



# Ohio Legislative Service Commission

## Bill Analysis

Bill Rowland

### **Am. H.B. 473\***

129th General Assembly

(As Reported by S. Agriculture, Environment & Natural Resources)

**Reps.** Wachtmann, Boose, Brenner, Buchy, Damschroder, Hall, Huffman, Johnson, Lynch, McClain, Sears, Stebelton, Thompson

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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 diversion permit program in the Lake Erie watershed.

### **Withdrawal and consumptive use permits**

- 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 withdrawals and consumptive uses of water from the Lake Erie watershed.
- Requires an owner or operator of a facility in the Lake Erie watershed that is not otherwise exempt under the bill to obtain a withdrawal or consumptive use permit if the facility meets any of the following threshold criteria:

--The facility has a new or increased capacity for withdrawals or consumptive uses from Lake Erie or a recognized navigation channel of at least 2,500,000 gallons per day;

--The facility has a new or increased capacity for withdrawals or consumptive uses from any river or stream or from ground water in the Lake Erie watershed of at least 1 million gallons per day; or

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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.

--The facility has a new or increased capacity for withdrawals or consumptive uses from any river or stream in the Lake Erie watershed that is a high quality water of at least 100,000 gallons per day.

- Specifies that the threshold applicable to high quality water does not apply to withdrawals and consumptive uses from outstanding state waters that are designated as such by the Environmental Protection Agency due to their exceptional recreational values.
- Specifies that if a river or stream or segment thereof is designated as a high quality water as of the bill's effective date, the high quality water threshold applies to the river or stream or segment thereof and the entire watershed upstream of that river, stream, or segment.
- Specifies that if a river or stream or segment thereof is designated as a high quality water after the bill's effective date, the high quality water threshold applies only if the Director of Environmental Protection and the Director of Natural Resources, or their designees, jointly determine that the proposed withdrawal or consumptive use would cause the high quality water to lose that designation.
- Specifies that if the Directors determine that the proposed withdrawal or consumptive use would not cause the high quality water to lose that designation, the 1 million gallon per-day threshold applies to the withdrawal and consumptive use under specified circumstances.
- Specifies that the owner or operator of a non-exempt facility that is subject to a non-high quality water threshold may commence installation of the withdrawing facility or equipment after submitting an application for a permit, but prior to issuance of the permit.
- Prohibits the owner or operator of a facility subject to the high quality water threshold from installing or operating the withdrawing facility or equipment until permit issuance.
- 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 meets or 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 to issue a withdrawal and consumptive use permit for a facility only if the Chief determines that the facility meets all of the criteria established in the Compact's decision-making standard.
- Requires the Chief, in applying the decision-making standard, 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 Great Lakes basin considered as a whole or of the Lake Erie watershed considered as a whole.
- Requires the Chief to consider certain factors when applying the portion of the Compact's decision-making standard that requires no significant and cumulative adverse impact to the waters of the Lake Erie watershed.
- 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.
- Requires an owner or operator of a facility who is applying for a withdrawal and consumptive use permit to submit a facility water conservation plan that incorporates environmentally sound and economically feasible water conservation measures in accordance with the Compact.
- Requires the Chief to keep confidential portions of the plan that are trade secrets, and establishes procedures for requesting confidentiality.
- Establishes 13 categories of withdrawals and consumptive uses that are exempt from the bill's permitting requirements, including:
  - Withdrawals and consumptive uses below threshold amounts;
  - Withdrawals and consumptive uses above threshold amounts if the maximum daily withdrawal is less than the threshold when averaged over a 90-day period

or a 45-day period for certain high quality waters, provided that with respect to certain high quality waters with a limited drainage area, the exemption does not apply;

--Withdrawals and consumptive uses from a baseline facility, which is a facility that was in the baseline report created on December 8, 2009 or added to the report not later than 180 days after the bill's effective date;

--Withdrawals and consumptive uses for emergency or humanitarian situations;

--Withdrawals and consumptive uses from certain utilities and public water systems;

--Withdrawals and consumptive uses regulated under the Industrial Minerals Mining Law; and

--Other specified withdrawals and consumptive uses.

- Establishes requirements governing baseline facility abandonment and facility abandonment, and defines both terms.
- Authorizes the sale or transfer of a withdrawal and consumptive use permit for a facility or the baseline withdrawal and consumptive use capacity of a baseline facility so long as the location of the facility, the source of water, and the withdrawal and consumptive use capacities do not change.
- Declares that transferred capacity of a baseline facility does not require a withdrawal and consumptive use permit.
- Establishes procedures for the sale of a portion of a facility for which a withdrawal and consumptive use permit has been issued and for a portion of a baseline facility.
- Requires the Chief to deny a transfer if the Chief determines that the transfer will result in noncompliance with the Compact, the bill, rules adopted under it, or the terms and conditions of a withdrawal and consumptive use permit.
- Establishes procedures for a person to petition the Chief for inclusion in the baseline report and the amendment of the amount of a withdrawal and consumptive use or other information included in the baseline report.
- Authorizes the Chief to issue an experimental use permit in lieu of a withdrawal and consumptive use permit as determined appropriate by the Chief.

