

# REPORT AND RECOMMENDATION REGARDING THE PROPOSED INCORPORATION OF THE GREAT LAKES—ST. LAWRENCE RIVER WATER RESOURCES REGIONAL BODY

## BACKGROUND

On December 13, 2005, the Great Lakes Governors and Premiers<sup>1</sup> came together to sign the *Great Lakes—St. Lawrence River Sustainable Water Resources Agreement* (“Agreement”). The Agreement is a good-faith agreement among the Great Lakes Governors and Premiers that will be implemented in Ontario and Québec through Provincial laws and regulations, as appropriate. The Agreement will be implemented in the States through the *Great Lakes—St. Lawrence River Basin Water Resources Compact* (“Compact”), an agreement among the Great Lakes States that will be passed into law through an interstate compact.

At the June 6, 2006 inaugural meeting of the Great Lakes—St. Lawrence River Water Resources Regional Body (Regional Body), the Regional Body adopted a resolution (Resolution #3) which stated in part that “...the Chair of the Regional Body is directed to develop a report and recommendation for the Regional Body’s consideration as to whether the Regional Body should incorporate as an Illinois<sup>2</sup> not-for-profit corporation with the board of directors of this proposed not-for-profit corporation to be the members of the Regional Body, ex officio.” Correspondingly, it is presumed that if the Regional Body does incorporate in this way, it will also seek tax exempt status as a 501(c)(3) organization with the U.S. Internal Revenue Service.

### ***The nature of the Great Lakes—St. Lawrence River Water Resources Regional Body***

Upon signing the Agreement, the Great Lakes Governors and Premiers organized themselves as the Great Lakes—St. Lawrence River Water Resources Regional Body (Regional Body). Their intention was to use the Regional Body to oversee the implementation and administration of the terms of the Agreement. All Great Lakes Governors and Premiers are equal and full members of the Regional Body.

The Regional Body is an important political institution that can make policy decisions, issue statements, send correspondence, provide guidance, and otherwise perform other activities as outlined in the Agreement. However, unless the Regional Body organizes itself as a legal, corporate entity, the Regional Body itself cannot independently perform certain administrative functions such as receiving funds, grants, property and services and cannot enter into or otherwise execute legally-binding agreements with third parties. Furthermore, any attempt to enter into a legal agreement with a third party would not bind the Regional Body to any such agreement, but may instead bind the signatory (e.g. the Chair, or the Council of Great Lakes Governors, Inc.) who purports to sign any such agreement on behalf of the Regional Body.

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<sup>1</sup> Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Ontario, Pennsylvania, Québec, and Wisconsin.

<sup>2</sup> Illinois was cited because the Council of Great Lakes Governors, Inc. which is serving as Secretariat to the Regional Body, is an Illinois not-for-profit corporation. Of course, the corporation could be formed in any State (including Delaware). Such incorporation outside Illinois would require the appointment of a registered agent in that State, thereby incurring an additional fee.

***The nature of the Council of Great Lakes Governors, Inc. (“Council”)***

The Council is a not-for-profit corporation organized under the laws of the State of Illinois and registered with the U.S. Internal Revenue Service as a 501(c)(3) corporation. As a corporate entity, the Council can receive funds, grants, property and services and can enter into or otherwise execute legally-binding agreements with third parties. The Council’s board of directors is the eight Great Lakes Governors, ex officio. While the Premiers of Ontario and Québec have been recognized as full and equal partners with the Governors when participating on certain Council projects, the Premiers formally remain associate non-voting members on the Council’s corporate board. As associate non-voting members, the Premiers do not have any rights to vote on matters, including financial matters, that formally come before the Council’s board of directors.

As a 501(c)(3) Illinois not-for-profit corporation, the Council undergoes an annual review of its accounts by an independent certified public accountant and files special reports with both the Illinois Attorney General’s office and the U.S. Internal Revenue Service. All costs associated with the review and filings are paid for by the Council.

As directed by the Governors, the Council manages a wide variety of projects that have required sophisticated tracking of revenues and expenses. Several of these projects have required the Council to serve as a fiscal agent for State and Federal agents. The Council has performed work on behalf of the Great Lakes States and Provinces through unincorporated institutions that are not legally separate from the Council but have their own funding streams and board structures. These include, but are not limited to the Great Lakes Biomass State-Regional Partnership and the Great Lakes of North America (regional tourism initiative). These arrangements have enabled these institutions to operate with considerable flexibility and independence, while formally under the Council’s management.

At the June 6, 2006 inaugural meeting of the Great Lakes—St. Lawrence River Water Resources Regional Body (Regional Body), the Regional Body adopted a resolution (Resolution #2) which designated the Council to serve as the Secretariat to the Regional Body.

**ISSUES TO CONSIDER WHEN DETERMINING WHETHER TO ORGANIZE THE REGIONAL BODY AS A 501(C)(3) NOT-FOR-PROFIT CORPORATION**

***Legislative Approval***

The appropriate legal counsel for each Governor and Premier will need to determine whether respective State and Provincial laws require special legislative endorsement before their Governor or Premier may serve as an incorporator and board member of a non-profit corporation of this nature.

***Execution of Legal and Administrative Actions***

Pursuant to the proposed Secretariat Memorandum of Understanding between the Council and the Regional Body, the Council will be able to execute legally binding

contracts, as well as receive funds, grants and services on behalf of the Regional Body. At the Regional Body's direction, the Council will serve as the Regional Body's agent when performing its Secretariat activities. However, to ensure that legal rights and obligations accrue to a corporate entity rather than an individual (such as the Council's Executive Director), it will have to be made clear that the Council is the legal entity receiving funds, grants and services on behalf of the Regional Body.

