

within Indiana's portion of the Great Lakes Basin, including watersheds of both Lake Michigan and Lake Erie.

Basch said the registration of a new surface or groundwater withdrawals with a capacity of at least 100,000 gallons-per-day has been a legal requirement for several years in Indiana. Adoption of the rules would implement the Great Lakes Compact so an individual or general permit would be required for a surface or groundwater withdrawal, for any period of 90 consecutive days, which exceeds on a daily basis the following:

- From Lake Michigan, five million (5,000,000) gallons;
- From a salmonid stream, one hundred thousand (100,000) gallons; and
- From any other source of ground water or surface water (or the combination of both), one million (1,000,000) gallons.

The rules would implement mandatory and voluntary water conservation and efficiency. They would also promote and encourage environmentally sound and economically feasible water conservation measures,

Basch commented, "There's been a significant amount of work done with regard to this part of the Compact. There's been a lot of information obtained from significant water withdrawal users in the State through our water use report." He said the Division of Water received "a lot of feedback from the Michigan-Indiana Association and other folks" with regard to the proposal.

Basch reported 875 significant water withdrawal facilities are currently registered in Indiana's Great Lakes Basin with the capacity of withdrawing greater than 100,000 gallons per day of groundwater and surface water. This number is approximately ¼ of the total number of such facilities registered in the State. Approximately two-thirds of the 875 registered facilities provide irrigation. Basch said the registered facilities have a combined withdrawal capacity of approximately 7.8 billion gallons per day, and reported water withdrawals in 2011 totaled 893 billion gallons.

Basch said that the Division of Water recommended preliminary adoption to amendments to 312 IAC 6.2 to assist with implementation IC-14-25-15.

Doug Grant asked Basch if all Compact States have similar withdrawal rules.

Basch answered, "The Compact itself sets kind of the standard if they don't adopt a provision for the regulated facilities. I think a lot of them look at the 100,000 gallons per day as the minimum capacity." For other States, including Wisconsin and Minnesota, regulation is triggered when capacity reaches 10,000 gallons per day for some facilities.

Ron McAhron added the Compact and Indiana's statute provide "if you don't have site-specific thresholds established, it defaults to 100,000 ten years after the passage. Ohio has similar numbers" to what is being proposed in this rule. "Michigan's are more restrictive. We went back and looked at 20-some odd years' period of record for the withdrawals by category to identify these. Indiana Code requires that the legislature revisit the thresholds established ten years after the passage of the implementation language."

McAhron continued, “We were the first State, I believe, that had heavy-lifting to pass this. Had it not been for Indiana... I don’t believe [the Great Lakes Compact] would have passed. Minnesota had a permitting program in place before Indiana. They were before us in implementation language. Illinois, which is largely exempted by virtue of a Supreme Court decree back many years ago for the Chicago diversion”, also adopted implementation language before Indiana. Our State was the first which had to undertake comprehensive new statutory responsibilities to implement the terms of the Compact. “So we were very instrumental in getting this started. There’s a lot of works that will be done in this area.” The rule adoption “is a necessary step to keep the ball moving forward.”

Michael Cline said, “Just for profiling, what types of facilities are we talking about? Are these local communities that take water out for their use of municipal water company? Are they industry?”

Basch answered that in terms of the number of persons regulated, it “would be farmers. Actually, the way that Indiana divvies up the facilities, there would be an irrigation category, public supply, industrial, energy production, power plants, miscellaneous and rural usage also.” In terms of water usage, “predominant ones” would include “public water supply systems and irrigation facilities. Even though the power plants would be a small number, they also represent, as you could imagine, a significant amount of the water withdrawn.”

Cline continued, “So, in general, most of the water is for municipal use, or is it for power companies or farmers?”

Basch replied, “The predominant water usage would be for energy production, but the majority of the facilities that are actually using it would be for agriculture or irrigation. Two-thirds of the registered facilities we have in the Great Lakes Basin are irrigation.”

Thomas Easterly commented, “I’m a little confused about the general permit. I understand you want a general permit that says if you’re less than five million gallons of surface water, you’re okay. But then when you come down, it says ‘any prior written approval from the department for any withdrawal from a well within one-half mile of a salmonid stream.’ Is every single homeowner going to have to get a DNR water withdrawal permit if they’re close to one of those streams?”

Basch answered, “Well, that would still have the 100,000 gallons per day.”

Easterly commented, “It doesn’t say that though, or maybe it’s hidden in another part of the rule.”

McAhron stated, “That’s the initial threshold for applicability of this, unless you want to divert water out of the Basin. If you want to divert any water out of the basin..., that’s covered.” You need a permit. “But for in-Basin use, there’s a statutory threshold of the 100,000 gallons to get into the game.”

Easterly continued, “So I never get to that page, to the general permit page [if I’m withdrawing less than 100,000 gallons a day], because I’m exempt from the whole rule?”

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McAhron responded, “If you’re withdrawing less than 100,000 gallons, and you do not divert water out of the Basin, you’re exempt from the statute and from the proposed rule.”

R.T. Green moved to approve preliminary adoption of rules for water resource management in the Great Lakes Basin under the Great Lakes-St. Lawrence River Basin Water Resources Compact as recommended by the Division of Water. Donald Ruch seconded the motion. Upon a voice vote, the motion carried.

McAhron added, “We will have a more robust than normal set of public hearings on this. We’ll get that schedule out there. There’s a lot of interest, especially up in the Basin.”

Executive Order 13-03 required agencies to “suspend rulemaking action on any proposed rules for which a notice of intent to adopt a rule...was not submitted to the office of the Indiana *Register* on or before January 14, 2013.” Additional compliance provisions were included in Financial Management Circular 2013-01. On March 27, 2013, Indiana Department of Natural Resources (“DNR”) Director, Cameron Clark, submitted to the Office of Management and Budget (“OMB”) a “Request for exemption to the suspension of rulemaking action under the provisions of Executive Order 13-03” for this rule proposal. On July 8, 2013, Christopher D. Atkins, OMB Director, wrote that “DNR’s request qualifies for an exception under Section 6(a) and 6(c) of Executive Order 13-03.”

The “Notice of Intent” to adopt the amendments was posted to the Indiana *Register* at 20130717-IR-312130335NIA on July 17, 2013. The notice identified Mark Basch as the “small business regulatory coordinator” for purposes of IC 4-22-2-28.1.

The Commission caused the information required by IC 4-22-2-22.5 to be included in the rulemaking docket maintained on its Internet website at <http://www.in.gov/nrc/2377.htm>. The rulemaking docket was also updated periodically as the rule adoption progressed.

As specified by the Executive Order that then applied, proposed fiscal analyses of the rule proposal were submitted, along with a copy of the proposed rule language and a copy of the posted Notice of Intent, to OMB and to the Administrative Rules Oversight Committee (“AROC”) on October 7, 2013. On October 17, 2013, as required by IC 14-22-2-28(i) and clarified in a Memorandum from Matt Light, Chief Counsel, Advisory Division of the Office of

the Attorney General dated October 8, 2013, the justification statement under IC 4-22-2-24(d)(3) was forwarded to the AROC. On December 30, 2013, Brian E. Bailey, SBA Director, Office of Management and Budget, wrote to the Commission to recommend the proposed rule amendments be approved.

On January 10, 2014, the Division of Hearings submitted the rule proposal to the Legislative Services Agency (“LSA”), along with the “Statement Concerning Rules Affecting Small Business” (also known as the “Economic Impact Statement”). The Notice of Public Hearing and the Justification Statement (IC 4-22-2-24(d)(3)) were submitted to LSA on January 16, 2014. On January 22, 2014, the following were posted to the *Indiana Register*: the text of the proposed rule (20140122-IR-312130335PRA); the notice of public hearing (20140122-IR-312130335PHA); and the Economic Impact Statement (20140122-IR-312130335EIA). Following receipt from LSA of an “Authorization to Proceed”, the Division of Hearings caused Notice of Public Hearing to be published on January 22, 2014 in the following newspapers:

- Indianapolis *Daily Star*, a newspaper of general circulation in Marion County, Indiana
- *The Times of Northwest Indiana*, a newspaper of general circulation in Porter County, Indiana
- *The Journal Gazette*, a newspaper of general circulation in Allen County, Indiana
- South Bend *Tribune*, a newspaper of general circulation in St. Joseph County, Indiana

The Statement Concerning Rules Affecting Small Businesses (the “EIS”), as required under IC 4-22-2.1-5, and submitted by the Small Business Regulatory Coordinator, indicates:

**Economic Impact Statement
LSA Document #13-335**

IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses

Estimated Number of Small Businesses Subject to this Rule:

Based upon 2010 U.S. Census data, an estimated 2,100 small businesses classified as agriculture, mining, utility, or manufacturing that are located within the Great Lakes Basin in Indiana would potentially be subject to this proposed rule.

Estimated Average Annual Reporting, Record Keeping, and Other Administrative Costs Small Businesses Will Incur for Compliance:

Small businesses with significant water withdrawal facilities (SWWFs) installed after December 8, 2009, and regulated under IC 14-25-15 will be required to register or permit water withdrawals and report water use annually. Statewide registration and water use reporting by SWWFs from all sectors have been required under IC 14-25-7-15 since

1984. No fees for registration, permitting, or reporting are set forth by statute or by the proposed rule. Small businesses may also be required to develop water conservation and efficiency plans as specified in IC 14-25-15. Costs associated with the development and implementation of these plans as required by IC 14-25-15 could be significant. All potential costs to small businesses for the approval of a new or increased diversion of water from the Great Lakes Basin, or for mandatory water conservation planning, are due to the provisions of IC 14-25-15 and not the result of this proposed rule. Small businesses located within the Great Lakes Basin in Indiana registered as a significant water withdrawal facility (SWWF) under IC 14-25-7 prior to December 8, 2009, were grandfathered under IC 14-25-15 and additional registration or permitting is not required unless withdrawal thresholds set forth in the statute are exceeded.

Estimated Total Annual Economic Impact on Small Businesses to Comply:

No fees for registration, permitting, and water use reporting are set forth by IC 14-25-15 or by the proposed rule, and total annual economic impact to small businesses for compliance with these provisions of the proposed rule is anticipated to be minimal. Costs associated with the development and implementation of water conservation and efficiency plans as required by IC 14-25-15 could be significant. All potential costs to small businesses for the approval of a new or increased diversion of water from the Great Lakes Basin, or for mandatory water conservation planning, are due to the provisions of IC 14-25-15 and not the result of this proposed rule.

Justification Statement of Requirement or Cost:

There are potential costs that result for applicants to comply with the requirements of IC 14-25-15, and these costs could be significant. All potential costs to small businesses for the approval of a new or increased diversion of water from the Great Lakes Basin, or for mandatory water conservation planning, are due to the provisions of IC 14-25-15 and not the result of this proposed rule. However, no additional costs or fees are specified by the proposed rule. All eight Great Lake states have enacted the provisions of the Great Lakes Compact and are currently implementing its requirements. Prior to enactment of the Compact, no criteria existed to obtain approval for a diversion of water from the basin, and small businesses were uncertain of the data necessary to obtain an approval and the costs related to obtaining and providing that data to the states and provinces.

Regulatory Flexibility Analysis of Alternative Methods:

No regulatory flexibility analysis of alternative methods was conducted by DNR. All compliance and reporting requirements are set forth by IC 14-25-15.

On January 17, 2014, the Economic Impact Statement was sent to the Lieutenant Governor's Indiana Office of Small Business and Entrepreneurship (the "OSBE") as agent for the Indiana Economic Development Corporation. On February 4, Jacob Schpok, Executive Director of OSBE, wrote to the Commission: "There would be no impact on small businesses for registration; permitting and water use reporting are set forth by IC 14-25-15 or by the proposed rule. The total annual economic impact to small businesses for compliance with these provisions

of the proposed rule is anticipated to be minimal. OSBE does not object to the economic impact to small business associated with the proposed rule.” Also on February 4, 2014, the Commission responded by email to the OSBE: “Thank you for your timely and thorough comments under IC 4-22-2-28. Since you have commented favorably upon the agency’s fiscal analysis, and have suggested no alternatives, it will be recommended that the...Commission move forward with consideration for final adoption.” On the same day a copy of the OSBE correspondence was uploaded to the Commission’s website at www.in.gov/nrc/2377.htm. Copies of the comments were also available at the public hearings.

On January 28, 2014, the Commission Chair, Bryan Poynter, notified Representative Jeffrey Thompson, Chair of the AROC, in accordance with IC 4-22-2-25, that the promulgation of this rule may not be completed within one year after the publication of the Notice of Intent and of the extension of the deadline for final adoption to September 1, 2014. The notification was also submitted to LSA. LSA posted the notification in the *Indiana Register* on February 5, 2014 at 20140205-IR-312130335ARA.

2. WRITTEN COMMENTS

The subject of this rule adoption generated written comments to the Commission following preliminary adoption and as posted by LSA on January 22, 2014 in the *Indiana Register*. Earlier written comments were also sent to DNR’s Division of Water. The Division of Water forwarded these comments to the Commission’s Division of Hearings. Comments forwarded from the Division of Water may refer to language modified or excluded from LSA’s January 22, 2014 posting. As a consequence, the earlier comments would not be directly applicable to the current rule proposal.

The Commission has authorized written comments on rule proposals to be made by First Class Mail directed to its Division of Hearings and through the Commission’s website at www.ai.org/nrc/2377.htm. “Citizen Comments to Hearing Officers”, Information Bulletin #55 (Second Amendment), 20100804-IR-312100484NRA. As posted on the Commission’s website and reported at each of the four public hearings, the period for public comment closed after

March 24, 2014. Timely written comments made according to the authorization are included in full. Written comments made before the January 22 posting are considered if they reflect upon matters in the posted rule draft and express viewpoints not otherwise offered. Written comments submitted during public hearings to augment or memorialize oral comments are included below in Part 3 beginning at page 16 of in the summaries for the four public hearings.

A. Written comments received by the Commission through its website or by First Class Mail

Commenter Name Barbara Simpson
City Zionsville **County** HAMILTON **State** Indiana
Organization (optional) Indiana Wildlife Federation
E-Mail Address simpson@indianawildlife.org
Comments March 8, 2013
Comments on Great Lakes Compact Implementation
Administrative Rule Change Proposal regarding 312 IAC 6.2-1-2 (11) , page 2

The Indiana Wildlife Federation respectfully requests that the listing of “Salmonid streams” be expanded to add more clarity to what streams are included in the restrictions and permit requirements for water withdrawals in the Great Lakes watershed. The suggested change is not an exhaustive list of all Salmonid streams but does identify the key tributaries in the Great Lakes watershed that are not named in the current draft of the proposed administrative rule.

In addition to the original proposed rule’s named streams of Trail Creek, the Galena River, the East Branch of the Little Calumet, and the St. Joseph River, we request the following tributaries be added by name: West Branch of the Little Calumet River, Grand Calumet River, Turkey Creek, Deep River, Salt Creek, Coffee Creek, Dunes Creek, Little Elkhart River, Cobus Creek, Solomon Creek, and all their tributaries. All listed rivers and streams are located in northern Indiana and part of the Lake Michigan watershed.

Common sense tells us that if these waterways are not already specifically considered a “Salmonid stream” they should be listed by virtue of being part of the Lake Michigan watershed. Smaller tributaries are much more sensitive to even minimal water withdrawals. Adding these streams by name will help assure that the person who obtains a permit before implementing a withdrawal does clearly understand that these smaller streams are in fact direct tributaries of the major rivers named in the current draft rule.

Thank you for your consideration of this requested modification to the draft rule.

Respectfully submitted,

Lynn W. Burry
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Comment Received 3/8/2013 1:52:01 PM

Commenter Name Erica Amt
City Elkhart **County** ELKHART **State** Indiana
E-Mail Address ecamt1@gmail.com
Comments In Section 8 (Mandatory conservation and planning) of the compact, it is not clear who is subject to decision making under the rule and are therefore required to complete conservation planning. If it is those that fall under 6.2-2-5(b), it would be helpful to have that reference in Sec. 8 (b).
Comment Received 6/21/2013 3:16:10 PM

On March 24, 2014, Jared Teutsch, Water Policy Advocate, Alliance for the Great Lakes; Nicole Barker, Executive Director, Save the Dunes; Marc Smith, Senior Policy Manager, National Wildlife Federation; Karen Hobbs, Senior Policy Analyst, Natural Resources Defense Council; Barbara Simpson, Executive Director, Indiana Wildlife Federation; Kim Ferraro, Water & Agriculture Policy Director and Staff Attorney, Hoosier Environmental Council; and Jim Sweeney, President, Porter County-IN Chapter, Izaak Walton League, submitted, by regular mail, the following comments (with attachment)¹:

On behalf of the undersigned organizations representing thousands of members in and across the state of Indiana, we are writing to share our comments on the draft rule process Indiana is undertaking to meet its obligations set out in the Great Lakes St. Lawrence River Water Resources Compact (Compact). Thank you for the opportunity to comment. We appreciate being part of the effort to meet the key standards set forth in the Compact. These rules are a good step forward for Indiana but still miss key points. Overall, we are concerned about the vague language and the lack of detail in the rules.

