



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

**Remarks from: the Canadian Environmental Law Association
To the Council of Great Lakes Governors and the Minister of Natural
Resources
Regarding the Great Lakes Basin Sustainable Water Resources Agreement
and US Great Lakes Basin Water Resources Compact
September 20, 2004**

Thank you for having these hearings tonight so that you can hear from Canadians on these two draft agreements. As you know the Canadian Environmental Law Association has a long involvement in water quantity in the Great Lakes. We were involved in efforts in 1984 to strengthen the Great Lakes Charter, have written commentary on all diversion proposals that have been brought forward since then. CELA had received standing to oppose the Nova Group permit to export water from Lake Superior in the 1998 Environmental Appeal hearing that was cancelled when after the government negotiated a settlement with the company. We have opposed various Canadian diversion proposals and our lawyers routinely represent Ontarians who have water allocation disputes. We have been instrumental in efforts to improve Ontario's water permitting system and pending laws on source protection that have led to Ontario having the strictest water allocation system in the Great Lakes. Given this history we accepted the invitation in 2001 to be one of the few Ontario Representatives on an Advisory Committee to the Governors and Premiers who have negotiated the two agreements before us tonight.

We went to the table with the belief that the Great Lakes Basin and Ontario need a much better toolbox to prevent harmful bulk water exports from the Great Lakes and that it was important that these tools be trade proof. We have been concerned at the haphazard handling of diversion and withdrawal proposals for the past two decades. Several proposals fell through the cracks and were approved without adequate consultation with other jurisdictions like the Mud Creek irrigation proposal in Michigan that exceeded the trigger level in the Charter. The Akron proposal set a bad precedent that was likely harmful to the environment was approved despite objections. The only hope Ontario and Quebec could intervene in a diversion proposal was to find an ally State to use their Water Resources Development Act (WRDA) veto to object to the proposal they opposed. That veto power is thought to be fragile at best and many think it could not endure a court

challenge in the future. WRDA is also an inadequate tool to protect the entire ecosystem as it only extends to surface not to the important ground water portions of the Great Lakes systems.

Canada can and will likely continue to object to Diversion proposals south of the Border through diplomatic notes and the use of the amendments passed implementing the Boundary Waters Treaty Act of 1909, the last binding document in the Great Lakes. In our opinion this Act is also inadequate to protect the whole ecosystem because it defines boundary waters as from shore to shore of the Lakes omitting the tributaries running in and out of the Basin as well as the groundwater. The Boundary Waters Treaty has a hierarchy of uses that gives priority hydro power and shipping over other uses and makes no mention of the environment or recreational uses which are so important today. CELA thinks that the two agreements have the potential to overcome the systemic problems and bring us to updated and improved ecosystem management so long overdue.

CELA will be submitting in depth comments to the Council and the Ministry of Natural Resources before the October 19th deadline as we have been throughout the past three years. We will continue to advocate for the changes we have suggested throughout which include: stricter trigger levels, and strengthened in-basin water conservation. We would like to see conservation targets and timetables added and made part of the legally binding clauses. We have many wording changes to suggest. We have called for the same standards to be applied to requests from outside and inside the basin to be non-discriminatory to further trade proof the agreements. We are still troubled by the oxymoron of the improvement requirement for diversions. We support the environmental hurdles which make the process of evaluating requests similar to an environmental assessment. This is the first time we have been given any environmental tools to evaluate requests for Great Lakes water. All previous decisions have been purely political.

I would like to be blunt about my glimpses into the negotiating room. I think Sam Speck who has led this process deserves a medal for keeping the Parties at the table despite elections in the States and Provinces that completely shuffled the deck in the ten jurisdictions. They have persisted although many of the stakeholders on the Advisory Committee have mounted strong campaigns to scuffle any resolution. The Government Working Group has struggled through mind boggling legal and governmental conundrums to persist so they can have a framework that can bind all jurisdictions as the International Joint Commission has recommended. This effort is a testimony to how important and crucial this issue is. Right now any legislation that may come out of the compact must pass all eight State Legislatures,

many with minority governments as well as Congress where the thirsty south west States will weigh in.

I for one do not want to walk away from the table with out an agreement. If we revert to the crisis water management we have practised over the last few decades, we will be guaranteeing diversions and that future generations will feel the cumulative impacts of many small withdrawals adding up to catastrophe for the health of the basin and its ecosystem. This agreement is flawed because, to be frank, there are forces who want it weakened. There is next to no will to volunteer to do water conservation in the Basin and a there is big push back for implementing widespread conservation that would reduce our use to levels in other developed countries.

It is tempting to take the moral high ground in Ontario and Quebec because we after all have moratoriums in place and none of our eight state neighbours have. However many provisions of the Great Lakes Sustainable Water Agreement would go a long way to improving flawed practices in Ontario. Ontario still entertains proposals to move water from the Basin of one Great Lake to another. This practice results in a loss of flows to users of the whole system in between. Right now I know of around ten proposals for pipelines to communities who have outgrown their water budgets or want to move from ground to Great Lake waters for unfettered growth. The Agreement prohibits these intra-basin diversions. Currently Ontario does not track return flow in its permitting process so we can only guess the volumes of consumptive use and the amount of water returned to the watershed. We have no way of knowing how much water has been over allocated or lost from leaky systems. We do not cumulate our water permit data so we can not begin to look critically at our use or predict future need adequately. The Agreement would improve all these deficiencies.

While to echo former Prime Minister Pierre Elliot Trudeau's parable about Canadian being mice in bed with the U.S. elephant, when the elephant sneezes the mouse catches a cold. In the Great Lakes this time it is a waterbed and that sneeze could cause a major leak. When it comes to the Great Lakes we cannot avoid being in bed with the elephant. I would rather have our rights to be there enshrined and the rules spelled out. Its time we had a binding agreement that reflects the twenty-first century and all the challenges of water shortages and climate change it promises.

These two agreements certainly do not pass the simplicity test set out in the Annex declaration. I too have trouble sifting through its highly dense and technical

language even though I have been involved for three years reviewing some of its drafts. The alarm expressed by the public this week is justified. They feel the need to truly understand something this important. I think that much more work needs to be done to make the process and resulting documents before us more transparent. The public needs more time to see how to begin to transform these agreements with safe guards they want to strengthen the protection of the Great Lakes. I also know that if something positive does not go forward from this work it will be a very long time before the Parties ever come back to the table. These agreements are a good start on fulfilling the recommendations made by the International Joint Commission reference in 2000. Basin communities need permanent protections that will endure the whimsy of changing governments. CELA urges negotiators to continue to work to fulfil our expectations.

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