

Pennsylvania Chamber of Business & Industry

Comments on Annex 2001 Implementing Agreements

October 6, 2004

On behalf of its over 10,000 members, representing the spectrum of Pennsylvania industry, business, and commercial enterprises, the Pennsylvania Chamber of Business & Industry appreciates the opportunity to provide comments to the Pennsylvania Department of Environmental Protection and the Council of Great Lakes Governors concerning the proposed Annex 2001 Implementing Agreements, including the proposed *Great Lakes Basin Sustainable Water Resources Agreement* (the “Agreement”), the related *Appendix 1, Decision Making Standard* (“*Decision Making Standard*”) and *Appendix 2, Procedures Manual* (“*Procedures Manual*”), and the draft *Great Lakes Basin Water Resources Compact* (the “Compact”).

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 needs to be consistent with the objectives of promoting an orderly, integrated and comprehensive development, use and conservation of the basin’s waters 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.

As a starting point, we believe that water management in the Great Lakes Basin, and across the remainder of the Commonwealth, 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. As Kathleen McGinty, Secretary of the Pennsylvania Department of Environmental Protection stated most succinctly at the September 27th meeting of the Statewide Water Resources Committee, there is no industry you can name where water is not an essential ingredient to its success, and 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.

Even though Pennsylvania’s portion of the Great Lakes Basin is a mere sliver, 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. 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.

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 competes globally. Those 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.

While the Chamber supports many of the objectives of the proposed agreements, we have serious reservations concerning a number of the proposed provisions and institutional arrangements. To briefly summarize the points that are illuminated in greater detail below:

- The Chamber supports provisions for gathering and reporting of data, as a necessary foundation of any water management program based on sound science. We believe that Pennsylvania's Act 220 provides a solid foundation for such data collection, and would urge that its provisions be incorporated into the draft Great Lakes agreements. Among other items, appropriate provisions need to be added to the Great Lakes proposals to protect confidential business information.
- 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 large consumptive uses might be subject to a process for regional consultation and comment, we do not believe a compelling case has been made for erecting another layer of multi-jurisdictional review and approval.
- 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.
- The Agreement, Compact, and Decision Making Standard confuse the concepts of an out-of-basin diversion with in-basin water uses; and would ostensibly convert in-basin water users into disfavored "diversions." The Chamber believes that the agreements should 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.

- 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. Those standards will discourage much needed investment and redevelopment within the Basin. The agreements should adopt the more reasonable and balanced decision making criteria for in-basin uses. Examples of more reasonable factors are reflected in model water management laws, such as the ASCE Regulated Riparian Model Water Code.
- 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 “minority rule” procedures embraced by the Compact, where 3 out of 10 members can veto a consumptive use project, are unacceptable.
- 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.

Definition of “Diversion” and “Consumptive Use”

The Agreement, Compact and Decision Making Standard 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.”

One of Chamber’s concerns involves the confusing and inconsistent statements contained in the Agreement, the Compact, the Decision Making Standard and the Procedure Manual as to what constitutes a “diversion” versus a “consumptive use.”

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. Recognizing the difference between various types of transfers, the Great Lakes Charter creates two definitions: one for “interbasin diversion” and a second for “diversion.” The Charter defines “interbasin diversion” to mean a transfer of water from the Great Lakes Basin into another watershed.”¹ The Charter then adds a separate definition of “diversion” to mean “a transfer of water from the Great Lakes Basin into another watershed, or from the watershed of one of the Great Lakes into that of another.” As such, the Charter adds a consideration of certain *intrabasin* transfers where water is moved from the watershed of one Great Lake (e.g., Lake Superior) to another (e.g., Lake Michigan).

In order to differentiate between in-basin and out-of-basin transfers of water, we would suggest that the Sustainable Water Resources Agreement adopt separate definitions of “interbasin diversion” and “intrabasin diversion.” At the same time, we would suggest that the States and Provinces more closely examine, develop and apply different standards and procedures to those transfers that involve interbasin diversions (that is, transfers of water outside of the Great Lakes Basin that are subject to WRDA provisions) versus those that involve transfers within the Basin from the watershed of one Lake to another. The standards governing interbasin and intrabasin transfers of water need not be the same. Indeed, a strong argument can be made that they should not be the same, since the relative impacts to the basin as a whole are quite different.