As noted above, while the Regional Body is the institution that will perform the important policy functions, it cannot independently engage in legally enforceable activities as it currently exists.<sup>3</sup> If the Regional Body does incorporate, the new corporation will be able to perform all of the above referenced administrative functions. Regional Body incorporation will not change the role of the Council as envisioned under the proposed Secretariat Memorandum of Understanding. Therefore, even if the Regional Body does incorporate, the Council—if it continues in its role as the Regional Body's Secretariat as outlined in the proposed Secretariat Memorandum of Understanding—would continue to serve as fiscal agent, execute agreements, and otherwise enter into legal agreements in support of the Regional Body.

### ***Financial***

The Council currently retains a professional bookkeeper intimately familiar with the Council's recording keeping, financial tracking and reporting requirements to assist in managing the Council's finances. As the fiscal agent of the Regional Body, additional time and resources will be necessary to track revenues received and expenditures incurred on behalf of the Regional Body. These costs will be incurred regardless of whether or not the Regional Body incorporates.

However, if the Regional Body incorporates, by law a separate annual audit of the new corporation will need to be performed by a certified public accountant. Furthermore, formal annual reports will need to be filed with the Illinois Attorney General's office as well as the U.S. Internal Revenue Service. The Regional Body would be responsible for annual costs for the separate audit and filings as well as initial one-time incorporation and filing fees.

### ***Perception***

Pursuant to the terms of the Agreement, only the members of the Regional Body acting together may speak in the Regional Body's name. This authority remains unchanged regardless of whether or not the Regional Body incorporates.

The Council has facilitated a number of initiatives, including the one that created the Agreement, where the Governors and Premiers are equal partners. As Secretariat to the Regional Body, the Council would be similarly supporting an equal partnership of the Governors and Premiers. Nevertheless, the Council is a corporate entity whose directors

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<sup>3</sup> Because of the good-faith nature of the Agreement, the Regional Body will not be able to make legally enforceable policy decisions (e.g. approving an exception to the prohibition on diversions) even if it incorporates. The "legal actions" referenced here are of an administrative nature, such as receiving grants and funds, entering into contracts, etc...

are the Governors of the eight Great Lakes States. It is recognized that this corporate structure could present perception issues in terms of equally serving each of the Governors and Premiers. If the Regional Body incorporates, this new legal entity could arguably be better positioned to present itself to the public of both countries as the legal entity where all the Governors and Premiers have equal standing when undertaking such legal and administrative actions as referenced above.

Finally, it should be noted that if the Regional Body does incorporate with all ten Great Lakes Governors and Premiers as equal members on the corporation's board, there may be a greater likelihood that Canadian foundations would be willing to provide grants in support of the Regional Body's activities, should such foundation support be sought in the future. It is possible that Canadian foundations may be less likely to provide grants to the Council because the Premiers are not formal members.

### **RECOMMENDATION OF THE CHAIR**

After careful consideration of the above issues and options, it is the recommendation of the Chair of the Regional Body that the Regional Body *not* incorporate as a not-for-profit corporation.

The Regional Body can, without incorporating, perform its functions as it works to implement the terms of the Agreement. For those administrative activities wherein the use of a corporate entity is necessary (e.g. executing contracts) the Council, serving as the Regional Body's Secretariat, has the legal standing to undertake all administrative actions necessary to support the Regional Body's activities. Furthermore, assuming the terms of the proposed Secretariat Memorandum of Understanding remain in place, it will be the Council and its staff, in the Secretariat role, that will be performing those administrative actions regardless of whether or not the Regional Body incorporates.

Except for potentially increasing the likelihood of receiving funds in support of Regional Body activities from Canadian Foundations, should such foundation support be sought in the future, there is no clear financial benefit to the Regional Body by incorporating. In addition, incorporating the Regional Body will require the expenditure of additional time and resources to perform the necessary legal and accounting functions as required by law. Furthermore, it has been made clear that many would be concerned with the creation of "one more" Great Lakes institution with its own staff and budget.

The Chair recognizes that there may be important perception issues that arise when the Council receives funds and enters into agreements on behalf of the Regional Body. These perception issues, however, are primarily that—issues of perception that will likely not be addressed through new legal arrangements to address what are essentially administrative concerns. These perception issues would naturally and obviously be addressed by providing clarity that all policy actions are undertaken by the Regional Body and not the Council.

To that end, the Chair recommends a communications effort to underscore the importance and legitimacy of the Regional Body as the decision-making entity that

includes all of the Great Lakes Governors and Premiers as equal partners. As noted several times above, the Regional Body as an institution may and has already issued statements, resolutions and guidance. To make it clearer that it is the Regional Body that is making all policy decisions and that the Council is only performing administrative functions in support of the Regional Body, additional steps could be taken, such as:

- Creating a Regional Body logo and letterhead;
- Creating a Regional Body website with its own domain name; and,
- Issuing future press releases by the Regional Body.

The Chair recommends that references to “The Council of Great Lakes Governors, Inc.” should only be made in legal contracts, grant applications, and other purely administrative documents where the involvement of a legal corporation is necessary to serve the ends of the Regional Body. Through proper communication and institutional management, the Regional Body can be shown to be the separate and distinct entity that it is.

This report and recommendation have been made in the context of the best information available at this time. Both are subject to further review should the needs and requirements of the Regional Body change as they move forward through the implementation process.