- States that the purpose of experimental use permits is to encourage the development of innovative water use practices and technologies that ensure sustainable water use for industrial, commercial, residential, agricultural, or public purposes, including recreational and cultural resources, as a means to facilitate sustainable economic growth and job creation.
- Establishes the parameters under which an experimental use permit may be issued.

### **Diversions permits**

- Requires the issuance of a diversion permit with respect to any diversion of water out of the Lake Erie watershed to another watershed, and authorizes the Chief to issue a diversion permit only if the diversion qualifies as one of the exceptions to the prohibition against diversions in the Compact.

### **Enforcement**

- Authorizes the Chief to investigate or make inquiries into any alleged failure to comply with the bill and to issue orders concerning violations.
- Establishes procedures for suspension or revocation of permits, entrance on lands to mitigate conditions caused by a violation, the issuance of injunctions, and hearings and appeals regarding orders of the Chief.
- Specifies that a person who commits a violation is liable to the Chief for any costs incurred by the Division of Soil and Water Resources in investigating, mitigating, minimizing, removing, or abating the violation and conditions caused by it.

### **Advisory group**

- Establishes an advisory group to make legislative recommendations for the application of the Compact's provisions related to the decision-making standard.

### **Existing diversion permit program**

- Applies Ohio's existing diversion permit program only to diversions from the Ohio River watershed.

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## **TABLE OF CONTENTS**

<b>BACKGROUND</b> .....	6
Great Lakes-St. Lawrence River Basin Water Resources Compact .....	6
Withdrawals and consumptive uses under the Compact .....	7
Water conservation and efficiency programs and other provisions .....	8

<b>THE BILL</b> .....	8
Withdrawal and consumptive use permits .....	8
Thresholds .....	9
Applicability of high quality water threshold .....	9
When facility or equipment installation may take place .....	10
Permit and application requirements .....	11
Application of Compact's decision-making standard.....	13
Water conservation plans.....	14
Confidentiality of water conservation plans.....	14
Exemptions from permitting requirements .....	15
Baseline facility and facility abandonment .....	17
Sale or transfer of a permit or capacity.....	18
Petition for inclusion in the baseline report .....	19
Experimental use permits .....	20
Diversion permits .....	21
Enforcement .....	22
Investigations .....	22
Orders of Chief.....	22
Permit suspension or revocation .....	22
Injunctions.....	23
Liability for costs.....	23
Hearings .....	24
Advisory group.....	25
Membership; other requirements.....	26
Legislative recommendations .....	27
Severability clause .....	27
Existing diversion permit program .....	27
Rules related to and enforcement of the Compact; intent statements.....	28

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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 and diversions 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. References to "Compact" in this analysis are to the Great Lakes-St. Lawrence River Basin Water Resources Compact.

### **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.

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

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

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

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

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

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

The Compact provides for public notice and participation in many matters. It also requires the parties to the Compact, together with the provinces of Ontario and Quebec, to conduct a periodic assessment of the cumulative impacts of withdrawals, 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.<sup>7</sup>

A facility is any site, installation, or building at which water withdrawal and consumptive use activities take place or are proposed to 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

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

<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. 1522.12(A).



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. Under the bill, water means ground or surface water contained within the basin of the Lake Erie source watershed.<sup>8</sup> The bill declares that for purposes of the bill, a reference to source watershed or the Lake Erie source watershed means the Lake Erie watershed considered as a whole.<sup>9</sup> (See **COMMENT 1**.)

The bill exempts facilities that are subject to the bill's permitting requirements from existing permitting requirements related to withdrawals and consumptive uses.<sup>10</sup>

### **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 or consumptive uses from Lake Erie or a recognized navigational channel (see below) of at least 2.5 million gallons per day.

(2) Except as discussed below, the facility has a new or increased capacity for withdrawals or consumptive uses from any river or stream or from ground water in the Lake Erie watershed of at least 1 million gallons per day.

(3) The facility has a new or increased capacity for withdrawals or consumptive uses from any river or stream in the Lake Erie watershed that is a high quality water of at least 100,000 gallons per day. The high quality water threshold does not apply to withdrawals and consumptive uses from outstanding state waters that are designated as such by the Environmental Protection Agency due to their exceptional recreational values.<sup>11</sup>

### **Applicability of high quality water threshold**

Under the bill, if a river or stream or segment thereof is designated as a high quality water as of the bill's effective date, the high quality water threshold applies to

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<sup>8</sup> R.C. 1522.01(F), (H), and (O).

<sup>9</sup> R.C. 1522.101.

<sup>10</sup> R.C. 1501.33(D).

<sup>11</sup> R.C. 1522.12(A).

the river or stream or segment thereof and the entire watershed upstream of that river, stream, or segment. However, if a river or stream or segment thereof is designated as a high quality water after the effective date of the bill, different requirements apply.

