Ohio Legislative Service Commission

Bill Analysis

Bill Rowland

Sub. H.B. 231*

129th General Assembly
(As Reported by S. Agriculture, Environment, and Natural Resources)

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

BILL SUMMARY

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

Withdrawal and consumptive use permits

- Requires 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.

- Requires an owner or operator of a facility in the Lake Erie watershed, when the facility is operating under intended operating conditions, to obtain a withdrawal or consumptive use permit if the following water withdrawal or consumptive use thresholds are 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;

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* This analysis was prepared before the report of the Senate Agriculture, Environment, and Natural Resources Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

--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.

- Specifies that a withdrawal and consumptive use permit must be issued only for the amount of withdrawal or consumptive use capacity of a facility that exceeds the threshold amounts, not amounts below those threshold amounts.

- Establishes permit application requirements, including a requirement that the applicant submit a description of environmentally sound and economically feasible water conservation methods to be utilized.

- Specifies that a permit is valid until a facility that is the subject of the permit is the subject of facility abandonment.

- Requires a certification of compliance with a permit every five years.

- Specifies that a permit must include terms and conditions restricting the withdrawal and consumptive use by a facility to amounts not exceeding the capacity of the facility.

- Requires the Chief, in making a decision to issue or deny a permit, to apply the decision-making standard established in the Compact.

- Requires the owner or operator of a facility for which a withdrawal and consumptive use permit has been issued to utilize environmentally sound and economically feasible water conservation measures.

- Provides that the owner or operator of a facility may implement those measures in the form of best management practices and that the owner or operator has discretion to determine which practices are best management practices.

- Establishes a series of irrebuttable presumptions that the Chief must utilize when applying the decision-making standard under the Compact.

- Applies the irrebuttable presumptions to withdrawals from all waters in the Lake Erie watershed other than high quality water.

- For purposes of the irrebuttable presumptions, specifies that a withdrawal and consumptive use will 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 results in a consumptive use that does not exceed a specified percentage of the long-term mean annual runoff from the Ohio portion of the Lake Erie watershed.

- Requires the Chief to establish the long-term mean annual runoff and update it every ten years.

- Prohibits the Chief from submitting an application for a withdrawal and consumptive use permit for regional review under the Compact unless regional review is agreed to by the permit applicant.

- Establishes 13 categories of withdrawals and consumptive uses that are exempt from the bill'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.

- Establishes procedures for the sale or transfer of a permit or a facility's withdrawal and consumptive use capacity.

- Requires the Chief to remove a facility from the baseline report when the facility is subject to baseline facility abandonment.

- Provides that the owner or operator of a facility may petition the Chief for: (1) inclusion in the baseline report if the owner or operator believes 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 believes that the information is incorrect.

Preclusion against mandatory water conservation program

- Declares that nothing in the Great Lakes-St. Lawrence River Basin Water Resources Compact or any law implementing the Compact authorizes the Chief or the Director of Natural Resources to adopt rules requiring mandatory conservation of water resources.

- Prohibits 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).

- Precludes 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

- Requires 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.

- Requires 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

- States that for purposes of the bill and the Compact, with respect to the definition of "source watershed" in the Compact, the General Assembly declares that "source watershed" means the Lake Erie watershed.

- Declares that the bill's purpose is 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.

- Declares that nothing in the bill limits 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

- Creates 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 bill.

- Authorizes a person having a direct economic interest that is or may be adversely affected by a decision or order of the Chief to appeal the decision, and establishes appeal procedures.

- Authorizes appeals of decisions of the Commission to be made to the applicable court of common pleas.

- Prohibits the awarding of attorney's fees by the Commission or a court of common pleas regarding appeals made under the bill.

Enforcement

- Establishes 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.

Existing diversion permit program and the Compact

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

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CONTENT AND OPERATION

The intent of the bill is to provide for the implementation of portions of the Great Lakes-St. Lawrence River Basin Water Resources Compact. The bill does 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.[1]

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 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

[1] R.C. 1522.01 – Section 1.2 and Section 4. (Note: R.C. 1522.01 is not in the bill.)

individual or cumulative adverse impacts to the quantity or quality of the waters and water dependent natural resources of the source watershed.[2]

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.[3] 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.[4]

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.[5]

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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[2] R.C. 1522.01 – Section 4.

