



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

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Additional Comments to the Great Lakes Water Management Working Group & Advisory Committee Members
From: the Canadian Environmental Law Association

Background

After attending the combined Advisory Committee, Great Lakes Water Management Initiative Working Group I wanted to communicate some of my concerns and input immediately upon my return. I find it a continuing challenge to sift through all the information and new revelations we receive at these meetings and be clear as to the big picture and directions the overall process is taking. At this point in the process it is still unclear where decisions have been made and what is still under review. Consequently, some of the assumptions I have made about the status of some issues may not be accurate.

The Canadian Environmental Law Association (CELA) has focused on the International/Inter-Provincial and Compact issues, primarily because there are no other environmental ENGOs from Canada attending. We certainly also have a lot of experience to contribute to the deliberations of the decision-making standard group, particularly since we are now undergoing a parallel exercise in Ontario. In order to protect the quantity and the quality of Ontario drinking water, a mandatory place-based watershed management planning framework has been proposed. CELA was part of the group that just finished designing this framework. Over the next month we will be advocating for this Source Protection Framework to become policy and as well we will be submitting our comments on a new reformed water permitting regulation that is proposing to adhere to the provisions of Annex 2001. Our Provincial commitment to the Charter has already moved into the regulatory phase, making Ontario a leader in this

regard in the basin. It has always been our hope that the Annex directives would strengthen our Province's water-taking permitting and management systems and would result in much better knowledge, understanding and management of our finite water resources. However, after the meeting this week I found myself wondering if the Annex as it is developing could instead have the potential to erode our permitting system that I believe is currently one of the best in the basin.

Underlying Principles

The thirty years that CELA has been involved in Great Lake protection were the years that the region pioneered **the ecosystem approach**. For those outside of the basin there will be an expectation that Annex 2001 will be built on this important principle that has potential to redefine water protection for the rest of the world. If instead of protecting the ecosystem we regress to protecting individual jurisdictions interests, we will have lost the global leadership we pioneered in the Basin. The NOVA proposal was the first time that global imperatives knocked on the doors of the Great Lakes, but it certainly will not be the last. The world is watching what we do here. If we do not implement the Annex directives in a **non-discriminatory** and **equitable** way, then we can give credibility to challenges that our management regime is protectionist. This is our one chance in the Region to plan for long-term sustainability of our water resources, and to reject what might be the most expedient and affordable in the short term. It is unlikely that we will ever be able to dedicate the resources and commitment we have in place now to a parallel effort sometime in the future.

Equity Issues

To achieve the goals of the Annex we should have one rigorous regime that is uniform and binding in all jurisdictions by setting up parallel processes and rights. In order to generate sound science and understanding of the sustainability of our supply we must be regulating and measuring withdrawals in all jurisdictions with the same rules and with parallel processes. If some jurisdictions do not implement any system to permit or licence withdrawals then our data will be of little value. We will be prevented from predicting cumulative impacts and acting to prevent harm.

The jurisdictions that are not moving to regulating water withdrawals are asking the other jurisdictions to share the benefits of the annex. At the same time they are denying others essential information while shouldering others with much more of the responsibility for implementation and enforcement. This is inequitable and unworkable and is contrary to the spirit of the Annex and the Great Lakes Charter.

Process Concerns

It had always been my expectation that the Annex process would result in a definitive assessment of a project with a clear pass or fail statement. Given that the expertise and the understanding of the complex Great Lakes system will be developed and fostered primarily by the collective efforts of the Regional Body (RB) it would be preferable that they make the decision. Once matters are sent back to individual jurisdictions we cannot ensure the same technical understanding or the decision support system will be applied to decision-making. It now seems that the recommendation is that a declaration of findings and compatibility with Annex directives is all that is expected from the Regional Body.

The decision-making flow charts for the Compact Commission entrench further inequities. In our group submissions with other environmental ENGOS we endeavoured to create a level playing field where citizens of each jurisdiction have the same rights to be involved at all stages of deliberation on a withdrawal proposal. In turn each jurisdiction would have an equal voice around a table where consensus would be a goal. There is no reason that the Compact Commission deliberations cannot happen before or at least simultaneously with the Regional Body deliberations. As it is now structured it is biased toward US jurisdictions having the last word and the ability to rescind their decision at the Regional Body. I have to ask myself why the Provinces would accept a process that could in effect alter or overturn their only opportunity to participate and abnegate a previously reached consensus. While we do accept the necessity of the compact process in the U.S. we feel it could act as the binding mechanism among the states but need not create a parallel process to the Regional Body.

This takes us to the question of binding. There seems to be a potential that some parties may be bound to more conditions than others. The jurisdictions that have water allocation systems in place and the highest standards are agreeing to generate data, adhere to prior notice and consultation, and forward proposals over the trigger level on to Regional Review. Where there are no systems in place and as is the case of Pennsylvania they are only agreeing to bind themselves to the compact. There is a serious question of how they will even know if a withdrawal in their jurisdiction will exceed the trigger level; without any system in place they could become targeted for large withdrawals. They will be unable to participate in data gathering crucial to charting ecological integrity in the future and unable to participate in prior notice and consultation.

We have a concern with the selection of the Great Lakes Charter Compact to implement the Annex. It was clearly designed to create and set out the mandate of the Great Lakes Commission in 1952. Today that mandate has evolved to be more expansive than originally envisioned. The Canadian Provinces are not signatories. The Compact sets out voting procedures and voting delegations of signatory states that are not necessarily suitable for the Annex. There have been discussions of setting up a new agency to implement the Annex and oversee functions flowing from it. Will the use of the Great Lakes Basin Compact preclude this?

The Precedent Questions

Casting off the confines of these legal deliberations for a moment, the grandmother in waiting in me has to pose the question "**Aren't the Great Lakes of such importance that we can establish our own precedents?**". So much of this exercise has relied on assurances from lawyers that we can only do what has been done before. They are insisting that we use old worn out agreements that never envisioned the water short world we have today or that the water itself and the life dependent on it might need protecting, not just our uses of it. We are setting out collectively to protect one fifth of the fresh water on the globe. Is it really all that important that it crosses many political boundaries? If we are serious about protecting the ecosystem why not establish the precedent ourselves with uniform legislation in each state and province. This can be done without compromising the constitutions of both countries.

The Highest Standard in the Basin should be mandated as best practices. These practices should be revised up as technology evolves and water needs increase. This should extend to the trigger level that we feel is too low. The trigger level should be the most protective standard currently in use for water allocation in the basin. If several jurisdictions within this range are able to regulate using these levels then they are best practices and clearly achievable by the other jurisdictions.

CELA will not support alterations to the Great Lakes Charter that weaken obligations set out there. Climate change impacts in our region makes it imperative that we track consumptive uses in the basin even if they are exempted from Annex provisions. We must have a way to gauge our own progress on reducing demands from all sectors. If the Great Lakes Region fails to reduce its wasteful per capita use of water that is two to three times higher than other developed countries, then we will have failed others who have accomplished wise use of their resources. In our estimation this is the most important part of our challenges.

As we get closer to settling details of the process, I feel our meetings would be far more productive if we shared documents, even if they were in draft. It would have been very beneficial at the meeting this week to have the draft Implementation Manual that has been written so that the big picture as well as the important details could have been more discernible to those of us attending the meeting.

Thank you for the continuing opportunity to be involved in this important negotiation.

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