



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

August 16, 2005

CELA Publication #515

Minister David Ramsay
Minister of Natural Resources
6th floor Room 6630
Whitney Block
99 Wellesley Street West
Toronto, Ontario
M7A 1W3

Dear Minister Ramsay,

**Re: Comments on the Second Draft of the Great Lakes Charter Annex released
June 25, 2005 EBR Registry no. [PB04E6018](#)**

The Canadian Environmental Law Association (CELA) has been involved on Ontario's Advisory Panel and on the Advisory Committee to the Council of Great Lakes Governors on the Great Lakes Charter Annex. We are grateful to have been part of this historic effort. Our long standing concern about the continuing vulnerability of the Great Lakes to harm from large water withdrawals has lead us to focus over the last decade on reforms in improved protections from both diversions as well as in-basin withdrawals, and on limiting over use.

CELA joins others in congratulating negotiators on a vastly improved second draft. The extension of the prohibition on diversions that exists now in the Provinces to the Great Lakes States is the greatest accomplishment.

CELA will limit our comments on these draft agreements to several issues that we feel still have the potential to compound harm from water withdrawals to the integrity of the ecosystem. While there is urgency to move toward consensus by the fall of 2005, we feel it is crucial that we have a set of agreements that will be durable and give us the tools to address water challenges in the future. It is imperative that we insist that we do this with the greatest scientific certainty possible.

**The Exceptions
Straddling Counties**

We must say that we were very disappointed to see the straddling county options being proposed so late in the agreement negotiations. This is the consequence of jurisdictions with weak water management programs not having the history or tools to deal with water conflicts and challenges within their boundaries. We need to make sure we are not creating a solution for the few that overwhelms the intent of the Annex undertaking or prevents progress on preventative and protective actions for others.

CELA proposes one additional condition for Straddling Counties.

1. We recommend that each applicant should also be required to demonstrate that they are already within the groundwater portion of the Great Lakes St. Lawrence River watershed.

This does **not** mean that all areas within the groundwater of the Basin should be considered straddling but only areas that are within counties that currently straddle the Basin. We have been struck in our work with both Advisory Committees and with the Great Lakes Commission's Water Resources Management Decision Support System for the Great Lakes study by the lack of sound science we currently have to apply to decisions on water use in the Great Lakes. Directive 5 of the Annex 2001 undertaking commits the jurisdictions to improving our understanding in a way that supports decision-making. All agree that our biggest knowledge deficit is our understanding of the relationship of groundwater to surface water in the Basin. It is crucial that we start to expand this understanding now by starting to apply sound science to the exceptions we are allowing. This will ensure that we do not begin this effort by setting a bad precedent by compounding harm to the ecosystem by placing expediency before sound science.

Intra-Basin Diversions

CELA has paid particular attention to how the Annex drafts impact intra-basin diversions because we are convinced that they are just as harmful as diversions to the areas deprived of flows between the point of taking and the discharge. This is particularly important in Ontario right now because:

- the Province's water-taking regime does not have explicit return flow provisions,
- there is a history in Ontario of municipalities diverting water from one Great Lakes Basin and returning it to another, and
- there are a significant number of Ontario municipalities now actively considering pipelines for future water supplies.

The first draft of the Annex Agreements equated intra-basin transfers with diversions and required the same conditions to mitigate harm from both. The second draft muddies the waters by creating a graduated scale, based on volumes withdrawn, that would allow most intra-basin transfers to return flows to another Great Lake from the Great Lake that is the source of the withdrawal. The Ministry of Natural Resources tells us that only one pipeline proposal in Ontario would ever have been required to return flows to the same Great Lake if this latest draft were in place at the time. Most other proposals would fall into the middle range of 379,000 litres per day to 19 million litres per day or 100,000 U.S. gallons per day to 5 million U.S. gallons per day. Thus they would not necessarily be required by the latest draft to return water to the Lake of origin. We contrast the volumes this draft allows to be permanently removed from parts of the Basin with the 50,000 litres per day that is the level Ontario currently considers protective of the province's water supplies.

Potential Consequences

CELA is very concerned that the current intra-basin draft will allow cumulative withdrawals without return flows that could be harmful to the health and well being of Ontarians and of the areas of the system where withdrawals are permanent. To cite several examples...

The areas downstream from Canada's chemical valley have always been vulnerable to spills. The First Nation at Walpole Island and the town of Wallaceburg have repeatedly had to close down their drinking water intakes after such spills. While considerable efforts are being made to reduce these spills, the sad reality is that the health of residents along the St. Clair depends on the dilution of pollution. What are the additional risks to them of concentrating pollution by reducing the flows in the St. Clair River? Most of the pipeline proposals in Ontario contemplate withdrawing water from Lake Huron Georgian Bay and returning the withdrawal to Lake Erie or Lake Ontario.