[3] R.C. 1522.01 – Section 4.10.1.

[4] R.C. 1522.01 – Section 1.2.

[5] R.C. 1522.01 – Section 4.2.

diversions, and consumptive uses from waters of the Basin for purposes of future implementation of the Compact.[6]

THE BILL

Withdrawal and consumptive use permits

The bill requires 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 must be established not later than 180 days after the bill'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 is not otherwise exempt under the bill must obtain a withdrawal and consumptive use permit from the Chief. A facility is any site, installation, or building at which water withdrawal and consumptive use activities take place that is located at a property or on contiguous properties and that is under the direction of either a private or public entity. A facility includes any site, installation, building, or service area of a public water system at or within which water withdrawal and consumptive use activities take place. Consumptive use has the same meaning as in the Compact (see above). For purposes of determining a new or increased capacity for consumptive use, consumptive use is the use based on a coefficient of consumptive use generally accepted in the scientific community that most accurately reflects the process at a facility or the use based on facility specific data, whichever is more accurate.[7]

The bill exempts facilities that are subject to the bill's permitting requirements from existing permitting requirements related to withdrawals and consumptive uses.[8]

Thresholds

A facility is subject to the bill's permit program if it meets any of the following threshold criteria:

(1) The facility, when operating under intended operating conditions, has a new or increased capacity for withdrawals or consumptive uses from Lake Erie or a river or stream under the influence of Lake Erie (see below) of at least 5 million gallons per day averaged over a 90-day period.

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[6] R.C. 1522.01 – Section 4.15.

[7] R.C. 1522.11(A) and 1522.10(E) and (F).

[8] R.C. 1501.33(D).

(2) Except as discussed below, the facility, when operating under intended operating conditions, has 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, has 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 apply:

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

--The river or stream has a drainage area of less than 100 square miles measured at the point where the withdrawal or consumptive use occurs.[9]

For the bill's purposes, capacity is the ability of a facility's pumps, pipes, and other appurtenances to withdraw and consumptively use water. Increased capacity does not include any capacity that results from alterations or changes made at a facility that replace existing capacity without increasing the capacity of the facility. A river or stream is 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 occurs. A river or stream under the influence of Lake Erie is that portion of any river or stream that has 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 is a direct tributary of Lake Erie, and (2) the portion of the river or stream is a recognized navigational channel. The bill specifies that the definition of that term applies only to that term as it is used in the bill's provisions governing the new permitting program (see **COMMENT** 2).

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

[9] R.C. 1522.11(A).

include outstanding state waters that are designated as such due to exceptional recreational values.[10]

Permit and application requirements

Withdrawal and consumptive use permits issued under the bill must be issued only for the amount of withdrawal or consumptive use capacity of a facility that exceeds the threshold amounts established by the bill. A permit must 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 must submit an application to the Chief of the Division of Soil and Water Resources on a form that the Chief prescribes. The applicant must 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 must be credited to the existing Water Management Fund. The bill authorizes money in the Fund to be used to administer the withdrawal and consumptive use permit program established under the bill. Currently, money in that Fund is derived from fees on existing permits for major increases in withdrawals of water of the state and water diversion permits.[11]

(3) A description of all of the following:

--The facility's current withdrawal capacity per day if the withdrawal is 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;

--The estimated average annual and monthly volumes and rates of withdrawal;

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[10] R.C. 1522.10(D), (H), (I), (K), (L), and (M).

[11] R.C. 1501.32, 1501.33, and 1521.04.

--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 may be satisfied if the application is denied or modified.[12]

The Chief cannot require an applicant to submit any other information with an application. A permit is valid until the facility to which the permit applies is the subject of facility abandonment, which is the voluntary and affirmative termination of a facility's withdrawal and consumptive use capacity as listed in a permit issued under the bill. Facility abandonment does not include the nonuse or the transfer of a facility's withdrawal and consumptive use capacity.[13]

Once every five years, the owner or operator of a facility must certify to the Chief that the facility is in compliance with the permit that has been issued for the facility. No person that is required to do so may fail to apply for and receive a withdrawal and consumptive use permit. A permit issued under the bill must include terms and conditions restricting the withdrawal and consumptive use by a facility to amounts not exceeding the facility's capacity.[14]

Application of Compact's decision-making standard

In making the decision to issue or deny a withdrawal and consumptive use permit, the Chief must apply the decision-making standard established in the Great Lakes-St. Lawrence River Basin Water Resources Compact.[15] 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 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

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[12] R.C. 1522.11(B) and (C).

