

Pennsylvania Chamber of Business & Industry

Comments on Annex 2001 Implementing Agreements

August 26, 2005

The Pennsylvania Chamber of Business & Industry, on behalf of its over 9,000 members representing the spectrum of Pennsylvania industry, business, and commercial enterprises, appreciates the opportunity to provide comments concerning the proposed Annex 2001 Implementing Agreements, including the revised June 30, 2005 drafts of the proposed *Great Lakes Basin Sustainable Water Resources Agreement* (the “Agreement”), the related *Appendix I, Procedures Manual* (“*Procedures Manual*”), and the draft *Great Lakes Basin Water Resources Compact* (the “Compact”).

On October 6, 2004, the Pennsylvania Chamber provided detailed comments on the prior draft of the Agreement, Procedures Manual and Compact. In those comments, while supporting many of the objectives of the proposed documents, we expressed deep concerns regarding a number of the proposed provisions and institutional arrangements, and their potentially profound effect on the future of economic development in the basin and region. While some of the provisions in the documents have been somewhat modified, many of the most disturbing and troublesome provisions remain. In their current form, we believe that the proposed documents are unworkable and unsupportable. While ostensibly aimed at conserving basin waters against the potential for exports to serve far-away states and regions, the documents in fact will have a much more profound and negative impact on uses and enterprises within the Great Lakes region. For the reasons explained below, if adopted in their current form, these documents would set back both the cause of sound water management and desirable economic development by propounding a series of poorly-drafted “standards.” Those standards, as now worded, could readily be used to deny access to needed water supplies by virtually any economic enterprise in the basin, and will provide ample fodder for litigation and challenges to even the most worthy municipal, agricultural, industrial and commercial projects.

The Chamber’s Perspective on Water Resource Management

As reflected by the Chamber’s advocacy for the passage of the Pennsylvania Water Resources Planning Act (Act 220 of 2002), we support efforts to promote and pursue management of the ground and surface waters of each water basin based upon sound science. That management must be consistent with the objectives of promoting an orderly, integrated and comprehensive development, use and conservation of the basin’s waters. Such management needs to be designed and to secure and maintain a ***proper balance*** among industrial, commercial, agricultural, water supply, residential, recreational, and other legitimate uses of the water resources of the basin.

Water management in the Great Lakes Basin, and across the remainder of the eastern region, needs to recognize an important point. Unlike some other natural resources, water is a

renewable resource – a resource that can be maintained and sustained through proper management for future generations and other users. The Governors of this Great Lakes region have long recognized and advocated that the waters of the Basin are central to the present and future economic development of the area. Many enterprises across the Basin are vitally dependant upon the availability and utilization of water as a component in their processes and activities – from farming to wineries, from power generation to automobile and paper production. There is no industry you can name where water is not an essential ingredient to its success. Given the resource constraints now confronting the southwestern and southern United States, we should expect and welcome a renewal of economic investment and development in our region based on the availability of relatively abundant, well-managed water resources.

There can be no doubt that the water resources of the basin are a vital natural resource and provide a foundation and engine of both the region’s economy and environment. Managed and used wisely, these waters are and can continue to be a strong base for economic development, providing a competitive advantage over other regions (such as the southwest) that are not blessed with such abundant supplies.

Even though Pennsylvania’s portion of the Great Lakes Basin is relatively small, the enterprises historically sited on or near Lake Erie are a sampling of that broad range of water using entities that rely on the basin’s ground and surface waters for one of the essential elements of production. The uses of that water within Pennsylvania include agriculture and horticulture, energy production, the manufacture of locomotives and large electrical equipment, paper production and a wide range of other enterprises.

The successful use of water as an engine for regional prosperity is not to adopt a plan based simply on *preservation*, but to recognize that *use* is inevitable, and wise use is critically important. The Basin’s water resources can and should be used to produce valuable products and services, providing a strong base for employment of the region’s citizens in a diverse and growing economy that must and does compete globally. The products and services produced in the basin have historically served, and will continue to serve, not only the region’s population, but provide a flow of products for distribution in trade across North America and around the world.

The key to successful water management is to achieve a balancing of water uses, while in the process preserving secure and predictable water rights upon which citizens and businesses in the basin may rely.

Summary of Concerns

While the Chamber supports many of the stated objectives of the proposed documents, we have serious reservations regarding a number of the proposed provisions and institutional arrangements. The Chamber cannot support, and would actively oppose, adoption of these documents in their current form. To briefly summarize the points that are illuminated in greater detail below:

- The Chamber strongly opposes the extension of the rigid “standard” approach to smaller water withdrawals (those between 100,000 gpd and the trigger for

regional review). States should be left with substantial flexibility when regulating such smaller withdrawals, reflecting the fact that virtually all impacts associated with these smaller uses are local in nature.

- The proposed “standards” for review and approval of in-basin withdrawals and consumptive uses are overly stringent, and as drafted would create potent “weapons” to oppose and defeat even the most reasonable and beneficial uses of water within the Great Lakes Basin. As examples, the requirement propounded in the Agreement, read with the Manual, of allowing “no measurable change” in the range of hydrologic conditions is irrational and absurd. It would virtually bar any public water supply reservoir that captures high flow and augments low flow. Similarly, the requirement that there be “no measurable” impact on other water users, applied literally as written, creates a system where groundwater withdrawals would be ruled by the shallowest well, rather than beneficial and efficient use. The review and approval of water withdrawals and in-basin consumptive uses should be based upon a ***consideration and flexible balancing of factors***, following the models adopted in other eastern states – a model which is reflected in the Regulated Riparian Model Water Code.
- The Agreement and Manual purport to adopt, as regulatory criteria, consumptive use factors for industrial sectors drawn from reports that (i) were never designed for such regulatory purposes, (ii) were not rigorously peer-reviewed or subject to public comment; and (iii) are not reflective of the diversity and range of facilities within sectors, and therefore are inappropriate for use as benchmarks in regulatory decision-making.
- We strongly believe that in-basin consumptive uses and withdrawals for use within the Great Lakes Basin should be subject to primary review and approval by state and provincial permitting authorities. While very large consumptive uses might be subject to a process for regional notice, consultation and comment, we do not believe a compelling case has been made for erecting another layer of multi-jurisdictional review and “determination” by a regional body.
- Although we understand the desire to avoid massive out of basin diversions to serve populations and enterprises in areas beyond the States and Provinces that surround the Great Lakes, the Chamber cautions that the clamor against “diversions” may unduly limit the development potential of numerous communities that straddle the Basin’s boundary. Given the relative abundance of the Great Lakes Basin’s waters, erecting artificial barriers to allowing a community drawing surface or groundwater within the basin from using it in part of its public water supply system that extends beyond the basin’s mapped boundaries seems irrational. Although the revised documents contain provisions for straddling communities, those provisions remain extremely stringent. In our view, all of Erie County, Pennsylvania has just as much right to utilize waters from the Great Lakes as Detroit, Michigan or Chicago, Illinois.