This month we have had premonitions of climate change impacts on Ontario. The CBC reported that *Power plants are worried as heat wave warms the Great Lakes* (see attached article). The article states that Ontario's water supply for power may be in jeopardy because a weeks-long heat wave has warmed the waters in the Great Lakes and lowered the levels of northern rivers. Ontario could be facing blackouts. Ontario Power Generation representatives stated that the warmer the water gets the less efficiently it cools the generators. That in turn reduces the generation capacity. If the current Annex provisions resulted in intra-basin transfers from Lake Huron to Lake Ontario, would the loss of flows through the Niagara power plants compound the reduced generation capacity in summer heat waves or in times of prolonged drought and impact power security of the whole Province? With the chronic shortages of power supplies in the Province this is a real concern.

CELA has always been concerned by the localized impacts of water withdrawals at the point of taking. Consequently we continue to support returning water to the same point of taking for all withdrawals to avoid harm. Failure to require return flow could result locally in a number of potentially significant impacts such as, loss of habitat, spawning grounds and even bio-diversity.

The intra-basin provisions in the recent drafts of the Annex Agreements, create options that may create an incentive for applicants to seek water volumes under the thresholds to avoid additional requirements to: return flow to remediate harm at the point of taking, scrutinize alternatives and undergo regional review. We already have a problem in Ontario assessing the cumulative impacts of pipelines because they are approved section by section under a class environmental assessment process and often grow like hydras overtime. There is currently no means to adequately evaluate the overall impacts, need, alternatives and magnitude of these pipeline projects. Once they reach their final limits it is too late.

What degree of harm will reduced flows at the withdrawal source and on the regions bypassed by intra-basin transfers? CELA believes we will also not be able to determine this until it is too late. For these reasons,

2. We recommend that return flow be required for all intra-basin transfers of water regardless of their volume (as they were in the 2004 draft) and that the Sustainable Water Resources Agreement, Procedures Manual and Compact be altered to require this.

This will protect the areas at the source of the withdrawal. It also minimizes harm to areas bypassed in intra-basin proposals.

Should these provisions remain in the next draft of the Annex, CELA will be urging the Province of Ontario to change their water protection laws to avoid creating these potentially harmful consequences.

Transparency

When the straddling communities, straddling counties and the Illinois exclusions were proposed, CELA repeatedly asked for Ontario to clarify the magnitude of these exclusions. Ontario has made efforts to research this but the States proposing these exclusions have not provided further information on the scope of these exceptions. CELA attempted to research the straddling county option and was only able to get limited information through a US Census site for 2003. Our research showed the percentage of the population in each state residing in the Straddling Counties but we were unable to refine our knowledge by subtracting the populations already within the surface water boundaries of the Basin. We did find the following percentages of state populations resided in straddling counties in 2003: New York 20.34%, Pennsylvania .03%, Ohio

17%, Indiana 24% Illinois 47% and Wisconsin 24%. All of Michigan is within the Great Lakes Basin.

3. We recommend that it should be incumbent upon those jurisdictions to provide further information on just which communities and their populations straddle the basin and the additional population that could potentially be added by the straddling county option.

We continue to have a lot of concerns and disquiet about the Chicago Diversion that removes most of that State's water from the Great Lakes Basin. We do not want to sanction this in perpetuity.

4. We still recommend that future increases in the Chicago Diversion above the level set by the current Supreme Court decree should be subject to all provisions of the Annex, including the return flow requirements.

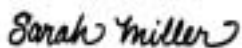
Meaningful Progress

CELA sincerely hopes that the resolve to protect the Great Lakes with a legally binding compact and regional agreement with measures to protect ecosystem integrity is not lost to concerns that it will bring change. These changes are long overdue and necessary for our region to have the tools to face a water-short world. This summer's heatwave that brought so many dramatic changes in the Region, is a precursor of things to come. We cannot wait for over a decade to implement the terms of this agreement. We have the ability now to extend the resiliency of the Great Lakes through achievable water conservation programs.

5. We recommend that the Great Lakes Charter Annex be implemented within five years and that the jurisdictions commit to begin drafting their conservation plans at once so they will come into force as soon as the Agreements are approved.

We wish you success in bringing these negotiations to a successful conclusion. If we succeed in protecting our waters now the health and well being of our Region will grow and we will have an economic advantage in the future when it will no longer be viable to locate water intensive activities in arid areas.

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Sarah Miller
Water Researcher



Paul Muldoon
Executive Director and Counsel

Copy to:

David Naftzger
Executive Director
The Council of Great Lakes Governors
35 East Wacker Drive, Suite 1850
Chicago, Illinois 60601