Definition of “Increased” Diversion or Consumptive Use Above Trigger Limits

The Agreement and Procedures Manual are vague regarding what will constitute a “increased” diversion or consumptive use above the trigger quantities, and specifically whether it is the *increased* amount or the *total amount* of the withdrawal or consumptive use that will be compared to the trigger value. For example, if manufacturing concern currently has the capacity and permitting authority to withdraw and consumptively use 5.1 mgd, and proposes a change in operations and facilities that would result in a consumptive use of 5.3 mgd (a 200,000 gpd increase), does one determine the triggering of the review criteria based on the 200,000 gpd increase (i.e., the review standard is not applicable) or look at the total resulting amount of consumptive use (thereby triggering the review criteria)?

Various entities have provided different interpretations of this aspect of the Agreement and Procedures Manual, and this confusion should be resolved. Following the logic of the Agreement (where the concern is changes from current conditions), the triggering criteria should consider solely the *change* from current conditions. It would seem illogical to say that a new industry could consumptively use 4.9 mgd without special review, while an existing company using 5.1 mgd attempting to improve its processes with a very small (say 0.1 mgd) increase in withdrawal would be forced to go through an arduous review procedure.

¹ As defined in the Charter, the “Great Lakes Basin” is “the watershed of the Great Lakes and the St. Lawrence River upstream from Trois Rivieres, Quebec.” Thus, the Charter’s definition of “interbasin diversion” matches the concept reflected in WRDA, focusing on out-of-basin diversions.

Procedures and Standards for Review of Diversions

Different review criteria should be developed for interbasin and intrabasin transfers.

This is not a situation where “one size fits all.” The concerns over conserving water within the basin as a whole (as reflected in the WRDA and Great Lakes Charter) may argue for more stringent criteria when considering out-of-basin diversions than transfers of water for uses that occur entirely within the basin. While transfers between two lakes of the Great Lakes may merit regulation (as recognized by the Charter), the level of scrutiny and the degree of regional review accorded to transfers within the basin might well be different than applied to out-of-basin diversions. Intrabasin transfers do not necessarily raise the same concerns regarding loss of water to the basin’s economy and ecosystem as presented by interbasin diversions. Lumping all diversions into the same “bucket” – essentially treating all watershed transfers, including those that keep water within the basin, as if they were out-of-basin transfers is not warranted, and will unduly penalize in-basin municipalities and businesses.

Some of the review criteria appear to be inapposite or inappropriate as applied to diversions.

In terms of establishing criteria for review of interbasin diversions (a topic that certainly needs to be addressed), the proposed Decision Making Standard contains statements that do not appear to make sense. For example, § I.A would indicate that new or increased diversion of 1 mgd would be approvable only when “there is no reasonable Water supply alternative within the basin or watershed of the Great Lake in which the Water is proposed for use” If such “standard” is intended to apply to interbasin diversions, it is nonsensical. An interbasin diversion by definition involves a use out of the basin, and it would be strange then to ask whether there is a reasonable water supply alternative within the basin or watershed of the Great Lakes to serve the intended use. When dealing with interbasin diversions, the question should be whether there is a reasonable water supply alternative in the *importing* basin that could and should be used instead of transferring water from the Great Lakes.

Similarly, § I.C of the Decision Making Standard does not appear appropriate for the review of interbasin diversions, in calling upon all of the water diverted to be returned to the Great Lakes. A more logical consideration would be to consider whether and how the amount of water that is being diverted out of the basin will be compensated for – which might occur through counterbalancing transfers of water into the basin at another point, or improvement measures to otherwise enhance basin resources.

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

In order to avoid unnecessarily hindering rational community development, the Agreement and Compact should consider developing less restrictive standards and review criteria for withdrawals by communities and public water supply systems that straddle the basin.

Unfortunately, the current draft of 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 an iron fence around the Basin is plainly irrational. 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 these communities, the Agreement and Compact appear to declare that “you can’t take any Basin water across this line, unless you bring it back drop for drop.” As a result, communities and water systems are divided into irrational pieces, forced to operate two water systems instead of one, and unable to provide services in a rational and cost-effective manner – all to achieve a purely arbitrary objective of “no transfer/no diversion.” While the drafters of the Agreement might think that they took aim at those who have pipe dreams of promoting massive diversions to the southwest U.S. or overseas water users, those who are truly “shot” are the communities and water systems who actually share part of the Basin.

Procedures and Standards for Review of Consumptive Uses and Withdrawals for Use in the Basin

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 approval.