- The Agreement, Compact, and Decision Making Standard confuse the concepts of an out-of-basin diversion with in-basin water uses; and convert in-basin water users into disfavored “diversions.” The Chamber reiterates its prior comment that the documents should clearly separate the concepts of interbasin transfers of water to a point outside of the basin from intrabasin transfers of water that occur between watersheds that are within the basin.
- We believe that creating another layer of regulatory institutions at the regional level is unjustified, and that the regional body called for in the Compact is not well suited or well designed to address the needs of the Basin.
- The Chamber is concerned that the draft Agreement creates process for rendering regional “findings” and resolving disputes that affect the rights and obligations of basin property owners and water users, but fails to provide clear due process procedures for hearing and appeal.
- The citizen suit provisions of the proposed Compact are inappropriate and will invite unnecessary litigation and reinterpretation of the Compact.
- The Chamber believes that the review and appeal procedures of the proposed Compact create opportunities for duplicative, expensive and wasteful litigation.
- The proposed Compact gives insufficient consideration to either the cost or requirements for funding the implementation of the Compact and Agreement. In light of prior case law, the draft Compact as currently worded would legally commit the states to fund the regional body, overriding legislative controls over the budgetary and appropriation processes.

Discussion of Concerns

1. The Agreement should not extension the rigid standard approach to smaller withdrawals.

The prior draft of the Annex 2001 implementing documents called on the States and Provinces to adopt legal regimes for regulating water withdrawals exceeding 100,000 gallons per day, but left to the individual jurisdictions flexibility in the design and implementation of such programs. The revised Agreement and Manual radically shifts that approach, imposing on each jurisdiction the requirement to apply the rigid “standard” approach to small and large withdrawals alike. A water withdrawal of 100,001 gpd is put through the same rigorous and expensive process – requiring studies to prove satisfaction of “standards” that may be impossible to meet¹ – as a consumptive use of 4,999,999 gpd.

Let’s be clear about the nature of the withdrawals being addressed, in comparison to the resource involved. One hundred thousand gallons represents less than half the amount of water

¹ See discussion of this issue below.

contained in a municipal swimming pool. A withdrawal of 100,000 gpd (0.155 cubic feet per second) represents less than 0.000008 percent of the flow of the Detroit River. Even a withdrawal of one million gallons per day (1.55 cfs) equates to less than one ten-thousandth of a percent of Great Lakes system flows.

These requirements would literally tie up beneficial agricultural, industrial and commercial enterprises in a quagmire of complex, and sometimes contradictory, mandates. As noted below, the rigid standard approach (which was originally developed with a focus on diversions) has serious flaws. Those flaws include several highly questionable, if not utterly unworkable requirements. As applied to smaller withdrawals and in-basin consumptive uses, the standards propounded in the draft documents would become incredibly burdensome. Consultants and in-house environmental managers working with the Council of Great Lakes Industries (“CGLI”) projected the costs of performing the studies required to address the “standards” – assuming that they are applied as currently written. Those costs have a range exceeding \$400,000 and extending upwards to over \$900,000. Even if the requirements were shortcut to some extent, application costs of several hundred thousand dollars could confront small to medium sized users.

The hallmark of every eastern state water management system that has been adopted and worked has been flexibility, built around a careful consideration and balancing of multiple factors to judge whether a proposed use is reasonable. The draft CGLG documents take a radically different approach, attempting to prescribe “tests” – each and every one of which must be satisfied to obtain a permit. The lack of flexibility and balance to the CGLG proposals render them unworkable and unacceptable.

We note Pennsylvania has long experience in terms of the formulation and debate of proposals for water withdrawal regulation. All of those proposals have faced severe distrust and opposition from many sectors of the regulated community. With the exception of the Water Resources Management Act, which was drafted and passed with the support of a coalition of conservation, agriculture and business interests, all other water withdrawal regulatory proposals have been unsuccessful. However, none of those state level proposals, however, were anywhere near as radical and draconian for smaller withdrawals as suggested in the draft CGLG proposal.

The CGLG proposals will not promote the passage of water management legislation in this, or other states. As presently cast, these documents will polarize the debate, and sow extreme distrust among those (such as farmers and industries) who vitally need water to maintain and grow their economic enterprises. We would predict that not only will these proposals not be adopted across the region, but that when presented to and scrutinized by the basin States’ legislative bodies, they will foster opposition from even the most thoughtful members of the regulated community, and actually set back the efforts to find common ground on a workable water management program.

2. ***The proposed “standards” for approval of withdrawals and consumptive uses are overly stringent, and will unnecessarily hinder reasonable and beneficial uses of water within the Great Lakes Basin.***

The proposed Agreement and Manual establish overly stringent hurdles to the approval of in-basin withdrawals and consumptive uses. These documents set up standards and criteria for approvals of withdrawals that go far beyond tested and accepted principles of water management as practiced in the eastern United States (such as those reflected in the ASCE Regulated Riparian Model Water Code).

In every modern water management system we are aware of (including the arrangements practiced in the Delaware and Susquehanna River Basins), the approval of withdrawals and consumptive uses are based upon a ***consideration*** and ***balancing*** of multiple factors. In contrast, the proposed Agreement and Manual would establish a series of bright-line tests that, if applied as currently written, will stifle to investment and economic redevelopment in the region. The following are some examples of those concerns.

a. ***Requirements for no significant impact.***

Article 203.4 of the Agreement requires that a withdrawal be implemented so as to “ensure that it will result in *no significant individual or cumulative adverse impacts* to the quantity or quality of Waters or Water Dependent Natural Resources ...” (emphasis added). While this criterion might sound facially rational, as the “standard” is interpreted in the Procedures Manual, it poses a nearly impossible hurdle.

The Procedures Manual proposes that the “no significant impact” criterion be interpreted with a number of tests. Several of those tests are not just questionable; they defy logic and are utterly impracticality

i. ***No Measurable Change to Variability:***

The Procedures Manual (pg. 29) suggests under the physical criteria heading that a significant (and thereby unacceptable) impact will be found if there is any “measurable change to the pre-proposal range of variability of the hydrologic regime.”

The sensitivity of current and evolving measurement techniques could make this criterion a “show-stopper” for almost any significant withdrawal, be it a farm, a power plant or a manufacturing operation. As worded, this would mean, for example, that if a stream previously had a low to high flow range of 500,000 to 200,000,000 gpd, and if a proposed withdrawal within the watershed of 10,000 gpd (2% of the lowest flow) could be detected by a stream gage, the withdrawal must be disapproved because there would be a “measurable change” to the range of variability.

This “no measurable change to variability” could have extreme repercussions for many public water systems. This no measurable change criterion would effectively bar both run-of-river and “high flow skimming” withdrawals. Likewise, the concept of utilizing reservoirs to skim from high flows to support uses and augment flows during droughts would be effectively prohibited. Under this “standard,” the concept of multi-purpose reservoirs (which combine flood

control, water supply and recreational use) would be proscribed throughout the basin. One has to question whether the Governors and other senior policy makers who endorsed this draft have been properly briefed about its real world repercussions.

As written, this test would cut off any change that can be measured, whether or not the measured change truly is expected to have a significant impact on water quantity or quality needed to support the biological integrity of the source watershed or basin as a whole.

We are currently unaware of any experienced water management jurisdiction that has gone to the extreme of adopting a “no measurable change in variability” test. While the impact on hydrologic regime variability might be a factor to be weighed in considering a proposal, the adoption of such an absolute test is not warranted by either the biological or hydrologic literature.