[13] R.C. 1522.10(G) and 1522.11(C) and (D).

[14] R.C. 1522.11(D) to (F).

[15] R.C. 1522.12(A).

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.[16]

The Chief must issue a withdrawal and consumptive use permit for a facility only if the Chief determines that a facility meets all of the criteria established in the decision-making standard.[17]

The bill requires the owner or operator of a facility for which a withdrawal and consumptive use permit has been issued to utilize environmentally sound and economically feasible water conservation measures in compliance with the Compact. The owner or operator may implement those measures in the form of best management practices that are applicable to the facility. The owner or operator has discretion to determine which practices are best management practices. An owner or operator that implements such measures is deemed to be in compliance with applicable provisions of the Compact. Any reporting that is required by the Chief of the Division of Soil and Water Resources for purposes of implementing the bill's provisions governing water conservation measures is proprietary and confidential and not subject to the Public Records Law. The bill declares that those provisions comply with the Compact's requirements that states implement a water conservation program (see "**Preclusion against mandatory water conservation program**," below).[18]

Presumptions concerning application of criteria under decision-making standard

Under the bill, for purposes of applying the criteria established under the decision-making standard, all of the following apply:

(1) If a withdrawal by a facility from Lake Erie or a river or stream under the influence of Lake Erie results in a consumptive use that is less than 1.5% of the long-term mean annual runoff from the Ohio portion of the Lake Erie watershed, it is irrebuttably presumed that the withdrawal and consumptive use will 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 does not apply to high quality water.

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[16] R.C. 1522.01 – Section 4.11.

[17] R.C. 1522.12(C).

[18] R.C. 1522.17(A).

(2) If a withdrawal by a facility from ground water or a river or stream that is not a river or stream under the influence of Lake Erie results in a consumptive use that is less than .75% of the long-term mean annual runoff from the Ohio portion of the Lake Erie watershed, it is irrebuttably presumed that the withdrawal and consumptive use will 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 does not apply to high quality water.

(3) A withdrawal and consumptive use from any river or stream that is a high quality water with a drainage area of less than 100 square miles has or will have no significant individual or cumulative adverse impacts on the Lake Erie watershed unless the withdrawal and consumptive use adversely impacts the high quality water as determined by the Chief in accordance with rules adopted under the bill. The Chief must 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 must establish standards for what constitutes significant individual or cumulative adverse impact to such a high quality water.[19] For purposes of adopting the rules, the Chief must convene an advisory group consisting of interested parties and ensure that at least one member of the advisory group represents The Nature Conservancy.[20]

(4) A withdrawal or consumptive use is reasonable under the Compact's decision-making standard unless a determination is made that the withdrawal or consumptive use is not reasonable by a court of competent jurisdiction in Ohio pursuant to the existing statute governing the determination of the reasonableness of a use of water. The bill declares that this provision does not provide standing to the Department of Natural Resources to bring suit under the reasonable use doctrine.[21]

Within 180 days of the bill's effective date and for purposes of making the calculations required under items (1) and (2) above, the Chief must establish the long-term mean annual runoff from the Ohio portion of the Lake Erie watershed. Beginning ten years after the bill's effective date and every ten years thereafter, the Chief must update the long-term mean annual runoff utilizing the best available published hydrologic data collected over the previous 20 years.

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[19] R.C. 1522.14.

[20] Section 3.

[21] R.C. 1522.12(A) and (D).

Prohibition against regional review

Under the bill, the Chief is not permitted to submit an application for a withdrawal and consumptive use permit for regional review under the Compact to the regional body under the Compact unless regional review is 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.[22]

Exemptions from permitting requirements

Under the bill, the following are exempt from the requirement to obtain a withdrawal and consumptive use permit:

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

(2) A baseline facility that has not increased its withdrawal and consumptive use capacity beyond the capacity listed in the baseline report and beyond the thresholds established by the bill. Under the bill, a baseline facility is a facility identified in the baseline report, a facility added to the baseline report under the bill (see below), or any other facility that has commenced withdrawal and consumptive use activities since the submission of the baseline report and prior to the bill'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).[23]

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

(4) A facility making a withdrawal and consumptive use from nonchannelized surface water that is not a river or stream or from an impoundment of water that is isolated and does not depend entirely on ground water for replenishment such as a farm pond, golf course pond, or other similar retention pond. The exemption does not

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[22] R.C. 1522.12(B) and 1522.01 – Sections 2.2 and 4.5.