For high quality water designated after the bill's effective date, the high quality water threshold applies to the river or stream or segment thereof and the entire watershed upstream of that river, stream, or segment only if the Director of Environmental Protection and the Director of Natural Resources, or their designees, jointly determine that the proposed withdrawal or consumptive use would cause the high quality water to lose its designation as a high quality water. If the Directors determine that the proposed withdrawal or consumptive use would not cause the high quality water to lose that designation, the threshold established in item (2), above (1 million gallons per day) applies to the withdrawal or consumptive use. That use applies at a point beginning 1,000 feet upstream of the upstream end of the designated high quality water segment or at a point beginning two times the length of the river or stream segment that has been designated as a high quality water, whichever is greater.<sup>12</sup>

#### **When facility or equipment installation may take place**

The owner or operator of a facility that is not otherwise exempt under the bill and that is subject to a threshold related to water other than high quality water, after submitting an application for a permit and a determination by the Chief that the application is complete, may commence installation of the facility or equipment that will result in a new or increased withdrawal or consumptive use of water in the Lake Erie watershed prior to issuance of the withdrawal and consumptive use permit. However, the owner or operator of a facility that is subject to the high quality water threshold cannot install or operate the facility or equipment that will result in a new or increased withdrawal or consumptive use of water in the Lake Erie watershed without first obtaining a withdrawal and consumptive use permit.<sup>13</sup>

For the bill's purposes, capacity is the ability of a facility's pumps, pipes, and other appurtenances to withdraw water presented in terms of withdrawal capacity, treatment capacity, distribution capacity, or other capacity-limiting factors. 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 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 recognized navigation channel is that portion of a river or stream extending from bank

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<sup>12</sup> R.C. 1522.12(A)(3)(b).

<sup>13</sup> R.C. 1522.12(A)(3)(b).

to bank that is a direct tributary of Lake Erie and that, as of the bill's effective date, is a state or federally maintained navigation channel. High quality water is a river or stream segment that has been designated in rules adopted by the Environmental Protection Agency as an exceptional warm water habitat, cold water habitat, outstanding state water, or superior high-quality water.<sup>14</sup>

### **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 meets or exceeds the threshold amounts established by the bill. A permit is not 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, address, and telephone number of the applicant and of a contact person for the applicant;

(2) The names, addresses, and other necessary contact information of any other owners and operators of the facility;

(3) 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>15</sup>

(4) 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;

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<sup>14</sup> R.C. 1522.10(D), (J), (K), (M), and (N).

<sup>15</sup> R.C. 1501.32, 1501.33, and 1521.04.

- 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;
- 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;
- Other ways the applicant's need for water may be satisfied if the application is denied or modified; and
- Any other information the Chief may require to adequately consider the application.<sup>16</sup>

Provided that a facility meets all applicable permit conditions, a permit is valid until the facility to which the permit applies is the subject of facility abandonment (see "**Facility and baseline facility abandonment**," below).<sup>17</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>18</sup>

The Chief must issue or deny a permit not later than 90 days after receipt of a complete application. If applicable, the Chief must comply with the requirements regarding prior notice established in the Compact, which are applicable to proposals for withdrawals of 5 million gallons per day or greater. The Chief must issue or deny a permit through issuance of an order. The Chief must issue a permit if all applicable criteria for receiving the permit are met.<sup>19</sup>

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<sup>16</sup> R.C. 1522.12(B) and (C).

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

<sup>18</sup> R.C. 1522.12(D) to (F).

<sup>19</sup> R.C. 1522.12(G).

## Application of Compact's decision-making standard

Under the bill, the Chief must issue a withdrawal and consumptive use permit for a facility if the Chief determines that the facility meets the Compact decision-making standard. One part of the decision-making standard requires a withdrawal and consumptive use to be implemented so as to ensure that the proposal will result in 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. Under the bill, the Chief, in applying this provision, must 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 Great Lakes basin considered as a whole or of the Lake Erie source watershed considered as a whole (see **COMMENT** 1). As part of the evaluation of a permit application under that provision, the Chief must do all of the following:

- (1) Rely on the best generally accepted scientific methods appropriate for Ohio derived from professionally accepted resources and practices;
- (2) Consider the long-term mean annual inflow and outflow of the Lake Erie source watershed; and
- (3) Consider the withdrawal and the portion of the withdrawal that is not returned to the Lake Erie source watershed.<sup>20</sup>

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 Great Lakes basin considered as a whole or the Lake Erie source watershed considered as a whole must be considered as a part of the evaluation of whether a proposed withdrawal or consumptive use is reasonable as provided under applicable provisions of the Compact. The Chief must not submit an application for a withdrawal and consumptive use permit for regional review under the Compact to the regional body unless regional review is agreed to by the applicant. The regional body is comprised of the members of the Great Lakes-St. Lawrence River Basin Water Resources Council, which consists of each state's governor or an alternate, and the Premiers of Ontario and Quebec or their designees. Regional review generally consists of the review of a proposed withdrawal and consumptive use by the regional body.<sup>21</sup>

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<sup>20</sup> R.C. 1522.13(A) and (B) and 1522.01 – Section 4.11.

<sup>21</sup> R.C. 1522.13(C) and (D) and 1522.01 – Section 4.5.

The bill declares that nothing in the provisions enacted by it must be construed to affect, limit, diminish, or impair any rights validly established and existing under the laws of Ohio as of December 8, 2008, or to limit 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>22</sup>

### **Water conservation plans**

The owner or operator of a facility who is applying for a withdrawal and consumptive use permit must submit to the Chief a facility water conservation plan that incorporates environmentally sound and economically feasible water conservation measures in accordance with the Compact. If the plan reasonably incorporates such measures applicable to the facility, it is deemed to be in compliance with applicable provisions of the Compact (Section 4.11.3).<sup>23</sup>

### **Confidentiality of water conservation plans**

The Chief must keep confidential any portions of a facility water conservation plan that constitute a trade secret as defined in the Uniform Trade Secrets Law as follows:

(1) During the period of time after confidentiality is requested under the bill (see below) and until the Chief makes a determination to approve or disapprove the request;

(2) On and after the date on which the Chief approves a request for confidentiality.