Great Lakes-St. Lawrence River Basin Compact in Indiana:

- In Section 3 of the rule, the language is unclear and may be interpreted to give existing users the ability to transfer a “right” in a baseline amount of water to other users without simultaneous transfer of the facility itself. The state should not allow existing users to treat the baseline exemption as a property right in a set amount of water that can be bought and sold, contrary to riparian doctrine. The exemption is only for purposes of permitting and should only be transferred along with a facility. In addition, this rule sets a bad precedent and

¹ For sake of brevity, the correspondence with its attachment is sometimes referred to here as the “March 24 Joint Environmental Groups Statement”.

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seems to conflict with two major goals of the Marquette Plan: Goal 2 – Plan for public recreational access to the shoreline; and Goal 3 – Recapture 75% of the shoreline for free public access. We would hope that if a business departs and the site is not soon recaptured for industrial use, it would be converted back to public use per the Marquette Plan. We would also hope that if a site sits vacant for years and is bought by another user, they would be considered a new withdrawal and may need a permit under the rules.

- In Section 5 of the rule, it is unclear when the minimum decision-making standard in Section 4.11 of the Compact will be applied. In this case, we recommend that the Decision-Making Standard in Section 4.11 of the Compact be explicitly included and defined in the rules. This section states that proposals may only be approved when they meet the listed criteria. The standard should be applied to all new or increased withdrawals and consumptive uses that exceed the thresholds. In addition, applicants should provide information not just on the use, but also on the permitting criteria. We must apply these to all new or increased withdrawals or consumptive uses that go over the set thresholds.
- In Section 6 of the rule, it is unclear when a general permit is required. If this section is intended to cover all new or increased withdrawals and consumptive uses that do not exceed the thresholds then that should be made explicit.
- We believe that listing all tributaries to Lake Michigan in the rule by name, even those indirectly flowing into Lake Michigan via another major or minor river, will clarify what waters are subject to protection under the Great Lakes Compact and will reconcile the differences between the 327 IAC designations and those identified by the Indiana Department of Natural Resources. This will ensure that all of the designated salmonid rivers and their sources of water remain protected from excessive withdrawals and diversions. Including the tributaries to all of the major waterways listed in the proposed rule will also ensure that these rivers are able to maintain the conditions required for salmonid populations under normal and projected climate change conditions. It will also ensure that tributaries will continue to serve as a reliable source of water for Lake Michigan in the future. We respectfully request that in addition to the waters listed in the draft rule, the following rivers listed in the Indiana Administrative Code (327 IAC 2-1.5-5(3)) as salmonid waters, also be included in the proposed rule: Salt Creek above its confluence with the Little Calumet River, Kintzele Ditch (Black Ditch) from Beverly Drive downstream to Lake Michigan, those waters listed by the Indiana Department of Natural Resources for put-and-take trout fishing, the Indiana portion of the open waters of Lake Michigan, all Lake Michigan tributary streams directly or indirectly feeding Lake Michigan within the Little Calumet-Galien watershed (including but not limited to: Dunes Creek and all of its tributaries, Brown Ditch, White Ditch, Grand Calumet River and all of its tributaries, West Branch of the Little Calumet River and its tributaries downstream to Lake Michigan via Burns Ditch, Deep River and all tributaries above its confluence with the Little Calumet River).
- Therefore, we request the following tributaries be added by name: West Branch of the Little Calumet River and all tributaries including but not limited to Deep River and Turkey Creek; East Branch of the Little Calumet River and all tributaries including but not limited to Salt Creek, Sand Creek, Coffee Creek, and Reynolds Creek; all direct tributaries to Lake Michigan including but not limited to Brown Ditch, Kintzele Ditch, Dunes Creek, Trail

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Creek, White Ditch and Galena River; the Grand Calumet River and its tributaries; the Little Elkhart River and its tributaries, Cobus Creek and its tributaries and Solomon Creek and its tributaries. All listed rivers and streams are located in northern Indiana and part of the Lake Michigan watershed.

- The language defining the standard of review for consumptive uses or “withdrawals greater than 5 million” is inconsistent with the Compact. The standard of review is 5 million gallons or greater. In general, in order to comply with the Compact, we urge you to adopt our recommended changes.
- Section 7 of the rule states that it “identifies and develops” Indiana's conservation and efficiency goals and objectives, which are to be consistent with the regional goals and objectives adopted by the Compact Council through Resolution 5. But rather than identify objectives for the state to strive towards, the section includes specific measures that can be taken by users. Section 10 of the rule, in contrast, lists some objectives that could form part of the state's planning process. But the rule lacks certain elements, such as development of science, technology and research.
- In Section 8 of the rule, it is unclear which withdrawals, consumptive uses and diversions are subject to conservation and efficiency requirements, and the requirements themselves are vague. The Compact’s minimum decision-making standard for a state management program requires each new or increased withdrawal and consumptive use to be implemented so as to incorporate environmentally sound and economically feasible water conservation measures. Diversions required to meet the exception standard must also incorporate these measures, and must show that the need for the diversion cannot be reasonably avoided through the efficient use and conservation of existing water supplies. These critical criteria are not fleshed out.
- In Section 8 of the rule, facilities are required to implement best management practices (BMPs), but those BMPs are not defined. Without such a definition, it’s impossible for the State to determine if a BMP was implemented, let alone if it was appropriate for the facility, or achieved water conservation and efficiency goals.
- Section 9(c) states that “the department shall consider modifying...”; however Regional Objectives 1 and 2 make it clear that the State is responsible for periodic review and that other parties can request a review.
- In Section 10, the economically feasible and environmentally sound conservation “measures” identified aren’t really measures, but more of the means to achieve those measures. Overall, the Conservation and Efficiency Program is very loose and general, and it is difficult to determine if and how it correlates to the Compact. It is missing significant items required in the Compact. It is our recommendation that DNR review Wisconsin’s and Ohio’s efforts as good examples that are easy to follow. Wisconsin’s economically feasible and environmentally sound conservation measures are the result of consensus among a wide number of interests; they are tailored to specific sectors and identify mandatory measures for each. Such a process is responsive to Regional Objective One, “Develop and implement programs openly and collaboratively, including with local stakeholders, governments and the public.”

Again, thank you for the opportunity to comment and to participate in this process. We welcome any further discussion or clarification and would be happy to participate in additional draft rule language.

ATTACHMENT

312 IAC 6.2-1 Comments, Section 2: Definitions

Section 2(4): “BMPs means methods or techniques found to be the most effective and practical means in achieving an objective”.

Comment: It is unclear whether the BMPs must be the “best” in terms of actual conservation and efficiency.

312 IAC 6.2-2 Comments, Section 3: Facility sale or transfer of all or a portion of baseline volume

3(a): “This section applies to the sale or other transfer of a facility with a baseline volume.”

Comment: We are concerned about the language in the baseline transferability section, which seems to state that users could sell all or part of their baseline water rights to another user. This would mean water use would never decrease. I suppose on some level it would encourage water conservation in that businesses could sell their excess water rights. But in terms of benefits to Lake Michigan and the goals of the Compact, this is not a good water conservation approach.

3(b): “Not later than March 31 of the year following a sale or other transfer to another person of a right to use all or a portion of a facility’s baseline volume, the facility must notify the division.”

Comment: This time period is too long; change to 3 months from the sale or transfer of baseline volume.

3(c): “If a facility does not comply with subsection (b), the sale or transfer is ineffective under IC 14-25-15-1.”

Comment: How is “ineffective” defined? We want this to state that the use would be treated as a new withdrawal subject to permitting requirements as that is the intent and language of the Compact.

Section 4: Registration of a withdrawal, consumptive use, or diversion

4(d)(2) – “Existing facility that would have an increased withdrawal exceeding the baseline volume...must notify the department by March 31 of the year following the increase.”

Comment: also shorten to 3 months rather than March 31 of the following year.

4(f): “To qualify for registration, an applicant must provide the following information on a department form...”

Comment: Application materials should include how the water is used, places it will be used, and where it will be discharged. These components are not mentioned in the rule.

Section 5: Individual permit for a withdrawal, consumptive use, or diversion

5(d)(3): “The location of any source of water for a withdrawal or diversion to include the following...”

Comment: This section makes no mention of need for water, which should be top priority. The decision-making standard required in the Compact is touched on in 5(f) but it should be clearly fleshed out in this document. This is a major item.

Section 7: Voluntary Conservation and Efficiency Objectives

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Section 7(a): “This section identifies and develops voluntary conservation and efficiency objectives in the basin of Indiana as anticipated by Resolution 5.”

Comment: Indiana’s Goal and Objectives, which are to be tied to the Regional Goals and Objectives, are required by the Compact but are missing. The components listed in Section 7 really aren’t objectives. Other objectives from the Compact are missing such as 1) programs developed openly and collaboratively, with stakeholders, First Nations, local governments and the public, 2) prepare and maintain long-term water demand forecast 3) develop long-term strategies that incorporate water conservation and efficient water use 4) review and build upon existing planning efforts by considering practices and experiences from other jurisdictions (e.g. WI and OH are good examples).”

7b(a): “Components (of water conservation and management) may include...”

Comment: The use of the word “may” rather than “must” makes this section very weak.

7(b)(2): “The implementation of best management practices developed by the department for the following use categories (Industrial, energy production, irrigation, public water supply, rural and other)....”

Comment: Some of the uses in these categories are very different. BMPs should be developed for more narrow categories. Wisconsin, for example, has the following categories: public water supply; industrial and institutional; irrigation; livestock; industrial; power production; other.”

7(b)(3): “The use of other recognized conservation and efficiency programs and information developed by the following (US EPA, American Ground Water Trust, Alliance for Water Efficiency, Indiana’s Water Shortage Plan, Another governmental agency or nongovernmental organization)...”

Comment: Section 7.b.3 really lets them use anything they’d like to list as guidance. This list is too loose and undefined. Will the user ever have to follow guidance set by the state? How will the state monitor/evaluate this? How will DNR access the reports that may or may not include the things listed and properly evaluate them?

7(b)(5)(c): “The department shall make an annual assessment of the extent to which conservation and efficiency programs meet goals and objectives.”

Comment: It is unclear how this assessment would be conducted. What are the objectives against which the program will be measured?

Section 8: Mandatory conservation and planning

8(b): “As part of a permit application to the department, a person with a facility subject to decision making under the compact must include a water conservation plan that satisfies Section 7(b)(1).”

Comment: 7b(1) states that the plan “may include” several different components. How will the DNR determine if a plan is satisfactory?

8c(1): “Document conservation and efficiency use of existing water supplies by providing analyses of community water use for the previous five (5) year period, including how water use has.”

Comment: Is this provision intended to flesh out the Compact requirement of “efficient use and conservation of existing water supplies” in the exception standard? While the 5- year analysis is helpful in understanding past water use, the applicant must still demonstrate that it has implemented BMPs determined by the state to be adequate to meet this requirement. Wisconsin’s rule is one way to do this.

8(c)(3): “(An applicant for a new/increased diversion for public water supply must...) Document the implementation of best management practices applicable to the facility.”

Comment: Where are BMPs listed? Who determines which ones are appropriate for which sector? Who monitors BMPs over time as they change/improve?

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8(d)(3): “(The Department shall not approve an application for a new/increased diversion/withdrawal unless the applicant demonstrates adequately the ability to perform each of the following.): Implementation of environmentally sound and economically feasible conservation and efficiency measures.”

Comment: Are these to be different from BMPs? They should be specified by user category and by type of use (withdrawal, consumptive use, diversion).”

Section 9: Reviews of conservation and efficiency objectives

9b: “A modification to conservancy and efficiency objectives may result as a response to Compact council review that is anticipated to occur every five (5) years.”

Comment: The Compact allows reviews to be done earlier at the request of a party.

9c(1): “A determination to modify objectives shall be based on the following: New technologies...”

Comment: What if technologies aren’t new but become important? Language change is necessary here.

9(C): “The department shall consider modifying conservation and efficiency objectives in its ongoing program implementation.”

Comment: The state is responsible for periodic review, per regional objectives #1 and #2. Also, the Compact says other parties can request a review.

Section 10: Indiana commitment to promote environmentally sound and economically feasible measures

Section 10

Comment: Unlike section 7, this includes some objectives that are consistent with regional goals and objectives. Why are they not included in the state goals and objectives? They should also include research and technology objectives.

10(1): “Measures to promote the efficient use of water as follows: Education and outreach on water efficiency directed to facilities registered under IC 14-25-7-15; regular dissemination of conservation information such as informational pieces, brochures, newsletters, updates, similar communications”

Comment: These are really not measures but means to achieve a measure. Need more ability to quantify here.

Section 11: Measuring success of water conservation and efficiency measures

11(b): “For voluntary water conservation and efficiency measures, the department shall determine, record, and report.”

Comment: this section is very vague and broad. It’s unclear how success would be measured. How would the department evaluate its success in creating BMPs, education, research? Attendance at workshops? This section seems somewhat weak and meaningless.

11(b): “This section describes how the department shall measure the success of the voluntary water conservation and efficiency measures.”

Comment: This doesn’t measure the success of the department in undertaking its own activities, such as identification of BMPs, education, and research and technology.

11c(3): “(Department shall develop metrics that...) Describe the remedies required for noncompliance with the standards.”

Comment: Does this include orders or other enforcement actions?”

B. Written comments received by DNR’s Division of Water before LSA Posting and subsequently forwarded to the Commission

On March 4, 2013, Douglas Bley, Manager Water Programs, ArcelorMittal USA, submitted the following comments to the DNR:

...Following is a brief synopsis of the issues I have identified with the draft rule...

312 IAC 6.2-1-1(4) – This section refers to a compact that, at least at this point in the reg, is not yet defined....

312 IAC 6.2-2-3(d) – This section makes no sense from a practical standpoint. It would suggest that if I were a public water supplier and I hood up a new customer, my baseline withdrawal number would go down. The baseline is related directly to the withdrawal structure(s). You cannot sell a portion of the intake structure, pumps or pipes. Consumptive use can be a perplexing issue but I would still hold the owner of the withdrawal facility accountable for its baseline withdrawal and consumptive use. If worried about diversions, you could certainly build in a prohibition for sale of the baseline unless all of the water, except for consumptive use, is returned to the basin and hold the owner of the withdrawal facility accountable to ensure that, if a portion is sold, it is returned.

312 IAC 6.2-2-4(e) – This section has a problem in that it requires advanced notification and authorization from the DNR by an existing facility (with a grandfather baseline) even if there is an increase in the withdrawal less than 5,000,000 gallons (90-day notification requirement) or more than 5,000,000 gallons even if the increase were still below a baseline. This is counter to the concept of establishing a baseline, which tends to allow a facility flexibility to changes its withdrawal rate dependant on need. Even with new facilities (under subsection c), withdrawal rates can change from day to day and there is no threshold. Both this section and subsection c should refer only the established baseline as a beginning threshold with less than 5MGD above the baseline requiring a 90-day report and more than 5 MGD requiring prior authorization.

312 IAC 6.2-2-5(c) – See comment above regarding subsection 4(e). This also requires advanced approval if the increase in withdrawal is greater than 5MGD, regardless if the increase is within the approved baseline. The baseline should be a threshold, all evaluations for increases, etc. should be after the baseline threshold has been exceeded.

Hopefully, the above helps some....

3. PUBLIC HEARINGS

Included here are written comments and summaries of oral comments received at public hearings. At the beginning of each scheduled public hearing, the Hearing Officer announced the comment period would close end of March 24, 2014. The close of the public comment period was also posted on the Commission’s online rule docket posted at

<http://www.in.gov/nrc/2377.htm>. The following public hearings were held and convened as scheduled:

- February 17, 2014 at 9:00 a.m., EST, at the Indiana Government Conference Center South, 402 West Washington Street, Conference Center Room 1, Indianapolis
- March 13, 2014, at 9:00 a.m., CDT, at the Northwestern Indiana Regional Planning Commission, 6100 Southport Road, Portage
- March 13, 2014, at 2:00 p.m., EDT, at the Community/Recreation Center, Pinhook Park, 2801 Riverside Drive, South Bend
- March 14, 2014, at 10:00 a.m., EDT, at the Fort Wayne City Building, 200 East Berry Street, Fort Wayne

A. Public Hearing: February 17, 2014 (Indianapolis)

Kay Nelson, Director of Environmental Affairs for the Northwest Indiana Forum, attended the public hearing in Indianapolis. DNR Director Cameron Clark and professionals from DNR's Division of Water, James Hebensteit, Mark Basch, Monique Riggs, and Allison Mann, were also present. Nelson discussed the proposed rule with the Hearing Officer and reported the Northwest Indiana Forum would defer comments until the public hearing in Portage.