The Chamber believes that the Agreement and Compact set 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 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 Compact propose to substantially “raise the bar” on in-basin consumptive uses by forcing all major consumptive uses (over 5 mgd in any 120-day period) to undergo “regional review.” (Decision Making Standard at § II). The Compact at § 3.4 takes this yet one step further. Under proposed Compact § 3.4, new or increased consumptive uses subject to “regional review” would require approval by the newly-created Great Lakes Basin Water Resources Council. Council approval would be given “unless three or more Council Members disapprove.” In essence, this allows any three States or Provinces to veto such a new or increased consumptive use. Thus, even if the host jurisdiction (for example, Pennsylvania) found that the proposed consumptive use (be it irrigation, a new power plant, or expanded manufacturing facility) meets all requirements for approval, any three other States or Provinces (even if far removed from the facility in question and unaffected by it) could veto the project.

This “minority veto” arrangement is unprecedented and extraordinary. We are not aware of any similar “minority veto” provisions among the most comprehensive basin water management compacts. In other major basin compacts (such as the Delaware River Basin Compact and Susquehanna River Basin Compact) where regional bodies are given the power of project approval or disapproval, a majority vote of a commission (taken after full opportunity for public hearing and due process) governs the project approval process. Ignoring this precedent, the proposed Compact creates a system where a small minority governs the approval of consumptive uses in the basin, with the power to prevent and exclude valuable economic development and enterprises in other jurisdictions. Faced with the prospect of being dragged into such a cumbersome, complex and demonstrably undemocratic 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 criterion.

The process need not be so cumbersome or anti-democratic 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 “consultation process,” under which the host jurisdiction would provide notice of the application to other Great Lakes jurisdictions with an invitation to comment. That consultation process should, however, be subject to specific time frames for raising objections and 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.

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 Compact, Agreement and Decision Making Standard 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 Decision Making Standard purport to 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.

1. Consumptive water use allowances.

Sections II.C and V.C of the Decision Making Standard (reflected in Compact §§ 8.3 and 9.3) require that any withdrawal greater than 100,000 gpd, as well as any consumptive use over 5 mgd, may not be approved unless all water withdrawn from the Great Lakes is returned to the Great Lakes Basin, less an “allowance for Consumptive Use of the applicable water use sector.” This provision is not further explained, either in the Decision Making Standard or in the accompanying Procedures Manual.

As written, these provisions suggest that some unnamed entity will determine “consumptive use allowances” for each water use sector against which all entities in that sector will be judged – such as 25% allowable consumptive use factor for irrigation, or 10% consumptive use factor for automobile manufacturing. In our view, such an approach is not reasonable or workable. 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.

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

Sections II.C and V.C of the Decision Making Standard (reflected in Compact §§ 8.3 and 9.3 of the Compact) state a further requirement with respect to return of water withdrawn by all withdrawals over 100,000 gpd and all significant consumptive uses. That standard would require:

Water Withdrawn directly from a Great Lake or from the St. Lawrence River shall be returned to the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively. Water 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 shall be returned to 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

First, unlike the first sentence of §§ II.C and V.C, the second and third sentences facially require that **all** water withdrawn be returned; there is no wording recognizing an exception for

the amount of consumptive water. While ¶2)C of the Procedures Manual suggests that the intent of the Return Flow requirement to assure return of water to the Source Watershed “less an allowance for Consumptive Use,” the allowance for consumptive use is not mentioned in the standard itself.

Second, we are troubled by definition of “Source Watershed” and the practical application of this standard. Article 103 of the Agreement defines “Source Watershed” in a manner that indicates that if water is withdrawn “from the watershed of a stream that is a direct tributary to a Great Lake or a direct tributary to the St. Lawrence River, then the Source Watershed shall be considered to be the watershed of that direct tributary stream.” 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.” Under such an interpretation, withdrawals from not only streams but also each groundwater well would need to be returned at or near the point of origin to be within the “source watershed.” 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. Requirements for no significant impact.

Sections II.D and V.D of the Decision Making Standard (reflected in Compact §§ 8.3 and 9.3) require 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 to overcome.

The Procedures Manual proposes that the “no significant impact” criterion be interpreted with a number of subtests that are extremely troublesome.

No Measurable Change to Variability: The Manual 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.

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. This no measurable change criterion would effectively bar both run-of-river and “high flow skimming” withdrawals, and would likewise preclude the development of any reservoirs to capture high flows for use during droughts.

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 – off-limits to any withdrawals, no matter how beneficial to the public welfare and economy of the basin. 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.

No significant/measurable impacts to existing water uses: The Procedures Manual 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 (say 60 foot) 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. Assume 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, the shallowest, least efficient well will determine the availability 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 public policy 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

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.*

No introduction of potentially harmful contaminants: Under the “chemical criteria,” the Procedures Manual indicates that a significant impact will be found, and a withdrawal project must be disapproved, if it involves the “[i]ntroduction of potentially harmful toxin, contaminants and excessive nutrients.” As cast, virtually any discharge of any pollutants would be barred.