Any portions of a facility water conservation plan that are kept confidential are not subject to the Public Records Law.<sup>24</sup>

The owner or operator of a facility may request that any portions of a facility water conservation plan be kept confidential. The request for confidentiality must be submitted at the same time that an owner or operator submits the plan. The owner or operator must clearly indicate the information that the owner or operator considers a trade secret and must label it as "trade secret." Failure to make such a request constitutes a waiver of the right to prevent public disclosure of the information. A request for confidentiality must be accompanied by documents that support the request. The documents must describe the measures that the requestor has taken to

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<sup>22</sup> R.C. 1522.13(E).

<sup>23</sup> R.C. 1522.17(A).

<sup>24</sup> R.C. 1522.17(B).

safeguard the confidentiality of the information and indicate whether or not others are bound by a confidentiality agreement related to the information.<sup>25</sup>

The Chief, by order, must issue a decision regarding the confidentiality request not later than 45 days after the receipt of the request. Until the decision is issued, the information that is the subject of the request is confidential and must be maintained by the Chief in a separate file labeled "confidential." The applicant must be notified by mail of the decision.<sup>26</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 facility that has a new or increased withdrawal capacity above an applicable threshold amount if either of the following applies:

(a) Except as provided in item (2)(b), below, the new or increased maximum daily withdrawal of the facility is less than the applicable threshold amount when averaged over any 90-day period; or

(b) The new or increased maximum daily withdrawal of the facility is less than the applicable threshold amount when averaged over any 45-day period with regard to a facility with withdrawals from a river or stream that is a high quality water when the withdrawals are made at a point where the area of the watershed of the river or stream is less than 100 square miles, but greater than 50 square miles.

The exemption discussed in items (2)(a) and (b), above, does not apply to withdrawals of a facility from a river or stream that is a high quality water when the withdrawals are made at a point where the area of the watershed of the river or stream is 50 square miles or less.<sup>27</sup>

(3) 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

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<sup>25</sup> R.C. 1522.17(C)(1).

<sup>26</sup> R.C. 1522.17(C)(2).

<sup>27</sup> R.C. 1522.14(B).



established by the bill. Under the bill, a baseline facility is a facility identified in the baseline report or a facility added to the baseline report. 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. Under the bill, the Chief of the Division of Soil and Water Resources must add to the list of baseline facilities in the baseline report any facility that commenced a water withdrawal after December 8, 2009, but not later than 180 days after the effective date of the bill.<sup>28</sup>

(4) An electric generating facility that increases its consumptive use due to a requirement imposed by a federal regulation that is unrelated to an increase in production at the facility;

(5) A facility making a withdrawal and consumptive use from an impoundment of water collected primarily from diffused surface water sources, including a farm pond, golf course pond, nursery pond, stormwater retention pond, or other private pond, or a facility making a withdrawal and consumptive use from any stream or river to augment the water supply of an impoundment of water if the impoundment is used, at least in part, for firefighting purposes. The exemption does not apply to a facility making a withdrawal and consumptive use for industrial purposes or for public water supply purposes.

(6) A facility that must temporarily establish a new or increased withdrawal and consumptive use capacity as a result of an emergency for the duration of that emergency that, without the new or increased withdrawal and consumptive use capacity, will result in imminent harm to human health or property;

(7) A facility that is establishing a new or is increasing its withdrawal and consumptive use capacity in compliance with an experimental use permit issued under the bill (see below);

(8) A facility that must temporarily establish a new or increased withdrawal and consumptive use capacity in order to respond to a humanitarian crisis for the duration of that crisis if the new or increased capacity is necessary to assist in the management of that crisis;

(9) A major utility facility that is subject to regulation by the Power Siting Board, or a public water system that withdraws water in an amount that would result in a new or increased consumptive use of more than 2 million gallons per day if:

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<sup>28</sup> R.C. 1522.10(A) and (C) and Section 4.



--The public water system was in operation on June 29, 1988, and no substantial changes are proposed for that system except for those specified in current law;

--The public water system that is proposed to be constructed or installed, or an existing system for which changes are proposed, encompasses only water distribution facilities; or

--The public water system, other than one that encompasses only water distribution facilities, is proposed to be constructed or installed, or substantial changes in the design capacity of an existing system, other than one that encompasses only water distribution facilities, are proposed; the plans submitted for the system to the Director of Environmental Protection declare and document information specified in current law; and the Director of Environmental Protection has applied criteria specified in current law in reviewing and approving the plans as determined by the Director of Natural Resources.<sup>29</sup>

(10) A facility that is subject to regulation under the Industrial Minerals Mining Law;

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

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

(13) A facility that is increasing its withdrawal or consumptive use capacity directly related to supplying a major electric generating facility that is subject to regulation by the Power Siting Board.<sup>30</sup>

### **Baseline facility and facility abandonment**

Under the bill, 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. Facility abandonment is the voluntary and affirmative termination of a facility's withdrawal and consumptive use capacity as listed in a withdrawal and consumptive use permit. Baseline facility abandonment and facility abandonment do not include the nonuse or the transfer of a baseline facility's or facility's withdrawal and consumptive use capacity unless either of the following applies:

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<sup>29</sup> R.C. 1501.33(C).