Quite literally, the standard proposed in the Procedures Manual would place the Great Lakes Basin in a hydrologic straight-jacket, reverting our law to an extreme version of the long-abandoned natural flow doctrine – a doctrine that was rejected by virtually all courts and states in the dawn of the industrial revolution. The concept of “no measurable change” would basically put much of the Great Lakes Basin’s watersheds back to the 18th Century “natural flow” theory that was long ago rejected in American common law. Re-adoption of that failed and discredited theory would place much of the basin off-limits to any withdrawals, no matter how beneficial to the public welfare and economy of the region. Under this criterion as presently formulated, many communities, farms and factories that do not border the lakes or their major river tributaries would be effectively precluded from any new or increased withdrawal where (as will often be the case) their impact on any part of the range of flows in local “source watersheds” become measurable.

ii. *No significant/measurable impacts to existing water uses*

The Procedures Manual (pg. 29) similarly creates a test requiring a showing of no “[s]ignificant/measurable impacts to existing Water uses.” The document’s authors provide no further elucidation on the meaning of this phrase, but read literally, it creates an extremely problematic criterion when applied in the real world.

As example will illustrate the problem. Consider a source area which currently has a number of shallow wells tapping a major aquifer that extends over many hundreds of square miles. A municipality or industry proposes a new, efficient deeper supply well in the area, and studies show that the new well, in combination with all existing withdrawals, is well within the safe yield (*i.e.*, long term recharge and replenishment rates) of the aquifer. However, the new well, like all wells, would create a certain zone of influence, resulting in a lowering of the groundwater table near the new well, with diminishing levels of water table influence as one proceeds a distance from the new well. As the Procedures Manual test is written, it appears that if the new deep well would cause *any measurable change* in the yield of any existing shallow well, or even any measurable change in the water level at any existing shallow well, the proposed new withdrawal would have to be disapproved.

Under this “no measurable impact” test as presently written into the Manual, the shallowest, least efficient well will determine the available yield of every aquifer. As stated in testimony by Professor Richard Parizek, a noted groundwater hydrology professor at Pennsylvania State University, in the case of *Levin v. Benner Township and State College Borough Water Authority*, adopting such a test that preserves every shallow well supply at the expense of foregoing more efficient wells is like setting the speed limit on an Interstate based on the velocity attainable by a horse-drawn buggy going up a hill.

At the same time, the adoption of a no measurable impact on existing water uses test effectively shifts all of the Great Lakes jurisdictions from the principles of riparian rights in surface water (and correlative rights in groundwater) to a version of the prior appropriation doctrine. Saying that no new use can have any impact on any existing use means that existing uses are given absolute priority over any new use. This is poor water management policy for the east, and will have serious adverse impacts with respect to the objective of redeveloping and expanding the Great Lakes Basin’s economic base.

The more rational approach to dealing with potential conflicts between competing water users is that adopted by most sophisticated eastern water management agencies, such as the Delaware and Susquehanna River Basin Commissions. Under the standard practice of such water agencies, pumping tests are conducted in an effort to predict the potential impact of a proposed new or expanded withdrawal. If such tests, or subsequent experience during operations, show significant interference with existing supplies, mitigation (in the form of provision of new or replacement water supplies or other compensation) will be required. For example, SRBC regulations provide:

(f) Interference with Existing Withdrawals. If review of the application or substantial data demonstrates that operation of a proposed groundwater withdrawal will significantly affect or interfere with an existing groundwater or surface water withdrawals, the project may be denied or the project sponsor may be required to provide, at its expense, an alternative water supply or other mitigating measures.²

18 C.F.R. §893.62. Similarly, DRBC rules provide protection for existing users under provision that require the sponsor of a new or expanded groundwater withdrawal to provide mitigating measures if the withdrawal significantly affects or interferes with any existing well.³ Such mitigation measures may include (i) providing an alternative water supply of adequate quantity and quality to the affected existing user; (ii) providing financial compensation to the affected owner sufficient to cover the costs of acquiring an alternative water supply, or (iii) such other measures as the agency may determine to be just and equitable under the circumstances present in the case of any individual application.⁴

² 18 C.F.R. § 803.43(f).

³ 18 C.F.R. § 430.21(b).

⁴ *Id.*

iii. No introduction of potentially harmful contaminants

Under the “chemical criteria,” the Procedures Manual (pg. 29) indicates that a significant impact will be found, and a withdrawal project must be disapproved, if it involves the “[i]ntroduction of potentially harmful toxins, contaminants and excessive nutrients.” As cast, virtually any discharge of any pollutants would be barred.

A formulation which refers to “potentially harmful” contaminants creates an impossibly high hurdle. By definition, any contaminants are *potentially* harmful; if there were no potential, then presumably the substance would not be considered a pollutant or contaminant. Although we doubt the authors of the Agreement and Manual intended such a result, the present wording of this decision-making criterion would, in essence, bar any withdrawal that involves any discharge of any pollutant anywhere, even if through a properly permitted NPDES discharge.

Unless we are going to ban all human activities everywhere in the Great Lakes Basin, this criterion must be replaced with a more realistic evaluation as to whether the quantity and concentration of pollutant discharges will cause significant impacts or not. The question should be whether the quantity and nature of pollutants involved, and the circumstances of their discharge, are realistically anticipated to cause a violation of water quality standards or a significant impact on the aquatic ecosystem. If (under the design conditions used in typical water quality evaluations) such impacts are not anticipated, and the withdrawal will not disrupt the hydrologic system’s ability to assimilate and process pollutants, then the withdrawal should be approvable.

b. Decline in population levels or health of native species

The biological criteria that call for no decline in population levels or health of native species may at first blush sound like “apple pie.” However, it ignores the fact that in a given watershed or stream, population levels of various aquatic species vary widely from month-to-month, season-to-season, and year-to-year, as the result of a wide range of physical, climatic, hydrologic, and other conditions. The literature of the biological sciences indicates that it is extremely difficult to measure the extent to which populations or biomass of given species of fish or macroinvertebrates change with relatively small changes in flow levels caused by human withdrawals.

In terms of protecting the biological integrity of the basin, we believe that this criterion should be restated. The restated criterion should inquire as to whether the proposed withdrawal or consumptive use will have *significant* and *long-term* impacts on native species. Biological factors to be considered might include diversity, populations and biomass. Significance should be evaluated with due consideration of the natural variability of such indicator factors for any particular species.

c. Consumptive water use allowances.

Article 203.3 of the Agreement requires that all water be returned to the source Watershed “less an allowance for Consumptive Use of the applicable water use sector.” The Manual (pg. 27) by stating that plans must use United States Geological Survey consumptive use coefficients or other consumptive use coefficients, and that if consumptive use estimates are

greater than “generally accepted Consumptive Use coefficients,” the application must include a justification for the Consumptive Use.

The problem is that the reference to “generally accepted Consumptive Use coefficients” elevates document that were designed as generalized planning studies to the level of regulatory benchmarks. The Manual refers to the Great Lakes Commission Survey conducted in spring 2002, entitled *Consumptive Use Coefficients by Water Use Category Among Great Lakes Jurisdictions and the USGS*. That document, however, was never intended as setting a regulatory standard. Unlike the type of rigorous studies of industrial use categories and subcategories used to establish water quality effluent limit guidelines under the Federal Clean Water Act, the Great Lakes Commission Survey, and the documents it refers to, are based on only limited reviews of an available literature and information gathering from a limited number of industrial sites. For one major sector, for example, the consumptive use coefficient is based on a single facility.