[23] R.C. 1522.10(A) and (C).

apply to a facility making a withdrawal and consumptive use for industrial purposes or for public water supply purposes.

(5) A facility that is 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, will result in imminent harm to human health or property;

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

(7) A facility that is 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 is necessary to assist in the management of that crisis;

(8) A major utility facility or a public water system that withdraws 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 is subject to regulation under the Industrial Minerals Mining Law;

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

(11) A facility with ground water or surface water withdrawals or consumptive uses that are subject to regulation under a state or federal law other than under the bill. However, the exemption from regulation under a state law does not apply 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' existing withdrawal program.

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

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

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[24] R.C. 1522.13.

Sale or transfer of a permit or capacity

A permittee may transfer a withdrawal and consumptive use permit upon the sale or transfer of a facility. In addition, the owner of a baseline facility may 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 does not require a withdrawal and consumptive use permit. Notice of a transfer must be provided to the Chief of the Division of Soil and Water Resources in a manner prescribed by the Chief.[25]

If a permittee sells or transfers a portion of a facility for which a withdrawal and consumptive use permit has been issued, the permittee may transfer the applicable portion of the withdrawal and consumptive use capacity authorized by the permit. The permittee must provide notice of the transfer to the Chief in a manner prescribed by the Chief. Upon receipt of the notice and if a permit is required based on the threshold amounts established by the bill, the Chief must issue a new permit to the permittee who transferred the portion of the facility and a new permit to the transferee. Any new permits must reflect the transfer of the portion of the withdrawal and consumptive use capacity.[26]

If the owner of a baseline facility sells a portion of that facility, the owner may transfer the applicable portion of the withdrawal and consumptive use capacity listed in the baseline report for that facility. The owner must provide notice of such a transfer to the Chief in a manner prescribed by the Chief. The Chief must update the baseline report to reflect the transfer rather than requiring the owner of the baseline facility or the transferee to obtain a withdrawal and consumptive use permit.[27]

The bill prohibits anyone from selling or transferring a withdrawal and consumptive use permit for purposes of evading the bill's requirements.[28]

Removal from the baseline report

The Chief must remove a facility from the baseline report when the facility is subject to baseline facility abandonment. However, a baseline facility must not be removed from the baseline report for the nonuse or the transfer of the facility's baseline capacity.[29] Baseline facility abandonment is the voluntary and affirmative termination

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[25] R.C. 1522.15(A)(1).

[26] R.C. 1522.15(A)(2).

[27] R.C. 1522.15(A)(3).

[28] R.C. 1522.15(A)(4).

[29] R.C. 1522.15(B).

of a baseline facility's withdrawal and consumptive use capacity as listed in the baseline report. It does not include the nonuse or the transfer of a baseline facility's withdrawal and consumptive use capacity.[30]

Petition for inclusion in the baseline report

As stated above, a baseline facility is exempt from the requirement to obtain a withdrawal and consumptive use permit under the bill. The bill provides that the owner or operator of a facility may petition the Chief for: (1) inclusion in the baseline report if the owner or operator believes 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 believes that the information is incorrect. The Chief must issue an order either approving or disapproving a petition and must base the order on a thorough examination of the circumstances concerning the petition. An order of the Chief may be appealed under the bill. Finally, the Chief must adopt rules in accordance with the Administrative Procedure Act establishing procedures for the submission of the petitions.[31]

Preclusion against mandatory water conservation program

The bill declares that nothing in the Great Lakes-St. Lawrence River Basin Water Resources Compact or in any provisions of law implementing the Compact authorizes 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.[32] Thus, because the bill precludes only a mandatory program, the Chief has the authority to implement a voluntary water conservation program. The bill also declares that the General Assembly cannot enact any law that would 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 bill then declares that the bill's water conservation provisions comply with the requirements of the Compact requiring states to implement a water conservation program.[33]

The bill precludes the Governor, the Department of Natural Resources, or any other state agency from adopting rules establishing a mandatory water conservation

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[30] R.C. 1522.10(B).