<sup>30</sup> R.C. 1522.14.

(1) The nonuse continues for 15 consecutive years for a facility with a potential withdrawal from Lake Erie or a recognized navigation channel and the nonuse is not extended in accordance with the bill (see below); or

(2) For all other facilities, the nonuse continues for 36 consecutive months and is not extended in accordance with the bill (see below).<sup>31</sup>

Under the bill, with regard to the nonuse of a baseline facility's or a facility's withdrawal and consumptive use capacity, not later than 60 days after the applicable time period specified above, the owner or operator of the facility may request an extension from the Chief to retain the facility's active status. The request must be made in a manner prescribed by the Chief. The Chief must determine the appropriate terms and conditions of the extension, if approved, based on information submitted by the owner or operator. The Chief must issue an order approving or disapproving the request and must do so in a manner prescribed by the Chief.<sup>32</sup>

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

Transfer of a withdrawal and consumptive use permit upon the sale or transfer of a facility may occur so long as the location of the facility, the source of water, and the withdrawal and consumptive use capacities do not change. Transfer of the baseline withdrawal and consumptive use capacity of a baseline facility upon the sale or transfer of the baseline facility may occur under the same conditions. 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.<sup>33</sup>

If the owner of a facility for which a withdrawal and consumptive use permit has been issued sells or transfers a portion of the facility, transfer of the applicable portion of the withdrawal and consumptive use capacity authorized by the withdrawal and consumptive use permit may occur so long as the location of the facility, the source of water, and the total withdrawal and consumptive use capacities do not change. The permittee must provide notice of such a transfer to the Chief in a manner prescribed by the Chief. Upon receipt of the notice and if a permit is required for the transferred portion based on the threshold amounts established by the bill (see above), the Chief must issue a new permit for the transferred portion of the facility to the transferee and a modified permit for the remaining portion of the facility to the original permittee upon

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<sup>31</sup> R.C. 1522.10(B) and (I).

<sup>32</sup> R.C. 1522.16(B).

<sup>33</sup> R.C. 1522.15(A)(1).

a showing that the transferee will meet the conditions of the original permit and all applicable requirements of the Compact and the bill and rules adopted under it. Any new permit must reflect the portion of the withdrawal and consumptive use capacity that has been transferred.<sup>34</sup>

If the owner of a baseline facility sells or transfers a portion of the baseline facility, transfer of the applicable portion of the withdrawal and consumptive use capacity listed in the baseline report for that facility may occur so long as the location of the facility, the source of water, and the total withdrawal and consumptive use capacities do not change. The owner must provide notice of such a transfer to the Chief in a manner prescribed by the Chief. The Chief must not require the owner of the baseline facility or the transferee to obtain a withdrawal and consumptive use permit, but must update the baseline report to reflect the transfer.<sup>35</sup>

The Chief may deny a transfer by issuing an order denying the transfer and sending written notice to the permittee and the transferee not later than 30 days after notice of the intended transfer. The Chief must deny the transfer if the Chief determines that the transfer will result in noncompliance with the Compact, the bill, rules adopted under it, or the terms and conditions of a withdrawal and consumptive use permit.<sup>36</sup>

The Chief must remove a facility from the baseline report when the facility is subject to baseline facility abandonment. However, a baseline facility cannot be removed from the baseline report due to the transfer of the facility's baseline capacity.<sup>37</sup>

The bill prohibits anyone from selling or transferring a withdrawal and consumptive use permit for purposes of evading the bill's requirements.<sup>38</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 authorizes the owner or operator of a facility to petition the Chief for: (1) inclusion in the baseline report if the owner or operator believes that the facility was erroneously excluded from the

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<sup>34</sup> R.C. 1522.15(A)(2).

<sup>35</sup> R.C. 1522.15(A)(3).

<sup>36</sup> R.C. 1522.15(A)(4).

<sup>37</sup> R.C. 1522.10(B) and 1522.15(A)(5).

<sup>38</sup> R.C. 1522.15(B).

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. Finally, the Chief must adopt rules in accordance with the Administrative Procedure Act establishing procedures for the submission of the petitions.<sup>39</sup>

### **Experimental use permits**

Under the bill, the Chief of the Division of Soil and Water Resources, with the approval of the Director of Natural Resources, may issue experimental use permits. An experimental use permit may be issued in lieu of a withdrawal and consumptive use permit as determined appropriate by the Chief. The stated purpose of experimental use permits is to encourage the development of innovative water use practices and technologies that ensure sustainable water use for industrial, commercial, residential, agricultural, or public purposes, including recreational and cultural resources, as a means to facilitate sustainable economic growth and job creation.<sup>40</sup>

An experimental use permit may be issued if all of the following apply:

- (1) The experimental use is reasonable based on a consideration of specified factors listed in the Compact's decision-making standard;
- (2) The experimental use will use no more water than is necessary to determine the effectiveness and economic feasibility of the experimental use; and
- (3) The experimental use does not reduce the protection afforded the waters and water dependent natural resources of the source watershed as defined in the Compact below what is provided in the bill and rules adopted under it.<sup>41</sup>

The Chief may refuse to issue an experimental use permit if the Chief determines that the proposed use will result in significant individual or cumulative adverse impacts on the quantity or quality of the waters and water dependent natural resources of the Great Lakes basin considered as a whole or the Lake Erie source watershed

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<sup>39</sup> R.C. 1522.16(A).

