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A Model State Water Act for Great Lakes Management: Explanation and Text

*By Joseph L. Sax**

Concern about increased withdrawal of water from the Great Lakes Basin led in 1984 to a series of meetings among representatives from each of the United States and Canadian Provinces in the Great Lakes Basin which focused on means by which those jurisdictions could protect the water resources in the Basin and also assure that they would have as much control as possible over the future of Great Lakes waters.¹ The major result of those discussions was the adoption of the Great Lakes Charter² which is briefly discussed below and described at length in the paper prepared by Peter MacAvoy.³

Among the various alternatives considered by the jurisdictions were the following:⁴ federal legislation to be enacted by the respective national governments controlling use of the waters and recognizing the interests and stakes of the Great Lakes States and Provinces; modification of the Boundary Waters Treaty of 1909;⁵ and adoption of a new interstate compact. None of these means was rejected, but it was believed that the path most easily accomplished, at least as a first step, was the enactment of parallel legislation by the various jurisdictions to recognize the mutual interests and responsibilities of the states and provinces in protecting the Great Lakes Basin.⁶ The minimum purposes of such legislation are development of information about new uses of water, agreement to cooperate with other states in permitting uses, and regulation of major

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¹ See GREAT LAKES GOVERNORS TASK FORCE, COUNCIL OF GREAT LAKES GOVERNORS, FINAL REPORT AND RECOMMENDATIONS ON WATER DIVERSION AND GREAT LAKES INSTITUTIONS 4-5 (1985)[hereinafter cited as FINAL REPORT].

² Reprinted in GREAT LAKES GOVERNORS TASK FORCE, COUNCIL OF GREAT LAKES GOVERNORS, FINAL REPORT AND RECOMMENDATIONS ON WATER DIVERSION AND GREAT LAKES INSTITUTIONS 40 app. III (1985) [hereinafter cited as Great Lakes Charter or Charter].

³ See MacAvoy, *The Great Lakes Charter: Toward a Basinwide Strategy for Managing The Great Lakes*, 18 Case W. Res. J. Int'l L. 65 (1986).

⁴ See FINAL REPORT, *supra* note 1, at 5.

⁵ Treaty Relating to Boundary Waters and Boundary Questions, Jan. 11, 1909, United States-Great Britain, 36 Stat. 2448, T.S. No. 548 [hereinafter cited as The Boundary Waters Treaty of 1909].

⁶ FINAL REPORT, *supra* note 1, at 21.

diversions through notification and permitting.⁷

Though not every state and province can be expected to enact identical legislation, there is much to be gained in encouraging parallel approaches, both because the jurisdictions have common interests in the protection of the resource and because the resource itself is unitary and does not recognize political boundary lines.⁸ The Model State Water Act that follows is an effort to provide the structure for a common legislative approach. Because one of the Great Lakes Basin States, Wisconsin, has already enacted a law⁹ designed to implement the Great Lakes Charter, this model act has been drafted to follow as closely as possible the Wisconsin approach.

The pages that follow are divided into three parts. First is an explanation of the purpose and the general coverage of the model act. There then follows a detailed analysis of the provisions of the model act, and finally there is the text of the model act itself.

I. THE PURPOSE AND COVERAGE OF THE MODEL STATE WATER ACT¹⁰

In February, 1985, eight Great Lakes governors and the premiers of Ontario and Quebec entered into an historic agreement by signing the Great Lakes Charter.¹¹ The Charter establishes a cooperative regional strategy to protect and conserve Great Lakes water supplies, to serve existing development in the region, and to protect the region's environmental quality and natural resource base.¹² The governors and premiers found that existing state, federal, and international laws and institutions did not adequately protect Great Lakes water from interbasin diversions nor adequately control consumptive uses in the Basin.¹³

The Charter calls for: (1) a regional information base on water use and management; (2) a water resources management committee to coordinate state and provincial programs; (3) a regional consultation procedure to review all proposals to divert or consume more than five million gallons per day; (4) state and provincial permitting programs; (5) a Great Lakes Basin water management plan; and (6) a regional water research program.¹⁴

⁷ *Id.* at 22-28 (discussing the five principles underlying the purposes of the Great Lakes Charter).

⁸ *Id.* at 20.

⁹ 1985 Wis. Laws 60.

¹⁰ 2 GREAT LAKES REP. (No. 2) 5 (Mar./Apr. 1985)

¹¹ *Id.* at 41.

¹² *Id.* at 40.

¹³ *Id.* at 42-43.

¹⁴ *Id.* at 40.

