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Ohio Takes Next Step to Implement Great Lakes-St. Lawrence River Basin Water Resources Compact

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INTRODUCTION

Ohio House Bill 473¹ (“H.B. 473” or the “Act”) authorizes the Division of Soil and Water Resources within the Ohio Department of Natural Resources (“ODNR”) to establish a water-withdrawal and consumptive-use permitting program in Ohio for the Lake Erie watershed, as required by the Great Lakes-St. Lawrence River Basin Water Resources Compact (the “Compact”).² Once the permitting program is in place, owners or operators of a “facility” that exceeds certain threshold capacities for new or increased water withdrawals or consumptive uses in the Lake Erie watershed must obtain a permit. The Act also provides that facilities with new or increased withdrawals that exceed maximum daily thresholds but fall below those levels when averaged over a 45-day or 90-day period (depending upon the source watershed) are exempt from permit requirements.

BACKGROUND

The Compact is an agreement among eight states, including Ohio,³ that share in the water resources of the Great Lakes and portions of the St. Lawrence River. The Compact requires that the party states manage their water withdrawals with common minimum standards for water conservation and sustainable use.⁴ Ohio and other member states have adopted the Compact by statute,⁵ and Congress ratified it in 2008.

Among other things, the Compact prohibits most new or increased interbasin diversions (transfers out of the Great Lakes Basin) and intrabasin diversions (transfers between separate Great Lakes watersheds).⁶ These types of diversions may be permitted in some circumstances, primarily if they meet the Compact’s “exception standard.”⁷ The Compact also requires each party state to establish (1) an inventory of existing water-withdrawal and consumptive-use data and (2) a permitting program regulating new or increased water withdrawals from the water sources of the Great Lakes and St. Lawrence River Basins.⁸

¹ H.B. 473, 129th Gen. Assem. (Ohio 2012), available at http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_473.

² Pub. L. No. 110-342, 122 Stat. 3739 (2008) (“Compact”).

³ The other states are Illinois, Indiana, Michigan, Minnesota, New York, Pennsylvania, and Wisconsin.

⁴ See Compact §§ 4.2, 4.10-4.12.

⁵ See, e.g., Ohio Rev. Code Ann. § 1522.01.

⁶ Compact §§ 4.8-4.9.

⁷ *Id.* § 4.9(4).

⁸ *Id.* §§ 4.1, 4.10.

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In establishing a permitting program, the party states must follow the Compact's minimum "decision-making standard."⁹ Under that standard, a new or increased water withdrawal or consumptive use within the party state must (among other things) (1) be returned to the source watershed less the amount used; (2) be reasonable (based on a series of factors in the Compact); (3) result in no significant individual or cumulative adverse impacts on the water resources (and water-dependent natural resources) of the source watersheds; (4) implement environmentally sound and economically feasible conservation measures; and (5) comply with applicable local, state, federal, and international law.¹⁰

In 2009, the General Assembly of Ohio passed legislation that authorized the creation of an advisory board to adopt recommendations for legislation to implement the Compact.¹¹ As part of that process, the advisory board collected data submitted by existing facilities (the "baseline facilities") regarding their capacities and average water withdrawals over a 30-day period (the "baseline report"). In addition, the board adopted recommendations for a permitting program, but did not establish agreed-upon thresholds that should trigger permit requirements for the Lake Erie watershed.

H.B. 473 supplies those thresholds.

H.B. 473

Governor Kasich signed H.B. 473 on June 4, 2012. H.B. 473 implements the requirements of the Compact and requires that the Chief of ODNR's Division of Soil and Water Resources establish a program with permit requirements based on the Compact's decision-making standards. The program should be in place by March 4, 2013 (180 days after the Act's effective date).¹²

The Act invokes various permit requirements for "facilities." A "facility" is defined broadly to include "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 . . ."¹³

First, the Act requires a permit to install or operate a "facility" or equipment that results in a new or increased diversion of water out of the Lake Erie watershed to another watershed.¹⁴ A person may obtain this type of permit only if the Chief of ODNR's Division of Soil and Water Resources finds that the diversion meets an exception to the general prohibition in the Great Lakes Compact. Therefore, consistent with the Compact's exceptions, H.B. 473 establishes a permit requirement for any new or increased interbasin diversions (transfers out of the Great Lakes Basin) and intrabasin diversions (transfers between separate Great Lakes watersheds).

⁹ See *id.* §§ 4.10-4.12.

¹⁰ *Id.* § 4.11.

¹¹ See ODNR, Ohio Great Lakes Compact Advisory Board, <http://ohiodnr.com/?TabId=21511> (last visited July 12, 2012).

¹² H.B. 473, 129th Gen. Assem. § 1 (Ohio 2012) (to be codified at Ohio Rev. Code Ann. § 1522.12).

¹³ *Id.* (to be codified at § 1522.10(H)).

¹⁴ *Id.* (to be codified at § 1522.11). The Act repeals parts of the Ohio Great Lakes Charter that formerly allowed certain diversions out of the Lake Erie watershed. See *id.* §§ 1-2 (repealing and replacing § 1501.32).