<sup>40</sup> R.C. 1522.131(A).

<sup>41</sup> R.C. 1522.131(B).

considered as a whole. The Chief must issue or deny an experimental use permit through issuance of an order.<sup>42</sup>

The Chief must establish the terms and conditions of an experimental use permit and may suspend such a permit, at any time, if the Chief finds that its terms or conditions are being violated or that its terms and conditions are inadequate to avoid significant individual or cumulative adverse impacts on the quantity or quality of the waters and water dependent natural resources of the Great Lakes basin considered as a whole or the Lake Erie source watershed considered as a whole. An experimental use permit expires not later than 24 months after the date of issuance.<sup>43</sup>

### **Diversion permits**

Under the bill, no person is permitted to install or operate a facility or equipment that results in a new or increased diversion of any water out of the Lake Erie watershed to another watershed without first obtaining a permit to do so issued by the Chief of the Division of Soil and Water Resources. Under the Compact, a diversion is a transfer of water from the Great Lakes/St. Lawrence River basin into another watershed or from the watershed of one of the Great Lakes into that of another by any means of transfer, including, but not limited to, a pipeline, canal, tunnel, aqueduct, channel, modification of the direction of a water course, tanker ship, tanker truck, or rail tanker, but does not apply to water that is used in the basin or a Great Lake watershed to manufacture or produce a product that is then transferred out of the basin or watershed.<sup>44</sup>

An application for such a permit must be submitted to the Chief on a form that the Chief prescribes and accompanied by a nonrefundable fee of \$1,000, which must be credited to the continuing Water Management Fund. The Chief must approve a permit application only if the Chief determines that it meets the criteria required to qualify as an exception to the prohibition against diversions established in the Compact. The Chief must issue or deny a permit through issuance of an order.<sup>45</sup>

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<sup>42</sup> R.C. 1522.131(C) and (D).

<sup>43</sup> R.C. 1522.131(E) and (F).

<sup>44</sup> R.C. 1522.11(A) and 1522.01 – Section 1.2.

<sup>45</sup> R.C. 1522.11(A) and (B).

## **Enforcement**

### **Investigations**

The Chief, on the Chief's own initiative or upon written complaint by any person, may investigate or make inquiries into any alleged failure to comply with the bill or the Compact, any rule adopted or order issued under the bill, or the terms and conditions of a permit issued under the bill. The Chief or the Chief's authorized representative may enter at reasonable times on any private or public property to inspect and investigate conditions relating to any such alleged act of noncompliance and, if necessary, may apply to the court of common pleas having jurisdiction for a warrant permitting the entrance and inspection.<sup>46</sup>

### **Orders of Chief**

The bill prohibits anyone from violating any provision of the Compact or the bill, any rule or order adopted or issued under the bill, or any term or condition of a permit issued under the bill.<sup>47</sup> The Chief may issue an order to a person that the Chief determines has violated, is violating, or is threatening to violate any such provision or rule, order, or permit. The order is effective upon issuance and 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. An order must be in writing and must contain a finding of the facts on which the order is based. Notice of the order must be given by certified mail to the applicable owner or operator of a facility. Notice also must be provided to a person who initiated a complaint that resulted in the order and must be posted on the web site of the Department of Natural Resources in a manner prescribed by the Chief.<sup>48</sup>

### **Permit suspension or revocation**

The Chief, by order, may propose to suspend or revoke a withdrawal and consumptive use permit, experimental use permit, or a permit for a diversion if the Chief determines that any term or condition of the permit is being violated. The Chief's order must identify the facility where the violation allegedly occurred, describe the nature of the violation, and prescribe what action the permittee may take to bring the facility into compliance with the permit. The Chief must fix and specify in the order a

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<sup>46</sup> R.C. 1522.18.

<sup>47</sup> R.C. 1522.19.

<sup>48</sup> R.C. 1522.20(A)(1) and (2).

reasonable date or time by which the permittee must comply. The order must state that the Chief may suspend or revoke the permit if the permittee fails to comply with the order by that date or time. If on that date or time the Chief finds that the permittee has not complied with the order, the Chief may issue a new order suspending or revoking the permit.<sup>49</sup>

The Chief or the Chief's designee may enter on private or public lands and take action to mitigate, minimize, remove, or abate the conditions caused by a violation that is the subject of a suspension of revocation order issued by the Chief.<sup>50</sup>

### **Injunctions**

The Attorney General, upon written request of the Chief, must bring an action for an injunction or other appropriate legal or equitable action against any person who has violated, is violating, or is threatening to violate any provision of the Compact or the bill, any rule or order adopted or issued under the bill, or any term or condition of a permit issued under the bill. The Attorney General must bring the action in the Franklin County Court of Common Pleas or the court of common pleas of the county where the applicable facility is located. In an action for injunction, any factual findings of the Chief presented at a hearing (see "**Hearings**," below) is prima-facie evidence of the facts regarding the order that is the subject of the hearing.<sup>51</sup>

### **Liability for costs**

A person who violates any provision of the Compact or the bill, any rule or order adopted or issued under the bill, or any term or condition of a permit issued under the bill is liable to the Chief for any costs incurred by the Division of Soil and Water Resources in investigating, mitigating, minimizing, removing, or abating the violation and conditions caused by it. Upon the request of the Chief, the Attorney General must bring a civil action against the responsible person to recover those costs in the Franklin County Court of Common Pleas. Money recovered must be deposited in the state treasury to the credit of the continuing Water Management Fund.<sup>52</sup>

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<sup>49</sup> R.C. 1522.20(B)(1).