A. *Implementation of the Great Lakes Charter*

In the Charter, the states and provinces agreed individually to adopt water diversion legislation to build the strongest legal framework possible to protect the region's water resources.¹⁵ This bill implements the Charter's principles by discouraging long range diversions and attempting to improve water management in the states.¹⁶

A recent decision of the United States Supreme Court¹⁷ provides guidelines for designing defensible diversion legislation. To restrict interstate water diversions, a state must be able to demonstrate:

1. A legitimate need to preserve its water supply for use within the state.
2. That regulations controlling interbasin diversions are narrowly tailored to the purpose of protecting and ensuring the availability of water resources for state citizens.
3. That such regulations apply equally to both in-state and out-of-state water users.¹⁸

Additional standards for state legislation adopted with the Charter provide that:

1. Regulatory controls should apply to both interbasin diversions and consumptive uses which place similar (if not identical) stresses upon basin water resources.¹⁹
2. Regulation of diversions and consumptive uses of water resources should be based on resource demand and availability and the effects of diversions and consumptive uses on the water resources of the Great Lakes States and Provinces.²⁰
3. Any new or increased withdrawal of Great Lakes Basin water resources in excess of 100,000 gallons per day should be subject to registration and periodic reporting of use.²¹
4. Any new or increased withdrawal involving a total interbasin diversion or consumptive use of Great Lakes Basin water resources in excess of two million gallons per day should be subject to review and a permit process.²²

¹⁵ See MODEL STATE WATER ACT, *infra*, at 245.

¹⁶ *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).

¹⁷ See *id.* at 954-58.

¹⁸ FINAL REPORT, *supra* note 1, at 30. A "withdrawal" is any removal of water from its source for any purpose. Great Lakes Charter, *supra* note 2, at 45. A "diversion" is a withdrawal that moves water from one watershed to another. *Id.* "Interbasin diversion" refers to a transfer of water out of the Great Lakes Basin. *Id.* A "consumptive use" is a withdrawal that results in some of the water not being returned to the source watershed because of evaporation, incorporation into a product, or other reason. *Id.*

¹⁹ FINAL REPORT, *supra* note 1, at 30.

²⁰ *Id.* at 31.

²¹ *Id.*

²² *Id.*

5. Any new or increased withdrawal of water resources involving a diversion or consumptive use in excess of five million gallons (nineteen million liters) per day should be subject to a prior notice and consultation process allowing other states and provinces in the region to comment on the proposed withdrawal.²³

B. *Summary of Major Components of the Model State Water Act*

1. Existing Uses

All existing water users retain the right to continue their current use.²⁴

2. Registration

- All new or existing withdrawals over 100,000 gallons per day (averaged over any thirty-day period) must register.
- Existing permit or reporting requirements qualify as registration.²⁵

3. Water Loss Approval

- All new or increased withdrawals resulting in a water loss (interbasin diversion or consumptive use) of over two million gallons per day (averaged over a thirty-day period) must obtain a water loss approval permit.²⁶
- Existing withdrawals which result in a water loss of less than two million gallons per day are exempt from the water loss approval requirement.²⁷

4. State Water Quantity Resources Plan

By 1988, the state must prepare and adopt a plan documenting the state's water needs and demonstrating its ability to manage its water resources wisely. The plan is an important component of the state's defense strategy against potential interstate diversion attempts.²⁸

5. Cooperation with Other States and Provinces

The state is authorized to work with the other Great Lakes States and Provinces to continue implementing the Charter by developing a regional data base, consultation process, and evaluation of resource availa-

²³ See MODEL STATE WATER ACT §§ 2(c)(1)(A), 2(d)(1), 2(d)(2).

²⁴ *Id.* § 2(c)(2)(A),(C).

²⁵ *Id.*

²⁶ *Id.* § 2(d)(1),(2).

²⁷ See *id.* § 2(d)(2).

²⁸ *Id.* § 2(h).

bility, needs, and management goals in the Basin.²⁹

C. *Format of Model Act*

The model act presents only the basic provisions to be incorporated in the diversion legislation to be proposed in each state to comply with the Great Lakes Charter and to respond to potential diversions and consumptive uses. The model act does not purport to integrate the model law with other relevant state law provisions (for example, existing permit requirements or laws regulating public utilities), nor does it include technical provisions (such as references to state administrative procedures, funding or appropriation authorizations, or "effective date" provisions and the like). Such matters should be referred to the legislative drafting services in each state.

D. *Origin of the Model Act*

The act is modeled closely after the recently enacted Wisconsin water diversion bill,³⁰ which itself was built upon the model state legislation that accompanied the Great Lakes Charter. The operating assumption has been that all Basin jurisdictions seek to enact parallel provisions in their laws, looking toward a cooperative approach to management and protection of the Great Lakes Basin, and to the possibility of future joint action among themselves and with Canada.