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As explained below, H.B. 473 also specifies the circumstances under which an owner or operator of a “facility” is required to obtain a permit for new or increased water withdrawals or consumptive uses from the Lake Erie watershed.¹⁵

When is a permit required? H.B. 473 provides the following provisions¹⁶ that trigger permit requirements for a facility, in the absence of any applicable exemption:

- **Withdrawals from Lake Erie or a Recognized Navigation Channel.** A permit is required for a facility that has a new or increased capacity¹⁷ for withdrawals or consumptive uses from Lake Erie or a recognized navigation channel¹⁸ of at least **2.5 million gallons per day**.
- **Withdrawals from Rivers, Streams, or Groundwater within the Lake Erie Watershed.** A permit is required for a facility that has a new or increased capacity for withdrawals or consumptive uses from any river or stream¹⁹ or from groundwater in the Lake Erie watershed of at least **1 million gallons per day**.
- **Withdrawals from a “High Quality Water” (Rivers or Streams).** A permit is required for a facility that 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” (as designated by Ohio’s Environmental Protection Agency)²⁰ of at least **100,000 gallons per day**.

What facilities are exempt from permit requirements? There are several exemptions from permit requirements specified in H.B. 473 for withdrawals from the Lake Erie watershed. Specifically, the Act does not require a permit for facilities or proposed facilities that have a withdrawal and consumptive use capacity or proposed capacity below the threshold amounts.²¹ Also, an owner or operator of a baseline facility²² does not need a permit unless its withdrawal and consumptive use

¹⁵ Note that under other state law, permits are required for large withdrawals from waters of the state. Under section 1501.33 of the Ohio Revised Code, modified slightly by H.B. 473, “no person shall allow a facility that the person owns or operates to withdraw waters of the state in an amount that would result in a new or increased consumptive use of more than an average of *two million gallons of water per day in any thirty-day period* without first obtaining a permit from the director of natural resources under section 1501.34 of the Revised Code.” *Id.* § 1 (to be codified at § 1501.33) (emphasis added). Under H.B. 473, however, if a permit is required for withdrawals in the Lake Erie watershed, the applicant need not obtain a permit under section 1501.34. *Id.* (to be codified at § 1501.33(D)).

¹⁶ *Id.* (to be codified at § 1522.12).

¹⁷ “Capacity” means “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.” *Id.* (to be codified at § 1522.10(D)).

¹⁸ “Recognized navigation channel” means “that portion of a river or stream extending from bank to bank that is a direct tributary of Lake Erie and that, as of the effective date of this section, is a state or federally maintained navigation channel.” *Id.* (to be codified at § 1522.10(M)).

¹⁹ “River or stream” means “a body of water running or flowing, either continually or intermittently, on the earth’s surface or a channel in which such flow occurs.” *Id.* (to be codified at § 1522.10(N)).

²⁰ “High quality water” means “a river or stream segment that has been designated by the environmental protection agency under *Chapter 3745-1 of the Administrative Code* as an exceptional warm water habitat, cold water habitat, outstanding state water, or superior high-quality water.” *Id.* (to be codified at § 1522.10(J)).

²¹ *Id.* (to be codified at §§ 1522.12(B), 1522.14(A)).

²² “Baseline facility” means “a facility identified in the baseline report or a facility added to the baseline report under section 1522.16 of the Revised Code.” *Id.* (to be codified at § 1522.10(A)).

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capacity (a) exceeds the capacity listed in the baseline report²³ and (b) exceeds the threshold amounts in H.B. 473.²⁴

A key issue in determining the applicability of the permit requirements or exemptions is the period used to measure the average amount of a withdrawal. Applicability of permit requirements and exemptions is based on whether, *on average*, a new or increased maximum daily water withdrawal or consumptive use exceeds a maximum daily threshold.²⁵ With respect to the period utilized to calculate the average maximum daily withdrawal or consumptive use, the Act provides as follows:

- ***Withdrawals and Consumptive Uses from a Non-“High Quality Water.”*** If the maximum daily withdrawal of a facility is less than the threshold when averaged ***over any 90-day period***, the owner or operator of the facility does not need a permit.
- ***Withdrawals and Consumptive Uses from a “High Quality Water.”*** If the maximum daily withdrawal of a facility from a high quality water (1) occurs at a point where the area of the watershed of the river or stream is greater than 50 but less than 100 square miles and (2) is less than the threshold when ***averaged over any 45-day period***, the owner or operator of the facility does not need a permit. If the area of withdrawal point of the high quality river or stream is less than 50 square miles, this exception does not apply.²⁶

The Act provides additional exemptions for (1) ***electric generating facilities*** that increase their consumptive use due to federal regulation unrelated to an increase in production at the facility; (2) an increase in consumptive use directly related to supplying a ***major electric generating facility*** subject to regulation under section 4906 of the Ohio Revised Code; (3) withdrawals from ***impoundments*** used not for industrial or public water supply purposes, but for (i) ***farm ponds, golf course ponds, nursery ponds, stormwater retention or other private ponds***, or (ii) other impoundments used in part for ***firefighting purposes***; (4) temporary increases for ***emergency*** purposes or humanitarian crises; and (5) withdrawals from ***impoundments*** substantially filled by a baseline facility or a permitted facility.²⁷