<sup>50</sup> R.C. 1522.20(B)(2).

<sup>51</sup> R.C. 1522.20(C).

<sup>52</sup> R.C. 1522.20(D).



## Hearings

Before issuance of a final order denying the issuance of a permit under the bill, denying a transfer of a permit, denying a petition for inclusion in the baseline report, or denying a request for confidentiality regarding a facility water conservation plan, or before the issuance of a final order regarding a violation of the Compact or bill, a rule or order adopted or issued under the bill, or a term or condition of a permit issued under the bill, the Chief must issue a proposed order indicating the Chief's intent to issue a final order. If the Chief receives a written objection from a person who is or will be aggrieved or adversely affected by the issuance of the final order, the Chief must conduct an adjudication hearing with respect to the proposed order in accordance with the Administrative Procedure Act. A person who is or will be aggrieved or adversely affected by the issuance of the final order and who submitted a written objection may be a party to the adjudication. A person who is or will be aggrieved or adversely affected is a person with a direct economic or property interest that is or will be adversely affected by an order or rule issued or adopted by the Chief.<sup>53</sup>

Under the bill, any person who is issued a proposed order or a final order by the Chief is a party in any administrative or legal proceeding in which the proposed order or final order is at issue. That provision is in addition to any other rights that a person may have as a person aggrieved or adversely affected.<sup>54</sup>

After the issuance of a final order, a person who is or will be aggrieved or adversely affected by the issuance of the order may appeal the order to the Franklin County Court of Common Pleas or the court of common pleas of the county in which the facility that is the subject of the order is located. Subject to certain exceptions established under the law related to appellate procedure, the court is confined to the record as certified to it by the Chief if an adjudication hearing was conducted by the Chief.<sup>55</sup>

However, the court may grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the Chief. If no adjudication hearing was conducted, the court must conduct a hearing de novo. The filing of an appeal does not automatically suspend the order that is the subject of the

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<sup>53</sup> R.C. 1522.21(A) and (B)(1).

<sup>54</sup> R.C. 1522.21(B)(2).

<sup>55</sup> R.C. 1522.21(C)(1).



appeal. Upon application by the appellant, the court may suspend or stay the order, pending an immediate hearing on the appeal.<sup>56</sup>

If the court finds that the order was lawful and reasonable, it must issue a written order affirming the order. If the court finds that the order was unreasonable or unlawful, it must issue a written order vacating or modifying it. The judgment of the court is final unless reversed, vacated, or modified on appeal. Attorney's fees cannot be awarded to any party to an administrative or legal proceeding under the appellate procedures mentioned above.<sup>57</sup>

## **Advisory group**

The Chief of the Division of Soil and Water Resources, not later than 90 days after the bill's effective date, must convene an advisory group. The purpose of the advisory group is to make legislative recommendations for the application of the Compact's provisions related to the decision-making standard. Those provisions of the Compact state:

The withdrawal or consumptive use will be implemented so as to ensure that the proposal will result in 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.<sup>58</sup>

The recommendations must be designed to ensure that withdrawal and consumptive use permits issued under the bill 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 Great Lakes basin considered as a whole or the Lake Erie watershed considered as a whole. The recommendations must not include any change to the provision in the bill related to the application of the decision-making standard in the Compact (see above). In developing its recommendations, the advisory group must consider the directives in the bill related to the decision-making standard in the Compact and must consider an adaptive management approach taking into account scientific and technological advances in accordance with specified provisions of the Compact.<sup>59</sup>

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<sup>56</sup> R.C. 1522.21(C)(1) and (2).

<sup>57</sup> R.C. 1522.21(C)(3) and (4).

<sup>58</sup> R.C. 1522.01 – Section 4.11.2.

<sup>59</sup> Section 3(A) and (B).

## **Membership; other requirements**

The advisory group consists of the Chief and all of the following:

(1) The Chief of the Division of Surface Water in the Environmental Protection Agency or the Chief's designee;

(2) The following members appointed by the Chief of the Division of Soil and Water Resources:

--A representative of a statewide environmental advocacy organization;

--A water quality expert from the faculty or staff of an Ohio college or university located within the Lake Erie watershed; and

--A representative of a sustainable economic development organization with a primary interest in the Lake Erie watershed.

(3) The following members appointed by the President of the Senate:

--A representative of a statewide business and economic development organization; and

--A representative of an independent business located within the Lake Erie watershed that owns or operates a registered water withdrawal facility.

