

FINAL

**Canadian Environmental Law Association
Environmental Advocates of New York
Great Lakes United
Lake Michigan Federation
Michigan Environmental Council
National Wildlife Federation Great Lakes Natural Resource Center
The Nature Conservancy Great Lakes Program
Ohio Environmental Council
Stratégies Saint-Laurent
Wisconsin Environmental Decade**

May 6, 2002

Don Vonnahme
Chairman, Decision-Making Standard Subcommittee
Water Management Working Group
Council of Great Lakes Governors

VIA ELECTRONIC MAIL

Dear Chairman Vonnahme,

Thank you for the open and responsive advisory subcommittee meeting you chaired April 23 to implement a decision-making standard for basin water withdrawals based on the principles of Annex 2001.

This letter is a response to your invitation to refine our views based on the subcommittee discussion. The meeting covered at least six topics, some in more detail than others. In this letter we focus on the three topics discussed in the most depth: 1) whether there should be a dual standard, 2) the level at which administrative review of proposed withdrawals should be triggered, and 3) the content of the improvement standard. Our positions on the other topics covered at the meeting are best set forth in the comments provided in our April 18 narrative response to the survey organized by the Council of Great Lakes Governors.

1. Single vs. dual standard

The question of whether the decision-making standard should apply in the same way to in-basin and out-of-basin withdrawals ran throughout the discussion. We think there are strong policy and legal reasons for adopting a single standard. We acknowledge that there are differences of legal opinion on whether a dual standard would meet the requirements of international trade agreements and the U.S. Constitution. The Lochhead report makes a strong case that a dual standard could be problematic under both regimes; other legal experts have asserted that there is less legal risk. We understand that the council will be investigating this question further at the May 8 meeting.

Securing the best legal defense for basin water management

Although we cannot know what the various lawyers will say, we think it is safe to predict that they will agree that the law is not entirely settled, and that there is a level of risk in adopting a dual standard that treats in-basin and out-of-basin withdrawals differently. Although they will likely disagree about the level of that risk, we anticipate that they will agree that some differential treatments of out-of-basin withdrawals create more risk than others. For example, distinctions that are based on economic preferences are likely to pose greater risks than those based on protection of the ecosystem. We would like to quote from Article XX of the General Agreement on Tariffs and Trade:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

A dual standard that relieves water withdrawals intended for in-basin use from meeting the same standard as withdrawals intended for out-of-basin use runs the risk of being construed as a cloaked protectionist measure. We assume all will agree that the closer the complete standard is to a single standard, the less the legal risk.

In sum, we think the result of further legal discussion will be continued dispute and for that reason alone the appropriate road is caution. Therefore we should establish the highest level of legal protection for the Great Lakes. Otherwise, a successful legal challenge under future international trade regimes or interpretation of U.S. commerce law could undo years of work and leave the Great Lakes and St. Lawrence River exposed to harmful water diversions.

Preparing the basin for future legal contexts

There is another reason to brace for an unfriendly trade dynamic in the future: the lengthening reach of international trade agreements. The agreements we are debating today are not the agreements that will be in force in even ten years. The current negotiating sessions of both the next iteration of the GATT and the new Free Trade Area of the Americas indicate substantial extension of trade rules into both services and investment. We have also seen a trend toward greater sanctioning power for alleged trade rule violations.

For these reasons the region needs to fashion water withdrawal management policy today that will stand the test of time. We believe a single standard ensuring a high degree of ecosystem protection best achieves this goal.

Securing extra-basin support

Strategic policy needs drive us to the same conclusion regarding single vs. dual standards. The states and provinces have reached a consensus that the U.S. states will seek an interstate compact to effectuate the mutually agreed-on standard. Such a compact must be enacted by Congress, which means that it will require substantial support by Congressional delegations from states outside the

Great Lakes basin. That support will be much easier to obtain if the decision standard is even-handed, that is, does not appear to be simply a veiled plan for discriminating against other regions of the country. The closer the standard is to a single standard, the more likely it is that Congress will support it.

