to adopt rules in accordance with the Administrative Procedure Act governing the procedure for appeals conducted under the act and could have adopted rules governing its own internal management that did not affect private rights. The Governor could have removed a member for inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance after notifying the member of the charges in writing with at least ten days' written notice of the time and place at which the Governor would publicly hear the member in defense of the charges. If the member was removed from office, the Governor was to file in the office of the Secretary of State a complete statement of the charges made against the

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<sup>37</sup> Section 4.

<sup>38</sup> R.C. 1522.101(B).

<sup>39</sup> R.C. 1522.18(A) and (B).

member and a complete report of the proceedings. The action of the Governor removing a member from office would have been final.<sup>40</sup>

A member would have been paid \$150 per day when actually engaged in the performance of work as a member and when engaged in travel necessary in connection with that work. In addition to monetary compensation, a member would have been reimbursed for all traveling, hotel, and other expenses, in accordance with the travel rules of the Office of Budget and Management, necessarily incurred in the performance of work as a member.<sup>41</sup>

### **Appeals to the Commission**

A person that had a direct economic interest that was or could have been adversely affected by a decision or order of the Chief of the Division of Soil and Water Resources under the act's provisions governing withdrawal and consumptive use permits could have appealed the decision or order. The appeal was to have been made by filing a notice of appeal with the Water Resources Review Commission not later than 30 days after the decision or order was made. The person also would have had to file a copy of the notice of appeal with the Chief not later than three days after filing the notice of appeal with the Commission. The notice of appeal was to contain a description of the decision or order complained of and the grounds on which the appeal was based. The Commission would have had exclusive original jurisdiction to hear and decide such appeals. The filing of a notice of appeal would not operate as a stay of any decision or order of the Chief.<sup>42</sup>

A permittee, if applicable, and the appellee, the Chief, and other interested persons were to be given written notice of the date, time, and location of a hearing on the appeal at least five days prior to the hearing. The hearing was to be of record. The Commission would have been required to affirm the decision or order of the Chief unless the Commission determined by a preponderance of the evidence that it was arbitrary, capricious, or otherwise inconsistent with law; in that case the Commission could have modified the decision or order or vacated it and remanded it to the Chief for further proceedings that the Commission directed. The Commission would have been required to render a decision not later than 30 days after the hearing.<sup>43</sup>

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<sup>40</sup> R.C. 1522.18(C), (D), and (E).

<sup>41</sup> R.C. 1522.18(F).

<sup>42</sup> R.C. 1522.19(A).

<sup>43</sup> R.C. 1522.19(B) and (C).

The chairperson of the Commission, under conditions that the chairperson prescribed, could have granted temporary relief that the chairperson considered appropriate pending final determination of an appeal if all of the following conditions were met:

(1) All parties to the appeal had been notified and given an opportunity for a hearing on the request for temporary relief.

(2) The person requesting relief showed that there was a substantial likelihood that the person would have prevailed on the merits.

(3) The relief would not have adversely affected public health or safety or caused significant imminent environmental harm to water resources.<sup>44</sup>

### **Appeals to the court of common pleas**

A party that was aggrieved or adversely affected by a decision of the Commission could have appealed to the court of appeals for the county in which the activity addressed by the Commission's decision occurred, was occurring, or would have occurred. The appeal was to be filed not later than 30 days after issuance of the Commission's decision. The court would have been required to confine its review to the record certified by the Commission. The court, upon motion, could have granted temporary relief that it considered appropriate pending final disposition of the appeal if all of the following applied:

(1) All parties to the appeal had been notified and given an opportunity to be heard on the request for temporary relief.

(2) The person requesting relief showed that there was a substantial likelihood that the person would have prevailed on the merits.

(3) The relief would not have adversely affected public health or safety or caused significant imminent environmental harm to water resources.

The court would have been required to affirm the Commission's decision unless the court determined that it was arbitrary, capricious, or otherwise inconsistent with law; in that case the court would have been required to vacate the decision and remand it to the Commission for further proceedings that the court directed.<sup>45</sup>

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<sup>44</sup> R.C. 1522.19(D).

<sup>45</sup> R.C. 1522.19(E).

## Attorney's fees and other appeal provisions

The Commission or a court of appeals could not have awarded attorney's fees to any party to an action under the act. An appeal could not have been taken if the subject of the appeal involved an exception to the prohibition against diversions under the Compact.<sup>46</sup>

## Enforcement

The act would have authorized the Chief to issue an order to a person that the Chief determined had violated, was violating, or was threatening to violate any provisions of the act or the Great Lakes-St. Lawrence River Basin Water Resources Compact, applicable rules, or a withdrawal and consumptive use permit. The order would have had to identify the facility where the violation had occurred, was occurring, or was threatened to occur, the specific violation, and actions that the owner or operator of the facility had to take to comply with the order. The order would have had to establish a reasonable date by which the owner or operator had to comply with it.<sup>47</sup>

An order of the Chief was to be in writing and contain a finding of the facts on which the order is based. Notice of the order was to be given by certified mail to each person whose rights, duties, or privileges were affected. Notice also was to be posted on the web site of the Department of Natural Resources in a manner prescribed by the Chief.<sup>48</sup>

The Attorney General, upon the request of the Chief, could have brought an action for injunction against a person who had violated, was violating, or was threatening to violate any provisions of the act or the Compact, applicable rules, a withdrawal and consumptive use permit, or an order of the Chief issued under the act. The action was to be brought in the court of common pleas of the applicable county. The court would have had jurisdiction to and would have had to grant preliminary and permanent injunctive relief upon a showing that the person against whom the action was brought had committed, was committing, or was threatening to commit such a violation.<sup>49</sup>

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<sup>46</sup> R.C. 1522.19(F) and (G).