[31] R.C. 1522.16.

[32] R.C. 1522.01 – Section 4.2.2.

[33] R.C. 1522.17(B).

program without authorization from the General Assembly. Current law instead precludes the Governor, the Department of Natural Resources, or any other agency of the state 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 current law, the Governor, the Department of Natural Resources, or any other agency of the state may adopt rules concerning and may implement voluntary water conservation and efficiency programs without authorization from the General Assembly.[34]

Assessment of cumulative impacts

Under the bill, every five years, the Chief of the Division of Soil and Water Resources must 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 must be based on information relating directly to withdrawals and consumptive uses by facilities that have received a withdrawal and consumptive use permit. The Chief must 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 bill declares that the above provisions comply with the requirements of the Compact as they relate to the assessment of significant cumulative adverse impacts.[35]

Declarations

The bill states that for purposes of the bill and the Compact, with respect to the definition of "source watershed" in the Compact, the General Assembly declares that "source watershed" means the Lake Erie watershed.[36]

In addition, the bill states that the General Assembly declares that the bill's purpose is 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.[37]

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[34] R.C. 1522.05(B).

[35] R.C. 1522.17(C).

[36] R.C. 1522.101(A).

[37] Section 4.

The bill also declares that nothing in the bill limits 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.[38]

Water Resources Review Commission

The bill creates the Water Resources Review Commission for purposes of hearing appeals of decisions of the Chief made under the bill. The Commission consists of five members appointed by the Governor with the advice and consent of the Senate. The bill establishes standard appointment procedures. Commission members serve staggered five-year terms. Two of the appointees must be experts in economic development, two must be experts in water resource management, and one must be a member of the public who is an attorney who is admitted to practice in Ohio and is familiar with the laws related to water resources. Not more than three members can be members of the same political party.[39]

Three members of the Commission constitute a quorum, and no action of the Commission is valid unless it has the concurrence of at least a majority of the members. The Commission must keep a record of its proceedings. Annually one member must be elected as chairperson and another member must be elected as vice-chairperson. The Commission must adopt rules in accordance with the Administrative Procedure Act governing the procedure for appeals conducted under the bill and may adopt rules governing its own internal management that do not affect private rights. The Governor may remove 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 will publicly hear the member in defense of the charges. If the member is removed from office, the Governor must file in the office of the Secretary of State a complete statement of the charges made against the member and a complete report of the proceedings. The action of the Governor removing a member from office is final.[40]

A member is 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 must be reimbursed for all traveling, hotel, and other expenses, in accordance with the current travel rules of the Office of

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[38] R.C. 1522.101(B).

[39] R.C. 1522.18(A) and (B).

[40] R.C. 1522.18(C), (D), and (E).

Budget and Management, necessarily incurred in the performance of work as a member.[41]

Appeals to the Commission

A person having a direct economic interest that is or may be adversely affected by a decision or order of the Chief of the Division of Soil and Water Resources under the bill's provisions governing withdrawal and consumptive use permits may appeal the decision or order. The appeal must be made by filing a notice of appeal with the Water Resources Review Commission not later than 30 days after the decision or order is made. The person also must 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 must contain a description of the decision or order complained of and the grounds on which the appeal is based. The Commission has exclusive original jurisdiction to hear and decide such appeals. The filing of a notice of appeal does not operate as a stay of any decision or order of the Chief.[42]

A permittee, if applicable, and the appellee, the Chief, and other interested persons must 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 must be of record. The Commission must affirm the decision or order of the Chief unless the Commission determines by a preponderance of the evidence that it is arbitrary, capricious, or otherwise inconsistent with law; in that case the Commission may modify the decision or order or vacate it and remand it to the Chief for further proceedings that the Commission may direct. The Commission must render a decision not later than 30 days after the hearing.[43]

The chairperson of the Commission, under conditions that the chairperson prescribes, may grant temporary relief that the chairperson considers appropriate pending final determination of an appeal if all of the following conditions are met:

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

(2) The person requesting relief shows that there is a substantial likelihood that the person will prevail on the merits.

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[41] R.C. 1522.18(F).