B. Public Hearing: March 13, 2014 (Portage)

Nicole Barker and Cathy Martin represented the Save the Dunes Council. Karen Lauerman represented the Northwest Indiana Forum. Chris Ducret and Chris Gosnell attended the public hearing. Also present were Mark Basch and Monique Riggs with the DNR Division of Water. Comments were provided as follows:

Karen Lauerman, with the Northwest Indiana Forum, read into the record comments by Kay L. Nelson, Director of Environmental Affairs, Northwest Indiana Forum:

The Northwest Indiana Forum (Forum) is a not-for-profit, regional economic development organization servicing members in Lake, Porter, LaPorte and Stark counties. Our focus is the retention and creation of quality employment opportunities that sustain and enhance our environment and quality of life for the residents of Northwest Indiana. Protection of the environment while enhancing the region's global competitive position is the highest priority for our members. I am here today to support the Natural Resources Commission formal adoption of the actions to amend and add language which will assist in the implementation of the Great Lakes – St. Lawrence River Basin Water Resources Compact (Compact).

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As an active stakeholder group during the development and passage of the Great Lakes Compact, Forum members have continued to be actively engaged in the proposed rule making process to amend 312 IAC 6.2-1 and to develop the addition of 312 IAC 6.2-2 to assist with the Compact Implementation.

Thank you for this change to provide our input. The Northwest Indiana Forum is strongly supportive of the Great Lakes Compact and all related conditions as a means to provide the necessary protection of Lake Michigan for the residents of Indiana.

Nicole Barker, Executive Director of the Save the Dunes Council, thanked the Commission, the DNR, and IDEM for discussing and drafting proposed rule language. “We really appreciate you coming all this way to hear us.” She said the Save the Dunes Council has partnered with the Alliance for the Great Lakes, the Natural Resources Defense Council, and the National Wildlife Federation, “all of whom have members in this area in Indiana and will be submitting their comments online.”

Cathy Martin, Land and Advocacy Specialist for the Save the Dunes Council, stated:

We appreciate being part of the effort to meet the key standards set forth in the Great Lakes S. Lawrence River Water Resources Compact. These rules are a good step forward for Indiana, but some of the language within the rule is inconsistent with the Compact requirements or allows room for unsustainable water use. Overall, we are concerned about some of the vague language and the lack of detail in the rules and wish to see some of these sections clarified and built upon.

The following are some key areas that we feel need to be addressed:

- In Section 3 of the rules – Facility sale or transfer of all or a portion of baseline volume – the language is unclear and may be interpreted to give existing users the ability to transfer a “right” in a baseline amount of water to other users without simultaneous transfer of the facility itself. The state should not allow existing users to treat the baseline exemption as a property right in a set amount of water that can be bought and sold. The exemption is only for purposes of permitting and should only be transferred along with a facility. In addition, this rule sets a bad precedent and seems to conflict with two major goals of the Marquette Plan, which is Goal 2 – Plan for public recreational access to the shoreline; and Goal 3 – Recapture 75% of the shoreline for free public access. We would hope that if a business departs and the site is not soon recaptured for industrial use, it would be converted back to public use per the Marquette Plan. We would also hope that if a site sits vacant for years and is bought by another user, they would be considered a new withdrawal permit and may need another permit under this use.
- In Section 5 of the rule – Individual permit for a withdrawal, consumptive use, or diversion – it is unclear when the minimum decision-making standard in Section 4.11 of the Compact will be applied. In this case, we recommend that the decision-making standard in Section 4.11 of the Compact be explicitly included and defined in the rules.

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The standard should be applied to all new or increased withdrawals and consumptive uses that exceed the thresholds.

- We believe that listing all tributaries to Lake Michigan in the rule by name, even those that indirectly flow into Lake Michigan via another major or minor river will clarify which waters are subject to protection under the Great Lakes Compact. This will ensure that all of the designated salmonids rivers and their sources of water remain protected from excessive withdrawals and diversions. It will also ensure that tributaries will continue to serve as a reliable source of water for Lake Michigan in the future.
- In Section 7 – the voluntary conservation and efficiency objectives – this section states it “identifies and develops” Indiana’s conservation and efficiency goals and objectives, which are to be consistent with the regional goals and objectives adopted by the Compact Council through Resolution 5. But rather than identify objectives for the state to strive towards, the section includes specific measures that can be taken by users. But the rule lacks certain elements, such as development of science, technology, and research.
- In Section 8 – mandatory conservation and planning it is unclear which withdrawals consumptive uses and diversions are subject to conservation and efficiency requirements. The requirements themselves are vague. The Compact’s minimum decisions making standard for a state management program requires each new or increased withdraw consumptive use to be implemented as to incorporate environmentally sound and economically feasible water conservation measures. Diversions required to make the exception standard must also incorporate these measures, and so that the need for diversion cannot be reasonably avoided through the efficient use and conservation of existing water supplies. These critical criteria are not fleshed out.
- Also in Section 8 – facilities are required to implement best management practices (BMPs), but those BMPs are not defined. Without such a definition, it is impossible for the state to determine if a BMP was implemented, let alone if it was appropriate for the facility, or achieved water conservation and efficiency goals.
- Section 9 – Regional Objectives 1 and 2 make it clear that the state is responsible for periodic review and that other parties can request a review. However, the language of Section 9(c), is contrary to that.
- In Section 10 – Indiana commitment to promote environmentally sound and economically feasible measures – the economically feasible and environmentally sound conservation measures identified aren’t really measures, but more of the means to achieve those measures. Overall, the Conservation and Efficiency Program is loose, in general, and it is difficult to determine if and how it correlates to the Compact. It is missing significant items required in the Compact. It is missing significant items required in the Compact.
- The language defining the standard of review for consumptive uses or withdrawals greater than five million gallons is inconsistent with the Compact. The standard of review is “five million gallons or greater”.

Martin added the Save the Dunes Council would submit written comments and may include examples from Wisconsin’s parallel rules. “Thank you for the opportunity to comment and participate in this process.”

C. Public Hearing: March 13, 2014 (South Bend)

Raymond Eiseman, Kathy Enders, Kim, Vanslager, and Jack Daly attended the public hearing.

Mark Basch and Monique Riggs with the DNR Division of Water were also in attendance.

Comments were provided as follows:

Kathy Enders of South Bend said, “People don’t realize what [the rule] is about and why there is not being something more in the local paper. That’s why you are lacking in people being here. I’m thinking if more people were aware or paid attention, it would be more likely that they would be more concerned as to what’s going on.” She outlined work-related experience in engineering associated with ground structure, water, and roads. “When it comes to nature, nature isn’t 100% all the time. But, at the same time, we have to look at what humanity is doing to change the parameters of everything involved. If the process is to make a little more controlling as to what we do and don’t do, that is a good thing.... This has a lot to do with our surviving, basically. Safe water is getting very scarce.”

Kim Vanslager of New Carlisle asked how the proposed rules would impact the planned gas-electric facility proposed for west of South Bend and “which would be withdrawing 5.9 million gallons of groundwater per day.” Mark Basch responded that the proposed facility would be within the Kankakee-Illinois River watershed and outside the Great Lakes Basin. As a result, the proposed rule would not apply. However the proposed facility would be subject to the state-wide water rights standards codified at IC § 14-25 and 312 IAC § 12. The facility would need to register with DNR’s Division of Water as a “significant water withdrawal facility”. Vanslager noted she has a greenhouse business “so water is important” to us.

There was a brief discussion of rule formatting, in SECTION 1 through SECTION 3 of the rule proposal. The hearing officer responded that an embryonic rule was adopted in anticipation of a more ambitious effort to follow with respect to the Compact. The 2005 rule and 2009 amendments were intended primarily to identify DNR’s Division of Water as the point of contact for interested persons to seek information. Also, the Indiana and Commission history with the Water Resources Development Act was memorialized. But the embryonic rule (existing 312

IAC 6.2-1-1 through 312 IAC 6.2-1-3) did not provide substantive provisions applicable directly to the Compact. Beginning with SECTION 4, all-new substantive language is offered for a permanent rule, although a series of temporary rules previously applied and currently apply. See particularly proposed 312 IAC 6.2-2-12.

Jack Daly of New Carlisle requested explanation regarding “grandfathering” of the existing and registered as a significant water withdrawal facilities (“SWWFs”) located within the Great Lakes Basin. Mark Basch explained SWWFs that were already registered in the Great Lakes Basin were “grandfathered” when the Compact was implemented. In 2009, DNR confirmed the baseline values for SWWFs within the Great Lakes Basin. The baseline volumes are based on capacity.

Daly asked whether the “grandfathered” SWWFs would need to go through the permitting process under the proposed rules. Basch responded an individual permit would be required if an SWWF “were to do something that would, as mentioned in proposed [312 IAC 6.2-2-5], bump [the SWWF] above the threshold of the Compact.” Existing Great Lakes diversions would be grandfathered under the Compact. Basch added, “The potential to move water out of the [Great Lakes Basin]—again, the Compact only allows for a diversion in a couple circumstances and it always has to be for public water supply. Any water that is diverted out of the Basin always has to go back into the basin after it is used. So, the wastewater would have to go back into the Basin after it has been treated.... That really is one of the main components of the Compact, to prohibit diversion.... That’s what this Compact deals with—the prohibition of diversions out of the Great Lakes.”

Daly asked who would be involved in the decision-making regarding allowable diversion of water from the Great Lakes Basin. The Hearing Officer responded that all eight Great Lakes States and the two Canadian Provinces would be involved in the “big decisions, and some of the smaller decisions would be made at the individual State level.”

Daly concluded, “I think increased oversight is good when you [have] industrial usage coming at you. I think that somebody should be minding the store. So I applaud that. I was hoping to get more information about ‘our little pond’, but [I now understand] that is another area outside” the Great Lakes Basin. He expressed disappointment the rules would not apply to his area in the Illinois River Basin.

D. Public Hearing: March 14, 2014 (Fort Wayne)

Nicole Wiley, Bill Bougher, Matthew Wirtz, and Andrew Schipper attended the public hearing. Mark Basch and Monique Riggs of the DNR Division of Water were also present. Comments were provided as follows:

Bill Bougher of Steel Dynamics in Butler stated, “We’re here just to get educated on the rule-making and what is being proposed here so we better understand what might be coming down the road. Obviously, we have an interest in conserving water as well, and we stress that in our facilities. This is an opportunity to see what is out there and what is formulated in the rules.” Mark Basch provided a brief overview of the proposed rule, and Monique Riggs provided information regarding the proposed conservation guidelines. Basch said if Steel Dynamics were to increase its withdrawal capacity over the approved baseline, then Steel Dynamics would be required to go through the permit process. The rule proposal provides the requirements of the permitting process. Basch added there is a general permit requirements proposed at 312 IAC 6.2-2-6, and other standards addressing ground water and surface water. A permit under this rule proposal and the Compact would include standards. He noted that Steel Dynamics would still be required to submit its water usage, but the Compact identifies an additional threshold.

Monique Riggs noted that in adopting the Compact, Indiana agreed to promote environmentally sound and economically feasible conservation efficiency strategies. “A lot of ways to achieving those is through a voluntary conservation program with significant water withdrawal facilities.” The voluntary program consists of outreach and education. “Also, a feedback links from the facilities to DNR that have also provided [DNR] data on what type of practices [the facilities] currently have in place, and what types of practices are planned for the future.” She added, “The

only time it becomes what might be considered ‘mandatory’ is as part of the permit application in the instances where the thresholds are met..., where the conservation and efficiency planning and water management strategies for a particular facility would be evaluated as part of the permit application package. That’s when [a conservation and efficiency plan] has to be provided. But, I would think that same facility may still participate voluntarily in the conservation and efficiency materials that we provide and provide feedback.” She noted that the voluntary conservation and efficiency program will be promoted statewide. The DNR’s Division of Water posted a “conservation clearinghouse” on its website at <http://www.in.gov/dnr/water/6364.htm>. “We have pretty much made it a one-stop-shop for everything..., like a water management plan framework, that is sort of a ‘fill in the blank’ document.” The website is “more geared to new facilities or smaller facilities as a starting point for their conservation efforts.”

Nicole Wiley of Steel Dynamics in Columbia City expressed interest in the consequences of the rule proposal.

Matthew Wirtz of Fort Wayne City Utilities asked whether the water usage reports were the same as the reports required by the Indiana Utility Regulatory Commission (“IURC”). Basch responded that DNR’s Division of Water has required water use reporting since 1985. The DNR’s reporting requirement is “basically the same thing as [IURC], but the [IURC] asked for other information, like financials.... But the water use reporting is identical.”

Wirtz said the City of Fort Wayne has established baselines for its withdrawal and diversion amounts with the Division of Water. Fort Wayne is preparing to divert an average of 3,000 million gallons per day into the Ohio River Basin, “but Fort Wayne will remain significantly below its baseline.” He asked whether DNR would have concerns. Basch responded that Fort Wayne had previously contacted DNR regarding the planned diversion, and the DNR provided a response. “As long as [Fort Wayne] is below its baseline for those amounts, that would be accommodated” by the rule proposal. A new permit would not be required.

Wirtz then asked how the rule proposal would impact a facility with an established baseline, withdrawing water from the St. Joseph River for consumptive use, which switches to a groundwater source. Basch responded the Compact applies to withdrawals of both surface water and groundwater. The Great Lakes Basin boundary is defined as the surface water boundary but includes groundwater. “In terms of the withdraw capacities..., it would still be based upon the capacity that is withdrawn. There may be some other issues with the stream, depending upon whether it is a salmonid stream, but it applies the established baseline.”

Wirtz reflected there is a small utility connected to City of Fort Wayne water that is interested in disconnecting and withdrawing instead from well fields. “In theory, Fort Wayne’s withdraw would go down, but this new entity will come in. The actual net to the Basin is the same.... It’s going to be a whole new withdraw in terms of a new facility.” The Hearing Officer asked whether the City of Fort Wayne would transfer a portion of its baseline to the small utility, or is the small utility “just going it alone? I think that might be part of the answer to your question.” Wirtz said the City of Fort Wayne probably would not want to transfer any portion of its baseline. Basch said the DNR would respond to questions from facilities regarding any water withdraw scenario under the jurisdiction of the Compact and the proposed rule amendments.

Andrew Schipper of Fort Wayne Utilities Engineering Department said he attended the public hearing to learn more about the process but did not have questions or comments.

4. COMPACT OVERVIEW

On February 20, 2008, Governor Mitch Daniels signed Indiana Public Law 4-2008, which authorized Indiana, upon approval by the eight Great Lakes States and consent by the U.S. Congress, to “solemnly covenant and agree” upon participation in the Great Lakes—St. Lawrence River Basin Water Resources Compact (“Compact”). P.L. 4-2008 included enabling legislation, which was to be mirrored by each of the Great Lakes States, as well as a few supplemental provisions. Indiana was the third State to approve the Compact, following Minnesota and Illinois. On July 9, 2008, Michigan became the eighth and final Great Lakes State to approve the Compact.

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On October 8, 2008, President George W. Bush signed U.S. Public Law 110-342 (S.J. Res. 45). P.L. 110-342 was a Joint Resolution of the House and Senate expressing “the consent and approval of Congress to an interstate compact regarding water resources in the Great Lakes—St. Lawrence River Basin.” The Compact became State and Federal Law on December 8, 2008.

The Compact details how the States manage use of the Great Lakes Basin’s water supply and builds on the 1985 Great Lakes Charter and its 2001 Annex. The Compact helps implement the Governors’ commitments under the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement that also includes the Premiers of Ontario and Québec. The Council of Great Lakes Governors serves as Secretariat to the Governors’ Compact Council created by the Compact.

The Great Lakes Basin is identified by the Detroit District of the U.S. Army Corps as follows:



The Division of Water of the Department of Natural Resources identifies the portion of the Great Lakes Basin that is located in Indiana (defined in proposed 312 IAC 6.2-1-1(3) as the “basin of

Indiana”), and the portion of what was historically part of the basin of Indiana but that has been diverted to the Illinois River Basin, as follows:



A note of appreciation is made to Allison M. Mann, Engineering Assistant within the Division of Water, for preparing this graphic.

5. DNR RESPONSES TO PUBLIC COMMENTS AND HEARING OFFICER ANALYSES

Before considering particular citizen comments a general observation is offered. Implementation of the Compact is still in its infancy. If the Compact is to endure, a long process will follow. Statutes and rules are only parts of the process, and they will undoubtedly be subject to many amendments. Put another way, the initiative is a marathon not a sprint. Given the jeopardy that can arise from making amendments between posting a rule and final adoption, the hearing officer

applies what is intended as a conservative approach. The final decision on the legal propriety of amendments rests with the Indiana Attorney General, but the intention is to defer amendments for a subsequent rule adoption that seem likely to be problematic from a procedural standpoint.

