



# Ohio Legislative Service Commission

## Bill Analysis

Bill Rowland

### H.B. 231

129th General Assembly  
(As Introduced)

Rep. Wachtmann

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## 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 and a voluntary water conservation 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 to obtain a withdrawal and consumptive use permit if the following water withdrawal and 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 and 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 and 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 and 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 and consumptive use capacity of a facility that exceeds the threshold amounts, not amounts below those threshold amounts.
- Establishes permit application requirements.
- 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.
- Establishes a series of irrebuttable presumptions that the Chief must utilize when applying the decision-making standard under the Compact.
- 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 11 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 and certain major utility facilities and public water systems, and withdrawals and consumptive uses made to comply with federal, state, or local 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.

### **Voluntary water conservation program**

- Requires the Chief of the Division of Soil and Water Resources to establish a voluntary water conservation program that is applicable to all facilities that are the subjects of withdrawal and consumptive use permits.
- Requires an owner or operator that chooses to participate in the voluntary water conservation program to develop best management water conservation practices that are economically feasible and applicable to the facility.
- Declares that nothing in the Great Lakes-St. Lawrence River Basin Water Resources Compact or any law implementing the Compact authorizes the Chief to adopt rules requiring mandatory conservation of water resources.
- Specifies that the General Assembly cannot amend the bill's provisions regarding the voluntary conservation program in a manner that would make it mandatory without a two-thirds vote of the General Assembly (see **COMMENT**).
- 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 and further declares as nonbinding the preference in that definition for the source watershed to be the direct tributary stream watershed from which water is withdrawn.

- 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's provisions and the Compact.
- 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.

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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, establishing a voluntary water conservation program, 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 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>

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<sup>1</sup> R.C. 1522.01 – Section 1.2 and Section 4.

<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.

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

## **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 consumptive use does not include water purchased from a public water supplier and, for purposes of determining a new or increased capacity for 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.<sup>7</sup>

The bill exempts facilities that are subject to the bill's permitting requirements from existing permitting requirements related to withdrawals and consumptive uses.<sup>8</sup>

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

<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).

## Thresholds

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

(1) The facility has a new or increased capacity for withdrawals and 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.

(2) Except as discussed below, the facility has a new or increased capacity for withdrawals and 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 has a new or increased capacity for withdrawals and 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.<sup>9</sup>

For the bill's purposes, capacity is the ability of a facility's pumps, pipes, and other appurtenances to withdraw and consumptively use water when operated under intended normal operating conditions. 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 any river or stream in the Lake Erie watershed identified in the Gazetteer of Ohio streams on the bill's effective date. A river or stream under the influence of Lake Erie is that portion of a river or stream that has a bottom elevation at or below the highest monthly long-term level of Lake Erie, as designated by the United States Army Corp of Engineers, of 571.9 feet above sea level 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. A river or stream under the influence of Lake Erie also includes that portion of any river or stream that is a tributary of Lake Erie that has a stream bottom elevation at or below 571.9 feet above sea level. 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

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

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 include outstanding state waters that are designated as such due to exceptional recreational values.<sup>10</sup>

### **Permit and application requirements**

Withdrawal and consumptive use permits issued under the bill must be issued only for the amount of withdrawal and 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.<sup>11</sup>

(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;

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

<sup>11</sup> R.C. 1501.32 (not in the bill), 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; and

--Other ways the applicant's need for water may be satisfied if the application is denied or modified.<sup>12</sup>

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.<sup>13</sup>

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.<sup>14</sup>

### **Decision to issue or deny a withdrawal and consumptive use permit**

In making the decision to issue or deny a withdrawal and consumptive use permit, the Chief of the Division of Soil and Water Resources must apply the decision-making standard established in the Great Lakes-St. Lawrence River Basin Water Resources Compact. That decision-making standard establishes certain criteria to be applied when deciding to approve or disapprove a new or increased withdrawal or consumptive use.<sup>15</sup> 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

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

<sup>13</sup> R.C. 1522.01(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).

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>

#### **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 facility's withdrawal and consumptive use from Lake Erie or a river or stream under the influence of Lake Erie will not lower the water level in Lake Erie by one inch over a five-year period from the long-term mean Lake Erie water level of 571.9 feet above sea level, 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.

(2) If a facility's withdrawal and consumptive use from ground water or from a river or stream that is not a river or stream under the influence of Lake Erie will not lower the water level in Lake Erie by one-half inch over a five-year period from the long-term mean Lake Erie water level of 571.9 feet above sea level, 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.

(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 that establish standards for what constitutes significant individual or cumulative adverse impact to a high quality water with a drainage area of less than 100 square miles.<sup>17</sup> For purposes of adopting the rules, the Chief must convene an advisory group consisting of interested

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

<sup>17</sup> R.C. 1522.14.

parties and ensure that at least one member of the advisory group represents The Nature Conservancy.<sup>18</sup>

(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.<sup>19</sup>

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 under the decision-making standard.<sup>20</sup>

### **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 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.<sup>21</sup>

### **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

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<sup>18</sup> Section 3.