Consumptive use varies widely within facilities within most industrial sectors, depending on a variety of factors, including the specific products being produced and related production technologies, incoming water quality, water quality discharge requirements, local climatic conditions, and other factors. Consumptive use factors cannot be established on a generalized basis. As with water quality effluent guidelines, a survey of available technologies and their performance cannot be judged on the basis of a few facilities, but requires a rigorous evaluation to ascertain (i) the subcategories in each use sector; (ii) their particular needs and requirements; (iii) the resulting amounts of water use and reuse; and (iv) the economic, energy and environmental tradeoffs with particular technologies for water conservation and consumptive use reduction.

Moreover, consumptive use “benchmarks” can be highly misleading and counterproductive. For example, historically many of the power plants in the basin used once-through cooling technologies which involve low consumptive used, but contribute thermal inputs to the receiving waters. Under the aegis of water quality regulations, newer plants are often required to install recirculation and cooling technologies, resulting in lower total water withdrawals but higher consumptive uses. One cannot borrow the benchmarks derived from once-through facilities and graft them as the goal of recirculating cooling technologies.

Skipping the essential step of rigorous evaluation of each sector, the Manual attempts to elevate crude planning documents into “benchmarks” that are bound to lead to a regulatory train wreck. In our view, such a consumptive use benchmark approach is not reasonable or workable given the current level of scientific literature. Even within specific manufacturing or other water use sectors, specific facilities and processes vary substantially, and the resulting amount of consumptive water use from evaporation, incorporation of water into product or other processes will similarly vary over some significant ranges. Any attempt to set consumptive use allowances by water use sector would inevitably result in major complexity and controversy.

At the same time, we would note that less consumptive use (as a percentage of total withdrawals) is not necessarily more efficient or better in terms of environmental impact. For example, in the highly efficient bottled water industry, a very high percentage (~87%) of the amount of water withdrawn is converted into the final product. Except for water used for

sanitation, very little water is lost in the process, and a relatively small percentage is returned. The only way a bottler would reduce the percentage of consumptive use would be to become less efficient, withdraw more water and return a larger portion through wastewater from the bottling facility.

d. Requirements for return of water to the watershed of origin.

As part of Article 203.3 of the Agreement, the decision making standard would require the return of water withdrawn to the “Source Watershed.” The term “Source Watershed” is defined by Article 103 as “the watershed from which a Withdrawal originates.” That definition goes on to state:

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 watershed of the St. Lawrence River, respectively. If Water is Withdrawn from a 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.

We are troubled by definition of “Source Watershed” and the practical application of this standard, including its “preference” for return to the direct tributary stream from which the water was withdrawn. The concept of a direct tributary is nowhere explained, and it could readily have several meanings. Under one interpretation, it would mean that each first-order, second-order, etc. stream that flows without interruption via a series of higher order streams into a Great Lake is to be considered a “direct tributary.” That would divide the basin into literally thousands of small “source watersheds.” In many situations, this is practically impossible, and may be environmentally imprudent. Instead of efficient sewage treatment plants serving regional areas, this standard would ostensibly “prefer” that industries and municipalities alike return their water through a multiplicity of small treatment systems to smaller streams to match where their water supplies originate.

For the “preference” to return water to the source watershed to be workable, the focus should be on returning water within the more significant subbasin watersheds of the Great Lakes Basin – for example, the Ashtabula or Cuyahoga River subbasins in Ohio. However, applying the return water principle to surface and groundwater withdrawals from each and every small tributary with a watershed of only a few square miles will not work, and will substantially constrain the rational development of water supplies for Basin communities and industries.

3. For in-basin uses, the Agreement should adopt the more reasonable and balanced decision-making criteria and factors reflected in established water management laws from other eastern jurisdictions and model water management laws, such as the ASCE Regulated Riparian Model Water Code.

In place of the rigid set of approval criteria proposed in the Agreement and Manual, experience in other jurisdictions teaches that good water management requires careful balancing

of multiple factors, not a set of absolute decisional standards. The type of bright line tests proposed in the Great Lakes implementing documents are doomed to failure. They will either bog the Basin down and stifle the development of prosperity of its farms, communities and industries, or alternatively be ignored and honored in the breach.

The type of balanced decision making process that should be considered in the Great Lakes Basin is reflected in a number of model water management laws. The most recent model that might be referenced is the ASCE Regulated Riparian Model Water Code (“*ASCE Model Code*”). The *ASCE Model Code* sets up five basic standards for obtaining a permit, requiring the administering state agency to consider whether:

1. The proposed use is reasonable.
2. The proposed withdrawal, in combination with other relevant withdrawals, will exceed the safe yield of the water source.
3. The proposed withdrawal and use are consistent with applicable comprehensive water plans and drought management strategies.
4. Both the applicant’s existing withdrawal and use, and the proposed withdrawal and use, incorporate a reasonable plan for conservation.
5. The proposed withdrawal and use will be consistent with the Code and regulations, plus any other statutes pertaining to the use of water.

Central to the *ASCE Model Code* is the balancing process for determining whether a use is “reasonable.” In determining “reasonable” use, the state agency is called upon to consider:

- (a) the number of persons using the water source and the object, extent, and necessity of the proposed withdrawal and use and of other existing and planned withdrawals and uses of water;
- (b) the supply potential of the water source in question, considering quantity, quality and reliability, including the safe yields of all hydrologically interconnected water resources;
- (c) the economic and social importance of the proposed water use and other existing or planned water uses sharing the water source;
- (d) the probable severity and duration of any injury caused or expected to be caused to other lawful consumptive and nonconsumptive uses of water by the proposed withdrawal and use under foreseeable conditions;
- (e) the probable effects of the proposed withdrawal and use on the public interests in waters of the State including environmental and ecological effects, sustainable development, recharge of groundwater, waste assimilation capacity, other aspects of water quality, wetlands and flood plains;

- (f) whether the proposed use is planning in a fashion that will avoid or minimize the waste of water;
- (g) any impacts on interstate or interbasin water uses;
- (h) whether the proposed withdrawal will unreasonably preclude other possible uses of the water; and
- (i) other relevant factors.

Many of these factors are interrelated, and some are actually countervailing. A ***thoughtful balancing*** of these “factors” is required to arrive at a decision as to whether or not to approve a new withdrawal or consumptive use. But such a thoughtful balancing is precisely what the Great Lakes implementing documents are missing.

A central problem with the “standard” or “test” approach to management decisions is that it purports to establish the precision of yes/no answers in a field where there are often competing and countervailing considerations. In doing so, the “standards” provide a potent weapon for those desiring to oppose projects. Even where host jurisdictions grant permits, those challenging permitting decisions will be able to argue, one-by-one, whether each of the separate standards – such as “no significant ... adverse impacts” – has been satisfied. Instead of looking at the project as a whole, and judging its relative merits and impacts, the standards approach breaks the process down into a war of attrition fought in multiple trenches, where the alleged “failure” on any one item (viewed in isolation) can result in denial of a permit.

4. Withdrawals for consumptive use and other water uses within the basin should be subject to review and approval at the host jurisdiction level, without a cumbersome regional review procedure.