Both with respect to the current rule proposal and going forward, the initiatives and experiences of the other seven Great Lakes States may be informative. Jennifer Kane, the Commission’s paralegal, researched and identified several pertinent linkages to Illinois, Michigan, Minnesota, Ohio, New York, Pennsylvania, and Wisconsin. To be noted is that while all of these States have joined the Compact (in other words, are “parties” to the Compact), all of these States also have unique laws pertaining to water rights apart from the Compact. The linkages are set forth in attached Exhibit B.

To the extent practicable, comments are considered in the numerical sequence of the rule:

312 IAC 6.2-1-1 Purposes

Douglas Bley, Manager Water Programs for ArcelorMittal USA, observes that proposed 312 IAC 6.2.1-1(4) “refers to a compact that, at least at this point in the reg, is not yet defined.”

DNR Response: Section 1(4): “Compact” is proposed to be defined in 312 IAC 6.2-1-2(5) to refer to the Great Lakes –St. Lawrence River Basin Compact described in IC 14-25-15-1. The DNR offers a technical correction to add the phrase “Water Resources” between “Basin” and “Compact” to conform to the statutory reference.

Hearing Officer Analyzes: The statement by ArcelorMittal is accurate in that reference to the “compact” precedes the definition. For rule writing, the Commission applies the “Administrative Rules Drafting Manual” of the Indiana Legislative Services Agency. Part 8-2 of the manual anticipates definitions are the second inclusion in a rule, and they follow a brief statement of applicability. The definition is unambiguous. The ordering for the proposed rules appears consistent with the manual. The technical correction offered by the DNR is recommended for inclusion.

312 IAC 6.2-1-2 Definitions

Subdivision (4): “best management practices” or “BMPs”

Cathy Martin, Land and Advocacy Specialist for the Save the Dunes Council, stated the proposed definition for “best management practices” or “BMPs” refers to “methods or techniques found to be the most effective and practical means in achieving an objective”. She added, “It is unclear whether the BMPs must be the ‘best’ in terms of actual conservation and efficiency.”

DNR Response: BMPs will be provided on the Division of Water webpage for various water use categories and will be evaluated and updated to reflect improvements in technology and management practices.

Hearing Officer Analyzes: The posted version of the definition states: “‘Best management practices’ or ‘BMPs’ means methods or techniques found to be the most effective and practical means in achieving an objective (such as preventing or minimizing water losses) while making the optimum use of available resources.” This definition was augmented from prior drafts offers additional clarity. In addition to posting on the Division of Water webpage, BMPs for particular water use categories could be referenced in a Commission nonrule policy document. The use of nonrule policy documents would be much like the New York approach. Minnesota and Ohio have generic language similar to the proposed rule language.

Subdivision (11): “salmonid streams”

Barbara Simpson, Executive Director of the Indiana Wildlife Federation, requested that the listing of “salmonid streams” should “be expanded to add more clarity to what streams are included in the restrictions and permit requirements for water withdrawals in the Great Lakes watershed. The suggested change is not an exhaustive list of all Salmonid streams but does identify the key tributaries in the Great Lakes watershed that are not named in the current draft of the proposed administrative rule.

“In addition to the original proposed rule’s named streams of Trail Creek, the Galena River, the East Branch of the Little Calumet, and the St. Joseph River, we request the following tributaries be added by name: West Branch of the Little Calumet River, Grand Calumet River, Turkey Creek, Deep River, Salt Creek, Coffee Creek, Dunes Creek, Little Elkhart River, Cobus Creek, Solomon Creek, and all their tributaries. All listed rivers and streams are located in northern Indiana and part of the Lake Michigan watershed.

“Common sense tells us that if these waterways are not already specifically considered a ‘Salmonid stream’ they should be listed by virtue of being part of the Lake Michigan watershed. Smaller tributaries are much more sensitive to even minimal water withdrawals. Adding these streams by name will help assure that the person who obtains a permit before implementing a withdrawal does clearly understand that these smaller streams are in fact direct tributaries of the major rivers named in the current draft rule.”

Cathy Martin, Land and Advocacy Specialist for the Save the Dunes Council, stated a belief at the public hearing in Portage “that listing all tributaries to Lake Michigan in the rule by name, even those that indirectly flow into Lake Michigan via another major or minor river will clarify which waters are subject to protection under the Great Lakes Compact. This will ensure that all of the designated salmonids rivers and their sources of water remain protected from excessive withdrawals and diversions. It will also ensure that tributaries will continue to serve as a reliable source of water for Lake Michigan in the future.”

The March 24 Joint Environmental Groups Statement included comments similar to those by Martin:

We believe that listing all tributaries to Lake Michigan in the rule by name, even those indirectly flowing into Lake Michigan via another major or minor river, will clarify what waters are subject to protection under the Great Lakes Compact and will reconcile the differences between the 327 IAC designations and those identified by the Indiana Department of Natural Resources. This will

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ensure that all of the designated salmonid rivers and their sources of water remain protected from excessive withdrawals and diversions. Including the tributaries to all of the major waterways listed in the proposed rule will also ensure that these rivers are able to maintain the conditions required for salmonid populations under normal and projected climate change conditions. It will also ensure that tributaries will continue to serve as a reliable source of water for Lake Michigan in the future. We respectfully request that in addition to the waters listed in the draft rule, the following rivers listed in the Indiana Administrative Code (327 IAC 2-1.5-5(3)) as salmonid waters, also be included in the proposed rule: Salt Creek above its confluence with the Little Calumet River, Kintzele Ditch (Black Ditch) from Beverly Drive downstream to Lake Michigan, those waters listed by the Indiana Department of Natural Resources for put-and-take trout fishing, the Indiana portion of the open waters of Lake Michigan, all Lake Michigan tributary streams directly or indirectly feeding Lake Michigan within the Little Calumet-Galien watershed (including but not limited to: Dunes Creek and all of its tributaries, Brown Ditch, White Ditch, Grand Calumet River and all of its tributaries, West Branch of the Little Calumet River and its tributaries downstream to Lake Michigan via Burns Ditch, Deep River and all tributaries above its confluence with the Little Calumet River).

DNR Response: Matt Buffington, a biologist and the Environmental Manager within DNR’s Division of Fish and Wildlife, provided the following information regarding the list of salmonid streams within the Great Lakes Basin as specified in subdivision (11):

Several of the streams IWF mentions are tributaries to the East Branch Little Calumet and the Compact already includes the East Branch and its tributaries. We don’t think it is necessary to list them additionally. Based on input from our Lake Michigan Fisheries Biologist, including the West Branch Little Calumet and its tributaries, Dunes Creek, and the DNR put-and-take streams (which includes Cobus, Little Elkhart, and Solomon) would be a positive step as they do harbor various salmonid species. As of now, the Grand Calumet is not a suitable salmonid stream. However, it may become more attractive to trout and salmon as the extensive restoration efforts on the river continue and the habitat improves.

Based upon this information, DNR recommended that Section 2(11) be revised to read as follows:

- (11) “Salmonid stream” refers to each of the following:
 - (A) Trail Creek and its tributaries downstream to Lake Michigan.
 - (B) Galena River and its tributaries in LaPorte County.
 - (C) East Branch of the Little Calumet River and its tributaries downstream to Lake Michigan via Burns Ditch.
 - (D) St. Joseph River and its tributaries in St. Joseph County from the Twin Branch Dam in Mishawaka downstream to the Indiana/Michigan state line.
 - (E) West Branch Little Calumet and its tributaries.
 - (F) Dunes Creek.
 - (G) Cobus Creek.
 - (H) Little Elkhart River.
 - (I) Solomon Creek.

Hearing Officer Analyses: The statutory foundation for the special protections afforded to salmonid streams is set forth in IC 14-25-15-7. This section is not within the interstate agreement that forms the Compact but is rather an augmentation by the Indiana General Assembly to provide additional environmental protections within Indiana.

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Sec. 7. (a) Except as provided in section 8 of this chapter, a person must, under the rules established under section 5(4) of this chapter, obtain a permit from the department for a daily withdrawal in excess of any of the following, calculated on average over any ninety (90) day period:

- (1) Five million (5,000,000) gallons from Lake Michigan surface water.
- (2) Subject to subsection (b), one hundred thousand (100,000) gallons from a salmonid stream.
- (3) For any other surface water or groundwater source, one million (1,000,000) gallons.
- (b) Notwithstanding 327 IAC 2-1.5-5(a)(3), the salmonid streams subject to subsection (a)(2)

are the following:

- (1) Trail Creek and its tributaries downstream to Lake Michigan.
- (2) Galien River and its tributaries in LaPorte County.
- (3) East Branch of the Little Calumet River and its tributaries downstream to Lake Michigan via Burns Ditch.
- (4) St. Joseph River and its tributaries in St. Joseph County from the Twin Branch Dam in Mishawaka downstream to the Indiana/Michigan state line.
- (5) Subject to subsection (c), any other watercourse determined by rule by the commission.
- (c) Before adopting a rule under subsection (b)(5), the commission shall seek input from the U.S. Fish and Wildlife Service.

Other parties have similar statutory augmentations. For example, Michigan and Minnesota provide additional protections for trout streams.

Listing all tributaries in the “basin of Indiana” is not feasible. There is no official compilation of tributaries by name. A single tributary may have multiple names. Some tributaries may be best known by their designation as a “regulated drain” or a “mutual drain” under IC 36-9. Most minor tributaries are unnamed. The challenge is underlined by the term “Galien River” used in the statutory definition. According to a popular definition from Wikipedia, the Galien River is not located in Indiana but is rather is a “30.0-mile-long...stream in the southwest region of...Michigan. The river begins at the outlet of Dayton Lake and flows in a predominantly westerly direction until it enters southeastern Lake Michigan at New Buffalo. The South Branch of the Galien River rises just north of the border with Indiana, at the confluence of Spring Creek and the Galena River, the latter rising in LaPorte County, Indiana.” The rule definition uses the term “Galena River” to avoid confusion of Indiana’s stream with Michigan’s Galien River.

Tributaries within the basin of Indiana are better identified through the application by DNR’s Division of Water of scientific principles and mapping. In addition to the map on page 25 of this report, the Division of Water provides on its website an interactive Great Lakes Basin Map, which allows the user to magnify and achieve improved specificity for whether a site is within or outside the basin, at <http://www.in.gov/dnr/water/5398.htm>. Any stream within the area mapped for the basin of Indiana, exclusive of those in the Illinois Basin diversion, is subject to the Compact. A popular listing could be developed for named tributaries, perhaps on a DNR webpage or in a Commission nonrule policy document. But the rule should not be burdened by a popular listing that is inherently incomplete.

The Indiana General Assembly did not by oversight omit salmonid stream listings from 327 IAC. No reconciliation of differences is required. In enacting IC 14-25-15-7(b), our legislature recognized but determined not include them. Neither is a statutory construction viable that would equate all streams within the basin of Indiana as salmonid streams. If the General Assembly intended the inclusion of all such streams within the more stringent standards accorded to salmonid streams, it could have stated “all tributaries of the Great Lakes”, “all tributaries in the Great Lakes basin”, or similar language. The

legislative intent would be thwarted by a rule that approved a blanket inclusion of every tributary as a salmonid stream.

The proposed rule does not extend the definition of “salmonid stream” beyond the geographic scope contained in the statute. As a result, an additional fiscal impact did not result and was not reported by the DNR for the proposed rule adoption. Currently, any fiscal impact resulting from the more stringent standards for salmonid streams is a consequence of the legislation and not of the proposed rules. If the rule definition is amended to include streams additional to those in the legislation, new fiscal analyses should be tendered and approved by the Office of Management and Budget. The hearing officer would not jeopardize final adoption of LSA Document #13-335(F) by adding salmonid streams to those identified by the legislature without first performing fiscal analyses and obtaining fiscal approvals.

Even so, there may well be streams additional to those already listed that could appropriately be defined as “salmonid streams”. The Indiana General Assembly anticipated the possibility when it authorized, at IC 14-25-15-7(b)(5), the Commission to add to the listing. But a proper factual and legal foundation should first be established. One element of the legislative structure was for the Commission to seek input from the U.S. Fish and Wildlife Service. To help develop a science-based and legally objective approach to considering additions of salmonid streams, the following is suggested:

- The DNR’s Division of Fish and Wildlife would articulate a proposed definition for what constitutes a salmonid stream. In particular, the expertise of the Division’s fisheries biologists would be applied. The listing suggested by Matt Buffington is a good beginning. The listed streams and those already identified by the Indiana General Assembly could be expected to have characteristics common to salmonid streams.
- The proposed definition for salmonid stream would be then tendered to Advisory Council for public discussion and the development of recommendations. The recommendations may include a nonrule policy document or rule to describe or define the characteristics of a salmonid stream. The recommendations may also include the addition of a particular stream or streams in addition to those described in the proposed rule. The streams identified by Buffington should be among those discussed. Before recommending any rule amendment, the Advisory Council would provide the U.S. Fish and Wildlife Service a reasonable period to offer input.
- If the addition of a stream is recommended by the Advisory Council following public discussion and input from the U.S. Fish and Wildlife Service, the DNR would prepare and submit fiscal analyses to the Office of Management and Budget. If OMB approved the fiscal analyses, the recommendation for the addition of a stream would be submitted to the Commission for consideration as to preliminary adoption.
- If the Advisory Council endorsed a definition or description of the characteristics of a salmonid stream, without recommending the addition of a particular stream, the definition or description may be submitted to the Commission for consideration as a nonrule policy document.

312 IAC 6.2-1-3 Administration by the department

Hearing Officer Analyses: No changes were sought in public comments, and none are proposed.

312 IAC 6.2-2-1 Purposes of the compact rule

Hearing Officer Analyses: No changes were sought in public comments, and none are proposed.

312 IAC 6.2-2-2 Facilities exempted from permitting but subject to monitoring and reporting

Hearing Officer Analyses: No changes were sought in public comments, and none are proposed.

312 IAC 6.2-2-3 Facility sale or transfer of all or a portion of a baseline volume

Cathy Martin, Land and Advocacy Specialist for the Save the Dunes Council, urged at public hearing “the language is unclear and may be interpreted to give existing users the ability to transfer a ‘right’ in a baseline amount of water to other users without simultaneous transfer of the facility itself. The state should not allow existing users to treat the baseline exemption as a property right in a set amount of water that can be bought and sold. The exemption is only for purposes of permitting and should only be transferred along with a facility. In addition, this rule sets a bad precedent and seems to conflict with two major goals of the Marquette Plan, which is Goal 2 – Plan for public recreational access to the shoreline; and Goal 3 – Recapture 75% of the shoreline for free public access. We would hope that if a business departs and the site is not soon recaptured for industrial use, it would be converted back to public use per the Marquette Plan. We would also hope that if a site sits vacant for years and is bought by another user, they would be considered a new withdrawal permit and may need another permit under this use.”

The March 24 Joint Environmental Groups Statement included comments similar to those by Martin:

In Section 3 of the rule, the language is unclear and may be interpreted to give existing users the ability to transfer a “right” in a baseline amount of water to other users without simultaneous transfer of the facility itself. The state should not allow existing users to treat the baseline exemption as a property right in a set amount of water that can be bought and sold, contrary to riparian doctrine. The exemption is only for purposes of permitting and should only be transferred along with a facility. In addition, this rule sets a bad precedent and seems to conflict with two major goals of the Marquette Plan: Goal 2 – Plan for public recreational access to the shoreline; and Goal 3 – Recapture 75% of the shoreline for free public access. We would hope that if a business departs and the site is not soon recaptured for industrial use, it would be converted back to public use per the Marquette Plan. We would also hope that if a site sits vacant for years and is bought by another user, they would be considered a new withdrawal and may need a permit under the rules.

The March 24 Joint Environmental Groups Statement added:

This section applies to the sale or other transfer of a facility with a baseline volume.
 Comment: We are concerned about the language in the baseline transferability section, which seems to state that users could sell all or part of their baseline water rights to another user. This would mean water use would never decrease. I suppose on some level it would encourage water conservation in that businesses could sell their excess water rights. But in terms of benefits to Lake Michigan and the goals of the Compact, this is not a good water conservation approach.

[Subsection] 3(b): “Not later than March 31 of the year following a sale or other transfer to another person of a right to use all or a portion of a facility’s baseline volume, the facility must notify the division.”

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Comment: This time period is too long; change to 3 months from the sale or transfer of baseline volume.

3(c): "If a facility does not comply with subsection (b), the sale or transfer is ineffective under IC 14-25-15-1."

Comment: How is "ineffective" defined? We want this to state that the use would be treated as a new withdrawal subject to permitting requirements as that is the intent and language of the Compact.

Douglas Bley, Manager Water Programs for ArcelorMittal USA, urges that subsection (d) "makes no sense from a practical standpoint. It would suggest that if I were a public water supplier and I hood up a new customer, my baseline withdrawal number would go down. The baseline is related directly to the withdrawal structure(s). You cannot sell a portion of the intake structure, pumps or pipes. Consumptive use can be a perplexing issue but I would still hold the owner of the withdrawal facility accountable for its baseline withdrawal and consumptive use. If worried about diversions, you could certainly build in a prohibition for sale of the baseline unless all of the water, except for consumptive use, is returned to the basin and hold the owner of the withdrawal facility accountable to ensure that, if a portion is sold, it is returned."