II. DETAILED ANALYSIS OF THE MODEL STATE WATER ACT³¹

The model act provides for regulating major withdrawals, interbasin diversions and consumptive uses of the water resources of the Great Lakes States and Provinces.³² A "withdrawal" is the removal or taking of any surface water or groundwater.³³ An "interbasin diversion" is a transfer of water from the Great Lakes Basin to any other basin.³⁴ A "consumptive use" is any other use of water which results in a failure to return all or part of the withdrawn water to the basin from which it is withdrawn.³⁵

The model act is based in part on the Great Lakes Charter,³⁶ which

²⁹ *Id.* § 2(k).

³⁰ 1985 Wis. Laws 60.

³¹ This analysis is drawn from the Wisconsin Legislative Reference Bureau's analysis of Wisconsin's water diversion bill, an unpublished document, Ref. No. LRB-4265/1, 1985-86 Legislature, Sept. 1985 Special Session.

³² MODEL STATE WATER ACT § 1(b)(2).

³³ *Id.* § 2(a)(14).

³⁴ *Id.* § 2(a)(8).

³⁵ *Id.* § 2(a)(3).

³⁶ See CHARTER, *supra* note 2.

was signed by the governors of the states of Wisconsin, Illinois, Indiana, Michigan, Minnesota, Ohio, New York, Pennsylvania, and the premiers of the provinces of Ontario and Quebec, Canada.³⁷ The model act applies to all persons, including public utilities.³⁸

The model act requires any person who, on or after the beginning of the eighteenth month starting after the effective date of the act is making or proposes a withdrawal that averages or will average more than 100,000 gallons of water per day in any thirty-day period to register the existing or proposed withdrawal with the state's Department of Natural Resources, or its equivalent.³⁹

A person who proposes to begin a new or increased withdrawal of water must first obtain approval if the proposed withdrawal will result in a water loss (interbasin diversion or consumptive use or both) averaging more than two million gallons per day in any thirty-day period above the person's authorized base level of water loss.⁴⁰ The model act establishes water withdrawal reporting requirements in order to determine how much water each regulated person is withdrawing and to establish that person's authorized base level of water loss, which will be stated as a condition of the person's permit or approval.⁴¹

An applicant for an approval must submit an application describing the location, nature, amount, anticipated costs, and effects of the proposed withdrawal, the need for land acquisition, equipment, energy consumption, relocation or resiting, the capacity of the proposed or existing system, the rates of withdrawal and water loss, the system's specifications and plans, a statement of the proposal's conformity with applicable water resources plans, and a statement of how the applicant's need for water will be satisfied if the application is denied or modified.⁴²

If the proposed withdrawal will result in a water loss to the Great Lakes Basin averaging more than five million gallons per day in any thirty-day period, the state must notify the governor or premier and the water resources management agency of each Great Lakes State or Province, and, if required under the Boundary Waters Treaty of 1909, the International Joint Commission, which has certain authority to regulate the use of the Great Lakes water.⁴³ Prior to acting on an application, the state is required to consider any timely comments received from other states and provinces.⁴⁴

³⁷ GREAT LAKES REP. (Mar./Apr. 1985) at 5, 6.

³⁸ See MODEL STATE WATER ACT § 2(a)(10), 2(c)(2)(A).

³⁹ *Id.* § 2(c)(1)(A).

⁴⁰ *Id.* § 2(d).

⁴¹ *Id.* § 2(c)(3).

⁴² *Id.*

⁴³ *Id.* § 2(e)(1).

⁴⁴ *Id.*

Before approving an application, the state must also determine all of the following: (1) that no public water rights will be adversely affected; (2) that the proposed withdrawal does not conflict with state plans for future water use; (3) that the applicant's current water use and proposed plans for withdrawal, transportation, development and use of water resources incorporate reasonable conservation practices; and (4) that the proposed withdrawal and uses will not adversely affect state waters or the environment and ecosystem of the Great Lakes Basin and are consistent with the protection of public health, safety, and welfare.⁴⁵

If the proposed withdrawal will result in an interbasin diversion, the state must additionally determine all of the following: (1) that the state or province to which the water will be diverted has developed and is implementing a plan to manage and conserve its own water resources, and that further development of its water resources is impracticable or would have substantial adverse economic, social or environmental impacts; (2) that granting the application will not impair the ability of the Great Lakes Basin to meet its own water needs; (3) that the diversion alone, or in combination with other water losses, will not have a significant adverse impact on lake levels, water use, the environment, or the ecosystem of those basins; and (4) that the proposed withdrawal is consistent with all applicable federal, regional, and interstate water resources plans.⁴⁶