Unlike interbasin diversions, in-basin consumptive uses and other withdrawals for uses within the Great Lakes Basin should be subject to primary review and approval by state and provincial permitting authorities. Large consumptive uses should be subject to a process for regional consultation and comment, but not multi-jurisdictional review and determination.

The Chamber believes that the Agreement sets up an unnecessarily complex and cumbersome process for the review and approval of more significant in-basin consumptive uses. Contrary to the goal of husbanding Basin resources as an engine to fuel in-basin economic development, the Agreement and Compact establish a procedure and standards that threatens to discourage the siting and expansion of major economic enterprises in the Great Lakes Basin.

Under the Water Resources Development Act (“WRDA”), only out-of-basin diversion of water are subject to “regional review,” requiring concurrence by the Governors of the Great Lakes States. In-basin consumptive uses are left to management under the water laws of the respective jurisdictions.

The Agreement and Manual propose to substantially “raise the bar” on in-basin consumptive uses by forcing all major consumptive uses (over 5 mgd in any 90-day period) to undergo “regional review.” (Agreement Article 204). This goes beyond the concepts of notice

and consultation found in the Great Lakes Charter, by creating a regional body with the ostensible power to make “declarations of findings” regarding consistency with the “standard.” (Agreement Article 506).

The process for regional review will clearly add time (and cost) to the process to siting and implementing major economic development projects across the Basin. First, the process only starts after the host State or Province (referred to at the “Originating Party”) has completed its own review of the project and is presumably ready to issue a permit. At that point (which may be many months from the date of application) a second round of review begins at the regional level. That starts with a technical review (Article 505), followed by a policy review of the “Regional Body.” Although the Regional Body must meet within 90 days after submission of the project to regional review, if consensus is not reached, then another mandatory 25 days is provided to achieve consensus. Thereafter, if consensus is still not achieved, the various States and Provinces may draft and submit a Declaration of Findings reflecting individual views and conclusions within an unspecified timeframe, and only then may the host State or Province render a decision. It appears that at a minimum, this process is destined to add another 90 days to an already long permitting process, with the potential for delaying projects by much longer if the region’s governments are not able to reach consensus.

Faced with the prospect of being dragged into such a cumbersome and complex process, those considering investment in the Great Lakes may well seek to site their enterprises in other areas that have more rational procedures and more balanced decisional criteria.

The process need not be so cumbersome to achieve the fundamental purposes of the Great Lakes Charter and the objectives of the Basin States and Provinces. Before enacting such a new basin decisional process, consideration should be given to a much simpler and more straightforward alternative.

In the Chamber’s view (which we understand is shared by many other basin sectors), withdrawals for in-basin consumptive uses should remain subject to review by the host-jurisdiction, to be conducted under the procedures and provisions of that jurisdiction’s water rights scheme and management program. New or increased consumptive uses above a given threshold might be made the subject of a “notice and consultation process,” under which the host jurisdiction would provide notice of the application to other Great Lakes jurisdictions with an invitation to comment. The notice and consultation process should move forward in parallel with normal permit application review procedures, so that additional time is not consumed in a seriatim process.

The consultation process should, however, be subject to specific time frames for submitting comments. If serious concerns are raised, the consultative process among the jurisdictions could move forward, either through direct discussions between the host jurisdiction and the other concerned jurisdiction(s), or through discussion at a regional consultative body that could provide recommendations to the host jurisdiction.

In all cases, however, public comments should be solicited at, and hearings should be conducted at, the *host jurisdictional level*, following established administrative procedures,

rather than flipping such projects into some form of super-regional body with a separate series of public hearings, deliberations, and decisions.

5. *The definitions of “Diversions” and “Consumptive Use” merit clarification.*

a. *The Agreement and Compact should not treat in-basin movements of water as a “diversion.”*

The Agreement and Compact confuse the concepts of an out-of-basin diversion with in-basin water uses; and would ostensibly convert many in-basin water users into disfavored “diversions.”

As a starting point, it is our understanding that Annex 2001 and these implementing agreements are intended to simultaneously address the particular requirements of Section 1109 of the 1986 Water Resources Development Act (“WRDA”) and implement the objectives of the *Great Lakes Charter*. Unfortunately, these documents use different concepts of what constitutes a “diversion.” When speaking of “diversions,” WRDA and the Charter are concerned with transfers of water withdrawn from within the Great Lakes Basin to a location outside of the Great Lakes Basin; and WRDA does not apply to transfers of water entirely within and among the watershed of the Great Lakes and St. Lawrence.

Most people reading the Agreement and Compact, when seeing the term “diversion” probably think that the documents are addressing disfavored out-of-basin diversions. The Agreement and Compact, however, conflate the concepts of out-of-basin diversion with uses of water involving transfers of water within and among the Great Lakes watersheds.

In order to differentiate between in-basin uses and out-of-basin transfers of water, we again suggest, as we did in our previous comments, that the Agreement adopt separate definitions of “interbasin diversion” and “intrasbasin transfer.”

We recognize that the revised Agreement and Compact, while prohibiting diversions, set up an “exception” for intrasbasin diversions. Such an approach, however, is built upon the faulty presumption that movement of water which stays within the basin is a diversion that should be banned except in extraordinary circumstances. Instead of this twisted construction, out-of-basin diversions should be viewed as entirely different than in-basin water usage.

b. *Agreement and Compact create confusion as to what constitutes a diversion via bulk transfer versus a consumptive use.*

At the same time, one of the Chamber’s concerns involves the confusion of in-basin uses with out-of-basin diversions, and particularly confusion as to what constitutes a “diversion” versus a “consumptive use.” In part, this confusion is fostered by Article 207.9 of the Agreement, which declares any proposal to withdraw water and remove it in “any container greater than 5.7 gallons (20 litres) shall be considered to be a Proposal for a Diversion.”

Although we understand that this formulation may have been aimed at attempting to differentiate between bottled water packaged within the basin and bulk transfers of water via pipeline, tanker ship, or other large bulk methods, the formulation chosen creates unintended and

undesirable trouble. An extreme example of the problem is seen in businesses, such as water treatment companies, which ship pieces of equipment or commodities such as water softener resins, membranes, or just the equipment itself which must be suspended in or contain water to maintain viability. In these cases, the water does not become an ingredient in a product, but remains as water serving a critical function in tanks, vessels, trucks, or rail cars. Under the provisions contained in Article 207.9, if container volumes are over 5.7 gallons, this use of water, if it crosses Basin boundaries, would be considered an outlawed diversion.

Thus, a more refined formulation is needed to differentiate between bulk water transfers and in-basin water use. One possible way to solve this problem is to amend this provision along the following lines:

Water withdrawn from the Basin and packaged at a location within the Basin in bottles, packages or other containers intended for distribution to end-use consumers for human consumption of the water as or in a beverage, shall be considered a Consumptive Use. Water withdrawn from the Basin which is not placed in or used as part of the packaging of products produced within the Basin, and which is transferred out of the Basin in bulk within pipelines, ships, tanker trucks, or similar vessels, shall be considered a Diversion.

6. *Changes of facility ownership should not trigger permitting or regional review if the use of water does not change.*

A fact of modern life is that business and other enterprises often change in ownership, as operations consolidate or new investors take over existing operations. That ownership transfer process is essential to the flow of capital into many businesses, and without that opportunity to transfer assets fairly readily, facilities may well falter or lose the chance of investments that can make them more competitive.