A formulation which precludes introduction of “potentially harmful” contaminants creates an impossibly high hurdle. By definition, any contaminants are *potentially* harmful; if there were no potential, then the substance would not be considered a pollutant or contaminant. Although we doubt the document’s authors 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.

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 discharge of pollutants 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 an 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.

Decline in population levels or health of native species: The biological criteria that calls 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 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. Biological sciences literature 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. For example, one multi-year study recently completed at one bottled water spring source in the mid-Atlantic region showed variations in fish populations over a six year period, but those variations appeared to have no discernable long term trends or measurable correlation to withdrawals. Indeed, that study showed that in some instances, slightly higher flows allowed predator fish species (brown trout) to occupy areas of a stream and apparently causes an observed decline in the numbers and biomass of other species (brook trout) that were either consumed or escaped for cover in shallower waters.

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.

4. Requirements for improvement measures.

Section II.F of the Decision Making Standard would require that in-basin consumptive uses over 5 mgd not only mitigate their potential adverse impacts, but also “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 Procedures Manual indicates that mitigation of impacts cannot be considered improvement. Thus, even if the impacts of a proposed consumptive use are *de minimis* and/or fully compensated, this “standard” will require an improvement project in all cases.

The Chamber strongly objects to the demand for such “beyond mitigation” improvement projects from in-basin water users, communities and industries. While we understand the principal and practice of providing mitigation for impacts caused by a proposed withdrawal, we are not aware of any other basin in eastern North America where such a requirement is imposed to provide “improvements” (such as improvements to endangered species habitat, artificial recharge of groundwater, removal of dams owned by other parties, *et cetera*). If the Great Lakes impose such an extraordinary requirement, then entities considering investing in new plants and facilities – who almost always have a choice between siting in the Great Lakes region or other relatively water abundant areas in the eastern U.S. and Canada – will be perceived as a strong disincentive to choosing the Great Lakes.

The Governors, Premiers and other governmental officials who have professed a desire to attract new or expanded enterprise and provide new jobs to the Great Lakes region should carefully reconsider this sweeping requirement. It is one thing to ask businesses to mitigate the adverse impacts of their withdrawals, through appropriate measures such as pass-by flows. It is quite another to mandate that, as condition for the “privilege” of investing in new facilities and jobs, they additionally pay for improvement projects to benefit the environment and others in the region. We believe that as to in-basin consumptive uses, the Great Lakes should adopt a sensible mitigation criterion – following the practice of other forward-looking eastern States.

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

The Agreement, Decision Making Standard and Procedures Manual propose a rigid set of approval criteria. 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 ultimately 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 determine that:

1. The proposed use is reasonable.

2. The proposed withdrawal, in combination with other relevant withdrawals, will not 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 suing 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 save 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.

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.

Creation, Structure and Funding of a Regional Regulatory Body

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 Compact. A 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.

We would observe that 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. To the extent they have achieved success, much of it can be credited to the fact that the agencies were created a comprehensive water management agencies, and staffed with a dedicated and sophisticated basin commission professional staff that could perform evaluations on the basis of sound science. 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 severe 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 Council envisioned by the Compact is poorly-suited to serve the basin’s needs, and the provisions allowing “minority rule” vetoes of in-basin projects are unacceptable.

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.

The Chamber strongly opposes the concept of “minority rule” embraced in the Compact – where any three out of 10 members can veto a consumptive use project, and any one member can veto an *intra*basin diversion where the water remains entirely within the basin. Granting such veto authority to a minority of jurisdictions is dangerous and totally unacceptable. Instead

of requiring dissenting jurisdictions to articulate their concerns and persuade others that their concerns are justified, the Compact's grant of such veto powers would allow a jurisdiction to simply cast a "no" vote and kill the project. This invites irresponsible decisions, based on primarily political motivations, rather than scientific grounds. This arrangement would readily make virtually every proposal into a political football, requiring project sponsors to seek "deals" in virtually every state and provincial capital.

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.

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.

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 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 a result, 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.

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 executive budgets, those requests are "subject to such review and approval as may be required by their respective budgetary processes."

Granting the power to impose unrestricted review fees is unwise; and the number of projects subject to review is unlikely to generate sufficient funds to support a regional regulatory body.