DNR Response: With regard to "change of ownership", IC 14-25-15-1, Section 4.12.4, specifies:

Change of ownership. Unless a new owner proposes a project that results in a proposal for a new or increased diversion or consumptive use subject to regional review or council approval, the change of ownership in and of itself shall not require regional review or council approval.

This proposed rule section allows for the sale or transfer of all or a portion of a baseline volume and is believed to be consistent with the provisions of the Compact.

Hearing Officer Analyses: Essential to application of the Compact are IC 14-25-15-1, Section 4.12.4, referenced in the DNR Response, as well as, IC 14-25-15-1, Section 8.1.2, which states:

2. Nothing contained in the [C]ompact shall be construed as affecting or intended to affect or in any way interfere with the law of the respective parties relating to common law water rights.

Indiana is a "party" to the Compact. IC 14-25-15-1, Section 1.2. All parties allow transfer with notice to the applicable party.

Neither the Compact nor the proposed rules can interfere with Indiana common law water rights. Generally, the "common law" designates "all that part of the positive law, juristic theory, and ancient custom of any state or nation which is of general and universal application, thus marking off special or local rules or customs." BLACK'S LAW DICTIONARY, 6th Ed. (West. Publishing Co., 1990).

Although an exhaustive review of the common law of water rights is beyond the scope of the proposed rules, some authorities support the conclusion a landowner may transfer water rights to another person. The Governor's Water Resource Study Commission espoused the general principle that water rights "are not inextricably bound to the land to which they are incident. Therefore, they may be conveyed although the land itself is retained by the grantor." THE INDIANA WATER RESOURCE: AVAILABILITY, USES, AND Needs (Indiana Dep't of Natural Resources 1980), p. 113. An example of state-sanctioned transfer of water from public reservoirs is provided by IC 14-25-2. The legislation includes rule-adoption authority, which the Commission implemented at 312 IAC 6.3, to condition transfers. The Indiana Supreme Court

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recently concluded the DNR and municipalities shared regulatory authority to control the sale of groundwater by a conservancy district. *Town of Avon*, 957 N.E.2d 598 (Ind. 2011). If there were no ability to transfer water rights, there would be no need to regulate transfers.

Neither the Compact nor the rules can obviate the need to comply with Indiana water laws. A status determination for a baseline under IC 14-25-15-12 does not allow a person to avoid other state legislation. For example, DNR may accord relief to the owner of a groundwater withdrawal facility, with a capability of withdrawing less than 100,000 gallons of water a day, whose water supply is damaged by the owner of a groundwater withdrawal facility capable of withdrawing more than 100,000 gallons a day. IC 14-25-4. Securing a baseline status determination does not shield the holder from responsibility pursuant to IC 14-25-4. Transfer of water to another person of all or a portion of the baseline amount also would not shield the recipient from responsibility.

Proposed 312 IAC 6.2-2-3 does not on its face contravene the common law of Indiana water rights. The proposal appears to properly support the consequences of a baseline status determination. But reasonable persons may differ on the application of water law in Indiana and may have standing to complain. They may also differ upon the consequences of a particular baseline transfer. The Compact specifically grants standing to an aggrieved person, party, or the Great Lakes—St. Lawrence River Basin Water Council to initiate a State action if a person is believed, without approval having been given, to have undertaken “a new or increased withdrawal, consumptive use, or diversion that is prohibited or subject to approval” under the Compact. IC 14-25-15-1, Section 8.1.3.

A dispute as to the application of Indiana water law and transfer of a baseline should properly apply Indiana water law in the context of the Compact. The dispute should also apply Indiana procedural law. “It has long been Indiana law that a claimant with an available administrative remedy must pursue that remedy before being allowed access to judicial power.” [Internal citations omitted.] Our General Assembly has codified this general jurisprudential rule of administrative law through Ind. Code 4-21.5-5-4, which provides: ‘A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged[.]’” Exhaustion of administrative remedies before the Commission may be performed either in the context of a particular agency action or as a quasi-declaratory judgment under 312 IAC 3-1-5. *Carter v. Nugent Sand Company*, 925 N.E.2d 356, 360 (Ind. 2010). Neither the Compact nor the rules add to or subtract from other rights or obligations under Indiana water law. If a person believes a DNR agency action under this rule provision would violate Indiana common law (such as “riparian doctrine”), or a statutory authority pertaining to water rights law, the remedy is not a function of the Compact but one within Indiana’s statutory and procedural jurisdiction.

On the other hand, a failure to properly document with the DNR the transfer of a facility’s baseline volume to another person would be a violation of the Compact and the proposed rules. To clarify the intent of 312 IAC 6.2-2-3, the following additional language is recommended within subsection (c):

(b) Not later than March 31 of the year following a sale or other transfer to another person of a right to use all or a portion of a facility’s baseline volume, the facility must notify the division on a department form. The notification must include the name and contact information for the buyer or other transferee and any other information reasonably required on the form to achieve compliance with this rule.

(c) If a facility does not comply with subsection (b), the sale or transfer is ineffective under IC 14-25-15 and this article. A facility violates this article if the facility authorizes another person to

use all or a portion of the facility's baseline volume without complying with subsection (b). A person also violates this article by using any portion of the baseline volume of a facility unless the facility complies with subsection (b).

The Joint Environmental Groups do not provide a citation for the Marquette Plan. According to Northwest Indiana Regional Development Authority at <http://www.rdatransformation.com/>, “the Marquette Plan is a regional strategy to redevelop the Lake Michigan shoreline, improve transportation infrastructure and transform the economy of Northwest Indiana. Since 2005, the RDA, shoreline communities, and for-profit and non-profit partners have invested or committed approximately \$210 million toward these goals.” Goals include (1) recapture of 75% of the lakeshore for public use; (2) stimulation of private development and investment; (3) expansion of commuter and air transportation in Northwest Indiana; and (4) creation of a livable lakefront. The Marquette Plan applies to a small fraction of the basin of Indiana, albeit an important one. The Marquette Plan is not part of the common law of Indiana water law. Even if it were, the commentators have not shown the proposed rules would conflict with the Marquette Plan.

ArcelorMittal USA describes a practical challenge to segregating and properly reporting to the DNR a baseline transfer. The hope is a solution to the challenge can be fashioned following communications with the DNR. But a baseline volume cannot be both transferred and retained. A facility must be responsible for reporting a transfer and for transparency that would allow the agency to verify the quantity transferred. If a facility cannot segregate the amount of the baseline transferred, and make reasonable provision for verification, a transfer cannot appropriately occur.

312 IAC 6.2-2-4 Registration of a withdrawal, consumptive use, or diversion

Douglas Bley of ArcelorMittal USA wrote subsection (e) “has a problem in that it requires advanced notification and authorization from the DNR by an existing facility (with a grandfather baseline) even if there is an increase in the withdrawal less than 5,000,000 gallons (90-day notification requirement) or more than 5,000,000 gallons even if the increase were still below a baseline. This is counter to the concept of establishing a baseline, which tends to allow a facility flexibility to change its withdrawal rate dependant on need. Even with new facilities (under subsection c), withdrawal rates can change from day to day and there is no threshold. Both this section and subsection c should refer only the established baseline as a beginning threshold with less than 5MGD above the baseline requiring a 90-day report and more than 5 MGD requiring prior authorization.”

DNR Response: Section 4(d): Revise proposed language to read “(2) increased total consumptive use for the facility that is five million (5,000,000) gallons or greater daily.”

Section 4(e): Revise proposed language to clarify that this subsection applies if an increased withdrawal causes the facility to exceed the approved baseline. The phrase “which exceeds the baseline, and” should be inserted following the word “withdrawal” and before “that”.

Hearing Officer Analyses: The technical change to subdivision (d) would cause the language of the proposed rule to mirror that in the Compact and should be approved as set forth in the public comments and in the DNR Response. The change to subdivision (e) makes explicit what was only implicit previously and should also be approved. These changes offered in the DNR response would address the Bley comment.

312 IAC 6.2-2-5 Individual permit for withdrawal, consumptive use, or diversion

Cathy Martin of the Save the Dunes Council urged at public hearing that this section “is unclear when the minimum decision-making standard in Section 4.11 of the Compact will be applied. In this case, we recommend that the decision-making standard in Section 4.11 of the Compact be explicitly included and defined in the rules. The standard should be applied to all new or increased withdrawals and consumptive uses that exceed the thresholds.”

The March 24 Joint Environmental Groups Statement included comments similar to those by Martin and included additional comments concerning this section:

In Section 5 of the rule, it is unclear when the minimum decision-making standard in Section 4.11 of the Compact will be applied. In this case, we recommend that the Decision-Making Standard in Section 4.11 of the Compact be explicitly included and defined in the rules. This section states that proposals may only be approved when they meet the listed criteria. The standard should be applied to all new or increased withdrawals and consumptive uses that exceed the thresholds. In addition, applicants should provide information not just on the use, but also on the permitting criteria. We must apply these to all new or increased withdrawals or consumptive uses that go over the set thresholds.

Section 5: Individual permit for a withdrawal, consumptive use, or diversion

5(d)(3): “The location of any source of water for a withdrawal or diversion to include the following...”

Comment: This section makes no mention of need for water, which should be top priority. The decision-making standard required in the Compact is touched on in 5(f) but it should be clearly fleshed out in this document. This is a major item.

Douglas Bley of ArcelorMittal USA wrote that a problem parallel to what he described for 312 IAC 6.2-2-4(e) also applies here to subsection (c). “This also requires advanced approval if the increase in withdrawal is greater than 5MGD, regardless if the increase is within the approved baseline. The baseline should be a threshold, all evaluations for increases, etc. should be after the baseline threshold has been exceeded.”

DNR Response: Section 5(c): Revise existing language similarly to changes in section 4(e) to clarify the subsection applies if the increased withdrawal exceeds the baseline. Also, reference in subsection (c) to the 90-consecutive-days period is redundant to the reference in subsection (b). The repetitious clause should be deleted and replaced with “in excess of the baseline”.

Section 5(d)(3): Add new section (E) to subsection (d)(3) to read “The applicant’s need for the water source.”

Add the following list of necessary criteria to subsection (f) to meet the “decision making standard” for approval subject to Section 4.10 of the compact.

- 1) All water withdrawn shall be returned, either naturally or after use, to the source watershed less an allowance for consumptive use

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- 2) The withdrawal or consumptive use will be implemented so as to ensure that the proposal will result in no significant individual or cumulative adverse impacts to the quantity or quality of the water and water dependent natural resources and the applicable source watershed.
- 3) The withdrawal or consumptive use will be implemented so as to incorporate environmentally sound and economically feasible water conservation measures.
- 4) The withdrawal or consumptive use will be implemented so as to ensure that it is in compliance with all applicable municipal, state, and federal laws as well as regional interstate and international agreements, including the Boundary Water Treaty of 1909.
- 5) The proposed use is reasonable, based upon a consideration of the following factors:
 - a) Whether the proposed withdrawal or consumptive use is planned in a fashion that provides for efficient use of the water, and will avoid or minimize the waste of water.
 - b) If the proposal is for an increased withdrawal or consumptive use, whether efficient use is made of existing water supplies.
 - c) The balance between economic development, social development, and environmental protection of the proposed withdrawal and use and other existing or planned withdrawal and water uses sharing the water source.
 - d) The supply potential of the water source, considering quantity, quality, and reliability an safe yield of hydrologically interconnected water sources.
 - e) The probable degree and duration of any adverse impacts caused or expected to be caused by the proposed withdrawal and use under foreseeable conditions to other lawful consumptive or nonconsumptive uses of water or to the quantity or quality of the waters and water dependent natural resources of the basin, and the proposed plans and arrangements for avoidance or mitigation of such impacts.
 - f) If a proposal includes restoration of hydrologic conditions and functions of the source watershed, the party may consider that.

Hearing Officer Analyses: The clarification to subsection (c) should be made consistently with the changed in section 4(e). New clause (E) should be added to subsection (d)(3) as sought by the Joint Environmental Groups and as set forth in the DNR response.

The Compact in Indiana, including augmentation by the Indiana General Assembly, is codified in IC 14-25-15. The Legislative Services Agency codified the statutory chapter at <http://www.in.gov/legislative/ic/code/title14/ar25/ch15.pdf>. IC 14-25-15-1, Section 4.11, governs the decision-making standard:

....Proposals subject to management and regulation in section 4.10 shall be declared to meet this decision making standard and may be approved as appropriate only when the following criteria are met:

1. All water withdrawn shall be returned, either naturally or after use, to the source watershed less an allowance for consumptive use.
2. The withdrawal or consumptive use will be implemented so as to ensure that the proposal will result in no significant individual or cumulative adverse impacts to the quantity or quality of the waters and water dependent natural resources and the applicable source watershed.
3. The withdrawal or consumptive use will be implemented so as to incorporate environmentally sound and economically feasible water conservation measures.
4. The withdrawal or consumptive use will be implemented so as to ensure that it is in compliance with all applicable municipal, state, and federal laws as well as regional interstate and international agreements, including the Boundary Waters Treaty of 1909.
5. The proposed use is reasonable, based upon a consideration of the following factors:

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- a. Whether the proposed withdrawal or consumptive use is planned in a fashion that provides for efficient use of the water, and will avoid or minimize the waste of water.
- b. If the proposal is for an increased withdrawal or consumptive use, whether efficient use is made of existing water supplies.
- c. The balance between economic development, social development, and environmental protection of the proposed withdrawal and use and other existing or planned withdrawals and water uses sharing the water source.
- d. The supply potential of the water source, considering quantity, quality, and reliability and safe yield of hydrologically interconnected water sources.
- e. The probable degree and duration of any adverse impacts caused or expected to be caused by the proposed withdrawal and use under foreseeable conditions to other lawful consumptive or nonconsumptive uses of water or to the quantity or quality of the waters and water dependent natural resources of the basin, and the proposed plans and arrangements for avoidance or mitigation of such impacts.
- f. If a proposal includes restoration of hydrologic conditions and functions of the source watershed, the party may consider that.

When the legislature provides rule-making authority to an agency, the purpose is to help complete statutory implementation. Rules are enforceable only to the extent that they are within the scope of statutory authority granted to the agency. *Van Allen v. State of Indiana*, 467 N.E.2d 1210 (1984 Ind. App.)

Section 4.11 governs the decision-making standard for the Compact in Indiana. Indiana and the DNR must apply the standard. But while rules should help complete statutory implementation, they should not repeat the statute. In writing rules, an agency should “[a]void duplicating standards found in state or federal laws”. IC 4-22-2-19.5(a)(3). Repetitious language is to be avoided in rule writing. Part 9-21 of the “Administrative Rules Drafting Manual” of the Indiana Legislative Services Agency. Other parties have not repeated the statute in their rules. Subsection (f) specifically recognizes the responsibility to satisfy Section 4.10 and Section 4.11 of IC 14-25-15-1. Any further reference to these statutory responsibilities would be unduly repetitious and should not be included.

312 IAC 6.2-2-6 General permit for withdrawal, consumptive use, or diversion

The *March 24 Joint Environmental Groups Statement* urged that “it is unclear when a general permit is required. If this section is intended to cover all new or increased withdrawals and consumptive uses that do not exceed the thresholds then that should be made explicit.”

DNR Response: Section 6: Remove “or diversion” from section title. The language in subsection (a) should be revised to read: “This section establishes a general permit for a new or increased withdrawal or consumptive use not exceeding the thresholds set forth in IC 14-25-15 and this article”.

Hearing Officer Analyses: The term “diversion” is in what the Indiana General Assembly deems a “section heading” and the Legislative Services Agency deems a “section header”. The term “diversion” is misleading because the section does not address diversions. But section headings (headers) do not affect the meaning, application, or construction of any rule. IC 4-22-9-4(3) and Part 3-4 of the “Administrative Rules Drafting Manual”. The section heading is modified without an amendment to the proposed rule.

More significantly, the applicability of general permits is to activities that do not exceed the applicable statutory threshold, and this limitation should be stated explicitly. The amendments referenced in the DNR Response should be given final adoption.

One point of additional clarification may be worthwhile. A person is not required to use a general permit and may instead elect to apply for an individual permit.

312 IAC 6.2-2-7 Voluntary conservation and efficiency objectives

Cathy Martin of the Save the Dunes Council urged at public hearing “this section states it ‘identifies and develops’ Indiana’s conservation and efficiency goals and objectives, which are to be consistent with the regional goals and objectives adopted by the Compact Council through Resolution 5. But rather than identify objectives for the state to strive towards, the section includes specific measures that can be taken by users. But the rule lacks certain elements, such as development of science, technology, and research.”