Article 207, ¶ 3 states that a change of ownership of any entity holding an approval “shall not require Regional Review, provided that the facts, conditions or other criteria upon which that approval was based have not changed.” That “proviso” cause threatens to swallow the rule, and create a system where it is highly uncertain whether water withdrawal rights will be stable and reliable in the event of a change in ownership. As currently written, if a facility that had been issued a permit ten years ago were to change ownership, anyone could argue that changed facts or conditions during the ensuing decade justify a complete reopening of the permit. Indeed, since this Agreement is establishing new “criteria” upon which water withdrawal approvals would be granted, then ostensibly every change in facility ownership after adoption of the Agreement would trigger permit reopening.

This formulation is far too broad. If the nature of water use is not materially changing and the quantity of water withdrawal is not increasing, then the transfer of facility ownership should not trigger any reopening of water withdrawal permits. In order to provide a solid foundation for economic investments, water rights should be predictable and secure, without fear that a change in the ownership of the facility or a change in the ownership (*e.g.*, shares) of the entity that operates the facility will trigger potential loss of those water rights.

7. *Procedures and Standards for Review of Withdrawals by Communities and Water Systems that Straddle the Basin*

We recognize that the revised draft of the Agreement and Compact recognize the need to accommodate the needs of communities and water systems that straddle the Basin. Such an accommodation is necessary in order to avoid unnecessarily hindering rational community development. However, we are concerned with some of the criteria set forth in the Compact and Agreement as applied to these communities.

Unfortunately, the Agreement and Compact tend to lump communities and public water supply systems that straddle the basin into the strongly disfavored category of “diversions” – imposing on these communities strenuous (some would say impossible) criteria for obtaining water withdrawal approvals. Given the relative abundance of the Great Lakes Basin’s resources, however, drawing such a fence around the Basin is not warranted. We have townships, cities and other communities in Pennsylvania and across the Basin that straddle the basin boundary. For these communities to develop workable water systems will, in many cases, involving siting wells or surface water intakes on one or both sides of the boundary, with treatment and distribution occurring across public water networks of pipes that serve homes and businesses throughout the communities. To place a fine point on it, we believe that the communities of Erie County, Pennsylvania have as much right to draw upon Great Lakes basin resources as Detroit, Michigan or Chicago, Illinois, and arbitrary line drawing is not warranted.

The “exception” cast for straddling communities is so narrowly drawn that it may be of little use. First, ¶1.a. of Article 201 of the Agreement declares that any water transferred by a straddling community “shall be used solely for public water supply purposes.” Just what does this mean? Read as written, this seems to suggest that the water can be distributed to residences, but cannot be distributed to commercial or industrial users. To this formulation, we would simply observe that residents without jobs, and with no where to shop and receive services, will hardly live in a viable community. The economic and social viability of these straddling communities requires a range of enterprises, and declaring that only some users may use the water, while others are forbidden, simply does not make sense. Further, why is a wine grower with vineyards on both sides of the basin line to be disfavored from drawing water from a well in the Basin to irrigate grapes across her property?

Second, ¶1.b. of Article 201 requires that return flow for transferred water be to the source watershed, while proscribing any water from outside the Basin from being part of that return flow. We understand that this might have been cast to avoid having water transferred from outside area simply for the purpose of compensating withdrawals, in a manner that might transfer nuisance species of aquatic life. However, as written, it would create a conundrum for many communities’ water and sewage systems. What this says, taken literally, is that a community such as the City of Erie cannot have a regional sewage treatment plant that receives wastewater that might be produced from communities that draw some of their water in the basin and some of their water from outside the basin. If a regional plant collects water outside the basin, then the “return flow” would clearly include some water from outside the basin.

The result of this rule will be to divide communities and their water and sewer systems into irrational pieces, forcing communities to operate two water systems and two sewer systems instead of one, instead of providing services in a rational and cost-effective manner.

8. *The Agreement and Compact should avoid the vague precautionary approach, and should instead recognize the well-established principles of adaptive management.*

The Agreement, in its preamble, purports to establish a mandate to “act with precaution” in water management, with no explanation of what this means. The same is true of the purposes provision of the Compact, which refers to promoting a “precautionary approach.” Some would doubtless argue that this undefined precautionary approach mandates that in the absence of clear knowledge about future impacts, no withdrawals should be allowed and no permit decisions should be made.

Curiously, the Agreement and Manual totally avoid any discussion of the well-established principles of adaptive management. In the field of water resources, unlike some other resource management areas, very few decisions have irretrievable or irreversible impacts. If unexpected impacts occur, water withdrawals can be adjusted or additional conditions can be considered. Such an adaptive management approach has been successfully adopted in most eastern regulated riparian jurisdictions, where permit decisions are accompanied by requirements for ongoing monitoring and with periodic reviews that allow adjustment if new information disclosures previously unanticipated problems.

9. *The Chamber endorses the decision to remove the “Improvement Standard” from the criteria governing individual withdrawals.*

The Chamber acknowledges and endorses the removal from this version of the Compact and Agreement of the so-called improvement standard. That standard contained in the prior draft would have required major users to “incorporate a proposal for an improvement” to Great Lakes waters and natural resources, and demonstrate how those “measures will be implemented to improve the physical, chemical or biological integrity” of basin waters and resources. The Chamber strongly objects to the demand for such “beyond mitigation” improvement projects from in-basin water users, communities and industries. As we noted in our prior comments, we are not aware of any other basin in eastern North America where such a requirement is imposed to provide “improvements,” and adoption of such a requirement would most certainly have discouraged investments in the Basin by those who have a choice between siting in the Great Lakes region or other relatively water abundant areas in the eastern U.S. and Canada.

10. *We have serious concerns regarding the creation, structure, funding of any new regional regulatory body.*

As we said in our prior comments, the Chamber believes that the facts do not justify creating yet another layer of regulatory institutions at the regional level, such as suggested in the proposed Agreement and Compact. Indeed, here we have proposals to create not one, but two new regional entities – the Regional Body (the States + the Provinces) and the Great Lakes Basin Water Resources Council (composed of the States only). A more practical and much preferable

approach would be to strengthen, properly staff and fund, and rely upon State and Provincial water management agencies, and utilize the type of “consultative” process suggested above with respect to proposals that may have impacts beyond the boundaries of individual jurisdictions.

Where regional water management institutions have been effective, they are operating within basins that (1) have a limited number of States, (2) are relatively cohesive in both geographic extent, and (3) share a strongly interconnected economy. The Delaware, for example, encompasses the relatively cohesive area of the northeastern metropolitan area, where the four basin states (New York, Pennsylvania, New Jersey and Delaware) have many common economic, social, environmental and other interests and perspectives. Moreover, each of the four jurisdictions has significant land area in the basin, and a substantial stake in the basin. Even within this relatively small area, and among just these four jurisdictions, reaching compromise and consensus is often not easy. Despite their achievements, both DRBC and SRBC now face ongoing budgetary difficulties which threaten their effectiveness as truly regional institutions.

The Great Lakes region presents a much greater challenge in terms of creating any entity at the regional level that could work efficiently and cohesively. The ten jurisdictions of the region are spread out across two countries, some 1200 miles, with many of the jurisdictions having only a small percentage of their land area within the Great Lakes basin. While the Great Lakes States and Provinces have some common interests, the region is not cohesive to the same degree in terms of either its geography or economy as seen in the regions governed by the SRBC and DRBC. Obtaining the political will, support and commitment to not just adopt, but also sustain, a workable compact agency will be extremely difficult given the myriad of disparate interests across the span of this region.