If the state approves an application, it may specify any conditions, limitations, and restrictions it determines are necessary to protect the public health, safety, and welfare and to ensure compliance with the conditions of the approval.⁴⁷

The model act requires the state to review all permits periodically.⁴⁸ It may modify any condition of a permit following a periodic review or at any other time at the request of the permittee or another person who is adversely affected by the condition, or at its own discretion if necessary to ensure continued compliance with all applicable statutes and rules.⁴⁹

The state is required to revoke a permit if it makes a determination that the permittee would not, under any conditions, be able to remain in compliance with the requirements established in this model act or with other applicable laws.⁵⁰ It also has the authority to issue an emergency order requiring the immediate cessation of any withdrawal if there is a danger of imminent harm to public health, safety, welfare, the environ-

⁴⁵ *Id.* § 2(e)(4)(A)-(E).

⁴⁶ *Id.* § 2(e)(4)(G)(i)-(iv).

⁴⁷ *Id.* § 2(f)(1)(G).

⁴⁸ *Id.* § 2(f)(2).

⁴⁹ *Id.* § 2(f)(3).

⁵⁰ *Id.* § 2(f)(4).

ment, or water and related land resources.⁵¹

The model act provides for the right to a contested case hearing for applicants, regulated persons, and others adversely affected by permit decisions.⁵²

The model act establishes a procedure requiring the state, upon petition by any six or more state residents, to investigate an alleged violation of a statute, rule, or condition of a permit or approval.⁵³ It may order any person determined to have committed such a violation to take any action necessary to achieve compliance.⁵⁴

The state must promulgate administrative rules establishing the procedures for registration, for reviewing and acting on applications for approval, reporting requirements, how to determine what constitutes a consumptive use, and procedure for implementing a long term state water quantity resources plan that the natural resources board is required to prepare.⁵⁵ It may establish a permit application fee to cover its costs in administering the approval process.⁵⁶

The State's coastal management council, or its equivalent is required to amend any existing the coastal management program to incorporate the provisions of this model act as they apply to the water resources of the Great Lakes Basin, to submit the amendments to the U.S. Secretary of Commerce for approval, and to consider the purposes and requirements of the model act when conducting federal consistency reviews.⁵⁷

The model act also requires cooperation with other Great Lakes States and Provinces in collecting, maintaining, and exchanging information related to the current and anticipated future uses and the management of the water resources of the region, participating in the development of a long-term plan for developing, conserving and managing the water resources of the Great Lakes Basin, and in developing a regional consultation procedure for use in exchanging information on the effects of proposed major interbasin diversions and consumptive uses of the waters of the Great Lakes region.⁵⁸

The model act creates a private cause of action, authorizing a person who is aggrieved or adversely affected by a water withdrawal made in violation of any provision of this model act, of any other applicable law or administrative rule or of any permit or approval to bring an action in

⁵¹ *Id.* § 2(g).

⁵² *Id.* §§ 2(e)(4)(G)(v), 2(F)(6).

⁵³ *Id.* § 3(a).

⁵⁴ *Id.* § 3(b)(2).

⁵⁵ *Id.* § 2(j)(1)(A)-(D).

⁵⁶ *Id.* § 2(j)(1)(e).

⁵⁷ *Id.* § 2(i).

⁵⁸ *Id.* § 2(k).

circuit court.⁵⁹ The person may be awarded appropriate relief, such as attorney fees and damages.⁶⁰

III. MODEL STATE WATER ACT

The people of the state of [name of state], represented in senate and assembly, do enact as follows:

SECTION 1. LEGISLATIVE FINDINGS; PURPOSE.

(a) The legislature finds that:

(1) The waters of the state are valuable public natural resources held in trust by this state and that this state has a duty as trustee to manage its waters effectively for the use and enjoyment of present and future residents and for the protection of the environment.

(2) The interbasin diversion and consumptive use of the waters of the state may have a significant adverse impact on the environment, economy, and welfare of this state.

(3) Increased attention to conservation measures is necessary to ensure the protection of the waters of the state.

(4) The waters of the Great Lakes Basin and [any other basins in the state] basin are valuable public natural resources and that the states and provinces of the Great Lakes region and the states of the [any other basins in state] region share a common interest in the preservation of those resources.

(5) The waters of the Great Lakes Basin are interconnected and are part of a single hydrologic system, and that the waters of the [any other basins in state] basin are interconnected and are part of a separate single hydrologic system.

(6) The continued availability of water for domestic, municipal, industrial and agricultural water supplies, navigation, hydroelectric power and energy production, recreation, the maintenance of fish and wildlife habitat and a balanced ecosystem are vital to the future economic health of the states and provinces of the Great Lakes region and the states of [any other basins in state].