Differential impacts

None of these justifications for a single standard mean that it must have identical impacts on in-basin and out-of-basin users; any single standard will likely have different impacts on different groups of users. For example, the lack of return flow that characterizes all diversions will clearly contribute to potential harm and in that sense be one mark against diversion proposals as a class during the review process. For another example, a conservation standard requiring an applicant to demonstrate that there is no feasible and prudent means of reducing or eliminating the proposed withdrawal (through conservation measures or obtaining the needed water from local sources) will likely be more difficult for an applicant intending to use water for Asia than for one intending to use it for a farm in Wisconsin. In both these examples, the standard itself is neutral and not open to the charge that it is merely the cover for a protectionist aim.

This logic helps guide our positions on the remaining two issues we address in this letter.

2. Trigger levels and mechanisms

At the April 23 meeting, the stakeholders discussed at length the issue of when a requested withdrawal should be reviewed by the state or province (the “trigger” levels). The subcommittee indicated that it was considering a dual trigger level: first, subcommittee members suggested a 100,000-gallon-per-day trigger level for withdrawals intended for either in-basin or out-of-basin uses, based not on the withdrawal quantity per se, but on the quantity of water “lost” (that is, consumed or diverted, taking into account return flow). Second, subcommittee members also suggested another trigger, concurrent “exemption” level of 12,500 gallons per day for water exports. Finally, the subcommittee discussed applying these different trigger / exemption levels based on different types of users and water sources (groundwater perhaps being treated differently than large lakes, which might be treated differently from tributaries).

Critique of the proposed trigger levels

We and others pointed out that this proposal was problematic for four reasons:

- The lack of any apparent distinction between water “lost” while used out of basin (to which the 100,000-gallon-per-day level would apply) and water intended for “export” (to which the 12,500-gallon-per-day level would apply).
- The redundancy of, on the one hand, a 100,000-gallon-per-day trigger for water lost while used outside the basin, and on the other hand, a 12,500-gallon-per-day trigger for water exported. Any potential diverter wishing to remove more than 12,500 gallons per day could easily define their diversion as an out-of-basin use rather than an export, which would put them under the 100,000-gallon rather than the 12,500-gallon limit.
- Using a lower trigger for exports (12,500 gallons per day) than for other withdrawals (a loss of 100,000 gallons per day) clearly sets a dual standard that could be interpreted as protectionist. On its face the difference has no relationship to protecting the Great Lakes – St. Lawrence River ecosystem. Instead it appears to be the result of geographic or economic bias. This creates a

higher political risk of resistance by Congress and a higher risk of invalidation under domestic or international trade rules.

- Most important, neither trigger even on its own has any relationship to environmental protection, the stated foundation of Annex 2001. A trigger level of 100,000 gallons of water lost per day would allow large withdrawals from sensitive aquifers and small tributaries that could be permanently damaged since the return flow can occur anywhere. In theory, Annex 2001-based “trigger” levels are not supposed to be based on administrative convenience, but on presumed insignificant environmental consequence. It may be that some level of withdrawal—we propose 10,000 gallons—could reasonably be presumed to cause harm so rarely as to not be worth monitoring. Withdrawals that *lose* 100,000 gallons a day clearly do not fall into this category, since loss is even more crude than withdrawal as a proxy for potential damage. Annex 2001 is supposed to lead to restoration of the system. It will fail to do so if a significant fraction of withdrawals that are exempt from the decision-making standard are likely to cause harm to the ecosystem. The trigger levels as currently proposed are completely contrary to the stated, ecosystem protection purpose of Annex 2001.

Institute quantity and quality triggers

We suggest the following two-part solution.

First, set a quantity trigger at 10,000 gallons per day. That is the current level under Minnesota law, and is close to the withdrawal level that requires permitting under Ontario regulations (50,000 litres or 13,210 gallons per day).