The fact is that across the Basin, the ten jurisdictions are often in competition for attracting economic development, and we are concerned that the process envisioned by the Agreement gives those who “lose” the siting competition an opportunity to delay and thwart development that they may have coveted.

At the same time, we need to frankly recognize that some of the Great Lake’s jurisdictions are not just governmental entities, but also major players in the market place directly competing with private enterprise. Specifically, in one of the region’s largest water using sectors, the Canadian provinces through their Crown corporations (Ontario Hydro and Quebec Hydro), directly compete with private U.S. electric generators.

a. The Council envisioned by the Compact is poorly-suited to serve the basin’s needs.

Unfortunately, the Great Lakes Basin Water Resources Compact as currently crafted is not well suited to serve the needs of this basin. The proposed “Council” is created not as a true regional water management body, with the ability to make streamlined decisions on a regional basis for the good of the entire region. Rather, the Council is structured as merely another layer of review, hearings, and approvals. It adds little, except additional expense, delay, and complication in the project review process. In sum, the proposed Compact would not be a step forward for water management in the Great Lakes Basin. As currently framed, the Council would provide a poor forum for any form of water management decision making.

b. *The proposed Compact gives insufficient consideration to either the cost or requirements for funding such an agency.*

The proposals are disturbingly silent with respect to the estimated costs of creating and maintaining a new regional regulatory body in the Great Lakes Region. The Compact's only provisions concerning costs and funding are buried in §§2.4 and 3.6, which provide for adoption of a budget, allocation of costs among the states and provinces, and imposition of fees. However, no effort has evidently been made to evaluate how much the operations of the regional regulatory body will cost, or whether those costs are commensurate with the benefits to be achieved.

c. *The Compact's provisions would ostensibly bypass state budgetary and appropriation processes, and by vote of the Council obligate states to fund the regional body.*

Section 2.4, ¶ 4 of the Compact provides that the Council shall annually adopt a budget for each fiscal year, with the amount required to balance the budget to be "apportioned equitably" among the signatory parties by vote of the Council. But the proposed Great Lakes Compact fails to contain the important provisions found in the Delaware and Susquehanna Compacts which make clear that this "apportionment" by the Council members remains subject to the budgetary and appropriation procedures of each of the member jurisdictions.⁵

As we commented in the last round, the Great Lakes States may well find themselves faced with the situation highlighted in *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 71 S. Ct. 557, 95 L.Ed.2d 713 (1951), where the U.S. Supreme Court found that the terms of the Ohio River Basin Compact bound each of the states to appropriate funds for the sanitation commission created by the compact, and bound future legislatures to make appropriations for the continued activities of the commission despite contrary provisions in the West Virginia constitution. If the Compact were to be adopted in its current form, the legislatures of the various states could well face a major surprise to find that they gave up their plenary control over the state budget, and are bound to appropriate whatever amount the executives sitting on the Council may decide.

d. *Granting the power to impose fees for vaguely referenced services or facilities is unwise.*

Section 3.3 of the Compact indicates that the Council may adopt fees and charges for or in connection with the "use, maintenance and administration of facilities it may own or operate, or any product or service rendered."

This provision begs three questions: What facilities? What products? What services? Unlike the Delaware and Susquehanna Compacts, which allow the regional commissions to

⁵ Section 13.3(c) of the Delaware River Basin Compact and Section 14.3 of the Susquehanna River Basin Compact both make clear that while the executives of each state pledge to request the amounts of the basin commission budgets in their respective executives budgets, those requests are "subject to such review and approval as may be required by their respective budgetary processes."

construct and operate reservoirs, water supply projects, flood control facilities, and recreation sites, the proposed Great Lakes Water Resources Compact gives the proposed Council no such project or facility development powers. In the absence of such authority, what is basis for the Council establishing fees and charges?

It appears that the only function of the Council is to review and approve certain “exceptions” to the diversion prohibition. Is this the “service” upon which charges are to be levied? If so, then this provision is nothing more than a recast of the language from the prior draft, which proposed the ability to charge fees for any project review.

In our view, it is dangerous to grant a vague power to establish fees and charges where there is no accountability to any legislative body for either the amount or disposition of those fees. Given the relatively small number of diversion applications that may be anticipated annually, it is unlikely that fees can generate a sufficient and reliable flow of funding to support a regional regulatory body with well-trained and experienced staff. We note that to date, very few diversion proposals have come forward for review under the Water Resources Development Act process. Under the circumstances, unless the charges for project review are to be exorbitant (in the hundreds of thousands of dollars), there will simply not be enough money raised through fees to come close to funding a modern water management agency. The result will be either a huge shortfall that must be made up through appropriations from the states and provinces, or a seriously underfunded agency unable to attract and keep the type of multi-disciplinary staff needed to make sophisticated scientific evaluations.

Absent a clear budget and financial plan, the Compact proposal is seriously deficient, and bound to fail. Even the most sophisticated basin agencies have confronted serious budgetary difficulties in recent years. This proposal threatens to create an entity which will be even more financially tenuous.

11. The proposed Agreement and Compact do not adequately assure procedural due process, and threaten cumbersome litigation that will delay and discourage economic development projects.

The Chamber is seriously concerned that the draft Agreement creates processes for rendering regional “findings” and resolving disputes that may affect the rights and obligations of basin property owners and water users, but fails to provide clear due process procedures for hearing and appeal. At the same time, the Agreement appears to leave one of the most important parties (the applicant) with no seat at the table, and no opportunity to directly address questions and concerns about their project.

a. The applicant’s role in the regional review process.

While the draft Agreement has provision for public participation in the regional review process, it is notably devoid of any mention of the right of the project applicant to be heard. If States or Provinces are getting together to discuss a municipality’s, industry’s or agricultural user’s project, that user should be at the table and able to respond to questions, concerns, and issues. That theory we have heard that the host State or Province’s regulatory agency represents the applicant in this process is unrealistic. We do not expect regulatory agencies in any

jurisdiction to change their hats and become advocates of particular projects. The project sponsor almost always knows the most about the project, and must have an opportunity to defend their proposal without having to go through a cumbersome process of passing questions and answers back and forth through a host jurisdiction's regulatory personnel.

b. Lack of due process in the declaration of findings process.

The proposed Sustainable Water Resources Agreement purports to set up a mandatory process by which some withdrawal application would be referred to the Great Lakes Water Resources Regional Body ("Regional Body") for review, and allows that Body to render a "declaration of findings" as to whether or not the application meets the Decision Making Standards. While Article 506, ¶8, imposes an obligation on the Originating Party (*i.e.*, the project site host jurisdiction) to consider the declaration of findings before deciding whether or not to issue a permit approval, the terminology of the Agreement suggests that the Regional Body's "declaration of findings" is more than just a set of comments or recommendations that may be considered (or ignored) by the host jurisdiction.