(7) Without careful and prudent management, future interbasin diversions and consumptive uses of water may have significant adverse impacts on the environment, economy, and welfare of the Great Lakes region and the [any other basins in state] region.

(8) All of the states and provinces of the Great Lakes re-

⁵⁹ *Id.* § 4.

⁶⁰ *Id.*

gion and the states of [any other basins in state] region have a duty to protect, conserve, and manage their shared water resources for the use and enjoyment of present and future residents.

(9) Each state and province of the Great Lakes region and each state of the [any other basins in state] region has the right to represent and protect its rights and interests in the water and other natural resources of the region in which the state or province is located.

(b) The purposes of this act are to:

(1) Protect and promote the conservation of the waters of the state and to provide for their management through the development of a state water quantity resources plan.

(2) Require registration of major withdrawals from the waters of the state and require the approval of the [name of state agency] for major interbasin diversions and consumptive uses of water.

(3) Authorize cooperative and coordinated action with other states and provinces to conserve and protect the water resources of the Great Lakes Basin and [any other basin in state] basin.

(4) Authorize this state to act to protect its rights when an existing or proposed interbasin diversion or consumptive use of the water resources of the Great Lakes Basin and of the [any other basin in state] basin, whether inside or outside of this state, threatens to affect the level, flow, use, or quality of the waters of the state.

SECTION 2. WATER RESOURCES CONSERVATION AND MANAGEMENT.

(a) Definitions. In this section:

(1) "Approval" means a permit issued under sub. (d) [or any other existing provision of state law].

(2) "Authorized base level of water loss" means any of the following:

(A) The maximum 30-day average water loss authorized as a condition of an approval.

(B) If there is no water loss from an existing withdrawal, zero gallons per day.

(3) "Consumptive use" means a use of waters of the state, other than an interbasin diversion, that results in a failure to return any or all of the water to the basin from which it is withdrawn. "Consumptive uses" include, but are not limited to,

evaporation and incorporation of water into a product or agricultural crop.

(4) "Department" means [the name of the state agency that will administer the law].

(5) "Great Lakes Basin" means the watershed of the Great Lakes and the St. Lawrence River upstream from Trois Rivieres, Quebec.

(6) "Great Lakes Charter" means the document establishing the principles for the cooperative management of Great Lakes water resources, signed by the governors and premiers of the Great Lakes region on February 11, 1985.

(7) "Great Lakes region" means the geographic region composed of the states of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, and Wisconsin, the Commonwealth of Pennsylvania, and the provinces of Ontario and Quebec, Canada.

(8) "Interbasin diversion" means a transfer of the waters of the state from either the Great Lakes Basin or the [any other basin in state] basin to any other basin.

(9) "International Joint Commission" means the commission established by the Boundary Waters Treaty of 1909 between the United States and Canada.

(10) "Person" means any individual, partnership, corporation, association, organization, or other legal entity, the state, any political subdivision of the state, any special purpose district, other states and provinces, and political divisions of other states and provinces.

(11) "[Any other basins in state] basin" means [describe].

(12) "Region" means the geographic region composed of [describe].

(13) "Water loss" means a loss of water from the basin from which it is withdrawn as a result of interbasin diversion, consumptive use, or both.

(14) "Withdrawal" means any removal of water from its source for any purpose.

(b) Aggregation of multiple withdrawals.

(1) In calculating the total amount of an existing or proposed withdrawal for purposes of determining the applicability of sub. (c), a person shall include all separate withdrawals which the person makes or proposes to make for a single use or related uses.

(2) In calculating the total amount of an existing or proposed water loss for purposes of determining the applicability

of sub. (d), a person shall include all separate interbasin diversions and consumptive uses, or combinations thereof, which the person makes or proposes to make for a single use or related uses.

(c) Registration required.

(1) (A) Except as provided in para. (2), any person who, on or after [insert effective date of this paragraph] proposes to begin a withdrawal that will average more than 100,000 gallons per day in any 30-day period shall register the proposed withdrawal with the department.

(B) A registration under para. (A) shall contain a statement of and supporting documentation for all of the following:

(i) The source of the proposed or existing withdrawal.

(ii) The location of any discharge or return flow.

(iii) The location and nature of the proposed or existing water use.

(iv) The actual or estimated average annual and monthly volumes and rates of withdrawal.

(v) The actual or estimated average annual and monthly volumes and rates of water loss from the withdrawal.

(2) Paragraph (1) does not apply to any of the following:

(A) A person making a withdrawal who has been issued an approval and, as a condition of the approval, is reporting the volume and rate of withdrawal and, if applicable, the volume and rate of water loss from the withdrawal to the department or, if the person is a public utility, to the public service commission.