(4) The following members appointed by the Speaker of the House of Representatives:

--A representative of agribusiness that operates within the Lake Erie watershed; and

--A representative of an independent business located within the Lake Erie watershed that owns or operates a registered water withdrawal facility.<sup>60</sup>

The Chief of the Division of Soil and Water Resources is to serve as chairperson. All appointments must be made not later than 45 days after the bill's effective date.

The advisory group must meet as necessary to accomplish its purpose and must submit its final recommendations to the Chief of the Division of Soil and Water Resources not later than 18 months after the bill's effective. If the advisory group does not reach a consensus regarding its recommendations, it may submit recommendations

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<sup>60</sup> Section 3(A).

representing each of the minority positions within the advisory group. Upon submission of its recommendations, the advisory group ceases to exist.<sup>61</sup>

### **Legislative recommendations**

The Chief must make legislative recommendations for purposes of the Compact's provisions related to the decision-making standard only after full consideration of the advisory group's recommendations, provided that those recommendations are submitted to the Chief not later than 18 months after the bill's effective date. When making legislative recommendations, the Chief must consider the economic consequences of determining whether an impact is significant.<sup>62</sup>

### **Severability clause**

The bill includes a severability clause that declares that if a court of competent jurisdiction holds any part of the bill to be void or unenforceable, it is to be considered severable from those portions of the bill that are capable of continued implementation in the absence of the voided provisions. All other provisions capable of continued implementation continue in full force and effect (see **COMMENT 2**).

In addition, if a court of competent jurisdiction holds all or part of the bill to be void or unenforceable such that the Chief of the Division of Soil and Water Resources is prohibited from implementing the withdrawal and consumptive use permit program under the bill, the owner or operator of a facility that otherwise would have been required to obtain a withdrawal and consumptive use permit instead must proceed to obtain a permit under the existing consumptive use permit program implemented by the Department of Natural Resources.<sup>63</sup>

### **Existing diversion permit program**

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 removes references to diversions from the Lake Erie watershed in the law governing that diversion permit program. Thus, diversions from the Lake Erie watershed will be governed solely by the Compact and the bill's diversion permitting provisions.<sup>64</sup>

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<sup>61</sup> Section 3(B) and (C).

<sup>62</sup> Section 3(D).

<sup>63</sup> Section 6.

<sup>64</sup> R.C. 1501.32.

## 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 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 in accordance with the Administrative Procedure Act for the implementation, administration, and enforcement of the Compact. The bill instead requires the Chief to adopt those rules. The bill also requires the Chief to adopt rules in accordance with the Administrative Procedure Act for the development, implementation, administration, and enforcement of any permit program established under the bill.<sup>65</sup>

The bill precludes the Chief from adopting rules governing the application of the portion of the decision-making standard in the Compact dealing with significant individual and cumulative adverse impacts until the Chief is authorized to do so by the General Assembly.<sup>66</sup> The bill specifies that rules adopted by the Chief must be no more stringent than the Compact. The Chief must convene a working group consisting of parties with interests in Lake Erie, the Lake Erie watershed, and the Compact. The working group must consult with the Chief regarding the adoption of all of the above rules.<sup>67</sup>

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.<sup>68</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. The bill requires the Chief of the Division of Soil and

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<sup>65</sup> R.C. 1522.03.

<sup>66</sup> Section 5.

<sup>67</sup> R.C. 1522.03.

<sup>68</sup> R.C. 1522.03.

Water Resources to adopt voluntary watershedwide goals, objectives, and standards for water conservation and efficiency consistent with the Compact.<sup>69</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>70</sup>

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## COMMENT

1. The bill uses the term "Lake Erie source watershed." For example, the bill requires the Chief of the Division of Soil and Water Resources, in making a decision regarding a withdrawal and consumptive use permit, to apply a decision-making standard established in the Compact. It then requires the Chief, in applying certain aspects of that standard, 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 great lakes basin considered as a whole or of the *Lake Erie source watershed considered as a whole* (emphasis added) (R.C. 1522.13(B)).

Under the Compact, "source watershed" means:

the watershed from which a withdrawal originates. If water is withdrawn directly from a Great Lake or from the St. Lawrence River, then the source watershed shall be considered to be the watershed of that Great Lake or the

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<sup>69</sup> R.C. 1522.05.

<sup>70</sup> R.C. 1522.07.

watershed of the St. Lawrence River, respectively. If water is withdrawn from the watershed of a stream that is a direct tributary to a Great Lake or a direct tributary to the St. Lawrence River, then the source watershed shall be considered to be the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively, with a preference to the direct tributary stream watershed from which it was withdrawn.<sup>71</sup>

The bill, in R.C. 1522.101, declares that "a reference to source watershed or the Lake Erie source watershed means the Lake Erie watershed considered as a whole." Thus, it appears that references to "source watershed" in the bill would not encompass the meaning of that term in the Compact.

2. The inclusion of a severability clause may not be necessary because the Revised Code already includes a general severability clause that applies to the entire Revised Code. Specifically, R.C. 1.50 reads:

If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.

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## HISTORY

ACTION	DATE
Introduced	03-07-12
Reported, H. Agriculture & Natural Resources	04-24-12
Passed House (59-38)	04-25-12
Reported, S. Agriculture, Environment & Natural Resources	--

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<sup>71</sup> Great Lakes-St. Lawrence River Basin Water Resources Compact § 1.2, R.C. 1522.01.