The *March 24 Joint Environmental Groups Statement* urged:

Section 7 of the rule states that it “identifies and develops” Indiana’s conservation and efficiency goals and objectives, which are to be consistent with the regional goals and objectives adopted by the Compact Council through Resolution 5. But rather than identify objectives for the state to strive towards, the section includes specific measures that can be taken by users. Section 10 of the rule, in contrast, lists some objectives that could form part of the state’s planning process. But the rule lacks certain elements, such as development of science, technology and research....

Section 7(a): “This section identifies and develops voluntary conservation and efficiency objectives in the basin of Indiana as anticipated by Resolution 5.”

Comment: Indiana’s Goal and Objectives, which are to be tied to the Regional Goals and Objectives, are required by the Compact but are missing. The components listed in Section 7 really aren’t objectives. Other objectives from the Compact are missing such as 1) programs developed openly and collaboratively, with stakeholders, First Nations, local governments and the public, 2) prepare and maintain long-term water demand forecast 3) develop long-term strategies that incorporate water conservation and efficient water use 4) review and build upon existing planning efforts by considering practices and experiences from other jurisdictions (e.g. WI and OH are good examples).”

7b(a): “Components (of water conservation and management) may include...”

Comment: The use of the word “may” rather than “must” makes this section very weak.

7(b)(2): “The implementation of best management practices developed by the department for the following use categories (Industrial, energy production, irrigation, public water supply, rural and other)....”

Comment: Some of the uses in these categories are very different. BMPs should be developed for more narrow categories. Wisconsin, for example, has the following categories: public water supply; industrial and institutional; irrigation; livestock; industrial; power production; other.”

7(b)(3): “The use of other recognized conservation and efficiency programs and information developed by the following (US EPA, American Ground Water Trust, Alliance for Water Efficiency, Indiana’s Water Shortage Plan, Another governmental agency or nongovernmental organization)....”

Comment: Section 7.b.3 really lets them use anything they’d like to list as guidance. This list is too loose and undefined. Will the user ever have to follow guidance set by the state? How will the state monitor/evaluate this? How will DNR access the reports that may or may not include the things listed and properly evaluate them?

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7(b)(5)(c): “The department shall make an annual assessment of the extent to which conservation and efficiency programs meet goals and objectives.”

Comment: It is unclear how this assessment would be conducted. What are the objectives against which the program will be measured?

DNR Response: Remove ‘objectives’ from title in Section 7. Remove “and develops” from subsection (a). The Compact’s regional goals and objectives are incorporated as Indiana’s goals and objectives by reference to Resolution 5. Another approach could be to list them out if that is deemed to have more clarity.

In subsection (b), “may” is used instead of “must” because by the Compact’s implementing Statute, conservation and efficiency planning in Indiana must be voluntary.

In (b)(2), BMPs have been developed for Indiana significant water withdrawal facilities specific to each of Indiana’s registered water use categories: irrigation, energy production, public supply, industrial, rural and miscellaneous. The BMPs, though defined, have purposely not been listed out. This is in recognition that best management practices in any field are in a constant state of re-evaluation and adaptation to technological and mechanical advances. Not publishing the list in the rule itself may allow for revisions of the BMP list with enough frequency that it can remain fluid and responsive to changes.

In (b)(3), reference is made to other recognized conservation and efficiency programs and information as stated. This statement in rule recognizes that the DNR’s Division of Water is not the only expert in water management and conservation planning. A sound water management and conservation plans may be devised incorporating another organization’s expertise.

Sec. 7(b)(5)(c): In response to the critique of “7(b)(5)(c)”, the objectives used as a barometer for Indiana’s voluntary conservation and efficiency program for significant water withdrawal facilities would be based upon the Sec.1 (b) for the promotion of environmentally sound and economically feasible water conservation measures consistent with the goals and objectives of Resolution 5.

Hearing Officer Analyses: The section heading is modified in Exhibit A, as suggested by the DNR, without amending the proposed rule. The phrase “and develops” should be deleted, as proposed in the DNR response, because the phrase seemingly does not reflect the tenor of the proposed section.

Other amendments to this section are not recommended. The voluntary measures identified in this section are compatible with those of Ohio and other parties to the Compact. Additional requirements in Wisconsin are based on a statutory structure in Wisconsin that is fundamentally different than what exists in Indiana. The Commission was directed by the Indiana General Assembly to adopt rules to implement “voluntary water conservation and efficiency programs”. IC 14-25-15-5(3). The Compact anticipates a party’s water conservation and efficiency program may be either “voluntary or mandatory”. IC 14-25-15-1, Section 4.2.2. The Indiana General Assembly prohibited the Commission from adopting rules for a mandatory program governing water conservation and efficiency, unless the General Assembly adopts an act authorizing such rule adoption. IC 14-25-15-5(2).

312 IAC 6.2-2-8 Mandatory conservation and planning

Cathy Martin of the Save the Dunes Council urged at public hearing “it is unclear which withdrawals consumptive uses and diversions are subject to conservation and efficiency requirements. The

requirements themselves are vague. The Compact’s minimum decisions making standard for a state management program requires each new or increased withdraw consumptive use to be implemented as to incorporate environmentally sound and economically feasible water conservation measures. Diversions required to make the exception standard must also incorporate these measures, and so that the need for diversion cannot be reasonably avoided through the efficient use and conservation of existing water supplies. These critical criteria are not fleshed out.

Also, “facilities are required to implement best management practices (BMPs), but those BMPs are not defined. Without such a definition, it is impossible for the state to determine if a BMP was implemented, let alone if it was appropriate for the facility, or achieved water conservation and efficiency goals.”

The March 24 Joint Environmental Groups Statement urged:

In Section 8 of the rule, it is unclear which withdrawals, consumptive uses and diversions are subject to conservation and efficiency requirements, and the requirements themselves are vague. The Compact’s minimum decision-making standard for a state management program requires each new or increased withdrawal and consumptive use to be implemented so as to incorporate environmentally sound and economically feasible water conservation measures. Diversions required to meet the exception standard must also incorporate these measures, and must show that the need for the diversion cannot be reasonably avoided through the efficient use and conservation of existing water supplies. These critical criteria are not fleshed out.

In Section 8 of the rule, facilities are required to implement best management practices (BMPs), but those BMPs are not defined. Without such a definition, it’s impossible for the State to determine if a BMP was implemented, let alone if it was appropriate for the facility, or achieved water conservation and efficiency goals.

Section 8: Mandatory conservation and planning

8(b): “As part of a permit application to the department, a person with a facility subject to decision making under the compact must include a water conservation plan that satisfies Section 7(b)(1).”

Comment: 7b(1) states that the plan "may include" several different components. How will the DNR determine if a plan is satisfactory?

8c(1): “Document conservation and efficiency use of existing water supplies by providing analyses of community water use for the previous five (5) year period, including how water use has.”

Comment: Is this provision intended to flesh out the Compact requirement of "efficient use and conservation of existing water supplies" in the exception standard? While the 5- year analysis is helpful in understanding past water use, the applicant must still demonstrate that it has implemented BMPs determined by the state to be adequate to meet this requirement. Wisconsin's rule is one way to do this.

8(c)(3): “ (An applicant for a new/increased diversion for public water supply must...) Document the implementation of best management practices applicable to the facility.”

Comment: Where are BMPs listed? Who determines which ones are appropriate for which sector? Who monitors BMPs over time as they change/improve?

8(d)(3): “(The Department shall not approve an application for a new/increased diversion/withdrawal unless the applicant demonstrates adequately the ability to perform each of the following.): Implementation of environmentally sound and economically feasible conservation and efficiency measures.”

Comment: Are these to be different from BMPs? They should be specified by user category and by type of use (withdrawal, consumptive use, diversion).”

Eric Amt wrote that in this section of the proposed rules, “it is not clear who is subject to decision making under the rule and are therefore required to complete conservation planning. If it is those that fall under 6.2-2-5(b), it would be helpful to have that reference in Sec. 8 (b).”

DNR Response: The title of this section should be amended from “Mandatory conservation and planning” to read “Conservation and planning for permit applicants”.

Revise proposed subsection (b) as follows to clarify who is required to complete conservation and efficiency planning:

As part of a permit application to the department required under 6.2-2-5, a person with a facility subject to decision making under the compact must include a water conservation plan that satisfies section 7(b)(1) of this rule.

Hearing Officer Analyses: The section heading is modified in Exhibit A, as suggested by the DNR, without amending the proposed rule. The conservation and planning anticipated by the section is an element of permit review for activities requiring new permits that are subject to scrutiny under the Compact. The essence of the section is for the limited classes of activities that require Compact permitting rather than as a water conservation and efficiency program.

The technical amendment to subsection (b) should be included (with a formatting adjustment to comply with LSA drafting specifications) to implement the Amt comment and as set forth in the DNR response.

Other amendments to this proposed section are not recommended. The proposed section is compatible with those of other parties and consistent with concepts for permitting at this early stage of Compact implementation. As experience is gained in Indiana and by other parties, additional specificity in the rule or in a nonrule policy document may be warranted. A broad expansion of the section at this time would lack foundation and could jeopardize the proposed rule adoption.

312 IAC 6.2-2-9 Reviews of conservation and efficiency objectives

Cathy Martin of the Save the Dunes Council urged at public hearing:

Regional Objectives 1 and 2 make it clear that the state is responsible for periodic review and that other parties can request a review. However, the language of Section 9(c), is contrary to that.

The March 24 Joint Environmental Groups Statement urged:

Section 9(c) states that “the department shall consider modifying...”; however Regional Objectives 1 and 2 make it clear that the State is responsible for periodic review and that other parties can request a review.

Section 9: Reviews of conservation and efficiency objectives

9b: “A modification to conservancy and efficiency objectives may result as a response to Compact council review that is anticipated to occur every five (5) years.”

Comment: The Compact allows reviews to be done earlier at the request of a party.

9c(1): “A determination to modify objectives shall be based on the following: New technologies...”

AGENDA ITEM #5

Comment: What if technologies aren't new but become important? Language change is necessary here.

9(C): "The department shall consider modifying conservation and efficiency objectives in its ongoing program implementation."

Comment: The state is responsible for periodic review, per regional objectives #1 and #2. Also, the Compact says other parties can request a review.

DNR Response: Regional objectives 2 and 3 from Resolution 5 are the appropriate references to the above comments. A party may make a request for review of another party's conservation and efficiency objectives, but those requests go through the council under Article 3, Section 3.4 Program Review and Findings, number 2. Language in subsection (c)(1) should be revised to include updated technologies that may become important but are not new. With these changes, this section would provide:

Sec.9. (a) This section applies to the review of conservation and efficiency objectives in the basin of Indiana.

(b) A modification to ~~conservancy~~ conservation and efficiency objectives may result as a response to council review that is anticipated to occur every five (5) years, or earlier at the request of the council.

(c) The department shall consider modifying conservation and efficiency objectives in its ongoing program implementation and review. A determination to modify objectives shall be based on the following:

- (1) New or updated technologies.**
- (2) New patterns in water use.**
- (3) New resource demands and threats.**
- (4) An assessment of cumulative impacts under Section 4.15 of IC 14-25-15-1.**

Hearing Officer Analyses: In subsection (b), the substitution of "conservation" for "conservancy" corrects a clerical error and should be approved. The timing of a review should be made to conform to Section 3.4.2 of IC 14-25-15-1 which provides:

2. The council, in cooperation with the provinces, shall review its water management and conservation and efficiency programs and those of the parties that are established in the compact and make findings on whether the water management program provisions in the compact are being met and, if not, recommend options to assist the parties in meeting the provisions of the compact. Such review shall take place:
 - a. thirty (30) days after the first report is submitted by all parties;
 - b. every five (5) years after the effective date of the compact; and
 - c. at any other time at the request of one (1) of the parties.

To achieve conformity, the following amendment to subsection (b) is recommended:

(b) ~~A modification to conservancy and efficiency objectives may result as a response to council review that is anticipated to occur every five (5) years.~~ In response to a review conducted under Section 3.4.2 of IC 14-25-15-1, the department shall recommend to the commission modifications to any water management and conservation and efficiency program governed by this article and which are needed to meet the provisions of the compact.

Modifications to subsection (c) should be recommended for inclusion based on public comments and as set forth in the DNR response.

312 IAC 6.2-2-10 Indiana commitment to promote environmentally sound and economical feasible measures

Cathy Martin of the Save the Dunes Council urged at public hearing:

In Section 10 – Indiana commitment to promote environmentally sound and economically feasible measures – the economically feasible and environmentally sound conservation measures identified aren't really measures, but more of the means to achieve those measures. Overall, the Conservation and Efficiency Program is loose, in general, and it is difficult to determine if and how it correlates to the Compact. It is missing significant items required in the Compact. It is missing significant items required in the Compact.

The March 24 Joint Environmental Groups Statement urged:

In Section 10, the economically feasible and environmentally sound conservation “measures” identified aren't really measures, but more of the means to achieve those measures. Overall, the Conservation and Efficiency Program is very loose and general, and it is difficult to determine if and how it correlates to the Compact. It is missing significant items required in the Compact. It is our recommendation that DNR review Wisconsin's and Ohio's efforts as good examples that are easy to follow. Wisconsin's economically feasible and environmentally sound conservation measures are the result of consensus among a wide number of interests; they are tailored to specific sectors and identify mandatory measures for each. Such a process is responsive to Regional Objective One, “Develop and implement programs openly and collaboratively, including with local stakeholders, governments and the public.”

Comment: Unlike section 7, this includes some objectives that are consistent with regional goals and objectives. Why are they not included in the state goals and objectives? They should also include research and technology objectives.

10(1): “Measures to promote the efficient use of water as follows: Education and outreach on water efficiency directed to facilities registered under IC 14-25-7-15; regular dissemination of conservation information such as informational pieces, brochures, newsletters, updates, similar communications”

Comment: These are really not measures but means to achieve a measure. Need more ability to quantify here.

DNR Response: Incorporate this section as a component of Section 7 perhaps, rather than stand alone? WI's referenced program is mandatory, not voluntary. Perhaps we need to define the difference between means and measures somewhere, if there is one. It should be noted that IN incorporated the conservation goals and objectives the same way OH did, which is by reference to the Compact.

Hearing Officer Analyzes: This section is reasonably suited to implementation of the Compact. No changes are recommended.

312 IAC 6.2-2-11 Measuring success of water conservation and efficiency measures

The March 24 Joint Environmental Groups Statement reflected upon this section and urged:

11(b): “For voluntary water conservation and efficiency measures, the department shall determine, record, and report.”

AGENDA ITEM #5

Comment: this section is very vague and broad. It's unclear how success would be measured. How would the department evaluate its success in creating BMPs, education, research? Attendance at workshops? This section seems somewhat weak and meaningless.

11(b): "This section describes how the department shall measure the success of the voluntary water conservation and efficiency measures."

Comment: This doesn't measure the success of the department in undertaking its own activities, such as identification of BMPs, education, and research and technology.

11c(3): "(Department shall develop metrics that...) Describe the remedies required for noncompliance with the standards."

Comment: Does this include orders or other enforcement actions?"

DNR Response: This section is intended to measure the success of a voluntary program that relies heavily on voluntary participation in Indiana by persons operating significant water withdrawal facilities. Revise language as below. The following modifications are proposed to subsection (b) and subsection (c).

Sec. 11 (b): For voluntary water conservation and efficiency measures, the department shall determine, record, and report the following:

- (1) The number of facilities for which conservation and efficiency planning is reported.
- (2) The number of facilities for which documentation of conservation and efficiency programming is provided.

(3) The number of facilities for which attendance at conservation and efficiency workshops, seminars or applicable educational efforts is reported.

(4) Other metrics that assist in determining conservation and efficiency participation.

(c): For ~~mandatory~~ water conservation and efficiency measures that are subject to evaluation under section 8 of this rule, the department shall develop metrics that do the following:

- (1) Summarize compliance standards for new or increased withdrawals and diversions and for consumption uses.
- (2) Document the frequency of noncompliance with the standards as summarized in subdivision (1).

In the alternative, if the Commission deems the measures meaningless, remove acquisition of measurements at all for a voluntary program.

Hearing Officer Analyzes: For consistency with the language and with the reasoning for changes to proposed 312 IAC 6.2-2-8, the word "mandatory" should be stricken from subsection (c). Proposed section 8 anticipates the development of permit conditions, particularly as set forth in subsection (d). A failure to comply with permit conditions is subject to enforcement as identified in proposed section 13.

Measuring success of compliance with the Compact in Indiana and the success of the Department in overseeing compliance are important functions. To require in a rule that the Division of Water report upon compliance success or upon the Department's oversight success might be misplaced. In any event, there may be no written comment to support such a rule as a "logical outgrowth" as required under IC 4-22-2-29.

No amendment other than striking the word "mandatory" is recommended for this section. But a recommendation is that the Division of Water report to the Advisory Council by July 1, 2015 concerning the success of water conservation and efficiency measures under this rule. An opportunity for public comments should be provided. Following receipt of the report and public comments, the Advisory Council would make any recommendations it determined appropriate to the Department and to the Commission with respect to metrics, a nonrule policy document, or a rule amendment.