(B) A person who is required to comply with sub. (d) before beginning the proposed withdrawal.

(C) A person holding a permit under [the laws of this state] or the Federal Water Pollution Control Act, 33 U.S.C. § 1251-1376 (1982)(as amended), for whom the department has established a water loss coefficient, based on flow diagrams and other water use information provided by the permittee, that the department uses to calculate the permittee's water loss.

(3) Each person who registers a withdrawal under para. (1) shall report the volume and rate of withdrawal and, if applicable, the volume and rate of water loss from the withdrawal to

the department in the form and at the times required by the department.

(4) The department shall periodically collect from each person who registers a withdrawal under para. (1) the fee established under sub. (j)(1)(E).

(d) **Water Loss Approval Required.** Before any person may begin a new withdrawal or increase the amount of an existing withdrawal, the person shall apply to the department for approval or a modification of its existing approval if either of the following conditions applies:

(1) The person proposes to begin a new withdrawal that will result in a water loss averaging more than 2,000,000 gallons per day in any 30-day period above the person's authorized base level of water loss; or

(2) The person proposes to increase an existing withdrawal that will result in a water loss averaging more than 2,000,000 gallons per day above the person's authorized base level of water loss.

(e) **Application; Approval; Denial.**

(1) *Application.* An application under sub. (d) shall contain a statement of and documentation for all of the following:

(A) The current operating capacity of the withdrawal system, if the proposed increase requires the expansion of an existing system.

(B) The total new or increased operating capacity of the withdrawal system.

(C) The place and source of the proposed withdrawal.

(D) The place of the proposed discharge or return flow.

(E) The place and nature of the proposed water use.

(F) The estimated average annual and monthly volumes and rates of withdrawal.

(G) The estimated average annual and monthly volumes and rates of water loss.

(H) The anticipated effects, if any, that the withdrawal will have on existing uses of water resources and related land uses both within and outside of the Great Lakes Basin or [any other basins in state] basin.

(I) Any land acquisition, equipment, energy consumption, or relocation or resiting of any existing community, facility, right-of-way or structure that will be required.

(J) The total anticipated costs of any proposed construction.

(K) A list of all federal, state, provincial, and local approvals, permits, licenses, and other authorizations required for any proposed construction.

(L) A statement as to whether the proposed withdrawal complies with all applicable plans for the use, management, and protection of the waters of the state and related land resources.

(M) A description of other ways the applicant's need for water may be satisfied if the application is denied or modified.

(N) A description of the conservation practices the applicant intends to follow.

(O) Any other information required by the department by rule.

(2) *Great Lakes Basin; consultation required.* If the department receives an application that, if approved, will result in a new water loss to the Great Lakes Basin averaging more than 5,000,000 gallons per day in any 30-day period, or an increase in an existing withdrawal that will result in a water loss averaging 5,000,000 gallons per day in any 30-day period above the applicant's base level of water loss, the department shall notify the office of the governor or premier and the agency responsible for management of water resources in each state or province of the Great Lakes region and, if required under the Boundary Waters Treaty of 1909, the International Joint Commission. In making its determination on an application, the department shall consider any comments that are received within the time limit established under para. (3).

(3) *Department response.* Within the time limit established by the department by rule, which shall be consistent with the time limit, if any, established by the governors and premiers of the Great Lakes States and Provinces, the department shall do one of the following in writing:

(A) Notify the applicant that the application is approved or denied, and, if it is denied, the reason for the denial.

(B) Notify the applicant of any modifications necessary to qualify the application for approval.

(4) *Grounds for approval.* Before approving an application, the department shall determine all of the following:

(A) That no public water rights in navigable waters will be adversely affected.

(B) That the proposed withdrawal does not conflict with any applicable plan for present or future uses of the waters of the state.

(C) That both the applicant's current water use, if any, and the applicant's proposed plans for withdrawal, transportation, development, and use of water resources incorporate maximum feasible conservation practices.

(D) That the proposed withdrawal and uses will not have a significant adverse impact on the environment and ecosystem of the Great Lakes Basin or [any other basins in state] basin.

(E) That the proposed withdrawal and uses are consistent with the protection of public health, safety, and welfare and will not be detrimental to the public interest or the public trust in waters in the state.

(F) That the proposed withdrawal will not have a significant detrimental effect on the quantity and quality of the waters of the state or its related land resources.

(G) If the proposed withdrawal will result in an interbasin diversion, all of the following in addition:

(i) That each basin, region, state, or province to which the water will be diverted has developed and is implementing a plan to manage and conserve its own water quantity resources, and that further development of its water resources is impracticable or would have a substantial adverse economic, social, or environmental impact.

(ii) That granting the application will not impair the ability of the Great Lakes Basin or [any other basins in state] basin to meet its own water needs.