<sup>19</sup> R.C. 1522.12(A) and (D).

<sup>20</sup> R.C. 1522.12(C).

<sup>21</sup> R.C. 1522.12(B) and 1522.01 – Section 1 and 2.

other facility that has commenced withdrawal and consumptive use activities since the submission of the baseline report and prior to the bill's effective. The baseline report is a list of the withdrawal and consumptive use capacities of facilities that was developed for purposes of the Great Lakes-St. Lawrence River Basin Water Resources 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>22</sup>

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

(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 no longer than 36 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 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 undergoes a ground water review under the Industrial Minerals Mining Law;

(10) A facility with ground water or surface water withdrawals or consumptive uses that are otherwise subject to regulation under a state or federal law other than under the bill and other than a permit issued under the Water Pollution Control Law and rules adopted under it; and

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<sup>22</sup> R.C. 1522.10(A) and (C).

(11) 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.<sup>23</sup>

### **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 given to the Chief of the Division of Soil and Water Resources in a manner prescribed by the Chief.<sup>24</sup>

If a permittee sells 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.<sup>25</sup>

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.<sup>26</sup>

### **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

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<sup>23</sup> R.C. 1522.13.

<sup>24</sup> R.C. 1522.15(A)(1).

<sup>25</sup> R.C. 1522.15(A)(2).

<sup>26</sup> R.C. 1522.15(A)(3).

capacity.<sup>27</sup> Baseline facility abandonment is the voluntary and affirmative termination 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.<sup>28</sup>

### **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 establish procedures for the submission of the petitions.<sup>29</sup>

### **Voluntary water conservation program**

Under the bill, the Chief of the Division of Soil and Water Resources must establish a voluntary water conservation program that is applicable to all facilities that are the subjects of withdrawal and consumptive use permits. The owner or operator of a facility may participate in the program. If the owner or operator chooses to participate, the owner or operator must develop best management water conservation practices that are economically feasible and applicable to the facility. The owner or operator has discretion to determine which practices are best management practices for that purpose. Any reporting that is required under the program is proprietary and confidential and not subject to Ohio's Public Record Law. 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 bill also declares that the General Assembly cannot amend the bill's voluntary conservation program provisions in any manner 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**). The bill then declares that the bill's

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<sup>27</sup> R.C. 1522.15(B).

<sup>28</sup> R.C. 1522.10(B).

<sup>29</sup> R.C. 1522.16.

voluntary conservation program provisions comply with the requirements of the Compact requiring states to implement a water conservation program.<sup>30</sup>

The bill 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. 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.<sup>31</sup>

### **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.<sup>32</sup>

### **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. Further, the General Assembly declares as nonbinding the preference in that definition for the source watershed to be the direct tributary stream watershed from which water is withdrawn.<sup>33</sup>

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<sup>30</sup> R.C. 1522.17(A).

<sup>31</sup> R.C. 1522.05(B).

<sup>32</sup> R.C. 1522.17(B).

<sup>33</sup> R.C. 1522.101(A).

The bill states that the General Assembly hereby 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.<sup>34</sup>

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.<sup>35</sup>

## **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's provisions and the Great Lakes-St. Lawrence River Basin Water Resources Compact. 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.<sup>36</sup>

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 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

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<sup>34</sup> Section 4.

<sup>35</sup> R.C. 1522.101(B).

<sup>36</sup> R.C. 1522.18(A) and (B).

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.<sup>37</sup>

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 Budget and Management, necessarily incurred in the performance of work as a member.<sup>38</sup>

### **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 or the Compact 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.<sup>39</sup>

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.<sup>40</sup>

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:

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<sup>37</sup> R.C. 1522.18(C), (D), and (E).

<sup>38</sup> R.C. 1522.18(F).

<sup>39</sup> R.C. 1522.19(A).

<sup>40</sup> R.C. 1522.19(B) and (C).

(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.

(3) The relief will not adversely affect public health or safety or cause significant imminent environmental harm to water resources.<sup>41</sup>

### **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.<sup>42</sup>

### **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.<sup>43</sup>

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<sup>41</sup> R.C. 1522.19(D).

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

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

## Enforcement

The Chief of the Division of Soil and Water Resources 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 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.<sup>44</sup>

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.<sup>45</sup>

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.<sup>46</sup>

## 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.

The Director also is required under current law to adopt rules for the implementation of the Compact. Further, current law declares that any appropriate

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<sup>44</sup> R.C. 1522.20(A)(1).

<sup>45</sup> R.C. 1522.20(A)(2).

<sup>46</sup> R.C. 1522.20(B).

state agency or governmental officer must enforce the Compact and take appropriate actions to effectuate its purposes and intent. The bill repeals those provisions.<sup>47</sup>

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.<sup>48</sup>

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.<sup>49</sup>

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## COMMENT

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

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<sup>47</sup> R.C. 1522.03.

<sup>48</sup> R.C. 1522.05(B).

<sup>49</sup> R.C. 1522.07.

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).")

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## HISTORY

ACTION	DATE
Introduced	05-17-11

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