312 IAC 6.2-2-12 Application of former temporary rules that assisted in administration of the compact

Hearing Officer Analyses: No changes were sought in public comments, and none are recommended.

312 IAC 6.2-2-13 Violation and enforcement

Hearing Officer Analyses: No changes were sought in public comments, and none are recommended.

Five million gallons or greater

Cathy Martin of the Save the Dunes Council also makes an observation of general application:

The language defining the standard of review for consumptive uses or withdrawals greater than five million gallons is inconsistent with the Compact. The standard of review is “five million gallons or greater”.

The *March 24 Joint Environmental Groups Statement* included comments similar to those by Martin:

The language defining the standard of review for consumptive uses or “withdrawals greater than 5 million” is inconsistent with the Compact. The standard of review is 5 million gallons or greater. In general, in order to comply with the Compact, we urge you to adopt our recommended changes.

DNR Response: The recommendation is 312 IAC 6.2-2-4(d) and 312 IAC 6.2-2-5(c) be revised to read “five million (5,000,000) gallons or greater daily” to be consistent with the Compact language.

Hearing Officer Analyses: This technical change would cause the language of the proposed rule to mirror that in the Compact and is recommended for approval as set forth in the public comments and in the DNR Response.

6. HEARING OFFICER RECOMMENDATIONS

(1) The proposed amendments to 312 IAC 6.2 appear to be appropriate, with recommended modifications as set forth by **bold underlining** or ~~strikethrough~~, and are presented for consideration as to final adoption as attached in Exhibit A.

(2) To help develop a science-based and legally objective approach to considering additions of salmonid streams to those considered in 312 IAC 6.2, the following is suggested:

- The DNR’s Division of Fish and Wildlife would articulate a proposed definition for a “salmonid stream”. In particular, the expertise of the Division’s fisheries biologists

would be applied. The listed streams and those already identified by the Indiana General Assembly could be expected to have characteristics common to salmonid streams.

- The proposed definition for salmonid stream would be tendered to Advisory Council by January 1, 2015 for public discussion and the development of recommendations. The recommendations may include a nonrule policy document or rule to describe or define the characteristics of a salmonid stream. The recommendations may also include the addition of a particular stream or streams in addition to those described in the proposed rule. The streams identified by Matt Buffington should be among those discussed. Before recommending any rule amendment, the Advisory Council would provide the U.S. Fish and Wildlife Service a reasonable period to offer input.
- If the addition of a stream is recommended by the Advisory Council following public discussion and input from the U.S. Fish and Wildlife Service, the DNR would prepare and submit fiscal analyses to the Office of Management and Budget. If OMB approved the fiscal analyses, the recommendation for the addition of a stream would be submitted to the Natural Resources Commission for consideration as to preliminary adoption.
- If the Advisory Council endorsed a definition or description of the characteristics of a salmonid stream, without recommending the addition of a particular stream, the definition or description may be submitted to the Commission for consideration as a nonrule policy document.

(3) By July 1, 2015, the Division of Water would report to the Advisory Council concerning the success of water conservation and efficiency measures provided under this rule. An opportunity for public comments would be provided. Following review of the report and consideration of public comments, the Advisory Council would make any recommendations it determined appropriate to the Department and to the Commission with respect to the development of metrics, a nonrule policy document, or a rule amendment.

Dated: April 28, 2014

Stephen L. Lucas
Hearing Officer

EXHIBIT A

TITLE 312 NATURAL RESOURCES COMMISSION

Final Rule

LSA Document #13-335(F)

DIGEST

Amends 312 IAC 6.2-1 and adds 312 IAC 6.2-2 to assist with implementation of Article 4 of IC 14-25-15-1 pertaining to water management and regulation under the Great Lakes-St. Lawrence River Basin Water Resources Compact to address registration and permitting of water withdrawal facilities; provide a voluntary conservation and efficiency program for water withdrawal facilities; provide mandatory conservation and efficiency programs for new and increased withdrawals, diversions, and consumptive uses; and otherwise comply with IC 14-25-15. Similar provisions previously applied in LSA Document #11-677(E), LSA Document 12-119(E), LSA Document 12-586(E), and LSA Document 13-532(E). Effective September 1, 2014.

312 IAC 6.2-1-1; 312 IAC 6.2-1-2; 312 IAC 6.2-1-3; 312 IAC 6.2-2

SECTION 1. **312 IAC 6.2-1-1** IS AMENDED TO READ AS FOLLOWS:

312 IAC 6.2-1-1 Purposes

Authority: IC 14-10-2-4; IC 14-25

Affected: IC 14-25-1-11; IC 14-25-15-1

Sec. 1. The purposes of this article are to assist with each of the following:

- (1) Implementation and administration of IC 14-25-1-11.
- (2) Execution of the state’s responsibilities under subsection (d) of 42 U.S.C. 1962d-20 (the “Water Resources Development Act”).
- ~~(3) Evaluation of water diversions from the basin.~~ **(3) Implementation of IC 14-25-15.**
- (4) Implementation of the compact.

(Natural Resources Commission; 312 IAC 6.2-1-1; filed Jan 5, 2005, 9:45 a.m.: 28 IR 1459; filed Jan 2, 2009, 1:30 p.m.: 20090128-IR-312080531FRA)

SECTION 2. **312 IAC 6.2-1-2** IS AMENDED TO READ AS FOLLOWS:

312 IAC 6.2-1-2 Definitions

Authority: IC 14-10-2-4; IC 14-25

Affected: IC 14-8-2; IC 14-9-3; IC 14-25

Sec. 2. ~~(a)~~ **The definitions in IC 14-8-2, Section 1.2 of IC 14-25-15-1, and in 312 IAC 1, and the following definitions** apply throughout this article.

~~(b) In addition to the definitions referenced in subsection (a),~~

- (1) “Baseline volume” refers to the amount of water approved through a status determination under IC 14-25-15-12 (or approved through a modification to a status determination or another previous department order) with respect to any of the following categories:**

- (A) A total water withdrawal capability registered under IC 14-25-7-15(c)(3).
- (B) A consumptive use attributable to a facility.
- (C) A facility that diverts water outside the basin.
- (2) “Basin” or “Great Lakes-St. Lawrence River Basin” means the watershed of the Great Lakes and the St. Lawrence River upstream from Trois-Rivières, Québec, within the jurisdiction of the parties to the compact.
- (3) “Basin of Indiana” means the portion of the basin located in the state of Indiana.
- (4) “Best management practices” or “BMPs” means methods or techniques found to be the most effective and practical means in achieving an objective (such as preventing or minimizing water losses) while making the optimum use of available resources.
- (5) “Compact” means the Great Lakes-St. Lawrence River Basin Water Resources Compact described in IC 14-25-15-1.
- (6) “Deputy director” refers to the deputy director for the bureau of water and resource regulation established by IC 14-9-3.
- (7) “Division” means the division of water of the department.
- (8) “Facility” means a water withdrawal facility.
- (9) “Q90” means the amount of flow in a stream that was equaled or exceeded by the annual daily mean stream flow ninety percent (90%) of the time.
- (10) “Resolution 5” refers to “Resolution #5--Adoption of Basin-Wide Conservation and Efficiency Objectives”, which was adopted by the council on December 8, 2008.
- (11) “Salmonid stream” refers to each of the following:
 - (A) Trail Creek and its tributaries downstream to Lake Michigan.
 - (B) Galena River and its tributaries in LaPorte County.
 - (C) East Branch of the Little Calumet River and its tributaries downstream to Lake Michigan via Burns Ditch.
 - (D) St. Joseph River and its tributaries in St. Joseph County from the Twin Branch Dam in Mishawaka downstream to the Indiana/Michigan state line.
- (12) “Water use audit” means a systematic framework for accurately measuring water use and water loss in a given system.
- (13) “Water withdrawal facility” refers to a system or process that:
 - (A) is a diversion; or
 - (B) in the aggregate from all sources and by all methods, has the capability of withdrawing more than one hundred thousand (100,000) gallons of ground water, surface water, or ground and surface water combined, in one (1) day.

(Natural Resources Commission; 312 IAC 6.2-1-2; filed Jan 5, 2005, 9:45 a.m.: 28 IR 1459; filed Jan 2, 2009, 1:30 p.m.: 20090128-IR-312080531FRA)

SECTION 3. 312 IAC 6.2-1-3 IS AMENDED TO READ AS FOLLOWS:

312 IAC 6.2-1-3 Administration by the department

Authority: IC 14-10-2-4; IC 14-25

Affected: IC 14-10-2-3; IC 14-25-15

Sec. 3. (a) The division shall:

- (1) serve as the point of contact; and
- (2) coordinate the administrative, professional, and technical functions of this article.

(b) Subject to IC 14-10-2-3 and to subsection (c), the ~~department~~ **deputy** director shall issue any order appropriate to the implementation of this article.

(c) This section does not delegate to the department or to the department director any authority granted to the governor under IC 14-25-15. (*Natural Resources Commission; 312 IAC 6.2-1-3; filed Jan 5, 2005, 9:45 a.m.: 28 IR 1460; filed Jan 2, 2009, 1:30 p.m.: 20090128-IR-312080531FRA*)

SECTION 4. 312 IAC 6.2 IS ADDED TO READ AS FOLLOWS:

Rule 2. Great Lakes-St. Lawrence River Basin Compact in Indiana

312 IAC 6.2-2-1 Purposes of compact rule

Authority: IC 14-10-2-4; IC 14-25

Affected: IC 14-25-1-11; IC 14-25-15

Sec. 1. (a) **Under IC 14-25-15 within the basin of Indiana, this rule implements and regulates the following:**

(1) **A water withdrawal, diversion, or consumptive use that is subject to registration or permitting.**

(2) **A voluntary program for promoting water conservation and efficiency for a person with a water withdrawal facility.**

(3) **A mandatory program for promoting water conservation and efficiency for a person with a water withdrawal facility that is consistent with Section 4.2 of IC 14-25-1-1 and IC 14-25-15-5.**

(b) **This rule assists with the goal of the state of Indiana to promote and encourage environmentally sound and economically feasible water conservation measures by water users within the basin consistent with the Great Lakes-St. Lawrence basin water conservation and efficiency objectives set forth in Resolution 5.**

(*Natural Resources Commission; 312 IAC 6.2-2-1*)

312 IAC 6.2-2-2 Facilities exempted from permitting but subject to monitoring and reporting

Authority: IC 14-10-2-4; IC 14-25-1

Affected: IC 14-25-1-11; IC 14-25-15-1

Sec. 2. (a) **A facility is exempted from the permitting requirements of this rule, if the facility does not exceed its approved baseline volume for any category.**

(b) **A facility exempted under subsection (a) must satisfy the monitoring and reporting requirements of this rule.** (*Natural Resources Commission; 312 IAC 6.2-2-2*)

312 IAC 6.2-2-3 Facility sale or transfer of all or a portion of baseline volume

Authority: IC 14-10-2-4; IC 14-25

Affected: IC 14-25-1-11; IC 14-25-15-1

Sec. 3. (a) **This section applies to the sale or other transfer of a facility with a baseline volume.**

(b) **Not later than March 31 of the year following a sale or other transfer to another person of a right to use all or a portion of a facility's baseline volume, the facility must notify the division on a department form. The notification must include the name and contact information for the buyer or other transferee and any other information reasonably required on the form to achieve compliance**

with this rule.

(c) If a facility does not comply with subsection (b), the sale or transfer is ineffective under IC 14-25-15 and this article. A facility violates this article if the facility authorizes another person to use all or a portion of the facility's baseline volume without complying with subsection (b). A person also violates this article by using any portion of the baseline volume of a facility unless the facility complies with subsection (b).

(d) For a sale or transfer that is effective, the buyer or transferee is beneficiary to the amount of the baseline volume that is sold or transferred. The amount of the approved baseline volume of the seller or transferor is reduced by the amount sold or transferred.

(e) A buyer or transferee must comply with any action required by Section 4.12(4) of IC 14-25-15-1. (*Natural Resources Commission; 312 IAC 6.2-2-3*)

312 IAC 6.2-2-4 Registration of a withdrawal, consumptive use, or diversion

Authority: IC 14-10-2-4; IC 14-25

Affected: IC 14-25-7-15; IC 14-25-15-1

Sec. 4. (a) This section governs registration of a withdrawal, consumptive use, or diversion.

(b) A person must register a facility with the division on a department form under this section.

(c) A new facility that would withdraw less than a threshold amount described in section 5(b)(1) or 5(b)(3) of this rule must notify the department within ninety (90) days of completion of the withdrawal facility.

(d) An existing facility that would have an increased withdrawal exceeding the baseline volume, for a water withdrawal capability under IC 14-25-7-15(c)(3), which, when combined with all prior increases, does not result either in:

(1) an increase above the threshold amount described in section 5(b) of this rule; or

(2) increased total consumptive use for the facility that is ~~greater than~~ greater five million (5,000,000) gallons or greater daily;

must notify the department by March 31 of the year following the increase.

(e) An existing facility with an increased withdrawal, which exceeds the baseline and that would not satisfy subsection (c), must obtain authorization in advance under IC 14-25-15 and this article.

(f) To qualify for registration, an applicant must provide the following information on a department form:

(1) The applicant's:

(A) name and mailing address;

(B) contact person's name; and

(C) contact person's telephone number and e-mail address.

(2) If an applicant authorizes another person to be responsible for implementation of a withdrawal and the return of water to the basin, and the associated reporting requirements, the authorized person must provide the following information:

(A) Name and mailing address.

(B) Contact person's name.

(C) Contact person's telephone number and e-mail address.

(3) The location and sources of any withdrawal or diversion.

(4) The capacity of any withdrawal in gallons per day.

(5) The amount withdrawn or diverted from each source in gallons per day for any thirty (30) day period.

(g) By March 31 of the following year, a person registered under this section must report each of the following to the division on a department form:

- (1) Updates to registration information.
- (2) Information regarding evaluation, implementation, and results of water conservation and efficiency efforts used at the facility during the year.
- (3) Monthly volumes of water in gallons for each of the following:
 - (A) Withdrawals.
 - (B) Consumptive uses.
 - (C) Diversions.

(h) Registration under IC 14-25-15 and this section also satisfies the registration requirements of IC 14-25-7-15. (*Natural Resources Commission; 312 IAC 6.2-2-4*)

312 IAC 6.2-2-5 Individual permit for a withdrawal, consumptive use, or diversion

Authority: IC 14-10-2-4; IC 14-25

Affected: IC 14-25

Sec. 5. (a) This section governs an individual permit for a withdrawal, consumptive use, or diversion.

(b) A person must obtain a permit under IC 14-25-15 and this rule before implementing a new average daily withdrawal over any ninety (90) consecutive days that exceeds the following:

- (1) From Lake Michigan, five million (5,000,000) gallons.
- (2) From a salmonid stream, one hundred thousand (100,000) gallons.
- (3) From any other source of ground water or surface water or of ground water and surface water combined, one million (1,000,000) gallons.

(c) Unless exempted under IC 14-25-15-8, a person must obtain advance approval to increase ~~for any period of ninety (90) consecutive days~~ in excess of the baseline, the average daily thresholds under subsection (b) of an existing withdrawal of ground or surface water or ground water and surface water combined for either:

- (1) a withdrawal; or
- (2) an increase in consumptive use to ~~greater than~~ greater than five million (5,000,000) gallons ~~per day or greater daily~~.

(d) Except as provided in subsection (g), an applicant must provide each of the following:

- (1) The information required for registration in section 4(f) of this rule.
- (2) Identification of which of the following the applicant seeks:
 - (A) A new or increased withdrawal in excess of a threshold described in subsection (b).
 - (B) A new or increased consumptive use in excess of five million (5,000,000) gallons per day.
 - (C) An exception to the prohibition on diversions for any of the following:
 - (i) A straddling community.
 - (ii) A community within a straddling county.
 - (iii) An intra-basin transfer.
- (3) The location of any source of water for a withdrawal or diversion to include the following:
 - (A) The applicant's sole or preferred source.
 - (B) Any source that is an alternative to clause (A).
 - (C) Any well or pump site.

(D) If a person other than the applicant would make a withdrawal, information to reasonably support a finding the person:

- (i) has sufficient capacity to serve the applicant's needs; and
- (ii) is willing to negotiate a purchase price with the applicant.

(E) The applicant's need for the water source.

(4) A map or photograph to assist with identification of the following:

(A) The source watershed that includes if:

- (i) ground water, that the source is a confined or an unconfined aquifer; or
- (ii) surface water, that the source is a river, stream, or lake (and the name of the water body).

(B) The proposed location of any withdrawal and return flow discharge.

(C) If a diversion, both of the following:

- (i) The existing water supply service area.
- (ii) The area that is proposed to receive the diverted water.

(5) The new or increased diversion and any associated consumptive use, which includes the following:

(A) The total proposed maximum volume of the withdrawal, diversion, or consumptive use over the planned life of the project (but not exceeding fifty (50) years) in millions of gallons per day:

- (i) averaged over a calendar year;
- (ii) over the peak period of ninety (90) consecutive days during a calendar year;

and

(iii) monthly.