(iii) That the interbasin diversion alone, or in combination with other water losses, will not have a significant adverse impact on lake levels, water use, the environment, or the ecosystem of the Great Lakes Basin or [any other basins in state] basin.

(iv) That the proposed withdrawal is consistent with all applicable federal, regional, and interstate and international water resources plans.

(5) *Right to hearing.* Any person who receives notice of a denial or modification requirement under para. (3) is entitled to a contested case hearing under [insert reference to State Ad-

ministrative Procedures Act] if the person requests the hearing within 30 days after receiving the notice.

(6) The department shall charge each applicant for an approval under this subsection the fee established under sub. (j)(1)(E).

(f) Approval.

(1) *Issuance; contents.* If an application is approved under sub. (e), the department shall modify the applicant's existing approval or shall issue a new approval that specifies all of the following:

(A) The location of the withdrawal.

(B) The authorized base level of water loss from the withdrawal.

(C) The rate of withdrawal and the times and dates on which or seasons during which water may be withdrawn.

(D) The uses for which water may be withdrawn.

(E) The amount and quality of return flow required and the place of discharge.

(F) The requirements for reporting volumes and rates of withdrawal and any other data specified by the department.

(G) Any other conditions, limitations, and restrictions that the department determines are necessary to protect the environment and the public health, safety, and welfare and to ensure the conservation and proper management of the waters of the state.

(H) Any requirement for metering, surveillance, and reporting that the department determines are necessary to ensure compliance with other conditions, limitations, or restrictions of the approval.

(I) If the department determines that a time limit is necessary to protect the interests specified in section 1 of this Act, the date on which approval for the withdrawal expires.

(2) *Review.* The department shall review each approval prior to the expiration date specified under para. (1)(I), if any, or within 5 years from the date of issuance and at least every 5 years thereafter.

(3) *Modification by department.* The department may at any time propose modifications of the approval or additional conditions, limitations, or restrictions determined to be neces-

sary to ensure continued compliance with this section or with any other applicable statute, plan, or rule.

(4) *Revocation.* If the department determines that a person to whom an approval has been issued would be unable under any conditions, limitations, or restrictions to comply with this section or other applicable statute or rule, it shall revoke the approval.

(5) *Request for modification.* A person to whom an approval has been issued or any person adversely affected by a condition, limitation, or restriction of an approval may request that the department modify a condition, limitation, or restriction of an approval.

(6) *Notice; right to hearing.* The department shall notify the person to whom the approval has been issued and any other person who has in writing requested notice of the receipt of a request to modify an approval or of the department's intent to modify or evoke an approval. The person to whom the approval is issued is entitled to a contested case hearing under [insert reference to State Administrative Procedures Act] before a revocation or modification takes effect. Any other person who may be aggrieved or adversely affected by a proposed modification is entitled to a contested case hearing under [insert reference to State Administrative Procedures Act] before a modification takes effect.

(7) The department shall periodically collect from each person whose application under this subsection is approved the fee established under sub. (j)(1)(E).

(g) *Emergency Order.* The department may, without a prior hearing, order a person to whom an approval is issued immediately to stop a withdrawal if the department determines that there is a danger of imminent harm to the public health, safety, or welfare, to the environment or to the water resources or related land resources of this state. The order shall specify the date on which the withdrawal must be stopped and the date, if any, on which it may be resumed. The order shall notify the person that the person may request a contested case hearing [insert reference to State Administrative Procedures Act]. The hearing shall be held as soon as possible after receipt of a request for a hearing. An emergency order remains in effect pending the result of the hearing.

(h) *Preparation of Water Quantity Resources Plan.* The [insert name of agency] shall, before [insert date], adopt and submit to the chief clerk of each house of the legislature, for distribution to the members, a long term state water quantity

resources plan for the protection, conservation, and management of waters of the state and its related land resources. The plan shall include, but need not be limited to, the following:

(1) The description of a system for allocating this state's water resources during a water shortage or other emergency.

(2) Identification of the existing uses of the waters of the state.

(3) An estimate of future trends in water use.

(4) Recommendations for the use, management, and protection of the waters of the state and related land resources that will affect persons subject to sub. (d).

(i) Amendment of Coastal Management Program.

(1) The [name of state] coastal management council shall amend this state's coastal management program submitted to the U.S. Secretary of Commerce under 16 U.S.C. § 1455 (1982), to incorporate the requirements of this section and the findings and purposes specified in this Act, section 1, as they apply to the water resources of the Great Lakes Basin, and shall formally submit the proposed amendments to the U.S. Secretary of Commerce.