What are the permit application requirements? The Act provides that the Chief of ODNR’s Division of Soil and Water Resources must develop an application form and require the applicant to include various information regarding water withdrawals and consumptive uses. The Act also requires a conservation plan. To illustrate:

- ***Water Withdrawal and Consumptive Use Information.*** The application must include the facility’s withdrawal capacity, its location, the source of intake and discharge/return flows, location and nature of consumptive uses, average monthly and annual volumes of withdrawals and rates of consumptive use, and a description of alternatives that may satisfy the applicant’s water needs if the application is denied or modified.²⁸
- ***Water Conservation Plan.*** In addition to information regarding the proposed withdrawal and water use, each applicant must submit a water conservation plan. A water conservation plan must

²³ “Baseline report” means “a list of the withdrawal and consumptive use capacities of facilities that was developed for purposes of Section 4.12 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.” *Id.* (to be codified at § 1522.10(C)).

²⁴ *Id.* (to be codified at § 1522.12(C)).

²⁵ *Id.* (to be codified at §§ 1522.12, 1522.14).

²⁶ *Id.* (to be codified at § 1522.14(A)-(B)).

²⁷ *Id.* (to be codified at § 1522.14(D)-(M)).

²⁸ *Id.* (to be codified at § 1522.12(C)).

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describe the environmentally sound and economically feasible water conservation practices the applicant intends to follow. ODNR must keep confidential all or portions of the plan that contain trade secrets.²⁹

When can an owner or operator commence the installation of a facility or equipment? An owner or operator of a non-exempt facility may commence installation of a facility or associated equipment after submitting an application for a permit that the Chief deems complete. The operator is not required to wait for the Chief to issue the permit. However, an owner or operator subject to a high-quality-water threshold cannot install or operate a new facility or associated equipment that meets the above threshold criteria without first obtaining the permit from the Chief.³⁰

What if a permit application is denied? The Chief of ODNR’s Division of Soil and Water Resources is required to issue withdrawal and consumptive use permits within 90 days after receiving a complete application, subject to the Chief’s determination that the facility meets all of the criteria established in the Compact’s decision-making standard. If the Chief elects to deny the application for a permit, the Chief will issue a proposed order accordingly. A “person who is or will be aggrieved or adversely affected” (meaning a person with a direct economic or property interest) must file a written objection. The Chief will conduct a hearing on the proposed order in accordance with Chapter 119 of the Ohio Revised Code. An aggrieved person may appeal to the court of common pleas of Franklin County or the court of common pleas in which the facility is located within 15 days after the final order.³¹

Can permits be transferred? H.B. 473 authorizes the transfer of a withdrawal and consumptive use permit upon the sale or transfer of a facility as long as the location of the facility, the source of water, and the withdrawal and consumptive use capacities do not change. Transferred capacity of a baseline facility does not require a permit under the Act.³²

How long does a permit last? Once issued, a permit is valid until “facility abandonment” – *i.e.*, the voluntary and affirmative termination of a facility’s withdrawal and consumptive use capacity as listed in the permit. For a baseline facility that does not request an extension for active status and that has the potential to withdraw or use water from Lake Erie or a recognized navigational channel, facility abandonment means 15 consecutive years of nonuse. For all other baseline facilities that do not request an extension of active status, the nonuse threshold for facility abandonment is 36 consecutive months. Withdrawal and consumptive use permits require facilities to issue a certification of compliance every 5 years.³³

Are there alternatives to water withdrawal and consumptive use permits? H.B. 473 establishes an “experimental permit” program to encourage innovation in water use practices and technology and to promote economic growth and job creation. Experimental permits are not subject to the thresholds in the Act, but they must (1) be reasonable based on the “reasonableness” factors in the Compact; (2) use no more water than necessary to determine the effectiveness and economic feasibility of the experimental use; and (3) not reduce the protections afforded to water resources and water-dependent natural resources of the Lake Erie watershed.³⁴

²⁹ *Id.* (to be codified at § 1522.17).

³⁰ *Id.* (to be codified at § 1522.12(A)(3)(b)).

³¹ *See id.* (to be codified at §§ 1522.12(G), 1522.13, 1522.21).

³² *Id.* (to be codified at § 1522.15).

³³ *See id.* (to be codified at §§ 1522.10(B), (I), 1522.12(D), 1522.16).

³⁴ *Id.* (to be codified at § 1522.131).

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CONCLUSION

ODNR's Division of Soil and Water Resources has 180 days from September 4, 2012, to establish the permitting program. Once established, owners and operators of facilities must determine whether new or increased water withdrawals or consumptive uses are subject to the Act's permit requirements. Stakeholders would be well served by monitoring the progress of the Division in establishing these new permit requirements for water withdrawals in the Lake Erie watershed.

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