<sup>47</sup> R.C. 1522.20(A)(1).

<sup>48</sup> R.C. 1522.20(A)(2).

<sup>49</sup> R.C. 1522.20(B).

## **Continuing diversion permit program and the Compact**

Continuing law prohibits any person from diverting more than 100,000 gallons per day of any waters of the state out of the Lake Erie or Ohio River basin to another basin without a permit to do so from the Director of Natural Resources. The act would have specified that the Director could not approve a permit for such a diversion if the proposed diversion did not qualify as an exception to the prohibition against diversions from the Great Lakes basin that is established in the Compact.<sup>50</sup>

## **Rules related to and enforcement of the Compact; intent statements**

The act would have required the Chief of the Division of Soil and Water Resources to enforce the Great Lakes-St. Lawrence River Basin Water Resources Compact and take appropriate actions to effectuate its purposes and intent. Continuing law requires the Director of Natural Resources to enforce the Compact and take those actions.

The Director also is required under continuing law to adopt rules in accordance with the Administrative Procedure Act for the implementation, administration, and enforcement of the Compact. The act instead would have required the Chief to adopt rules in accordance with that Act for the implementation, administration, and enforcement of the Compact's provisions governing diversions.

Continuing law declares that any appropriate state agency or governmental officer must enforce the Compact and take appropriate actions to effectuate its purposes and intent. The act would have repealed that provision.<sup>51</sup>

Additionally, the act would have repealed a provision in continuing law that precludes the Governor, the Department of Natural Resources, or any other agency of the state from adopting rules or implementing any program regulating the use, withdrawal, consumptive use, or diversion of water pursuant to specified provisions of the Compact unless the General Assembly enacts legislation authorizing the implementation of the program or adoption of rules. It would have precluded the Governor, the Department of Natural Resources, or any other agency of the state from adopting rules related to the Compact unless the General Assembly enacted legislation authorizing the rules.<sup>52</sup>

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<sup>50</sup> R.C. 1501.32.

<sup>51</sup> R.C. 1522.03.

<sup>52</sup> R.C. 1522.05(B).

The act would have repealed certain intent statements in continuing law that govern baselines for withdrawals, consumptive uses, and diversions. First, it would have repealed an intent statement that provides that the Compact must be interpreted to require that a withdrawal or consumptive use will be implemented so as to ensure that the withdrawal or consumptive use will result in no significant individual or cumulative adverse impacts on the quantity or quality of the waters and water dependent natural resources of the Lake Erie basin considered as a whole or the applicable source watershed of Lake Erie considered as a whole. The act also would have repealed a statement that declares that it is the understanding and intent of the General Assembly that impacts of a withdrawal or consumptive use on the quantity or quality of waters and water dependent natural resources of more localized areas that affect less than the Lake Erie basin or an applicable source watershed as a whole are to be considered a part of the evaluation of reasonable use as provided under specified provisions of the Compact.<sup>53</sup>

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## COMMENT

1. The provision of the act in R.C. 1522.17(A) that would have required a two-thirds majority vote of the Senate and House of Representatives to amend the act's voluntary conservation program provisions in any manner that would require a mandatory water conservation program possibly could not have been enforceable with respect to future General Assembly actions. Though the provision purported to require a supermajority in order to alter the act's provisions related to the voluntary water conservation program, the General Assembly could have eliminated the supermajority requirement by a simple majority vote. Thus, it is not clear what the practical effect of the act's supermajority provision would have been. (See also Article II, Section 15 of the Ohio Constitution, which provides that "[t]he general assembly shall enact no law except by bill, and no bill shall be passed without the concurrence of a *majority* of the members elected to each house (emphasis added).")

2. The act used accepted drafting protocols in defining terms for its purposes, stating that the terms *as used in* the act's provisions governing the withdrawal and consumptive use permit program had the meanings assigned to them. Thus, the additional language specifying that the act's definition of "river or stream under the influence of Lake Erie" applied only to that term as it was used in those provisions appears to have been duplicative. Its intent was unclear.

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<sup>53</sup> R.C. 1522.07.

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## HISTORY

ACTION	DATE
Introduced	05-17-11
Reported, H. Agriculture & Natural Resources	06-21-11
Passed House (60-39)	06-22-11
Reported, S. Agriculture, Environment & Natural Resources	06-28-11
Passed Senate (25-8)	06-28-11

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