(2) After approval of the amendments submitted to the U.S. Secretary of Commerce under para. (1), the coastal management council shall, when conducting federal consistency reviews under 16 U.S.C. § 1456(c) (1982), consider the requirements, findings, and purposes specified under para. (3), if applicable.

(3) If the department issues an approval for a withdrawal, and the withdrawal is subject to a federal consistency review under 16 U.S.C. § 1456(c) (1982), the [name of state] coastal management council shall directly certify that the withdrawal is consistent with this state's coastal management program.

(j) Rule Making; Fees.

(1) The department shall promulgate rules establishing all of the following:

(A) The procedures for reviewing and acting on applications under subs. (c) and (d).

(B) Requirements for reporting volumes and rates of withdrawals.

(C) The method for determining what portion of a withdrawal constitutes a consumptive use.

(D) Procedures for implementing the plan adopted under sub. (h).

(E) A graduated schedule for the fees required under

subs. (c)(4), (e)(5), and (f)(7) periodically. The fees established under this subsection shall be sufficient to equal the department's full cost of administering this subsection and subs. (c)-(h), (k), (l) and section 3 of this Act.

(k) Cooperation with Other States and Provinces. The department shall do all of the following:

(1) Cooperate with the other Great Lakes states and provinces to develop and maintain a common base of information on the use and management of the water resources of the Great Lakes Basin and to establish systematic arrangements for the exchange of such information.

(2) Collect and maintain information regarding the locations, types, and quantities of water use, including water losses, in a form that is comparable to the form used by the other Great Lakes states and provinces.

(3) Collect, maintain, and exchange information on current and projected future water needs with the other Great Lakes states and provinces.

(4) Cooperate with the other Great Lakes states and provinces in developing a long-term plan for developing, conserving, and managing the water resources of the Great Lakes Basin.

(5) As provided in the Great Lakes Charter, participate in the development of a regional consultation procedure for use in exchanging information on effects of proposed interbasin diversions and consumptive uses.

(6) Participate in the development of a [any other basins in state] basin regional consultation procedure for use in exchanging information on the effects of proposed water losses from that basin.

(l) Miscellaneous Provisions.

(1) The enumeration of any remedy under this section does not limit the right to any other remedy available in an action under the statutory or common law of this state or any other state or province, federal law, or Canadian law.

(2) Proof of compliance with this section is not a defense in any action not founded on this section.

(3) This state reserves the right to seek, in any state, federal, or provincial forum, an adjudication of the equitable apportionment of the water resources of the Great Lakes Basin or [any other basins in state] basin, and the protection and determination of its rights and interests in those water resources, in any manner provided by law.

SECTION 3. INVESTIGATION OF ALLEGED WATER WITHDRAWAL VIOLATIONS.

(a) Any 6 or more residents of this state may petition for an investigation of a withdrawal, as defined under sec. 2(a)(14), alleged to be in violation of sec. 2(c)(1), in violation of a condition, limitation, or restriction of a permit or approval issued in conformance with sec. 2(f)(1), or in violation of any rule promulgated under secs. 2(c)(1) or 2(d)-(f) by submitting to the department a petition identifying the alleged violator and setting forth in detail the reasons for believing a violation occurred. The petition shall state the name and address of a person in this state authorized to receive service of answer and other papers on behalf of the petitioners and the name and address of a person authorized to appear at a hearing on behalf of the petitioners.

(b) Upon receipt of a petition, the department shall:

(1) Upon preliminary investigation determine whether the allegations are baseless, and, if so, dismiss the petition without holding a hearing. Otherwise the department shall:

(2) Conduct a contested case hearing under [insert reference to State Administrative Procedures Act] on the allegations of the petition. Within 60 days after the hearing, the department shall either dismiss the petition or notify the alleged violator of its finding that the allegations are true and order the alleged violator to take whatever action is necessary to achieve compliance with the statute, rule, condition, limitation, or restriction alleged to have been violated.

SECTION 4. REMEDIES; WATER WITHDRAWAL VIOLATIONS.

Any person who makes a withdrawal, as defined under sec. 2(a)(14), in violation of sec. 2(c)(1), in violation of a condition, limitation, or restriction of a permit or approval issued in conformance with sec. 2(f)(1), or in violation of any rule promulgated under secs. 2(c)(1), 2(d), or 2(f) is liable to any person who is aggrieved or adversely affected by the withdrawal for damages or other appropriate relief. Any person who is or may be aggrieved or adversely affected by any existing or proposed withdrawal, as defined under sec. 2(a)(14), which is in violation of a condition, limitation, or restriction of a permit or approval issued in conformance with sec. 2(f)(1) or in violation of any rule promulgated under secs. 2(d)-(f) may bring an action in the circuit court to restrain or enjoin the withdrawal.