Section 3.6 indicates that the Council may adopt fees for review of new or increased consumptive uses and diversions. The amount of such fees is not limited by anything other than the word “reasonable,” and there is no accountability to any legislative body for either the amount or disposition of those fees.

Given the relatively small number of major consumptive use or diversion applications that may be anticipated annually, it is unlikely that fees alone 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, and the number of proposals involving new or increased consumptive uses over 5 mgd are likewise expected to be very few per year. Under the circumstances, unless the review fees 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, and this proposal threatens to create an entity which will be even more financially tenuous.

Assuring Procedural Due Process and Avoiding Cumbersome Litigation

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.

1. 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 jurisdiction (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.

At the same time, the Agreement’s processes contain a number of troublesome aspects. Among them, as part of the provisions for inviting public participation, the Agreement suggests that all comments received from any member of the public will be “made part of the proposal’s administrative record.” This will allow any person to say anything in comments filed before the Regional Body, and ostensibly require that such comments be included in the administrative record of the host jurisdiction even if those comments would not be eligible for consideration as part of such a record under the administrative law of the host jurisdiction.

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.

The draft Agreement utterly skews these administrative procedural protections, and would ostensibly allow anyone to say anything in comments to the Regional Body, and with the Agreement mandating that every such comment be admitted into the administrative record, even if it was inadmissible under applicable state law.

2. Dispute resolution process.

The Agreement seems to make permit proposals subject to an extra-judicial “dispute resolution” process. Under Article 601 of the draft Agreement, any “Party” (i.e., a state or province) may provide notice to another Party and the Regional Body of a “dispute” and invoke the dispute resolution process involving one of several processes, including appointment of a panel to hear the parties, establishment of a fact-finding group, conciliation or mediation, or reference to the Regional Body. As worded, it appears that disagreements about permits issued by one jurisdiction that another jurisdiction disfavors may be the grounds for such a dispute.

In the contest of withdrawal permits, this “dispute resolution” process creates several major problems:

- First, the Agreement is silent regarding what happens to an issued permit while such a dispute resolution process is underway. Where a withdrawal permit is issued by a host jurisdiction and no appeal is taken under that host jurisdiction's administrative law, but another state/province seeks "dispute resolution" under the Agreement, is the permit in effect or suspended?
- Second, the Agreement's dispute resolution process refers solely to participation by the State and Provinces who are party to the Agreement. As drafted, the Agreement would purport to hold a dispute resolution process concerning a permit issued to a particular community or business could be conducted *without any provision for participation by the project sponsor*, that is, without the person most directly affected by the process. States and Provinces cannot simply "resolve disputes" that affect the rights, privileges and obligations of their citizens without the participation of those most directly affected. Provision for participation and hearing of the affected parties (i.e., the project sponsor) is the essence of constitutionally-protected due process, at least in the United States jurisdictions.

Outside of a formal compact, adopted by proper state and federal legislation, we do not believe that it is possible to set up a full and adequate due process arrangement at the regional body level. With all due respect, the executives of the States and Provinces do not have the authority alone to establish, via executive agreement among the Governors and Premiers, a regional body with formal decision-making authority, or to ordain an administrative procedure process outside the existing processes within each of the jurisdictions.

In order to avoid a due process morass, we believe that the Agreement must be amended to make it clear that the contemplated process is consultative in nature, and involves nothing more than the other jurisdictions providing comments and recommendations to the host jurisdiction. The Agreement should emphasize that in all cases, the final decision to be made entirely by the host jurisdiction pursuant to the applicable law and administrative procedures of the host jurisdiction, and subject to the appeal procedures provided under that host jurisdiction's constitution and law.

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

Section 2.9(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 be a fertile ground for real mischief.

We broadly 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.

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.

Scope of Water Conservation Programs

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 302 of the Sustainable Water Resources Agreement. Section 302 requires each state and province to "implement programs to promote Environmentally Sound and Economically Feasible Water Conservation Measures to minimize existing Great Lakes Basin Withdrawals, Consumptive Uses and Diversions." On its face, this provision uses the same terminology as found in the "standard" applied to new or increased consumptive uses and diversions, where the Procedures Manual sets up elaborate criteria and matrixes for defining the term "Environmentally Sound and Economically Feasible Water Conservation Measures." In turn, each jurisdiction's program is to

be judged annually by the “Regional Body” for conformance with the standards and requirements of the Agreement.

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 Procedures Manual, it appears that the drafters envision a major new regulatory program, including permitting, enforcement and technical standards, 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 “standard” 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 unjustified and misaimed. 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 multitude of 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.

Gathering and Reporting of Data

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.