[42] R.C. 1522.19(A).

[43] R.C. 1522.19(B) and (C).

(3) The relief will not adversely affect public health or safety or cause significant imminent environmental harm to water resources.[44]

Appeals to the court of common pleas

A party that is aggrieved or adversely affected by a decision of the Commission may appeal to the court of appeals for the county in which the activity addressed by the Commission's decision occurred, is occurring, or will occur. The appeal must be filed not later than 30 days after issuance of the Commission's decision. The court must confine its review to the record certified by the Commission. The court, upon motion, may grant temporary relief that it considers appropriate pending final disposition of the appeal if all of the following apply:

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

(2) The person requesting relief shows that there is a substantial likelihood that the person will prevail on the merits.

(3) The relief will not adversely affect public health or safety or cause significant imminent environmental harm to water resources.

The court must affirm the Commission's decision unless the court determines that it is arbitrary, capricious, or otherwise inconsistent with law; in that case the court must vacate the decision and remand it to the Commission for further proceedings that the court may direct.[45]

Attorney's fees and other appeal provisions

The Commission or a court of appeals cannot award attorney's fees to any party to an action under the bill. An appeal may not be taken if the subject of the appeal involves an exception to the prohibition against diversions under the Compact.[46]

Enforcement

The Chief may issue an order to a person that the Chief determines has violated, is violating, or is threatening to violate any provisions of the bill or the Great Lakes-St. Lawrence River Basin Water Resources Compact, applicable rules, or a withdrawal and

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[44] R.C. 1522.19(D).

[45] R.C. 1522.19(E).

[46] R.C. 1522.19(F) and (G).

consumptive use permit. The order must identify the facility where the violation has occurred, is occurring, or is threatened to occur, the specific violation, and actions that the owner or operator of the facility must take to comply with the order. The order must establish a reasonable date by which the owner or operator must comply with it.[47]

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

The Attorney General, upon the request of the Chief, may bring an action for injunction against a person who has violated, is violating, or is threatening to violate any provisions of the bill or the Compact, applicable rules, a withdrawal and consumptive use permit, or an order of the Chief issued under the bill. The action must be brought in the court of common pleas of the county in which the violation has occurred, is occurring, or is threatened to occur. The court has jurisdiction to and must grant preliminary and permanent injunctive relief upon a showing that the person against whom the action is brought has committed, is committing, or is threatening to commit such a violation.[49]

Existing diversion permit program and the Compact

Current 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 bill specifies that the Director must not approve a permit for such a diversion if the proposed diversion does not qualify as an exception to the prohibition against diversions from the Great Lakes basin that is established in the Compact.[50]

Rules related to and enforcement of the Compact; intent statements

The bill requires 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. Current law requires the Director of Natural Resources to enforce the Compact and take those actions.

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[47] R.C. 1522.20(A)(1).

[48] R.C. 1522.20(A)(2).

[49] R.C. 1522.20(B).

[50] R.C. 1501.32.

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

Finally, current 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 bill repeals that provision.[51]

Additionally, the bill repeals a provision in current 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 then precludes 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 enacts legislation authorizing the rules.[52]

The bill repeals certain intent statements in existing law that govern baselines for withdrawals, consumptive uses, and diversions. First, it repeals 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 bill also repeals 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.[53]

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[51] R.C. 1522.03.

[52] R.C. 1522.05(B).

[53] R.C. 1522.07.

COMMENT

1. The provision of the bill in R.C. 1522.17(A) that requires a two-thirds majority vote of the Senate and House of Representatives to amend the bill's voluntary conservation program provisions in any manner that would require a mandatory water conservation program may not be enforceable with respect to future General Assembly actions. Though the provision purports to require a supermajority in order to alter the bill's provisions related to the voluntary water conservation program, the General Assembly may eliminate the supermajority requirement by a simple majority vote. Thus, it is not clear what the practical effect of the bill's supermajority provision would be. (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 bill uses accepted drafting protocols in defining terms for its purposes, stating that the terms *as used in* the bill's provisions governing the withdrawal and consumptive use permit program have the meanings assigned to them. Thus, the additional language specifying that the bill's definition of "river or stream under the influence of Lake Erie" applies only to that term as it is used in those provisions appears to be duplicative. Its intent is unclear.

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	---

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