Second, also set a quality “trigger” that involves some preliminary screening for potential harm from small withdrawals. This could happen on an individual level, for example, a simple, non-scientific checklist that small withdrawers must look at (but not submit to anyone) to assure that they are not contemplating a withdrawal that will harm the ecosystem. Or the quality “trigger” could take place on an agency level, for example, determination of sensitive areas where even small withdrawals might be harmful. Agencies might also issue a rule that small withdrawals must comport with any pertinent elements of local master plans. There is an analogy for this approach, speaking generally, in Great Lakes water quality standards that require a “reasonable potential” determination to decide whether toxic pollution effluent limitations might be required in pollution discharge permits.

In any case, as noted in our April 18 recommendations, withdrawals exempted from review should still be subject to review at some time in the future if the agency learns that the withdrawal may in fact be having a significant adverse individual or cumulative impact on the ecosystem.

Base the quantity trigger on withdrawal

Furthermore, we suggest having the trigger level based on withdrawal rather than loss. Since return flow for an unpermitted withdrawal can take place anywhere, we must set the trigger level assuming effectively 100 percent loss for the source sub-ecosystem. We can imagine ecosystem damage at withdrawal (and possible loss) levels of 10,000 gallons per day or less, but expect it would be rare.

Summary

A single, low trigger level ensures that Wisconsin law and Ontario regulations are followed while avoiding an explicit embrace of a dual standard that increases the risk of problems with Congress or conflict with commerce or international trade rules. A single trigger level avoids the complexity of attempting to set different levels for different source water bodies. A single trigger level also avoids the administrative burden of permitting a large number of small withdrawals such as household wells. Most importantly, a single trigger level can assure that few unpermitted projects will damage the ecosystem; by containing some element that addresses environmental quality rather than only quantity, a single trigger can reflect both the need for resource-based standards and the fact that even small withdrawals have the potential to harm the ecosystem.

3. The improvement standard

The subcommittee and the stakeholders also wrestled with the question of how a proposed withdrawal could be matched to the location, size and type of improvement required under the annex principles. We reiterate the most relevant suggestions contained in our April 18 submission:

- a. All improvements projects should be assured to function as improvements in perpetuity. This is critical for assuring that the basin ecosystem as a whole moves toward restoration, rather than simply slowed degradation.
- b. All improvement projects should be tied to a Great Lakes – St. Lawrence River basin ecosystem restoration plan that sets restoration priorities.
- c. Improvements within the same subwatershed as the proposed withdrawal should be preferred. If no improvement projects for the subwatershed are listed in the basin restoration plan, then the proposed improvement should be drawn from the list of projects detailed by the restoration plan for the same lake basin.
- d. Measuring improvement could be as simple as assessing the quality of the ecological system before and after the change. Such assessments should be based on ecological rather than economic values, to avoid turning the improvement into a fee for withdrawing water.

Based on the discussions of the advisory group, we would like to also suggest:

- e. Categorizing different classes of withdrawals according to:
 - General size (small, medium, large)
 - Type of source (aquifer, small tributary, large tributary, lake)
 - Potential for unknown harm to the ecosystem (small, medium, large)
 - Location by watershed

Then, establishing parallel categories of improvement projects—something analogous to “best management practices.”

- f. Soliciting public input on the development of these classifications

For any withdrawal proposal, an appropriate improvement could then be determined by simply matching the size, type of water source, potential for unknown harm, and location of the proposed withdrawal to an improvement that falls into equivalent categories and is consistent with the priorities of the basinwide restoration plan.

Conclusion

We look forward to continuing to discuss these and the other critical issues with you, the Council, and the stakeholder group. As you know, we have strong views on the other topics that were touched on more briefly at the standards subcommittee meeting—most significantly, cumulative impacts, significant impacts, and conservation—that are reflected in the proposals submitted to the Council with the April 18 letter. As those topics are discussed in more detail in future meetings, we will be happy to provide additional comments and analysis.

Thank you again for the opportunity to participate meaningfully in this important process.

Very truly yours,

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