The terms used in the Agreement imply that the Regional Body is rendering "*findings*" (that is, a determination) on the conformity of a given application with particular regulatory standards. In turn, such a determination by its nature would appear to directly and materially affect the rights, privileges and obligations of the property owners and project sponsors involved in the particular withdrawal application. Yet, the Agreement is devoid of any due process protections for the project sponsor, including any process by which the project sponsor may appeal or challenge the purported "findings" rendered by the Regional Body. The Agreement purports to place the Regional Body in a wholly unaccountable position, ostensibly above the law and outside the due process purview of review by the courts. Such a situation is not acceptable, and runs counter fundamental principles of due process protected by both federal and state constitutional provisions.

Pennsylvania and most other states have very specific administrative hearing procedures by which evidence is gathered and admitted into the administrative record. Under those state administrative procedures, only competent and admissible evidence may be presented and included in the record. These state procedures also provide, in most cases involving contested matters, the protections of requiring submission of testimony under oath and subject to cross-examination. Such procedures do not allow into the formal administrative record unsworn and unsupported statements. Moreover, to avoid protracted proceedings, most state administrative forums require that the persons participating in presenting evidence to become part of the administrative record have "standing" by showing a direct, immediate and substantial interest that may be affected by the proposed application.

12. The citizen suit provisions in the proposed Compact are inappropriate and should be removed.

Section 3.9, ¶ 4 of the proposed Compact would create a citizen suit provision, allowing any "aggrieved person" to commence an action to enforce the terms of the Compact against any other person who is alleged to have undertaken a diversion or consumptive use without required

approval. To our knowledge, this would be the first time that an interstate water resources compact created such a citizen suit right.

The dangers of such a citizen suit provision lie in the very nature of this draft Compact. Even today, after some years of debate, there remain disagreements among divergent basin interests as to what constitutes a “diversion.” While a host jurisdiction may interpret the Compact as not being applicable to a particular withdrawal, and no other jurisdiction objects, the citizen suit provision allows individuals who take a different interpretation of the Compact to bypass such decisions and go to court to reinterpret the terms of the Compact. Given the loose wording of the Compact, and the ample room it provides for misinterpretation (as discussed above), the citizen suit provision can lay fertile ground for real mischief.

We strongly question the wisdom of pursuing a compact at this time, and a citizen suit provision is most certainly not necessary to achieve the proposed Compact’s ends. If a true diversion or significant consumptive use were to be proposed that truly threatened the resources of the basin, we are sure that the proposed Council or at least one other basin state or province would be well motivated to seek injunctive relief to enforce the Compact’s review requirements. The real world effect of the proposed citizen suit provision is to threaten legitimate enterprises, who have followed the interpretations and obtained the approvals of their host jurisdictions, with a double jeopardy of collateral attack in another forum by some disgruntled individuals or organizations.

13. The review and appeal procedures in the proposed Compact create opportunities for duplicative, expensive and wasteful litigation.

All of the host States and Provinces, who are expected to have primary permitting authority in approving water withdrawals, have administrative and judicial procedures for appropriate hearings and appeals. We see no need to duplicate those processes with yet another layer of hearings, decisions, and appeals, as outlined in the proposed Compact.

Beyond that, however, the Compact creates an avenue for duplicative appeals of water withdrawal approvals, by allowing persons who disagree with the decision to approve a project to not only challenge the host jurisdiction’s decision, but to alternatively (or concurrently) appeal the Council’s concurring decision to the Federal District Court in the District of Columbia (or in the district where the Council may have its offices). Thus, a project applicant in Minnesota faces the prospect of not only addressing hearings and challenges in state courts, but the need to trek to Washington, D.C. to defend their approvals. While lawyers may find this prospect of duplicative appeals in far off forums to be a boon, the specter to regional farmers, communities and industrial enterprises is daunting and disheartening.

14. Water conservation programs should be focused on voluntary efforts, rather than vague mandates.

The Chamber endorsed the ***voluntary*** conservation program provisions of the Pennsylvania Water Resources Planning Act, and we believe that such ***voluntary*** programs are a proper starting point for the Great Lakes Basin.

While appreciating the importance of conservation, the Pennsylvania Chamber joins with other associations and industries across the Great Lakes Basin in questions regarding the intended scope and intent of the “water conservation programs” required under Section 303 of the Sustainable Water Resources Agreement. Section 303 requires each state and province to “develop and implement Water conservation programs” that will ensure improvement of water and water dependent natural resources, protect the integrity of the ecosystem, and retain and restore surface and ground water quantity. Paragraph 4 mandates that Parties achieve conservation through demand and supply-side Measures and incentives. The concept of “Measures” is defined in Article 103 to mean legislation, regulations, directives, guidelines, policies, administrative practices and other procedures.

The question, clearly, is just what is the scope of water conservation programs to be imposed on existing water users across the basin. Given the language of the Agreement, it appears that the drafters envision a regulatory program, including mandates imposed either through legislation or by mere administrative fiat, that would potentially involve the government in dictating major modifications to facilities and processes across the basin. If (as is implied by the current wording), the water conservation mandate is to be applied to all existing, as well as new or increased, withdrawals, then ostensibly every user across the basin will be required to retrofit their facilities to meet the government’s new vision of what conservation measures are environmentally sound and economically feasible.

In our view, adopting such a broad mandatory, command-and-control conservation program across the basin is not justified. Given cost-considerations relating to pumping, water supply treatment, and wastewater treatment, most industries and commercial enterprises are already well-motivated to find and implement more efficient methods of using and recycling water. Business does not need agency personnel dictating the manner and method of water use and conservation. Indeed, we doubt that any agency, no matter how well-motivated, can muster the expertise and understanding of each industrial sector, facility and process, or the myriad of nuances that go into making choices regarding the many divergent water using processes that occur across this vast region. Creating a mandatory program where all water users have to go through a government-supervised procedure of identifying and evaluating conservation methods will rapidly bog down the progress of water conservation.

As seen in the Pennsylvania legislation, the most effective approach to promoting water conservation is a combination of education and technical outreach. That should be the focus of the Agreement’s water conservation program for existing uses, and language suggesting a regulatory “top down” conservation program should be removed.

15. Water use data gathering should avoid duplication with existing programs, and must assure protection of confidential business information at all levels.

As we have in the Pennsylvania statute, the Chamber can generally support the proposals for registration and reporting of water withdrawals over specified trigger amounts. We recognize that collection of such data is the foundation of any decent water planning and management effort; and in the absence of such data collected on an accurate and consistent basis, rational water management plans and decisions cannot be formulated.

We have two major concerns.

First, it is imperative that we avoid overlapping and inconsistent requirements, which will lead to further duplications of effort and confusion in the regulated community. Pennsylvania has just enacted a water registration and reporting system, and our statute has specific instructions regarding the scope and limitations of those requirements. We are still working on obtaining understanding of these requirements across the thousands of potentially affected entities and operations, in order to achieve a reliable rate of return and compliance. It would be extremely counterproductive if the Great Lakes Basin were to adopt inconsistent requirements, which would only add confusion to the process that is now underway.

Our second concern is protection from public disclosure of confidential business information. Pennsylvania's law is quite specific on the subject of protecting such confidential information, but the proposed Agreement and Compact are silent on the issue. While state, provincial and regional governmental entities may receive and review data for planning purposes, the specific production data for particular companies and facilities should be aggregated (and not ascribed to particular entities) in publicly reported and available information. The law and procedures should contain specific protections for confidential information, including confidential business data and information, the disclosure of which might threaten the security of public water supplies.