



Ohio Establishes **New Permit Program** for Lake Erie Basin Water Withdrawals

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On June 4, 2012, Ohio Governor John Kasich signed Amended H.B. 473 (129th Ohio General Assembly), which establishes a new regulatory program requiring permits for all new or expanded withdrawals of water from the Lake Erie basin above certain threshold volume levels. The bill is designed to implement the requirement in the Great Lakes-St. Lawrence River Basin Water Resources Compact (first adopted in 2005 and put into effect in 2008) for each of the eight Great Lakes states to create a program by December 2013 for the management and regulation of new or increased withdrawals and consumptive uses by adopting and implementing measures consistent with the standards set forth in the Compact. Any state that fails to establish its own threshold levels for such withdrawals by December 2018 would be required by the Compact to regulate all new or increased withdrawals of at least 100,000 gallons per day averaged over a 90-day period.

The bill signed by Governor Kasich will require the owner or operator of a facility in the Lake Erie watershed to obtain a permit from the Ohio Department of Natural Resources (ODNR) if the facility has a new or increased capacity for withdrawals or consumptive uses of at least 2.5 million gallons per day from Lake Erie or a recognized navigation channel, 1 million gallons per day from any river or stream or from ground water in the Lake Erie watershed, or 100,000 gallons per day from any river or stream in the Lake Erie watershed that is a “high-quality” water. Last summer Governor Kasich vetoed a similar bill (H.B. 231) that would have established higher threshold values of 5 million gallons per day from Lake Erie, 2 million gallons per day from rivers and streams, and 300,000 gallons per day from high-quality waters. The final version of H.B. 473 signed by Governor Kasich also differs from the bill as introduced by adding a limitation on the 90-day averaging period where the withdrawal is made from high-quality waters in smaller watersheds covering between 50 and 100 square miles (45-day averaging period) or less than 50 square miles (no averaging period).

Although the threshold levels in H.B. 473 are lower than those in the bill vetoed last year, they are higher than those adopted thus far by most of the other Great Lakes states. Pennsylvania set its limit at 100,000 gallons per day, averaged over a 90-day period; Michigan and New York set theirs at 100,000 gallons per day averaged over a tighter, 30-day period. Only Indiana has a higher threshold, permitting the withdrawal of 5 million gallons per day, averaged over 90 days. Consequently, H.B. 473 had been opposed by a range of environmental groups arguing that it was not sufficiently protective of Ohio’s water resources. These groups also objected to the fact that H.B. 473 limits the right to appeal any permits that are issued to persons with a “direct economic or property interest that is or will be adversely affected by” the permit.

The business community, on the other hand, while generally supportive of the bill, had voiced concerns over its failure to establish a clear standard for the approval of permits by ODNR. H.B. 473 states that ODNR must issue a permit if the facility meets the decision-making standard set forth in Section 4.11 of the Compact. That standard has two main components:

- the withdrawal will result in “no significant individual or cumulative impact” to the quantity or quality of the waters or water-dependent natural resources of the Great Lakes basin and the applicable source watershed; and
- the proposed use is “reasonable” based on a consideration of six listed factors.

H.B. 473 defines the applicable source watershed as the Lake Erie watershed “considered as a whole,” and it directs ODNR to determine what constitutes a “significant” adverse impact using the “best generally accepted scientific methods appropriate for this state.” When evaluating whether the

withdrawal is “reasonable,” H.B. 473 also directs ODNR to consider its impacts on “more localized areas” than the Great Lakes basin or the Lake Erie watershed considered as a whole, without specifying what those “localized areas” should be.

These refinements to the Compact’s decision-making standard will leave prospective permit applicants faced with considerable uncertainty when H.B. 473 becomes effective on September 4, 2012. A separate section of the bill directs ODNR to convene an advisory group within 90 days after the effective date of the legislation to make “legislative recommendations” for the application of the “no significant adverse impacts” criterion, which are to be submitted to ODNR within 18 months after the bill’s effective date. ODNR is then required to make recommendations to the legislature, after giving “full consideration” to the advisory group’s recommendations, and also considering the “economic consequences” of determining whether an impact is significant.

For more information on the new legislation and how it might affect your organization, or to discuss other issues in environmental law, please contact your primary Squire Sanders lawyer or one of the lawyers listed below.

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