(B) Whether the use would be:

- (i) continuous;
- (ii) seasonal; or
- (iii) temporary.

(C) Locations where the withdrawal and where the return discharge would be measured.

(D) The technical method to be used for determining the rates of flow.

(6) If within the prior ten (10) years, an application was approved to increase the baseline volume for the facility, the date of the approval and the daily volume in gallons for any the following:

(A) Withdrawal.

(B) Consumptive use.

(C) Diversion.

(e) For an exception to the prohibition on diversions that is subject to Section 4.9 of IC 14-25-15-1, an applicant must additionally satisfy the criteria in:

- (1) Section 4.9.1 of IC 14-25-15-1 for a straddling community;
- (2) Section 4.9.2 of IC 14-25-15-1 for an intra-basin transfer; or
- (3) Section 4.9.3 of IC 14-25-15-1 for a straddling county;

as described in Section 4.9.4 of IC 14-25-15-1.

(f) For a new or increased withdrawal or consumptive use that is subject to Section 4.10 of IC 14-25-15-1, an applicant must additionally satisfy the criteria in the decision making standard of Section 4.11 of IC 14-25-15-1.

(g) The owner of a facility is not required to register under IC 14-25-7-15, or to obtain a water withdrawal permit under this rule, if the facility is installed and used exclusively for any of the following purposes:

(1) Testing or evaluating the ground water resource for a period not greater than seventy-two (72) hours in one (1) calendar year.

(2) A noncommercial project that continues for not more than three (3) months for firefighting, humanitarian, or emergency response purposes.

(3) Supplying a vehicle, boat, or aircraft with respect to:

(A) transport of a person or animal;

(B) ballast; or

(C) operating a vehicle, boat, or aircraft. *(Natural Resources Commission; 312 IAC*

6.2-2-5)

312 IAC 6.2-2-6 General permit for a withdrawal or consumptive use

Authority: IC 14-10-2-4; IC 14-25

Affected: IC 14-21.5-4; IC 14-25-1-11; IC 14-25-15-1

Sec. 6. (a) This section establishes a general permit for a new or increased withdrawal or for a consumptive use not exceeding the threshold amounts set forth in IC 14-25-15 and this article.

(b) A person who qualifies under this section is not required to obtain an individual permit under IC 14-25-15 and Section 5 of this rule.

(c) To qualify for a general permit, a person must satisfy each of the following:

(1) Comply with all requirements for registration of a withdrawal or consumptive use under section 4 of this rule.

(2) Limit any new or increased average daily consumptive use to less than five million (5,000,000) gallons over any period of ninety (90) consecutive days.

(3) Unless prior written approval is obtained from the department, refrain from making a daily withdrawal of one hundred thousand (100,000) gallons from either

(A) a salmonid stream; or

(B) a well located within one-half (1/2) mile of a salmonid stream.

(4) Following an order issued by the department under IC 4-21.5-4, cease or curtail the withdrawal as directed, if the department determines either:

(A) a ground water withdrawal exceeds the recharge capability of the source aquifer; or

(B) the withdrawal is causing a stream flow that is both:

(i) below Q90; and

(ii) likely to result in an adverse impact to fish, wildlife, or botanical resources.

(Natural Resources Commission; 312 IAC 6.2-2-6)

312 IAC 6.2-2-7 Voluntary conservation and efficiency

Authority: IC 14-10-2-4; IC 14-25

Affected: IC 14-25-7-15

Sec. 7. (a) This section identifies ~~and develops~~ voluntary conservation and efficiency objectives in the basin of Indiana as anticipated by Resolution 5.

(b) Consistent with Section 4.2 of IC 14-25-15-1, all facilities registered under IC 14-25-7-15 are encouraged to consider and implement measures such as the following:

(1) The development and submission to the division for comment of a water conservation and management plan as follows:

(A) Components may include:

(i) A description and quantification of current water use and reuse as identified by a water audit.

(ii) Water conservation goals.

(iii) Current and proposed metering activity.

(iv) Methods to control unaccounted water.

(v) Methods for water reuse.

(vi) Methods for leak detection and repair.

(vii) Other conservation or efficiency measures employed or considered.

(B) An implementation timeline for each component listed in clause (A).

(C) A monitoring plan that includes measures for adaptive management.

(2) The implementation of best management practices developed by the department for the following use categories:

(A) Industrial.

(B) Energy Production.

(C) Irrigation.

(D) Public water supply.

(E) Rural and other.

(3) The use of other recognized conservation and efficiency programs and information developed by the following:

(A) United States Environmental Protection Agency.

(B) American Ground Water Trust.

(C) Alliance for Water Efficiency.

(D) Indiana's Water Shortage Plan.

(E) Another governmental agency or nongovernmental organization.

(4) Reporting participation in a water conservation and efficiency program. The report may include any of the following:

(A) Elements of the program.

(B) The resulting savings in water use quantified in gallons or liters. They may include financial savings from reductions to:

(i) chemical treatments for public water supply;

(ii) expenditures on infrastructure;

(iii) pesticides or herbicides; or

(iv) additives to irrigation water.

(C) Any other information supporting improved understanding of conservation and efficiency programs.

(5) Participation in department surveys and questionnaires that seek accurate and timely data regarding conservation and efficiency programs.

(c) The department shall make an annual assessment of the extent to which conservation and efficiency programs meet goals and objectives. The department shall provide the assessment as follows:

(1) Annually to the council and the regional body.

(2) On the department's website and as otherwise practicable to the public. (*Natural Resources Commission; 312 IAC 6.2-2-7*)

312 IAC 6.2-2-8 Conservation and planning for permit applicants

Authority: IC 14-10-2-4; IC 14-25

Affected: IC 14-25-1-11; IC 14-25-15-1

Sec. 8. (a) This section governs water conservation and planning, as required under IC 14-25-15, for a new or increased withdrawal, diversion, or consumptive use.

(b) As part of a permit application to the department required under section 5 of this rule, a person with a facility subject to decision making under the compact must include a water conservation plan that satisfies section 7(b)(1) of this rule.

(c) In addition to the requirements of subsection (b), an applicant for a new or increased diversion for public water supply must do each of the following:

(1) Document conservation and efficiency use of existing water supplies by providing analyses of community water use for the previous five (5) year period, including how water use has:

(A) changed over time; and

(B) changed or is anticipated to change with the implementation of a conservation and efficiency program.

(2) Include a water-use reduction goal and methods proposed to measure attainment of the goal.

(3) Document the implementation of best management practices applicable to the facility.

(d) The department shall not approve an application for a new or increased diversion or withdrawal unless the applicant demonstrates adequately the ability to perform each of the following:

(1) Measurement of water use.

(2) Adoption of BMPs.

(3) Implementation of environmentally sound and economically feasible conservation and efficiency measures. (*Natural Resources Commission; 312 IAC 6.2-2-8*)

312 IAC 6.2-2-9 Reviews of conservation and efficiency objectives

Authority: IC 14-10-2-4; IC 14-25

Affected: IC 14-25-1-11; IC 14-25-15-1

Sec.9. (a) This section applies to the review of conservation and efficiency objectives in the basin of Indiana.

(b) ~~A modification to conservancy and efficiency objectives may result as a response to council review that is anticipated to occur every five (5) years.~~ In response to a review conducted under Section 3.4.2 of IC 14-25-15-1, the department shall recommend to the commission modifications to any water management and conservation and efficiency program governed by this article and which are needed to meet the provisions of the compact.

(c) The department shall consider modifying conservation and efficiency objectives in its ongoing program implementation and reviews. A determination to modify objectives shall be based on the following:

(1) New or updated technologies.

(2) New patterns in water use.

(3) New resource demands and threats.

(4) An assessment of cumulative impacts under Section 4.15 of IC 14-25-15-1. (*Natural Resources Commission; 312 IAC 6.2-2-9*)

312 IAC 6.2-2-10 Indiana commitment to promote environmentally sound and economically feasible measures

Authority: IC 14-10-2-4; IC 14-25

Affected: IC 14-25-7-15

Sec. 10. **This section identifies the commitment by the state of Indiana to promote environmentally sound and economically feasible measures such as the following:**

(1) Measures to promote the efficient use of water as follows:

(A) Education and outreach on water efficiency directed to facilities registered under IC 14-25-7-15.

(B) Regular dissemination of conservation information such as informational pieces, brochures, newsletters, updates, and similar communications.

(2) Identification and dissemination of best management practices and state of the art conservation and efficiency technology as follows:

(A) Surveys to identify current water use planning and conservation components implemented or planned by registered facilities.

(B) Education and outreach tailored to registered facilities in all use categories.

(C) Public listing of potential best management practices.

(D) Other methods reasonably designed to implement this subdivision.

(3) Assistance to facilities with the development and application of sound planning principles as follows:

(A) Documents and forms for voluntary management planning.

(B) Assistance with water auditing and plan development.

(C) Support for conservation planning, analyses, or modification.

(D) Other planning assistance.

(4) Identification of demand-side or supply-side measures or incentives as follows:

(A) Promoting conservation pricing for public utilities.

(B) Promoting public education on conservation activities at all levels of water use.

(C) Developing a recognition program for “super conserver” awards to be posted publicly.

(D) Other measures and incentives reasonably designed to implement this subdivision. (*Natural Resources Commission; 312 IAC 6.2-2-10*)

312 IAC 6.2-2-11 Measuring success of water conservation and efficiency measures

Authority: IC 14-10-2-4; IC 14-25

Affected: IC 14-25-1-11; IC 14-25-15-1

Sec. 11. **(a) This section describes how the department evaluates the success of water conservation and efficiency measures.**

(b) For voluntary water conservation and efficiency measures, the department shall determine, record, and report the following:

(1) The number of facilities for which conservation and efficiency planning is reported.

(2) The number of facilities for which documentation of conservation and efficiency programming is provided.

(3) Attendance at conservation and efficiency workshops.

(4) Other metrics that assist in determining conservation and efficiency participation.

(c) For ~~mandatory~~ water conservation and efficiency measures that are subject to section 8 of this rule, the department shall develop metrics that do the following:

(1) Summarize compliance standards for new or increased withdrawals and diversions and for consumption uses.

(2) Document the frequency of noncompliance with the standards as summarized in subdivision (1).

(3) Describe the remedies required for noncompliance with the standards.

(4) Document the success or failure of remediation. (*Natural Resources Commission; 312 IAC 6.2-2-11*)

312 IAC 6.2-2-12 Application of former temporary rules that assisted in administration of the compact

Authority: IC 14-10-2-4; IC 14-25

Affected: IC 14-25-1-11; IC 14-25-15-1

Sec. 12. The following temporary rules applied to assist with implementation of IC 14-25-15-1 during the referenced periods:

(1) LSA Document #11-677(E), posted at 20111109-IR-312110677ERA, from November 1, 2011 until November 1, 2012.

(2) LSA Document #12-119(E), posted at 20120328-IR-312120119ERA, from April 1, 2012 until November 1, 2012.

(3) LSA Document #12-586(E), posted at 20121031-IR-312120586ERA from November 1, 2012 until November 1, 2013. LSA Document #12-586(E) may be referenced as guidance from November 1, 2013 until December 1, 2013.

(4) LSA Document #13-532(E), posted at 20131204-IR-312130532ERA from December 1, 2013 until September 1, 2014. (*Natural Resources Commission; 312 IAC 6.2-2-12*)

312 IAC 6.2-2-13 Violations and enforcement

Authority: IC 14-10-2-4; IC 14-25

Affected: IC 14-10-2-3; IC 14-25-1-11; IC 14-25-15-1

Sec. 13. (a) A person violates IC 14-25-15 and this rule if the person does either of the following:

(1) Acts without authorization if authorization was required under:

(A) IC 14-25-15;

(B) this rule; or

(C) a document described in section 12 of this rule;

when the act occurred.

(2) Violates a term or condition of a registration, an individual permit, a general permit, an exemption, or another authorization described in IC 14-25-15 or this rule.

(b) Except as provided in 312 IAC 6.2-1-3(c) and subject to IC 14-10-2-3, the deputy director may issue any order appropriate to licensure or a status determination under or enforcement of IC 14-25-15 and this rule. (*Natural Resources Commission; 312 IAC 6.2-2-13*)

SECTION 5. SECTIONS 1 through 4 of this document take effect on September 1, 2014.

EXHIBIT B

State Statute and Rule Survey

Illinois

Wisconsin v. Illinois, 449 US 48 - Supreme Court 1980

[http://scholar.google.com/scholar_case?q=Wisconsin+v.+Illinois,+449+U.S.+48+\(1980\)&hl=en&as_sdt=800006&case=13891513903461781873&scilh=0](http://scholar.google.com/scholar_case?q=Wisconsin+v.+Illinois,+449+U.S.+48+(1980)&hl=en&as_sdt=800006&case=13891513903461781873&scilh=0)

Level of Lake Michigan Act (615 ILCS 50/5)

<http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1790&ChapterID=47>

Ill. Admin. Code TITLE 17. Conservation, Chapter I: Department of Natural Resources, Subchapter h: Water Resources Part 3730, Allocation of Water From Lake Michigan

<http://www.ilga.gov/commission/jcar/admincode/017/01703730sections.html>

Michigan

Michigan Compiled Laws (MCL)

Natural Resources and Environmental Protection Act (Excerpt) Act 451 of 1994, Part 322, Great Lakes Basin Compact

[http://www.legislature.mi.gov/\(S\(emz1dy450r3c143z1alzte45\)\)/mileg.aspx?page=GetObject&objectname=mcl-451-1994-III-1-THE-GREAT-LAKES-322](http://www.legislature.mi.gov/(S(emz1dy450r3c143z1alzte45))/mileg.aspx?page=GetObject&objectname=mcl-451-1994-III-1-THE-GREAT-LAKES-322)

Part 327, Great Lakes Preservation

[http://www.legislature.mi.gov/\(S\(jlwmwo2girkrug55ved3xc55\)\)/mileg.aspx?page=getObject&objectName=mcl-451-1994-III-1-THE-GREAT-LAKES-327](http://www.legislature.mi.gov/(S(jlwmwo2girkrug55ved3xc55))/mileg.aspx?page=getObject&objectName=mcl-451-1994-III-1-THE-GREAT-LAKES-327)

Minnesota

Statute: Minnesota 103G.801

<https://www.revisor.mn.gov/statutes/?id=103G.801>

Rules: Department of Natural Resources, Chapter 6115

<https://www.revisor.mn.gov/rules/?id=6115>

New York

Statute: ENV, Environmental Conservation, Title 10

<http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=@PLENV0A21T10+&LIST=SEA8+&BROWSER=EXPLORER+&TOKEN=14271612+&TARGET=VIEW>

NYCRR, Chapter V - Resource Management Services, Subchapter D, Chapter V, Resources Management Services, Part 601: Water Withdrawal Permitting, Reporting and Registration

<http://www.dec.ny.gov/regs/4445.html?showprintstyles#87250>

Ohio

Title [15] XV Conservation of Natural Resources

Ohio Revised Code (ORC) Chapter 1522: Great Lakes–St. Lawrence River Basin Water Resources Compact (<http://codes.ohio.gov/orc/1522>)

ORC §1501.30 – 1501.35 (<http://codes.ohio.gov/orc/1501>)

ORC Chapter 1521.16 (<http://codes.ohio.gov/orc/1521.16>)

Ohio Administrative Code Chapter 1501-2, Water Diversion

<http://codes.ohio.gov/oac/1501-2>

Pennsylvania

The Pennsylvania Code, Title 25, Environmental Protections, Article II, Water Resources, Chapter 110 <http://www.pacode.com/secure/data/025/chapter110/chap110toc.html>

Note: 32 P.S. §§ 817.21—817.30 Great Lakes—St. Lawrence River Basin Water Resources Compact and 27 Pa.C.S. Chapter 31 (relating to water resources planning) may have been repealed. Pennsylvania appears to be in the process of re-codifying some of its regulations relating to the Great Lakes—St. Lawrence River Basin Water Resources Compact.

Wisconsin

Chapter 281, Subchapter III, Water Quality and Quantity; General Regulations

§ 281.343 Great Lakes — St. Lawrence River Basin Water Resources Compact

<https://docs.legis.wisconsin.gov/statutes/statutes/281/III/343>

§ 281.35 Water resources conservation and management

<https://docs.legis.wisconsin.gov/statutes/statutes/281/III/35>

§ 281.35 Water resources conservation and management

<https://docs.legis.wisconsin.gov/statutes/statutes/281/III/35>

Chapter NR 852, Water Conservation and Water Use Efficiency

https://docs.legis.wisconsin.gov/code/admin_code/nr/800/852

Chapter NR 856, Water Use Registration and Reporting

https://docs.legis.wisconsin.gov/code/admin_code/nr/800/856

Chapter NR 860, Water Use Permitting

https://docs.legis.wisconsin.gov/code/admin_code/nr/800/860